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EVALUATING LOBBYING IN THE UNITED KINGDOM:
MOVING FROM A CORRUPTION FRAMEWORK TO 'INSTITUTIONAL DIVERSION'

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BARRY SOLAIMAN

MAGDALENE COLLEGE

UNIVERSITY OF CAMBRIDGE

EVALUATING LOBBYING IN THE UNITED KINGDOM:

MOVING FROM A CORRUPTION FRAMEWORK TO 'INSTITUTIONAL DIVERSION'

THIS DISSERTATION IS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY (FACULTY OF LAW)

SUBMITTED JULY 2017

SUPERVISORS:

PROFESSOR DAVID HOWARTH

DR STEPHANIE PALMER

Summary

Evaluating Lobbying in the United Kingdom: Moving from a Corruption Framework to 'Institutional Diversion'

Barry Solaiman

The lobbying of Parliament and the Government in the United Kingdom by wealthy or influential groups and individuals raises concerns about corruption and political equality. Professional lobbying is available mainly to those with significant resources and is often the most effective means of influencing decision-makers. Unchecked, it corrodes public trust in core public institutions. This thesis argues that the problems attending the lobbying of Parliament and Government in the UK need to be identified and understood more clearly so that targeted regulatory solutions can be determined. Currently, lawmakers, organisations and academics have struggled to propose clear pathways for identifying the main issues and understanding them. This is due to a failure to agree on the nature and scope of the central problems associated with lobbying, the relationship between them, and how they are relevant to the model of democratic government in the UK.

To overcome this, an analytical framework called 'institutional diversion' is developed, tested and evaluated. The framework is developed from institutional corruption literature in the United States and is divided into three parts. Part 1 provides elements which help to identify specific lobbying concerns and provide a rich account of the underlying issues. Part 2 articulates a test to determine whether the identified problem in Part 1 causes a diversion from the purpose of the relevant public institution. It is argued that the critical purpose of decision-makers in Parliament and the Government is to 'act in the public interest' and that a diversion from that purpose can be tested using the two criteria of 'integrity' and 'objectivity'.

Further, it is not sufficient for a framework to simply identify and help to understand the concerns with lobbying. The logical next step is to identify solutions, and that process must also be rationally guided. Therefore, guidelines are developed from an analysis of an interview with the Registrar of Consultant Lobbyists in the UK conducted specifically for this thesis. The guidelines are intended to help future reform analyses by highlighting the practical and political restrictions within which solutions must be developed otherwise they will be unlikely to succeed.

Evaluating Lobbying in the United Kingdom: Moving from a Corruption Framework to 'Institutional Diversion'

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Preface

Following the global financial crisis in 2008, I was determined to understand more about the use of complex 'credit derivatives' that fuelled the financial bubble. It was during my undergraduate dissertation on that topic that I learnt about lobbying. There was a determined effort behind the scenes in the United States to deregulate Wall Street; an objective that led to the Glass-Steagall Act of 1933 being repealed and the subsequent rise of credit derivates. In 2007, Barack Obama ran for President. He captured my mood well in the following passage from a speech:

> But too many times, after the election is over, and the confetti is swept away, all those promises fade from memory, and the lobbyists and the special interests move in, and people turn away, disappointed as before, left to struggle on their own […] The cynics, and the lobbyists, and the special interests who've turned our government into a game only they can afford to play. They write the checks and you get stuck with the bills, they get the access while you get to write a letter, they think they own this government.[1]

I naively believed that Obama would change this reality (he subsequently did not). I was disappointed but found that I was not alone. It may be surprising to some that the largest online news show in the world is not a mainstream media outlet but 'The Young Turks' (TYT) who have spoken loudly about political corruption since 2006. Such shows in the 'new media' capture the disillusionment of young people with politics nowadays. Their host, Cenk Uygur, passionately stated that:

> Our government does not represent us; they represent only the rich and the corporations who pay their bills. Come on guys, there is only one issue in America. You have to clean up campaigns. If they keep getting paid by the rich and that's how they keep getting re-elected and in the Senate, 94% of the time the guy with more money wins re-election, well then we don't have a representative democracy anymore. They represent the people who pay them.[2]

Naturally, I turned my attention to lobbying in the UK and was surprised to find comparatively little written about it. London has the third biggest lobbying industry in the world after Washington and Brussels. The influence of lobbyists in the UK is embedded in the political system and there are genuine concerns about political corruption. Those concerns are not on the same scale as the US

[1] 'Barack Obama's Campaign Speech' (*The Guardian*, 10 Feb 2007) <https://www.theguardian.com/world/2007/feb/10/barackobama> accessed 20 June 2017.
[2] Cenk Uyger, 'Millionaire Surtax – Democrats Cave' (*The Young Turks*, 15 December 2011) <http://www.youtube.com/watch?v=iBggK0TXnH8&feature=mfu_in_order&list=UL> accessed 20 June 2017.

but lobbying is pervasive in the UK and deserves more attention because it affects everyone in society. We should all have the right to lobby—to influence decision-makers. However, some should not be afforded more opportunities than others to lobby because of corruption or political inequalities. Unfortunately, these issues are not well understood.

My concerns grew in the years following my dissertation as I paid more attention to the issue. I was offered a fantastic opportunity to undertake a PhD at the University of Cambridge. I wholeheartedly recommend that any person only undertake a PhD if they truly care about an issue. Their passion for that issue will sustain them during the long periods of doubt, confusion and the sense of inadequacy that often arises when researching. My love and care for my subject has trumped all the obstacles that have arisen. Ultimately, I have felt a sense of gratitude and responsibility. Gratitude, at being able to do something that I love for more than three years at Cambridge of all places. Responsibility, for producing good research on an exceptionally important issue that has received little attention academically.

Additionally, the timing of this thesis has been extraordinarily fortunate. Within two weeks of starting my PhD in 2014, the UK's first lobbying legislation was enacted. I had significant materials at my disposal from parliamentary committees and have had the opportunity to assess the success of that legislation in the following years. The law has been rightly heavily criticised for bringing little transparency to lobbying. I have interviewed the Registrar of Consultant Lobbyists in 2016 whose post was created by the legislation, and have assisted Lord Brooke of Alverthorpe in the House of Lords between 2016 to 2017 with the Lobbying Transparency Bill that he sponsored to replace the 2014 legislation. I learnt much from the process of advising on the wording of the Bill and drafting amendments to it. During the same period, there have been two general elections, two Labour Party leadership elections and a referendum. All these experiences and events have enriched my research in a multitude of unexpected ways.

However, the focus of this thesis is more fundamental than an emphasis on those experiences or events. Its purpose is to develop a framework from which the remarkably varied issues underlying lobbying can be identified in a structured and coherent way, to test when those issues cause office-holders to be diverted from their duty of acting in the public interest, and to help guide solutions moving forward. The PhD process has taught me that taking a step back, giving order and coherence to an issue is sometimes more important than jumping straight in, in an attempt to 'fix' an issue in isolation. This is especially the case with lobbying that is so fundamentally complex. My aim is to offer a rational and structured framework which can be used in academia and beyond to help unravel this complexity.

Declaration

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text.

It does not exceed the prescribed word limit for the Faculty of Law Degree Committee. That is, it does not to exceed 80,000 words exclusive of footnotes, appendices and bibliography and falls within the overall word limit of 100,000 words exclusive of bibliography, table of contents and any other preliminary matter.

Acknowledgements

This PhD was only possible thanks to my family. My father, Michail Solaiman, has selflessly funded the bulk of my education from my undergraduate studies onwards. None of my success would have been possible without his unwavering support. My mother, Linda, and my siblings, Mandy, Samy and Ellis have also been a constant source of encouragement. I am very fortunate to have a family that has trusted and supported my decisions throughout my life. I have never been pressured to pursue any particular path. They have simply thrown their full weight behind every decision I have taken. This has allowed me to pursue my interests without pressure and to genuinely enjoy what I do. I am very lucky.

I shall also be eternally grateful for the opportunity that the Faculty of Law has given me. I was shocked to have been offered a place on such a prestigious degree programme at the best law faculty in the country, if not the world. It is truly humbling and I have never taken this opportunity for granted. Nicky Padfield, David Howarth and Stephanie Palmer have supervised me at various stages of my research. They rigorously challenged my assumptions; opening my eyes to the complex world that we live in. Their experience, knowledge, support and sharp incisive feedback have underpinned my significant intellectual growth during my time here. Should I achieve a fraction of what they have achieved in their careers, I shall consider my career a success.

Many fantastic opportunities have arisen during my time at Cambridge. I became Editor-in-Chief of the Cambridge International Law Journal, co-founded and hosted the PhD Seminar Series for three years, amended a Bill in the House of Lords, assisted on important research projects on the funding of political parties and human rights, and I have published various pieces (one book review was cited in the Court of Appeal). Those opportunities were a matter of good timing and luck, and they could not have happened if it were not for the backing of my family and the opportunity I was given to study at Cambridge.

Incredible people have enriched and contributed to my PhD experience in important ways: Dr Michael Robinson, Will Bateman, Lord Brooke of Alverthorpe, Anthony Inglese CB, Alison White, Catherine Gascoigne, Rachel Leow, Stefan Theil, Yalan Zhang, Visa Kurki and John Magyar. There are many others that space does not permit me to name.

The majority of my time researching and writing was spent in the Wigglesworth Law Room at Magdalene College library. It has been an inspiring 'workshop' to research from, with views of the gardens and the River Cam.

Key Definitions

Lobbying	The act of individuals or groups attempting to influence decisions taken at a political level.
Institutional Corruption	Systemic and strategic influence which is legal, or even currently ethical, that undermines the institution's effectiveness by diverting it from its purpose or weakening its ability to achieve its purpose, including, to the extent relevant to its purpose, weakening either the public's trust in that institution or the institution's inherent trustworthiness.
Institutional Diversion	Decision-makers working within the institutions of Parliament or the Government in the UK are subject to lobbying—or there is some concern about lobbying—which is illegal, legal, ethical or unethical, which diverts the decision-makers from their purpose of acting in the public interest or weakens their ability to act in the public interest, including weakening either the public's trust in Parliament or the Government or their inherent trustworthiness because of that lobbying.
Integrity	Holders of public office should not place themselves under any financial or other obligation to lobbyists that might influence them in the performance of their official duties.
Objectivity	Office-holders should assess ideas on their merits or inherent worthiness in the sense that they should not give greater weight to representations arising from lobbying that is underpinned by corruption or political inequality.

List of Key Abbreviations

BA 2010	Bribery Act 2010
BC	House of Commons Backbench Business Committee
CSPL	The Committee on Standards in Public Life
EU	European Union
MP	Member of Parliament
PASC	House of Commons Public Administration Select Committee
PCRC	House of Commons Political and Constitutional Reform Committee
PPERA 2000	Political Parties, Elections and Referendums Act 2000
TLA 2014	Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014
UK	United Kingdom
US	United States of America

1

Introduction

Lobbying is the act of individuals or groups attempting to influence decisions taken at a political level.[1] Whether it is direct lobbying where a person airs their grievances to their local Member of Parliament (MP),[2] or indirect lobbying whereby thousands protest in the streets, or professionalised lobbies hosting and sponsoring events,[3] the aims are similar; to influence the political system and bring about change. Lobbying is essential in any democracy. Citizens should be able to participate in politics to express their views. Politicians should not make decisions in a vacuum. Instead, they should engage with individuals and groups to determine the development of policy and law. However, lobbying by wealthy or powerful groups and individuals raises concerns about corruption and political equality. Such professional lobbying is available mainly to those with significant resources and is often the most effective means of influencing decision-makers.[4] Unchecked, it corrodes public trust in core public institutions.[5]

Concerns have long been articulated in the United States (US) in the fields of law, political science, economics and sociology. In the US, legislation to regulate lobbying has existed for over a century.[6] Underpinning the drive for

[1] See, Raj Chari, John Hogan and Gary Murphy, *Regulating Lobbying: a global comparison* (Manchester University Press 2010) 4.
[2] Other forms of 'direct lobbying' involve sending letters or making phone calls. See, Alf Dubs, *Lobbying: an insider's guide to the parliamentary process* (Pluto 1989) 23–27.
[3] For examples of 'indirect' or 'grassroots' lobbying, see, Daniel E Bergan, 'Does Grassroots Lobbying Work? A Field Experiment Measuring the Effects of an e-Mail Lobbying Campaign on Legislative Behavior' (2009) 37(2) American Politics Research 327, 328.
[4] Data has consistently shown that groups such as 'business' in the UK 'gain far higher levels of access than others' to the Government. See Katharine Dommett, Andrew Hindmoor and Matthew Wood, 'Who Meets Whom: Access and Lobbying During the Coalition Years' (2017) 19(2) The British Journal of Politics and International Relations 389, 404.
[5] The undermining of trust is explored in Chapter 2.
[6] At the Federal level, the oldest statute was the Federal Regulation of Lobbying Act 1946; the laws at the state level in the US are the oldest in the world. See, Chari, Hogan and Murphy (n 1) 20; An example of early regulation was the Constitution of Alabama 1901 which 'forbad

regulation has been the simple argument that wealthy people should not have more influence over the political process than people on lower incomes.[7] The greatest criticisms are often directed at corporations and organisations who use their wealth to influence the political system in their favour.[8] Such concerns are explored from a variety of angles in different fields which reflects the multifaceted nature of the phenomenon. In the United Kingdom (UK), there has been comparatively little research, but there is a growing body of literature thanks to excellent work conducted by a small group of academics. The most developed literature arises in two areas. First, in research on the funding of political parties (campaign finance) by Keith Ewing and others who have explored that topic since the 1980s.[9] Campaign finance literature crosses over significantly with lobbying literature because donations are often given to influence politicians. Indeed, the overlap between the fields if often considered explicitly.[10]

The second area is on pressure groups in Britain.[11] Lobbyists constitute genuine pressure groups,[12] and the literature explores the legitimate role of groups in the political system from three standpoints. First, groups are essential to democracy because they encourage participation and balance concentrations of power.[13] This account emphasises how there is 'a body of individuals bound together and guided forward by a unified and authoritative will'.[14] The second

legislators from accepting free railroad passes', see, Clive S Thomas, 'Interest Group Regulation Across the United States: Rationale, Development and Consequences' (1998) 51(4) Parliamentary Affairs 500, 505.

[7] Cass R Sunstein, 'Political Equality and Unintended Consequences' (1994) 94 Colum L Rev 1390, 1392; see also, Julian Bernauer, Nathalie Giger and Jan Rosset, 'Mind the Gap: Do Proportional Electoral Systems Foster a More Equal Representation of Women and Men, Poor and Rich?' (2015) 36(1) International Political Science Review 78, 78.

[8] Dorie Apollonio, Bruce E Cain and Lee Drutman, 'Access and Lobbying: Looking Beyond the Corruption Paradigm' (2008) 36 Hastings Const LQ 13, 33.

[9] Keith D Ewing, *The Funding of Political Parties in Britain* (CUP 1987); Keith D Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (Hart Publishing 2007); Keith D Ewing, Jacob Rowbottom and Joo-Cheong Tham (eds), *The Funding of Political Parties: Where Now?* (Routledge 2012).

[10] See generally, Richard Briffault, 'Lobbying and Campaign Finance: Separate and Together' (2008) 19 Stan L & Pol'y Rev 105; Heather Gerken, 'Keynote Address: Lobbying as the New Campaign Finance' (2011) 27 Ga St U L Rev 1155; Gajan Retnasaba, 'Do Campaign Contributions and Lobbying Corrupt? Evidence From Public Finance' (2006) 2(1) JL Econ & Pol'y 145.

[11] A detailed comparison of pressure group theory is undertaken by Grant, see, Wyn Grant, *Pressure Groups, Politics and Democracy in Britain* (2nd edn, Harvester Wheatsheaf 1995) Ch 2.

[12] Maurice Duverger, *Party Politics and Pressure Groups: A Comparative Introduction* (Robert Wagoner tr, Nelson 1972) 110.

[13] Grant (n 11) 27–28.

[14] Samuel H Beer, *Modern British Politics* (2nd edn, Faber and Faber Limited 1969) 40.

perspective describes policy networks and policy communities which are organisations connected to one-another by resource dependencies. Policy networks describe a form of governance consisting of patterns of rule arising from interactions between multiple organisations.[15] The organisations have highly restricted memberships and provide services for decision-makers.[16] Their influence can help to contribute to better quality decision-making.[17] The third account describes corporatism which is the bargaining between employers, trade unions and the state on economic policy. By securing the agreement of their members, unions and employers can help to influence government policy.[18]

Aside from campaign finance and pressure group literature, there is also new literature developing that offers broader conceptions for analysing lobbying concerns. The most notable effort is that of Rowbottom who provides an overarching approach in his book that is underpinned by developing accounts of political corruption.[19] Apart from these studies, there are also sporadic studies which analyse specific lobbying issues.[20] The greater focus given by academics to lobbying is coinciding with the significant political attention that it is also attracting.

In 2014, lobbying became directly regulated by legislation for the first time following the enactment of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (TLA). This led to the creation of a Statutory Register of Consultant Lobbyists which was unsatisfactory to many. Consequently, a new Lobbying (Transparency) Bill was sponsored and passed the House of Lords in 2016.[21] Additionally, parliamentary committees have written several reports on lobbying since the mid-2000s, and the main political

[15] David Judge, *Democratic Incongruities: Representative Democracy in Britain* (Palgrave Macmillan 2014) 111.
[16] Grant (n 11) 35.
[17] ibid 23.
[18] ibid 38.
[19] Jacob Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics* (CUP 2010); different accounts of political corruption are explored in Chapter 2.
[20] For example, for the influence of lobbyists on migration policy, see W Somerville and SW Goodman, 'The Role of Networks in the Development of UK Migration Policy' (2010) 58(5) Political Studies 951; for the influence of the alcohol lobby on health policy, see B Hawkins, C Holden and J McCambridge, 'Alcohol Industry Influence on UK Alcohol Policy: A New Research Agenda for Public Health' (2012) 22(3) Critical Public Health 297.
[21] Although, it did not become law having not been given time in the House of Commons by the Government.

parties have included lobbying reform in their manifestos in 2010, 2015 and 2017. Further, the regulation of standards in the UK has developed significantly since the early 1990s mainly in response to lobbying scandals. Indeed, office-holders have been filmed by undercover reporters offering to give speeches in Parliament or to undertake work on behalf of private entities in return for money; sometimes for £5,000 per day. Some have offered to amend bills for £120,000 and claim to be like a 'cab for hire'.[22]

Most of the concerns, however, are more insidious and less easily detectable. For example, political parties preclude access to ministers on the grounds of wealth. At a time when the average annual salary in the UK is roughly £27,000, the Conservative Party openly advertise access to the Prime Minister for a donation of £50,000 per year. In private, they reveal to undercover reporters that 'premier league' access costs £250,000.[23] Secret fundraisers occur annually where tables are sponsored for significant sums of money by private corporations. Foreign governments, media moguls and professional lobbyists pay for seats at such events. Further, the ability of citizens to influence government decisions is severely undermined by sham consultations. For example, the public were encouraged to express their views to consultations on nuclear energy policy under the governments of Tony Blair and Gordon Brown but policy decisions had already been made.[24]

The reach of lobbyists pervades to the very heart of the political system itself. Major accountancy firms second staff for 'free' but openly admit that they do so in the interests of their private paying clients. They gain insider knowledge on policy and may even influence the development of it. A dependency on their assistance develops. Cross-party groups called all party parliamentary groups (APPGs) sitting in Parliament have been accused of being a front for commercial organisations. They are assisted by lobbyists and members have been flown to Beijing and beyond by foreign Chinese state-funded firms.[25]

[22] This example is detailed in Chapter 6.
[23] ibid.
[24] ibid.
[25] ibid.

The decision-making environment is also cleverly controlled. Lobbyists have been accused of mobilising like an army to convey their messages through seemingly independent sources. For example, the tobacco industry has been accused of using local campaign groups, former police officers and council officers to lobby for them. They apparently flood public consultations and create fake consumer websites. They supposedly create fraudulent petitions containing signatures of people approached to sign them when drunk, falsify what the petition is about, or simply scribble fake names and signatures page after page. They threaten legal action and use fear to encourage office-holders to delay or scrap proposals.[26] There are also concerns about the influence of secretive companies on elections and referendums,[27] and the rise of 'fake news' spread by lobbyists seeking to influence the environment that ultimately influences decision-makers.[28] The average person simply lacks the resources to generate such opportunities for influence and control and, therefore, cannot compete with wealthier lobbyists.

Some think-tanks have closed memberships and do not reveal their source of funding yet they are intertwined with the main political parties. Not only do they significantly influence the short-term development and implementation of policy, but they also shape the environment in which government decisions are made. Many members of think-tanks have been appointed to government positions. Peers and ministers also sit on the boards of lobbying organisations. Decisions are made without consulting with other interested groups. There are even questions about the relationship between regulators and lobbyists.

The implications of these and many other issues (which are detailed in Chapter 6) are poorly understood which is particularly concerning at this time. The UK's decision to leave the European Union following the 2016 referendum raises significant opportunities for lobbyists seeking to take advantage of the

[26] ibid.
[27] Carole Cadwalladr, 'The Great British Brexit Robbery: How Our Democracy Was Hijacked' (*The Guardian*, 7 May 2017) <https://www.theguardian.com/technology/2017/may/07/the-great-british-brexit-robbery-hijacked-democracy> accessed 10 May 2017.
[28] 'Investigate Facebook and Google Over 'Murky' Fake News, Publishers Demand' (*The Telegraph*, 9 March 2017) <http://www.telegraph.co.uk/news/2017/03/09/investigate-facebook-google-murky-fake-news-publishers-demand/> accessed 10 May 2017.

'Brexit bonanza'.[29] Indeed, the legal and regulatory landscape will change substantially which has 'sparked one of the most intensive lobbying efforts in recent memory'.[30] There are genuine concerns that the policy landscape will be increasingly shaped by powerful and vested interests; omitting most citizens from the political process.[31]

Whilst the literature on lobbying is developing, these concerns about lobbying, and potential solutions to those problems, remain underexplored which poses problems for lawmakers.[32] One of the greatest obstacles for legislators seeking to regulate lobbying is identifying the specific problem or worry that regulations should rectify beyond donation and expenditure limits. Politicians are presented with a myriad of concerns which are sometimes completely distinct or overlap in some parts but not others. For the legislator, determining the main problem amongst this 'blur' is challenging. Judges also struggle to understand concerns about lobbying and how it works in practice. The same disconnect arises in academic literature which does not offer a clear framework for evaluating lobbying matters in the UK context. Terms such as 'corruption', 'equality' and 'impropriety' are used, but a 'great deal of uncertainty' regarding what they mean remains.[33] It is this problem that this thesis seeks to explore and offer a path towards solving.

1. Aims of Research and Hypotheses

This thesis argues that the problems with the lobbying of Parliament and Government in the UK should be identified and understood more clearly so that targeted regulatory solutions can be determined. Currently, lawmakers, organisations and academics have struggled to propose clear pathways to achieving that objective due to a failure to agree on certain fundamental issues: the nature and scope of the central problems associated with lobbying, the

[29] 'Pitch Imperfect' (*The Times*, 24 August 2016) <https://www.thetimes.co.uk/article/pitch-imperfect-lj7r9tcts> accessed 10 May 2017.
[30] Andrew MacAskill and William James, 'Bankers Dominate Lobbying of Britain's Brexit Ministry' (*Reuters*, 18 April 2017) <http://uk.reuters.com/article/uk-britain-eu-banks-lobbying-idUKKBN17K1F2> accessed 10 May 2017.
[31] Oliver Wright, 'Hague 'Lobbying by Back Door' in Brexit Deals with Government' (*The Times*, 24 August 2016) <https://www.thetimes.co.uk/edition/news/hague-lobbying-by-back-door-in-brexit-deals-with-government-rl58m0nqn> accessed 10 May 2017.
[32] This is examined in Chapter 2; see also Ewing, Rowbottom and Tham (n 9) 7.
[33] Ewing, *The Cost of Democracy* (n 9) 88.

relationship between them, and how they are relevant to the model of democratic government in the UK. As a result, discussions about reform and proposed solutions are poorly informed, not fully considered and sometimes misguided.

To overcome this, an analytical framework called 'institutional diversion' will be developed, tested and evaluated. 'Institutional diversion' is developed by building on the theory of 'institutional corruption' in the US by Dennis Thompson and its adapted form 'dependence corruption' by Lawrence Lessig. Those theories of political corruption are situated in the fields of campaign finance and legislative ethics in the US. They provide a useful starting point because lobbying is a central theme in those works. However, those theories are too narrow in scope to provide a sufficient basis for identifying all lobbying problems in the UK. The focus on 'institutional corruption' ignores two other significant concerns. Namely, 'individual corruption' (which the authors are keen to stress is distinct from institutional corruption) and 'political equality' (which the authors have denied the prominence of within institutional corruption theory). Omitting an analysis of these matters would limit the depth of the enquiry because lobbying is complex and raises concerns about individual corruption, institutional corruption and political equality.[34] At the same time, those issues would be better understood if structured within an overarching framework—a framework that can be developed from institutional corruption.

Therefore, 'institutional diversion' embraces individual corruption and political equality as being fundamental issues. The omission of 'corruption' in the title and the inclusion of the term 'diversion' indicates that difference. The result is that institutional diversion should help to identify individual corruption, institutional corruption and political equality concerns without promoting one concern as being more important than the other. Within this framework, a more balanced analysis of the key issues can be undertaken.

In the following chapters, the institutional diversion framework is developed and evaluated to determine whether it helps to identify the concerns with lobbying and to test whether decision-makers have been diverted from their

[34] This is recognised by Rowbottom who analyses both individual corruption and political equality concerns. See generally, Rowbottom, *Democracy Distorted* (n 19).

duty of acting in the public interest. Once developed, the framework is applied to specific examples of lobbying in the UK across a breadth of issues. However, it is not sufficient for a framework to simply identify and help to understand the concerns with lobbying. The logical next step is to identify solutions, and that process must also be guided. Therefore, guidelines are developed from an analysis of an interview with the Registrar of Consultant Lobbyists in the UK conducted specifically for this thesis.[35] The guidelines should help to guide the development of solutions that account for the practical and political realities operating in the UK political system. Taking account of those factors should improve the likelihood of proposed solutions succeeding (or at least not being dismissed outright by politicians). Thus, it is intended that 'institutional diversion' not only acts as a starting point for identifying the concerns and testing why they are problematic but also as a guide to the development of solutions.

Four hypotheses are made. First, 'institutional diversion' will help to identify the concerns with lobbying with greater precision than other literature through a clear structure and will offer a rich account of the underlying matters. Second, the framework will offer straightforward tests to determine when a diversion has occurred. Third, the framework will act as a starting point for normative enquiries into reform by highlighting issues of concern that require changing. Fourth, the framework will help to guide the development of solutions that are workable within the UK political and administrative context.

The aim is for the framework to be helpful to anyone seeking to identify and understand lobbying concerns and to those who are looking to develop solutions to those worries such as academics, policymakers, legislators and judges. It is also intended that the framework will act as a starting point for future research into lobbying in the UK by offering a clear structure to explore the issues.

2. Scope of Research

There are three matters concerning the scope of this research. First, determining the types of lobbying covered. Second, identifying which lobbyists are addressed

[35] See Appendix.

since there are many potential lobbyists. Third, explaining which institutions and individuals are covered who are subjected to lobbying.

First, this thesis takes a broad view of what lobbying is. Essentially, any conduct (both direct and indirect) that is undertaken with the aim of influencing politicians is lobbying. Academics tend to label various conduct separately from lobbying which is odd. For example, Rowbottom notes how corrupt payments are one form of unequal wealth impacting on the decision-making process and that 'aside from corrupt payments, more common ways to influence [politicians] include lobbying'.[36] This is an unsatisfying distinction because activities such as corrupt payments are usually undertaken to *influence* politicians which falls within the definition of lobbying. The corrupt payment is the lobbying conduct that one is concerned with; they are not separate. Overall, the framework is intended to be comprehensive so that most conduct can be identified under the 'lobbying' label.

Second, on who can lobby, most persons and groups who lobby are covered by the framework save for a few exceptions. Lobbying by the Monarch or the Royal Family is not covered because that involves separate constitutional considerations which are beyond the scope of this thesis.[37] MPs, peers and ministers who lobby one another whilst in office are not considered but those who lobby once they have left office, who have second jobs or who take up (or are offered) appointments whilst in office are. Politicians lobbying one another whilst in office is not covered because regulations would impose unrealistic and absurd restrictions on their ability to work. If every MP had to record every interaction with a colleague (such as an MP or a minister of the Government), this would impose time-consuming and bureaucratic burdens on their work.

Further, a clear distinction is maintained in this thesis between political parties and lobbyists. Political parties are not lobbyists in this thesis. They seek to win seats in elections and form government whereas lobbyists do not. They have far wider concerns than lobbyists and develop policies on a broad range of

[36] Rowbottom, *Democracy Distorted* (n 19) 78.
[37] The lobbying of the Government by Prince Charles came to light in the case of Evans. See, *R (on the application of Evans) and another (Respondents) v Attorney General (Appellant)* [2015] UKSC 21; *Evans v Information Commissioner (Correspondence with Prince Charles in 2004 and 2005)* [2012] UKUT 313 (AAC) (Upper Tribunal - Administrative Appeals Chamber); *Ministry of Defence v Information Commissioner and Rob Evans* [2007] UKFTT EA/2006/0027 (IT) (Information Tribunal).

issues.[38] This matter becomes complicated when the internal structure of a party consists of a coalition of various interests. For example, questions have long been raised by the specific case of the Labour Party which has affiliated members through trade unions. The party is dependent on funding from unions who could technically be defined as lobbyists because they influence party policy.[39] This issue is addressed in Chapter 4, however, at this stage, it is important to state that the relationship is unlikely to engage the framework developed in this thesis for two reasons. First, the unions form part of the structure of the Labour Party and are not, therefore, defined as lobbyists in that context.[40] Indeed, the party would not have existed without union support.[41] Second, exchanges within the party will not breach corruption rules since the party and unions are essentially the same entity which cannot conduct an exchange with itself, and the relationship does not preclude the political equality opportunities of citizens generally—both of which are important elements of the framework.[42] The same applies for any political party with similar structural arrangements. Nevertheless, this thesis does cover exchanges between external lobbyists and political parties. For example, a lobbyist donating to an MP's party to influence them.

Therefore, aside from these identified people and groups, everyone who lobbies is considered as a lobbyist in this thesis. This approach is broader than most research in this field in the UK which tends to analyse the regulation of lobbying from the aspect of the lobbied only (the politicians). Understanding the conduct of lobbyists is essential to the analysis.

Third, for the lobbied, the framework is narrowed to cover MPs, peers and ministers in the UK Government. However, the following Government entities are not analysed: non-ministerial departments, executive agencies, executive non-departmental public bodies, advisory non-departmental public bodies, public corporations and others that work with and are accountable to the UK

[38] Grant (n 11) 8–9.
[39] Beer (n 14) 23.
[40] See, Labour Party, 'Labour Party Constitution' (*The Labour Party*, 2017) <https://www.labour.ie/party/constitution/> accessed 20 June 2017, Article 10; the Labour Party was founded by the unions. See, Leon D Epstein, *Political Parties in Western Democracies* (Freferick A Praeger 1967) 148.
[41] Epstein (n 40) 147.
[42] Although, if unions give impermissible donations to the party, the framework will be engaged. See, Chapter 4.

Government.[43] The Civil Service is not covered because the analysis would become unwieldy. The devolved institutions in Scotland, Wales and Northern Ireland are not analysed nor are mayors, local councillors or other public officials who are not members of Parliament or the Government.[44] Keeping the framework focussed on a narrow group of officials is necessary for overcoming some of the obstacles for defining political corruption explored in Chapter 2.[45]

In summary, for this research, lobbying means direct and indirect lobbying. The lobbyists covered include everyone except the Monarch and the Royal Family, political parties or politicians lobbying one another whilst in office. Those lobbied, are MPs, peers and ministers. The analysis covers these identified groups only. However, it is likely that the framework can be developed to cover other categories in future research.

3. Terminology

Unless otherwise stated, Parliament collectively refers to the House of Commons and the House of Lords in the UK. The Government refers to Her Majesty's Government of the UK. The terms public officials, office-holders, decision-makers, officials and politicians are used interchangeably to refer to MPs, peers, ministers or their staff.

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[43] There are currently 119 ministers in the UK Government. See, UK Government, 'How Government Works' (*UK Government*, 2017) <https://www.gov.uk/government/how-government-works> accessed 23 April 2017.

[44] Transparency International UK published a report which compared lobbying regulations in England, Scotland, Northern Ireland and Wales. It highlighted large disparities between regulations. See Elizabeth David-Barrett and Nick Maxwell, *Lifting the Lid on Lobbying: The Hidden Exercise of Power and Influence in the UK* (Transparency International UK, 2015).

[45] It is acknowledged that the opportunity exists to approach parts of the subject-matter of this thesis, within the discourse of British administrative law doctrine and theory. That opportunity is most evident insofar as the decision-making functions of ministers may be affected by lobbying, because the influence of lobbyists may sway ministers into considering irrelevant considerations, exercising a statutory power for an improper purpose, in bad faith or in circumstances of unreasonableness. It is less evident where lobbying affects peers and MPs in their legislative capacities, where the norms of judicial review do not normally apply. Despite those opportunities, it should be emphasised that the 'institutional diversion' framework is not proposed as a new conceptual map of administrative (or public) law, nor is it designed for the purpose of judicial operationalization. The central challenges of lobbying are addressed from the vantage point of socio-legal policy, rather than through the prism of black-letter law. Nevertheless, the framework may complement doctrinal understandings about lobbying in the administrative law context (which is considered in Chapter 6).

4. Structure

Including this chapter, this thesis is divided into eight chapters. Chapters 2–5 develop the diversion framework. Chapter 6 revisits the lobbying concerns highlighted above, applies the framework to them, and evaluates the effectiveness of the framework. Chapter 7 develops guidelines which can be used to shape future reform analyses. Chapter 8 assesses whether the hypotheses made at the outset are achieved.

In Chapter 2, there are two aims. First, it is determined why the framework is needed. Second, the framework is introduced and outlined. On the former, the concerns about lobbying expressed by the main political parties in their manifestos are analysed as are those raised by parliamentary and other committees. It is argued that the concerns are not articulated coherently and diverge in places. Further, the misgivings voiced by ministers, MPs and peers during the bill stages of the TLA 2014 are detailed. The analysis demonstrates that there were significant differences regarding what the perceived problems with lobbying were and what problems the TLA 2014 was meant to address. On the latter, following an analysis of the UK literature on political corruption, 'institutional corruption' theory from the US is adapted to develop a framework called 'institutional diversion'. The diversion framework is divided into three parts. Part 1 is called 'Identify', Part 2 is called 'Test' and Part 3 is called 'Solve'. The adaptations are explained, the framework is justified, and the development of the framework in Chapters 3, 4 and 5 is outlined.

In Chapter 3, a comprehensive analysis is undertaken of what the purpose of MPs, peers and ministers is and how they may become diverted from that purpose for Part 2 of the framework. Part 2 is developed first because it assists the reader to have in mind the defined purpose of the relevant office-holder when considering the specific concerns that might cause a diversion from their purpose analysed in Chapters 4 and 5. It is argued, following an analysis of laws, codes of conduct and the literature that it is an express purpose of MPs and peers is to 'act in the public interest'. An analysis of the literature does not reveal a similarly expressed purpose for ministers. Thus, it is argued, normatively, that ministers should act in the public interest. Two criteria are introduced called 'integrity' and

'objectivity' which can be used to test when decision-makers have been diverted from their purpose of acting in the public interest. Integrity pertains to the independence of individuals being compromised by personal gain. Objectivity pertains to the need for decision-makers to make decisions on their merits. The introduction of the criteria lays the foundation for developing questions from the literature in subsequent chapters to test when those criteria have been undermined thereby causing a diversion.

In Chapters 4 and 5, both Parts 1 and 2 of the framework are developed. For Part 1, the elements of individual corruption, institutional corruption and political equality (which may cause a diversion from the purpose established in Chapter 3) are detailed. In Chapter 4, for Part 1 of the framework, the elements of individual corruption used for identifying a concern with lobbying are established through an analysis of laws, rules and resolutions. Next, the elements of institutional corruption are established. To achieve this, the theories of Lessig and Thompson are evaluated, synthesised and adapted to work within the diversion framework. For Part 2, questions are developed to test when the criterion of 'integrity' has been undermined thereby causing a diversion.

In Chapter 5, the elements of 'political equality' are detailed for Part 1 of the framework. It is argued that Lori Ringhand's framework on political equality offers a useful starting point for identifying political equality concerns. Ringhand confines her framework to the field of party funding in the UK, and that framework is, therefore, expanded to apply to the lobbying context through an analysis supplemented by additional literature. It is argued that two elements underlie all concerns with political equality and lobbying—the 'equality of arms' and the 'equality of the opportunity to influence'. Those elements are detailed and developed, as are six derivative sub-elements. Additionally, the crossover between institutional/dependence corruption and political equality is explained, and the implications of that crossover are explored. For Part 2 of the framework, several questions are developed which can be used to test specifically whether a concern about lobbying causes 'objectivity' to be undermined thereby causing a diversion.

In Chapter 6, the diversion framework is summarised and applied to concerns about lobbying in the UK. The effectiveness of Parts 1 and 2 of the

framework are evaluated in three stages. First, there is an analysis of case studies categorised into concerns about lobbying explored in earlier chapters on individual corruption, institutional corruption and political equality. The framework is applied to those case studies and evaluated. Second, there is an analysis of a case involving lobbying which highlights how the court's poor understanding of lobbying issues may undermine its ability to reach fully informed conclusions. Third, there is an analysis of the influence of lobbying on the development of recent legislation. The diversion framework is evaluated for its effectiveness in identifying lobbying concerns, testing whether they cause a diversion and for highlighting issues that potentially require regulatory reform.

Chapter 7 develops Part 3 of the framework. It examines how the TLA 2014 regulates lobbying in the UK, whether the Act deals with the concerns that justified its creation and the matters highlighted by the diversion framework. It is argued that the TLA 2014 does little to deal with lobbying concerns and that regulatory solutions should be developed carefully in the future. In that regard, there is an analysis of an interview, conducted specifically for this thesis, with the UK's lobbying Registrar, Alison White. From that interview, ten guidelines are synthesised which will help to shape future reform analyses. It is hoped that the guidelines will contribute to regulatory analyses that are considered more coherently and efficiently; avoiding redundant solutions that will simply not work in the UK context because of political restrictions.

Finally, in Chapter 8, the thesis is concluded with an evaluation of whether the institutional diversion framework achieves the hypotheses set out above. Namely, whether the framework helps in the identification of lobbying issues, offers useful tests to determine when and why those issues are concerning, and offers guidelines for developing workable regulatory solutions moving forward.

2

Exploring the Need for the 'Institutional Diversion' Framework

Introduction

The concerns about lobbying are multifaceted and complex. A constituent may be influenced by media stories about corruption and lobbying; linking wrongdoing to some form of criminality. An MP may be concerned not about criminality, but with the infiltration of lobbyists into the decision-making process. A charity may feel aggrieved at their lack of influence or opportunities to influence compared with wealthy professional lobbyists who have power and access to officials. A wealthy individual may see it as their right to spend money lobbying whereas a poor citizen may begrudge a system that enables the wealthy to skew policy more easily.[1] The issues are complex and require careful thought when identifying the underlying concerns and exploring solutions to those problems.

However, in practice, such concerns are not afforded the careful thought they demand. There is often a focus on one factor which fails to account for other important factors. Political parties do not agree on what the problems are, and there is much divergence in political will for solving matters. Parliamentary and other committees do a better job of articulating the issues but do not do so in a coherent or structured way. Further, their reports are based on witness evidence which—although helpful—do not offer holistic insights. Academic literature offers a better foundation for analysing the issues but could be developed to draw

[1] The purpose of this thesis is not to analyse freedom of expression rights and lobbying which are covered elsewhere. See, for example, Jacob Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics* (Cambridge University Press 2010) Ch 2; Stephanie Palmer, 'Legal Challenges to Political Finance and Election Laws' in Keith D Ewing, Jacob Rowbottom and Joo-Cheong Tham (eds), *The Funding of Political Parties: Where Now?* (Routledge 2012).

the different threads together more clearly and with greater focus. In this thesis, it is argued that a useful approach is to build on the US literature on institutional corruption to develop an analytical framework called 'institutional diversion'. It is hypothesised that this framework will offer a better approach than currently exists for identifying the concerns with lobbying, to test why they are problematic and to guide solutions to them. There are four aims in this chapter.

First, the concerns about lobbying expressed by the main political parties in their manifestos are considered. It is argued that their worries are not articulated coherently and diverge in places. Second, the problems with lobbying expressed by three committees are analysed. Their reports better explain the issues but also do not articulate them clearly or coherently. Nevertheless, their reports influenced consultations during the bill stages of the TLA 2014. The third aim is to consider the misgivings expressed by ministers, MPs and peers by analysing Government statements, and speeches given, during the bill stages of the TLA 2014. The analysis demonstrates significant incongruousness regarding what the concerns were and what problems the TLA 2014 was meant to address.

Fourth, the academic literature on lobbying is considered in two stages. First, the work of Rowbottom and others in the UK is examined, and it is explained how this thesis can complement their work whilst developing the evaluation of lobbying in a more structured direction using a framework. Thus, second, it is argued that the theory of 'institutional corruption' from the US can provide a starting point for developing that framework. The US literature is detailed, and it is hypothesised that adapting 'institutional corruption' theory to develop a framework called 'institutional diversion' would offer a better approach for analysing and evaluating lobbying matters. This chapter defines and outlines the framework; the remaining chapters develop and test it.

1. The Incongruous Lobbying Concerns Expressed by Political Parties

The concerns regarding lobbying voiced by the main political parties are important for two reasons. First, from a practical perspective, any lobbying regulation will inevitably affect political parties significantly. Their members form

Government and sit in both Houses of Parliament. They and their staff attract the attention of lobbyists, and their perspective is, therefore, of obvious importance. Second, it will be elected members of the major political parties who will inevitably be tasked with formulating legislation on lobbying regulation, debating it and voting on it. Their perspective of the issues will significantly affect what form regulations take. The starting point is to analyse the matters that the major political parties identified in their manifestos for the 2010 and 2015 general elections when lobbying was a hot topic. Manifestos are analysed because they are a simple tool for gauging the policies of political parties on lobbying, and because of the importance that political parties attach to them. Between 1987 to 2005, 88% of manifesto pledges were kept by political parties who formed Government.[2]

1.1 The Liberal Democrats

The Government in power at the time of the TLA 2014 was the Coalition Government consisting of the Conservative Party and the Liberal Democrats.[3] The seeds of the policy of both parties on lobbying regulation can be gleaned from their respective manifestos. Under the heading of 'cleaner politics', the 2010 Liberal Democrats manifesto stated that they would:

> Curb the improper influence of lobbyists by introducing a statutory register of lobbyists, changing the Ministerial Code so that ministers and officials are forbidden from meeting MPs on issues where the MP is paid to lobby, requiring companies to declare how much they spend on lobbying in their annual reports, and introducing a statutory register of

[2] Judith Bara, 'A Question of Trust: Implementing Party Manifestos' (2005) 58(3) Parliamentary Affairs 585, 594; The statistics for the 2010 Coalition Government are more complicated since policies were based on a Coalition Agreement which was a compromise of both parties' manifestos. See, UK Government, *The Coalition - Our Programme for Government* (HM Government, 20 May 2010); Additionally, 'policy pledges' were made in the Coalition Agreement which usurped traditional manifesto pledges to provide stable government. In some cases, pledges were made which 'seemingly emerged from nowhere'. See Thomas Quinn, *Mandates, Manifestos and Coalitions: UK Party Politics after 2010* (The Constitution Society, 2014) 32–36; Rudimentary analyses by the media point towards a mixed success rate for the Coalition in achieving their pledges. See, Mark Leftly and Mollie Goodfellow, 'Election 2015: How many of the Government's coalition agreement promises have been kept?' (*The Independent*, 29 March 2015) <http://www.independent.co.uk/news/uk/politics/generalelection/election-2015-how-many-of-the-governments-coalition-agreement-promises-have-been-kept-10141419.html> accessed 18 Aug 2016.

[3] The Coalition Government governed from 2010 to 2015.

> interests for parliamentary candidates based on the current Register of Members' Interests.[4]

Thus, the Liberal Democrats identified four issues. First, lobbyists may have 'improper influence' over the political process. Second, there are concerns about MPs, who are paid to lobby, from meeting with ministers and officials. Third, there is unease with the transparency of company spending on lobbying. Fourth, there were misgivings with the register which existed at the time that parliamentary candidates registered their interests on.

1.2 The Conservative Party

For the Conservative Party, their leader David Cameron gave a speech in 2010 in which he stated that lobbying was the 'next big scandal waiting to happen'.[5] His party's manifesto provided more context under the heading of 'Make politics more accountable':

> We will clean up politics: the expenses, the lobbying and problems with party funding.[6]
>
> […]
>
> It is vital that we act quickly and decisively to restore the reputation of politics. Too much unacceptable behaviour has gone unchecked for too long, from excessive expenses to sleazy lobbying practices. the people of Britain have looked on in horror as revelations have stripped away the dignity of Parliament, leaving millions of voters detached from the political process, devoid of trust in the political classes, and disillusioned with our system of government.[7]
>
> […]
>
> The public are concerned about the influence of money on politics, whether it is from trade unions, individuals, or the lobbying industry.[8]

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[4] Liberal Democrats, *The Liberal Democrat Manifesto 2010* (Liberal Democrats, 2010) 89.
[5] Andrew Porter, 'David Cameron Warns Lobbying is Next Political Scandal' (*The Telegraph*, 2010) <http://www.telegraph.co.uk/news/election-2010/7189466/David-Cameron-warns-lobbying-is-next-political-scandal.html> accessed 25 September 2015.
[6] The Conservative Party, *Invitation to Join the Government of Britain: The Conservative Manifesto 2010* (The Conservative Party, 2010) 65.
[7] ibid.
[8] ibid 66.

> […]
> We will start by cleaning up the expenses system to ensure MPs live by the same standards as the people who give them their jobs, and by curbing the way in which former ministers have secured lobbying jobs by exploiting their contacts.[9]
> […]
> A Conservative government will introduce new measures to ensure that the contacts and knowledge ministers gain while being paid by the public to serve the public are not unfairly used for private gain. We will:
>
> - ensure that ex-Ministers are banned from lobbying government for two years after leaving office;
> - ensure that ex-Ministers have to seek advice on the business posts they take up for ten years after leaving office; […]
> - Introduce new rules to stop central government bodies using public money to hire lobbyists to lobby other government bodies.[10]

Therefore, several issues were identified in the manifesto. First, there is a problem with money in politics. The expenses claimed by politicians, party funding and lobbying are all part of that problem, and the public is suspicious about the influence of money on those processes. Second, there is a behavioural problem in politics caused by 'sleazy lobbying' which has undermined the reputation of the political system and has led to citizen disillusionment in the political process. The statement by David Cameron that lobbying 'is the next big scandal' suggests that there are also corruption fears. Third, there are misgivings about former ministers exploiting their contacts to secure lobbying jobs. Ministers may be using the information they gained whilst in public office for private gain. Fourth, there is a problem with the transparency of lobbying practices. Fifth, the heading of 'make politics more accountable' under which the issues are stated suggests that the issues collectively highlight a lack of accountability within politics.

[9] ibid 65.
[10] ibid 66.

1.3 The Labour Party

The Labour Party also included lobbying in its manifesto.[11] Under the heading of 'cleaning up politics', the first page of the manifesto stated that:

> We will create a Statutory Register of Lobbyists to ensure complete transparency in their activities. We will ban MPs from working for generic lobbying companies and require those who want to take up paid outside appointments to seek approval from an independent body to avoid jobs that conflict with their responsibilities to the public.[12]

1.4 The Coalition Programme for Government

Following the 2010 election, the Conservative Party and the Liberal Democrats formed the Coalition Government. The Coalition created a 'Programme for Government' which brought together the policies of both parties. On lobbying, the Programme stated simply that 'we will regulate lobbying through introducing a statutory register of lobbyists and ensuring greater transparency'.[13] The Programme only highlighted transparency as a concern with *consultant* lobbying which significantly differed from the more thorough pledges outlined in the respective manifestos of the Conservative Party and the Liberal Democrats.

1.5 Summary

The main political parties identified several concerns with lobbying in the UK. Table 1 below summarises them for comparative purposes. The issues that overlap between the parties are highlighted in green. The separate concerns of the Liberal Democrats and the Conservative Party are highlighted in orange and blue respectively (aligning with the party colours).

[11] The Labour Party were the main opposition party.
[12] The Labour Party, *The Labour Party Manifesto 2010: A Future Fair For All* (The Labour Party, 2010) section 9:2.
[13] UK Government, *The Coalition - Our Programme for Government* (n 2) 21.

Table 1: The problems with lobbying in the UK identified by the main political parties in 2010.

	The Liberal Democrats	The Conservative Party	The Labour Party
1	**Transparency** of company spending on lobbying.	**Transparency** of lobbying practices.	**Transparency** of lobbying activities.
2	Problem with **MPs** who were **paid to lobby** from meeting with ministers and officials.	**Former ministers** exploiting their contacts to **secure lobbying jobs**. The problem is that ministers may be using the information they gained whilst in public office for **private gain**.	**MPs** who want to take up paid outside appointments and MPs **who work for** generic **lobbying companies.**
3	Problem with parliamentary candidates **registering** their **interests** on the register (that existed at that time).		
4	Lobbyists have **'improper influence'** over the political process.		
5		There is a behavioural problem in politics caused by **'sleazy lobbying'** which has undermined the reputation of the political system and has led to citizen disillusionment in the political process.	
6		There is a problem with **accountability.**	
7		The **public are concerned** about the link between **money and lobbying.**	

Five issues are identified above with only two overlapping between all parties. These are a lack of transparency of lobbying practices and MPs securing lobbying jobs. Behavioural issues were identified by the Liberal Democrats and the Conservatives who cited improper influence and sleaze as being a concern. One matter raised by the Liberal Democrats related to MPs registering their interests and two matters raised by the Conservative Party related to the overarching public mistrust with money in politics and a lack of accountability. Further, an important observation can be derived from Table 1; the subtle differences in terminology which identify different problems.

The Conservatives and Labour noted that there was a lack of transparency of lobbying activities. The Liberal Democrats, however, specified the lack of transparency around company spending as a worry which are different issues. The former is a broad concern about a lack of transparency whereas the latter is a narrower transparency issue on company lobbying spending. Both manifestos use the word 'transparency', but the focus is different. On MPs working as lobbyists, the parties identified three different factors. For the Conservatives, MPs exploiting their public office for private gain is potentially a matter about corruption. The Liberal Democrats were suspicious of MPs, who were paid to lobby, meeting with officials and ministers to influence them. For Labour, there was unease at MPs taking up paid outside appointments and working for lobbying companies. At first glance, it may appear that terms such as 'MPs' and 'being paid to lobby' are the same concern, but the parties describe different facets of the problem which highlights a lack of precision.

On the conduct of lobbyists, there are more questions than answers. The Liberal Democrats highlighted 'improper influence' as a worry. The term is given no context and could fall anywhere on a scale between illegal bribery and conduct which is permissible in law but deemed improper for other reasons. Similarly, the Conservatives use the term 'sleazy lobbying': a term which raises the same questions about meaning. The use of imprecise terminology without context highlights how the problems are not defined with coherence. Finally, it is not explained why, in the context of lobbying, the register of members' interests should be placed on a statutory footing. It is also not explained what it is about money and lobbying that causes the public to become disillusioned with the

political process nor why there is an accountability problem. None of the matters are articulated clearly.

Of course, it is not expected that a party manifesto will provide much detail as these will be determined during the development of legislation. However, the political parties identify different problems with lobbying which are not articulated properly. Even where terms overlap they are used in different contexts. For example, there are three distinct issues highlighted with MPs being 'paid to lobby'. All could be relevant or not, but the fact that they are different illustrates a lack of focus about what the precise problem is. Further, the terms used are undefined which can be seen with 'improper influence' and 'sleazy lobbying'. This has consequences for regulation because there must be an agreed problem for regulation to solve. The next section explores the misgivings with lobbying as identified by three committees in reports from 2008 to 2015.

2. The Contrast Between Committees on Lobbying Concerns

The Committee on Standards in Public Life (CSPL), the Public Administration Select Committee (PASC) and the Political and Constitutional Reform Committee (PCRC) have published several reports since 2008 which have either examined lobbying specifically or considered lobbying issues within other contexts. Their reports are helpful because they consist of oral and written evidence given from academics and lobbyists who provide good insight. Whilst all committees are important (because their reports influence decision-makers to varying degrees), the CSPL is of most importance. The UK landscape on ethics regulation began to change significantly in the 1990s following the creation of the CSPL.[14] The CSPL has 'played a major and unique role in raising the salience of ethical issues across the public sector and putting in place new institutions to regulate individual sectors'.[15] Its prominence makes an analysis of its reports imperative.

There are two observations which will become apparent from the analysis below. First, the committee reports unsurprisingly provide much greater detail and context to the concerns with lobbying than the manifestos. However, the

[14] David Hine and Gillian Peele, *The Regulation of Standards in British Public Life: Doing the Right Thing?* (Manchester University Press 2016) 52.
[15] ibid 66.

problems with lobbying are not always articulated clearly. Issues are often mixed which require careful analysis to decipher the precise misgivings. Further, the 'mixing' of different matters reflects a problem with structuring and identifying the relationship between different issues. The analysis below was only possible by piecing together various parts of the reports to understand the matters more clearly.

Second, whilst there is much crossover between the problems highlighted in the reports, there is a lack of consistency about what the concerns with lobbying are. This is reflected in the titles of the reports. The CSPL report is titled 'Strengthening Transparency Around Lobbying' which suggests the main problem is a lack of transparency with lobbying.[16] The PASC report is titled 'Lobbying: Access and Influence in Whitehall', suggesting that the main issue is privileged access and influence.[17] The PCRC report highlights 'the perception of undue influence' as the main worry.[18] The lack of consistency leads to questions about which matters are of greatest concern or whether all the highlighted issues are of equal worry.

2.1 The Committee on Standards in Public Life

Although the report of the CSPL focusses on 'Strengthening Transparency Around Lobbying', it highlights several other problems with lobbying:[19]

> At the heart of the concern is the confluence of money, influence and power and vested interests: it is often not known who is influencing decisions or what may have been done to achieve the influence. This arises from suspicions:
>
> - that some lobbying may take place in secret—people do not know who is influencing a decision and those who take a different view

[16] Committee on Standards in Public Life, *Strengthening Transparency Around Lobbying* (CSPL, 2013).
[17] House of Commons Public Administration Select Committee, *Lobbying: Access and Influence in Whitehall* (HC 2008-09, 36-I).
[18] House of Commons Political and Constitutional Reform Committee, *Introducing a Statutory Register of Lobbyists: Second Report of Session 2012-13* (HC 2012-13, 153-I).
[19] These concerns were presented in evidence to the Committee by academics, the lobbying industry, charities, campaign bodies and think-tanks. See Committee on Standards in Public Life, *Strengthening Transparency* (n 16) 10.

> do not have the opportunity to rebut arguments and present alternative views;
>
> - that some individuals or organisations have greater access to policy makers, because they or someone they know works with them, because they are significant donors to a political party or simply because they have more resources;
> - of the way lobbying can be carried out; either because it is being accompanied by entertainment or other inducements or because there is a lack of clarity about who is financing particular activities.[20]

Therefore, the concern is that there is a lack of transparency—not knowing who is influencing whom and how they are influencing—and the consequences of a lack of transparency. The consequences involve important issues which are deciphered in turn.

The first consequence is that poor transparency can lead to public suspicions about what is taking place behind closed doors; particularly the conduct of lobbyists. The passage above cites 'entertainment or other inducements' as conduct which may lead to suspicions. Later passages cite 'excessive hospitality' as being another type of conduct.[21] Essentially, the problem is that lobbyists have unduly influenced decisions-makers, that there has been corruption or other impropriety.[22] This 'undue influence' matter is alluded to in the following passage which states that it is important:

> That the public has confidence that decisions are made fairly and on merit; without undue influence from vested interests; and in an open and transparent manner—the process by which a decision is made matters.[23]

The first worry is that a lack of transparency leads to suspicions that undue influence or some other form of corruption has taken place. This, in turn, undermines objective decision-making. The concern is not that officials have

[20] ibid 5.
[21] ibid 22.
[22] ibid.
[23] ibid 6.

been unduly influenced but that there are *suspicions* that they have been unduly influenced which undermines public trust. Therefore, it is a misgiving about public confidence in the political system.

The second consequence of a lack of transparency noted above is that other interested parties (who take a different view to those lobbying) will not have the opportunity to rebut arguments and present alternative views.[24] If a person is unaware of the arguments being put forward (because there is no public record of the meeting), they will not have the opportunity to respond to those arguments. This consequence is made up of two matters; equality of access and objective decision-making. On the former, the report states that:

> The concern is that there is not always a level playing field of fair and equitable access to decision making and to the development or implementation of public policies.[25]

Access is determined by 'money, influence and power and vested interests'.[26] Few people possess money, influence and power which leads to worries that policy is being influenced by vested interests or by the will of a wealthy minority as opposed to the majority. This relates to the latter issue highlighted below:

> Equality of access is important in enabling decision makers to act in accordance with the Nolan principle of Objectivity and take decisions impartially, fairly and on merit using best evidence and without discrimination or bias.[27]
>
> […]
>
> Lobbying which is secret without good reason inhibits even-handedness, results in distorted evidence and arguments.[28]

[24] This point was reiterated in another report by the CSPL. See, Committee on Standards in Public Life, *Standards Matter: A Review of Best Practice in Promoting Good Behaviour in Public Life* (Cm 8519, January 2013) 53.
[25] Committee on Standards in Public Life, *Strengthening Transparency* (n 16) 14; Committee on Standards in Public Life, *Standards Matter* (n 25) 52.
[26] Committee on Standards in Public Life, *Strengthening Transparency* (n 16) 14.
[27] ibid 20.
[28] ibid 22.

Therefore, the second consequence of a lack of transparency around lobbying is that some will not have the opportunity to respond to lobbying. This may result in decisions being made in a manner that is not impartial, fair and based on merits because office-holders are being influenced by a few vested and powerful interests that have access (and who could distort the policy narrative). The committee reason that more transparency around decision-making would mean 'more rounded decisions, taking on board a range of views and revealing the stance and motives of [lobbyists]'.[29] A third point raised in the report, not related to transparency, is on conflicts of interest:

> The revolving door raises the risk of potential conflicts of interest and particular cases often generate close media attention or other public scrutiny. Hiring people either permanently or temporarily with contacts or knowledge gained from their time in government or the public sector can be seen as an attempt to buy access and influence. The concern is that public office holders' "*behaviour before leaving employment is altered in a way that is not in the public interest in anticipation of future employment or, post-public office, commercial or other organisations are given unfair advantages over others as a result of the knowledge or contacts of people they employ post-office*".[30]
>
> […]
>
> If such movements across sectors are not managed carefully, they can present "opportunities for public officials to use their position for personal gain, and may give rise to public anxiety about the probity of former, and serving, public officials" and have the potential to damage public trust and confidence in public office holders and the decisions they take generally.[31]

These points may appear to be an extension of the two consequences regarding the undermining of public trust and equality of access highlighted above. Indeed,

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[29] ibid.
[30] ibid 30; The CSPL cited evidence of Sir Christopher Kelly to the Public Administration Select Committee. See House of Commons Public Administration Select Committee, *Business Appointment Rules* (HC 404 [incorporating HC 1762-i-v, Session 2010-12] 2012-13) Oral Evidence, 2.
[31] Committee on Standards in Public Life, *Strengthening Transparency* (n 16) 30; The CSPL cited the summary of a report by the PASC; See Public Administration Select Committee, *Business Appointment Rules* (n 30) 3.

the passages note how hiring former decision-makers can be seen as an attempt to buy access (which only few can do). It also highlights that the behaviour of decision-makers could be altered thereby undermining objective decision-making, and damaging public confidence. Despite the obvious crossover, the passage also raises an entirely separate point to those matters which is not necessarily related to transparency—that decision-makers may use their position for personal gain. Personal gain is a worry about individual corruption so, in this regard, conflicts of interest are not merely an extension of the consequences alluded to in the report but also raise a new matter.

Overall, the report positively highlights important considerations thanks to the CSPL collating a good body of evidence. It describes the nature of the problems with lobbying in more depth. However, the problems could be articulated and structured more clearly. Issues are often mixed together which required careful analysis to decipher the precise issue being enunciated. Further, the analysis could only be undertaken by piecing together various parts of the report to understand matters more clearly because they are not presented logically or coherently.

2.2 The Public Administration Select Committee

The PASC report covers similar ground to the CSPL; concluding that:

> There are two underlying issues of concern: that of privileged access […] but also, and equally importantly that of excessive influence […] someone with access does not necessarily have influence. The two ideas are inextricably linked, however, because anyone without access cannot hope to wield direct influence.[32]

Taken together, the points highlight the same unease as the CSPL; that those with money, power and influence may have better access (an equality of access worry). However, there are also separate matters which were not made explicit in the passage above. First, *how* privileged access is gained:

[32] Public Administration Select Committee, *Lobbying: Access and Influence in Whitehall* (n 17) 13.

> Particularly controversial is the practice of hiring people with personal contacts at the heart of Government. This can be portrayed as an attempt to buy access and influence.[33]

A second concern is that 'excessive' influence reflects some wrongdoing. In this regard, the report indicates that hospitality may be of worry: 'lunches are the kinds of contacts which can be of as much potential concern as formal lobbying meetings'.[34] Further, whilst the PASC highlights two matters in its report, it—like the CSPL—raises further misgivings regarding conflicts of interests:

> We have concerns that individuals may find themselves facing conflicts of interest between their career and the public good, if they are asked, for example, to assess the balance of regulation in a sector into which several of their predecessors have moved.[35]

There is trepidation that objective decision-making may be undermined because of conflicts of interest compromising an official's ability to 'assess' policy. This conflict may also lead to individual corruption with the official using their position for a personal gain:

> We are strongly concerned that […] former Ministers in particular appear to be able to use with impunity the contacts they built up as public servants to further a private interest.[36]

As a result, there are three issues arising from conflicts of interest.[37] First, hiring former ministers looks like buying access which only few people have the resources to do—an equality of opportunity issue. Second, when officials are hired, this may undermine their objectivity when making decisions. Third, office-holders may use their position for personal gain. Finally, the PASC raise the issue of lower public trust in politics:

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[33] ibid 13.
[34] ibid 57.
[35] ibid 59.
[36] ibid 58.
[37] The same issues were highlighted in a later report by the PASC. See, Public Administration Select Committee, *Business Appointment Rules* (n 30) 24.

> The result of doing nothing would be to increase public mistrust of Government, and to solidify the impression that Government listens to favoured groups—big business and party donors in particular—with far more attention than it gives to others.[38]

Overall, the PASC raise similar misgivings as the CSPL. The PASC provide some description of the concerns but the issues are not clearly explained. Initially, the report highlights access and influence as being the main issue but later raises 'strong concerns' surrounding conflicts of interest and the undermining of public trust. Further, like the CSPL report, one must piece together the various elements from different parts of the report to make sense of the matters.

2.3 The Political and Constitutional Reform Committee

The PCRC report was published during the consultation process of the TLA 2014. The main worry raised in the report is that 'there is a perception in some quarters that some people have undue access to, and influence over, the policy-making process'.[39] Similar to the CSPL's concern of public 'suspicions', the PCRC argue that there is a 'perception' of a problem of undue access and influence over the policy-making process. There may also be 'inappropriate relationships between Ministers and lobbyists'.[40]

The PCRC report is the only report which does not provide much detail because it is focussed on reforming the TLA 2014 rather than re-assessing the problems with lobbying which the CSPL and PASC had already undertaken. Nevertheless, the conclusions drawn by the PCRC are vague and only account for part of the problem raised by the other committees; the 'perception' of a problem. At this stage, it is helpful to summarise the main concerns with lobbying highlighted by the three committees. Issues that overlap between all the committees are highlighted in green, matters that overlap between two committees are in yellow and matters covered by one committee are in red.

[38] Public Administration Select Committee, *Lobbying: Access and Influence in Whitehall* (n 17) 42.
[39] Political and Constitutional Reform Committee, *Introducing a Statutory Register of Lobbyists: Second Report of Session 2012-13*, 'Introducing a statutory' (HC 153-1) 8.
[40] ibid 9.

Table 2: The problems with lobbying in the UK identified by three committees between 2008 to 2013.

	CSPL	PASC	PCRC
1	Public suspicions that the conduct of lobbyists has **unduly influenced** decision-makers. These suspicions can undermine public confidence in the political system.	Lobbyists may have **excessive influence** over decision-makers.	There is a perception that some people have **undue** access to (and **influence** over) the policy-making process.
2	Those with money, power and influence may have **greater access to decision-makers**. Few people possess money, power and influence which means that access to decision-makers is unequal.	Some have **privileged access** to officials.	There is a perception that some people have **undue access** to (and influence over) the policy-making process.
3	**Conflicts of interest**: (a) Decision-makers who take up **outside appointments** may compromise their behaviour in a way that is **not in the public interest** in anticipation of that appointment. (b) Officials may use their position for **personal gain** by taking up external appointments.	**Conflicts of interest**: (a) Officials may face conflicts of interest **between their career and the public good.** (b) Ministers may be able to use with impunity the contacts they built up as public servants to further a **private interest**.	
4	Since some lobbying is in secret, others will not have the **opportunity to respond** to the arguments put forward.		
5	Officials may make **decisions** in a manner that is **not impartial, fair and based on merits** because they are being influenced by a few vested and powerful interests that have access.		

2.4 Summary of the Concerns Highlighted by the Committees

Three observations can be made about the reports. First, they identify the misgivings with lobbying in reasonable detail which helps to elucidate the matters identified by the political party manifestos. For example, row 2 of Table 1 (earlier in the chapter) reveals worries about MPs who are paid to lobby or who take up positions for private gain. This is explained more fully in row 3 of Table 2 above which reveals that this worry consists of two issues. Second, despite that positive, the problems with lobbying are not always articulated clearly. The reports could have explained the problems more precisely and structured the issues more coherently. Third, the reports place a different emphasis on what the main issues are which highlights a lack of consistency. This leads to questions about which issues are of greatest concern. The next section considers, in greater depth, the matters expressed by ministers, MPs and peers by analysing Government documentation and speeches given during the bill stages of the TLA 2014.

3. The Differing Government Concerns Leading up to the TLA 2014

The sections above highlighted several concerns with lobbying raised by the three main political parties in 2010 and three parliamentary committees from 2008 to 2013. The consultation process for the TLA 2014 and the various stages of the TLA Bill took place in 2013 which means that the Government had all the issues available for consideration. During the consultation and Bill stages of the TLA 2014, the Government stated what problems the law was meant to address. This section analyses two impact assessments and statements by the Government during the stages of the TLA Bill in the House of Commons and Lords to identify those problems. The analysis demonstrates significant incongruousness regarding what matters the lobbying register created by the Act was supposed to address.

3.1 Impact Assessments

The first articulation of the problems with lobbying arises from the Government's impact assessments for the TLA 2014. One impact assessment identifies the following problem:

> It is not always transparent whose interests are being represented when consultant lobbyists meet with ministers and senior officials. This information asymmetry may lead to suboptimal policy making.[41]

This raises two issues. First, there is a lack of transparency about whose interests are being represented by consultant lobbyists which is a distinct and much narrower transparency issue to that noted by the CSPL or the manifestos. The CSPL were concerned with a lack of transparency surrounding who is lobbying. The impact assessment highlights a worry about whose interests are being represented when a *consultant* lobbyist lobbies (one type of professional lobbyist). As such, the lobbyist is identified (a consultant lobbyist) and there is unease about a lack of transparency surrounding whom a consultant lobbyist is representing. This matter is narrowed further to cover only meetings between consultant lobbyists, ministers and senior officials. The transparency gap noted by the CSPL and PCRC referred more generally to 'policy makers' and the 'policy making process'. The transparency 'problem' highlighted by the Government is thus distinct and much narrower than that identified in other reports. Nevertheless, it is the problem that the Government sought to address.

Second, the impact assessment states that there is concern that this 'information asymmetry' may lead to suboptimal policy making. The use of the term 'information asymmetry' reflects a lack of precision in describing the problem and is poorly aligned with the literature on lobbying. Taken alone, the term simply means that one person has more information than another person, placing them at an advantage. The impact assessment is, therefore, highlighting that only consultant lobbyists know whose interests they are representing which the public do not know (although it is not explained exactly why these leads to suboptimal policy making). The use of the term is problematic because there is literature which analyses 'information asymmetry' in lobbying in a very different context to which the term is applied above. In political science and economics, information asymmetry describes how decision-makers are forced to rely on lobbyists for policy expertise, or how lobbyists benefit from information

[41] Cabinet Office, *A Statutory Registry of Lobbyists (as part of the Transparency Lobbying, Non-Party Campaigning and Trade Union Administration Bill)* (Impact Assessment, 9 July 2013) 3.

asymmetries to encourage corporations to lobby.[42] The description of 'information asymmetry' in the impact assessment does not align with the descriptions in the literature which creates confusion. The second impact assessment states that:

> Where lobbying is opaque, this creates a market failure caused by imperfect information that can undermine public confidence in the decision making process and its results.[43]

This statement illustrates both a poor articulation of the problem and a broadening for the justification for more reform. On the first point, it is challenging to decipher exactly how opaqueness in lobbying creates market failures without clear explanation. This concern may relate to Hasen's theory on rent-seeking,[44] but this is not clear from the description given. The latter point regarding a lack of transparency undermining public confidence in the political system is easier to decipher and has been explained more clearly in the CSPL report above.[45] However, this is a broader concern than a lack of transparency about whom consultant lobbyists represent—which is the focus of the TLA 2014.

3.2 Bill Stages of the TLA 2014

The statements given by the Government during the bill stages of the TLA 2014 reveal a greater lack of precision and further inconsistencies. During the second reading, Mr Lansley on behalf of the Government stated that:

> There are two key principles reflected in the Bill. The first is that transparency is central to accountability and that the public should be able to see how third parties seek to influence the political system. The second

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[42] Lee Drutman, *The Business of America is Lobbying: How Corporations Became Politicized and Politics Became More Corporate* (OUP 2015) 165 & 228; Jan Potters and Frans Van Winden, 'Lobbying and asymmetric information' (1992) 74 Public Choice 269, 271; David Martimort and Aggey Semenov, 'Political Biases in Lobbying Under Asymmetric Information' (2007) 5 Journal of the European Economic Association 614, 615.

[43] Cabinet Office, *Proposals to Introduce a Statutory Register of Lobbyists* (Impact Assessment, 27 November 2011) 1.

[44] See, Richard L Hasen, 'Lobbying, Rent-Seeking and the Constitution' (2012) 64 Stan L Rev 191.

[45] The 'public confidence' issue was also noted in a Government command paper which stated that 'where lobbying is not transparent, it can undermine public confidence in the decision-making process and its results'. See UK Government, *Introducing a Statutory Register of Lobbyists* (Cm 8233, 2012) 9.

> is that third parties should act in an open and accountable way. The Bill will give the public more confidence about the way third parties interact with the political system.[46]

There are two issues here. First, there is a lack of transparency around lobbying which is similar to the impact assessments. Linked to this, is the issue of third party lobbying which hints towards worries about improper influence. The use of the term 'accountability' highlights another matter which is emphasised in the next passage by Mr Lansley:

> I believe that the great majority of those in our Parliament and our political system behave well. But, human nature being what it is, the minority tempted to do otherwise need to know that they cannot engage in sustained, concealed efforts to peddle influence. Their activity will be brought into the open and they must expect to be held to account for their behaviour. Sunlight is the best disinfectant.[47]

This passage is concerned with bringing transparency to hold decision-makers to account for their 'concealed efforts to peddle influence'. It highlights a different issue to the Government's impact assessment which was concerned with a lack of transparency surrounding whose interests' consultant lobbyists represent. It also raises a different issue to the 'two key principles' apparently underlying the Act first stated by Mr Lansley. This brings into question what the key principles reflected in the Bill (and subsequently the Act) were because there is a focus on different points. Further, it appears that inequalities of power, wealth or access around lobbying were not a worry for the Government as they were not highlighted in the statements by the Government. However, this strongly contradicts the rationale underlying Part 2 of the TLA 2014 which introduced spending limits on third parties in elections. Mr Lansley stated that:

> The Bill strengthens the existing limits on the campaign spending of third parties. We have spending limits on parties at elections. That ensures a

[46] HC Deb 3 September 2013, Vol 567, Col 169.
[47] ibid Col 179.

> degree of equality of arms, and we should not see it undermined by distorting activity of disproportionate expenditure by third parties.[48]

The Government was thus concerned about the disproportionate expenditure of third parties undermining the equality of arms in elections. However, it was not concerned with the disproportionate expenditure of lobbyists undermining equality in the policy making process. This illustrates a contradiction in the logic of the Government and highlights a lack of articulation about the problems with lobbying. Further, it will be seen in Chapter 5 that election expenditure issues cross over significantly with lobbying issues, and so it appears that the Government were unwittingly describing a lobbying concern in the passage.

More contradictions are found in statements by the Government at other Bill stages. During the second reading of the TLA Bill in the Lords, the Parliamentary Under-Secretary of State, Department for Business, Innovation and Skills (Viscount Younger of Leckie) stated that:

> There has been some concern, however, that some lobbying activity is opaque and there is a perception that certain powerful organisations and individuals could exert a disproportionate influence on government.[49]

This observation is different to Mr Lansley's about a lack of transparency regarding whom consultant lobbyists represent. Instead, it is a concern that there is a perception that powerful individuals and groups could exert disproportionate influence on the Government. During the same reading stage, Lord Wallace of Tankerness stated that:

> It is not, nor has it been, the Government's intention to attempt to regulate comprehensively all those who communicate with government, and the register will not, therefore, be associated with a statutory code of conduct. Instead, the Government are committed to ensuring that the statutory register complements the existing self-regulatory regime by

[48] ibid Col 181.
[49] HL Deb 22 October 2013, Vol 748, Col 893.

> which the industry promotes the ethical behaviour that is essential to the integrity and reputation of the lobbying industry.[50]

This statement suggests that the 'ethical behaviour' of lobbyists is an issue and that the TLA 2014 was meant to 'complement' existing regimes which promote ethical behaviour. However, none of the previous statements or reports consider the issue of ethics at all.

3.3 Summary

The passages above highlight four issues. First, the problem that the Government sought to address with lobbying was initially very narrow; that it was not clear whom consultant lobbyists were representing. Second, that problem was mixed with other concerns surrounding lobbying which were neither articulated well nor explained clearly. Third, there were contradictions about what problem the law was meant to address. Different statements focussed on various matters that deviated from the original problem as stated. Fourth, the issue regarding the transparency of consultant lobbyists is distinct from all the misgivings raised in the party manifestos in 2010 and the parliamentary reports between 2008 to 2013. As such, the analysis demonstrates significant incongruousness regarding what the worries are and what problems the TLA 2014 was meant to address. This passage could have considered the matters highlighted in the statements given by other parties during the bill stages, but the conclusions would have been much the same. The next section develops a more coherent framework for analysing the concerns with lobbying.

4. Creating a Framework for a Lobbying Evaluation: 'Institutional Diversion'

Analysing the problems caused by lobbying requires an analytical framework which gives order and structure to the concerns surrounding the complex phenomenon of lobbying. It is evident from the analysis above that lobbying takes on numerous guises, permeates different institutions, influences different people and can have diverging intentions. It is, therefore, not enough to think about the

[50] HL Deb 13 Jan 2014, Vol 751, Col 52.

concerns of lobbying as merely being about one issue or another. Further, it does not suffice to present the issues without coherence or structure because that approach undermines efforts to identify solutions. When purported solutions are identified, their purpose, place and effect in the grander scheme is unknown.

Academic literature provides greater depth to the analysis through various definitions of corruption which are helpful. However, those analyses usually do not cover the crossover between concerns about individual corruption, institutional corruption and political equality explicitly. The main exception is Rowbottom who analyses that crossover in good depth. However, despite the efforts of Rowbottom and others, a clearer and more structured approach is needed than is currently offered. It is argued below that this thesis can complement the excellent work of other academics whilst developing the evaluation of lobbying in a more structured direction using a framework. Second, it is argued that the theory of 'institutional corruption' from the US can provide a useful starting point and foundation for developing that framework.

4.1 Advancing the UK Literature on Political Corruption

In his book, *Democracy Distorted*, Rowbottom considers the influence of wealth on politics in the UK, arguing that the greatest objection to wealth is its corrupting effect on politics or that it is contrary to the principle of political equality.[51] When Rowbottom writes of 'influence', he is essentially concerned with lobbying because lobbying entails the influence of the political process. Throughout his book, he considers different issues pertaining to political equality in the UK democratic system. His analyses will complement those in this thesis (particularly those in Chapters 3 and 5). However, it is two contentions in his book that are important at this stage.

In his chapter on lobbying, Rowbottom rightly highlights the difficulties of analysing political corruption because of definitional challenges.[52] Lobbying is the central issue in such an analysis. Indeed, whilst Rowbottom restricts his analysis of lobbying explicitly to one chapter,[53] the misgivings with lobbying arise

[51] Rowbottom, *Democracy Distorted* (n 1) 1.
[52] ibid Ch 4.
[53] ibid.

consistently throughout his book. His analysis shows that it is hard to determine the norms against which one can judge lobbying conduct which is problematic. In this regard, he highlights two ways of defining political corruption.

First, is a 'norms of office' approach. Under that approach 'a corrupt act occurs where a person holding office deviates 'from norms binding upon its incumbents' for personal or private gain'.[54] One must identify the norms that bind the office-holder which may arise from set rules. However, those rules do not 'tell us what standard the official is expected to live up to and takes as a given the existing rules that bind the officeholder'.[55] Therefore, to determine whether an act is corrupt, one must refer to the rules or expectations governing the particular office.

The second approach is called the 'public interest' approach. This 'moves away' from the first approach because one looks to establish whether the corrupt behaviour is damaging the public interest as opposed to the norms of office.[56] The 'public interest' is frequently used in literature. Indeed, Howarth notes that 'the ultimate ideal for any activity that involves design is to produce something of benefit, and the most general way to measure benefit is in terms of maximising public welfare'.[57] Rowbottom explains that the public interest approach:

> Brings normative questions into the open and provides a way of thinking about whether an action should be thought of as corrupt. The major difficulty with this definition is in determining whether an arrangement is detrimental to the public interest. […] Consequently, a public interest definition does not provide answers as to whether lobbying activities, beyond the most obvious scenarios, should be regarded as corrupt.[58]

For both definitions, he explains how there is a close connection between corruption and political equality and that the latter can play a role in defining the standards from which office-holders deviate:[59]

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[54] ibid 81.
[55] ibid.
[56] ibid.
[57] David Howarth, *Law as Engineering: Thinking About What Lawyers Do* (Edward Elgar 2013) 144.
[58] Rowbottom, *Democracy Distorted* (n 1) 81–82.
[59] ibid 82.

> For example, if the norms regulating the official or the standard of the public interest are drawn from democratic theory, then the 'basic norm of democracy' is that 'every individual potentially affected by a decision should have an equal opportunity to influence the decision'.[60]

Rowbottom highlights that this standard will be applied in different ways to different offices. The expectations on MPs acting as representatives will be different to the expectations on ministers or civil servants. MPs are expected to be responsive, and civil servants should be impartial and, therefore, a corruption can be established by a *deviation* from those requirements.[61] He explains that the understanding of corruption can be shaped by general arguments about political equality.[62] Under this account, corruption and political equality are rooted in a common concern.[63]

Similarly, Philp notes how the approach to understanding corruption as the '*subversion* of the public interest […] by private interests is one with an impeccable historical pedigree'.[64] He explains that both the 'norms of office' and 'public interest' conceptions must be fleshed out to establish their character and scope.[65] However, it is not immediately obvious which norms one can turn to but they will most likely turn on public opinion, legal norms and standards derived from modern Western democratic systems.[66] Taking each approach in isolation is problematic because there are times, for example, when principles will come into play where legal rules are silent.[67] Ultimately, Philp argues that to identify political corruption, one must 'make commitments to conceptions of the nature of the political and the form of the public interest'. One line definitions of corruption are reductionist and misleading because they 'obscure the extent to which the concept is rooted in ways of thinking about politics — that is, of there being some 'naturally sound condition' from which corrupt acts deviate'.[68]

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[60] ibid.
[61] ibid.
[62] ibid.
[63] ibid 83.
[64] Philp cites Machiavelli and Nye who have offered such a conception. Mark Philp, 'Defining Political Corruption' (1995) 45 Political Studies 436, 440.
[65] ibid 441.
[66] ibid.
[67] ibid 444–445.
[68] ibid 446.

Beetham also argues that a lot of conduct in the political sphere cannot be captured by narrow definitions of corruption which is why a broader definition is needed.[69] He suggests a broader conception of corruption defined as 'the distortion and subversion of the public realm in the service of private interests'.[70] The activities of the Government 'should serve a general or public interest rather than a set of private ones, and that there should be transparent public debate to determine where the general interest lies'.[71] He finds that the literature lacks 'a coherent narrative which links these different phenomena together, explains their common causes and systematic effects'.[72] This latter contention is echoed by Hine and Peele who note that when one puts the criminal law to one side, we are left with 'improper' conduct for which the main sanction is the ballot box. Such conduct has proved to be 'the most sensitive and difficult'.[73] Together with Philp, they not how there is a:

> Need for a systematic account of why we think certain forms of behaviour are acceptable, and others not, and of how, when we form a view of this, we implement the values which our accounts entail in ways that give them a reasonable chance of bedding down with existing British institutions.[74]

The arguments by these academics illustrate the problems with analysing lobbying very well. They are right that a coherent narrative is missing which can articulate misgivings such as those highlighted in this chapter. Philp and Beetham are correct that a one line definition does not suffice because the issues are inherently complex. Rowbottom comes very close to offering an answer to that approach when he highlights that one can apply the 'norms of office' or 'public interest approach' which can be informed by principles of political equality. Beetham's attempt to offer a definition of a 'distortion' or 'subversion' from the public interest also comes tantalisingly close to offering an answer but is insufficient

[69] David Beetham, 'Moving Beyond a Narrow Definition of Corruption' in David Whyte (ed), *How Corrupt is Britain?* (Pluto Press 2015) 42.
[70] ibid 41.
[71] ibid 42.
[72] ibid 44.
[73] David Hine and Gillian Peele, 'Integrity Issues in the United Kingdom: An Emerging Debate' in Dirk Tanzler, Konstadinos Maras and Angelos Giannakopoulos (eds), *The Social Construction of Corruption in Europe* (Ashgate 2012) Ch 3.
[74] David Hine, Gillian Peele and Mark Philp, 'Keeping it Clean: But How Exactly?' (Undated) <https://www.politics.ox.ac.uk/materials/profile_materials/KeepingItClean.pdf> accessed 15 May 2017.

because it is not underpinned by an in-depth analysis. Ultimately, it is submitted that the authors do not offer an answer to the problem they have identified.

Beetham's analysis is very short (spanning a five-page chapter) and consequently does not grapple with necessary analyses of what the 'public interest', 'distortion' and 'subversion' mean in the UK context. Philp offers great depth as to how one defines political corruption but does not offer a conception of it for analysing lobbying (that was not the aim of his work). Similarly, Hine and Peele highlight the lack of coherence but do not offer a mechanism or framework for identifying and analysing the main issues. Although, the work of Philp, Hine and Peele offer a very informative basis for developing such a mechanism.

For Rowbottom, his analysis is excellent in that he pinpoints very relevant concepts of equality and corruption laws. He applies examples of lobbying to those concepts and laws to explain why the issue is concerning. However, whilst his application of those principles is consistent, he does not offer a unifying gauge through which every matter can be funnelled. He is dismissive of using the 'public interest' because, he argues, a public interest definition does not provide answers as to whether lobbying activities, beyond the most obvious scenarios, are corrupt. That is correct if one does not define the public interest, but it is submitted that a definition can be provided. This can be achieved by combining the 'norms of office' and 'public interest' approaches which need not be applied in isolation as is recognised by Philp.

Indeed, it is submitted that there are common norms of office pertaining specifically to lobbying conduct that bind MPs, peers and ministers.[75] A 'transparent public debate to determine where the general interest lies'[76] is not needed as Beetham and Rowbottom suggest because an answer already exists. In any case, their approach is not satisfying because, as Philp highlights, it raises many questions about whose opinion to give most weight to in developing such a conception.[77] By analysing the norms, one can determine what the public interest is in a given case. Further, the norms can be informed, as Rowbottom

[75] These are explored in Chapter 3.
[76] Beetham (n 69) 42; Jacob Rowbottom, 'Corruption, Transparency, and Reputation: The Role of Publicity in Regulating Political Donations' (2016) 75(2) Cambridge Law Journal 398, 399.
[77] Philp, 'Defining Political Corruption' (n 64) 441.

suggests, by examining the close connection between corruption and political equality principles. From this, an analytical framework can be developed which gives order and coherence to the analysis of lobbying in a way that has not been achieved so far. In this thesis, that framework is called 'institutional diversion' and is developed from the theory of 'institutional corruption' in legislative ethics by Dennis Thompson and Lawrence Lessig's 'dependence corruption' theory (which is an adaptation of institutional corruption).

4.2 From 'Institutional Corruption' to 'Institutional Diversion'

Most of the concerns identified with lobbying highlight conduct that is not illegal. The vast majority of public officials are not taking bribes, and most who lobby are not offering a bribe. The matters which are usually identified are more complex. The theory of institutional corruption was developed by Dennis Thompson[78] who moves beyond blatant bribery to consider what he calls 'the shadowy world of implicit understandings, ambiguous favors, and political advantage. Moving beyond individual corruption [to focus on] the institutional corruption [that has been neglected]'.[79] Like Thompson, Lessig's work focuses on the corruption of the US Congress from an institutional perspective.[80] However, he offers a slightly different approach to Thompson by arguing that an institution becomes corrupted where it deviates from its intended dependence.[81]

The nuances of that debate are detailed, and their framework is developed in Chapter 4. For this section, two tasks are necessary. First, to outline the definition of institutional corruption, and to adapt that definition for 'institutional diversion'. Second, to outline the framework that manifests from Thompson and Lessig's definition which is used to test for an institutional corruption, and to adapt that framework in light of the adapted definition of institutional diversion for the institutional diversion framework.

[78] See, Dennis F Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (The Brookings Institution 1995).
[79] ibid 7.
[80] Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress - and a Plan to Stop It* (Twelve 2011).
[81] See generally, Lawrence Lessig, 'What an Originalist Would Understand "Corruption" to Mean' (2014) 102 Cal L Rev 1.

4.2.1 The Definition

Institutional Corruption

A systemic and strategic influence which is legal, or even currently ethical, that undermines the institution's effectiveness by diverting it from its purpose or weakening its ability to achieve its purpose, including, to the extent relevant to its purpose, weakening either the public's trust in that institution or the institution's inherent trustworthiness.

This definition[82] offers an excellent starting point for a framework because it covers legal and ethical conduct pertaining to the issues of political equality highlighted by Rowbottom. Further, the definition correlates with Beetham's broader conception of a 'subversion' when it states that an influence must 'divert' the institution from its 'purpose'. That concern of a 'subversion' is not new in the UK political context. As long ago as 1695, the House of Commons resolved that improper influences over Parliament tend 'to the subversion of the constitution'.[83] The idea of a 'diversion' is, therefore, not new and this thesis seeks to use it as an overarching gauge of the institutional diversion framework because it is conceptually straightforward. Further, it should be noted that the definition is written in the campaign finance context, but Lessig and Thompson clearly envisage the relevance of lobbying. Thompson states that:

> When the recipients are organized as *lobbyists* (or more generally when they are financially dependent on powerful economic interests in society), the corruption becomes embedded in the routines of government.[84]
>
> [and]

[82] Lawrence Lessig, 'Foreword: "Institutional Corruption" Defined' (2013) 41(3) The Journal of Law, Medicine & Ethics 553, 553.
[83] Resolution of 2 May 1695: Against Offering Bribes to Members, see House of Commons, *The Code of Conduct together with The Guide to the Rules Relating to the Conduct of Members* (HC 2015, 1076) 51.
[84] Dennis F Thompson, 'Two Concepts of Corruption' [2013] Edmond J Safra Working Papers, No 16 1, 11.

> When [officials] travel with *lobbyists*, providing easy and routine access denied to ordinary citizens, they are likely to be participating in institutional corruption.[85]

Lessig states that:

> If you have a system where the mechanism is so directly and powerfully controlled by the *lobbyists* and the only people who can effectively afford the *lobbyists* are a tiny fraction of that that need to influence government, then you have replicated the inequality that denies citizens equal standing inside our process.[86]

Whilst a 'diversion' in the context of lobbying is, therefore, not problematic, the narrow definition of 'corruption' is. Both Thompson and Lessig are keen to emphasise that a 'corruption' has occurred: albeit not in the sense of criminality. Thompson explains that

> In the case of institutional corruption, the fact that an official acts under conditions that tend to create improper influence is sufficient to establish corruption, whatever the official's motive (…) Action under these conditions is not merely evidence of corruption, it constitutes the corruption.[87]

For Lessig, the US Congress is, by design, meant to be dependent upon the people alone. Any conflict which causes that dependency to change is the corruption itself.[88] Therefore, for both Thompson and Lessig, corruption describes something that does not work according to its design.

It is contended that their definition is helpful to this thesis but in an adapted form. The aim is to develop a holistic framework from a definition which takes account of individual corruption, institutional corruption and political equality worries. Indeed, Rowbottom analyses individual corruption,[89] institutional

[85] ibid 12.
[86] Lawrence Lessig, *What is Institutional Corruption?: Lessig in the Dock (Video Interview)* (Edmond J. Safra Center for Ethics 2015).
[87] Thompson, 'Two Concepts of Corruption' (n 84) 13.
[88] Lessig, 'What an Originalist' (n 81) 5.
[89] Rowbottom, *Democracy Distorted* (n 1) 84.

corruption,[90] and political equality[91] in his studies. However, in its current articulation, institutional corruption theory is not sufficient to analyse individual corruption or many aspects of political equality. Thompson differentiates individual and institutional corruption quite explicitly, and institutional corruption will not identify many instances of problematic lobbying.

Further, the name of the theory, 'institutional corruption', is not the best label for an adapted framework. Whilst, for Thompson and Lessig, 'corruption' means something different to bribery, it is submitted that the term has developed an association with criminality which has become almost ingrained. If one were to suggest to an MP that Parliament is institutionally corrupt, it would likely provoke a defensive response due to the association of corruption with bribery. This is important because it is hoped that policymakers and lawmakers will use the framework. Therefore, the definition requires developing not only to cover broader lobbying concerns but also to describe the problems is a manner that might not provoke a defensive and dismissive response.

Additionally, Thompson avoids describing corruption directly in terms of an institutional purpose for two reasons. First, the purposes of government 'are multiple and contestable, and therefore cannot be fully specified and endorsed independently of a legitimate collective decision-making process'.[92] Second, within the institutional corruption framework, it is necessary to identify procedures and rules that distinguish permissible and corrupt conduct—rules that are not 'natural or obvious'.[93] On the first point, whilst there are multiple and contestable purposes of government, there is no reason why an analysis cannot focus on one determinable and key purpose such as 'acting in the public interest' from which a diversion can be tested.[94] On the second point, instead of identifying 'procedures' for establishing a corruption, Chapter 3 introduces the elements of 'integrity' and 'objectivity' which, it is argued, are sufficient for testing for that diversion.[95]

[90] Rowbottom, 'Corruption, Transparency, and Reputation' (n 76) 403.
[91] Which he analyses throughout his book. Rowbottom, *Democracy Distorted* (n 1).
[92] Thompson, 'Two Concepts of Corruption' (n 84) 5.
[93] ibid.
[94] Explored in Chapter 3.
[95] ibid.

As such, six adaptations are made to the definition of 'institutional corruption' for 'institutional diversion'. These adaptations are needed to cover the necessary lobbying conduct and to provide a foundation for analysing lobbying which accounts for the matters raised by UK academics.

First, a 'systematic and strategic influence' contained within the definition is replaced with 'a concern about lobbying' since lobbying is about *influencing* office-holders.[96] An influence need not be 'systematic' nor 'strategic' since the conduct in question could be a one-off bribe. Second, the requirement that the influence is 'legal, or even currently ethical' which diverts the institution from its purpose, is adapted to lobbying that is 'illegal, legal, ethical or unethical'. This will account for misgivings about individual corruption and political equality.

Third, it is unnecessary to retain the requirement that the influence '*undermines the institution's effectiveness* by diverting it from its purpose'. This suggests that a diversion from a purpose will result in the *effectiveness* of the institution being undermined. The presumption is, therefore, that the institution's operations or purpose (as it stands) are effective. The reality may be that the purpose is not effective and that the influence may achieve enhanced effectiveness for that institution. For this reason, 'effectiveness' is omitted. Further, the key concern here is not that effectiveness has been 'undermined' but that a diversion from a purpose has occurred. That is the more serious issue since the institution is not operating according to its purpose. Therefore, the measure required is a 'diversion from a purpose or a weakening of the ability to achieve that purpose'. Whether that diversion is good or bad can be considered later in the analysis.

Fourth, since the institutions in this thesis are known (Government and Parliament), the definition is given greater precision by identifying those institutions. However, the focus is specifically on 'decision-makers' working within those institutions rather than the institutions as a collective. It would be impossible to hold the institutions of Parliament or Government accountable for a diversion, but holding individual decision-makers to account is more achievable and realistic.

[96] Raj Chari, John Hogan and Gary Murphy, *Regulating Lobbying: a global comparison* (Manchester University Press 2010) 4.

Fifth, it is necessary to identify the 'purpose' of the decision-makers. In Chapter 3, it is argued that their purpose is to 'act in the public interest'. This purpose is, therefore, identified within the definition. Sixth, the final element of the definition is retained; that a diversion must result in 'weakening either the public's trust in that institution or the institution's inherent trustworthiness'. Ultimately, one is concerned with enhancing public trust in the political process. Therefore, applying those six adaptations, an 'institutional diversion' is defined as follows:

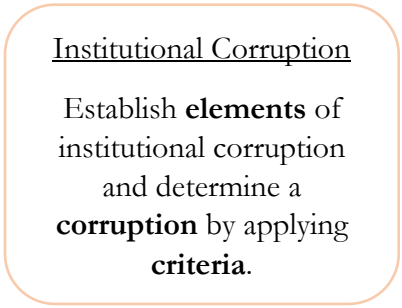
> **Institutional Diversion**
>
> Decision-makers working within the institutions of Parliament or the Government of the UK are subject to lobbying—or there is some concern about lobbying—which is illegal, legal, ethical or unethical, which diverts the decision-makers from their purpose of acting in the public interest or weakens their ability to act in the public interest, including weakening either the public's trust in Parliament or the Government or their inherent trustworthiness because of that lobbying.

The definition accounts for the crucial differences that are necessary for the creation of the framework. It identifies the institutions, the decision-makers working within them, and the need for office-holders to be diverted from their purpose of acting in the public interest or are weakened in their ability to achieve their purpose because of lobbying. From this, one can consider lobbying broadly grouped into matters about individual corruption, institutional corruption or political equality which may cause a diversion, and can develop specific definitions of the public interest from an analysis of norms.

4.2.2 The Framework

From the definition, a framework can be created which allows one to test precisely why lobbying is problematic in a coherent manner. Indeed, the definition of institutional corruption given by Thompson and Lessig manifests a framework that is used to test for institutional corruption. That framework is explored in detail in Chapter 4. However, a basic outline is offered at this stage.

Figure 1: The Institutional Corruption Framework



In this thesis, it is argued that *criteria* can also be used in the 'institutional diversion' framework to test why lobbying is concerning in a clear and coherent way. However, the *criteria* of institutional and dependence corruption require adapting. Lessig's criteria are insufficient, and Thompson's criteria are both too contingent and too complicated. Lessig's approach is insufficient because a 'dependency' cannot describe many of the problems with lobbying; although it describes an important one. Thompson's approach is too contingent because there are too many steps to establishing institutional corruption. It is also too complicated because he uses terminology that is overly complex and unnecessary. The institutional diversion framework should be intelligible to academics, politicians and policymakers and should, therefore, be easy to understand and follow.

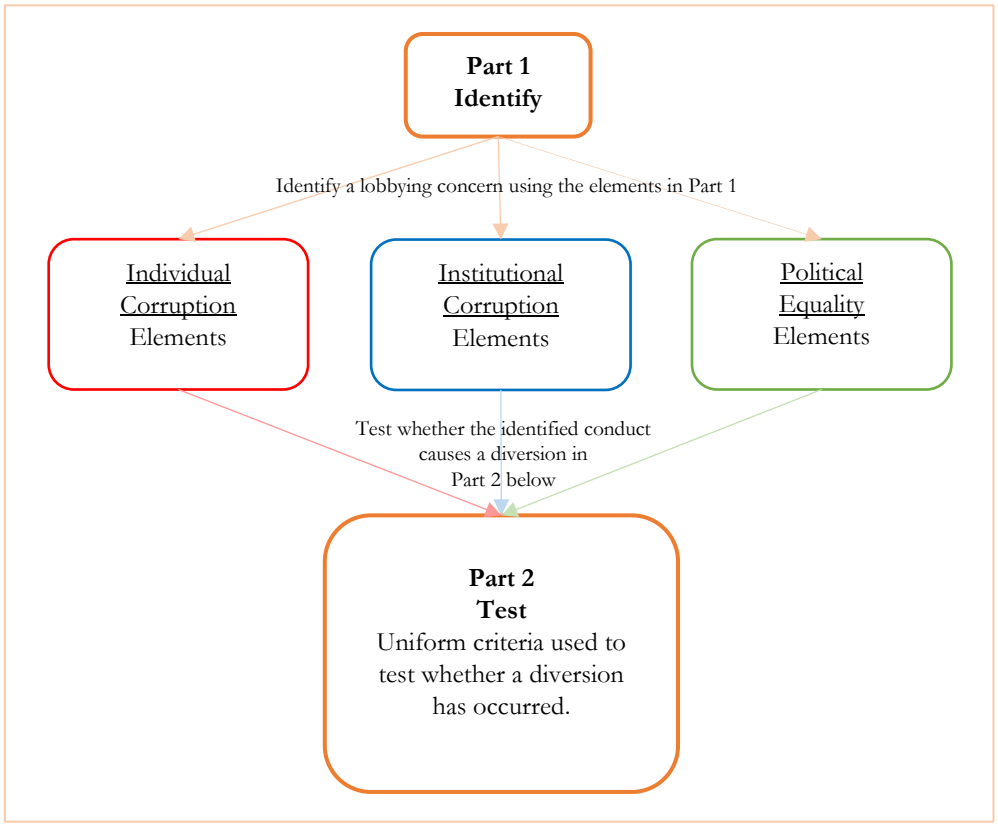
Therefore, for this thesis, the *elements* for institutional corruption remain but are separated from the criteria. The elements of institutional corruption are necessary because they help to identify the problem of institutional corruption. However, these are further supplemented with new elements of individual corruption and political equality.[97] Together, the elements can be applied to any issue about lobbying to identify the underlying unease in a consistent and coherent way. However, different *criteria* are applied to test more broadly for a diversion in the institutional diversion framework. Again, different criteria are used because Thompson and Lessig's criteria are both insufficient, unnecessary and overly complex. The institutional diversion framework requires straightforward criteria

[97] Similar to those highlighted by Rowbottom.

to test for the concerns of individual corruption, institutional corruption and political equality holistically.

In this regard, three arguments are made which will be tested in later chapters. First, the criteria used in the diversion framework are sufficient because they help to test clearly when a diversion has occurred. Second, they are not overly complex and thus easy to understand for most readers. Third, they are not overly contingent because there are only two or three steps (depending on the scenario) in the process for identifying a diversion. The framework that manifests from the definition of institutional diversion and the adaptation of Thompson and Lessig's approach is outlined below.

Figure 2: The Institutional Diversion Framework



Part 1 is called 'Identify'. For this, one identifies whether the worry is about individual corruption, institutional corruption or political equality by reference to certain elements that are necessary for identifying those concerns. As noted above, the elements of institutional corruption arise from those enunciated by Thompson and Lessig (although, they will be adapted in Chapter 4). The elements

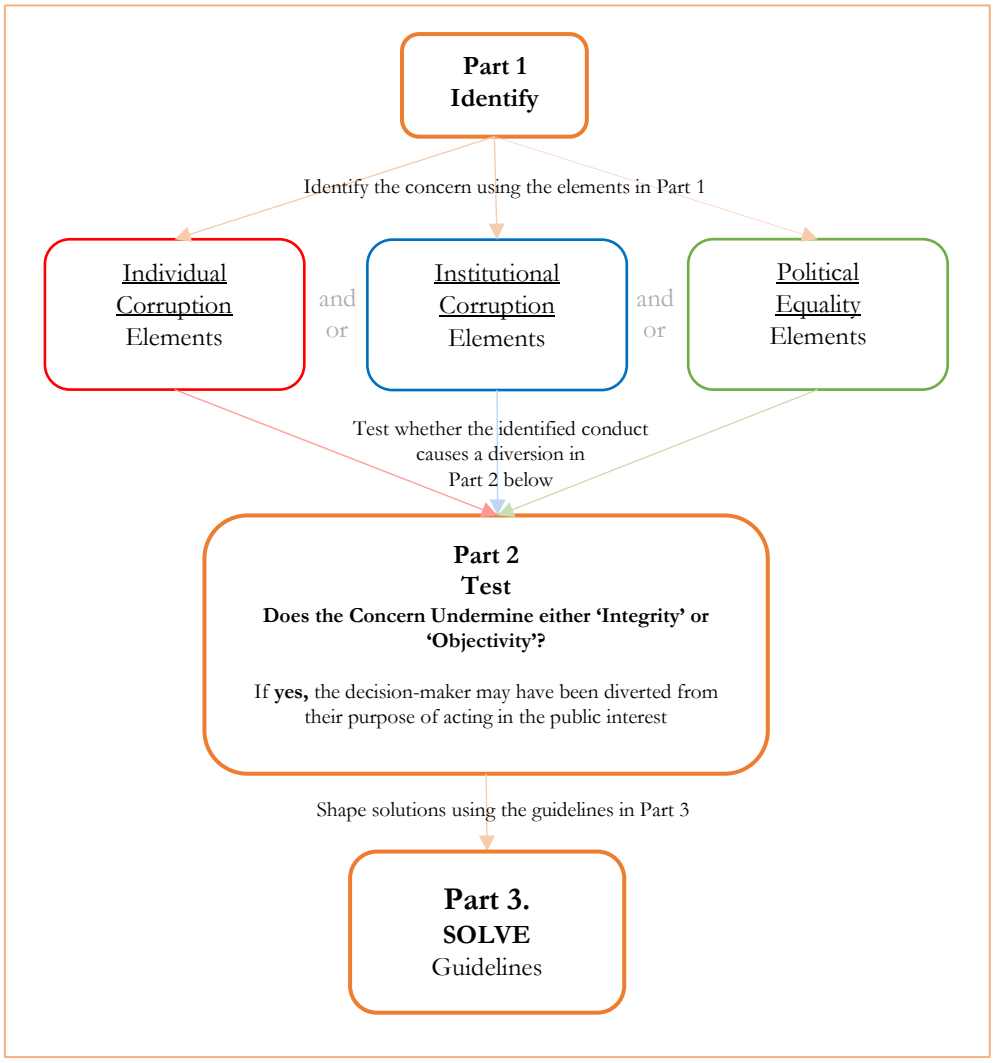
of individual corruption are explained in Chapter 4. The elements of political equality are explained in Chapter 5. This identification stage in Part 1 is necessary for a later examination of whether there has been a diversion in Part 2.

Part 2 if called 'Test'. For this part, uniform criteria are used to gauge whether the matter identified in Part 1 causes a diversion from the purpose of acting in the public interest and why. To achieve this, the criteria of 'integrity' and 'objectivity' are used to test whether there has been a diversion through a series of questions. The criteria derive from the 'norms of office' that apply to decision-makers being lobbied, and the questions arise from the literature on political equality and corruption. In this manner, Rowbottom's recommendation is followed that political equality can play a role in defining the standards from which office-holders deviate.[98] Where 'integrity' or 'objectivity' are undermined, decision-makers in Parliament or the Government may have been diverted from their purpose of acting in the public interest or their ability to do so has been weakened.

In addition to Parts 1 and 2 developed from the definition above, Chapter 7 develops a third part of the framework. Part 3 is called 'Solve' and offers guidelines, based on an interview with the UK's lobbying Registrar for shaping regulatory solutions to the problems identified in Parts 1 and 2. The purpose of Part 3 is to avoid 'jumping the gun' when analysing regulatory solutions. One could conceive of many solutions to the problems, but it is more helpful first to understand what type of reform is achievable in the UK's political environment otherwise solutions are unlikely to be enacted. Thus, the institutional diversion framework can be developed further.

[98] Rowbottom, *Democracy Distorted* (n 1) 82.

Figure 3: The Institutional Diversion Framework Developed



The institutional diversion framework is distinct from institutional corruption theory on definitional grounds which also manifests a framework that is structured differently. The definition is different because 'institutional corruption' is insufficient for identifying many other lobbying concerns. In this regard, this thesis accepts the measure of a 'diversion' but rejects that a 'corruption of the institution' explanation is appropriate for articulating the misgivings with lobbying in the UK. Instead, institutional diversion recognises three broad categories which can explain when lobbying may lead to a diversion of the institution's purpose.

Further, the diversion framework is distinct from institutional corruption because it offers ways to test for a diversion by reference to the criteria of 'objectivity' and 'integrity' in Part 2. Whether those criteria have been undermined

is determined by reference to specific questions arising from the literature on corruption and political equality. Finally, the development of regulatory guidelines in Part 3 also highlights the distinctive nature of the diversion framework.

4.3 Institutional Diversion: A Better Approach

There are four reasons why the institutional diversion framework should offer a better approach than currently exists for identifying the concerns with lobbying, testing why they are problematic, and guiding solutions to those problems.

First, the framework can bring clarity to an area that is often confused. This chapter highlighted how the misgivings with lobbying are not articulated clearly or coherently. The concerns are sometimes connected and sometimes not and they are seldom articulated in a manner that can assist in illuminating why they are problematic within the UK's model of democratic government. The framework will offer clear elements for identifying the concerns and testing why they are problematic.

Second, the framework encourages broader institutional considerations. Institutional concerns are rarely articulated as being institutional, or when they are, the specifics of why something is an *institutional* corruption is not detailed beyond the short analysis offered by Beetham.[99] Retaining the elements of institutional corruption within the wider institutional diversion framework will provide a more detailed evaluation of the issues in the UK.

Third, the gauge of a 'diversion' is conceptually straightforward and clear. If decision-makers are not acting as they should be, that is a problem which should be rectified. One can then explore the details of why those officials are not acting as expected and seek solutions. This approach is more complete and is easier to understand than disparate and unfocused arguments about notions of corruption or equality only.

[99] Miller also offers a short analysis of institutional corruption but does not develop it in the UK context. See, David Miller, 'Neoliberalism, Politics and Institutional Corruption: Against the 'Institutional Malaise' Hypothesis' in David Whyte (ed), *How Corrupt is Britain?* (Pluto Press 2015); Further, Gray considers the theory in the British Journal of Criminology but only in the US context. See, Garry C Gray, 'Insider Accounts of Institutional Corruption' (2013) 53 British Journal of Criminology 533.

Fourth, the framework encourages a more sophisticated holistic examination of the underlying issues. An MP who is bribed raises individual corruption concerns but also raises questions about the consequences of such conduct for the institution as a whole, the internal rules in place and the public's trust in the institution. This is more helpful than analyses which exist in a narrow void ignoring bigger and more fundamental questions.

These hypotheses will be tested in Chapter 6 when applying the institutional diversion framework to specific examples of lobbying in the UK.

4.4 Structure of the Analysis in this Thesis

Whilst the diversion framework is organised into three consecutive parts, the analysis in the following chapters in structured differently. Instead of beginning with Part 1, Chapter 3 explores the 'purpose' of Parliament and the Government for Part 2 of the framework. It is necessary to determine the purpose before determining when a diversion from that purpose arises. Within the same chapter, the criteria of 'integrity' and 'objectivity' are defined, and their use in the institutional diversion framework is justified. This structure assists the reader in understanding the context for the concerns analysed in Chapters 4 and 5 regarding individual corruption, intuitional corruption and political equality. The analyses in Chapters 4 and 5 will concurrently develop Part 1 (the elements of individual corruption, institutional corruption and institutional corruption), and Part 2 (the questions to test when integrity and objectivity have been undermined) of the framework. This approach enables the reader to have in mind whether, why, and how the concerns might cause a diversion from the purpose of acting in the public interest (having established what that means in Chapter 3). The framework is tested in Chapter 6, and guidelines are developed in Chapter 7 for Part 3.

Conclusion

The concerns with lobbying are poorly structured and poorly articulated. The analysis above reveals that different worries with lobbying are identified by the political parties in their manifestos. The committee reports provided much greater detail, but they often mixed issues instead of clearly explaining and structuring the issues. The reports were also incongruous in their emphasis of the problems with

some issues being given greater weight than others. For the CSPL, transparency was the main issue. For the PASC, privileged access was the main problem. For the PCRC it was the perception of undue influence. The committees also considered matters that did not fall within those headings. Therefore, it is unclear what the main concerns are or whether all the issues are of equal concern. The Government impact assessments and the reading stages of the TLA Bill also reveal contradictory reasons for regulation and the purpose of the law.

The academic literature in the UK has come close to offering a means of analysing and evaluating the problems with lobbying but needs developing further. It points in the right direction, and this thesis seeks to move in that direction. As such, this chapter examined the definition of 'institutional corruption'. It was argued that an adapted form of institutional corruption called 'institutional diversion' can offer useful a framework for identifying the concerns with lobbying and testing why they are problematic, as well as providing guidelines that help to shape potential solutions. The next chapter explores the 'purpose' of Parliament and the Government in the UK and defines the criteria of 'integrity' and 'objectivity' for Part 2 of the institutional diversion framework.

3

Examining the Purpose of Office-holders: Acting in the Public Interest

Introduction

In this chapter, Part 2 of the institutional diversion framework called 'Test' is developed. It is argued that the 'purpose' of office-holders working within Parliament and the Government is to 'act in the public interest' and that a diversion from that purpose caused by lobbying can be ascertained using the criteria of 'integrity' and 'objectivity'. Where those criteria are undermined, a diversion from acting in the public interest (or a weakening of the ability to act in the public interest) may have occurred. Below, the meaning of 'acting in the public interest' is deciphered, and the criteria are defined through a detailed exploration of the role of decision-makers, codes and statute. Specific questions are developed in Chapters 4 and 5 to determine when the criteria are undermined thereby causing a diversion from acting in the public interest.

Beginning with an analysis of the 'purpose' is essential because one cannot analyse in what circumstances office-holders become diverted from their purpose without first identifying what that purpose is. Indeed, Lessig notes that 'if an institution does not have a purpose, then it cannot be corrupted in this sense. If it does, then corruption is manifested relative to that purpose'.[1] However, identifying what the 'public interest' means is challenging because it raises normative questions about the representative role of decision-makers in the UK. In that regard, there are no legal requirements compelling office-holders to act in

[1] Lawrence Lessig, 'Foreword: "Institutional Corruption" Defined' (2013) 41(3) The Journal of Law, Medicine & Ethics 553, 554.

the interests of those whom they represent.[2] There exists only one common law offence called 'misconduct in public office' which could apply where the conduct of the office-holder has been 'calculated to injure the public interest'.[3] However, that offence is strictly confined and usually only applies as an aggravating factor when some other explicit breach of a statutory criminal offence has been found (such as a breach of the Bribery Act 2010).[4]

In the lobbying literature, the 'public interest' is used to express concerns about the influence of private or commercial interests to the detriment of public interests.[5] Despite that articulation, the concept is seldom detailed explicitly. For Lessig, he determines the 'purpose' of the US Congress by analysing Originalist accounts of the US Constitution. Based on those analyses, he argues that the purpose of Congress is to be 'dependent upon the people alone'.[6] The 'people' meaning 'the great body of the people' and not just 'some people'.[7] Thus, Lessig takes a high-level principled approach by arguing that the US Constitution requires Congress to be financially dependent upon the majority of the population and not on a small minority.

That definition is not helpful for the diversion framework because an equivalent articulation of a 'dependency' is not borne out by a legal, constitutional analysis in the UK. Further, the analysis is complicated by the fact that three institutions are analysed which are very different (the Commons, Lords and the Government). The challenge is, therefore, to determine whether MPs, peers and ministers are required to act in the public interest in the same manner (to keep the framework consistent). It is certainly not possible to provide a broad

[2] Mark Elliott and Robert Thomas, *Public Law* (2nd edn, OUP 2014) 157.
[3] *R v Dytham* [1979] QB 722, 728 (Shaw LJ).
[4] Crown Prosecution Service, 'Misconduct in Public Office' (*CPS*, 2015) <http://www.cps.gov.uk/legal/l_to_o/misconduct_in_public_office/> accessed 14 February 2015.
[5] As was detailed in Chapter 2; See also, OECD, *Lobbyists, Governments and Public Trust, Volume 2: Promoting Integrity through Self-regulation* (OECD Publishing, 2012) 3; Craig Holman and William Luneburg, 'Lobbying and Transparency: A Comparative Analysis of Regulatory Reform' (2012) 1(1) Interest Groups & Advocacy 75, 78; William Dinan and David Miller, 'Sledgehammers, Nuts and Rotten Apples: Reassessing the Case for Lobbying Self-Regulation in the United Kingdom' (2012) 1(1) Interest Groups & Advocacy 105, 106; Miriam Galston, 'Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities' (1993) 71 Tex L Rev 1269, 1271.
[6] Lawrence Lessig, 'What an Originalist Would Understand "Corruption" to Mean' (2014) 102 Cal L Rev 1, 16.
[7] ibid 8 & 10.

definition of what the public interest means in every situation, but it is possible to identify what is not in the public interest by applying the criteria of 'integrity' and 'objectivity' derived from an analysis of the norms of public office. As such, this chapter first examines the role of MPs, peers and ministers in isolation to determine the relevance of 'acting in the public interest' to their respective jobs. MPs and peers are examined first because there is a congruence in the standards that apply to them which can be contrasted with the differing standards that apply to ministers. That examination informs the second aim of developing definitions of 'integrity' and 'objectivity' which are used to test when MPs, peers and ministers are not acting in the public interest. It is argued that 'integrity' means officials 'should not place themselves under any financial or other obligation to lobbyists that might influence them in the performance of their official duties'. 'Objectivity' means that officials 'should assess ideas on their merits or inherent worthiness in the sense that they should not give greater weight to representations arising from lobbying that is underpinned by corruption or political inequality'.

In this manner, the same definitions (or common 'standards') are used to determine when the public interest is undermined.[8] Further, the 'public interest' and 'norms of office' approaches identified in Chapter 2 are combined. Therefore, Thompson's approach is followed of identifying conduct which may 'frustrate the primary purpose of the institution' by reference to core principles of ethics similar to the criteria of 'integrity' and 'objectivity'.[9] At the same time, using the 'public interest' as the ultimate gauge retains Lessig's high-level approach of using an overarching purpose. Below, the norms of the House of Commons, the House of Lords and the Government are analysed in turn.

1. MPs and the Public Interest

The purpose of MPs is examined in two parts. First, there is an examination of what the representative and decision-making role of MPs entails through reports of parliamentary committees, deliberative/participatory initiatives and the

[8] Both Rowbottom and Philp note how a 'standard' is needed to gauge a 'deviation'. See Jacob Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics* (CUP 2010) 82; Mark Philp, 'Defining Political Corruption' (1995) 45 Political Studies 436, 445.
[9] Dennis F Thompson, 'Two Concepts of Corruption' [2013] Edmond J Safra Working Papers, No 16 1, 6, 7, 11, 12, 13 & 17.

statements of MPs. Second, it is argued that the principles of 'integrity' and 'objectivity' found in the House of Commons Code of Conduct can be used to test when the public interest has been undermined by lobbying. The meaning of 'integrity' is clear and uncontroversial and, therefore, can be inserted into the diversion framework with little alteration. However, 'objectivity' is vaguely defined which raises questions about its meaning. Thus, the examination undertaken on the role of MPs in the first part is used to flesh out what that principle means more clearly. Normative arguments are made about what 'objectivity' should mean.

1.1 Examining the Role of MPs

There is little doubt that MPs should act in the public interest. The House of Commons Code of Conduct states that MPs 'should take decisions solely in terms of the public interest'.[10] However, it is questionable what this means, particularly where MPs are lobbied by different people. The job of an MP 'comprises a number of different but interconnected roles; sometimes mutually reinforcing and sometimes conflicting'.[11] That is, in part, because the 'demands of politics are unpredictably diverse and protean'.[12] As a result, academics have struggled to generalise, articulate and codify their role.[13] Even established theories fail to capture 'the normative complexity of what MPs 'should do",[14] never mind what they are required to do. As Wright bluntly states: 'what do they mean. That they should take account of their representations? That they should do what their constituents want? That they should answer to them for their activities? Or does it just mean that they have to face periodic elections?'[15] Similarly, Hirst queries the meaning of giving 'expression to the will of the people':

[10] This Code is analysed in detail below under section 1.2; House of Commons, *The Code of Conduct together with The Guide to the Rules Relating to the Conduct of Members* (HC 2015, 1076) 4.
[11] House of Commons Select Committee on Modernisation of the House of Commons, *Revitalising the Chamber: The Role of the Back Bench Member* (2006-07, HC 337) 3.
[12] Richard D French, 'The Professors on Public Life' (2012) 83(3) The Political Quarterly 532, 538.
[13] ibid.
[14] David Judge, 'Recall of MPs in the UK: 'If I Were You I Wouldn't Start from Here" (2013) 66 Parliamentary Affairs 732, 744.
[15] Tony Wright, 'Recalling MPs: Accountable to Whom?' (2015) 86(2) The Political Quarterly 289, 291.

> What can that mean? In a sense the answer has an obvious meaning: democracy is a decision procedure and the people use this political mechanism to choose those public actions they want done by government. But there is a mass of problems in this obvious meaning. For a start, democracy is presented as a single idiom: one is a democrat, one is in favour of democracy. But once one starts to ask what democracy is for, one uncovers the thorny problem of what democracy is. There is no "democracy" in the singular, rather there are a variety of doctrines of democracy and a variety of political mechanisms and decision procedures which are claimed to be democratic.[16]

Thus, there are questions about the meaning of democracy itself which is problematic because there are no manuals or rules regarding how MPs should be 'democratic'.[17] There is the additional conundrum of what 'representation' means in this context. Whilst the term 'parliamentary democracy' is often associated with 'representation', Judge explains that the concept of representation existed before democratic times: the 'structure of representative government predates the growth of representative democracy in Britain and has never fully accommodated itself in practice to the idea of popular sovereignty inherent within democratic theory'.[18] He argues that this has led to paradoxes such as the inclusion of citizens in the political process during elections yet their exclusion from the decision-making process once power has been attained.[19] Therefore, there is much debate about the meaning of the 'public interest' because there is uncertainty about the meanings of 'democracy' and 'representation' which underlie it. Ultimately, it is submitted that the following passage by Judge accurately reflects the complex role of MPs:

> MPs are primarily representatives of their party, increasingly attentive to their territorial constituencies, marginally more descriptive of the population at large than two decades ago, yet retain a propensity to assert

[16] Paul Hirst, 'Representative Democracy and its Limits' (1988) 59(2) The Political Quarterly 190, 191.
[17] French (n 12) 534–35.
[18] David Judge, 'Whatever Happened to Parliamentary Democracy in the United Kingdom?' (2004) 57(3) Parliamentary Affairs 682, 683.
[19] ibid.

> the value of their own independent judgement [...] Burkean notions of 'trusteeship', co-exist alongside more contemporary collectivist theories.[20]

This description is unravelled in the analysis below to understand the proper decision-making role of MPs when faced with lobbying. It will be seen that the complex factors involved lead to different views about what the public interest is. Specifically, one's view of politics will colour what the 'merits' means when making decisions objectively. To that end, the sections below examine reports of parliamentary committees, how citizens participate in the political process and what MPs think about their role. Together, the analyses assist in shaping a conception of 'objective' decision-making that can be used to test when MPs are not acting in the public interest for the diversion framework.

1.1.1 What Parliamentary Committees Say

The role of MPs has been considered by various House of Commons committees both explicitly and implicitly following the 2009 parliamentary expenses scandal.[21] Howarth notes that the controversy surrounding the scandal contributed to a public view that MPs 'were merely local "campaigners" who occasionally turned up in London to speak on constituency issues or [that they were] creatures of their party who mindlessly voted as their whips instructed them'.[22] An additional concern was (and continues to be) the significant control that the Government exercises over the parliamentary agenda.[23] Therefore, the Reform Committee considered these issues in 2008 and 2009 with the aim to 'make the Commons matter more, increase its vitality and rebalance its relationship with the executive, and to give the public a greater voice in parliamentary proceedings'.[24] It was argued that MPs should have more control over the agenda of the House. Therefore, in 2010 the Backbench Business Committee (BC) was created.[25] It was

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[20] David Judge, *Democratic Incongruities: Representative Democracy in Britain* (Palgrave Macmillan 2014) 105.
[21] See, 'Q&A: MP Expenses Row Explained' (*BBC News*, 18 June 2009) <http://news.bbc.co.uk/1/hi/uk_politics/7840678.stm> accessed 22 May 2017.
[22] David Howarth, 'The House of Commons Backbench Business Committee' [2011] Public law 490, 492.
[23] ibid 490.
[24] House of Commons Reform Committee, *Rebuilding the House: First Report of Session 2008–09* (2008-09, HC 1117) 5.
[25] ibid 7.

given powers on 'the scheduling of business in the House; the election of select committee chairs; the election of the Deputy Speakers',[26] and enabled backbench Members to bring forward debates of their choice.[27]

The report by the Reform Committee highlights an important point about the role of MPs in upholding the public interest. In it, the Committee noted how the public already exercises 'very substantial influence' over what is discussed and that it is rare for proceedings not to originate from public concerns.[28] Nevertheless, they suggested this could be improved with calls for the 'primary focus of the House's overall agenda for engagement with the public to be shifted towards actively assisting a greater degree of public participation'[29] to ensure that the public is 'listened to'.[30] The main focus was on giving the public greater *influence* over the agenda of the Commons and thereby to 'nourish' representative democracy.[31] However, the agenda itself would continue to be *controlled* by the Government, the BC, the Liaison Committee and the Petitions Committee.

This can be seen in the Standing Orders of the House of Commons on Public Business in 2016. These state that 'save as provided in this order, government business shall have precedence at every sitting'.[32] Sittings are then allocated in a cascading number of days for the opposition parties,[33] the BC,[34] and Private Members' bills.[35] The Liaison Committee is also responsible for determining the time available for sittings in Westminster Hall,[36] and the Petitions Committee determine whether a sitting should take place in Westminster Hall.[37] Thus, politicians continue to exercise ultimate control over the agenda with most

[26] Howarth (n 22) 492.
[27] UK Parliament, 'How the Backbench Business Committee Works' (*UK Parliament*, 2016) <http://www.parliament.uk/business/committees/committees-a-z/commons-select/backbench-business-committee/how-the-backbench-business-committee-works/> accessed 22 December 2016.
[28] Reform Committee (n 24) 66.
[29] ibid 6.
[30] ibid 12.
[31] ibid 6 & 13; specific examples of that influence are considered below.
[32] Standing Orders of the House of Commons - Public Business 2016, SO 14(1).
[33] ibid 14(2).
[34] ibid 14(4).
[35] ibid 14(9).
[36] ibid 10(7).
[37] ibid 145A(7).

of the power residing with the Government which exercises 'exclusive domination of much of the House's agenda'.[38]

Consequently, it has been argued that the public interest is served by holding the Government to account. A 'battle' ensues between the Government and the Opposition which offers a forum for public concerns being expressed.[39] Some argue that such a verbal battle achieves little because 'the governing party, inevitably, triumphs in the lobbies and pushes its legislation through'.[40] Therefore, whilst MPs attempt to 'reflect public concerns' better to make the business of Parliament 'matter more to the public',[41] the extent to which citizens can influence the verbal battle becomes a pertinent issue. This can be garnered by examining deliberative/participatory initiatives.

1.1.2 What Deliberative/Participatory Initiatives Tell Us

Deliberative and participatory forms of engagement are concerned with giving citizens the opportunity to express their views.[42] There is an increasing tendency at the national and subnational levels in British politics for MPs to endorse participatory and deliberative initiatives for citizen participation in politics.[43]

The purpose of deliberation is to derive policy 'through the assembly and education of representative samples of the citizenry'.[44] Recommendations are more justified when they arise from deliberations because they are more representative, more rational and are supposedly in the common good.[45] Participatory elements allow citizens to put their views forward to officials, to be consulted, be given access to information and have the right to vote on decisions; the purpose being to ensure that policy is better-prepared and considered.[46]

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[38] Committee, *Rebuilding the House* (n 24) 40 & 45.
[39] ibid 12.
[40] This was the view held by former MP Hilary Armstrong, see Howarth (n 22) 494.
[41] Committee, *Rebuilding the House* (n 24) 7.
[42] Elliott and Thomas (n 2) 158; Gianfranco Baldini, 'Is Britain Facing a Crisis of Democracy?' (2015) 86(4) The Political Quarterly 540, 546.
[43] This gives credibility to the institutions. See, Stewart Davidson, Alastair Stark and Gordon Heggie, 'Best Laid Plans . . . The Institutionalisation of Public Deliberation in Scotland' (2011) 82(3) The Political Quarterly 379, 380.
[44] French (n 12) 533.
[45] ibid.
[46] Dawn Oliver, *Constitutional Reform in the UK* (OUP 2003) 35.

Despite these aims, such initiatives are limited in their ability to decipher what the public interest is on a given issue for several reasons.

First, it is impractical to defer to public opinion on every decision, so there should be careful consideration about when to engage with the public.[47] They could be consulted where there is a popular demonstration, a national campaign or consistent polling of an issue over time but the best approach is not evident.[48] Second, some MPs have narrow views of their role which are 'consonant with traditional modes of consultation and representation—that is, as individual access to elected representatives' rather than deciphering the public interest through deliberative/participatory initiatives.[49] Linked to this is the effect that parliamentary positions have on the attitudes of decision-makers.[50] The ruling majority favour the ideals of representative democracy and majoritarian rule whereas the Opposition favour the ideals of participatory democracy.[51] These differences arise in part because of self-interest; politicians will support ideas that increase their chances of retaining and reaching positions of power.[52]

Third, there are concerns that there is an emerging gap between the rhetoric of using more deliberative/participatory initiatives and their use in practice.[53] Part of this is due to the time constraints placed on MPs who undertake several parliamentary duties. Davis highlights the 'over-riding impression, gained from observing and interviewing politicians, is one of constant pressure, to balance constituency and parliamentary duties, and to keep up with a fast-moving sequence of tasks, debates, meetings and decision-making on multiple issues'.[54] To fulfil these numerous duties, politicians filter out 'meaningful engagement

[47] David Beetham, 'Political Participation, Mass Protest and Representative Democracy' (2003) 56 Parliamentary Affairs 597, 604.
[48] ibid 605.
[49] Davidson, Stark and Heggie (n 43) 380.
[50] Mikael Gilljam and David Karlsson, 'Ruling Majority and Opposition: How Parliamentary Position Affects the Attitudes of Political Representatives' (2015) 68 Parliamentary Affairs 552, 568.
[51] ibid 567.
[52] ibid.
[53] Robert Hoppe, 'Institutional constraints and practical problems in deliberative and participatory policy making' (2011) 39(2) Policy & Politics 163, 163.
[54] Aeron Davis, 'Embedding and disembedding of political elites: a filter system approach' (2014) 63 The Sociological Review 144, 153.

with external social conditions and public concerns'.[55] Fourth, it is hard practically to 'connect [public engagement] up to the 'main game', politically',[56] to ensure that it is meaningful.[57]

Therefore, there are limitations on the extent to which deliberative/participatory methods can help to decipher the public interest is on a given issue. Nevertheless, considerable importance is increasingly attached to them. Indeed, in 2001, the Public Administration Select Committee stated that 'the period since the middle 1990s has seen an explosion of interest in involving the public more frequently, more extensively and in much more diverse ways in the conduct of decision-making within the public services'.[58] This is increasingly the case today as evidenced by the greater use of referendums, petitions, consultation exercises, committee inquiries and outreach initiatives which are briefly considered below.[59] Together, they help to show how the public interest on given issues is deciphered.

First, referendums demonstrate a greater emphasis on broad citizen engagement. They are a powerful device of direct democracy; able to supplement representative government,[60] override the decisions of Parliament[61] and are now established constitutional conventions for important issues such as devolution and European Union (EU) membership.[62] Their use has increased recently as evidenced by the United Kingdom Alternative Vote Referendum in 2011 (41% turnout),[63] the Welsh Devolution Referendum in 2011 (35% turnout),[64] the

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55 ibid 154.
56 Robert E Goodin, 'How Can Deliberative Democracy Get a Grip?' (2012) 83(4) The Political Quarterly 806, 806–07.
57 Indeed, that is one of the reasons why the Backbench Business Committee was created; see also, Meg Russell and others, 'Tony Wright on Doing Politics Differently: the Commentators' (2009) 80(4) The Political Quarterly 575, 582.
58 House of Commons Public Adminnistration Select Committee, *Public Participation: Issues and Innovations* (HC 2001, 373-I) para 75.
59 Many of the examples are drawn from the Reform Committee and the Liaison Committee. See, Reform Committee (n 24) 66–81; House of Commons Liaison Committee, *The Work of Committees in Session 2008–09* (2009-10, HC 426) 40–46.
60 Reform Committee, Evidence of Professor Bogdanor (n 24) Ev 23.
61 ibid.
62 ibid Ev 24.
63 'Vote 2011: UK Rejects Alternative Vote' (*BBC News*, 7 May 2011) <http://www.bbc.co.uk/news/uk-politics-13297573> accessed 25 Jan 2016.
64 'Welsh Referendum: Voters Give Emphatic Yes on Powers' (*BBC News*, 4 March 2011) <http://www.bbc.co.uk/news/uk-wales-politics-12648649> accessed 25 Jan 2016.

Scottish Independence Referendum in 2014 (85% turnout),[65] and the UK's in-out European Union Referendum in 2016 (72% turnout).[66] Their greater use highlights that office-holders are increasingly deferring to citizens on decisions of national and constitutional significance.

Second, e-petitions have gained prominence following the launch of the e-petitions website in 2015.[67] Citizens can create petitions which are debated by MPs and receive a Government response where 100,000 signatures are received.[68] For example, a petition to 'Give the Meningitis B vaccine to ALL children, not just newborn babies' gained over 800,000 signatures.[69] Those who sign the petition are directed to the contact details of their local MP to discuss the matter. Whilst MPs do not have to create new laws or to resolve the issue raised by a petition[70] (they usually do not),[71] petitions can lead to action. The Meningitis B vaccine petition resulted in a debate on the issue by MPs, a working group being set up by the Government, and a national awareness campaign to increase public knowledge about dangerous infections.[72] Third, political parties are increasingly using broad consultation exercises to form policy[73] instead of forming policy solely through traditional means of membership based upon social or class integration.[74] Examples include Labour Party's 'Big Conversation' in 2003, 'Let's Talk' in 2006, 'Fresh Ideas' in 2011 and 'Your Britain' in 2013.[75] Whether such initiatives are genuine (and this is a contentious issue) they 'indicate that the nature

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65 'Scotland Votes No' (*BBC News*, 2014) <http://www.bbc.co.uk/news/events/scotland-decides/results> accessed 25 Jan 2016.
66 The Electoral Commission, 'EU Referendum Results' (*The Electoral Commission*, 2016) <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> accessed 29 Aug 2016.
67 'New e-petitions website opens' (*BBC News*, 20 Jul 2015) <http://www.bbc.co.uk/news/uk-politics-33599604> accessed 29 Aug 2016.
68 UK Parliament, 'Petitions' (*UK Government and Parliament*, 2016) <https://petition.parliament.uk> accessed 10 February 2016.
69 Lee Booth, 'Give the Meningitis B Vaccine to ALL Children, Not Just Newborn Babies.' (*UK Government and Parliament*, 2016) <https://petition.parliament.uk/petitions/108072> accessed 23 April 2017.
70 Reform Committee, Evidence of Vernon Bogdanor (n 24) Ev 23.
71 Liaison Committee, *The Work of Committees* (n 59) 45.
72 Lee Booth, 'Give the Meningitis B Vaccine' — Government Response (n 69).
73 Stewart Davidson and Stephen Elstub, 'Deliberative and Participatory Democracy in the UK' (2014) 16 British Journal of Politics and International Relations 367, 373.
74 Anika Gauja, 'The Individualisation of Party Politics: The Impact of Changing Internal Decision-Making Processes on Policy Development and Citizen Engagement' (2015) 17 British Journal of Politics and International Relations 89, 100 & 102.
75 ibid 96–98.

of party organisation and the way in which policy opinions are aggregated has fundamentally changed'.[76]

Fourth, committees undertake outreach initiatives and offer a channel for the public to submit evidence to MPs on issues, and inquiries provide opportunities for some to present oral testimony. The Reform Committee note that matters inquired into are frequently those which have been expressed to committees by the public.[77] Further, committees often make informal visits around the UK which give opportunities for the public to participate.[78] For example, MPs have visited towns and cities to meet with small businesses, NHS and prison workers.[79] Further, educational events around the UK are frequently advertised,[80] and special events such as Parliament Week are promoted with the goal of engaging and empowering citizens to get involved and 'make their voices heard about the issues that matter to them'.[81]

Another report by the Liaison Committee in 2015 stated that committees must see public engagement 'as a core way of undertaking scrutiny and oversight' and that the public should be involved in topic selection.[82] The use of intermediary organisations like Mumsnet and Money Saving Expert was also encouraged, as well as the dissemination of reports on platforms like Facebook.[83] Twitter and YouTube have been used to encourage the public to submit questions on issues, to gather evidence, spread information, select witnesses and launch reports.[84] Twitter was used in 2012 to collect thousands of questions on education and policy which were put to the former Secretary of State, Michael Gove in an evidence session.[85]

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[76] ibid 98.
[77] Reform Committee (n 24) 70.
[78] ibid; Liaison Committee, *The Work of Committees* (n 59) 43.
[79] Liaison Committee, *The Work of Committees* (n 59) 43.
[80] UK Parliament, 'Events in Your Area' (2016) <https://www.parliament.uk/get-involved/attend-an-event/event-listing/> accessed 29 Aug 2016.
[81] UK Parliament, 'Parliament Week: About' (*UK Parliament*, 2016) <https://www.ukparliamentweek.org/about/> accessed 29 Aug 2016; for specific examples, see Liaison Committee, *The Work of Committees* (n 59) 44.
[82] House of Commons Liaison Committee, *Building Public Engagement: Options for Developing Select Committee Outreach* (2015-16, HC 470) 7–8.
[83] ibid.
[84] ibid 36–38.
[85] ibid; UK Parliament, 'Michael Gove Answers #AskGove Twitter Questions' (*UK Parliament*, 31 Jan 2012) <http://www.parliament.uk/education-committee-askgove-twitter-questions> accessed 29 Aug 2016.

Therefore, deliberative/participatory initiatives have enhanced citizen engagement and influence over the political agenda. The public interest on a given issue is deciphered, in part, through those initiatives. Nevertheless, in most cases, it is impossible to defer to public opinion. Even where public opinion is available, MPs can disregard it. In this sense, MPs are giving citizens some influence over the political agenda but not all of it, and certainly not control of it. To unravel this further, it is helpful to consider the views of MPs regarding their role.

1.1.3 What MPs Think

MPs have different views about their role in upholding the public interest. To understand this divergence, it is necessary to step back and consider the views of former MP, Edmund Burke, who gave a famous address in 1774.[86]

Burke believed that MPs should use their judgement independently of others when making decisions.[87] Only the interests of a small number of powerful constituents were important, and in any case, were readily apparent to the representative. In other words, the MP 'did not have to be told what the interest was, nor did he need to receive instructions as to how best to advance that interest'.[88] As such, Burke believed that an MP's duty was to maintain the interests of his constituents even if it was against their own opinions.[89] Burke's views crossed over with those of John Stuart Mill who supported the notion that an MP should exercise independent judgment by using their 'mental superiority' to correct the views of constituents that are wrong.[90]

The role of MPs was to listen to their constituents and be electorally responsible to them. This did not mean that citizens could express policy preferences but that elections were a mechanism by which constituents could 'assess the efficacy of representation and decide how far a constituency's

[86] David Judge, 'British representative theories and parliamentary specialisation' (1979) 1 Parliamentary Affairs 40, 41.
[87] David Judge, 'Representation in Westminster in the 1990s: The Ghost of Edmund Burke' (1999) 5(1) The Journal of Legislative Studies 12, 13.
[88] ibid 14.
[89] ibid.
[90] Beetham (n 47) 600; John Stuart Mill, *Considerations on Representative Government* (Parker, Son, And Bourn 1902) 225; Monica Brito Vieira and David Runciman, *Representation* (Polity 2008) 50.

economic interest has been protected'.[91] Further, MPs should not be bound by the instructions of constituents or act as their delegate in Parliament;[92] the job of the representative was to give the ill-informed public information and not receive it.[93] Burke favoured the idea of an aristocratic trusteeship and certainly did not support the idea that individuals had equal political footing.[94] The aristocracy would determine the national interest and could not be mandated or bound by the wishes of constituents.[95]

Burke's ideas existed when most citizens were uneducated and where media dissemination of information was not prevalent.[96] Nevertheless, a concept of the public interest existed for MPs (as far back as 1774) of a trustee model of representation whereby the public interest would be served by MPs deciding what that meant. Whilst these views were a product of their time, some MPs have never fully moved on from that mode of thinking. As noted above, MPs are seeking to give citizens greater influence over the political agenda, and citizens are more educated today. However, Parliament remains sovereign, and MPs are free to make their own judgments and to vote independently.[97]

These points were expressed in a 2007 Select Committee report where it was stated that 'Members of the House do not pass laws or hold the government to account in a vacuum; they do so in ways that *they judge* best meet the interests of their constituents, particular groups, and the nation as a whole'.[98] Some office-holders explicitly subscribe to this. In evidence presented to the Reform Committee in 2008, several MPs responded negatively to proposals for the public to initiate debates in the Commons. Bill Cash believed 'that Members of Parliament are elected as representatives of the electors. I do not subscribe to the

[91] Judge, 'Representation in Westminster in the 1990s' (n 87) 15.
[92] ibid 16.
[93] ibid.
[94] ibid 17.
[95] ibid.
[96] ibid 18–20.
[97] John Alder, *Constitutional & Administrative Law* (10th edn, Palgrave 2015) 161–72; Hilaire Barnett, *Britain Unwrapped: Government and Constitution Explained* (Penguin 2002) 267; Nevil Johnson, *Reshaping the British Constitution* (Palgrave Macmillan 2004) 292–93.
[98] Select Committee on the Modernisation of the House of Commons (n 11) 5.

idea of enabling the public to initiate debates and proceedings in the House'.[99] Colin Challen expressed his concerns more strongly:

> And what's this about how the public can "initiate proceedings in the House"? How about a weekly referendum or The Sun (which apparently wants to dictate defence policy) telling us what we need to do? Have we completely lost sight of the fact that MPs are elected not only as representatives but also mediators?[100]

David Ames stated that it was a 'ridiculous proposal and totally unworkable. The House of Commons and its Members should be well aware of how the public feel on any number of issues and should act accordingly'.[101] Further, some academics express deep scepticism about whether MPs seek to reflect the views of citizens. Diamond et al. argue that British democracy is in crisis because of a 'top-down, leadership view of British democracy […] a limited, liberal notion of representation in which parliamentarians act according to [what they believe is in] the national interest, rather than expressing the views of voters'.[102] Indeed, Burke's ideals are often used 'to justify the actions of representatives when those actions conflict with constituency 'opinion', party policy or the wishes of interest groups'.[103]

This was seen in the Labour Party leadership election in 2016 that followed the EU Referendum. Jeremy Corbyn became the leader of the Labour Party in 2015 having won 60% of the vote of party members.[104] Following the EU referendum—and despite polls showing that Corbyn retained the support of the majority of members—[105] Labour MPs passed a no-confidence motion in Corbyn

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[99] Reform Committee (n 24) Ev 3.
[100] ibid.
[101] ibid Ev 1.
[102] Patrick Diamond, Roger Liddle and David Richards, 'Labouring in the Shadow of the British Political Tradition: The Dilemma of 'One Nation' Politics in an Age of Disunification' (2015) 86(1) The Political Quarterly 52, 54.
[103] Judge, 'Representation in Westminster in the 1990s' (n 87) 20.
[104] Labour Party, 'Results of the Labour Leadership elections' (*Labour Party*, 12 Sept 2015) <http://www.labour.org.uk/blog/entry/results-of-the-labour-leadership-and-deputy-leadership-election> accessed 27 Aug 2016.
[105] 51% of Labour Party members believed he was doing well as leader following the Brexit vote according to polls. See, YouGov, 'Corbyn Loses Support Among Labour Party Membership' (*YouGov*, 30 June 2016) <https://yougov.co.uk/news/2016/06/30/labour-members-corbyn-post-brexit/> accessed 27 Aug 2016.

by a majority of 172 to 40 MPs.[106] MPs followed their personal views on Corbyn's leadership when passing a no-confidence motion despite Corbyn retaining the support of most Labour Party members. The trustee model, therefore, appeared to be the prevailing dogma with party MPs; although, the popular choice prevailed in the subsequent 2016 leadership election when Corbyn won with an increased 62% of the vote.

Statements following the EU referendum in 2016 also highlight Burkean ideals. There were calls by some MPs not to invoke Article 50 of the Lisbon Treaty (which triggered the EU exit process) at all or until Parliament voted to agree to it being triggered. Ben Bradshaw queried: 'is it not the case that referendums are advisory and that this Parliament is sovereign?'.[107] David Lammy opined that 'in our democracy, parliament is sovereign and must vote ahead of any decision to Brexit'.[108] Owen Smith demanded that Article 50 should not be invoked without another referendum or general election; arguing that he would 'fight tooth and nail' to keep the UK in the EU.[109] Kenneth Clarke stated that he had always used his judgement to decide what is in the national interest— 'then I go back and I'm accountable for it and if they don't like it, they can throw me out. That's called parliamentary democracy. That's how we've been governed for years'.[110] He has similarly argued that 'MPs should vote according to their judgement in the national interest and the interest of their constituents' and they should not take a referendum result as an instruction on how to vote.[111] He stated

106 'Labour MPs Pass No-Confidence Motion in Jeremy Corbyn' (*BBC News*, 28 June 2016) <http://www.bbc.co.uk/news/uk-politics-36647458> accessed 27 Aug 2016.
107 Ben Bradshaw, 'My Question on Article 50' (*Labour Party*, 12 July 2016) <http://www.benbradshaw.co.uk/my_question_on_article_50> accessed 27 Aug 2016.
108 Nicola Slawson, 'Theresa May 'Acting Like Tudor monarch' by Denying MPs a Brexit Vote' (*The Guardian*, 28 Aug 2016) <http://www.theguardian.com/politics/2016/aug/27/theresa-may-acting-like-tudor-monarch-in-denying-mps-a-vote-over-brexit> accessed 28 Aug 2016.
109 'Brexit: Owen Smith Opposes Article 50 Move Without Vote' (*BBC News*, 24 Aug 2016) <http://www.bbc.co.uk/news/uk-politics-37167253> accessed 27 Aug 2016.
110 Jack Sommers, 'BBC Question Time: Ken Clarke Responds To Brexit Audience Member Who Told Pro-Remain MPs To 'Clear Off'' (*Huffington Post*, 21 October 2016) <http://www.huffingtonpost.co.uk/entry/bbc-question-time-ken-clarke-responds-to-brexit-audience-member-who-told-pro-remain-mps_uk_5809444be4b0fce107d0044a> accessed 6 December 2016.
111 Anushka Asthana and Rowena Mason, 'Ken Clarke Tells Constituents: 'EU Referendum is Not Binding'' (*The Guardian*, 3 September 2016) <https://www.theguardian.com/politics/2016/sep/13/ken-clarke-tory-constituent-brexit-eu-referendum-not-binding> accessed 6 December 2016.

that 'we must have respect for each other's opinions, rather than telling each other that we have been ordered by an opinion poll to start abandoning them'.[112]

Thus, some MPs in 2017 continued to favour traditional Burkean notions whereby MPs would ultimately decide whether or not leaving the EU was in the public interest. Whilst this view aligns with the Supreme Court,[113] it highlights how even 52% of citizens voting to leave in a referendum with a 72% turnout remain subordinates in the ultimate outcome of issues that they have explicitly voted on. In other words, for some MPs, citizen inputs into the political process should be entirely disregarded even when expressed through a democratic referendum.

Whether the views voiced by a minority of MPs are a fair reflection of representation in practice generally, is an open question. MPs are giving citizens greater opportunities to influence the political agenda, but they are not giving them much control over the agenda. Nevertheless, where citizens exercise a considerable degree of influence on the outcome of a pre-set agenda (such as a referendum), the outcome of which was not desired by most MPs (such as leaving the EU), the wishes of citizens are adhered to. Whilst there was opposition to triggering Article 50 of the Lisbon Treaty to leave the EU, it was subsequently invoked with MPs voting 461 in favour and 89 against.[114] The vocal resistance, noted above, to the popular will usurping Parliament's powers, thus appears to be in the minority where the weight of influence carries considerable force. The prevailing sentiment is probably best captured by Conservative MP Heidi Allen who, after the referendum, stated that whilst she was 'personally very

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112 HC Deb 7 December 2016, vol 618, col 256.

113 See, *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; This is not uncontroversial. For example, Elliott and Hooper argue that the High Court in *Miller* 'paid insufficient attention to the referendum itself' when considering the relative weight that the constitution accords to popular sovereignty versus parliamentary sovereignty. See, Mark Elliott and Hayley J. Hooper, 'Critical reflections on the High Court's judgment in R (Miller) v Secretary of State for Exiting the European Union' (*UK Constitutional Law Association*, 7 November 2016) <https://ukconstitutionallaw.org/2016/11/07/mark-elliot-and-hayley-hooper-critical-reflections-on-the-high-courts-judgment-in-r-miller-v-secretary-of-state-for-exiting-the-european-union/> accessed 6 December 2016.

114 HC Deb 7 December 2016, vol 618; 'MPs Back Government's Brexit Timetable' (*BBC News*, 7 December 2016) <http://www.bbc.co.uk/news/uk-politics-38243500> accessed 9 December 2016.

disappointed' with the result, MPs 'cannot ignore the wishes of the rest of the country'.[115]

Further, whilst some MPs have expressed reluctance at giving citizens control over the parliamentary agenda, others have been supportive. In evidence given to the Reform Committee, Hugh Bayley MP (who was concerned that well-financed lobbying groups might subvert the general public interest) suggested that citizens could nominate topics for debate through their MPs who could debate the issues in the Commons.[116] Dai Davies similarly proposed that the public could suggest topics through petitions or a dedicated office.[117] Michael Meacher submitted that the Petitions Committee should rotate meetings around major cities in the country to improve the public's sense of engagement.[118] He also argued in favour of public petitions initiating debates in the Commons.[119] Jo Swinson suggested that the public should submit proposed topics and vote on the subject of a debate chosen by the Leader of the House.[120] She stated that 'Parliament must move with the times, recognising and embracing the opportunities this gives for opening up public access to politics and meaningful two-way involvement'.[121]

These statements align with evidence presented to the Modernisation Committee which indicates that MPs do not draw distinctions between parliamentary work and representing constituents.[122] For example, Oliver highlights that when consenting to legislation, Members believe that they do so on behalf of constituents.[123] Indeed, some MPs argue that holding the Government to account is done so for constituents,[124] and some argue that MPs prioritise the interests of constituents when sourcing information.[125] Support for

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115 Heidi Allen, 'Heidi Allen MP Makes Statement on the EU Referendum Result' (*Heidi Allen*, 24 June 2016) <https://www.heidisouthcambs.co.uk/news/heidi-allen-mp-makes-statement-eu-referendum-result> accessed 6 December 2016.
116 Reform Committee (n 24) Ev 2.
117 ibid Ev 4.
118 ibid Ev 6.
119 ibid.
120 ibid Ev 7.
121 ibid.
122 Select Committee on the Modernisation of the House of Commons (n 11) 9.
123 ibid.
124 ibid.
125 Davis (n 54) 155.

these views can also be found from academics who argue that the UK is moving tentatively 'into a new area of constitutional reform [by introducing] new elements of direct democracy into the British political system'.[126]

As such, MPs have mixed views about what their role entails. Whilst some continue to believe in Burkean ideals, there is a gradual shift towards the greater use of deliberative/participatory initiatives which are mostly supported. Citizens do not have the express power to decide outcomes or to control the agenda itself. Instead, MPs make decisions about what they believe is in the public interest and what should be debated. Nevertheless, in making decisions, most MPs will not simply disregard the views of citizens but will give considerable weight to them in deciding what is in the public interest. Therefore, Burkean ideals exist to the extent that MPs continue to *decide*. However, citizen *influence* over those decisions has increased. Thus, questions arise about when the judgement of MPs is reasonable when making decisions that are in the public interest. In this regard, it is argued below that the criteria of 'integrity' and 'objectivity' can be used to test when MPs are not acting in the public interest.

1.2 Defining 'Integrity' and 'Objectivity'

1.2.1 The Code of Conduct

Public integrity systems consist of values expressed through principles.[127] Values are important for determining the basic ethos of a country's public life through their aspirational and social impact rather than through legal force. It is formal procedures which define and enforce the precise rules through codes or laws.[128] For the House of Commons, values are expressed through the Nolan Principles created by the Committee on Standards in Public Life (CSPL) in the 1990s.[129] These values are expressed in the House of Commons Code of Conduct[130] which sets the parameters for defining those values and the mechanisms for their

[126] Reform Committee (n 24) Ev 8, 22 & 24.
[127] David Hine and Gillian Peele, *The Regulation of Standards in British Public Life: Doing the Right Thing?* (Manchester University Press 2016) 15.
[128] ibid.
[129] ibid; UK Government, 'The 7 Principles' (*Committee on Standards in Public Life*) <https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2> accessed 30 November 2015.
[130] House of Commons, *The Code of Conduct* (n 10).

enforcement. The Nolan Principles were created with the intention of being adaptable to the institution that incorporates them. This has significant implications for their meaning when adapted for the role of MPs. There are seven principles outlined in the Code: selflessness, integrity, objectivity, accountability, openness, honesty and leadership. From these principles, it is argued that adapted definitions of 'integrity' and 'objectivity' can be used to determine when MPs are not acting in the public interest.

The first principle—selflessness—as originally drafted by the CSPL states that 'holders of public office should act solely in terms of the public interest'.[131] This is reworded and narrowed in the Code to state, following that initial sentence, that: 'They should not do so in order to gain financial or other material benefits for themselves, their family or their friends'.[132] This is striking because it qualifies 'acting in the public interest' as meaning not to seek personal financial benefits. Consequently, the principle only prohibits bribery or certain conflicts of interest. It does not, however, prohibit financial or other benefits for the political party of the MP. Thus, 'selflessness' is likely grounded in the conflict of interest and anticorruption rules of the Commons.[133] The principle of 'integrity' expands upon this. As originally drafted, it states that:

> Holders of public office must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends. They must declare and resolve any interests and relationships.[134]

When adapted in the Code, 'integrity' states that:

[131] UK Government, 'The 7 Principles' (n 129).
[132] House of Commons, *The Code of Conduct* (n 10) 4.
[133] ibid 5, Resolutions of 2 May 1695, 22 June 1858, and 15 July 1947 as amended on 6 November 1995 and 14 May 2002.
[134] UK Government, 'The 7 Principles' (n 129).

> Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.[135]

There are three important facets to this adaptation. First, the decision was taken to incorporate the latter sentence of the Nolan definition of integrity into the definition of 'selflessness' in the Code. As such, selflessness, in terms of acting in the public interest, means that office holders should act with integrity by not seeking personal financial gain. Second, the vague term, 'inappropriately', is omitted in the revised definition which makes the requirement more explicit. However, third, whilst the Code retains the former part of the Nolan definition on integrity, it alters the principle to a normative requirement in its adapted definition. A decision-maker 'must' avoid placing themselves under any obligation is changed to 'should not'. Nevertheless, it is explicit that office-holders should not place themselves under any obligation to outside influences by individuals and organisations that might influence them. The meaning of 'obligation' appears to entail contractual obligations only. This is highlighted in a Resolution of the House of Commons which Ewing and Bradley call an 'important statement of principle'.[136] The House resolved that:

> It is inconsistent with the dignity of the House, with the duty of a Member to his constituents, and with the maintenance of the privilege of freedom of speech, for any Member of this House to enter into any *contractual agreement* with an outside body, controlling or limiting the Member's complete independence and freedom of action in Parliament or stipulating that he shall act in any way as the representative of such outside body in regard to any matters to be transacted in Parliament; the duty of a Member being to his constituents and to the country as a whole, rather than to any particular section thereof.[137]

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[135] House of Commons, *The Code of Conduct* (n 10) 4.
[136] K.D. Ewing and Bradley A.W., *Constitutional and Administrative Law* (16th edn, Pearson 2015) 236.
[137] Resolution of 15 July 1947, amended on 6 November 1995 and 14 May 2002: Conduct of Members, see House of Commons, *The Code of Conduct* (n 10) 52.

The principle of 'objectivity' as originally drafted, states that office-holders 'must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias'.[138] This is clearly not applicable to MPs (for the reasons given below) which is why the same principle is completely redefined in the Code. It states that 'in carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit'.[139]

This change highlights that MPs are not impartial beings which aligns with the examination of the role of MPs above. If this were a requirement, it would be explicitly stated which can be seen with the role of the Speaker of the House of Commons whose political impartiality 'is one of the office's most important features […] Once elected, the Speaker severs all ties with his or her former party and is in all aspects of the job a completely non-partisan figure'.[140] It is also a clear expectation of those working in the Civil Service where impartiality has long been required[141] and which is subject to constant scrutiny.[142] This is because the political impartiality of the Civil Service is seen as an important counterweight to the partisanship of politicians.[143] It is also seen in the House of Commons Library which 'provides impartial information and research services for Members of Parliament and their staff'.[144] Thus, the expectation of impartiality is clearly stated where it is required. MPs are partisan and are not expected to act impartially.

For these reasons, the adapted definition of 'objectivity' in the Code limits its meaning to MPs making decisions on their 'merits'. This, itself, is restricted to specific decisions such as public appointments, awarding contracts, or recommending individuals for rewards and benefits. That list is not exhaustive,

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138 UK Government, 'The 7 Principles' (n 129).
139 House of Commons, *The Code of Conduct* (n 10) 4.
140 UK Parliament, 'The Speaker, Impartiality and Procedural Reform' (*UK Parliament*, October 2016) <http://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentwork/offices-and-ceremonies/overview/the-speaker/procedures-and-impartiality/> accessed 6 December 2016.
141 The principle of impartiality was stated in the founding report of the Civil Service and reiterated in numerous reports. See, Stafford H Northcote and C E Trevelyan, *Report on the Organisation of the Permanent Civil Service, Together with a Letter from the Rev B Jowett* (HC 1854).
142 See, eg, House of Commons Public Administration Select Committee, *Lessons for Civil Service impartiality from the Scottish Independence Referendum: Fifth Report of Session 2014–15* (2014-15, HC 111).
143 Hine and Peele (n 127) 169.
144 UK Parliament, 'The Commons Library and its Research Service' (*UK Parliament*, December 2016) <https://www.parliament.uk/commons-library> accessed 6 December 2016.

but the context suggests that decision-making on merits does not extend to the decision-making role of MPs more broadly. This also has implications for the principles of 'selflessness' and 'integrity' analysed above. It correlates that the partisan nature of MPs (as implicitly recognised by the adaptation of 'objectivity' in the Code) means that the accrual of financial benefits by MPs for their parties is not contrary to the principle of selflessness. The benefit is not a personal one, and the MP is merely fulfilling their partisan obligation to their party which is not, on the wording of the Code, contrary to the public interest.

However, that is not to say that normative arguments do not exist that MPs should assess ideas on their merits beyond what is covered in the Code; particularly where lobbying is involved. MPs need not be impartial, but they should make decisions by assessing the inherent worthiness of an idea as opposed to favouring ideas which gained prominence because of lobbying underpinned by corruption or political inequalities. In this manner, the statement of Colin Challen MP noted above is pertinent: 'MPs are elected not only as representatives but also mediators'.[145] Two factors arise. First, how MPs balance their personal views against other views. Second, how MPs mediate between different lobbying influences externally.

In both cases, this balancing exercise is an art and not science. MPs can act as 'trustees' by forming their own judgements when making decisions, and they can also function as delegates. For example, in their judgement, an MP may believe that leaving the EU is wrong. Against that, is a referendum in which citizens have voted to leave. The MP may feel that following the result of a referendum would be to accord weight to an external factor which is wrong. They might believe that they are not making a decision on the merits of an idea and disregard the referendum outcome (a strict Burkean interpretation). However, considering the analysis above, it is submitted that for most MPs a referendum would carry significant weight in their determination of the merits of an idea. Of course, this can only be taken so far because it is impossible to gauge the views of the people on every decision. Additionally, the subjective views of MPs aside, it can be hard to judge which external views they should accord greater weight to.

[145] Reform Committee (n 24) Ev 3.

As such, it is submitted that, at the very least, MPs should assess ideas on their merits or inherent worthiness in the sense that they should not give greater weight to representations arising from lobbying that is underpinned by corruption or political inequality. 'Corruption' (in terms of personal financial gain influencing decisions) is clearly against the rules and will be explored in Chapter 4 in more detail. 'Political inequalities' that have led to decisions being accorded greater weight are not explicitly prohibited and raise all manner of normative debates which are considered in Chapter 5. For this stage, it is argued that lobbying can undermine objectivity by restricting genuine opportunities to influence to the most powerful and wealthy in society.

Linked to 'objectivity' is the principle of 'openness' in the Code. In its original form, it states that 'holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing'.[146] This is qualified in the adapted form to state that MPs 'should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands'.[147] It is left open who determines what the wider public interest 'clearly demands', but one Resolution highlights that it is MPs who make that judgement (with regard to declaring interests at least). Where a Member has the opportunity to speak he will: 'Declare his interest at the beginning of his remarks […] It will be a matter for *his judgement*, if his interest is already recorded in the Register, whether he simply draws attention to this or makes a rather fuller disclosure'.[148]

Another principle, 'honesty', as originally worded, states that 'holders of public office should be truthful'.[149] The definition of 'honesty' in the Code has little to do with 'truthfulness'. It states that MPs 'have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest'.[150] That is mostly a rewording of

[146] UK Government, 'The 7 Principles' (n 129).
[147] House of Commons, *The Code of Conduct* (n 10) 4.
[148] ibid 49, Resolution of 12 June 1975, amended on 9 February 2009: Members' Financial Interests (Declaration).
[149] UK Government, 'The 7 Principles' (n 129).
[150] House of Commons, *The Code of Conduct* (n 10) 4.

the requirements in the Code on 'selflessness' and 'integrity', adding only that MPs should be truthful about their conduct where those principles are engaged.

Only two of the principles as drafted are straightforward because they are much the same as their original form. The principle of 'accountability' in the Code states that office-holders are 'accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office'.[151] The principle of 'leadership' states that MPs should 'promote and support these principles by leadership and example'.[152]

Therefore, the principles of selflessness, integrity, objectivity, accountability, openness, honesty and leadership are revealing. A common theme is that MPs should act in the public interest and one can determine, to an extent, how to gauge when the public interest is undermined by reference to those principles. It is clear that MPs should not seek personal financial gain from their role. This is seen with 'selflessness' which reveals that MPs should not use their office for personal gain. It is also seen with 'integrity' which holds that MPs should not be placed under any contractual obligation to outside individuals or organisations which might influence them in the performance of their duties. The principle of 'honesty' reinforces those principles.

For 'objectivity', MPs should make decisions on their merits for certain decisions; although what that means in practice is vague. Thus, it was argued that making decisions on their 'merits' in the lobbying context ought to mean that MPs should assess ideas on their merits or inherent worthiness in the sense that they should not give greater weight to representations arising from lobbying that is underpinned by corruption or political inequalities (explored in more detail at the end of this chapter and in Chapters 4 and 5). The principle of 'openness' is about the transparency of that process, but that says little about how the decision itself should be made. 'Accountability' is about scrutiny and similarly offers little, beyond MPs evading their accountability obligations, about when decisions are not in the public interest. 'Leadership' merely reinforces the importance of the principles.

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[151] ibid.
[152] ibid.

Together, the principles paint a complex picture of what MPs should do. This is to be expected when considering the analysis above which reveals a complex picture of what representation means in the UK. Nevertheless, one can derive that the role of MPs is clearly defined with regard to personal financial or other gain and conflicts of interest (integrity). Their role is loosely defined with regard to making decisions on their merits (objectivity). That is because there are different views about what is right or good. An official's view of the 'merits' will be influenced by different factors such as their view on politics. Thus, normative arguments were made about when lobbying might undermine decision-making based on the process of decision-making rather than the content of the matters which are being decided. An important query underlying the analysis above is how much importance should be attached to the Code and resolutions. In this regard, the Recall of MPs Act 2015 gives much force to them.

1.2.2 The Recall of MPs Act 2015

Under the Act, constituents can force MPs to stand down and face a by-election where certain criteria are met. A recall petition is triggered where an MP:

(a) is convicted of a custodial sentence; or
(b) the House of Commons Committee on Standards suspends an MP for breaching the Code of Conduct (and other rules); or
(c) an MP is convicted under section 10 of the Parliamentary Standards Act 2009 which deals with providing misleading information regarding allowances.[153]

If one condition is met, the petition is triggered, and a by-election is held where 10% of constituents sign the petition.[154]

The Act has been criticised because, in practice, it affords little power to constituents, and decisions about recall are made by MPs instead of an independent body. It is a committee of MPs that will ultimately judge whether the conduct right or wrong. Nevertheless, the Act codifies the rights of citizens to remove MPs where they fall below expectations. The Commons Committee on

[153] Recall of MPs Act 2015 section 1(3), 1(4) & 1(9).
[154] ibid section 9(4).

Standards has the power to investigate matters 'relating to the conduct of Members, including specific complaints in relation to alleged breaches of the Code which have been drawn to the Committee's attention by the Commissioner'.[155] Any member of the public can make a complaint to the Commissioner about potential breaches by MPs under Part V of the Code of Conduct.[156] The relevant provisions under Part V state that:

> 10. Members shall base their conduct on a consideration of the public interest, avoid conflict between personal interest and the public interest and resolve any conflict between the two, at once, and in favour of the public interest.
>
> 11. No Member shall act as a paid advocate in any proceeding of the House.
>
> 12. The acceptance by a Member of a bribe to influence his or her conduct as a Member, including any fee, compensation or reward in connection with the promotion of, or opposition to, any Bill, Motion, or other matter submitted, or intended to be submitted to the House, or to any Committee of the House, is contrary to the law of Parliament.[157]

Thus, whilst it is unlikely to be triggered, there is now a legal mechanism for constituents to remove MPs where—because of a serious breach—they have not acted in the public interest. The 'public interest' is not defined in this context, but it would likely be gauged taking into account the Code and resolutions because the Act refers specifically to them. A recall can also be triggered where an MP has received a custodial sentence. For example, where an MP is convicted of bribery and sentenced to prison, this can trigger a complaint and recall.

It is acknowledged that a recall petition being triggered because an MP has not acted in the public interest is very unlikely to succeed. The Committee on

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[155] UK Parliament, 'Committee on Standards - role' (2016) <http://www.parliament.uk/business/committees/committees-a-z/commons-select/standards/role/> accessed 10 Feb 2016.
[156] UK Parliament, 'Parliamentary Commissioner for Standards: Complaints and Investigations' (2016) <http://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliamentary-commissioner-for-standards/complaints-and-investigations/> accessed 10 Feb 2016.
[157] House of Commons, *The Code of Conduct* (n 10) provisions 10, 11 & 12.

Standards would need evidence of serious malfeasance and some MPs would disagree about what their purpose is. As Judge notes:

> If there is neither a simple single conception of what MPs should do, nor agreement upon what they actually do, it is extremely difficult to determine what they are responsible for, in the sense of individual culpability (beyond personal malfeasance or misfeasance), and the grounds upon which they should be recalled.[158]

Nevertheless, the existence of the Act and the requirements underlying it are unprecedented. At most, it means that MPs can be removed for not acting in the public interest (the meaning of which is decided by a committee). That gives force to the importance of those principles but also highlights the difficulty in finding a breach because they are so vague. This also demonstrates that there is an evolving attitude in Parliament which emphasises the importance of the public interest as a purpose. As Wright notes, it is 'indicative of a changing political culture and opens up a much wider debate. It invites discussion about the nature of political accountability and how it might be strengthened. It also requires us to think freshly about both representative and direct democracy'.[159]

1.3 Summary: The Role of MPs

The role of MPs has evolved since 1774 when Burke conceived of the trustee model of representation. Since then, there has been a proliferation of public engagement whereby MPs have sought to give citizens more opportunities to influence the political agenda. That is not to say that the trustee model no longer exists; it clearly does for some MPs. However, most MPs do seriously weigh the views of the public when discerning what the public interest is. It would be surprising for the House of Commons not to give effect to a referendum result or for a petition not to be debated seriously. It would be seen as regressive and undemocratic for public engagement initiatives to be reversed and for the House to become more insular. As Oliver summarises, the democratic system has shifted 'from government and Parliament strongly legitimated by the process of election

[158] Judge, 'Recall of MPs in the UK' (n 14) 745.
[159] Wright (n 15) 296.

to government […] to a system where legitimacy has to be won through success in meeting the needs of the people, through openness, and responsiveness through participatory arrangements'.[160] Nevertheless, defining the role of MPs is not simple. Whilst the nature of representation is changing, it retains elements of the old and new which brings about contradictions regarding defining a purpose. Thus, as noted above, the following passage from Judge appears to be an accurate reflection of the role of MPs:

> MPs are primarily representatives of their party, increasingly attentive to their territorial constituencies, marginally more descriptive of the population at large than two decades ago, yet retain a propensity to assert the value of their own independent judgement [...] Burkean notions of 'trusteeship', co-exist alongside more contemporary collectivist theories.[161]

From this complex dynamic four points emerge for the diversion framework. First, an overriding purpose of MPs is to act in the public interest which is evidenced in the analysis above. Second, the public interest is served by considering the views of citizens (increasingly ascertained through deliberative/participatory initiatives) when making decisions. Third, the success of that aim can be tested by reference to values and principles which are given effect through the Commons Code and resolutions. These matter because the Recall of MPs Act 2015 enshrines them in statute along with 'the public interest' as a purpose against which to gauge a breach of that statute.

Fourth, the values and principles used to gauge the public interest are clear in some places but not in others. They are clear with regard to impropriety akin to bribery or other financial impropriety. These pertain to the 'integrity' of the individual which is a criterion developed in Chapter 4. It will be seen in that chapter how individually corrupt conduct such as breaches of the law, violations of codes and the undermining of independence, can indicate when integrity is undermined. Questions will be created in that chapter to establish clearly when

[160] Oliver (n 46) 362.
[161] Judge, *Democratic Incongruities* (n 20) 105.

MPs have not acted with 'integrity' thereby causing a diversion from acting in the public interest.

The values and principles are unclear for 'objectivity'; stating only that decisions should be made on their merits in some circumstances. It is argued that making decisions on their 'merits' ought to mean that MPs should assess ideas on their merits or inherent worthiness in the sense that they should not give greater weight to representations arising from lobbying that is underpinned by corruption or political inequality. Specific determinations about whether decisions are made on their merits are guided by questions developed in Chapter 5 arising from the political equality literature.

2. Peers and the Public Interest

There may be a lower empirical expectation that peers should act in the public interest because they are unelected. The Lords also institutionalises the Anglican Church which is arguably unrepresentative of the religious divide today. It has an honours system and is seen as a status of privilege that is disconnected from the realities of working citizens. It is an institution very different in nature to the Commons. Nevertheless, it is argued that the Lords have followed a public interest mantra, recognising that it is their overarching purpose. They are not compelled to act this way, but they recognise that they should do so—particularly where lobbying is involved. Two important points are revealed by the analysis below. First, peers attach great importance to deliberation in determining the public interest; using that information to hold the Government to account—to a greater extent than the Commons—and thus to act in the public interest. This aim is expressly stated in reports as being the main overarching purpose. Second, the Lords, unlike the Commons, have expressly incorporated the Nolan Principles into their Code without alteration.

2.1 Examining the Role of Peers

The Lords is not a perfect embodiment of deliberation and is open to criticisms 'that peers [do not] necessarily represent their [the people's] interests in the chamber. Peers have no mandate from voters, and so have no obligation to represent their interests beyond the general imperative to obey party whips (which

they usually do)'.[162] Further, the unelected nature of the Lords, for some, undermines its legitimacy and, therefore, its power to perform deliberation effectively.[163]

However, it is also true that following the enactment of the House of Lords Act 1999 (which significantly reduced the membership of the Lords) that the Lords has been 're-energised'.[164] As a result, it is much more active in holding the Government to account by inflicting defeats. From 1980–1997, the Lords inflicted 241 defeats on various Conservative Governments[165] compared with the period of 1997–2017 in which the Labour, Coalition and Conservative governments suffered 688 defeats.[166] One recent defeat in 2015 was on the issue of tax credits where there were worries that a Government proposal would leave millions of people financially worse off.[167] Significantly, the defeat broke a constitutional convention established in 1911 that the Lords should not block financial legislation. It is, thus, a strong indicator of the lengths to which peers will go to uphold their view of the public interest and underlines that impression that, since 1999, the House of Lords has 'developed a reputation for rigorous scrutiny, high quality and frequently non-partisan debate, and a willingness to challenge the government'.[168]

This greater scrutiny of the Government has also coincided with the increasingly deliberative nature of the Lords which takes public opinion seriously.[169] Farrington argues that the Lords subscribe to the idea of deliberation to a greater extent than the Commons.[170] Peers 'often think of themselves as undertaking surrogate representation of interests and groups outside party

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[162] Conor Farrington, 'Lords Reform: Some Inconvenient Truths' (2015) 86(2) The Political Quarterly 297, 302.
[163] John Parkinson, 'The House of Lords: A Deliberative Democratic Defence' (2007) 78(3) The Political Quarterly 374, 380.
[164] Hine and Peele (n 127) 127.
[165] UK Parliament, 'Government defeats in the House of Lords' (2016) <http://www.parliament.uk/about/faqs/house-of-lords-faqs/lords-govtdefeats/> accessed 10 February 2016.
[166] ibid (as of April 2017).
[167] 'Tax credits: Lords vote to delay controversial cuts' (*BBC News*, 26 October 2015) <http://www.bbc.co.uk/news/uk-politics-34631156> accessed 14 February 2016.
[168] Conor Farrington, 'Does It Matter If the House of Lords isn't Reformed? Perspectives from a Symposium at Trinity Hall, Cambridge' (2012) 83(3) The Political Quarterly 599, 606.
[169] ibid 599; Parkinson (n 163) 374.
[170] Farrington, 'Does It Matter' (n 168) 607.

political issues'.[171] Indeed, interviews reveal that peers believe their role is to represent public opinion or be guided by it in a broad sense.[172] Moreover, peers are less likely to be distracted from this aim by party loyalty. The Lords has many experts, who have a lifetime membership which frees them from the constraints of party loyalty and patronage.[173] They are less susceptible to the influence of party whips than MPs and are less worried about adhering to the ideological alignment of a party. The result is many experts across a number of fields and 'the presence of a large body of crossbenchers who are open to persuasion and who may lean to the left or right as the occasion demands'.[174] Farrington argues that:

> Overall, it seems reasonable to conclude that the House of Lords can be said to possess a degree of non-electoral legitimacy by virtue of its greater representativeness of the public's political views than the Commons, the willingness of (many) peers to engage in surrogate representation and support unpopular causes, the propensity for deliberative debate in the House, and the Lords' increased capacity to challenge the government and exert impact on policy.[175]

Finally, membership between the parties is more evenly spread in the Lords than the Commons. The Lords is, in a sense, more representative than the Commons because 'it has been a cross-party maxim of the post-1999 chamber to ensure that no one party could command an overall majority'.[176] This contributes to an open and inclusive deliberative environment in which a variety of voices are heard.[177] These points are echoed by Parkinson who argues that the Lords is to an extent more inclusive than the Commons because of the 'rough parity between parties [which] gives those groups a more effective deliberative voice than the latter, whilst the appointed nature of the Lords gives a parliamentary platform for some minorities and some perspectives that they would otherwise lack'.[178]

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171 Farrington, 'Lords Reform' (n 162) 302.
172 ibid 303.
173 Parkinson (n 163) 380.
174 Farrington, 'Lords Reform' (n 162) 303.
175 ibid 304.
176 ibid 302.
177 Parkinson (n 163) 374.
178 ibid 378.

Therefore, peers are arguably less constrained than MPs in their ability to uphold the public interest, and the suggestion is that deliberation plays a more central role. This is reflected in an analysis of committee reports and the House of Lords Code of Conduct.

2.2 Defining 'Integrity' and 'Objectivity'

Like MPs, peers are bound by a Code which uses the same rules and restates in several provisions the requirement for peers to 'base their actions solely upon consideration of the public interest'.[179] Unlike the Commons, they subscribe to the Nolan Principles as defined by the CSPL.[180] On the 'public interest', the relevant provisions of the Code are:

> 7. In the conduct of their parliamentary duties, Members of the House shall base their actions on consideration of the public interest, and shall resolve any conflict between their personal interest and the public interest at once, and in favour of the public interest.
>
> 12. A Member with a relevant interest is free to take part in the public business of the House subject to: the resolution of any conflict between personal and public interest in favour of the public interest (paragraph 7 of the Code).
>
> 16. Members are required under paragraph 7 of the Code to base their actions on consideration of the public interest.
>
> 19. At the same time, in their parliamentary work, and whenever they act in their capacity as parliamentarians, Members are required to base their actions solely upon consideration of the public interest.[181]

Additionally, in 2009, the Lords recognised that one of the overarching principles underlying the Code was to act in the public interest.[182] In 2011, the Leader's Group report on working practices strongly emphasised the public interest as

[179] House of Lords, *Code of Conduct for Members of the House of Lords* (HL 2015, HL Paper 3) 3, 9 & 10.
[180] UK Government, 'The 7 Principles' (n 129).
[181] House of Lords, *Code of Conduct* (n 179).
[182] Hine and Peele (n 127) 138.

being a core purpose of the Lords. They noted that 'the House should make the best possible use of all its available resources […] so as to serve the public interest better',[183] and that 'in all its work, the House seeks to serve the public—to act in the public interest and to facilitate public engagement in its work'.[184] Furthermore, the Report consistently used the term 'public interest'.[185] As such, the Lords has expressed, quite emphatically, that its purpose is to act in the public interest. It also has broader rules for assessing when the public interest is undermined.

Its Code states that members 'should observe the seven general principles of conduct' of the CSPL which 'will be taken into consideration when any allegation of breaches of the provisions in other sections of the Code is under investigation'.[186] The definitions of the Nolan Principles are broader than in the Commons Code. Acting solely in terms of the public interest is covered by 'selflessness'. 'Integrity' requires that Members 'must not' (as opposed to 'should not') place themselves under financial obligations. 'Objectivity' requires that Members 'must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias'. 'Openness' means that decisions should be taken transparently unless there are 'lawful' reasons for not doing so. 'Honesty' means that Members should be truthful.[187] Those principles 'should act as a guide to Members in considering the requirement to act always on their personal honour'.[188] 'Personal honour' is unique to the culture of the Lords.[189] The term:

> Has been used within the House for centuries to describe the guiding principles that govern the conduct of Members; its meaning has never been defined, and has not needed definition, because it is inherent in the culture and conventions of the House. These change over time, and thus any definition of 'personal honour', while it might achieve temporary 'legal certainty', would quickly become out-moded […] the term 'personal honour' is ultimately an expression of the sense of the House as a whole

[183] House of Lords, *Report of the Leader's Group on Working Practices* (2010-12, HL Paper 136) 7.
[184] ibid 49.
[185] ibid 8, 19, 26, 47, 53 & 91.
[186] House of Lords, *Code of Conduct* (n 179) 4, para 9.
[187] ibid.
[188] ibid.
[189] Hine and Peele (n 127) 129.

> as to the standards of conduct expected of individual Members […] Members cannot rely simply on their own personal sense of what is honourable. They are required to act in accordance with the standards expected by the House as a whole. 'Personal honour' is thus […] a matter for individual Members, subject to the sense and culture of the House as a whole.[190]

The Code states when lobbying might undermine the personal honour of a Member. For example, personal financial benefits are consistently prohibited by the Code.[191] Regarding the decision-making process, the Code states that 'some lobbying can give rise to suspicion of improper influence over Parliament. Members must have regard to such public perceptions. Members' dealings with lobbyists should always be governed by the principles of integrity and openness [of the CSPL]'.[192] Significantly, the Code then states that:

> Members should take particular care not to give the impression of giving greater weight to representations because they come from paid lobbyists; representations should be given such weight as they deserve based on their intrinsic merit. Members must in their dealings with lobbyists observe the prohibitions on paid advocacy and on the provision of parliamentary advice or services for payment or other reward. Members should decline all but the most insignificant or incidental hospitality, benefit or gift offered by a lobbyist.[193]

This passage is notable because it states that decisions should be made on the intrinsic merits of ideas. In essence, the passage articulates that members must have regard to 'objectivity' when making decisions or when mediating between different lobbying influences which aligns with analysis of MPs above.

However, despite the articulations in the passages above, which are broader than those in the Commons, the system of enforcing those principles is

[190] House of Lords Committee for Privileges, *The Conduct of Lord Moonie, Lord Snape, Lord Truscott and Lord Taylor of Blackburn: Volume I Report* (2008-09, HL Paper 88-I) paras 28–29.
[191] House of Lords, *Code of Conduct* (n 179) 11–12.
[192] ibid 12, para 33.
[193] ibid 13, para 34.

convoluted which tends to undermine their importance in practice. Where a member of the public is concerned about some conduct, they may complain to the House of Lords Commissioner for Standards for violations of the Code.[194] Where a breach is found, the Sub-Committee on Lords' Conduct reviews the findings and recommends an appropriate sanction to the Committee for Privileges and Conduct.[195] That Committee then presents its findings to the House who makes a final decision.[196] Sanctions are found under section 1 of the House of Lords (Expulsion and Suspension) Act 2015. Members may be temporarily suspended or expelled from the Lords. The effect of this is explained in the House of Lords Reform Act 2014. Under section 4(2) a member becomes disqualified from attending the proceedings of the Lords. Under section 4(8), an expelled member may not subsequently become a member of the House.

This process is much more convoluted than in the Commons. Complaints are passed through several committees who shall act 'in accordance with the principles of natural justice and fairness'. Nevertheless, the Code expressly identifies that the purpose of members is to act in the public interest which means that personal financial gain is prohibited (integrity) and that decisions should be made on their merits (objectivity). The underlying principles are, therefore, similar to those in the Commons. Further, there is a statutory mechanism (albeit, one which barely involves the public) for removing members deemed to have breached the Code for not acting in the public interest.

2.3 Summary: The Role of Peers

Since 1999, the Lords has become much more active in holding successive governments to account on issues which, members would argue, reflect public misgivings on certain policies such as the defeat on tax credits. Members are less constrained than MPs by party loyalty and are not as strongly influenced by career progression opportunities since most are older and have established careers. They are guided by broad public opinion on issues and have determined that their purpose is to act in the public interest. Like the Commons, this is made explicit

194 ibid rule 107.
195 ibid rule 119.
196 ibid rule 20.

in a Code which incorporates the Nolan Principles. However, the Lords go further by integrating the definitions of the Nolan Principles as defined by the CSPL. These are much broader and are considered when investigating and sanctioning Members.

Therefore, the expectations of peers to act in the public interest go further than MPs. However, for the diversion framework, the same articulated 'purpose' is sought for MPs, peers and ministers to keep the framework consistent. Thus, 'integrity' here also means the accrual personal financial benefits which are clearly prohibited in the Lords. For 'objectivity' it is submitted that peers should assess ideas on their merits or inherent worthiness in the sense that they should not give greater weight to representations arising from lobbying that is underpinned by corruption or political inequality. This is slightly broader than the articulation stated in the passage earlier which specified 'paid lobbyists' (the lobbyists for the diversion framework need not be paid). However, the explicit inclusion of 'objectivity' as defined by the CSPL in the Code—that decisions should be made impartially, fairly and on merit, using the best evidence and without discrimination or bias—supports the use of 'objectivity' as defined for the diversion framework. For those reasons, like MPs, it is submitted that peers should also act in the public interest and that a diversion from the public interest can be tested using the principles of 'integrity' and 'objectivity'.

3. Ministers and the Public Interest

The analysis below reveals that, unlike the Commons and Lords, there are few expressions holding that ministers should act in the public interest. Consequently, a normative argument is made at the end of this section that ministers should act in the public interest by upholding 'integrity' and 'objectivity' in the same manner articulated above. The analysis is undertaken in three parts. First, the role of ministers in terms of upholding the public interest is examined by reference to the relationship between the Government and citizens. Second, codes and rules are analysed. It will be seen that the 'public interest' is lacking in those rules and the criterion of 'objectivity' is explicitly omitted. Thus, third, the normative arguments noted above are articulated and justified.

3.1 Examining the Role of Ministers

The relationship between the Government and citizens is very different to that between Parliament and citizens. Instead of being 'rule by the people',[197] the Government is a problem that should be controlled.[198]

This can be seen with elections. Whilst ministers seek to uphold their manifesto pledges,[199] they are not bound to keep their promises as was noted by Lord Brandon of Oakbrook in *Bromley LBC* v *Greater London Council*.[200] His Lordship stated that it is 'entirely wrong' for elected officials to 'regard themselves as bound to […] their election promises, whatever the cost and other countervailing considerations may turn out to be'.[201] Indeed, there are sometimes high profile cases of governments 'breaking promises'.[202] Underlying this are questions about the importance of manifestos because most voters may not read them.[203] Even if voters are aware of pledges because of media dissemination of that information,[204] it is questionable how accurately and fairly those pledges are presented in a very pluralised media in the UK.[205] Therefore, it has been argued that elections are a 'tool' used by the electorate to control the choices of office-holders who are conscious of the need for future re-election.[206]

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197 Hirst (n 16) 193 & 196.

198 It could be argued that the Government is technically loyal upwards to the Monarch rather than downwards to the people. All ministers become members of the Privy Council where they are sworn to be a 'true and faithful Servant unto The Queen's Majesty'. However, such an argument would oversimplify the nature of government which can be explained by a multitude of contestable theories. This section focuses on factors that are necessary for developing the diversion framework. For the oath, see, 'Privy Councillor's Oath' (*BBC News*, 22 October 2008) <http://news.bbc.co.uk/1/hi/uk_politics/a-z_of_parliament/p-q/85690.stm> accessed 19 June 2017; for an account of those theories, see, Judge, *Democratic Incongruities* (n 20) Ch 5.

199 Judith Bara, 'A Question of Trust: Implementing Party Manifestos' (2005) 58(3) Parliamentary Affairs 585, 594.

200 *Bromley LBC v Greater London Council* Bromley LBC v Greater London Council [1983] 1 AC 768 (HL).

201 ibid 853 (Brandon L).

202 Patrick Hennessy, 'General Election 2010: Labour's Broken Manifesto Pledges' (*The Telegraph*, 25 April 2010) <http://www.telegraph.co.uk/news/election-2010/7628796/General-Election-2010-Labours-broken-manifesto-pledges.html> accessed 23 May 2017.

203 Thomas Quinn, *Mandates, Manifestos and Coalitions: UK Party Politics after 2010* (The Constitution Society, 2014) 7.

204 ibid.

205 Robert E Goodin and Michael Saward, 'Dog Whistles and Democratic Mandates' (2005) 76(4) The Political Quarterly 471, 471.

206 Judge, 'Whatever Happened' (n 18) 685–686; Elliott and Thomas (n 2) 154–58.

As such, it is unsurprising that the Government is not seen as a device for executing the will of the people but as an authority over citizens.[207] Indeed, the actions of ministers often seem 'to have little clear relationship to a defensible conception of the public interest'.[208] Part of that is simply because of the demands of the role. Ministers do not have the time for broad deliberations to reach decisions that reflect the 'balance of reasons' in the 'public interest'.[209] Instead:

> Life for senior politicians is a stimulating, enervating and exhausting blur of appointments, questions, airplanes, meetings, negotiations, limousines, briefings, hotel rooms, debates in the legislature, church basements, phone calls, decisions, community centres, speeches, boardrooms, interviews, more questions, appearances and controversies […] the general lack of preparation for members, their constant arriving and leaving, the shortage of time, the phone calls, the reading and writing of messages, the fatigue and drowsiness, the effects of alcohol and food […] it absorbs the totality of the energy and imagination of any typical human being for as long as it lasts.[210]

This busy reality keeps ministers away from constituents and creates difficulties for them in coming to conclusions about what people want and to articulate the preferences of citizens.[211] That is not to say ministers do not consider the views of citizens; they usually consult with interested parties, the wider public and derive political information from special advisers (see below).[212] However, the relationship between citizens and ministers is mostly characterised as involving a set of political factors (such as elections and polls) which help to exercise constraints on the Government that are constant rather than intermittent. Consequently, it is unsurprising that the 'public interest' is barely expressed in the rules pertaining to ministers.

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[207] Hirst (n 16) 196.
[208] Ian Harden, 'Regulating Government' (1995) 66(4) The Political Quarterly 299, 299.
[209] French (n 12) 537.
[210] ibid 537–538.
[211] Karen Celis, Anke Schouteden and Bram Wauters, 'Cleavage, Ideology and Identity. Explaining the Linkage between Representatives and Interest Groups' [2015] Parliamentary Affairs 1, 1.
[212] Alder (n 97) 51.

3.2 The Omission of the 'Public Interest' in Rules

3.2.1 The Ministerial Code and the Annex

Ministers follow the Ministerial Code[213] which is not afforded the same importance as the Codes for the Commons and Lords. Hine and Peele highlight that:

> For the government, the Code has never been the 'public framework of rules against which conduct should be judged'. It was never intended to be a justiciable code like others, and no government has accepted pressure of the CSPL and the PASC for it to be seen this way.[214]

It is, therefore, unsurprising that there is no requirement in the Code for ministers to act in the public interest. Faulkner and Everett note that:

> Beyond relevant provisions of the criminal and civil law and parliamentary rules of conduct affecting Members generally there are few if any 'rules' regarding ministerial responsibility which guide and bind ministers in their official capacity.[215]

The furthest the Code goes to establishing such duties is found in the following provision of the Code:

> 1.2 The Ministerial Code should be read against the background of the overarching duty on Ministers to comply with the law and to protect the integrity of public life. They are expected to observe the Seven Principles of Public Life.[216]

However, there is little reiteration of the Nolan Principles within the Code itself. They are annexed to the Code along with any mention of the 'public interest'.

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213 Cabinet Office, *Ministerial Code* (Ministerial Code, 2015).
214 Hine and Peele (n 127) 164.
215 Ed Faulkner and Michael Everett, *The Ministerial Code and the Independent Adviser on Ministers' Interests* (House of Commons Library, Briefing Paper 03750, 21 Oct 2015) 19.
216 Office, *Ministerial Code* (n 213) Annex A.

Thus, for the Ministerial Code, the Nolan Principles are a footnote. Aside from those principles, there are typical provisions regarding conflicts of interest:

> f. Ministers must ensure that no conflict arises, or appears to arise, between their public duties and their private interests.[217]

The provision requires that ministers act in the interests of the public ahead of any personal interests, but the 'public interest' is not emphasised in the same manner as the rules for the Commons and Lords. There is also a more decisive division between the tasks of representatives in their role as ministers versus their role as constituency MPs:

> 6.5 Ministers are free to make their views about constituency matters known to the responsible Minister by correspondence, leading deputations or by personal interview provided they make clear that they are acting as their constituents' representative and not as a Minister.[218]

This contrasts with the Commons where MPs argue that their role is to act in the interests of constituents. For ministers, there is an acceptance that their decisions could conflict with those of their constituents. This duality of functions highlights a divergence regarding the role of office-holders in their capacity as ministers versus their role as MPs which is underlined in the following provision:

> 7.23 Gifts given to Ministers as constituency MPs or members of a political Party fall within the rules relating to the Registers of Members' and Lords' Interests.[219]

Finally, the Code is not underpinned by statute and has a weak process for investigating breaches.[220] The Prime Minister decides whether allegations will be referred to an Independent Adviser on Ministers' Interests—a role for which selections are not subject to open recruitment or pre-appointment hearings and for which the Prime Minister decides whom to appoint.[221] Further, ministers will

[217] ibid provision 1.2.
[218] ibid provision 6.5.
[219] ibid provision 7.23.
[220] Faulkner and Everett (n 215) 9–10.
[221] ibid 10; Cabinet Office, *Ministerial Code* (n 213) provision 1.3.

only resign where there is a clear and serious failing and is thus seldom resorted to.[222]

Therefore, the 'public interest' is not expressed in the Ministerial Code except for in the Nolan Principles annexed to the Code. The Code draws a clear distinction between the work of individuals in their capacity as ministers and as MPs which underlines that ministers operate under different expectations. They are not representatives but exist to pursue the Government's programme. At most, it could be argued that annexing the Nolan Principles should mean that ministers follow the relevant principles that articulate the public interest otherwise they should be omitted from the Code. However, that is not a clear enough threshold to establish that as a purpose.

3.2.2 The Code of Conduct for Special Advisers

Special advisers are a type of civil servant that occupy roles in the Treasury and Downing Street pursuant to Part 1 of the Constitutional Reform and Governance Act 2010. In their role, they support ministers by providing political advice and assistance. They are fully integrated into the functioning of government[223]—or as one MP has described it, 'glued at the hip' of ministers which underlies their potential influence.[224] For these reasons, they are an obvious target for lobbyists. This has led to calls for them to be covered by the TLA 2014 but was resisted by the Government of the time. The remnants of that tussle can be seen in section 2(4) of the Act which states that future regulations may amend the Act to include special advisers.

An analysis of the Code of Conduct of Special Advisers is particularly illuminating not for what it stipulates but for what it explicitly omits. This reveals much about the nature of Government with regard to its purpose. The Code states that special advisers are:

[222] Scott Brenton, 'Ministerial Accountability for Departmental Actions Across Westminster Parliamentary Democracies' (2014) 73(4) Australian Journal of Public Administration 467, 469.
[223] Cabinet Office, *Code of Conduct for Special Advisers* (Cabinet Office 2015) para 2.
[224] HC Deb 22 January 2014 Vol 574, Col 317.

> Bound by the standards of integrity and honesty required of all civil servants as set out in the Civil Service Code. However, they are exempt from the general requirement that civil servants should be appointed on merit and behave with impartiality and objectivity, or that they need to retain the confidence of future governments of a different political complexion.[225]

It was noted above that 'impartiality' is only required where it is explicitly stated such as for civil servants. The Code for special advisers recognises that people working in government are also not bound by such a principle and has thus exempted a select few civil servants (special advisers) working in government from that obligation.[226] As the Code states, 'they are employed to serve the objectives of the Prime Minister, the Government and the Minister(s) for whom they work'.[227]

Therefore, the Code reveals that special advisers are not required to act with impartiality or objectivity which underlines how ministers are also not generally expected to be 'objective' as defined by the Nolan Principles. Instead, special advisers serve the Prime Minster and other ministers who set objectives and targets based on the Government's programme.

3.3 A Normative Purpose of Ministers

Acting in the public interest is not a purpose of ministers. The relationship between the Government and citizens is different to that between citizens and Parliament. Government is a problem to control and not a mechanism through which the public interest is upheld. Further, there are few rules regarding the public interest. The Ministerial Code relegates the Nolan Principles to an annex rather than incorporating them, and the Prime Minister makes any disciplinary decisions in an arbitrary process. The Code of Conduct for Special Advisers explicitly omits the principles of objectivity and impartiality; noting that the role of special advisers is to serve the objectives of the Prime Minister and other

[225] Cabinet Office, *Code of Conduct for Special Advisers* (n 223) para 8.
[226] ibid para 17.
[227] ibid para 10.

Ministers. This underlines that people in government are not expected to be objective.

Nevertheless, the analysis above does not detract from normative arguments about the 'public interest' acting as a useful as a high-level principle against which problematic lobbying of ministers can be gauged. For the Lords and Commons at least, the analysis offers a very narrow conception of the public interest; that MPs and peers should act with integrity by not taking financial or other inducements. For objectivity, MPs and peers should assess ideas on their merits or inherent worthiness in the sense that they should not give greater weight to representations arising from lobbying that is underpinned by corruption or political inequality. It is argued that these should also apply to ministers.

On integrity, Ewing argues that, as a general principle, parties with a mandate have a duty to govern in the public interest and that should not be compromised by offers of personal favours, corruption or conflicts of interest.[228] On objectivity, Rowbottom suggests that objections to legislative strategies could be advanced on the grounds that money (such as donations from lobbyists) might cause government decisions to be based on factors other than the merits of the policy in question.[229] Indeed, it would be surprising if ministers would not also agree with such conceptions. It should certainly be held by a Prime Minister that the integrity of a minister is undermined and that it would not be in the public interest if they take a bribe or if there was a blatant conflict of interest. It is also uncontroversial to argue that the ministers should consider the merits of ideas when making decisions and, in doing so, be sensitive to lobbying underpinned by corruption and political inequalities.

Any UK Government today recognises that some forms of lobbying may result in decisions that are not in the public interest. That is why ministers are prohibited from lobbying the Government for two years under the Ministerial Code.[230] It is also why there have been significant regulatory developments of

[228] Keith D Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (Hart Publishing 2007) 175–76.
[229] Jacob Rowbottom, 'Political Donations and the Democratic Process: Rationales for Reform' [2002] Public Law 758, 765; see also ibid.
[230] Cabinet Office, *Ministerial Code* (n 213) rule 7.25.

British Public Life since the 1990s which have arisen specifically in response to lobbying scandals involving ministers.[231] Therefore, it is rational to argue that ministers should not be diverted from acting in the public interest by problematic lobbying, and that the criteria of integrity and objectivity are sensible gauges to assist with such a determination.

4. Summary: The Meaning of 'Integrity' and 'Objectivity'

It has been argued that two criteria can be used to gauge when there has been a diversion from the purpose of acting in the public interest.

The criterion of 'integrity' is uncontroversial and can be adapted from the codes analysed. It means that 'holders of public office should not place themselves under any financial or other obligation to lobbyists that might influence them in the performance of their official duties'.[232] There are clear expressions for MPs, peers and ministers that they must act with integrity in this regard. Additionally, the requirement to act with integrity is an established principle of legislative ethics. Thompson notes that decision-makers should play by the rules.[233] They have obligations to the institution they belong to and their colleagues, and those who abuse privileges cause damage to the legislative process.[234] Following codes, resolutions, laws—especially linked to personal financial gain—are matters of integrity. Specific questions to test when officials are not acting with integrity are created in Chapter 4.

The criterion of 'objectivity' is more complex. The analysis above reveals that 'objectivity' does not mean that office-holders should make decisions 'impartially'. However, it is argued that 'objectivity' can mean that decisions should be made on their 'merits'. However, the 'merits' means something broader than the context offered in the Commons Code of Conduct which limits 'merits' to specific tasks such as public appointments. Instead, it means something similar to the following passage in the Lords Code of Conduct:

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231 Hine and Peele (n 127) 1–6.
232 House of Commons, *The Code of Conduct* (n 10) 4.
233 Thompson, 'Two Concepts of Corruption' (n 9) 12.
234 Dennis F Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (The Brookings Institution 1995) 19–24.

> Members should take particular care not to give the impression of giving greater weight to representations because they come from paid lobbyists; representations should be given such weight as they deserve based on their intrinsic merit.[235]

This conception, however, does not go far enough because it states that member should not give the 'impression' of giving greater weight to the representation of 'paid' lobbyists. It should simply be the case that they 'should not' give more weight to representations arising from lobbying that is concerning. Thus, it is argued that 'officeholders should assess ideas on their merits or inherent worthiness in the sense that they should not give greater weight to representations arising from lobbying that is underpinned by corruption or political inequality'. Specific questions to test when officials are not acting with objectivity are created in Chapters 5. This use of 'objectivity' pertaining to 'merits' is justified in the lobbying context for two reasons.

First, objective decision-making based on merits is stated clearly in the codes of both the Commons and Lords and is, therefore, already used. Although, the 'merits' means different things to those institutions which highlights that it is not a rigid concept. It is also a well-established principle within the field of legislative ethics and is thus supported in the literature. Indeed, Thompson argues that officials should make decisions on their merits. This does not mean they should remain completely independent.[236] Instead, the aim is to be independent of influences that are 'clearly irrelevant' to the merits of policies or promoting the public goods.[237] The phrase 'clearly irrelevant' is not helpful and, thus, the questions developed in Chapters 4 and 5 are preferred. At this stage, it is hypothesised that influences which will undermine the goal of objectivity are those which have gained prominence because of lobbying efforts underpinned by corruption or political inequalities. For example, where wealthy individuals exert significant influence over a decision in their self-interest, and others cannot compete with that effort financially, then objectivity may be undermined because of financial inequalities. This would not be the case where 100,000 people donate

[235] House of Lords, *Code of Conduct* (n 179) 13, para 34.
[236] Thompson, *Ethics in Congress* (n 234) 19–24.
[237] ibid.

£1 to raise awareness for a cause. That issue gained attention because most could afford £1 to promote the cause which is in the interests of many people.

Second, lobbying is clearly recognised as a problem by decision-makers and others, and there have been significant developments in the regulation of British public life since the 1990s in response to lobbying scandals. That is abundantly clear from the sources analysed above which enunciate specific rules on lobbying. The criterion of objectivity is necessary to gauge many of the problems with lobbying because there are matters which 'integrity' alone simply will not capture. Lobbying is a complex phenomenon. In this regard, it will be seen in the following chapters that 'objectivity' is a sufficient gauge for those complexities.

For these reasons, it is argued that objectivity, as defined for the diversion framework, is a justified gauge for testing whether office-holders have been diverted from acting in the public interest because of problematic lobbying.

5. The Relevance of 'Undermining Public Trust'

Finally, it is important to explain why the 'public trust' is relevant to Part 2 of the diversion framework. In the definition of 'institutional diversion' lobbying should divert decision-makers from their purpose of acting in the public interest or should weaken their ability to act in the public interest, including weakening either the public's *trust* in Parliament or the Government or their inherent *trustworthiness* because of that influence.

Lessig argues that some institutions require that the public trust their recommendations. Influences which make it difficult to trust those recommendations are 'therefore a corruption of it'.[238] The public might lose confidence in democracy which 'seems like a charade, we lose faith in its process' and participation declines.[239] Alternatively, he argues that the inherent trustworthiness of an institution might be weakened if people are not given reasons to trust it.[240] Similarly, Thompson notes the importance of sustaining

[238] Lessig, 'Foreword' (n 1) 3.
[239] Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress - and a Plan to Stop It* (Twelve 2011) 8–9.
[240] Lessig, 'Foreword' (n 1) 3.

public confidence.[241] The actions of officials are crucial for maintaining public trust, and they should provide assurances that they are acting for the right reasons.[242]

That is not to say that greater regulation will restore public trust.[243] It is acknowledged that regulation may lower public confidence further by, for example, revealing problems that were previously unknown.[244] However, the effect of regulations aside, there are public concerns about lobbying. The British public has very little trust in politicians, with less than one-third of citizens in polling expressing that they trust politicians.[245] Polls reveal that 88% of people believe that lobbying poses a big or significant risk to the policy making process.[246] Further, the increased regulations that arise from lobbying scandals highlight how office-holders are also concerned with the damaging effect of lobbying on public trust. Indeed, one of the purposes of the CSPL (created in response to lobbying scandals in the 1990s) was to foster greater public trust in the political system.[247] The need to enhance public confidence was also recognised in the Government's Anticorruption Plan in 2014 which states that:

> Well-publicised events concerning MPs expenses and lobbying have damaged public confidence in the Parliamentary system. The Government is committed to supporting the Parliamentary authorities to put in place proportionate controls to address corruption risks and ensure public confidence.[248]

Thus, there are significant concerns about trust in the political process being undermined by lobbying. It is, therefore, sensible that 'undermining trust' forms

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241 Thompson, 'Two Concepts' (n 9) 12
242 Thompson, *Ethics in Congress* (n 234) 19–24.
243 Richard L Hasen, 'Book Review: Fixing Washington' (2013) 126 Harv L Rev 550, 568.
244 Hine and Peele (n 127) 15, 211 & 302; see generally, Jacob Rowbottom, 'Corruption, Transparency, and Reputation: The Role of Publicity in Regulating Political Donations' (2016) 75(2) Cambridge Law Journal 398.
245 Hine and Peele (n 127) 5.
246 Alliance for Lobbying Transparency, 'YouGov Poll Shows Overwhelming Public Support for Changes to Lobbying (Scotland) Bill' (*ALT*, 3 January 2016) <http://www.lobbyingtransparency.org/blog/2016/1/6/yougov-poll-shows-overwhelming-public-support-for-changes-to-lobbying-scotland-bill> accessed 23 December 2016.
247 Hine and Peele (n 127) 62.
248 UK Government, *UK Anti-Corruption Plan* (HM Government, December, 2014) 28, para 4.27.

part of the institutional diversion framework. Whether regulation restores trust can be determined in other studies.

Conclusion

For Part 2 of the diversion framework, it is argued that 'acting in the public interest' is a rational purpose for gauging when lobbying causes a diversion. Further, the criteria of 'integrity' and 'objectivity' are sufficient for testing whether office-holders have been diverted from that purpose. These criteria flow not only from the detailed analysis undertaken above but also from Lessig and Thompson's analyses on legislative ethics. In this regard, the approach in this thesis uses both Lessig and Thompson's approaches and combines the 'public interest' and 'norms of office' approaches highlighted in Chapter 2. Acting in the 'public interest' offers a positive high-level principled approach to identifying a 'purpose'; similar to Lessig's approach. At the same time, gauging a diversion from that purpose by reference to the criteria of 'integrity' and 'objectivity' builds upon Thompson's more granular approach of determining when ethics have been breached by reference to 'principles'.

Therefore, the purpose of 'acting in the public interest' and the criteria of 'integrity' and 'objectivity' from Part 2 of the diversion framework. Chapters 4 and 5 will develop Part 1 as well as Part 2 further. Chapter 4 establishes elements for identifying individual corruption and institutional corruption for Part 1. It develops specific questions for testing when 'integrity' is undermined for Part 2. Chapter 5 establishes the elements of political equality for Part 1, and the develops specific questions to test when 'objectivity' is undermined for Part 2.

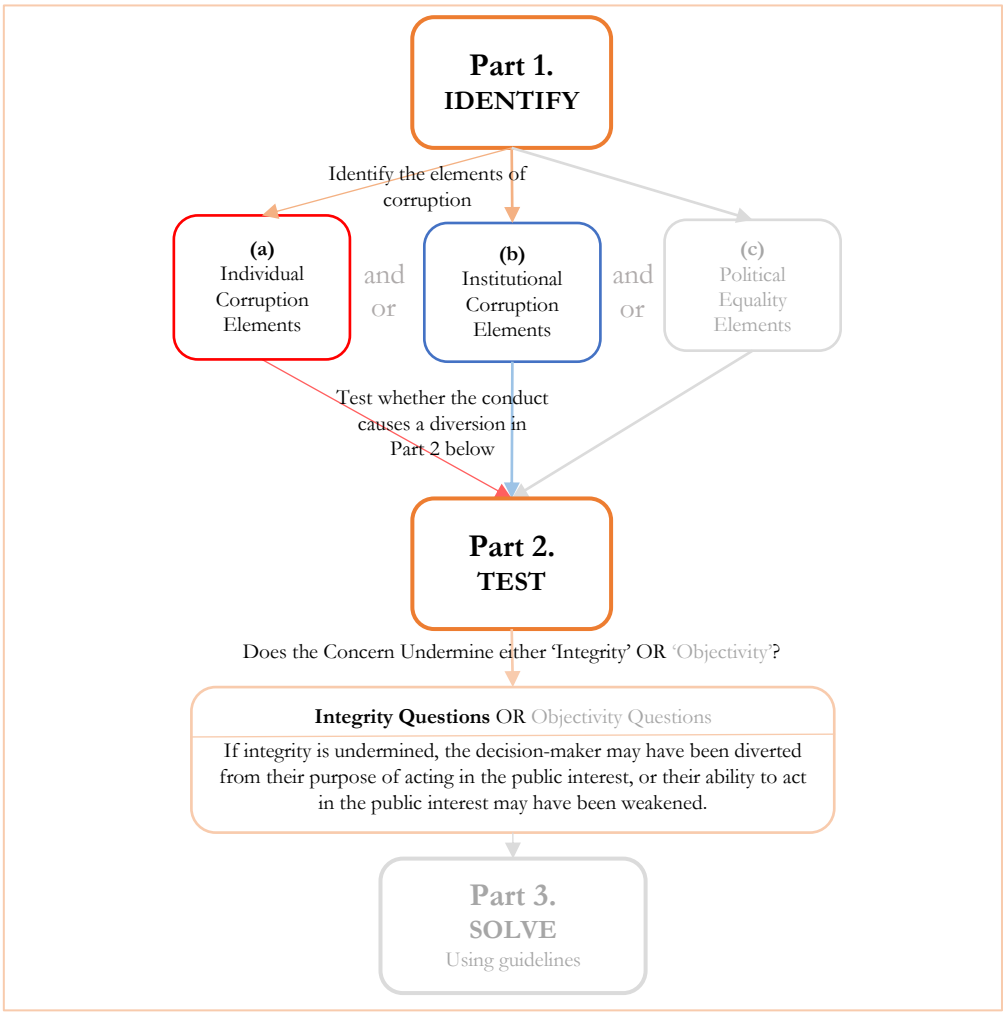
4

Identifying Corruption Concerns and Testing for a Diversion Using 'Integrity'

Introduction

There are broadly three concerns expressed about lobbying in the literature; individual corruption, institutional corruption and political equality. In this thesis, it is contended that the concerns are not articulated clearly or coherently. This chapter offers a coherent structure for identifying corruption concerns by establishing the elements of individual corruption and institutional corruption for Part 1 of the diversion framework. Further, building on Chapter 3, specific questions are developed for Part 2 to test when 'integrity' has been undermined thereby causing a diversion. 'Integrity' may also be undermined because of political equality concerns but is more likely a corruption concern and so the questions are developed in this chapter. The scope of this chapter is highlighted in Figure 1 below:

Figure 1: The Scope of Chapter 4.



The sections below analyse and outline four elements of individual corruption arising from laws, codes and resolutions and three elements of institutional corruption. Institutional corruption theory was developed by Dennis Thompson in the 1990s and has been adapted by Lawrence Lessig who develops a theory of dependence corruption. It is argued that the elements in Thompson's theory are too contingent and too complicated for the institutional diversion framework and that Lessig's elements are insufficient. Thompson's elements are too contingent because there are too many steps for identifying a corruption. They are too complicated because he uses terminology that is overly complex and unnecessary. Lessig's elements are insufficient because a dependency cannot describe many of the problems with lobbying; although it describes an important one. As such, both theories are adapted to offer three elements for identifying institutional corruption that are easier to follow, but which are sufficient for an analysis of

complex lobbying concerns in the UK. The analysis below begins with individual corruption.

1. The Elements of 'Individual Corruption'

The most obvious concern which may cause a diversion is individually corrupt conduct. The focus here is on the conduct of lobbyists and decision-makers working in their official capacities as opposed to their private lives. For office-holders, Thompson distinguishes between personal and legislative ethics:

> The public may think less of politicians who enjoy hard-core pornography or commit adultery, but as long as they keep these activities private and do not let them affect their public responsibilities, legislative ethics does not proscribe them […] Conversely, some conduct that is permissible or even praiseworthy in personal ethics may violate the principles of legislative ethics. Returning a favor or giving preference to a friend is often admirable in private life, but […] is more often ethically questionable and sometimes even criminal [in the legislative context].[1]

Therefore, a line is drawn in legislative ethics between the conduct of individuals in their official capacities and their private lives. In reality, that distinction may be blurred by a 'trial by media' whereby politicians resign because of some corrupt private conduct. However, for legislative ethics, the distinction is maintained. It is not only the conduct of politicians that is relevant but also the conduct of lobbyists.

Below, it is argued that there are four 'elements' of individual corruption that may arise in the lobbying context. Namely, bribery, impermissible donations to political parties, lobbying whilst unregistered and conflict of interest rules.

1.1 Element One: Bribery

Bribery is prohibited by the Bribery Act 2010 (BA), codes of conduct and resolutions. It a concern because it is immoral.[2] In the criminal law context, the

[1] Dennis F Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (The Brookings Institution 1995) 12.
[2] Scott Turow, 'What's Wrong with Bribery' (1985) 4(4) Journal of Business Ethics 249, 250.

moral 'content' of bribery can be divided into three elements. Culpability (the mental element such as intent or belief), harmfulness (the degree to which harm is caused) and wrongfulness (the violation of specific moral norms like cheating, deception or promise-breaking).[3] Since lobbying pervades the political process, bribery in the lobbying context poses particularly sensitive risks to society. It may lead to inappropriate grounds for decision-making, create political instability, distort markets, undermine legitimacy or the credibility of institutions, stifle development, waste resources, undermine public confidence, lead to unfair outcomes, injustice and inefficiency.[4] The BA 2010 was enacted to deal with such concerns.[5] It may be surprising then that the BA 2010 does not contain a specific offence covering the conduct of public officials. Indeed, there were concerns during the bill stages of the BA 2010 that public officials should be labelled explicitly because higher standards are expected of them.[6] Nevertheless, those concerns were unwarranted because the Act clearly covers the conduct of public officials as well as lobbyists.

Under section 3(2), the functions and activities covered include 'functions of a public nature', 'activities connected with a business', 'performed in the course of a person's employment' or 'performed by or on behalf of a body of persons'. The terms are undefined, but Section 16 states that 'this Act applies to individuals in the public service of the Crown as it applies to other individuals'. Therefore, the Act clearly covers the conduct of public officials such as those working within Parliament and the Government. It also covers the conduct of professional lobbyists or any citizen who engages in lobbying. Further, sections 3(3) and 3(4) highlight the expectation that public officials perform their duty in 'good faith' and with 'impartially'. As such, the BA 2010 covers public officials and thereby

[3] Stuart P Green, 'What's Wrong With Bribery' in R.A. Duff and Stuart Green (eds), *Defining Crimes: Essays on The Special Part of the Criminal Law* (Oxford University Press 2005) 151.
[4] ibid; Jeremy Horder, 'Bribery as a Form of Criminal Wrongdoing' [2011] 127 Law Quarterly Review 37, 42–43.
[5] There were several laws prior to the BA 2010 on bribery. For an excellent overview of the development of those laws, from the Victorian period to the present day, see, David Hine and Gillian Peele, *The Regulation of Standards in British Public Life: Doing the Right Thing?* (Manchester University Press 2016) Ch 2.
[6] Peter Alldridge, 'Reforming bribery: Law Commission Consultation Paper 185: (1) Bribery Reform and the Law - Again' [2008] Criminal Law Review 671, 678.

covers the lobbying of decision-makers in Parliament and the Government. Sections 1, 2 and 7 of the Act detail where lobbying may breach the Act.

Section 1 covers bribing another person, making it an offence for a person ('P') to offer, promise or give a financial or other advantage to another person in two cases. First, where P intends the advantage to bring about the improper performance by another person of a 'relevant function' or 'activity', or to reward such improper performance.[7] Second, where P knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes improper performance of a relevant function.[8] 'Improper performance' means performance which amounts to a breach of an expectation that 'a person will act in good faith, impartially, or in accordance with a position of trust'.[9]

The test for deciding whether a function or activity constitutes improper performance is what a reasonable person would expect in relation to the performance of the function or activity.[10] For example, if a person offers 'a sum of money to a Member of Parliament, knowing or believing that acceptance of the offer would mean that a reasonable person in the UK would consider that MP to have breached the expectation placed in him by the public by virtue of being in a position of trust, then [that person] will have committed an offence'.[11] Therefore, section 1 covers bribery from the perspective of a lobbyist offering a bribe. Section 2 covers bribery from the standpoint of the official receiving a bribe.

Under Section 2(1), an offence is committed where P requests, agrees to receive or accepts a financial or other advantage with the intention of performing a relevant activity improperly. The improper performance may be conducted by someone other than the person receiving an advantage, and a request can be made through a third party. The advantage should be accepted or requested in anticipation of, or as a reward for, the improper performance and it does not matter whether the person giving the advantage knows or believes that the

[7] Ministry of Justice, *The Bribery Act 2010: Guidance* (MOJ, 2011) 10.
[8] ibid.
[9] ibid.
[10] ibid.
[11] David Aaronberg and Nichola Higgins, 'Legislative Comment: The Bribery Act 2010: All Bark and No Bite...?' [2010] Archbold Review 6, 7.

performance is improper. Therefore, section 2 covers the conduct of an official receiving a bribe.

Further, there are provisions regarding bribery by corporations which are relevant to companies offering lobbying services or companies which have in-house lobbyists. Section 7 creates a corporate liability offence for commercial organisations which fail to prevent bribery. An offence is committed under section 7(1) where a person working for a commercial organisation bribes another person to obtain or retain business or an advantage for the company. There is a defence available to organisations who can prove they have in place adequate procedures for preventing bribery (these are called proportionate procedures, top-level commitment, risk assessment, due diligence, communication, training and monitoring and review).

Those working as lobbyists in a corporate capacity may thus breach the BA 2010 where they—on behalf of their company or organisation—provide gifts, charitable and political donations, demands for facilitation payments or hospitality and promotional expenditure.[12] Whilst hospitality is not prohibited by the BA 2010 prosecutors may investigate if it is thought that hospitality is provided to bribe someone. In determining a potential breach, prosecutors will look at the level of hospitality offered, the way in which it was provided and the level of influence the person receiving it has on the business decision in question.[13] Whilst the guidance to the Act indicates that hospitality can be 'employed as bribes',[14] it concedes that hospitality is 'very unlikely to engage the Act' under section 7.[15]

Most likely, a prosecution will not be sought where a company creates a document that will 'pass muster' that it has in place the adequate procedures noted above.[16] In practice, corporate hospitality is more likely a concern about institutional corruption or political inequality (covered in Chapter 5) rather than individual corruption. It is, nevertheless, possible for hospitality to satisfy the

[12] Ministry of Justice, *The Bribery Act 2010: Guidance* (n 7) 22.
[13] Ministry of Justice, *The Bribery Act 2010: Quick start guide* (MOJ, 2010) 7.
[14] Justice, *The Bribery Act 2010: Guidance* (n 7) 12.
[15] Justice, *The Bribery Act 2010: Quick start guide* (n 13) 7.
[16] David Aaronberg and Nichola Higgins, 'All Hail the Bribery Act - The Toothless Wonder!' [2011] 6 Archbold Review 1, 5.

elements of individual corruption and is, for that reason, considered here. The BA 2010 thus legislates for conduct which covers the work of public officials and those who attempt to influence them.

Ultimately, bribery is rare and the threshold for proving it is high. Only a very serious and obvious breach is likely to be prosecuted. Further, section 7 is unlikely to be engaged for corporate hospitality. Nevertheless, lobbying may fall within the elements of the BA 2010 either where a person, in their capacity as a public official, accepts a benefit in return for a political favour or where the lobbyist offers a benefit. In such circumstances, the public official is receiving a personal benefit which does not serve any institutional purpose and is wholly for the benefit of the individual. Bribery through lobbying is, therefore, prohibited and is one method by which office-holders can become diverted from their purpose of acting in the public interest.

The prohibition of bribery has also long been established by codes of conduct and resolutions of Government and Parliament. For resolutions, as long ago as 1695, the House of Commons resolved that: 'The Offer of any Money, or other Advantage, to any Member of Parliament, for the promoting of any Matter whatsoever, depending, or to be transacted, in Parliament, is a high Crime and Misdemeanour, and tends to the Subversion of the Constitution'.[17] The Resolution is thus concerned with the corrupt influence of money through bribery. It is also specifically concerned with bribery in the lobbying context as evidenced by the Resolution being encapsulated within the House of Commons Code of Conduct within the 'Lobbying for Reward or Consideration' section.[18]

There were further resolutions in subsequent years. In 1858, the House resolved that: 'It is contrary to the usage and derogatory to the dignity of this House, that any of its Members should bring forward, promote or advocate, in this House, any proceeding or measure in which he may have acted or been concerned for or in consideration of any pecuniary fee or reward'.[19] Another

[17] Resolution of 2 May 1695: Against offering Bribes to Members, see House of House of Commons, *The Code of Conduct together with The Guide to the Rules Relating to the Conduct of Members* (HC 2015, 1076) 51.
[18] ibid. Furthermore, the Resolution makes clear the specific concern of the bribe causing a 'subversion of the constitution'.
[19] ibid 52, Resolution of 22 June 1858, Reward to Members.

Resolution arose in 1947 when an MP, WJ Brown, agreed to be the 'Parliamentary General Secretary' for a Civil Service union. Following this, the House resolved that:

> No Member of the House shall, in consideration of any remuneration, fee, payment, reward or benefit in kind, direct or indirect, which the Member or any member of his or her family has received, is receiving, or expects to receive—
>
> > (i) advocate or initiate any cause or matter on behalf or any outside body or individual,
> >
> > or
> >
> > (ii) urge any other Member of either House of Parliament, including Ministers, to do so,
>
> by means of any speech, Question, Motion, introduction of a Bill or amendment to a Motion or Bill, or any approach, whether oral or in writing, to Ministers or servants of the Crown.[20]

The resolutions demonstrate that Parliament has consistently maintained that bribery in the lobbying context to be criminal. Indeed, each resolution was passed in response to a specific scandal. For example, the Resolution of 1695 was passed following a bribe to the Speaker by the City of London in connection with the passage of a bill.[21] Therefore, individuals accepting personal benefits in such circumstances are acting corruptly. Further, the codes of conduct for MPs and Lords also prohibit bribery as does the Ministerial Code. The House of Commons Code states that:

> The acceptance by a Member of a bribe to influence his or her conduct as a Member, including any fee, compensation or reward in connection with the promotion of, or opposition to, any Bill, Motion, or other matter

[20] ibid 52, Resolution of 15 July 1947, amended on 6 November 1995 and 14 May 2002: Conduct of Members.
[21] David Judge, *Representation: Theory and Practice in Britain* (Routledge 1999) 104.

> submitted, or intended to be submitted to the House, or to any Committee of the House, is contrary to the law of Parliament.[22]

Furthermore, under section 173(1)(b) Representation of the People Act 1983, a person convicted of a corrupt or illegal practice shall vacate their office if they are already elected to a seat in the Commons. The House of Lords Code states that Members:

> Must not seek to profit from membership of the House by accepting or agreeing to accept payment or other incentive or reward in return for providing parliamentary advice or services.[23]

The Ministerial Code states that:

> It is a well established and recognised rule that no Minister should accept gifts, hospitality or services from anyone which would, or might appear to, place him or her under an obligation.[24]

Whilst the rules consistently prohibit bribery, they are limited in their focus on the receiver of the bribe; the public official. Therefore, a drawback of the resolutions and codes for the diversion framework is their narrow focus on the receiver of the bribe (the decision-maker) and omission of the briber (the lobbyist). Nevertheless, the BA 2010 provides adequate coverage for both.

1.2 Element Two: Impermissible Donations

Another form of individual corruption relevant to lobbying arises in the context of permissible donations under electoral law. Donations are relevant because they can be used by lobbyists to influence politicians.[25] Section 54 Political Parties, Elections and Referendums Act (PPERA) 2000 defines what are permissible donations to political parties in the UK. Section 61 covers offences concerned with the evasion of restrictions on donations. A person commits an offence where they knowingly enter into, or knowingly do, any act which facilitates (whether by

[22] House of Commons, *The Code of Conduct* (n 17) 5.
[23] House of Lords, *Code of Conduct for Members of the House of Lords* (HL 2015, HL Paper 3) 4.
[24] Cabinet Office, *Ministerial Code* (Ministerial Code, 2015) 17.
[25] The issue arose recently in *Cruddas v Calvert* [2015] EWCA Civ 171, [2015] EMLR 16.

means of any concealment or disguise or otherwise), the making of donations to a political party by any person other than a permissible donor. In this regard, the Act covers dishonest and corrupt conduct which may arise in the context of donations being used to lobby. Lobbyists giving impermissible donations to influence would, therefore, be covered by this element in the diversion framework.

1.3 Element Three: Lobbying Whilst Unregistered

This offence affects a narrow range of individuals under the TLA 2014. Under section 12(1), a person cannot carry out a business of consultant lobbying without being registered on the lobbying register. Under section 12(2), a consultant lobbyist also cannot lobby where their return on the register is inaccurate or incomplete. It is an offence for failing to submit information when requested under section 12(3), or for supplying inaccurate information under section 12(4). The sanction is a summary conviction or a fine under section 12(7). Whilst these offences are strictly not 'corruption' offences; it is unlikely that a summary conviction will be imposed unless there is clearly dishonest and evasive conduct which pertains to the corruption of the individual in their professional capacity. Therefore, these offences are included under 'individual corruption' in the diversion framework.

1.4 Element Four: Conflicts of Interest

Conflict of interest rules are relevant because they pertain not only to individually corrupt personal benefits but also to the undermining of independence (which is relevant to testing whether integrity has been undermined). Where conflict of interest rules are contravened, independence most likely has been too which will result in a diversion

The House of Commons Code states that MPs shall 'avoid conflict between personal interest[s] and the public interest and resolve any conflict between the two, at once, in favour of the public interest'.[26] Members are also

[26] House of Commons, *The Code of Conduct* (n 17) Rule V, Provision 10.

required to declare their interests in the Register of Members' Financial Interests.[27] MPs cannot enter into contractual arrangements which fetter their 'complete independence in Parliament'.[28] This rule extends to lobbyists: 'nor may an outside body (or person) use any contractual arrangement with [an MP] as an instrument by which it controls, or seeks to control, his or her conduct in Parliament, or to punish that Member for any parliamentary action'.[29] The Code states that:

> The rules on lobbying are intended to avoid the perception that outside individuals or organisations may reward Members, through payment or in other ways, in the expectation that their actions in the House will benefit that outside individual or organisation, even if they do not fall within the strict definition of paid advocacy.[30]

The House of Lords Code contains the same statement on conflicts of interest as in the Commons.[31] Further, Members of the Lords have a range of outside interests which are encouraged in the Code for the expertise that members bring from their experience. This includes directorships of companies, public bodies or even trade unions.[32] However, this must be considered alongside the following rule:

> The prohibition on accepting payment in return for parliamentary services means that Members may not, in return for payment or other incentive or reward, assist outside organisations or persons in influencing Members of either House, ministers or officials. This includes seeking by means of participation in proceedings of the House to confer exclusive benefit upon the organisation (the "no paid advocacy rule"); or making use of their position to lobby, or to help others to lobby, Members of either House, ministers or officials, by whatever means. A Member may never provide parliamentary services in return for payment or other

[27] ibid Rule V, Provision 13.
[28] ibid Ch 3, para 3.
[29] ibid.
[30] ibid Ch 3, para 4.
[31] House of Lords, *Code of Conduct* (n 23) Rule 7.
[32] ibid Rule 18.

> incentive or reward (regardless of whether the Member intends to register and declare the interest).[33]

For ministers, the Ministerial Code states that 'Ministers must ensure that no conflict arises, or could reasonably be perceived to arise, between their public duties and their private interest, financial or otherwise'.[34] Further, upon leaving office, ministers are 'prohibited from lobbying Government for two years'.[35] That rule is justified to avoid suspicion that they 'might be influenced by the hope or expectation of future employment with a particular firm or organisation' or that 'an employer could make improper use of official information to which a former Minister has had access to'.[36]

Thus, there are conflict of interest rules applying to MPs, peers and ministers which deal with lobbying not strictly confined to bribery. Nevertheless, they pertain to the independence of the office-holder and are, therefore, elements which can be used to identify individual corruption under Part 1 of the framework.

1.5 Summary: Individual Corruption and Institutional Diversion

In summary, the first concern about lobbying falling within the institutional diversion framework is individual corruption of which there are four elements. Namely, bribery, impermissible donations, lobbying whilst being unregistered and conflicts of interest. The specific provisions of those elements are accounted for by statute, codes and resolutions and can be used to identify individual corruption. For example, one would apply the provisions of the BA 2010 to identify a concern about bribery or the rules on conflicts of interest to identify those concerns. It is only necessary to establish one of the four elements of individual corruption before moving to the test in Part 2 of the framework (developed at the end of this chapter). The next section examines the elements of institutional corruption.

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[33] ibid Rule 22.
[34] Cabinet Office (n 24) Rule 7.1.
[35] ibid Rule 7.25.
[36] ibid Annex B, Rule 1(a) & (b).

2. The Elements of 'Institutional Corruption'

In this section, Thompson's theory of institutional corruption[37] is examined alongside Lessig's theory of dependence corruption.[38] Their theories are helpful for identifying concerns about insidious forms of lobbying. Indeed, institutional corruption theory moves beyond blatant bribery scandals to consider 'the shadowy world of implicit understandings, ambiguous favors, and political advantage'.[39] Lord Scott described this type of 'insidious' conduct in the House of Lords[40] case of *Magill*:[41]

> [T]his is a case about political corruption. The corruption was not money corruption. No one took a bribe. No one sought or received money for political favours. But there are other forms of corruption, often less easily detectable and therefore more insidious. Gerrymandering, the manipulation of constituency boundaries for party political advantage, is a clear form of political corruption. So, too, would be any misuse of municipal powers, intended, for use in the general public interest but used instead for party political advantage […] Political corruption if left unchecked, engenders cynicism about elections, about politicians and their motives and damages the reputation of democratic government.[42]

In the following sections, the theories of Thompson and Lessig are analysed, adapted and merged into a coexistent theory of 'institutional/dependence corruption' consisting of three elements (all of which are necessary when applied) for Part 1 of the diversion framework. Below, the three elements are detailed. The first two are uncontroversial. However, both academics offer a different third element to which significant changes are made in this chapter. Thompson's third element is too contingent and complicated. It is too contingent because there are many steps involved and is too complicated because he uses terminology that is overly complex and unnecessary. Lessig's third element is insufficient because his

[37] Thompson, *Ethics in Congress* (n 1).
[38] Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress - and a Plan to Stop It* (Twelve 2011).
[39] Thompson, *Ethics in Congress* (n 1) 7.
[40] Now the Supreme Court of the UK.
[41] *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357.
[42] ibid 503, para 132.

description of a 'dependency' does not account for many concerns about institutional corruption.

2.1 Element One: A Political Benefit to an Official

The first element is understood by considering the distinction between individual corruption and institutional corruption.[43] As noted above, for individual corruption, a public official taking a bribe in return for a political favour is receiving a *personal benefit* which is not part of the official's job description. The exchange (and whatever influence it may have) does not serve any institutional purpose and is, therefore, individual corruption. For institutional corruption, the focus is on *political benefits* rather than personal benefits. Where an official accepts, for example, a donation; this is a political benefit.[44] The rationale for this element is explained by Thompson who argues that:

> When the pursuit of political gain undermines the very process the money is supposed to support, politicians not only fail to do their job, they disgrace it. They betray the public trust in a more insidious way than when they use their office for personal gain, which is after all incidental to their role. When they pursue political gain improperly, they betray their duty while doing it.[45]

It should be emphasised that when Thompson speaks of 'improper' gain, he describes gains which 'betray the public trust' rather than gains that are illegal. Thus, there is a distinction between individual corruption and institutional

[43] Thompson emphasises that underlying both individual and institutional corruption is the use of a public office for private purposes. He states that the agents of institutional corruption are 'greedy individuals, grasping factions, and private corporations and organizations that seek to control collective authority for their own exclusive purposes. The essence of corruption in this conception is the pollution of the public by the private interest'. However, that approach is not necessary for the diversion framework because one can identify a corruption without reference to 'private interests'. Indeed, Lessig notes that the independence of an institution can be diverted whether or not that diversion is caused by private interests. See Dennis F Thompson, 'Two Concepts of Corruption: Making Campaigns Safe for Democracy' (2005) 73 Geo Wash L Rev 1036, 1038; Lessig, *Republic, Lost* (n 38) 338, fn 5.
[44] Dennis F Thompson, 'Two Concepts of Corruption' [2013] Edmond J Safra Working Papers, No 16 1 (Edmond paper) 7.
[45] ibid 10.

corruption. Whether public officials 'disgrace' their job would depend on the conduct as not all political gain is improper (considered below).

2.2 Element Two: A Systematic Service to a Lobbyist

The second element is that there must be a service provided by the public official to the lobbyist. Further, the service offered must be systematic: there is a 'persistent pattern of relationships, rather than in episodic or one-time interaction' whether it is the same relationship ongoing or a pattern of behaviour by the same official with different recipients.[46] Thompson argues that the systematic nature of the service makes institutional corruption so destructive compared with individual conduct which can be rooted out and removed:

> When the service is provided in a continuing relationship or regular practice, especially when the recipient itself is an institution, habits and routines are established, expectations generated, and a culture of influence developed. This makes it much harder to stop the corruption, or even to see the practices as corrupt. When the recipients are organized as lobbyists (or more generally when they are financially dependent on powerful economic interests in society), the corruption becomes embedded in the routines of government.[47]

Thus, where a public official, on one occasion, offers their services to a lobbyist, this would not fall within institutional corruption. Conversely, where there are exchanges between the public official with the same lobbyist time and again, this is systematic and thus institutionally corrupt (if the other elements are also satisfied). Equally, the exchange may not be with the same lobbyist; a systematic service also arises where there is a pattern of behaviour with different people.

2.3 Element Three: An Improper Exchange

Significant changes are made to the content and structure of the third element articulated by Thompson and Lessig. The logic underpinning the changes is detailed below. However, it is helpful to state the adapted form of the element

[46] ibid 11.
[47] ibid.

here. Namely, the benefit to the public official (element one) and the systematic service given to a lobbyist (element two) is collectively called an 'exchange'. For the third element, that 'exchange' must be 'improper'. To identify impropriety, one applies the elements of individual corruption (outlined above) or political equality (detailed in Chapter 5). Applying these establishes the reason for the impropriety and that there has been an institutional corruption. In this manner, there is much crossover between institutional corruption, individual corruption and political equality.

2.3.1 Thompson's Approach

Thompson's articulation of the third element of institutional corruption is needlessly complex. He argues that there must be an improper connection between the benefit obtained and the service given. The improper connection must 'manifest a tendency that disregards the democratic process'.[48] Satisfying this element is made overly complex due to the additional sub-elements he introduces which makes his theory too contingent and too complicated.[49] First, one is required to establish a 'tendency':

> We have to show only that the official accepted the benefit and provided the service under institutional conditions that tend to cause such services to be provided in exchange for benefits, or give rise to a reasonable belief that such an exchange has taken place.[50]

One example of a 'tendency' that can damage the democratic process is that of access provided to lobbyists: 'When [officials] travel with lobbyists, providing easy and routine access denied to ordinary citizens, they are likely to be participating in institutional corruption'.[51] Second, having established a 'tendency', one is then required to show that the tendency 'disregards' or 'weakens' the democratic process by causing 'damage' to a core process of the institution. Thompson argues

[48] This contrasts with individual corruption where the link between the benefit and service is the motive of the individual.
[49] These stages are not explicitly stated by Thompson but were deciphered by Lessig. See Lawrence Lessig, 'Institutional Corruptions' [2013] Edmond J Safra Working Papers, No 1, 7.
[50] Thompson, 'Two Concepts' (n 44) 12.
[51] ibid. According to Thompson, the task of legal regulation is to 'identify the principles and the accompanying procedures that discourage such tendencies'. He notes that the most general principle is that 'officials should make decisions on the basis of considerations that are relevant to promoting the purposes of the institution'.

that political corruption is a condition in which private interests distort public purposes by influencing government to disregard the democratic process. Where private interests are subjected to the rigors of a robust democratic process, they may earn a legitimate place on the public agenda, and may ultimately be transformed into public purposes. However, if those interests are promoted in ways that bypass or short-circuit the democratic process, they become agents of corruption.[52] The corruption 'occurs not simply because private interests are promoted, but because they are promoted *without due regard* for the rules of a legitimate process'.[53]

> When a legislator accepts a campaign contribution, even while doing a favor for the contributor, the political benefit (and any influence it may have) may or may not be corrupt. It is not corrupt if the practice promotes (or at least does not damage) political competition, citizen representation, or other core processes of the institution. But it is corrupt if it is of a type that tends to undermine such processes (as indicated by the violation of legitimate procedures), and thereby frustrates the primary purposes of the institution.[54]

Third, to measure whether a practice has 'damaged' the democratic process, Thompson refers to three principles of legislative ethics. These principles are independence (deciding on the merits), fairness (playing by the rules), and accountability (sustaining public confidence):[55]

> Together, the principles imply that a connection is more likely to generate institutional corruption the less closely the contribution is connected to the merits of conduct it is intended to influence, the less fairly distributed the services are, and the less accessible the connection is to the public'.[56]

From a regulatory perspective, if the risk of abuse is high then one can justify restricting or prohibiting practices that are otherwise legitimate.[57]

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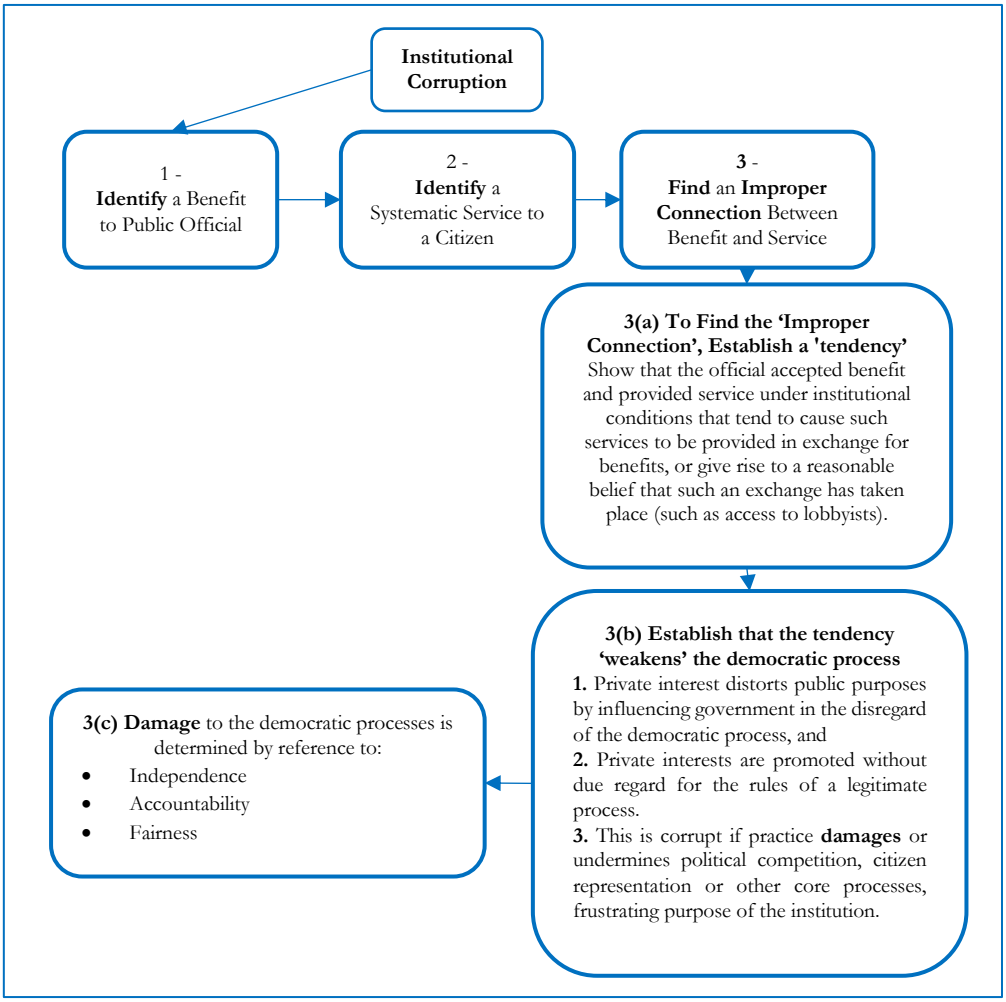
[52] ibid 4.
[53] ibid 6.
[54] ibid 7.
[55] ibid 12.
[56] ibid 13.
[57] ibid 8.

The three stages of Thompson's test are summarised as follows. An institutional corruption arises where a benefit is provided to a public official and the public official provides a service in return which is systematic in nature. There must be an improper connection between the benefit and the service. The improper connection is corrupt in some circumstances but not others, and we can use certain indicators to determine when there is corruption. The complexity of the institutional corruption test is illustrated in Figure 2 below.

Figure 2: An Overview of Institutional Corruption.



Thompson's third element is rich in detail but is too contingent and too complicated for the institutional diversion framework. First, the terminology used in 3(a) (Figure 2 above) unnecessarily restates the elements 1 and 2 of the framework. One must establish a 'tendency' which means that there must be a systematic exchange of a benefit and service. The term 'tendency' makes the

analysis needlessly complicated when one is essentially seeking to highlight that an 'exchange' has taken place. Whilst it is straightforward to test whether an official has accepted a benefit and provided a service, it is harder to decipher when that exchange has 'tended to cause such services to be provided in exchange for benefits, or give rise to a reasonable belief that such an exchange has taken place'. The language is unclear which requires further enunciation of what a 'tendency' means.

Matters become more complex in sub-element 3(b) which has three sub-elements itself. It must be established that the 'tendency' or 'exchange' *weakens* the democratic process. First, the private interest must 'distort' public purposes. Second, private interests must be promoted without due regard for the rules. Third, the elements 3(b)(1) and 3(b)(2) must 'corrupt' the institution. They are corrupt in 3(b)(3) if they 'damage' or 'undermine' certain principles. Thus in 3(c), one tests for 'damage' by reference to three principles.

It is submitted that this approach is too contingent and too complex. Establishing a 'tendency', 'distortion', 'weakening', 'damage' and 'corruption' is unnecessary. This problem is highlighted by Lessig who, like Thompson, focuses on the corruption of the US Congress from an institutional perspective.[58] Lessig notes that whilst Thompson provides a 'perfect description of how money can corrupt in politics' the problem is that:

> Political competition, citizen representation or other core processes are very hard ideas to define in a very compelling and clear way. Each evoke tones of debate about what is proper political competition, citizen representation or other core processes. My challenge was to ask how do we get a conception that fits perfectly within this frame but is actually easier to grapple with and understand, to see precisely what the problem is?[59]

[58] Lessig, *Republic, Lost* (n 38).
[59] Lawrence Lessig, *What is Institutional Corruption?: Lessig in the Dock (Video Interview)* (Edmond J. Safra Center for Ethics 2015).

2.3.2 Lessig's Approach

To that end, Lessig develops 'dependence corruption' which he considers as an instance of the corruption of citizen representation. Lessig's theory broadly aligns with the first and second elements of institutional corruption given by Thompson. However, Lessig's approach is also not followed for two reasons. First, he introduces an additional element of 'establishing an intended dependency' of the institution which is illogical within the diversion framework. Second, he offers a different third element that is insufficient for identifying institutional corruption concerns in the lobbying context. It should be emphasised at the outset that Lessig's approach is less concerned with dependencies that exist because of the internal constitutional structure of political parties and more concerned with external dependencies. Thus, as will be seen in Lessig's example below, a political party with a close union membership is unlikely to result in a 'dependence corruption' because the party is ultimately dependent upon the 'people' broadly conceived. Anyone can join a union and influence the policies of the party whereas most are precluded from joining professional business associations that lobby political parties.

Thus, to achieve a less contingent understanding of institutional corruption, Lessig focuses on the concept of 'independence' querying whether there is a better 'frame' for examining if certain acts are corrupting or not.[60] He reformulates the idea of independence to that of an institution with the proper dependence. He states that:

> I want to see if in at least some contexts, we can make this problem simpler than Thompson sees it. Simple, as in less contingent. Institutional corruption certainly is, as Thompson defines it, about tendencies. But can we short-circuit the complex reckoning of "tendencies" to see why at least our Congress, in the context of our tradition, is obviously institutionally corrupt.[61]

[60] Lessig, 'Institutional Corruptions' (n 49) 9.
[61] ibid 4.

For Thompson, 'independence' means that a member should act on reasons relevant to the merits of public policies or reasons relevant to advancing a process that encourages acting on such reasons.[62] Lessig argues that this approach 'feels unsatisfying' when applied to two examples.[63] In the first example, a large union encourages members to vote in general elections for politicians that have achieved at least 90% on the union score card. Further, the politician votes in Parliament in a way to assure that he receives 90% or more on the union's score card.[64]

In the second example, there is a large association of businesses representing a large pool of wealth. The association regularly and reliably directs large donations to the candidate that achieves support of 90% or more on the association's score card. Again, the politician votes in a way to ensure they receive 90% or more on the score card.[65] In both situations, the politicians are receiving a benefit (donations) and are offering a service 'under institutional conditions that tend to cause such services to be provided in exchange for benefits'.[66]

Finally, Lessig focuses on the principle of 'independence' to establish an improper connection between the benefit and the service and thus to determine whether there is a corruption in either scenario. Lessig argues that Thompson's conception of 'independence' (that the institution is independent to the extent that deliberations are on the merits), 'feels unsatisfying when used to guide the adjudication' between his two hypothetical scenarios.[67] He states that:

> In both cases, the tendency of the influence is to tempt a legislator towards tracking the particular interest rather than tracking "the merits." […] the reasonable soul, unable to peer into the deliberative process of an ordinary legislator, would be justified in believing that it was the power that each represented – rather than a fair reading of "the merits" – that was guiding the legislator's behaviour.[68]

[62] Thompson, *Ethics in Congress* (n 1) 20–22.
[63] Lessig, 'Institutional Corruptions' (n 49) 9.
[64] ibid 7.
[65] ibid 8.
[66] ibid.
[67] ibid 9.
[68] ibid.

Therefore, for Lessig, the politician's independence has been compromised not because the politician has voted without assessing what the merits are. Instead, the politician's independence has been compromised because of the power of the union and association. Thus, he seeks to develop another conception of 'independence', called dependence corruption, which he argues better shows when conduct is corrupting or not.[69]

To explain dependence corruption, Lessig uses the allegory of 'Lesterland' (which he likens to the political system in the United States). In Lesterland there are two elections. The first is the 'Lester election' in which only the 'Lesters' can vote (the Lesters are the wealthiest people in Lesterland). Only candidates who do very well in the Lester election can participate in the second general election (because they need to raise enough money to take part in the general election). Lesterland, therefore, has a two-step democratic process because candidates first have to clear the Lester election hurdle before they can clear the general election. Lessig argues that candidates are thus dependent upon the Lesters even though they are also dependent on the 'people'.[70] This situation produces what Lessig calls a 'subtle, understated, perhaps camouflaged bending to keep the Lesters happy. That bending is how this alternative influence manifests itself'.[71] The result is that:

> Over time, no doubt, members get good at speaking in a way that inspires that essential funding. They learn to talk about the issues the funders care about; they spend very little time talking about the issues most Americans care about.[72]

Consequently, 'an institution can be corrupted in the same way individuals within that institution become dependent upon an influence that distracts them from the intended purpose of the institution. The distracting dependency corrupts the institution'.[73] Like Thompson, Lessig explains how a dependency develops over

[69] ibid.
[70] Lawrence Lessig, 'What an Originalist Would Understand "Corruption" to Mean' (2014) 102 Cal L Rev 1, 4.
[71] ibid 3.
[72] ibid 4.
[73] Lessig, *Republic, Lost* (n 38) 15.

time as set patterns of interaction whereby a resistance develops to breaking that pattern (a systematic service). The 'resistance' is a form of reward which is hard if not impossible for some to give up.[74] This does not mean that an individual is 'evil or bad'; their conduct may be accepted or not even considered a problem by others (especially within the institution itself).[75] Lessig notes that this is best understood 'when we think of an institution in which key individuals have become distracted by an improper, or conflicting, dependency'.[76] He provides an example of how dependence corruption might arise:

> Imagine a young democracy, its legislators passionate and eager to serve their new republic. A neighbouring king begins to send the legislators gifts. Wine. Women. Or wealth. Soon the legislators have a life that depends, in part at least, upon those gifts. They develop a sixth sense about how what they do in their work might threaten, or trouble, the foreign king. They avoid such topics. They work instead to keep the foreign king happy, even if that conflicts with the interests of their own people.[77]

Therefore, Lessig's argues that representatives in the US have at least two dependencies which conflict (one on the 'funders' and one on the 'people'). They conflict because there is 'no way to view "the Funders" as either representative of "the People" or aligned with the interests of "the People"'.[78] This view about 'conflict' supposedly complements Thompson's theory because it allows us to understand institutional corruption. It allows one to see that the Framers of the US Constitution were 'also exercised about "independence" […] but understood "independence" to be a function of the proper dependence".[79] This can be understood by an analogy of the judiciary. An independent judiciary is not a judiciary that is free to do as it pleases but is dependent upon the law.[80] Dependence corruption is a type of institutional corruption because it also

[74] ibid 17.
[75] ibid 16.
[76] ibid 17.
[77] ibid 18.
[78] Lessig, 'Institutional Corruptions' (n 49) 13.
[79] ibid. Lessig makes this argument through an analysis of Originalist theory.
[80] ibid.

involves a 'tendency' that evolves within Congress. A conflicting dependency weakens the effect of the intended dependence.[81]

The question is thus where dependence corruption would fit into the institutional corruption framework. Lessig states that dependence corruption would be limited to 'political gain'. If the intended dependence were so intended because it 'tended to promote the institution's interest', then dependence corruption would concern gain that in general tends to promote 'interests of the separate and conflicting dependency'.[82] This has been criticised by Thompson who argues that:

> To determine whether a dependency is improper we usually have to refer to the procedures necessary for the institution to fulfill its purposes. Understanding those procedures and purposes is where the critical work is to be done.[83]

Lessig retorts that this is 'simply not true' because one can see 'instances of "dependence corruption" without knowing anything about the "procedures necessary for the institution to fulfill its purposes"'.[84] Dependence corruption makes things 'much simpler […] although getting to that simple resolution will require a couple more steps' explains Lessig.[85] He argues that dependency does not say anything about the theory of representation that a government should embrace: 'Instead, what a theory of "dependence corruption" says is that regardless of the theory of representation, permitting a separate dependence to evolve corrupts the design that "the People" were to be the exclusive dependence' (as according to the US Constitution).[86] The only finding that one needs to make is that the 'competing dependence is conflicting'. We can measure 'conflict' through the test of 'possibility': 'is it possible for any member of "the People" to also be a Lester? Could anyone, if any so chose?'.[87]

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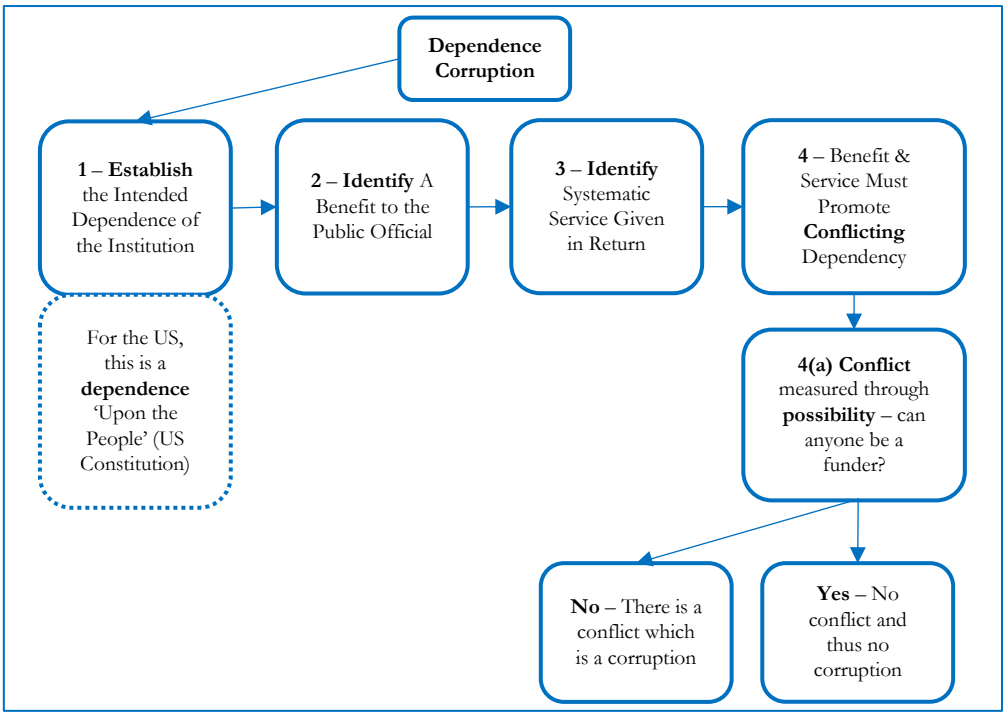
[81] ibid 14.
[82] ibid 14–15.
[83] Thompson, 'Two Concepts of Corruption' (n 44) 7.
[84] Lessig, 'Institutional Corruptions' (n 49) 16.
[85] ibid 17.
[86] ibid.
[87] ibid 17. This conception of 'possibility' is important and will be considered below.

Returning to his example of the association and the union that turn out their members to vote for candidates achieving 90% on the scorecard, he states that the economic reality for most people is that they could not in any sense choose to become a 'Funder'. For unions, the common currency is citizenship because everyone is entitled to join a union and thus the influence of the union cannot be conflicting because its members are made up of 'the People'. Membership of the association, however, is premised on simple currency. Only those with enough money could join the association and influence the candidate.[88] The result is that the association creates a dependency that conflicts with the dependency intended (a dependency upon the people). This conflict is a corruption.[89] Figure 3 below brings together Lessig's theory to illustrate how it is structured.

Figure 3: An Overview of Lessig's Dependence Corruption



Dependence corruption provides a mechanism through which to identify institutional corruption. The core elements of institutional corruption theory—a benefit to the public official and service to the citizen—remain. The difference is that dependence corruption first requires one to establish the intended

[88] ibid 18.
[89] ibid.

dependence of the institution. It also lays down a new test for the final element. Instead of establishing an 'improper connection' and a 'tendency' by reference to several processes and principles which are measured by 'damage'; dependence corruption introduces the test of a conflict measured by 'possibility'. This approach is less contingent than Thompson's but is problematic for three reasons.

First, as noted above, Lessig's conception requires that one must establish an intended dependence of the institution. Enunciating a 'dependence' is not achievable within the institutional diversion framework because an intended dependence of Parliament and the Government cannot be identified from the UK's constitution. One could analyse the history books for the same period from which Lessig determines the purpose of Congress. Historically, in the 1700s, there were concerns that the House of Commons was corrupt because its dependence on the people gradually subsided into an 'utter dependence' on the King and his ministers.[90] The belief was that the House of Commons should be dependent on the people and not the King. However, drawing historical parallels from the UK's experience does not assist with an enunciation of the intended dependence of Parliament today; it is not a concept that has been a part of constitutional thought. It also says nothing about the 'intended dependence' of the House of Lords or the Government. That is probably why Thompson specifically raises concerns about the usefulness of dependence corruption to an analysis of the UK Parliament:

> Members of parliaments in Europe and the U.K. do not depend on campaign contributions in the same way or to the same extent. But although they are not subject to "improper dependency," they may still provide access and other advantages to private interests, and therefore participate in institutional corruption. (This is another reason not to base

[90] UK Parliament, *On Parliamentary Reform* (O Rich 1831, Digitised by the American Quarterly Review 2014) 21; Thomas Curson Hansard and Great Britain Parliament, *Cobbett's Parliamentary history of England: From the Norman conquest, in 1066. To the year, 1803*, vol 19 (William Cobbett ed, TC Hansard 1814, digitised 2010) 347–348; (on 'utter dependence') Jerrilyn Greene Marston, *King and Congress: The Transfer of Political Legitimacy, 1774-1776* (Princeton University Press 2014) 38.

> the analysis of institutional corruption entirely on the idea of dependency).[91]

Thompson overstates the point that MPs do not depend on contributions. Historically, it was well documented that MPs were dependent on a wealthy few. Indeed, in 1760 many MPs had election expenses paid for by a patron to whom the MP became dependent.[92] In this way, a considerable degree of influence was exercised by the patron. MPs were essentially employed to further the interests of patrons.[93] Over time, new forms of patronage arose such as the relationship between MPs and trade unions in the Twentieth Century.[94] Indeed, in modern times, it is trite to note that the Conservative Party depend greatly on donations from business and the Labour Party from trade unions.[95] Although, it should be emphasised that the mere existence of a dependency does not necessarily cause an 'institutional diversion'.

As noted above, if a party is dependent on a particular group, it would not be of concern as long as others are not precluded from the same opportunities to influence. For example, in the context of trade unions and the Labour Party, the unions undertake important functions such as representing collective interests.[96] This is accounted for in statute under the Trade Union and Labour Relations (Consolidation) Act 1992. Unlike companies, unions are not simply seeking to attain 'value for their money'.[97] Instead, they fight for the rights of workers[98] and act as a counterweight to party leaderships seeking to centralise control.[99] In this regard, the following statement by Lessig requires clarification. He notes that 'nothing in the analysis of 'dependence corruption' says that the story couldn't be

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[91] Thompson, 'Two Concepts of Corruption' (n 44) 18.
[92] Samuel H Beer, *Modern British Politics* (2nd edn, Faber and Faber Limited 1969) 23.
[93] ibid 24.
[94] ibid 23.
[95] Jacob Rowbottom, 'Institutional Donations to Political Parties' in K.D. Ewing, Jacob Rowbottom and Joo-Cheong Tham (eds), *The Funding of Political Parties: Where now?* (Routledge 2012) 11 et seq; the parties are also dependent on those sources for reasons beyond donations. See Keith D Ewing, *The Funding of Political Parties in Britain* (CUP 1987) Chs 2–3 & p.177.
[96] Keith D Ewing, 'The Function of Trade Unions' (2005) 34(1) Industrial Law journal 1, 3.
[97] ibid 25.
[98] ibid 5.
[99] Keith D Ewing, 'The Trade Union Question in British Political Funding' in Keith D Ewing, Jacob Rowbottom and Joo-Cheong Tham (eds), *The Funding of Political Parties: Where Now?* (Routledge 2012) 71.

reversed. It is certainly possible to imagine a democracy where 'the Lesters' are 'the Unions".[100] Lessig's contention is true but not where political parties have internalised democratic structures consisting of broad affiliated members that have voting powers and the ability to shape policy.

Nevertheless, whilst the concerns about a dependency are unlikely to be relevant in that context, there may be genuine other concerns about a dependency on external lobbyists. In this regard, there is very little transparency about lobbying activities to determine precisely whether parties are or are not subject to an improper dependency (that is, in part, the purpose of creating this framework; to encourage such an analysis). Therefore, it is important that 'dependence' remains part of the framework because it is relevant to lobbying concerns in the UK.

However, the institutional diversion framework already defines the 'purpose' of the institutions. Appending an 'intended dependence' would, at worse, create an additional purpose for the framework which would overcomplicate it or, at best, slightly reformulate the purpose as already identified in Chapter 3. One could reframe the purpose of 'acting in the public interest' as the need to be 'dependent upon the public to serve their interests' but the term 'dependent' has no constitutional or other foundation as noted above. The 'purpose' of 'acting in the public interest', however, clearly arises from the analysis in Chapter 3. For these reasons, it is not possible, or necessary, to retain Lessig's newly added element of establishing the intended dependence of the institution.

The second point relates to Lessig's analysis of 'power' and 'merits'. In the passages above, Lessig rejects a reading of corruption on the 'merits' because that requires one to determine what the public good is. He notes that 'conceptions of the good are deeply rich and plural' which means that 'political culture gives us no clear guidance about the "public good"'.[101] As a result, he argues that 'all that's left for adjudication is power'.[102] That it is the power of unions or associations

[100] Lessig, 'Institutional Corruptions' (n 49) 19.
[101] ibid 16.
[102] ibid.

which guides a legislator's behaviour rather than a fair reading of the merits.[103] Over time, decision-makers get good at acting in a way that encourages funding. Consequently, the issues which receive the most attention are those which the funders care about as opposed to the majority.[104]

The contention that all one can adjudicate is power, is not true for the institutional diversion framework because a diversion from the 'public good' or 'public interest' can be tested using the criteria of 'integrity' and 'objectivity' (as will be explored later in this chapter and Chapter 5). Further, Lessig's separation of 'merits' and 'power' is an odd distinction to maintain because they are so closely linked. The power of the funder (or lobbyist as is the case in this thesis) is precisely a power that causes the official not to make decisions on their merits. In most cases, the public interest is undermined because someone has leveraged their power (only attainable by a small number of people) to skew the decision-making process in their favour. It would not be contrary to the public interest if unions leveraged their power because anyone can join a union. However, it may be contrary to the public interest if ten wealthy people were able to skew the decision-making process using money because few people would be able to compete financially. In those circumstances, the ability of a decision-maker to make a decision on their 'merits' could be undermined. In this regard, Lessig's dismissal of a fair reading of the 'merits' in favour of 'power' negates from a clearer understanding of the issues. Thompson is correct when he states that 'we usually have to refer to the procedures necessary for the institution to fulfill its purposes'.[105] An analysis of lobbying should not 'shortcut' these important considerations. In this manner, dependence corruption is insufficient for analysing lobbying concerns alone.

The third issue concerns Lessig's sub-element of 'possibility'. The test for 'possibility' is whether 'it is possible for anyone to be a 'Lester' or a 'funder'. If not, then a conflicting dependency arises because the politician is dependent on the 'funder' as opposed to the 'people'. Thus, a 'conflicting dependency' must be measured through the concept of 'possibility'. However, this is problematic

[103] ibid 9.
[104] Lessig, 'What an Originalist' (n 70) 4.
[105] Thompson, 'Two Concepts of Corruption' (n 44) 7.

because other potential consequences arise from a 'dependency' that are not accounted for by 'possibility'. Thus, Thompson criticises Lessig's framework for being unnecessary and insufficient on these grounds:

> Improper dependency does not seem *necessary* because other relationships can give rise to institutional corruption. A politician may not depend on the lobbyists he travels or parties with (they may not even contribute to his campaign), but they get greater access and thereby more opportunities for influence than other citizens.[106]
>
> […]
>
> It does not seem *sufficient* because many instances of improper dependency look very much like familiar individual corruption. A politician may come to depend on receiving a retainer, a special deal on his mortgage or rental housing, or a job for his wife or child. Whether or not he returns the favor, the dependency creates the potential for a quid pro quo exchange.[107]

Thompson rightly highlights that dependence corruption seems to cross over with both individual corruption and political equality issues. For individual corruption, if an official depends on a bribe from a lobbyist to pay his mortgage, the concern is about bribery not 'possibility'. In that scenario, the concern is not that everyone could not possibly have the money to pay such a bribe (because one would be advocating bribery), the concern is about individual corruption which arises because of a dependency. This is recognised by Lessig:

> "Dependence corruption" is not necessarily exclusive to "institutional corruption." The most extreme instances of "dependence corruption" are plainly individual: think of a drug addict, selling his vote for access to illegal narcotics.[108]

For political equality, Lessig's element of 'possibility' crosses over explicitly with a political equality concept. Namely, in Chapter 5, the concept of the 'unequal

[106] ibid.
[107] ibid.
[108] Lessig, 'Institutional Corruptions' (n 49) 14 & 16.

opportunity to influence' which is developed for the 'political equality' part of the diversion framework. Just as many people might not have the *possibility* to be wealthy 'funders' who create a relationship of 'dependency', most do not have the same *opportunities* to create a 'dependency' because they are not wealthy. It will be seen in Chapter 5 that 'opportunity' or 'possibility' is clearly an equality concept which can arise in many contexts; whether dependence corruption or otherwise. That chapter also highlights a second core concept of equality called the 'equality of arms'. A rich account is given of both elements and derivative sub-elements flowing from them. Consequently, only applying 'possibility' would render the framework insufficient as there are other relevant factors that should not be omitted.

Nevertheless, despite crossing over with individual corruption and political equality, dependence corruption can help to identify an institutional corruption characterised as a 'dependence'. This is noted by Lessig: 'that it overlaps individual corruption doesn't mean it can't help us see institutional corruption'.[109] In this regard, it should be remembered that the purpose of the institutional diversion framework is to offer a detailed and holistic understanding of the concerns about lobbying. Since both Thompson and Lessig identify different ways in which an institutional corruption can be identified, both theories are helpful. An either-or approach, particularly when analysing lobbying conduct which is a complex phenomenon, would result in an incomplete analysis.

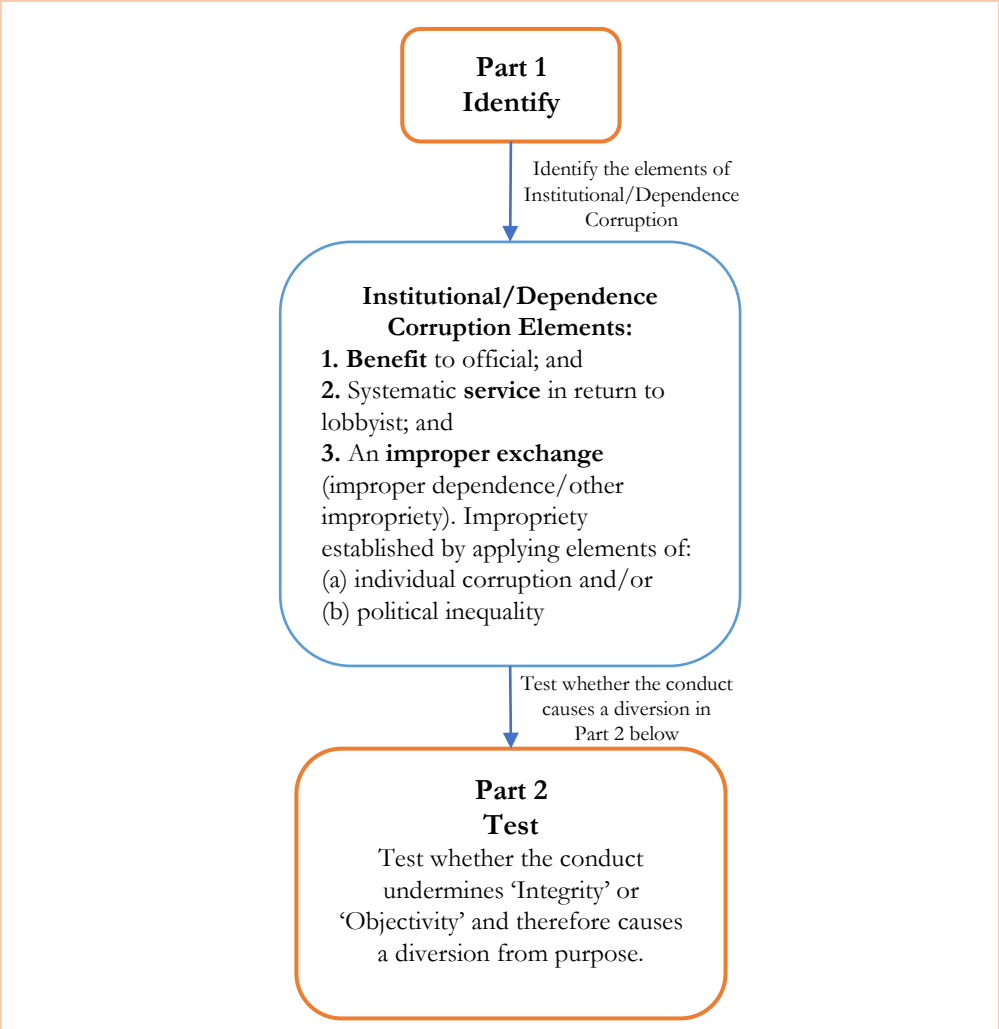
2.3.3 The Approach in this Thesis

Taking into account the analysis above, the third element for identifying institutional/dependence corruption is adapted as follows. Namely, the benefit to the public official (element one) and the systematic service given to a lobbyist (element two) are together called an 'exchange'. For the third element, that 'exchange' must be improper. The exchange will be characterised as one of 'dependency' where relevant to give a more detailed articulation of the concern. To identify why the exchange (whether articulated as a dependency or not) is improper, the elements of 'individual corruption' (identified earlier in this chapter) or 'political equality' (identified in Chapter 5) are applied. In this way, a

[109] ibid 14 & 16.

clear identification of the underlying concern can be undertaken but in a manner that is consistent throughout the framework, and which highlights complex crossovers. Part 2 of the framework can then be used to test whether the institutional/dependence corruption causes the institution to divert from its purpose. Figure 4 below outlines the adapted approach to identifying institutional/dependence corruption. The logic is explained below.

Figure 4: Identifying the Elements of Institutional Corruption in the Diversion Framework



In Figure 4, a less contingent version of the institutional corruption and dependence corruption frameworks is developed for Part 1 of the diversion framework. This is best understood by an example.

Consider a politician who has consciously afforded, on more than one occasion, more assistance to a wealthy lobbyist on a matter of policy than to the public. The lobbyist has a history of donating large sums to the politician's party, and the politician wishes to encourage more donations in the future. The institutional/dependence corruption framework is engaged in the following manner. First, the politician has obtained a benefit (the donation). Second, the politician has provided a systematic service because he has afforded assistance on more than one occasion to the lobbyist. Third, there is potentially an improper exchange for reasons of an improper dependency or some other impropriety.

If the official depends on the benefit, Lessig's dependence approach is engaged. However, instead of following Lessig's test of 'power' (because it is insufficient), 'conflict' (because one is not measuring a conflicting dependency) and 'possibility' (because it is insufficient), one identifies whether the 'dependency' is improper by applying the elements of individual corruption and/or political equality. Satisfying those elements will highlight precisely where the impropriety has arisen. In this regard, a 'dependency' operates to provide greater insight into the concern rather than being a necessary element.

Returning to the example of the lobbyist. Assume that the politician's party needs the lobbyist's donations otherwise the party will have a deficit for its election campaign. A concern about a dependency is identified because the party depends on that money to cover its deficit. Next, one considers the elements of individual corruption and/or political equality to determine if the dependency is improper. In this scenario, the element of 'unequal opportunity to influence' will arise because the donor is being afforded more opportunities to influence (this element will be explored in greater detail in the next chapter). This is a concern where the party depends on the donations of a narrow external interest as opposed to depending on the donations of its membership base.

But what of an 'improper exchange' that is nothing to do with a 'dependency'? The framework in Figure 4 also offers a much simplified and less contingent route than Thompson's theory. Instead of establishing a 'tendency' and asking whether it 'weakens the democratic process' or causes 'damage' etc., again, one simply identifies whether the elements of individual corruption or

political equality apply. If they do, the reason for the impropriety is identified. This approach operates the same way except that 'dependency' is omitted as an issue.

It is, therefore, possible for both theories to coexist within a logical and simplified framework. The new framework satisfies the requirements of both dependence and institutional corruption in a manner that is consistent with the lobbying context in the UK and which avoids conflict between the two theories. It also allows for an encompassing approach to determining when conduct is or is not institutionally corrupt and when that conduct causes a diversion. The next section develops the questions for the criterion of 'integrity' for Part 2 of the framework which is used to test whether a diversion has occurred.

3. 'Integrity' Criterion to Test for a 'Diversion'

In Chapter 3, it was argued that the criteria of 'integrity' and 'objectivity' can be used to test for a diversion from the purpose of acting in the public interest in Part 2 of the framework. Here, questions are developed to test when 'integrity' has been undermined by lobbying thereby causing a diversion. In Chapter 5, questions are developed to test whether 'objectivity' has been undermined. 'Integrity' is defined as follows:

> Holders of public office should not place themselves under any financial or other obligation to lobbyists that might influence them in the performance of their official duties.[110]

Whilst a House of Commons resolution indicates that an 'obligation' might be a 'contractual agreement',[111] it was argued in Chapter 3 that there are cases which could extend beyond contractual agreements. Indeed, institutional/dependence corruption could place an office-holder under an obligation that might influence them in the performance of their duties. The obligation need not be a financial one nor one arising from a bribe—although financial obligations are most likely to be involved. Therefore, to test whether integrity has been undermined, three questions are developed which arise from the analysis above on corruption. The

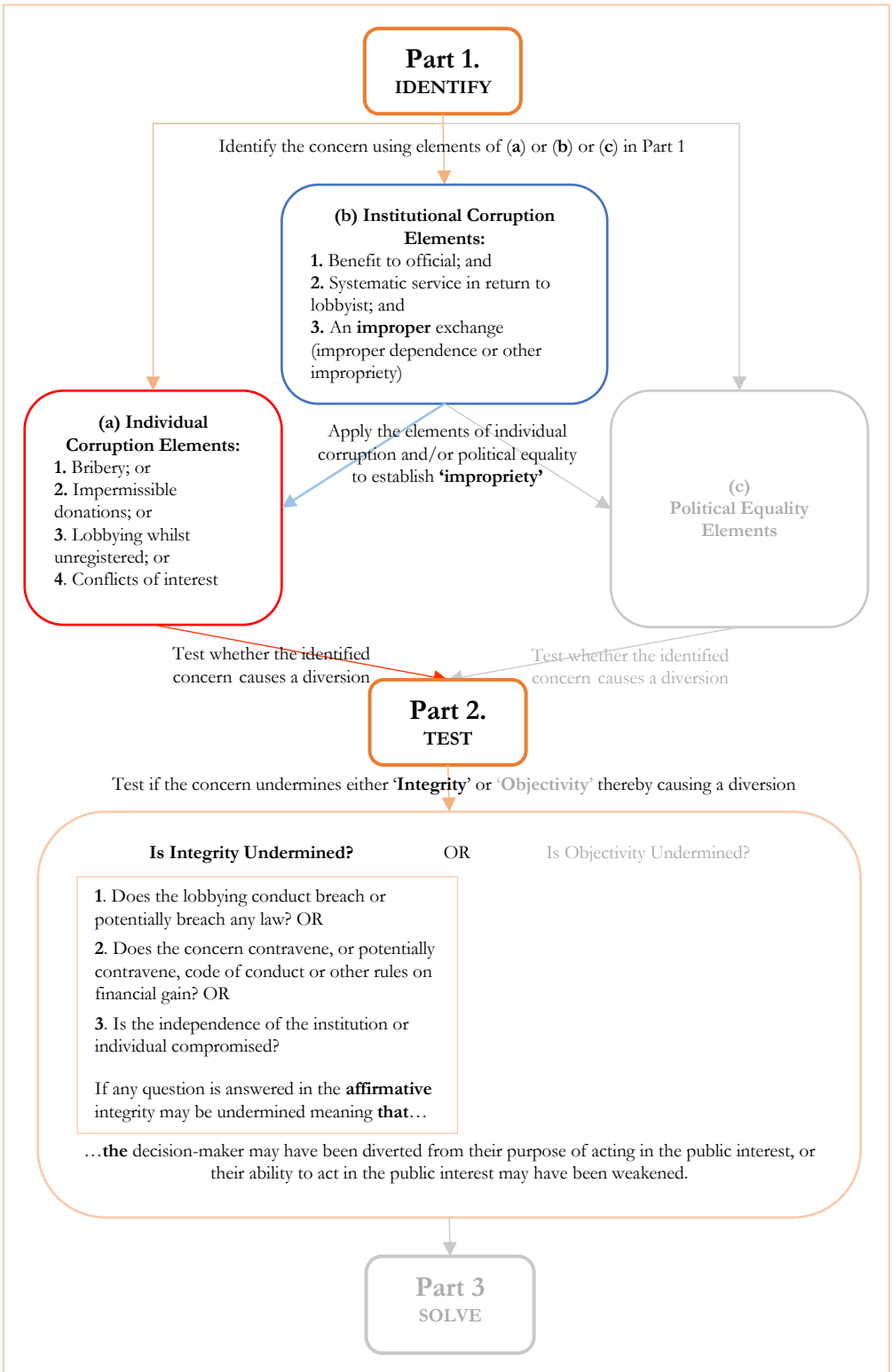
[110] Adapted from the House of Commons, *The Code of Conduct* (n 17) 4.
[111] ibid 52. Resolution of 15 July 1947, amended on 6 November 1995 and 14 May 2002.

three questions can be used to test when integrity has been undermined thereby causing a diversion. Only one question must be answered in the affirmative to establish whether integrity has been undermined.

First, does the lobbying conduct breach or potentially breach any law? If someone is guilty of bribery under the BA 2010 or any law covering corrupt conduct, their integrity is clearly and obviously called into question. Second, does the concern contravene, or potentially contravene, code of conduct or other rules on financial gain? Again, these rules pertain specifically to the integrity of the individual. Third, is the independence of the institution or individual compromised? 'Independence' is relevant because it is recognised as an element of central importance for institutional/dependence corruption by both Thompson and Lessig. The integrity of an individual will be called into question where their independence is compromised. It also arises explicitly from the conflict of interest rules identified under 'individual corruption' and is thus an appropriate question.

If any of the three questions are answered in the affirmative, the integrity of the individual may have been undermined. For example, an official who tables a question in Parliament for their future employer has a conflict of interest which undermines their integrity thereby causing a diversion. Corruption concerns may also undermine objective decision-making because of political inequalities, but different questions are asked to make such determinations in Chapter 5. Therefore, taking into account the analyses in this chapter concerning individual corruption, institutional corruption and the questions regarding integrity; the institutional diversion framework is developed to include those elements in Figure 5 below:

Figure 5: The Institutional Diversion Framework Developed



Conclusion

Thompson's conceptually rich theory of institutional corruption has offered a method to analyse more insidious forms of corruption that are harder to detect and describe. His theory is a cornerstone in this field but is too contingent and unnecessarily complex for an analysis of lobbying in the UK. It also omits the important idea of a 'dependency' which Lessig has powerfully advocated (but which is insufficient on its own). The analysis above reveals that 'institutional diversion' can have the best of both worlds. Both theories can co-exist within a clear and logical structure from which a diversion can be tested. Both theories are needed for the diversion framework because lobbying is a complex phenomenon. Lobbying could be a problem because of an individual who is corrupt, an improper dependency or some other improper exchange that causes a diversion. Only a framework that accounts for such diversity can assist in identifying the underlying concerns with lobbying holistically. Further, the questions for 'integrity' developed for Part 2 of the framework, offer tests to determine when corruption causes a diversion. The questions arise explicitly from the analysis in this chapter. The next chapter establishes the elements of political equality and develops the criterion of 'objectivity'. The framework is applied to examples in Chapter 6.

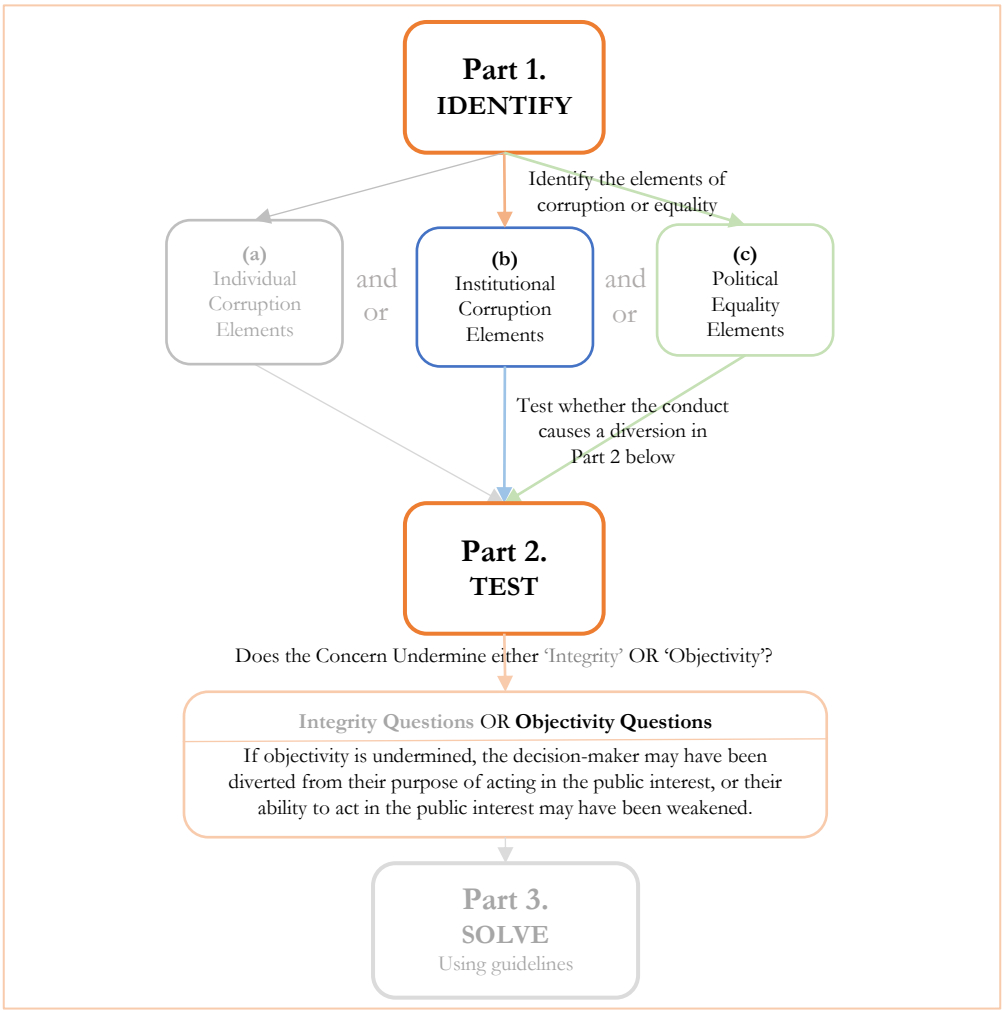
5

Identifying Political Equality Concerns and Testing for a Diversion Using 'Objectivity'

Introduction

In the previous chapter, Part 1 of institutional diversion was developed by establishing the elements for identifying individual corruption and institutional corruption. For Part 2 of the framework, questions were developed to test when the lobbying conduct identified in Part 1 of the framework, undermines 'integrity' causing a diversion. In this chapter, there are two aims. First, the elements for identifying concerns about political equality are developed for Part 1 of the framework. As noted in Chapter 4, there is much crossover between institutional corruption and political equality. That crossover is also analysed more explicitly in this chapter. Second, questions are developed for Part 2 of the framework to test when the criterion of 'objectivity' is undermined by lobbying thereby causing a diversion. The scope of this chapter is highlighted in Figure 1 below.

Figure 1: The Scope of Chapter 5.



Whilst political equality issues have long been prevalent in the context of elections in the UK (such as the fight for universal suffrage or limits on general election expenditure),[1] there has been a lesser focus on political equality and lobbying. The main exception is Rowbottom who applies political equality concepts throughout his book to numerous issues.[2] He pinpoints many of the relevant concepts but does not offer an overarching framework that ties all the concepts together, a method of applying those concepts consistently and a test for establishing when a diversion has occurred (from a political corruption standpoint). Nevertheless, his analysis remains very relevant and will be complemented throughout this chapter with points of crossover highlighted. To develop a coherent structure,

[1] Jacob Rowbottom, 'Political Donations and the Democratic Process: Rationales for Reform' [2002] Public Law 758, 766.
[2] Jacob Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics* (CUP 2010).

this chapter draws on the work of Ringhand as a starting point. She offers a convenient framework on political equality in the British campaign finance context,[3] but it must be adapted for the institutional diversion framework in the lobbying context. There are nuanced differences between political equality concerns in the campaign finance context and the lobbying context. The adaptation will ensure that lobbying concerns can be identified clearly and holistically. The approach of the analysis is detailed below.

1. A Political Equality Framework for Identifying Lobbying Concerns

Ringhand analyses political equality in the British campaign finance debate.[4] She identifies three commonly used concepts of equality in academic and other literature which are 'equality of arms' between political parties, 'equality of influence' between citizens, and 'equality of access in the marketplace of ideas'.[5] She argues that the three concepts are 'rarely independently valuable concepts' and are, instead, valuable to the British campaign finance debate when they are understood as promoting one of four principles that underlie those concepts.[6] The four principles are:

> Political equality requires the state to show equal respect and concern for each of its citizens; that wealth in society should be equitably distributed; that representative democracy should constitute a deliberative search for a greater public good rather than a struggle between self-interested

[3] Lori A Ringhand, 'Concepts of Equality in British Election Financing Reform Proposals' (2002) 22 Oxford Journal of Legal Studies 253; various inequalities are also highlighted by Rowbottom. This crossover will be highlighted where it arises. Rowbottom, *Democracy Distorted* (n 2) Ch 1.
[4] Ringhand (n 3).
[5] ibid 254; Hasen also categories political equality arguments into three categories similar to Ringhand's concepts. However, Hasen's approach is not followed; first, because Ringhand's concepts cover a broader range of equality issues which is pertinent for the lobbying sphere and, second, because her approach is more flexible than Hasen's for an application to the lobbying context. See, Richard L Hasen, 'Is "Dependence Corruption" Distinct from a Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig' (2013) 12(3) Election Law Journal 305, 311–13.
[6] Ringhand (n 3) 253.

> entities; or that democratic self-governance requires public access to the widest possible variety of information.[7]

Ringhand argues that the three concepts of equality are used to advance one or more of those four principles.[8] However, the four principles involve complex questions of democracy and distributional fairness and are thus not uncontroversial. Nevertheless, the campaign finance debate could be enhanced if advocates of reform focus on articulating or defending the four underlying principles as opposed to using vague language about equality.[9]

Ringhand's 'concepts' and 'principles' are helpful for both Parts 1 and 2 of the institutional diversion framework. Specifically, the 'concepts' will be adapted into 'elements' used to identify concerns about lobbying and political equality for Part 1. The 'principles' will be converted into questions which are used in Part 2 to determine whether 'objectivity' has been undermined (thereby causing a diversion). However, before developing those parts, three adaptations to Ringhand's framework are necessary.

First, the analysis below reveals that only two elements of equality are needed to identify lobbying concerns rather than three. The elements are 'equality of arms' and 'equality of influence'. Second, the latter element is renamed to the 'equality of the opportunity to influence' because it will be seen how in the lobbying context, that element pertains to the *opportunity* to influence rather than the relative financial power or influence of a lobbyist which is accounted for by 'equality of arms'. Thus, 'equality of the opportunity to influence' is concerned with the opportunities that lobbyists have to lobby. These two elements cross over a lot. In many cases, the opportunity to influence will be dictated by the financial power of a lobbyist. However, that is not always the case. For example, a former government minister may have greater opportunities to lobby their

[7] ibid 254; the principle of equal respect and concern highlights a Dworkinian view of democracy. See generally, Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2002); see also Jacob Rowbottom, 'Government Speech and Public Opinion: Democracy by the Bootstraps' (2017) 25(1) The Journal of Political Philosophy 22, 29.
[8] Ringhand (n 3) 254.
[9] ibid.

former colleagues which has little to do with their relative financial wealth as against other lobbyists. As such, these are distinct elements.

Further, it will be seen that Ringhand's third concept (access in the marketplace of ideas), and other concepts which are considered but which are not part of Ringhand's framework (such as participation) are best thought of as sub-elements of which the underlying concerns are 'unequal arms' or 'unequal opportunity to influence'. For example, a person may have fewer opportunities to *access* an MP and *participate* in politics because an MP has granted greater access to a wealthy lobbyist. In such a case, the 'equality of arms' and the 'equality of opportunity to influence' remain the underlying equality issues from which the lack of participation is predicated. Ultimately, it is argued below that there are six sub-elements which flow from the two core elements. They are access to the marketplace of ideas, loudness in the marketplace of ideas, controlling the marketplace of ideas, controlling decision-makers and the political process, the economy of attention and political participation. The sub-elements identify insidious problems that are harder to detect.[10]

Third, the 'principles' noted by Ringhand are adapted below to develop questions to test whether 'objectivity' has been undermined in Part 2 of the framework. In this way, political equality plays a role in defining the standards from which office-holders deviate as Rowbottom recommends.[11] However, in this chapter, one of the principles is omitted: the 'equal distribution of wealth'. The unequal distribution of wealth is the greatest (although not the only) underlying concern about lobbying, but the desire to equalise the distribution of wealth in society is not instructive for the institutional diversion framework. Lobbying regulation will not resolve that problem (if it is indeed a problem) nor will lobbying regulation change the capitalist nature of society (which the concern appears to stem from). This is alluded to by Rowbottom who notes that 'difficulty

[10] None of the six sub-elements are necessary for identifying a concern about political equality. Only one of the core elements ('arms' or 'opportunity') is necessary and the sub-elements merely help to provide a richer account of the underlying issue. Further, Rowbottom highlights five (although, they appear to be three) 'non exhaustive' concepts which arise from wealth inequalities. Although he does not use the same labels, the concepts he highlights are the economy of attention, equality of participation and the marketplace of ideas which cross over with the sub-elements applied in this chapter. Rowbottom, *Democracy Distorted* (n 2) 2–5.
[11] ibid 82.

stems from the tension of a system of government where inequalities are deemed a necessary part of its economic system, but bases the democratic system on political equality'.[12] The goal of reform is, therefore, better targeted towards protecting the decision-making process from inequalities arising from the economic system (which may itself be unfair).[13] Thus, what is more relevant for the framework is an analysis of the inequalities brought about by wealth, rather than the disparity of wealth in society itself. Nevertheless, wealth remains a fundamentally important part of this analysis because it can be used to generate unequal opportunities to influence politicians.[14] As Rowbottom notes:

> Giving greater weight to one set of votes rather than to another offends the individuals' sense of inclusion in the political process. Similarly allowing one wealthy individual to have a greater voice than other participants sends out a signal that one set of individuals are worth more than another group.[15]

In this regard, the share of income is significantly skewed towards the top 1% of people at a time when office-holders have followed policies favoured by the financial industry, and which are usually preceded by a 'torrent' of lobbying.[16] Groups with large incomes can spend significant sums to influence political outcomes,[17] causing decisions of individual legislators to mirror the interests of the wealthy.[18] As a consequence, policies may develop which are more supportive of those concentrated interests than to the wider public.[19] As such, wealth remains the undercurrent that pervades throughout the analysis of political equality and lobbying.[20]

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12 Rowbottom, 'Political Donations' (n 1) 768.
13 ibid.
14 Rowbottom, *Democracy Distorted* (n 2) 31.
15 Rowbottom, 'Political Donations' (n 1) 771.
16 Stewart Lansley, 'Inequality, the Crash and the Ongoing Crisis' (2012) 83(4) The Political Quarterly 754, 756 and 758–59.
17 Wyn Grant, *Pressure Groups, Politics and Democracy in Britain* (2nd edn, Harvester Wheatsheaf 1995) 23.
18 Julian Bernauer, Nathalie Giger and Jan Rosset, 'Mind the Gap: Do Proportional Electoral Systems Foster a More Equal Representation of Women and Men, Poor and Rich?' (2015) 36(1) International Political Science Review 78, 79.
19 Dorie Apollonio, Bruce E Cain and Lee Drutman, 'Access and Lobbying: Looking Beyond the Corruption Paradigm' (2008) 36 Hastings Const LQ 13, 43.
20 For an analysis of wealth and democratic politics see, Rowbottom, *Democracy Distorted* (n 2) Ch 1.

Therefore, the three adaptations of Ringhand's framework are, first, to remove 'access in the marketplace of ideas' as one of the core elements of political equality (although it remains as a sub-element). Second, to rename 'equality of influence' to the 'equality of the opportunity to influence'. Third, to remove the 'equal distribution of wealth' in society as a principle to be promoted (meaning the principle will not be adapted into a question to test for 'objectivity' being undermined for Part 2). Under Part 1, it is only necessary to identify one of the two core elements before moving to the test in Part 2 of the framework. The sub-elements are not necessary but help to provide a richer account of what concern the core elements identify in each scenario (much like 'dependency' does in Chapter 4). The next section develops the elements of political equality used in Part 1: the 'equality of arms' and the 'equality of the opportunity to influence'.

2. The Core Elements of Political Equality

Below, the two elements as detailed in the campaign finance context are analysed and are adapted to identify concerns about lobbying.

2.1 Element One: Equality of Arms

The first element of political equality is the 'equality of arms'. In the campaign finance literature, it means the unequal playing field between the major political parties in terms of their ability to spend money during elections to influence voters.[21] It also means the degree of equality of spending between the major and minor political parties so that minor parties are not excluded from the political process.[22] The concern is that significant differences in spending during elections could give some parties an unfair advantage.[23] In other words—as noted by the CSPL—no party should have an electoral advantage due to their greater wealth over other parties.[24] As Ewing explains, one party may enjoy a much larger financial advantage over others because it is supported by 'the patronage of a few

[21] Ringhand (n 3) 257; Rowbottom, *Democracy Distorted* (n 2) 124–25.
[22] Ringhand (n 3) 257; Andrew Scott, "A Monstrous and Unjustifiable Infringement'?: Political Expression and the Broadcasting Ban on Advocacy Advertising' (2003) 66(2) Modern Law Review 224, 240–41.
[23] Ringhand (n 3) 258.
[24] Committee on Standards in Public Life, *The Funding of Political Parties in the United Kingdom: Volume 1 Report* (CSPL, Cm 4057-I, 1998) 117.

wealthy individuals or institutions' despite other parties having more individual members, supporters and donors.[25] The purpose of regulation is to ensure that significant disparities in spending do not occur; largely through the implementation of spending restrictions.[26] Thus, the central concern of 'equality of arms' in campaign finance is the disparities in wealth between different parties.

Of the principles noted by Ringhand, it is the first principle—that the state should show equal concern for citizens—which regulation seeks to protect. Ringhand argues that equality of arms between political parties is important not because parties should have the right to spend equal amounts of money. Instead, it is about ensuring that 'spending equality between political parties protects the equality of citizens by showing equal respect and concern for their political preferences'.[27] This is echoed by Sunstein who argues that government has a legitimate interest in ensuring that political liberties 'have real value to the people who have them'.[28] That value is undermined where office-holders do not treat citizens with fairness and respect.[29] Therefore, protecting equality of arms means parties should act equally as proxies for citizens during elections,[30] and that there should be an element of democratic fairness regarding equality of spending between parties, or at least the opportunity to spend.[31] It is on this basis that 'equality of arms' supports the principle that the state should show equal concern for citizens.

Equality of arms also supports the principle of self-governance. Citizens will be more exposed to the ideas of different parties if those parties are better able to express their views.[32] Disparities in wealth might compromise expression and, as a result, undermine attempts for democratic self-governance to succeed.

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[25] Keith D Ewing, 'Transparency, accountability and equality: the Political Parties, Elections and Referendums Act 2000' [2001] Public Law 542, 556; for an account of the 'arms race' in the UK, see Keith D Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (Hart Publishing 2007) 5–7 & 27–29.
[26] Ringhand (n 3) 258 & 263.
[27] ibid 265.
[28] Cass R Sunstein, 'Political Equality and Unintended Consequences' (1994) 94 Colum L Rev 1390, 1390.
[29] Paul Heywood, 'Political Corruption: Problems and Perspectives' [1997] Political Studies 417, 421.
[30] Ringhand (n 3) 265.
[31] Labour Party submission to the Committee on Standards in Public Life, *The Funding of Political Parties'* (n 24) Appendix V, 218.
[32] Ringhand (n 3) 271.

Self-governance, therefore, provides another concern which justifies regulation aimed at promoting equality of arms amongst parties.[33]

It is straightforward to adapt equality of arms in the campaign finance context to identify concerns about lobbying under Part 1. Instead of an unequal playing field between political parties regarding their ability to spend money during elections and influence voters; the concern is that of an unequal playing field between those who lobby regarding their ability to spend money influencing officials. There are serious concerns in particular about the disproportionate influence of corporate lobbyists 'whose turnover dwarfs the national income of entire countries, [and who] command a level of financial firepower that it is impossible for any other voice to match in the competition for political viability and persuasion'.[34] Consequently, some argue that the sheer scale and cost of the lobbying industry 'makes a level playing field appear all but impossible'.[35] In practice, this leads to some lobbyists having more opportunities than others to influence because of wealth.

Indeed, there is much consensus in the US literature that money buys access and that lobbyists hope to gain (and maintain) access through donations.[36] Hasen notes how lobbyists with access are in the best position to influence the political process directly. Opportunities for access are gained by using wealth advantages that help to cultivate relationships with public officials or their staff by raising campaign contributions or offering future employment, all of which can contribute to a culture of reciprocity.[37] Such concerns are echoed in the UK where the issue of privileged access was expressed in evidence given to the Public Administration Select Committee (PASC) in its report on lobbying in 2009.[38] Professor Miller stated that there are concerns regarding the 'privileged access of

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[33] ibid.
[34] Dieter Zinnbauer, 'Corrupting the Rules of the Game: From Legitimate Lobbying to Capturing Regulation and Policies' [2009] Transparency International Global Corruption Report 32, 33.
[35] ibid 34. Zinnbauer cites the cost of lobbying in the United States to support this claim rather than the United Kingdom.
[36] Apollonio, Cain and Drutman (n 19) 24; Zephyr Teachout, 'The Anti-Corruption Principle' (2009) 94 Cornell L Rev 341, 392; Dennis F Thompson, 'Two Concepts of Corruption: Making Campaigns Safe for Democracy' (2005) 73 Geo Wash L Rev 1036, 1041; Dennis F Thompson, 'Two Concepts of Corruption' [2013] Edmond J Safra Working Papers, No 16 1, 7.
[37] Richard L Hasen, 'Book Review: Fixing Washington' (2013) 126 Harv L Rev 550, 557.
[38] House of Commons Public Administration Select Committee, *Lobbying: Access and Influence in Whitehall, Volume II, Oral and written evidence* (HC 2008-09, 36-II, 2009) 48 & 58.

lobbyists and vested interests being able to secure privileged access to MPs, civil servants and ministers' which is ultimately a concern about 'there not being a level playing field'.[39] Those with resources and narrow interests have a greater ability to lobby by donating or by hiring lobbyists who have easier access to politicians and can influence legislators to 'tailor' their policies towards their needs.[40] This is harder to achieve for the poor even if they try to organise because they lack the resources and face the barrier of an institution that is potentially biased towards the wealthy.[41]

Underlying this, the main cause is thus wealth inequality but the specific principles promoted remain the same as those articulated by Ringhand. The first principle of 'showing equal concern for the political preferences of citizens' remains pertinent in two aspects. First, professional lobbyists are not acting equally as proxies for citizens because they represent those who hire their services. Second, citizens who are not professional lobbyists cannot represent themselves to the same extent as wealthier professional lobbyists. In contrast to the campaign finance context, the second principle is also arguably relevant in the lobbying context. That principle—on enhancing deliberation in the political process—is supported by Sunstein who argues that regulation should promote political deliberation and reason-giving.[42]

In the lobbying context, competition between different lobbyists with widely varying levels of wealth may squelch deliberation where those with the greatest financial resources have greater influence. This could happen where donations to political parties have the effect of skewing policy decisions in favour of the donor lobbyists.[43] The third principle of self-governance is also relevant because office-holders and citizens may be exposed to fewer ideas. This is a slight variation on the campaign finance analysis where citizens are exposed to fewer ideas from political parties. In the lobbying context, that remains true but with

[39] ibid 16.
[40] Richard L Hasen, 'Lobbying, Rent-Seeking and the Constitution' (2012) 64 Stan L Rev 191, 227.
[41] ibid; Apollonio, Cain and Drutman (n 19) 22.
[42] Sunstein (n 28) 1392.
[43] ibid.

the added consequence of Government and Parliament having less exposure to citizen preferences.

Overall, the concerns about 'equality of arms' are very relevant to the lobbying context and have an even broader application. Of course, that is not to say that all the concerns are founded in the UK context and are subject to a more detailed analysis in Chapter 6. However, they are potential concerns nonetheless and are justifiably part of the political equality framework. Thus, the first element for 'political equality' under Part 1 of the framework is 'equality of arms' which means an unequal playing field between those who lobby regarding their ability to spend money influencing decision-makers.

2.2 Element Two: Equality of the Opportunity to Influence

The second element is created by adapting Ringhand's concept of 'equal influence among citizens'. In the campaign finance context, 'equality of influence' means the disproportionate ability of wealthy citizens to influence political parties by making large donations. Ringhand explains that '[t]he idea, simply put, is that elected officials are influenced by those who give them money and that people with large amounts of money should not be allowed to acquire undue influence just because they can make large political contributions'.[44] This is similar to Dworkin's view that citizens are equal, and the unjust distribution of wealth in society should not equate to an unfair level of influence over the political process.[45]

It has been argued that if everyone had an equal share of resources, wealth would be 'no more of an inappropriate basis of political inequality than political commitment or well-developed leadership skills'.[46] This has led to calls for 'a clear separation of wealth from power' so that people are treated as equals.[47] However, others take a different view, arguing that unequal distribution of wealth is not the main problem.[48] Strauss imagines a system in which citizens have an equal ability

[44] Ringhand (n 3) 264.
[45] ibid; Dworkin (n 7) 194–96.
[46] Ringhand (n 3) 266.
[47] Committee on Standards in Public Life, *The Funding of Political Parties*, Evidence of Martin Linton MP (n 24) 118.
[48] David A Strauss, 'Corruption, Equality, And Campaign Finance Reform' (1994) 94 Colum L Rev 1369, 1372.

to support candidates financially. A contributor could punish or reward candidates directly for the positions they take by making or withholding donations. Politicians would earn campaign donations in correlation to how closely their actions aligned with the preferences of her constituents.[49] His concern is that the corrupting influence of money would persevere in such a scenario because politicians would 'do no more than implement the self-interested preferences of individuals or groups that give them money'.[50] Strauss's aversion to that dynamic is based upon his belief that representatives should exercise independent judgement and act in the broader public interest.[51] Although, it appears that the purpose of independent judgment is different to that of the 'trustee model' explored in Chapter 3. The purpose of exercising independent judgement here is to protect those with a weaker voice when compared to organised interests who have a stronger ability to influence.

The crux of the issue for Ringhand and Strauss is, therefore, different to the unequal distribution of wealth. Their concern is the tendency of officials to vote in accordance with the wishes of self-interested individuals instead of engaging in a deliberative process whereby the 'public good' is ascertained.[52] Even if wealth were equalised, politicians would continue to respond to those who contribute to them or their party which would undermine the deliberative goals of democracy. This concern has also been expressed in the 'pressure group' literature in the UK where it has been argued that pressure groups represent selfish special interests that have little interest in the unified will and common good.[53] In achieving the selfish goal of the group, they attempt to conceal their true purpose behind supposed idealistic objectives, giving the appearance that their goals are aligned with the general public.[54] Ultimately, the influence of these vested interests makes desirable societal change difficult to achieve.[55]

[49] ibid 1373.
[50] Ringhand (n 3) 267; Strauss (n 48) 1378.
[51] Strauss (n 48) 1375–376.
[52] Ringhand (n 3) 267.
[53] Samuel H Beer, *Modern British Politics* (2nd edn, Faber and Faber Limited 1969) 40.
[54] Maurice Duverger, *Party Politics and Pressure Groups: A Comparative Introduction* (Robert Wagoner tr, Nelson 1972) 105.
[55] Grant (n 17) 26.

Despite the concern about self-interested entities, Ringhand accepts that the solutions to unequal influence tend to revert to financial equalisation measures such as limits on the amount that individuals can contribute to political parties.[56] She notes that restricting private contributions may, at best, limit the total sum of money received by political parties from 'blatantly self-interest sources'.[57] The solutions, therefore, target wealth distribution which only partly addresses the specific concern about a lack of deliberation.

Further, Ringhand and Strauss are keen to distinguish between cause and consequence. Unequal influence (brought about by the unequal distribution of wealth) undermines deliberation because politicians will respond to those who donate to them. In the US, there is plenty of anecdotal evidence that legislators tailor policies to the demands of donors.[58] This is often described using different 'distortion' terminology in the US literature; the 'distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas'.[59] This is mainly described as an equality concern in the US[60] but has also found expression in the UK in relation to third parties. For example, Ewing notes that, without limits, third parties can spend high in elections and thus distort the election process by spending more than political parties.[61]

Whilst the analysis above about equality of influence arises from the campaign finance literature; it is mostly a concern about lobbying. The context is campaign finance: someone wealthy is donating money to the election campaign of a party. However, where that is done to influence the political process (which Ringhand is concerned about), that is a lobbying problem and not only a campaign finance matter. Certainly, it is not a lobbying issue if the donation is a mere gift and does not *influence* the political process in any way; but such donations are not a concern because they are not meant to influence. Therefore, the observations of Ringhand, Dworkin and Strauss, technically pertain to a concern

[56] Ringhand (n 3) 264.
[57] ibid 267.
[58] Apollonio, Cain and Drutman (n 19) 22.
[59] As stated in the US Supreme Court in, *Austin v. Michigan Chamber of Commerce* 494 US 652 (1990) 660.
[60] *Citizens United v. Federal Election Commission* 588 US 310 (2010) 381.
[61] Ewing, 'Transparency, accountability' (n 25) 560.

about lobbying. When Dworkin describes the problem of the unequal distribution of wealth allowing some people to donate more money than others and, through that donation, they achieve greater *influence*; he is describing a concern about lobbying. When Strauss and Ringhand opined about the tendency of officials to respond (because of the *influence* of money) to the self-interested groups donating to them as opposed to engaging in deliberations; they described a lobbying concern. Recognising this point allows one to consider the issue more holistically.

Consider influence that is not based on wealth. The concern is not that everyone should have the same level of influence on every issue. Political influence cannot and should not be singularly measured by wealth. As Sunstein notes, 'there is no good reason to allow disparities in wealth to be translated into disparities in political power' whether that is wealth garnering more influence or poverty leading to an absence of influence.[62] Unequal influence arises in different guises which are sometimes encouraged,[63] and lobbyists often rely on information and expertise to influence officials.[64] For example, it is more desirable that doctors have greater influence over policy affecting the duties of doctors than engineers. That policy will have a direct impact on the work of doctors who will be best placed to inform and influence the proposed policy. An engineer will likely have no expertise or interest in the policy, and it will be desirable for them to have less influence. This point is captured in evidence given to the PASC from the Chartered Institute of Public Relations (CIPR)—one of the self-regulatory bodies of lobbyists in the UK—who state that:

> It is undoubtedly the case that some organisations have more influence over Parliament and Government than others—and it is inevitable that this should be the case.
>
> (…)
>
> Some organisations are simply far larger—and represent far more important groups—than others. It seems to us to be logical and

[62] Sunstein (n 28) 1390 & 1392.
[63] Ringhand (n 3) 264.
[64] Apollonio, Cain and Drutman (n 19) 21.

> acceptable that the CBI and the TUC should have more influence than, for instance, a small single-issue pressure group.[65]

The CIPR take the point too far. The 'importance' of an organisation should not justify greater influence but those with greater expertise or experience on an issue should. Ringhand argues that unequal influence of this sort adds 'value to our political discourse',[66] and—as Dworkin rightly notes—attempting to equalise such influence 'would require too much sacrifice of official independence and other values'.[67] Reformers are thus not concerned with levelling desirable inequality of influence but instead, inequalities in the *opportunity* to influence which are based on wealth.[68] Those with wealth have the opportunity to develop a 'close nexus' with office-holders giving them a disproportionate ability to influence the political process.[69]

This is distinct from the issue as described in the campaign finance context where wealth may cause a distortion. Indeed, wealth may have caused a 'distortion', but there is a more nuanced point; that such a distortion could not have been achieved without the *opportunity* to influence which arose because of wealth. That disproportionate opportunity to influence based on wealth is the key point.[70] Opportunity could arise because someone wealthy donated a significant amount of money to a party to influence it, or it could arise where someone wealthy hires an expensive lobbyist to lobby politicians. It could arise where a bank uses an in-house team of lobbyists to influence policy. Most could not afford to donate a significant amount to a party, hire a lobbyist or instruct a team of in-house lobbyists; they do not have the wealth to generate those opportunities. Influence of this sort is problematic because wealth dictates the level of opportunity which may itself lead to the distortion. It should be emphasised that it may not only be wealth that is problematic. A former minister with contacts and access because of their previous employment is another manifestation of that unequal opportunity. Nevertheless, wealth inequality is the main concern.

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[65] Evidence of the Chartered Institute of Public Relations to the PASC, *Lobbying: Access and Influence* (n 38) 148.
[66] Ringhand (n 3) 265.
[67] Dworkin (n 7) 199.
[68] Ringhand (n 3) 265.
[69] Zinnbauer (n 34) 34.
[70] Rowbottom, *Democracy Distorted* (n 2) 9, 11 & 24.

The lack of opportunity has consequences for the same principles described by Ringhand. First, the institution may not show equal concern for the preferences of citizens if people do not have the same opportunities to express those concerns. Second, there may be less deliberation because wealthy lobbyists will have greater opportunities to influence the political process. Third, democratic self-governance may be undermined because politicians and the public will have less access to information since not everyone will have the same opportunity to express their views.

Thus, the second element for 'political equality' in Part 1 of the diversion framework is 'equality of the opportunity to influence'. Below, it is argued that there are six sub-elements deriving from the two core elements which can help to provide a rich account of the underlying concerns.

3. Six Sub-Elements of Political Equality

There are six broad concerns about political equality that derive from the two elements analysed above. These concerns can be thought of as 'sub-elements'. However, they do not need to be present to identify a concern about 'equality of arms' or 'equality of the opportunity to influence'. Instead, they offer a more detailed analytical account of the underlying lobbying concern in a given case.

3.1 One: Access to the Marketplace of Ideas

The third concept of equality noted by Ringhand is that of 'equality of access in the marketplace of ideas'.[71] It is argued in this section that the marketplace of ideas does not raise a distinct core concept of equality but highlights different ways in which 'unequal arms' and the 'unequal opportunity to influence' manifest in the lobbying sphere. Specifically, the 'marketplace' can be divided into three sub-elements of the two core concepts which are not necessary to establish but may offer a richer account of the underlying concern.

There is much literature in the US on the 'marketplace' and it is not the purpose of this thesis to venture too far into that literature because the analysis

[71] Ringhand (n 3) 257; see also, Rowbottom, *Democracy Distorted* (n 2) 44 et seq.

would involve extraneous doctrinal analyses of US law not relevant to this thesis.[72] Instead, the 'marketplace' is used simply because it offers a vivid conceptualisation of insidious lobbying concerns articulated by writers in the UK. For Ringhand, the 'marketplace of ideas' is an unregulated market where ideas can freely compete for acceptance from the public and decision-makers.[73] It was alluded to by Cave and Rowell in the following passage when they considered the 'control' of 'the intellectual space in which officials make policy decisions':

> Lobbyists today, though, do far more than seek ear-time with government. Politicians and officials do not make decisions in a vacuum. They are influenced by what the media says, the views of influential others — business leaders, think tanks, commentators — and sometimes public opinion. The game thus played by the influence industry is to control the intellectual space in which officials make policy decisions. They have developed a number of sophisticated techniques to achieve this audacious aim.[74]

It is posited that the 'marketplace of ideas' is the same as the 'intellectual space'. Both are a theoretical space in which ideas compete to influence decision-makers who will be informed by the ideas in that marketplace when making decisions. Conceptually, it is helpful to think of the 'marketplace' in the lobbying context as a market consisting of various 'stalls'. Those stalls include the media, academia, think-tanks, businesses, protestors and unions amongst others. They produce outputs in the form of ideas distributed through various channels such as reports or research. The important distinction between lobbying arising from the market versus other types of lobbying is that the influence is indirect. A professional lobbyist might meet with a politician and attempt to influence them directly. However, in the marketplace, nobody is meeting with a politician directly and no one is directing ideas to specific office-holders. Instead, ideas are distributed freely

[72] It was defined by Justice Over Wendell Holmes of the US Supreme Court in, *Abrams v United States,* 250 US 616 (1919) 630 (Holmes J); on the concept, see generally, Bruce A Ackerman, 'The Marketplace of Ideas' (1981) 90(5) Yale LJ 1131; for an analysis of debates on the marketplace in the US constitutional context see Stanley Ingber, 'The Marketplace of Ideas: A Legitimizing Myth' [1984] Duke LJ 1.
[73] Ringhand (n 3) 267.
[74] Tamasin Cave and Andy Rowell, *A Quiet Word: Lobbying, Crony Capitalism, and Broken Politics in Britain* (The Bodley Head 2014) 17.

and politicians may happen to read them and be influenced by them. In general, 'the ideas that survive or prevail will be those espoused either by the most powerful or the most numerous in society'.[75] The concern in the lobbying context, however, is more complex.

In this regard, Ringhand's articulation of this marketplace requires some development. On the one hand, she describes the equality concern as the need for ideas to have 'roughly equitable substantive exposure *in* the marketplace of ideas'.[76] In this context, speech that becomes too loud, ought to be limited by the state to give even parity to the quieter voices that do not have the resources to express themselves loudly. On the other hand, Ringhand describes a concern about having 'access *to* the marketplace of ideas'.[77] In this respect, the public ought to have access to a variety of ideas to make informed decisions. As such, there is a distinction between lobbyists having access *to* the marketplace and ideas having equal influence (loudness) once they are aired *in* the marketplace.

On access *to* the marketplace, Ringhand is concerned with *decision-makers* needing to have access *to* the marketplace of ideas to make informed decisions. In the lobbying context, one is concerned with the ability of *citizens* to have access to the marketplace of ideas to have the opportunity to circulate their ideas (and thereby lobby indirectly). This is not a distinct core element of equality but a sub-element of 'equality of arms' or 'the opportunity to influence'. It might be argued that anyone can access the marketplace of ideas and so this is a moot point. For example, a large protest group can circulate ideas in the marketplace when protesting, and so there is no issue of access to the marketplace. However, protests or petitions aside, there are other organisations which have many resources, whose output citizens may or may not be able to influence which precludes access and thus the opportunity to influence. Indeed, some ideas will never make it to the marketplace[78] because those organisations have high entry barriers which make them difficult to participate in.[79]

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[75] Jill Gordon, 'John Stuart Mill and the "Marketplace of Ideas"' (1997) 23(2) Social Theory and Practice 235, 240.
[76] Ringhand (n 3) 269.
[77] ibid 270.
[78] Rowbottom, *Democracy Distorted* (n 2) 45.
[79] Grant (n 17) 37.

Consider the example of well-financed think-tanks which produce reports for circulation in the marketplace of ideas. Being able to influence the output of those think-tanks becomes an important factor in one's ability to have access to the marketplace of ideas because think-tanks have so much influence. Some think-tanks are open to outside members. The Bow Group (a Conservative think tank) advertises membership for a fee of £40.[80] The Centre for Policy Studies (a Thatcherite think-tank) advertises membership for £100.[81] Therefore, in some cases, citizens are not precluded from having access to the marketplace. Whilst membership fees are variable; they are palatable for citizens adamant on being able to influence the output of ideas into the marketplace and, as such, have access to it by means other than protests or petitions. However, this is not always the case; some think-tanks do not advertise memberships (such as the Social Market Foundation). Further, it is questionable how much influence members have within those organisations. Much depends on their internal democratic structure and their funding arrangements.[82]

If one considers the media, the issues become even more complex about the extent to which citizens can influence outputs. There are huge variables involved which will either support citizen participation or not and thus determine their ability to access the marketplace of ideas. An individual might influence the media without paying money, influence a think-tank with a £40 membership fee or be entirely precluded from influencing a 'stall' because they are not financially supporting it. As such, equality of arms and the equality of the opportunity to influence have variable relevance in this context.

The main concern is where the opportunity to participate is precluded entirely on the grounds of wealth. There are legitimate reasons why influence may be precluded for other reasons. It is legitimate for a staunch Labour Party member to have little influence over the policy of a Conservative think-tank—the purpose of that think-tank being to advance a Conservative agenda. It is legitimate for a citizen with no expertise in aeronautical engineering to have no influence on

[80] The Bow Group, 'Get Involved: Join' (*The Bow Group*, 6 December 2016) <http://www.bowgroup.org/content/join> accessed 6 December 2016.
[81] Centre for Policy Studies, 'Membership' (*Centre for Policy Studies*, 6 December 2016) <http://www.cps.org.uk/get-involved/membership/> accessed 6 December 2016.
[82] Grant (n 17) 45; See also Rowbottom on the power of media owners who may dictate which ideas gain prominence. Rowbottom, *Democracy Distorted* (n 2) 178–80.

academic research into that subject matter. Equality of access to the marketplace of ideas is relevant to equality where a citizen is precluded from participating in an organisation such as a think-tank only on financial grounds.[83] In that case, the citizen cannot have the opportunity to influence the final output of that think-tank which circulates ideas into the marketplace. As Ringhand notes, the issue is thus one of 'the political rights of citizens as speakers to participate in public political discourse'. [84] This is, therefore, a sub-element of equality of arms and equality of the opportunity to influence because the opportunity (or lack thereof) to access the marketplace is dictated by financial inequalities.

3.2 Two: Loudness in the Marketplace of Ideas

The next issue articulated by Ringhand is that of the relative 'loudness' of ideas once they are circulating *in* the marketplace of ideas. Equality is relevant here in the sense that ideas should have equal airing or circulate equally within the market so that one idea does not have market dominance over another idea.[85] The aim is to protect the interests of listeners in 'having a wide variety of ideas available for public consumption in the marketplace of ideas'.[86] Therefore, the 'loudness' of speech is important because officials need to hear many sides of a debate to make informed decisions,[87] which is a necessary pre-condition for informed self-governance.[88] The underlying assumptions of this idea have been questioned by those who query whether speech can be drowned-out in present times when citizens have access to many forms of social and other media.[89]

In the campaign finance context, 'dominant' speech is dictated by large donations to political parties. Some argue that, in such cases, the state should intervene to restrict 'the overpowering speech to protect the equal speech rights of others'.[90] The target of regulation is usually to implement contribution and

[83] Rowbottom similarly notes how wealth is a concern where is can be used to buy access to the main forums of communication (in the media context). See Rowbottom, *Democracy Distorted* (n 2) 173.
[84] Ringhand (n 3) 257.
[85] ibid 267.
[86] ibid 257.
[87] ibid 269.
[88] ibid; Owen M Fiss, *The Irony of Free Speech* (Harvard University Press 1996) 18.
[89] Ringhand (n 3) 269.
[90] ibid 268; see also Fiss (n 88) 16.

expenditure limits in elections.[91] A recent example of the latter can be seen with spending cap being lowered on third party expenditure in UK general elections in Part 2 of the TLA 2014. The principle promoted being that of equal respect and concern for individuals since the concept is about the equality rights of speakers.

As such, this element is both about the power of money to influence the relative loudness of an idea, and the need to protect listeners from hearing mainly the loudest voices. It is not about the differences in the influence of an idea in a given situation (the equality of influence between ideas) because it is desirable that some ideas carry more influence than others as noted earlier in this chapter. The ideas of doctors produced in a report should have more influence (both directly and indirectly) on policy involving medical practice than a report produced by engineers on the same issue. However, wealth should not preclude an engineer from having a loud voice (which may, in any case, be given less weight because of its lack of influence). Where wealth does preclude participation, then 'loudness in the marketplace of ideas' becomes a relevant sub-element which offers a richer account of the core concepts. The inequality of arms between lobbyists should not preclude good ideas from being heard. Possibilities for unfairness become particularly acute where the marketplace of ideas is itself controlled by lobbyists.

3.3 Three: Controlling the Marketplace of Ideas

In the passage above, quoted from Cave and Rowell's book, they noted how a game is played by lobbyists 'to *control* the intellectual space in which officials make policy decisions'.[92] This concept is also alluded to in the US literature with Issacharoff highlighting that a source of corruption may be significant expenditures '*capturing* the marketplace of ideas'.[93] Gilens and Page call it the 'second face' of power: 'the ability to shape the agenda of issues that policy makers consider'.[94]

[91] Ringhand (n 3) 268.
[92] Cave and Rowell (n 74) 17.
[93] Samuel Issacharoff, 'On Political Corruption' (2010) 124 Harv L Rev 118, 122.
[94] Martin Gilens and Benjamin I Page, 'Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens' (2014) 12(3) Perspectives on Politics 564, 576.

To control the marketplace of ideas, lobbyists attempt to exert influence over as many 'stalls' in the market as possible. Lobbyists who control more stalls will have greater opportunities for indirect influence by exposing officials to one side of an argument, increasing the likelihood that the office-holder will be persuaded by a certain narrative.[95] For example, sophisticated lobbyists might fund the research of think-tanks, academics and influence media stories on an issue.[96] In such circumstances, lobbyists have exercised significant control over the marketplace of ideas without politicians being directly aware of their influence. The official might reasonably believe that they are relying on various and distinct sources of information when making decisions. However, unseen to them, was the significant level of control over the marketplace by lobbyists. The fingerprints of the sophisticated lobbyists could rest on numerous seemingly distinct sources which they have worked hard to infiltrate and influence. This would not be the case where lobbyists use their 'arms' advantage to pay £50,000 and join a political party donor club to meet officials directly. In those circumstances, officials will be very aware of where an idea has come from whereas they will be less aware of a lobbyist's influence arising from their control of the marketplace.

This poses an unseen challenge for the decision-maker who not only has to gather relevant information, but also has to prioritise it, decipher it and understand the implications of implementing policy related to it.[97] A greater diversity of information will assist the official in understanding the complex issues involved and in balancing priorities.[98] However, this might be a challenge too far where the marketplace has been controlled by concentrated powers who might also have manipulated public opinion through the media or stifled debate.[99]

Thus, control of the marketplace highlights an indirect facet of influence as opposed to the obvious direct influence. Lobbyists are not just competing to

[95] Key Lehman Schlozman and John T Tierney, *Organized Interests and American Democracy* (Longman Higher Education 1986) 165.
[96] Rowbottom examples the control of the media to shape public opinion. See, Rowbottom, *Democracy Distorted* (n 2) 4.
[97] Frank R Baumgartner and Bryan D Jones, *The Politics of Information: Problem Definition and the Course of Public Policy in America* (University of Chicago Press 2015) 6–7.
[98] ibid.
[99] Adrian Pabst, 'Is Liberal Democracy Sliding into 'Democratic Despotism'?' [2015] The Political Quarterly 1, 1.

influence politicians directly but are attempting to control stalls within the marketplace which can be used to influence the political process indirectly. The more control they can exercise over the market, the more opportunities that will arise to influence. Achieving control in this context is, therefore, about the principle 'equality of arms' because lobbyists will need many resources to control the marketplace more broadly. 'Equality of the opportunity to influence' is also relevant because more control equates to more opportunity. As such, controlling the marketplace is not a core element of equality but constitutes a sub-element which describes another way in which unequal arms and opportunity can manifest in the lobbying sphere.

For these reasons, loudness within, and control of, the marketplace of ideas promotes the same principles offered by Ringhand. First, politicians cannot show equal respect and concern for each of its citizens where lobbyists have infiltrated the source of information influencing their decisions and can project that information loudly. In that regard, potential solutions might include either giving citizens more control over the marketplace so that they can compete in influencing the political process, or by seeking greater transparency over how the marketplace is controlled thereby ensuring more informed decisions at the political level. Second, where a smaller number of entities control the marketplace, this will undermine the goal of representative democracy in constituting a deliberative search for a greater public good. Instead, the process will constitute a struggle between self-interested groups vying for control and, therefore, influence. Equally, self-interested groups will compete to project their ideas loudest. The concern is not with the battle between political parties that are struggling for the self-interests that they represent. Instead, the concern is with external lobbyists. Some lobbyists will have more resources than others to compete which creates greater opportunities for influence. Third, office-holders and the public will not have access to the widest possible variety of information because the marketplace is potentially controlled by a small number of lobbyists, or because other information is drowned out in the market by the loudness of wealthy lobbyists.

This control of information feeds into other sub-elements not explicitly highlighted in the analysis above; the control of the decision-making process itself and the economy of attention.

3.4 Four: Controlling Decision-Makers and the Political Process

Much has been written in corruption and economics literature about the capture of institutions, office-holders and the decision-making process. By controlling the political system itself, lobbyists can exert much influence (examples of this are explored in Chapter 6). The underlying theory is explained by Kaufmann who notes that

> Where the rules of the game, laws and institutions have been shaped, at least in part, to benefit certain vested interests, some forms of corruption may be *legal* in some countries. […] For instance, soft forms of political funding are legally permitted in some countries, through the creative use of legal loopholes, and may exert enormous influence in shaping institutions and policies benefiting the contributing private interests, and at the expense of the broader public welfare. A similar problem is seen in favouritism in procurement, where […] a transparent and level playing field may be absent, without necessarily involving illegal bribery.[100]

It is not only donations that have this effect but also relationships. Where close relationships are established with decision-makers, mutually beneficial outcomes are sought which may be detrimental to others.[101] Thus, whilst the political process may be captured by bribes, this approach recognises influences that arise without recourse to bribes,[102] and by capturing or controlling the process itself, lobbyists can 'remove public policy from the realm of democratic—i.e. contestable—decision-making'.[103] In this regard, studies of European countries

[100] Daniel Kaufmann, 'Corruption, Governance and Security: Challenges for the Rich Countries and the World' (2004) Chapter 21 in the Global Competitiveness Report, World Bank Institute <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Kaufmann_GCR_101904_B.pdf> accessed 4 November 2014.
[101] ibid; see also Susan Rose-Ackerman, 'Trust, Honesty and Corruption: Reflection on the State-Building Process' (2001) 42 European Journal of Sociology 526, 565–66.
[102] Joel S Hellman, Geraint Jones and Daniel Kaufmann, 'Seize the State Seize the Day: State Capture, Corruption and Influence in Transition' [2000] The World Bank, Policy Research Working Paper 2444.
[103] Kaufmann, 'Corruption, Governance' (n 100).

show that 'captor firms enjoyed clear private advantages in association with aggregate social costs [and that] the impact of inequality on influence [generates] a self-reinforcing dynamic in which institutions are subverted'.[104]

It is hypothesised that the main concerns with lobbying with regard to capture will arise in three cases in the UK (and most likely where there is institutional/dependence corruption). First, where a promise of employment is given to a decision-maker who is exercising their decision-making function.[105] That promise could act as a form of control over their decision-making function on matters of interest to their future employer. Second, where decision-makers are currently (or have been) members of organisations that are seeking to lobby. For example, politicians who act as both regulators and advisers run the risk of being controlled to the extent that they are not exercising their decision-making function properly. Those with long-standing interests in an organisation seeking to lobby may retain strong connections and be controlled in the sense that their decision-making will be skewed to favour that connection. Third, where lobbyists donate financially or offer other support to political institutions (such as seconding staff), they may be able to exert control over the decision-making processes of the institution.

These hypotheses are tested in Chapter 6 which considers examples of lobbying in practice. Whilst officials can be controlled; it should be remembered that they will also exert a significant degree of control over which ideas to consider which pertains to the next sub-element.

3.5 Five: The Economy of Attention

The economy of attention is defined as:

> Focussed mental engagement on a particular item of information. Items come into our awareness, we attend to a particular item, and then we decide whether to act. Attention occurs between a relatively unconscious narrowing phase, in which we screen out most of the sensory inputs

[104] Daniel Kaufmann and Pedro C Vicente, 'Legal Corruption' (2005) SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=829844> accessed 3 March 2017, 3.
[105] This crosses over with concerns in Chapter 4 on conflicts of interest.

> around us (we are aware of many things, but not paying attention to them), and a decision phase, in which we decide to act on the attention-getting information.[106]

The definition provides for an apt description of the information bombardment that public officials are subjected to, whether through direct or indirect lobbying. Thus, the question of how politicians decide which information to afford their time to is also an important equality issue.[107] In this section, it is hypothesised that there are three factors which contribute to this attention economy in the lobbying context.[108] Namely, the structural influences existing within the political system, the personal backgrounds of politicians and the revolving door.

3.5.1 Structural Influences Within the Political System

Four structural influences are relevant to equality and lobbying. First, globalisation and a general pro-business environment have created a structural skew towards wealthy interests,[109] with concentrated interests and corporations arguably dominating the political system.[110] Rather than networks influencing governance, a hierarchy prevails. There is an asymmetric power model in which some groups are advantaged (corporations), and the rest are disadvantaged.[111] Political parties now compete for private donations and cultivate close relationships with business.[112] Lobbyists are paid to ensure this paradigm continues. It is no coincidence that professional lobbying has increased since the Reagan-Thatcher era of the 1970s and 1980s with policies resulting in 'long-term political and economic trends [which] have benefitted those at the top, at the cost

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[106] Thomas H Davenport and John C Beck, *The Attention Economy: Understanding the New Currency of Business* (Harvard Business School Press 2001) 20–21.
[107] This has been labelled by Rowbottom as 'the various biases amongst decision-makers'. See, Rowbottom, *Democracy Distorted* (n 2) 2.
[108] This is tested in Chapter 6; For an analysis of how government should respond to public opinion, see generally, Rowbottom, 'Government Speech' (n 7).
[109] Rowbottom, *Democracy Distorted* (n 2) 3; Jonathan Hopkin and Kate Alexander Shaw, 'Organized Combat or Structural Advantage? The Politics of Inequality and the Winner-Take-All Economy in the United Kingdom' (2016) 44(3) Politics & Society 345.
[110] Apollonio, Cain and Drutman (n 19) 33.
[111] David Judge, *Democratic Incongruities: Representative Democracy in Britain* (Palgrave Macmillan 2014) 113.
[112] Ewing, *The Cost of Democracy* (n 25) 25.

of the mass of the middle and lower class'.[113] Indeed, Miller and Dinan argue that the huge expansion of lobbying in the United Kingdom 'has been a direct result of the business-friendly policies pursued by successive governments'.[114]

In the US, there is strong evidence for the unequal responsiveness of officials towards wealthy people[115] which is caused by lobbyists 'combating' for the implementation of pro-business policies.[116] In the UK, the development of that structural influence is more nuanced. Lobbying is 'less decisive than the deployment of political ideas favouring unfettered markets, which over time produce a self-perpetuating structural advantage for the richest—an advantage that is, in turn, justified by the same ideas'.[117] This results in the average citizen having little impact on public policy;[118] especially outside of election periods.[119] Instead, close relationships develop between powerful groups and decision-makers which has the effect of excluding people from the political process rather than involving them.[120] Indeed, a study of ministerial meetings between 2010 and 2015 demonstrated that 'nearly 45% of all meetings held by senior ministers' were with business organisations.[121] The same study highlights how business gains far higher levels of access than others when one considers government as a whole'.[122] Thus, a 'structural influence' biased towards corporations arises which causes

[113] Aeron Davis, 'Embedding and disembedding of political elites: a filter system approach' (2014) 63 The Sociological Review 144, 146; Hopkin and Shaw (n 109) 349; others argue that the seeds were sewn for pro-business policies post-World War 2, see, Pabst (n 99) 1.
[114] William Dinan and David Miller, 'Sledgehammers, Nuts and Rotten Apples: Reassessing the Case for Lobbying Self-Regulation in the United Kingdom' (2012) 1(1) Interest Groups & Advocacy 105, 108.
[115] Thomas J Hayes, 'Responsiveness in an Era of Inequality: The Case of the U.S. Senate' (2013) 66(3) Political Research Quarterly 585, 595; see generally, Martin Gilens, 'Inequality and Democratic Responsiveness in the United States' (Conference on the Comparative Politics of Inequality and Redistribution, Princeton University, May 11-12 2007).
[116] See generally, Jacob Hacker and Paul Pierson, 'Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States' (2010) 38(2) Politics & Society 152; in the US, there also concerns that this control can lead to 'rent-seeking' activities which means that money and resources are used to capture government transfers instead of being used for productive purposes. See Hasen, 'Lobbying, Rent-Seeking' (n 40) 191.
[117] Hopkin and Shaw (n 109) 346.
[118] Gilens and Page (n 94) 575; Stewart Davidson and Stephen Elstub, 'Deliberative and Participatory Democracy in the UK' (2014) 16 British Journal of Politics and International Relations 367, 379.
[119] Pabst (n 99) 2.
[120] Grant (n 17) 37.
[121] Katharine Dommett, Andrew Hindmoor and Matthew Wood, 'Who Meets Whom: Access and Lobbying During the Coalition Years' (2017) 19(2) The British Journal of Politics and International Relations 389, 397.
[122] ibid 404.

politicians to 'filter out' broader public concerns and, instead, focus on thinking internally about issues to which the system has directed them.[123]

Second, ideology will determine which ideas will be given attention. This is not a static factor as can be seen with the changing ethos of the Labour Party in recent decades with various forms of social democracy espoused by Tony Blair's 'Third Way',[124] and Ed Miliband with the 'One Nation' model which emphasised social democratic ideals as a critique of capitalism.[125] In the Conservative Party, David Cameron launched a plan for a 'Big Society' in 2010 which would empower communities to run post offices, libraries and transport services.[126] Ideas pertaining to achieving those ideologies (which often change between successive governments) would have likely gained the attention of decision-makers. However, not only might the attention given to a specific idea aligning with an ideology be the source of inequality, but also inequalities generated by the policy itself creating a self-perpetuating cycle of inequality. This could be seen, for example, with the Cameron Government's policies which supposedly marginalised minorities, making it more difficult for them to defend and promote their interests.[127]

Third, the methods employed by Parliament to deliberate with the public will affect which ideas are given attention to.[128] In this regard, some take the view that political scandals stem from 'the failure of decision-makers to properly take account of the interests and wishes of the electorate'.[129] Many of the issues on deliberation and the methods by which decision-makers act in the public interest were covered in Chapter 3 and will not be revisited in detail here. However, the

[123] Davis (n 113) 152 & 157.
[124] Lansley (n 16) 755.
[125] Patrick Diamond, Roger Liddle and David Richards, 'Labouring in the Shadow of the British Political Tradition: The Dilemma of 'One Nation' Politics in an Age of Disunification' (2015) 86(1) The Political Quarterly 52, 57–58.
[126] 'David Cameron Launches Tories' 'Big Society' Plan' (*BBC News*, 19 July 2010) <http://www.bbc.co.uk/news/uk-10680062> accessed 6 December 2016.
[127] Ben Kisby, 'The Big Society: Power to the People?' (2010) 81(4) The Political Quarterly 484, 488.
[128] Karen Celis, Anke Schouteden and Bram Wauters, 'Cleavage, Ideology and Identity. Explaining the Linkage between Representatives and Interest Groups' [2015] Parliamentary Affairs 1, 2.
[129] David Richards and Martin J Smith, 'In Defence of British Politics Against the British Political Tradition' (2015) 86(1) The Political Quarterly 41, 42.

calls for greater democratisation and citizen engagement highlight a concern about the methods employed to determine the issues important to citizens.[130]

Fourth, the internal incentive structure for officials within the Government and the party also affects which ideas are given attention to. Hirst notes how 'party leaders want an administration which is loyal and responsive only upwards, and which reveals only those aspects of policy or the information pertaining to it which suit the government's political purposes'.[131] Within the party, an official will be conscious of their own career progression prospects.[132] To achieve that, there is a 'very strong pressure to pursue official policy'.[133] In this regard, the attention of office-holders is more likely to be gained if the policy aligns with institutional goals or career ambitions.[134]

Linked to this is the close relationships that develop within the political system. When populist movements arise, there is a perception that party establishments defend their self-interests or the interests of their donors instead of voters.[135] In practice, this means that lobbyists and 'a small number of unaccountable donors and external advisors [are] likely to direct MP behaviours towards party and elite objectives'.[136] One example is the influence of those in the media, which Davis argues has resulted in decision-makers becoming:

> Too close to their sources. At Westminster, specialist lobby correspondents tend to remain in post for many years, have on-site offices, share social facilities with politicians (restaurants, bars, sports teams), and have organized political access and information supply. The close politician-journalist relationships that form over years can mean that political reporting agendas and frames are determined entirely by the political centre, and political accountability is weakened.[137]

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130 ibid.
131 Paul Hirst, 'Representative Democracy and its Limits' (1988) 59(2) The Political Quarterly 190, 199.
132 Duverger (n 54) 106.
133 Hirst (n 131) 199.
134 Beer (n 53) 87; Hirst (n 131) 199.
135 Pabst (n 99) 2.
136 Davis (n 113) 152.
137 ibid 155.

3.5.2 The Background of Decision-makers

Another dimension to the economy of attention, which flows from the analysis above, is the personal and educational backgrounds of politicians.[138] When assessing the statistics regarding front-benchers following 2001, Davis notes that:

> Looking just at the post-2001, under 50s intake of 20, which included all three current main party leaders, there was minimal non-political experience. Half had a PPE (Philosophy, Politics and Economics) degree from Oxford, purpose made for aspiring politicians. They had a shorter pre-politics careers (7–8 years on average), most commonly working on policy, in a party or think tank, or in the media, in journalism or public relations […] Thus, the newer generation of leaders […] have been less socially embedded in wider society than their predecessors and more embedded in the political sphere from an earlier point.[139]

The most recent statistics when examining the Cabinet Ministers of the Government of Theresa May in 2016 show that of the 22 members, 10 attended Oxbridge for their university studies and 12 did not.[140] Although, it is fair to highlight that there is a skewed representation of office-holders who undertook the PPE course at Oxford. Their experiences will be very different to those of students studying other courses at Oxbridge.[141] In terms of careers, 17 of the 22 members had careers in media, lobbying, law, career politics, banking or working for an oil company in one case. Of the remaining five, there was a tax adviser, teacher, doctor, an executive of an agricultural business and one worked in manufacturing. The careers of the majority of the UK Cabinet in 2016 thus reflected a narrow range of sector work in the UK. Added to this are concerns of the so-called career politician; a person working mainly as a ministerial aide, special adviser, parliamentary researcher, party staffer, in an NGO or think-tank

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[138] ibid.
[139] ibid 151.
[140] Those who attended Oxbridge were Theresa May, Boris Johnson, Elizabeth Truss, Greg Clark, Jeremy Hunt, Damian Green, Chris Grayling, David Lidington, Natalie Evans and Philip Hammond, see UK Government, 'Ministers' (*UK Government*) <https://www.gov.uk/government/ministers> accessed 1 August 2016.
[141] It may be that office-holders' narrow life experiences such as studying on the same course like the PPE will have similar outlooks or approaches to decision-making. A Cabinet consisting of people from different backgrounds may avoid such vulnerabilities as ministers could learn from the wider experiences and knowledge of their colleagues.

before becoming an MP.[142] This leads to criticisms that decision-makers have not done 'proper jobs' or have not worked in the 'real world'.[143]

However, that is not to say that the narrow backgrounds of decision-makers has a specific effect on votes in Parliament. Research by Goodwin demonstrates that MPs with a scientific background voted no differently in Parliament than those without scientific training on the Human Fertilisation and Embryology Act 2008.[144] Goodwin also finds that there is no strong evidence to show that MPs with a scientific background are more likely to vote on scientific issues or vote against the wishes of the political party.[145] Therefore, whilst the narrow backgrounds of politicians might result in a lack of specific industry experience, the evidence suggests that (in terms of votes at least) this does not affect voting outputs. Indeed, it could be argued that decision-makers are well equipped to consider the expertise of others and form good policy based on those considerations. It is their job to familiarise themselves with the key issues, and they well have much information at their disposal. They are also equipped with excellent advocacy skills to fight for the interests of citizens.[146]

Nevertheless, there remain pertinent equality issues relevant to this point. First, there are doubts about the informational advantages of officials who—whilst knowing a lot about policies directly affecting them—may know less about the human impact of policies that do not affect them.[147] Second, the narrow range of experience means that it becomes necessary for politicians to seek expertise from lobbyists who have aggregated more knowledge on certain issues.[148] At the same time, lobbyists may possess more money to influence, more access to decision-makers and more control over the marketplace of ideas. They will use their knowledge to help officials develop policy and provide information about the opinions of voters.[149] Whilst lobbyists are unlikely to misrepresent such

[142] Judge (n 111) 97.
[143] ibid 98.
[144] Mark Goodwin, 'Political Science? Does Scientific Training Predict UK MPs Voting Behaviour?' (2015) 68 Parliamentary Affairs 371, 371.
[145] ibid.
[146] Judge (n 111) 98.
[147] Gilens and Page (n 94) 576; Linked to this is the under-representation of lower income citizens versus the overrepresentation of higher income citizens. See, Judge (n 111) 97.
[148] Davis (n 113) 151–52.
[149] Celis, Schouteden and Wauters (n 128) 2.

information, they may not be impartial since the purpose of lobbying is to advocate certain positions, emphasise certain facts or frame issues in a particular way.[150]

This should be considered alongside the structural influences noted above. The increased professionalization of party leaderships has resulted in parties seeking to create stronger links with 'professional campaign consultants, outside lobbyists and big party funders'.[151] A biased attention skew of office-holders towards lobbyists offering expertise that fits with their ideology, political aims or personal views may arise; resulting in equality being undermined. Therefore, whilst the narrow background of an MP may not influence the direction of their vote, the general lack of broad industry experience of an office-holder might lead them to rely on information that is provided or influenced by lobbyists who are not impartial.

3.5.3 The Revolving Door

Where people move from a narrow range of sectors (such as the nuclear industry) to front-bench positions and back, concerns are raised that there is an inherent policy bias towards those sectors. This is another way in which the system may lead to wealthy people gaining a 'structural influence over the implementation of governmental policy'.[152] In practice, the revolving door and personal connections result in opportunities to influence that are more readily available to lobbyists than to ordinary citizens.[153] Having worked as lobbyists previously, Cabinet ministers may see professional lobbyists as being a legitimate source of information or may be more likely to engage with them.

Consequently, decision-makers may 'forego their independent judgment and take actions that are in the lobbyists' clients' best interests, as distinct from the interests of the general public'.[154] The revolving door may thus influence who officials direct their attention to. It is also linked to the 'control of the decision-

[150] Apollonio, Cain and Drutman (n 19) 29–30.
[151] Davis (n 113) 152.
[152] Scott (n 22) 240.
[153] Anita S Krishnakumar, 'Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation' (2007) 58(3) Ala L Rev 513, 524.
[154] ibid 525.

making process' where the revolving door is used as a means of controlling how decision-makers act when in office. For example, the promise of future employment may exert an unseen form of control on the official's decisions.

Thus, the economy of attention highlights various factors that influence which issues are given attention to by officials. Both concepts of 'equality of arms' and the 'equality of the opportunity to influence' are engaged because wealth and opportunity underpin the concerns. Since the core elements are engaged, so too are the same principles highlighted by Ringhand. The 'economy of attention' operates as a sub-element which can give a detailed account of more insidious manifestations of those core elements.

3.6. Six: Equality of Participation

It is contended that 'equality of participation' is another sub-element of political equality which helps to provide a richer account of equality concerns in the lobbying sphere. This argument is contrary to that espoused by Overton that 'participation' is a concept distinct from political equality.

'Participation' terminology is often expressed in campaign finance and lobbying literature. In the campaign finance literature, it is sometimes argued that the role of money should be linked to equality among participants in the electoral process.[155] In the lobbying context, it is argued that participation can be broadened by encouraging citizens to financially support campaigns, issues and interest groups.[156] The common theme in both fields is that differences in participation rates across income groups can help to explain why the views of the rich are better heard than the poor.[157]

In the campaign finance context, Overton argues that the focus of reform should be on increasing citizen participation in the political process as opposed to pushing an anticorruption framework or equalising funds between

[155] Rowbottom, 'Political Donations' (n 1) 766.
[156] Spencer Overton, 'The Donor Class: Campaign Finance, Democracy, and Participation' (2004) 153 U Pa L Rev 73, 101.
[157] Bernauer, Giger and Rosset (n 18) 81.

candidates.[158] Instead of fighting against systemic wealth inequalities, he believes that we should embrace the role of money in politics by encouraging more people to participate financially.[159] This is to be achieved by encouraging citizens to make financial contributions to political parties and candidates so that the majority of election funds come from the broadest cross-section of society possible.[160] The law should recognise that wealth can be a barrier to participation and provide incentives which encourage widespread participation rather than equalising the voice of people with different incomes.[161]

Overton contends that the concept of participation is different to the anticorruption and equality approaches. On the former, participation acknowledges that money can be a tool for meaningful engagement whereas as anticorruption arguments do not espouse that money can play a major role in encouraging participation.[162] Nevertheless, Overton accepts that participation and corruption concerns cross over. He states that:

> Granted, although participation is distinct from anticorruption, the two concepts are intertwined. Widespread participation prevents corruption by diversifying a candidate's support so that she is less beholden to a narrow group of large donors. Similarly, preventing corruption and the appearance of corruption is said to promote participation.[163]

Participation also crosses over with dependence corruption (considered in Chapter 4 and again below):

> The relationship between participation and anticorruption is further complicated depending on one's definition of corruption. If corruption is broadly defined as "dependency" on a small class of large donors, then greater participation becomes a solution to the problem of corruption.[164]

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158 Overton, 'The Donor Class: Campaign Finance, Democracy, and Participation' (n 156) 73; Spencer Overton, 'The Participation Interest' (2012) 100 Geo LJ 1259, 1259.
159 Overton, 'The Participation Interest' (n 158) 1261.
160 ibid.
161 ibid 1287.
162 ibid 1279.
163 ibid 1281.
164 ibid.

Further, on the latter distinction between participation and equality, he argues that participation differs from equality. First, in noting the similarities of equality and participation, he acknowledges that they are closely linked. For example, economic inequality can dampen widespread participation. He also considers the argument that participation is a democratic value which is rooted in the idea that all citizens are equal. Equality arguments relate to getting money out of politics. Participation arguments of getting people back into politics could be another equality argument based on the idea of 'levelling-up rather than levelling down'.[165] Nevertheless, Overton argues that:

> Participation, however, differs from equality. Equality is mathematical and allocation-oriented. Participation is about personal engagement, being vested in a cause, joining with like-minded individuals, and reaching out with and deliberating with neighbors. Participation encompasses the special experience individuals enjoy in being engaged in and owning a part of a campaign and being connected to something larger than themselves. Those feelings extend beyond stuffing envelopes and include giving and raising money (in both small and large amounts).[166]

This difference is best understood with the example of a voucher program (not too dissimilar to that of Strauss considered above) where each citizen is given a voucher with a cash value from the state to give to a politician of their choice. Overton argues that such vouchers promote mathematical equality because every citizen receives a voucher with the same value; which makes money like voting.[167] Such a programme also separately encourages greater participation because citizens are given a role in allocating funding to politicians.[168]

Whilst it is evident that there can be technical difference between participation and equality, that distinction serves no purpose in the institutional diversion framework. Participation, according to Overton's definition, is about citizens being engaged and participating in the political process which is strictly a

[165] ibid 1283; see generally Joel L Fleishman and Pope McCorkle, 'Level-Up Rather Than Level-Down: Towards a New Theory of Campaign Finance Reform' (1984) 1 JL & Pol 211.
[166] Overton, 'The Participation Interest' (n 158) 1284.
[167] ibid 1286.
[168] ibid.

distinct concept from equality. However, that concept is mainly used in the equality context (alternatively, the corruption context). Encouraging citizens to participate more financially is merely an attempt to equalise the ability of some to participate or to tackle a deficit in participation. Wealth can cause unequal levels of participation across income groups[169] and giving more money to poorer groups is an equalising measure. This point is noted by Rowbottom who finds that the 'analogy between donating and voting as an act of participation points to a need to regulate donations to preserve equality'.[170]

Furthermore, Overton's argument that equality is mathematically and allocation-oriented as opposed to the participation concept, is not entirely convincing. The problem, he argues, is that not enough people participate in the political process. The solution is to provide financial incentives so that more people participate. That appears to be an attempt at promoting mathematical parity as to the numbers of individuals participating. To develop his example further about the voucher program; yes, a voucher would separately encourage greater participation, however, the motivation for that program arises because there is a lack of mathematical equality in the number of people participating.

Therefore, participation is a sub-element of the concepts of equality of arms and the opportunity to influence. Ensuring an equality of arms of spending between those who can lobby or spend in elections, and ensuring an equal opportunity to influence, are both aimed at reducing equality deficits to enhance participation. The same can be said for participation which is also about enhancing participation but by different means—giving more money to people to increase participation.

Furthermore, Overton argues that increased participation serves four 'functions'. However, those functions are almost indistinguishable from Ringhand's 'principles' which the concepts of equality promote—further underlying how participation is best thought of as a sub-element of political equality. The first 'function' of participation is that office-holders become more exposed to a variety of ideas which ensures better-informed decisions.[171] Second,

[169] Rowbottom, *Democracy Distorted* (n 2) 4.
[170] Rowbottom, 'Political Donations' (n 1) 768.
[171] Overton, 'The Donor Class' (n 156) 101.

this, in turn, gives greater legitimacy to government decisions.[172] The first two functions are thus the same as Ringhand's principle that democratic self-governance requires public access to the widest possible variety of information. Third, wider participation encourages governments to redistribute their resources to deal with areas of concern identified through greater citizen participation.[173] This function is the same as Ringhand's first principle that the state should show equal concern for the preferences of citizens by enabling them to participate more. That marriage is captured in the following passage by Rowbottom:

> Giving greater weight to one set of votes rather than to another offends the individuals' sense of inclusion in the political process. Similarly allowing one wealthy individual to have a greater voice than other participants sends out a signal that one set of individuals are worth more than another group.[174]

Fourth, individual citizens become more politically self-fulfilled because they can shape and influence the decisions that affect their lives.[175] Again, this function is not too dissimilar to Ringhand's principle regarding democratic self-governance.

Another relevant matter relates to Overton's voucher scheme. The voucher scheme may increase deliberation since politicians would compete for the donations of citizens. However, this brings Overton's argument full circle with the considerations noted above by Strauss who exampled a system in which everybody has an equal amount of money to spend in an election. This led to concerns about the tendency of officials to vote in accordance with the wishes of self-interested individuals instead of engaging in a deliberative process whereby the 'public good' is ascertained.[176]

Ultimately, it has been noted elsewhere that an important question is whether certain groups can take better advantage of access and influence than others; something that would be contrary to democratic norms of equal

[172] ibid.
[173] ibid.
[174] Rowbottom, 'Political Donations' (n 1) 771.
[175] Overton, 'The Donor Class' (n 156) 102.
[176] Ringhand (n 3) 267.

participation.[177] It provides no practical benefit to consider participation as a concept distinct from equality when it is a sub-element of 'equality of arms' and 'equality of the opportunity to influence'. Therefore, for the institutional diversion framework, participation describes another way in which unequal arms or the opportunity to influence can manifest in the lobbying sphere. It provides a richer and more detailed account of the concerns underlying those core elements.

4. The Crossover Between Institutional/Dependence Corruption and Political Equality

In this section, the crossover between political equality and institutional/ dependence corruption explored in Chapter 4 is explained. It is argued that the elements of political equality can constitute a sub-element of institutional/ dependence corruption. In that chapter, it was determined that there are three elements of institutional/dependence corruption. First, there is a political benefit to a public official. Second, there is a systematic service given in return. Together, the first two elements are characterised as an 'exchange' that may or may not involve a dependency. Third, one establishes whether the exchange is 'improper' by applying the elements of individual corruption or political equality.

For political equality, Thompson clearly incorporates political equality elements in this theory of institutional corruption. He argues that an improper exchange can weaken the democratic process if it undermines political competition or citizen representation—equality ideas ultimately linked to equality of arms and the opportunity to influence.[178] For dependence corruption, Lessig describes how candidates may be unable to fund their campaigns without the 'funders' (the wealthy) and have, therefore, developed a dependence on them.[179] The analysis in Chapter 4 reveals the importance of equality elements to dependence corruption. Lessig focusses on concepts such as 'power', 'merits' and 'possibility' ultimately derived from the core political equality elements.

[177] Apollonio, Cain and Drutman (n 19) 32.
[178] Thompson, 'Two Concepts' (n 36) 7.
[179] Lawrence Lessig, 'A Reply to Professor Hasen' (*Harvard Law Review Forum*, 20 December 2012) <http://harvardlawreview.org/2012/12/a-reply-to-professor-hasen/> accessed 21 June 2016.

Exchanges characterised as dependence corruption highlight opportunities open mainly to the wealthy.

Some academics have argued that dependence corruption is neither about political equality nor corruption, but about political participation. Charles analyses dependence corruption and argues that:

> The state has delegated a public function, the financing of campaigns, to private parties, which have in turn created a barrier for political participation, wealth, that some citizens will never be able to overcome. This is not an equality problem (levelling up or levelling down). But is also not a corruption problem. It is a participation or exclusion problem.[180]

Despite Charles' contention, it is evident that he is describing a political equality concern for two reasons. First, and more broadly, the reason why dependence corruption usually leads to a participation problem is precisely because of the unequal opportunities to influence that some lobbyists have because of their unequal arms advantage. In this regard, the same arguments considered above on political participation arise in this context. Second, Charles notes how the delegation of a public function to private entities has created a barrier to political participation. The main query here is *why* the state has delegated such a public function. The answer is, most likely, because of the structural influences that exist within the political system that have led to such a delegation, or even the control of the decision-making process itself that has led to that delegation. These describe sub-elements of the core elements of political equality. In this sense, Charles is describing political equality concerns accounted for by the sub-elements of political equality.

Further, other academics have criticised dependence corruption for being only about political equality rather than corruption.[181] Thus, Hasen argues that Lessig uses the term 'dependence corruption' but is actually talking about 'the distortion of policy outcomes, or skew, caused by the influence of money,

[180] Guy-Uriel E Charles, 'Corruption Temptation' (*SSRN, California Law Review, Forthcoming*, 2013) <https://ssrn.com/abstract=2272189> accessed 20 April 2017, 8.
[181] Richard L Hasen, "'Electoral Integrity," "Dependence Corruption," and What's New Under the Sun' (2014) 89(87) New York University Law Review Online 87, 89–90.

channelled through lobbyists'.[182] Such arguments seek to justify laws 'on grounds that the laws distribute political power fairly and correct a distortion present [reducing] the voice of some to enhance the relative voice of others' (similar to the 'loudness' arguments above).[183] However, Lessig rightly queries why dependence corruption cannot identify equality and corruption concerns,[184] arguing that a 'false dichotomy' has been presented:

> It is not either corruption or equality. It is both. Our current system for funding campaigns is corrupt precisely because it violates a certain kind of equality. The violation is not an equality of speech, but an equality of citizenship […] To say that a system has been corrupted is to say that it is not functioning as designed; something has interfered with its ability to function as designed. That interference [the wrong dependence] is the corruption. […] Whether strategically it makes sense to continue to describe our system as "corrupt" is a small point. That "corruption" is inequality is the more important and fundamental agreement.[185]

By 'equality of citizenship', Lessig means the denial of 'the equality of equal standing as citizens' or the denial of 'a role as equal citizens'.[186] This is broad but indicates that citizens cannot have the same opportunities to participate in the political process where the institutions are dependent upon a minority. Ultimately, Lessig is right that dependence corruption raises both corruption issues (as highlighted in Chapter 4) and equality issues. That is why the institutional/dependence corruption elements are structured to determine impropriety by reference to individual corruption and political equality as sub-elements. In fairness to Lessig's critics, their disagreements are shaped by a desire to situate theories of corruption and equality properly within restrictions laid

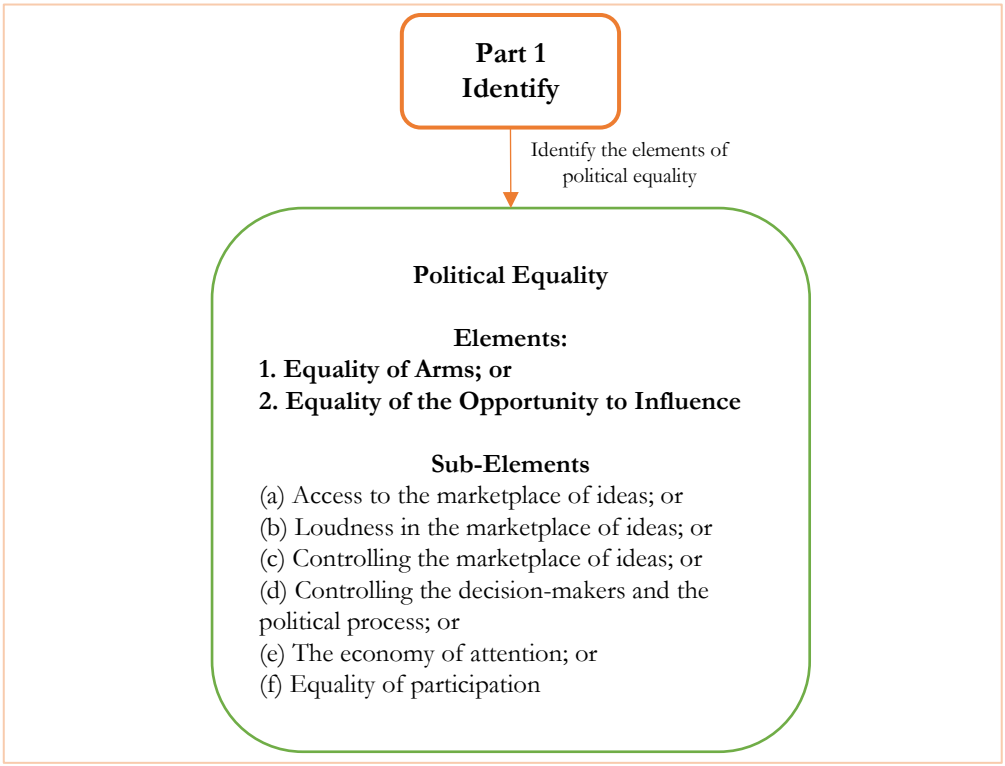
[182] Hasen, 'Book Review' (n 37) 571; it is also odd that Thompson engages in a similar criticism of dependence corruption when institutional corruption also clearly crosses over with political equality. See Thompson, 'Two Concepts' (n 36) 4, fn 3.
[183] Richard L Hasen, 'Is "Dependence Corruption" Distinct from a Political Equality Argument for Campaign Finance Laws? A Reply to Professor Lessig' (2013) No. 2013-94 Legal Studies Research Paper Series, University of California Irvine 1, 11 & 14.
[184] Lawrence Lessig, 'A Reply to Professors Cain and Charles' (2014) 102 Cal L Rev 49, 51.
[185] Lawrence Lessig, 'Corrupt and Unequal, Both' (2015) 84 Fordham L Rev 445, 445, 447 & 451.
[186] Lawrence Lessig, *What is Institutional Corruption?: Lessig in the Dock (Video Interview)* (Edmond J. Safra Center for Ethics 2015).

down by US Supreme Court jurisprudence.[187] Fortunately, such doctrinal restrictions do not arise in the UK context.[188] The analysis above demonstrates how political equality can be applied in the third element of institutional/dependence corruption.

5. Summary: Identifying Political Equality Concerns

In summary, from the analysis above, it is argued that there are two core elements of political equality and six sub-elements. These can be used to identify a concern with lobbying in Part 1 of the diversion framework. The elements are outlined in Figure 2 below.

Figure 2: Identifying the Elements of Political Equality in the Diversion Framework



[187] Charles expresses frustration when he notes that justifications for reform in the US are limited by doctrinal corruption interpretations. He states that 'to be taken seriously, which means to be relevant to the doctrinal debate, all of our discourse must be articulated within the corruption framework, which ignores other concerns that ought to be of interest'. See Guy-Uriel E Charles, 'Corruption Temptation' (2014) 102 Cal L Rev 25, 26.

[188] Indeed, Cain notes that other democracies can do more because their constitution does not limit them. See Bruce E Cain, 'Is "Dependence Corruption" the Solution to America's Campaign Finance Problems?' (2014) 102 Cal L Rev 37, 45.

In analysing a concern about lobbying that is linked to political equality, one would identify the underlying equality concern (such as 'opportunity' or 'arms') or a sub-element of it (such as control of the marketplace). The next step is to develop questions to test for a diversion under the criterion of 'objectivity' in Part 2 of the framework

6. 'Objectivity' Criterion to Test for a 'Diversion'

This section adapts Ringhand's 'principles' analysed above to create questions for Part 2 of the institutional diversion framework. The questions will be used to test when the criterion of 'objectivity' is undermined by lobbying thereby causing a diversion. In Chapter 4, three questions were developed to test whether 'integrity' has been undermined thereby causing a diversion. First, does the lobbying conduct breach or potentially breach any law? Second, does the concern contravene, or potentially contravene, code of conduct or other rules on financial gain? Third, is the independence of the institution or individual compromised? If any of the questions are answered in the affirmative, the office-holder may have been diverted from their purpose of acting in the public interest because 'integrity' has been undermined. As noted in Chapter 3, 'objectivity' is defined as follows:

> Officials should assess ideas on their merits or inherent worthiness in the sense that they should not give greater weight to ideas that have gained prominence because of lobbying underpinned by corruption or political inequality.

Since the core elements of political equality promote the principles highlighted by Ringhand, it follows that the sub-elements deriving from the core elements will do the same. Therefore, the questions that can be used to test when 'objectivity' is undermined can be derived from the principles she highlights. However, those questions must be linked clearly to the definition of objectivity. Thus, in Part 1 of the framework, one identifies 'lobbying underpinned by corruption or political inequality' using the elements outlined in the framework (this is called 'problematic lobbying' in the paragraph below for simplicity). With that established, one then determines whether an official has given 'greater weight' to

an idea, or that their ability to assess an idea on its merits is weakened because of that lobbying. This determination is made by asking the following questions.

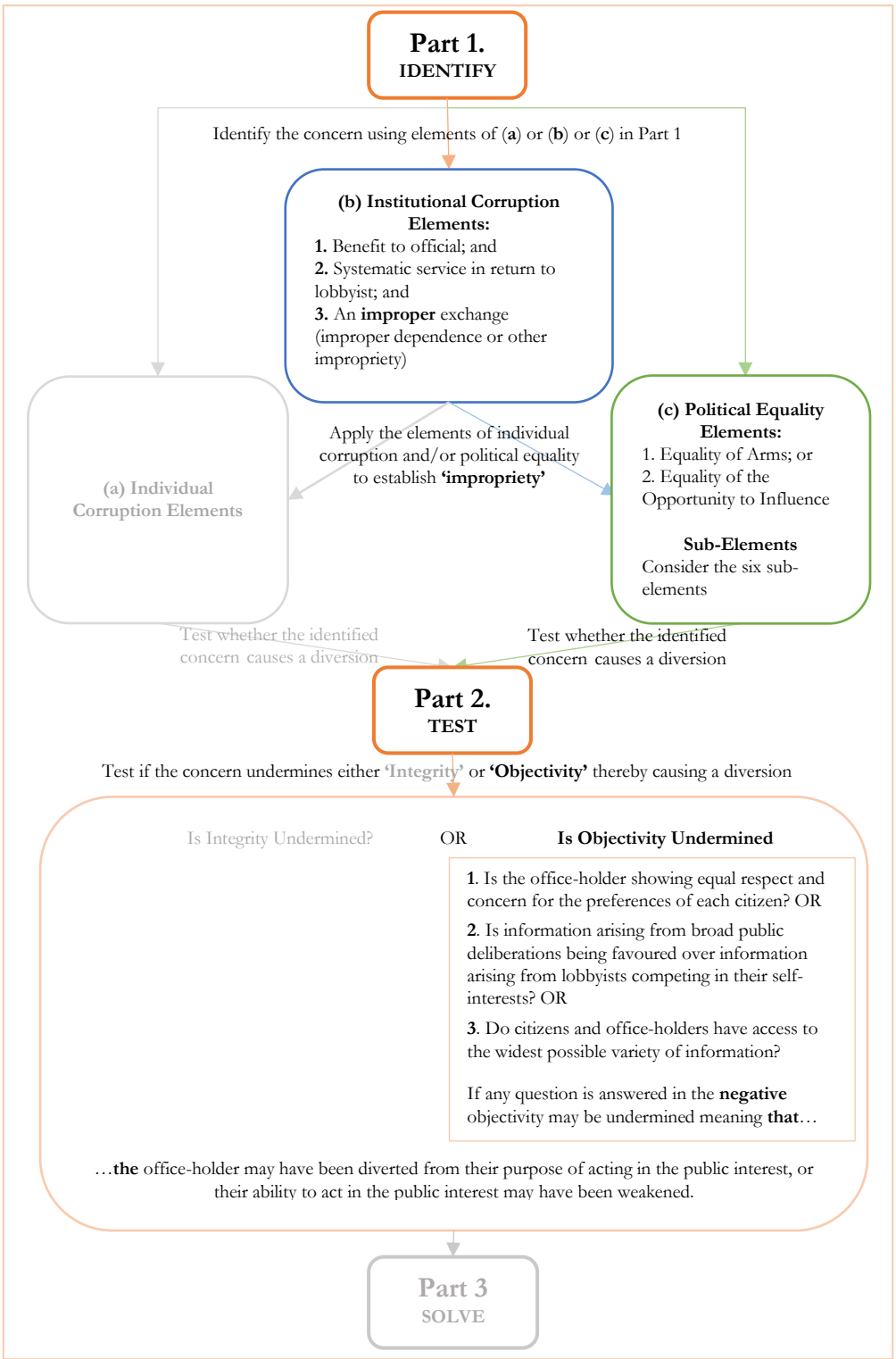
First, is the institution (or individual working within it) showing equal respect and concern for the preferences of each of its citizens? If they are not, they may be giving greater weight to the representations arising from problematic lobbying which undermines 'objectivity'. Second, is the information arising from broad public deliberations being favoured over information resulting from lobbyists competing in their self-interests? If not, then greater weight may have been given to ideas that gained prominence from problematic lobbying. Third, do decision-makers have access to the widest possible variety of information? If they do not, their ability to make decisions on their merits may be weakened which also undermines objectivity. Where any question is answered in the negative, objective decision-making may be undermined causing a diversion. In this manner, the questions used derive from the analysis of equality principles identified above.

The questions developed in Chapter 4 and this chapter were divided so that 'integrity' pertained to corruption and 'objectivity' pertained to equality because they are more likely to align with those issues. Nevertheless, the questions can cross over both areas. For example, if an official is not showing equal concern for citizens because he is accepting a bribe, and thereby not making decisions objectively or acting with integrity, this raises both corruption and equality concerns. Much will depend on the specific scenario about which questions to ask.

Conclusion

Taking into account the analyses in this chapter, the institutional diversion framework can be developed as follows.

Figure 3: The Institutional Diversion Framework Developed



First, one identifies a lobbying concern by applying the elements of political equality in Part 1. The sub-elements can also be used (although they are not necessary) to identify further underlying issues and provide a rich account of those concerns. The issue is then tested in Part 2 to determine whether it causes a diversion from the purpose of acting in the public interest or weakens the ability of officials to act in the public interest. The test is conducted by asking questions relevant to the criteria of integrity or objectivity (most likely objectivity in the case of political equality concerns). Some scenarios may cross over with political equality. Thus, political equality can be used as a sub-element for institutional/dependence corruption to identify those concerns before moving to Part 2 of the framework. The next chapter summarises the framework and applies it to specific lobbying concerns in the UK.

6

Applying and Evaluating the 'Institutional Diversion' Framework

Introduction

There are two aims in this chapter. First, the institutional diversion framework is summarised. Second, the framework is applied to concerns about lobbying in the UK, and its effectiveness is evaluated for identifying the issues and testing for a diversion.

Practical examples of lobbying have received little academic attention in the UK,[1] especially when compared with the literature in the US where there are many legal and political science studies. However, one recent book by Cave and Rowell[2] has offered a good exploration of the issues in the UK, albeit without linking them to the underlying theories synthesised in this thesis. Therefore, this chapter will provide an analysis of lobbying examples tied to the theory that has been carefully developed. Cave and Rowell's book offers many useful case studies but is not considered in isolation. Indeed, case studies in three broad areas are explored.

First, case studies are analysed from media investigations and books. Those case studies are categorised into the concerns about lobbying explored in earlier chapters on individual corruption, institutional corruption and political equality. The examples highlight the insidious and pervasive nature of some lobbying. Second, there is an analysis of a Court of Appeal case involving lobbying. The

[1] The exception is Rowbottom who considers lobbying concerns in his book. Jacob Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics* (CUP 2010).
[2] Tamasin Cave and Andy Rowell, *A Quiet Word: Lobbying, Crony Capitalism, and Broken Politics in Britain* (The Bodley Head 2014).

case reveals how some judges have little understanding of how lobbying works in practice and that even a rudimentary consideration of the issues highlighted by the diversion framework could assist them in reaching better informed conclusions. Third, there is an analysis of the influence of lobbying on two specific laws in recent years which reveals how lobbyists 'battle' to influence the provisions of legislation.

The usefulness of the framework will be evaluated throughout.[3] Namely, it is asked whether it helps in identifying the lobbying concerns (whether they are in isolation or whether they cross over)? Are the integrity and objectivity tests useful for identifying why those concerns are problematic and for establishing a diversion? Does the concept of an 'institutional diversion' help to conceptualise the problems clearly? Does that assist with identifying potential issues which require regulation? Is the framework a better tool for analysing lobbying concerns than the current approach in academic literature? Are there any drawbacks to the framework? Can they be overcome and, if so, how? Ultimately, does the institutional diversion framework work? The first section summarises the framework.

1. Overview of the Institutional Diversion Framework

An institutional diversion occurs where:

> Decision-makers working within the institutions of Parliament or the Government of the United Kingdom are subject to lobbying—or there is some concern about lobbying—which is illegal, legal, ethical or unethical, which diverts those decision-makers from their purpose of acting in the public interest or weakens their ability to act in the public interest, including weakening either the public's trust in Parliament or the Government or their inherent trustworthiness because of that lobbying.

[3] The purpose here is to evaluate the effectiveness of the diversion framework in identifying the problems with lobbying and not to argue that people should not be able to lobby. Lobbying is a democratic manifestation of the right of individuals to band together and express their views, vent disenchantment and defend minority interests; see, Duncan Watts, *Pressure Groups* (Edinburgh University Press 2007) 215.

From this definition, several points arise for establishing a diversion caused by lobbying. First, the framework is restricted to Parliament and the Government and those working within those institutions such as MPs, peers and ministers. The examples below thus pertain to those decision-makers and their staff who form a key part of the decision-making environment. That environment is broadly conceived to include all sources that may influence decision-making. Second, office-holders must be diverted from their purpose, or their ability to act according to their purpose is weakened. In Chapter 3, it was argued that the purpose of those officials should be to act in the public interest.

Third, in testing whether an office-holder has been diverted from their purpose of acting in the public interest, the criteria of 'integrity' and 'objectivity' are used. Integrity means that 'holders of public office should not place themselves under any financial or other obligation to lobbyists that might influence them in the performance of their official duties'.[4] In Chapter 4, three questions were developed to test whether lobbying has undermined integrity. First, does the lobbying conduct breach or potentially breach any law? For example, if someone is guilty of bribery under the BA 2010 or any law covering corrupt conduct, their integrity is clearly and obviously called into question. Second, does the concern contravene, or potentially contravene, code of conduct or other rules on financial gain? Again, these rules pertain specifically to the integrity of the individual. Third, is the independence of the institution or individual compromised? If any of the three questions are answered in the affirmative, the decision-maker may have been diverted from their purpose of acting in the public interest, or their ability to act in the public interest may have been weakened because 'integrity' has been undermined.

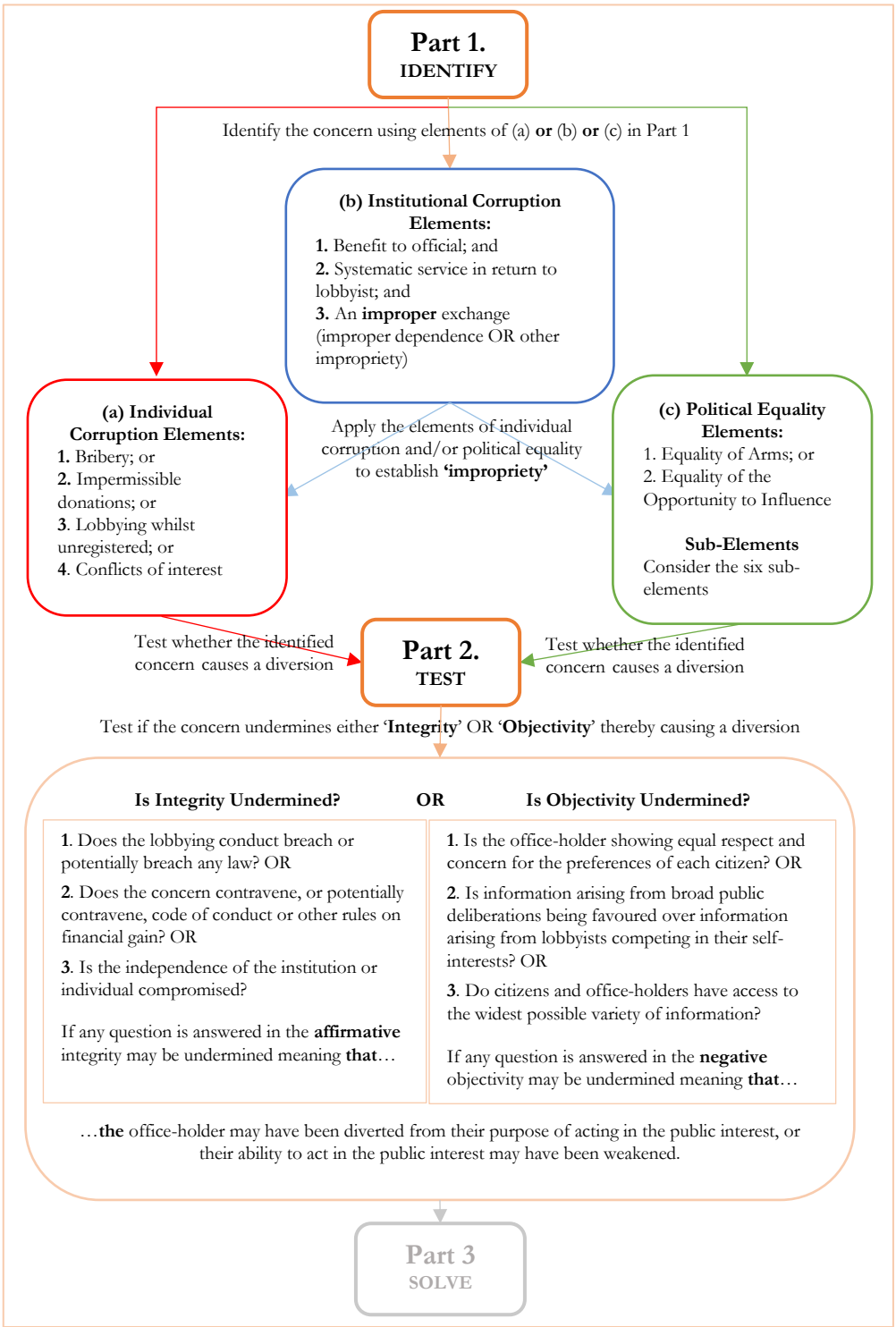
Objectivity means that officials should assess ideas on their merits or inherent worthiness in the sense that they should not give greater weight to ideas that have gained prominence because of lobbying underpinned by corruption or political inequality. In Chapter 5, three questions were developed to test whether 'objectivity' has been undermined, causing a diversion. First, is the institution (or individual working within it) showing equal respect and concern for the

[4] Adapted from House of Commons, *The Code of Conduct together with The Guide to the Rules Relating to the Conduct of Members* (HC 2015, 1076) 4.

preferences of each of its citizens? If not, they may be giving greater weight to representations arising from problematic lobbying which undermines 'objectivity'. Second, is the information arising from broader public deliberations being favoured over information resulting from lobbyists competing in their self-interest? If not, officials may be giving greater weight to ideas that have gained prominence from problematic lobbying. Third, do decision-makers have access to the widest possible variety of information? If they do not, their ability to make decisions on their merits may be weakened which also undermines objectivity. Where any of the questions are answered in the negative, the decision-maker may have been diverted from their purpose of acting in the public interest, or their ability to act in the public interest may have been weakened because 'objectivity' has been undermined.

The questions in Chapters 4 and 5 were developed separately, but the questions are interchangeable because there is a crossover between corruption and equality concerns. Finally, with regard to public trust in the institutions being undermined, this is simply established by integrity or objectivity being undermined, and the resulting diversion. That is because the existence of those principles is couched in the need to uphold the public trust. The case studies below help to illustrate when and how the public trust might be undermined. Bringing together these various elements, Figure 1 below outlines the institutional diversion framework. Part 3 of the framework is developed in Chapter 7.

Figure 1: Parts 1 and 2 of the Institutional Diversion Framework Summarised



In Part 1 of the framework, a concern is identified by establishing the elements of individual corruption, institutional corruption or political equality. The concern is then tested in Part 2 using the criteria of 'integrity' and 'objectivity' to determine whether there is an institutional diversion.

2. Applying the Institutional Diversion Framework

In this section, concerns about lobbying in the UK are applied to the diversion framework. This builds upon Rowbottom's book which applies political equality concepts to numerous lobbying issues. This chapter undertakes that effort within the structure of the diversion framework which offers a consistent and coherent approach for analysing the issues. To achieve this, the sections below analyse media investigations and books (which have done much to reveal scandals in the previous two decades in the UK), case law, and the influence of lobbying on the passage of two laws. The framework is evaluated for its effectiveness in identifying the problems with lobbying and testing for a diversion.

2.1 Media Investigations and Institutional Diversion

This section considers examples pertaining to the elements of individual corruption, institutional corruption and political equality. Whilst examples are drawn from several sources, Cave and Rowell's investigations in their book offer the most detailed consideration of the activities of lobbyists in the UK and will thus provide the basis for much of the information analysed.[5] No claims are made about the culpability of individuals or groups in this thesis. This section merely restates what is published elsewhere, analyses that information and applies it to the institutional diversion framework to evaluate its effectiveness.

2.1.1 Individual Corruption Case Studies

(a) Cash for Access

In 2013, two former Foreign Secretaries, Jack Straw and Malcolm Rifkind, were secretly filmed by investigative journalists in a 'cash for access' scandal.[6] Straw had informed the journalists that he operated 'under the radar' to influence and change EU rules on behalf of a firm which paid him £60,000 per year.[7] He stated that 'normally, if I'm doing a speech or something, it's £5,000 a day, that's what

[5] Cave and Rowell (n 2).
[6] Rowena Mason, 'Sir Malcolm Rifkind and Jack Straw Cleared of Cash-for-Access Misconduct' (*The Guardian*, 17 September 2015) <https://www.theguardian.com/politics/2015/sep/17/sir-malcolm-rifkind-and-jack-straw-cleared-of-cash-for-access-misconduct> accessed 23 Feb 2017.
[7] ibid.

I charge'.[8] It was subsequently revealed that Straw would be employed by a company that had secured a £75m government contract after he lobbied a minister on its behalf for a number of years.[9] Specifically, he lobbied the Cabinet Office minister, Francis Maude, on behalf of Senator International which offered him an executive position for after he had left office.[10] The Chairman of Senator International stated that 'we're doing loads of work but occasionally Jack is, tries to move things forward'.[11] Straw told undercover reporters:

> I happen to have helped them over the last four years anyway. I mean, without taking a penny from that […] But as a result of getting the name out - it's a private firm - they've said would I be interested ultimately in going on the board.[12]

Rifkind claimed that he could offer useful access to every British ambassador in the world and stated that he was self-employed despite receiving a salary as an MP.[13] Both were found not to have broken the rules (as they stood) because they were seeking employment for after they had left Parliament.[14] Further, both strongly defended their own conduct on the basis that their actions were 'entirely appropriate' and 'in accordance with parliamentary rules'.[15]

The rules were subsequently changed so that former MPs are now banned from working as paid lobbyists for six months after stepping down.[16] Further, members of the Parliamentary Standards Committee that cleared both former ministers expressed serious misgivings about the Code of Conduct being too weak. One member of the Committee noted how 'we have got a problem with

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[8] ibid.
[9] laire Newell, Lyndsey Telford and Luke Heighton, 'Jack Straw to Take Job for Firm he Lobbied for in Commons' (*The Telegraph*, 23 Feb 2015) <http://www.telegraph.co.uk/news/investigations/11430777/Jack-Straw-to-take-job-for-firm-he-lobbied-for-in-Commons.html> accessed 23 Feb 2017.
[10] ibid.
[11] ibid.
[12] ibid.
[13] Mason (n 6).
[14] ibid.
[15] Newell, Telford and Heighton (n 9).
[16] Lyndsey Telford and others, 'Ex-MPs Banned From Lobbying After 'Cash for Access' Scandal' (*The Telegraph*, 30 September 2015) <http://www.telegraph.co.uk/news/politics/11902758/Ex-MPs-banned-from-lobbying-after-cash-for-access-scandal.html> accessed 23 Feb 2017.

the rules' which involves MPs being judge and jury of fellow decision-makers.[17] They noted how for this specific scandal:

> There was no proper discussion over the conduct of Straw and Rifkind by the committee […] Mr Barron simply held up the report during a meeting and asked for approval for it to be passed. The other members sat in silence and he took this as approval.[18]

The member of the Committee went on to note that:

> The problem is that the rules are not tight enough. There is a cultural problem as well. Rifkind and Straw's complaint was that they were stung by Channel Four – not that it would be wrong to work for a Chinese PR company. The truth is you can work for as many Chinese PR companies as you like and be a member of Parliament. Before this Parliament is up it would be proper to have a look at them again.[19]

In another case in 2011, a scandal arose in the Cameron Government concerning the Defence Secretary Dr Liam Fox. His close friend and lobbyist, Adam Werritty, was given access to Fox's department, attending many meetings, and accompanied him on many foreign visits despite having no official role in Government.[20] It was determined that Fox had breached the Ministerial Code having allowed the distinction between his personal interests and Government activities to become blurred.[21] A minister must declare potential conflicts between their personal and professional lives. Fox subsequently resigned stating that 'I have also repeatedly said that the national interest must always come before personal interest'.[22]

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[17] Peter Dominiczak and others, 'MPs Who 'Cleared' Jack Straw and Sir Malcolm Rifkind Reveal 'Misgivings'' (*The Telegraph*, 17 September 2015) <http://www.telegraph.co.uk/news/investigations/mps-who-cleared-jack-straw-and-sir-malcolm-rifkind-reveal-misgiv/> accessed 23 Feb 2017.
[18] ibid.
[19] ibid.
[20] 'As it happened: Liam Fox Resigns' (*BBC News*, Undated) <http://www.bbc.co.uk/news/uk-politics-15313986> accessed 23 Feb 2017.
[21] 'Liam Fox Quits as Defence Secretary' (*BBC News*, 14 October 2011) <http://www.bbc.co.uk/news/uk-politics-15300751> accessed 23 Feb 2017.
[22] ibid.

(b) Cab for Hire

The 'cab for hire' scandal followed an undercover investigation in which three former Labour Cabinet Ministers offered to help lobbying firms in return for money. The former Transport Secretary, Stephen Byers, stated that he was like a 'cab for hire' and would work for £5,000 per day.[23] Former Health Secretary, Patricia Hewitt claimed that she helped an advisory group, who paid her £3,000 per day, obtain a key seat in Government.[24] Former Defence Secretary, Geoff Hoon, noted how we wanted to make money by making use of his contacts.[25] The three former ministers were suspended from the Labour Party, and an investigation by the Standards and Privileges Committee found Byers and Hoon to have been in serious breach of parliamentary rules.[26]

(c) Cash for Amendments

In 2009, three Labour peers offered to make amendments to bills for undercover reporters (posing as lobbyists) in exchange for up to £120,000.[27] It was found that two peers, Lord Truscott and Lord Taylor, had breached the Lords Code of Conduct for failing to 'act on their personal honour'.[28] They became the first members of the Lords to be suspended since 1642.[29] The then leader of the Lords, Lady Royall said 'we are at a dark moment for democracy. The trust that people place in Parliament and parliamentarians has sunk like a stone. People's disgust at Parliament is palpable'.[30] Indeed, there were calls for the police to investigate the matter for breach of corruption laws.[31]

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[23] 'History of political lobbying scandals' (*BBC News*, 3 June 2013) <http://www.bbc.co.uk/news/uk-politics-22754297> accessed 20 June 2014.
[24] ibid.
[25] ibid.
[26] ibid.
[27] ibid.
[28] ibid.
[29] ibid.
[30] Andrew Sparrow, 'Lords Votes to Suspend Peers Over 'Cash-for-Amendments' Scandal' (*The Guardian*, 20 May 2009) <https://www.theguardian.com/politics/2009/may/20/peers-suspended-cash-for-amendments> accessed 23 Feb 2017.
[31] 'Police Must Look Into Lords 'Cash for Amendments' Claims, say Lib Dems' (*The Guardian*, 25 Jan 2009) <https://www.theguardian.com/politics/2009/jan/25/peers-inquiry-cash-legislation> accessed 23 Feb 2017.

(d) Applying Institutional Diversion

Examples of outright corruption are rare. Most office-holders abide by the rules and violations of corruptions laws are highly unlikely to arise. The three examples above, however, highlight concerns about individual corruption under Part 1 of the framework. All decision-makers involved were supposedly seeking a personal or private financial gain (sometimes through the promise of future employment). These were not instances of institutional corruption because a political benefit was not involved. The payments were not donations to a political party.

In some cases, such as for Straw and Rifkind, no breaches of the rules were found. In Straw's case, he was seeking a benefit of employment once leaving office which was not, at that time, in breach of any rules. However, it is questionable why the Bribery Act 2010 would not be engaged. There was an offer/promise of a financial or other advantage (employment). Representing a private interest in public office might constitute improper performance of a relevant function. Straw would argue that no breaches of the Code of Conduct were found and thus there was no improper performance. However, the BA 2010 stipulates that there is improper performance where a person does not act in good faith, impartially, or in accordance with a position of trust. Straw is clearly in a position of trust. Even if that argument fails with regard to Straw, surely it succeeds in the cases of the Peers who were suspended after serious breaches of the Code of Conduct were found. There was clearly improper performance, and there was financial gain involved. The same goes for the 'cab for hire' scandal. Nevertheless, even if the BA 2010 was not breached, the rules within Parliament were which is why members were suspended. As such, one of the elements, at least, of individual corruption is satisfied.

The next stage is to test whether integrity is undermined under Part 2. Integrity means that holders of public office should not place themselves under any financial or other obligation to lobbyists that might influence them in the performance of their official duties. Three questions can be asked to determine whether officials have placed themselves under an obligation that might influence them in the performance of their duties. First, does the lobbying conduct breach or potentially breach any law? It is argued that BA 2010 has been breached in

some of the scenarios above. If that argument is not accepted, question two succeeds regardless. Second, does the concern contravene code of conduct or other rules on financial gain? Investigations clearly found that those rules had been contravened in the scenarios above which answers the question in the affirmative. Third, is the independence of the institution or individual compromised? The independence of the individuals has clearly been compromised because they are acting in the interests of the lobbyists because of promises of personal financial gain or future employment. Thus, officials have placed themselves under an obligation to outside individuals that have influenced them in the performance of their official duties. Integrity is undermined which means that those officials have been diverted from their purpose of acting in the public interest.

Further, whilst institutional corruption is not engaged, elements of political equality are (institutional corruption might be engaged if the evidence showed a pattern of behaviour). For Part 1 of the framework, the examples highlight how wealthy and influential people can gain an unequal opportunity to influence the political system by paying money to officials (unequal arms). The sub-elements of equality are also engaged. First, by offering employment and financial advantages to officials, lobbyists are exerting control over the decision-making process because they can direct officials to act for them. The economy of attention is also engaged because those office-holders are directing their attention to those who are offering them personal benefits. Equality of participation is relevant since participation in the political system is limited to those with vast resources who can 'hire' officials. The elements of political equality are, therefore, engaged.

For Part 2, both 'integrity' and 'objectivity' are undermined because of these political inequalities. For integrity, question three is engaged on whether the independence of the individual or institution is compromised. Clearly, the control of the decision-making process undermines the independence of the decision-makers. For 'objectivity', the officials did not show equal respect and concern for the preferences of each citizen and did not engage in broad deliberations about the issues (Question 1). Instead, they offered themselves to act in accordance with the wishes of their paymasters. They gave greater weight to representations that gained prominence because of lobbying that was underpinned by corruption and

political inequalities. The ability of those officials to make decision objectively is undermined alongside integrity. Thus, officials have been diverted from their purpose of acting in the public interest which will undermine public trust.

In this regard, whilst the concerns in these scenarios might initially appear to be mainly about individual corruption, the framework offers a more holistic consideration of the issues by highlighting political equality concerns. Two issues arise in terms of identifying regulatory solutions. First, there are questions in the Straw case about the effectiveness of parliamentary rules. Politicians should not be able to act for private interests offering future employment because conflicts of interest clearly arise. It is not only the rules but the investigative process which is of concern, with members approving a report without proper discussion. A cultural problem is thus highlighted with annoyance directed externally towards investigative journalists rather than members seeking private gain. Second, the reluctance for proper police investigations into conduct that potentially engage the BA 2010 seems problematic. Further, a lack of transparency surrounding lobbying presents a hurdle to proper scrutiny where the Act might be engaged.

2.1.2 Institutional Corruption Case Studies

(a) Dependence and Donor Clubs

The main political parties in the UK have donor clubs. The Conservative Party has a donor system consisting of eight tiers. For £50 per month an individual can join Club2020 to help 'defeat the rise of socialism'; the Fastrack Club for £300 per year to meet and network with others during receptions and events hosted by key figures in politics; Team 2000 for £2,000 per year to support the Party's policies, attending speeches of Party leaders and attending discussion groups; the Business & Entrepreneurs Forum for £3,000 per year to meet monthly with politicians and support free-market policies; the Front Bench Club for £5,000 per year to meet and debate with MPs at a series of lunches and receptions; the Renaissance Forum for £10,000 per year to enjoy dinners and debate with eminent speakers in business and politics; the Treasurers' Group for £25,000 per year to join senior figures from the Party at dinners, lunches, drinks receptions and other events; and the Leader's Group for £50,000 per year to join the Prime

Minister and other senior figures at post-PMQ lunches, drinks receptions and other events.[32]

The Labour Party also runs donor clubs (although with a less elaborate setup). Individuals can join the Thousand Club in one of three tiers. The lowest tier entails invites to bi-annual receptions, networking opportunities and other events for £1,200 per year; the Vice President's Tier for £2,500 per year involves invitations to receptions and regular communications with the President of the Club; and the President's Tier for £5,000 per year involves invitations to receptions of the President and lunch at the annual conference.[33]

(b) Sponsoring Events and Fundraising

Lobbyists can also influence parties by sponsoring events. In his book on lobbying, UK lobbyist Lionel Zetter offers strategies for donating to political parties. He encourages 'low-key' approaches such as sponsoring a frontbencher's private office, taking tables at party fund-raisers (which has the added benefit of entertaining clients whilst currying favour with politicians), sponsoring a party policy launch and sponsoring a leaflet or handbook. Additionally, political party conferences offer an 'excellent opportunity' for lobbyists to channel their own or their clients' money to political parties. He explains that:

> It is possible to sponsor fringe meetings and receptions, or to advertise in the conference centre. Again, there are usually gala dinners or corporate dinners involving the party leader and other senior figures. It is possible to either sponsor the whole event or just take a table.[34]

The tactics highlighted by Zetter are used by lobbyists at political party events. At a Conservative Party summer party in 2011, Russia's former deputy finance minister won an auction (having paid £160,000) to play tennis with David

[32] Conservatives, 'Donor Clubs' (*Conservative Party*, 2017) <https://www.conservatives.com/donate/Donor-Clubs> accessed 20 Feb 2017.
[33] The Labour Party, 'Join the Thousand Club' (*Labour Party*, Undated) <http://www.labour.org.uk/w/join-thousand-club> accessed 20 Feb 2017.
[34] Lionel Zetter, *Lobbying: The Art of Political Persuasion* (2nd edn, Kindle edn, Harriman House Ltd 2011) section 1.4.

Cameron and Boris Johnson.[35] The auction took place at the Hurlingham Club in London where 50 tables were sponsored and organised by an investment firm called Shore Capital for £12,000 per table.[36] The entire Conservative Party Cabinet was present at the event which was attended by 73 financiers, 47 retail and property executives and 19 professional lobbyists.[37] The event was criticised by the former chairman of the Committee on Standards in Public Life for providing an opportunity for direct and secret access to high ranking politicians.[38]

The same fundraiser also highlighted potential conflicts arising from foreign donations. It was revealed that a firm acting for the Government of Bahrain headed one of the prominent tables and hosted the then Defence Secretary Philip Hammond. Other guests at the table included the CEO of the Arab-British Chamber of Commerce whose aim is to foster trade between the UK and Bahrain, and the Chair of the UK-Bahrain All-Party Parliamentary Group, Conor Burns MP.[39] James Henderson, the chief executive of Bell Pottinger attending the Conservative Party summer party event stated that 'we do not go there to lobby ministers in any form […] Apart from shaking a hand I don't believe I have ever spoken to a minister at any of these events'.[40] The chief executive noted how his colleague was also attending 'in a private capacity as the personal guest of her host. She didn't raise any issues on behalf of Bell Pottinger or her clients'.[41] The Labour Party has also hosted similar events with dinners

[35] Melanie Newman, Nick Mathiason and Tom Warren, 'Exclusive: Russian Banker Pays £160,000 to Play Tennis with David Cameron and Boris Johnson' (*The Bureau of Investigative Journalism*, 3 July 2014) <https://www.thebureauinvestigates.com/stories/2014-07-03/exclusive-russian-banker-pays-160-000-to-play-tennis-with-david-cameron-and-boris-johnson> accessed 22 Feb 2017.
[36] Nick Mathiason and Tom Warren, 'Howard Shore and Andrew Law Among City Bosses out in Force at Tory Fundraiser' (*The Bureau of Investigative Journalism*, 2 July 2014) <https://www.thebureauinvestigates.com/stories/2014-07-02/howard-shore-and-andrew-law-among-city-bosses-out-in-force-at-tory-fundraiser> accessed 22 Feb 2017.
[37] Newman, Mathiason and Warren, 'Exclusive: Russian Banker' (n 35).
[38] ibid.
[39] Nick Mathiason, 'Cameron Forced to Explain Defence Secretary's Encounter with Bahrain Lobbyist at Fundraising Party' (*The Bureau of Investigative Journalism*, 2 July 2014) <https://www.thebureauinvestigates.com/stories/2014-07-02/cameron-forced-to-explain-defence-secretarys-encounter-with-bahrain-lobbyist-at-fundraising-party> accessed 22 Feb 2017.
[40] Nick Mathiason, Melanie Newman and Tom Warren, 'Access all Ministers: Billionaires and Lobbyists at Lavish Party with David Cameron' (*The Bureau of Investigative Journalism*, 1 July 2014) <https://www.thebureauinvestigates.com/stories/2014-07-01/access-all-ministers-billionaires-and-lobbyists-at-lavish-party-with-david-cameron> accessed 22 Feb 2017.
[41] ibid.

being attended by lobbyists and other industry experts who could have direct access to shadow ministers.[42]

The reach of lobbyists also appears to extend to many entertainment events. An analysis of the Register of Special Advisers' Gifts and Hospitality by the BIS in 2011 revealed that Rupert Murdoch's companies and representatives hosted 23% of all entertainment events registered (26 of 111 for the period analysed).[43] The then Prime Minister's director of communications, Andy Coulson, attended lunches with representatives of the news empire on five occasions and attended an awards dinner hosted by the Sun (belonging to Murdoch).[44] At the time, the Government was considering whether to allow NewsCorp's proposed takeover of BSkyB in a £10bn deal which would have significantly increased the size of Murdoch's business.[45] Such events led to questions about the efficacy of disclosure rules surrounding meetings with ministers because official face-to-face meetings had to be declared, but fundraisers did not fall within the scope of disclosure rules.[46]

(c) Support and Secondments

Lobbyists provide support in other ways. For example, support is given by the 'big four' accountancy firms to Government and Parliament. In a three-year period from 2009 to 2012, it was revealed that Deloitte, Ernst & Young, KPMG and PricewaterhouseCoopers (PwC) had given donations of staff costs worth £1.36m and offered consultancy work worth £500,000 to the Conservative Party,

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[42] ibid.
[43] Alice Ross and Nick Mathiason, 'NI Hosted Nearly a Quarter of Hospitality Enjoyed by Cameron's Inner Circle' (*The Bureau of Investigative Journalism*, 23 July 2011) <https://www.thebureauinvestigates.com/stories/2011-07-23/ni-hosted-nearly-a-quarter-of-hospitality-enjoyed-by-camerons-inner-circle> accessed 22 Feb 2017.
[44] ibid.
[45] ibid.
[46] Melanie Newman and Nick Mathiason, 'Lobbyists and PRs Mix with David Cameron, Philip Hammond and Jeremy Hunt' (*The Bureau of Investigative Journalism*, 1 July 2014) <https://www.thebureauinvestigates.com/stories/2014-07-01/lobbyists-and-prs-mix-with-david-cameron-philip-hammond-and-jeremy-hunt> accessed 22 Feb 2017.

Labour and the Liberal Democrats.[47] They also seconded fifteen staff members to the Treasury in a one year period.[48]

In 2014, the Labour Party front bench accepted over £600,000 of research help from PwC.[49] There were concerns that PwC were using their position for personal gain; although this was denied by the Labour Party.[50] This led to an investigation by the House of Commons Public Accounts Committee which found 'worrying' cases of individuals from PwC who provided advice on legislation, then going 'back to their firms and [advising] their clients on how they can use those laws to reduce the amount of tax they pay'.[51] PwC themselves confirm that they provide advice to lawmakers in their own interests. They state that '*in the interests of the firm and its clients*… we may, subject to the agreement of the Executive Board, provide limited non-cash assistance to those parties in areas where we have appropriate expertise'.[52]

Such arrangements have also led to concerns about the financial benefits that can be attained by those companies. For example, a company half-owned by Deloitte won contracts worth £774m.[53] Whilst the process of granting the contracts was not of concern, the secondees loaned by the firms might have provided an insider advantage by 'knowing when contracts are coming up and even getting themselves on the tender list. Undoubtedly having insider information is beneficial. That is why the big four second staff'.[54]

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[47] Maeve McClenaghan, 'How 'Big Four' Get Inside Track by Loaning Staff to Government' (*The Bureau of Investigative Journalism*, 10 July 2012) <https://www.thebureauinvestigates.com/stories/2012-07-10/how-big-four-get-inside-track-by-loaning-staff-to-government> accessed 22 Feb 2017.
[48] ibid.
[49] James Ball and Harry Davies, 'Labour Received £600,000 of Advice From PwC to Help Form Tax Policy' (*The Guardian*, 12 November 2014) <http://www.theguardian.com/politics/2014/nov/12/pricewaterhousecoopers-tax-structures-politics-influence> accessed 20 January 2015.
[50] ibid.
[51] House of Commons Committee of Public Accounts, *Tax Avoidance: The Role of Large Accountancy Firms: Forty-fourth Report* (HC 2012-13, 870, 2013) 4.
[52] PWC, 'Engaging with and Advising Policy Makers' (*PricewaterhouseCoopers*) <http://www.pwc.co.uk/who-we-are/engaging-with-and-advising-policy-makers.jhtml> accessed 20 January 2015.
[53] McClenaghan, 'How 'Big Four'' (n 47).
[54] ibid.

(d) Applying Institutional Diversion

Under Part 1 of the framework, the examples above do not highlight instances of individual corruption because the benefits accrued are political. It is political parties that are receiving donations or the institutions that are gaining support. Thus, the concerns are about institutional corruption.

In all the examples, a political benefit is being received which satisfies the first element of institutional corruption. Whether it is donor clubs raising money for political parties, fundraising events or staff support, a benefit is attained. Second, there may be a systematic service being given in return. This is difficult to prove without more transparency, but questions do arise. In the case of donor clubs at least, there is clearly a systematic service being given in return for the donation because donors can attend several events and they derive other membership benefits. In the case of events being sponsored or staff being seconded, much would depend on whether anything is offered in return and, if so, whether the service is systematic. The secondment of staff by the 'big four' accountancy firms suggests that they are receiving access or another service which provides insider knowledge. That insider knowledge might be considered a systematic service because it is ongoing whilst the staff are present in Parliament. For those donating at events, sponsoring events or hosting tables, it would depend on whether a systematic service is being returned. If it is, then the second element of the institutional corruption test is satisfied.

For the third element, the examples highlight exchanges that are improper for (a) improper dependency reasons and (b) other improprieties. On the former, it is clearly the case that political parties depend on donations to survive. The Government and Parliament also appear to be dependent on help from outside firms offering 'free' staff in the form of secondees or other help. Rowbottom explains the concern about such dependencies in the following passage:

> If a politician depends on a particular donor for substantial funds, there is a danger that the official will be influenced by the views or interests of that donor (especially if he wishes to receive donations in the future), even if the donation has come with no strings attached […] the presence of the

> donation can taint the politician's decision-making and present a conflict of interest.[55]

The theory of reciprocity explains this. It is human nature to 'return a favour' to someone who has offered help.[56] A sense of obligation underlines the returning of a favour by the recipient of the original favour.[57] Reciprocity is more likely to develop in the lobbying context because gifts may be exchanged, donations given or free help offered.

Thus, identifying a dependency can offer a richer account of an institutional problem that exists. However, for both (a) and (b) above, the elements of individual corruption (already rejected above) or political equality must be established for finding impropriety. In that regard, the elements of political equality are engaged. There is competition between lobbyists who use their financial arms advantages to donate to parties, sponsor events and second staff. Their financial strength generates opportunities for influence that most could not afford. The sub-elements of the 'controlling the decision-making process', the 'economy of attention' and the 'equality of participation' help to identify underlying problems. There are questions about the control that accountancy firms are exerting over policy internally by virtue of the dependency on their expertise. Further, politicians are more likely to give their attention to those offering support, and participation in the political process is precluded by one's ability to offer something advantageous to office-holders. Thus, the exchanges noted above are improper for these reasons of equality.

For Part 2 of the framework, the criterion of 'objectivity' can be used to test whether the institutional corruption identified causes a diversion. For question 1, officials are not showing equal respect and concern for the preferences of each citizen because they are offering advantages to those who donate to them. They could be giving greater weight to their representations. For question 2,

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[55] Jacob Rowbottom, 'Institutional Donations to Political Parties' in K.D. Ewing, Jacob Rowbottom and Joo-Cheong Tham (eds), *The Funding of Political Parties: Where now?* (Routledge 2012) 15.
[56] Thomas M Susman, 'Private Ethics, Public Conduct: An Essay on Ethical Lobbying, Campaign Contributions, Reciprocity, and the Public Good' (2008) 19(1) Stan L & Pol'y Rev 10, 15.
[57] ibid 16.

information arising from extensive public deliberations may not be favoured over influences arising from lobbyists competing in their self-interests. For example, it is logical that the opposition front bench will be more likely to heed the 'advice' of the accountancy firms offering them £600,000 of research assistance than others. For these reasons, it is also questionable whether officials have access to the widest possible variety of information (Question 3). Thus, objectivity is likely undermined in these scenarios because it is doubtful whether office-holders are assessing ideas on their merits and giving equal weight to representations when such a strong dependency exists.

Furthermore, 'integrity' is also potentially undermined. Namely, the third question for integrity: is the independence of the institution or individual compromised? Independence is compromised not only because a dependency exists, but also because firms are providing help to the Government who needs to regulate them. The independence of the institution is, therefore, compromised for those two reasons. Thus, both the criteria are potentially undermined which means that a diversion from acting in the public interest has arisen. That diversion causes trust in the institutions to be undermined. If access and influence can be purchased (which it can) then citizens will not trust that the political system is working for them.

Regarding regulation, the issues highlight how reforms might be needed to the system of donations to avoid dependencies and political equality barriers created by the political system. A lack of transparency surrounding secondments and the hosting of events makes it difficult to draw definitive links, and so greater transparency would help to draw firmer conclusions. Conflicts of interest highlight the potential reforms needed regarding who can operate within the political system and what information they have access to. Thus, the examples highlight an array of issues stemming from concerns about institutional corruption which flow into issues about political equality. The framework offers a clear and logical path to deciphering those issues in a holistic manner that is not offered elsewhere.

2.1.3 Political Equality Case Studies

The examples below highlight the pervasive and infiltrative nature of lobbyists in the political system. They illustrate in more detail the much more complex sub-elements of political equality; the marketplace of ideas, the control of the decision-making process and the economy of attention.

(a) The Marketplace of Ideas

(i) Tobacco: Third Parties and Shutters

In 2009, the Government amended the Tobacco Advertising and Promotion Act 2002 and other regulations[58] to ban the display of cigarettes at the point of purchase. Shutters were required to hide cigarette displays and are now a prominent feature in supermarkets in the UK. When a customer requests to buy cigarettes, a member of staff must slide a shutter to reveal the cigarettes before closing the shutters once the transaction is complete. The purpose of the law is to limit the exposure that children have to cigarettes. Evidence suggested that similar laws in other countries resulted in a reduction in smoking amongst young people.[59]

The lobbying effort by the tobacco industry to oppose the introduction of such a law in the UK reveals the extent to which the marketplace of ideas can be controlled by lobbyists. Cave and Rowell explain that 'an immense lobbying effort to fight the shutters' was launched by the industry which was fronted by 'people other than tobacco firms'.[60] Those people consisted of shopkeepers whom large tobacco firms sought to control to give the public impression of 'the friendly face of their local corner shop struggling against excessive government regulation'.[61]

In other words, the aim was for the tobacco firms to put their words 'in someone else's mouth'.[62] Rose explains the rationale for this approach is to give

[58] See, UK Government, 'Key Information on Tobacco Displays' (*Gov UK*, 27 March 2012) <https://www.gov.uk/government/news/key-information-on-tobacco-displays> accessed 17 Feb 2017.
[59] Cave and Rowell (n 2) 114.
[60] ibid 115.
[61] ibid.
[62] Merrill Rose, 'Activism in the 90s: Changing Roles for Public Relations' (1991) 36(3) Public Relations Quarterly 28, 30–31.

the appearance of credibility to an argument by giving the argument the appearance of independence.[63] Where an idea does not appear motivated by a self-interest or the desire to protect profit (particularly in the context of sensitive issues such as smoking and public health) it may have a greater likelihood of success.[64] 'It is about separating the message from the self-interested source' explain Cave and Rowell.[65] The tobacco industry have influenced officials through third parties for decades by funding think-tanks, retailers, scientists, academics and journalists. Such third parties enjoy more credibility than corporations who appear to have an agenda. The use of third parties can be a 'deeply deceptive tactic' because seemingly independent third parties may, in reality, be formed, trained and financed by lobbyists. At the same time, 'strenuous' efforts are made to conceal all traces of lobbyists' influence and to 'selectively and quietly' disclose financial information.[66]

With regard to the law on cigarette shutters, tobacco firms allegedly devised a plan internally, called 'Project Clarity' to 'try and derail, or failing that, delay the new law'.[67] Two lobbying firms were instructed called Gardant Communications (later rebranded to Meade Hall & Associates) and iNHouse Communications. The firms used shopkeepers to front the lobbying campaign and thus be in the public eye as opposed to the lobbying firms. The firms also prepared legal challenges against the Government. Once filed, the lawsuits would be supported by larger lobbying organisations such as the British Retail Consortium and the Confederation of British Industry. The plan was also for newsagent representatives to approach MPs seeking votes in the upcoming 2010 general election. Regional rallies would be sponsored for prospective MPs where the candidates would be asked to sign a pledge to oppose the ban on tobacco displays. They argued that a ban should be opposed because it would lead to more smuggling and thereby more crime and lower tax revenues. To support that argument, the lobbyists recruited former police and customs officers to convey

[63] ibid.
[64] ibid.
[65] Cave and Rowell (n 2) 115.
[66] ibid 116.
[67] ibid.

the message. The pledge would later be used to influence the candidates should they have subsequently been elected to Parliament.[68]

Following this lobbying effort, and days before the general election, the then shadow Health Minister of the Conservative Party informed the newsagents' lobby group that he was concerned about the legality of the proposed ban and that, if elected, the Conservatives would reconsider the proposals.[69] According to the authors, the comments 'caused great excitement' amongst the lobbyists who called it 'hugely important [and] directly attributable to the grassroots efforts'.[70] Conservative Party policy had been influenced which was evidenced by the ban being delayed for two years for small shops, and six years for newsagents, once the Conservatives were elected.[71]

Having succeeded in delaying the ban, the lobbyists then sought to achieve a more permanent retreat from the law. An action plan supposedly belonging to the lobbyists[72] indicated that they planned to seek the support of 100 MPs to pressure the Government. The lobbyists communicated their arguments through another third party, the Leicestershire Asian Business Association (LABA). This was achieved by sending mail to LABA members encouraging them to contact and influence MPs.[73] The lobbyists reframed the issue as being a concern about business rather than health. Cave and Rowell note that the lobbyists:

> Combined a media campaign designed to alarm, with third party lobbying, including a determined 'grassroots' effort, aimed at demonstrating widespread opposition.[74]

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[68] ibid 117.
[69] 'Tories Back Industry Appeal Against Cigarette Display Law' (*Evening Standard*, 2010) <http://www.standard.co.uk/business/tories-back-industry-appeal-against-cigarette-display-law-6463062.html> accessed 15 Feb 2017.
[70] Cave and Rowell (n 2) 118.
[71] ibid.
[72] The authenticity of the action plan cannot be verified in this thesis but a link to it is included for illustrative purposes. 'Project Clarity, Action Plan' (*Tobacco Tactics*, 6 Dec 2013) <http://www.tobaccotactics.org/index.php/PMI's_Mobilising_Support_from_Retailers#cite_ref-POSD_1-0> accessed 15 Feb 2017.
[73] Cave and Rowell (n 2) 119.
[74] ibid.

To exert control of third parties to front lobbying campaigns, the authors explain that lobbyists:

> Seek to exploit a dormant constituency who may share their stance, spurring these allies into action and through funding giving them prominence with politicians and the media. Or, if allies are hard to come by, lobbyists will create them from nothing, hiring people and forming groups.[75]

(ii) Tobacco: Manipulative Tactics and Plain Packaging

These tactics extended to another issue of concern to the tobacco industry: plain packaging on cigarettes. There was a Government proposal to remove branding from cigarette packets and replace them with graphic health warnings because branding is a key factor in enticing young consumers to smoke. In response, tobacco lobbyists conveyed their stance through third parties such as shopkeepers, a body representing rural shops (financially supported by tobacco firms) and an organisation representing Scottish wholesalers.[76] A lobbying firm, Luther Pendragon, was hired with the tactic of approaching local authorities, council representatives and trading standards officers throughout the country.[77] The trading standards officers were urged by the lobbyists to write to their local MP with the suggestion of delaying the proposals on plain packaging.[78] The authors highlight that 'tobacco was getting council officers to lobby for it'.[79]

Former police officers were also employed whose names allegedly appeared in media articles warning that the smuggling of tobacco would become worse if plain packaging were introduced. Further, in submissions to the Government on the issue, tobacco companies cited former police offers as expert witnesses who opposed the packaging. Those former officers were, however, members of a

[75] ibid 120.
[76] ibid.
[77] ibid 121.
[78] Extracts from the letters can be found at the following source (again, the letters cannot be verified in this thesis). 'Luther Pendragon: Lobbying Against Plain Packaging' (*Tobacco Tactics*, November 2012) <http://www.tobaccotactics.org/index.php/Luther_Pendragon#cite_note-3> accessed 15 Feb 2017.
[79] Cave and Rowell (n 2) 121.

group funded by tobacco companies.[80] The following extract highlights the pervasive lengths to which lobbying firms controlled the messaging:

> A small army of specialists were brought in to supplement these and other third party messengers such as business associations, anti-counterfeiting groups, researchers, and think tanks, like the Institute of Economic Affairs and the Taxpayers' Alliance. The PR company Finsbury helped PMI [the tobacco lobby] on key campaign decisions; the law firm DLA Piper was tasked with working up national stories, exclusives, op-eds and 'thought-provoking pieces'; the advertising company Pepper Media targeted its audience with regional stories about illicit trade. The specialist broadcast PR company Markettiers4dc was also roped in as consultants on the campaign. Also laid out was the broadcast and national and regional print media to target. Papers like the Financial Times, Daily Mail and Telegraph were in. The Guardian and the Independent were out.[81]

The aim was to bring about a collective effort to promote the message that the smuggling of tobacco would increase substantially, to doubt the evidence surrounding the benefits of plain packaging and to threaten 'legal implications' of introducing plain packaging laws. Importantly, plain packing had been introduced in Australia and one of the core arguments was to encourage the Government to adopt a 'wait and see' approach as regards the success of plain packaging in Australia before introducing such a law in the UK.

Much planning went into the lobbying effort with the lobbyists creating an 'influencers' map detailing those in favour and against plain packaging. The map included politicians, think-tanks, businesses and government departments. Their plans also revealed the lengths to which they would go to influence a Government public consultation on the proposals. The lobbyists claimed to have the capacity to generate 18,000 responses to the consultation arising from smokers' groups they recruited, industry, retail groups, think-tanks and trade unions. British American Tobacco also influenced the consultation process with a target of

[80] ibid.
[81] ibid 121–122.

200,000–300,000 individual submissions through websites. Indeed, a website was created by lobbyists that had the appearance of being a 'consumer website'. [82]

A report by the Telegraph highlighted how an open letter was delivered to the Health Secretary by 51 MPs opposing plain packaging. Of those MPs, 'six have each accepted tickets and lunch at the Royal Chelsea Flower Show worth more than £1,100 from Japan Tobacco International (JIT), which owns the Silk Cut, Mayfair and Benson & Hedges Brands'.[83] They noted how an MP had 'accepted two tickets to the opera festival Glyndebourne from the company last spring, valued at £1,132'.[84] In the open letter signed by the MPs, it was argued that there was 'no reliable evidence that plain packaging will have any public health benefit' and that plain packaging would encourage tobacco smuggling.[85] The Telegraph claimed that JIT had spent more than £23,000 'courting MPs in the last eighteen months'.[86]

A political science study demonstrated that over a three-year period which included the Government's consultation on plain packaging:

> 88% of research and 78% of public communications opposing plain packaging were carried out by organisations with financial links to tobacco companies. And public retailer campaigns funded by tobacco companies to mobilise opposition to plain packaging generated 95% of the more than 420,000 negative postcard and petition submissions to the consultation.[87]

Some of the tactics used also appeared to be dishonest and manipulative when lobbyists argued that half a million people were opposed to plain packaging. In support of this number, they cited petitions, online forms, postcards or written

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[82] ibid 122.
[83] Cal Flyn, 'MP Opponents of Plain-Packaging for Cigarettes Accepted Hospitality from Tobacco Giant' (*The Telegraph*, 28 June 2012) <http://www.telegraph.co.uk/news/politics/9361730/MP-opponents-of-plain-packaging-for-cigarettes-accepted-hospitality-from-tobacco-giant.html> accessed 16 Feb 2017.
[84] ibid.
[85] ibid.
[86] ibid.
[87] Jenny Hatchard, 'Big Tobacco's Dirty Tricks in Opposing Plain Packaging' (*The Conversation* 17 October 2016) <https://theconversation.com/big-tobaccos-dirty-tricks-in-opposing-plain-packaging-66854> accessed 16 Feb 2017.

submissions to the Department of Health.[88] However, the authenticity of those sources was called into question. Cave and Rowell describe that in 2012 a civil servant:

> Was leaving London's busy Waterloo Station when he saw two men wearing Hands Off Our Packs campaign T-shirts. This was the campaign run by the tobacco front group Forest. The official watched as one of the Hands Off Our Packs canvassers filled in a number of responses to a petition against the measure, forging one signature after another. The civil servant challenged him. The man refused to say what he was doing.[89]

A letter by that civil servant from the Department of Health sent to the campaign group Forest was revealed by a Freedom of Information request. In the letter, the civil servant noted that:

> I observed your representatives for a short period, during which I saw one of them writing frantically on the pad he was holding in full view of the public. I approached him, and saw that he was writing names and addresses on his pad, then signing the pad next to the names in different ways. During the short time I watched him, he filled completely a whole sheet […] On the assumption that the signed petitions will be sent to DH [Department of Health] as part of your organisation's response to the consultation, I am alerting you to the possibility that forged names may have been included in your petition.[90]

In another letter to Forest, the civil servant wrote:

> Today, I received correspondence from Head of the Department of Epidemiology and Public Health at the University of Nottingham, and the Chair of the Royal College of Physicians' Tobacco Advisory Group regarding your organisation's petition on tobacco packaging […]

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[88] Cave and Rowell (n 2) 129.
[89] ibid.
[90] 'FOI release – Correspondence About the Government's Consultation on the Packaging of Tobacco Products: FOI Reply 719739 Attachment 2' (*National Archives*, 13 Sept 2012) <http://webarchive.nationalarchives.gov.uk/20130402145952/http://transparency.dh.gov.uk/2012/09/13/foi-release-correspondence-about-the-governments-consultation-on-the-packaging-of-tobacco-products/> accessed 16 Feb 2017.

> [correspondence from the said person]
>
> *In a meeting with the undergraduate medical students here at the University of Nottingham on Monday, one student informed me that he had been approached by two of his friends who I understand to be other students to sign the 'Hands off our Packs' petition. He stated that his friends had to acquire a certain number of signatures otherwise they would not get paid. He went on to say that he had signed the petition giving a false name because he felt sorry for his friends. Obviously this is of huge concern on a number of fronts.*

In three emails, members of the public contacted the Department of Health to complain about the tactics used by Forest. They complained that members of the 'help protect our pack' campaign approached people to sign the petition leaving them under the impression that they would receive free gifts. The campaign was also accused of approaching drunk people to sign the petition in clubs and bars and for providing false information about the Government's proposals, leaving people under the impression that the Government was seeking an outright ban on cigarettes.[91]

The lobbying efforts on plain packaging appeared to be successful. The Government's legislative plan for 2013 did not include plain packaging. At the time, a tobacco industry lobbyist blogged that it was time 'to get the party started'.[92] Two months later, the Government announced that it would 'wait and see' whether plain packaging was effective in Australia. The authors note how that delaying tactic was a 'central message employed by the tobacco lobbyists'.[93] In an interview, the then Prime Minister stated that there was not enough evidence to prove that plain packaging was effective at cutting smoking amongst young people and that there was too much legal uncertainty—both central arguments employed by tobacco lobbyists. Reflecting on the lobbying effort, Hatchard states that:

> Arguments that come from tobacco companies and their research spill into public spaces. Once there, they can influence the public and political

[91] ibid, FOI reply 719739, Attachment 3, 7–10.
[92] Cave and Rowell (n 2) 123.
[93] ibid.

> mood on life-saving tobacco control policies and create a misleading impression of diverse and widespread opposition. This is known in the world of political science as "conflict expansion". And the potential effects are significant. When widespread, these "third party" activities can work to delay and even prevent policies: it took four years to get from consultation to implementation in the UK.[94]

(iii) Think-Tanks

A consistent thread in the examples analysed is the influence of think-tanks in the UK on the political process. Establishing a direct link between their influence and policy outputs is almost impossible because the processes involved are complex and multifaceted.[95] Further, a lack of transparency makes a clear relationship difficult to ascertain.[96] The furthest political science studies can go is to establish a 'congruence between ideas and the content of policy decisions' although that in itself does not establish impact.[97] Nevertheless, there is a 'strong suggestion' that think-tanks have enjoyed a significant role in disseminating and legitimising particular policy proposals.[98] Furthermore, it is undeniable that think-tanks exist to lobby because their purpose is to influence policy.

It is, for that reason, that UK lobbyist Zetter offers a 'top tip' of indirectly donating to political parties by sponsoring think-tanks or their reports. He explains that 'by sponsoring a report by one of these think tanks, it is possible to have a positive influence on the thinking of political parties and politicians without having to register a donation'.[99] It is not only research outputs of think-tanks that can influence but also their financial ability to sponsor events. They achieve this by 'hosting conferences and seminars, submitting proposals to relevant civil servants and ministers, writing articles in newspapers, and publishing books and pamphlets'.[100] For those that do reveal their financial details, much appears to be given from the financial industry.

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[94] Hatchard (n 87).
[95] Peter Dorey, *Policy Making in Britain* (2nd edn, Sage 2014) 44.
[96] ibid 68.
[97] ibid 44.
[98] ibid 68.
[99] Zetter (n 34) section 1.4.
[100] Dorey (n 95) 47.

An investigation by the BIS in 2012 showed that in a one year period, the UK's top 18 think-tanks had received £1.3m from the financial sector raising questions about their independence.[101] Some working for think-tanks have acknowledged these risks. For example, Sam Read from the New Economics Foundation think-tank stated that:

> Theoretically a wealthy individual who doesn't like a government policy could give millions of pounds to a thinktank to promote their agenda […] As well as utilising the thinktank's professed close links to politicians, they can help to create a debate in the media where they will give the impression that certain policies are backed by independent experts.[102]

Some think-tanks have stated that donors 'do not have massive influence but they do offer suggestions on areas of focus'.[103] Thus, think-tanks appear to be, in some cases, influenced by those with significant financial resources.

Two influential think-tanks are the Institute of Economic Affairs (IEA) founded in 1955 and the Adam Smith Institute (ASI) founded in 1977. Both favour neo-liberal free-market ideals and undertake research promoting policies in that area. Their influence has been extensive with claims that the Thatcher Governments implemented 200 of 624 policy proposals listed in a 1985 ASI file.[104] Together, the ASI and IEA have used subtly different approaches to influencing policy. The IEA has broadly presented 'the intellectual case for long-term market-orientated policies and values, whereas the ASI has focussed rather more on the short-term or practical means of actually implementing such policies'.[105] Indeed, for the IEA, it has 'sought to change the climate in which government thinking was taking place' and that it influenced 'those who help to frame the context in which policy-making takes place'.[106]

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[101] Maeve McClenaghan, 'Big Banks and Thinktanks' (*The Bureau of Investigative Journalism*, 12 July 2012) <https://www.thebureauinvestigates.com/stories/2012-07-12/big-banks-and-thinktanks> accessed 22 Feb 2017.
[102] ibid.
[103] ibid.
[104] Dorey (n 95) 47.
[105] ibid.
[106] ibid 48. Original quotations cited in Dorey.

A more modern think-tank called Policy Exchange was formed in 2002. Its purpose was to challenge Labour to help the Conservatives. Former Prime Minister David Cameron claimed that 'without Policy Exchange, there would be no Conservative revolution'.[107] Whilst Dorey notes that the statement was 'almost certainly hyperbole', the links between the Conservative Party and Policy Exchange are strong.[108] Michael Gove (former minister and candidate for the Conservative Party leadership) sat as its former Chair. Further, before the Conservatives winning the general election in 2010, it was claimed that Policy Exchange was a 'hothouse for many of its likely personnel, and the deviser of much of what the Conservatives are likely to do in Office'.[109] Subsequently, the Conservative Party adopted many of its policies under Cameron.[110]

Another think-tank, the Institute for Public Policy Research (IPPR), is claimed 'to have played a major role in the 1992 establishment, by the Labour leadership, of the (Borrie) Commission on Social Justice, which in turn, provided the basis for such New Labour policies as the New Deal'.[111] The extent of the IPPR's influence on the Labour Party was considered to be so significant that it was referred to as 'New Labour's civil service'.[112] A different think-tank, Demos, was concerned less with proposing policies but in shaping the framework in which policies were developed which has echoes with the dynamic between the IEA and ASI.[113] There are also direct links between think-tanks and Governments. Following the Labour Party's election victory in 1997, the then Prime Minister Tony Blair appointed the co-founder of Demos to the Cabinet Office to coordinate the implementation of policies.[114] This direct link appears to be a pattern. There have been 24 individuals who had memberships or held posts within influential think-tanks, who were subsequently appointed to government

[107] George Parker, 'Policy Exchange Powers Party's 'Liberal Revolution'' (*Financial Times*, 21 May 2008) <http://www.ft.com/cms/s/0/3006a6c4-26d1-11dd-9c95-000077b07658.html?ft_site=falcon&desktop=true#axzz4Z9rDOfsB> accessed 19 Feb 2017.
[108] Dorey (n 95) 49.
[109] Andy Beckett, 'What Can They be Thinking?' (*The Guardian*, 26 September 2008) <https://www.theguardian.com/politics/2008/sep/26/thinktanks.conservatives> accessed 19 Feb 2017.
[110] Dorey (n 95) 49.
[111] ibid 51.
[112] ibid.
[113] ibid 52.
[114] ibid 53.

positions as special advisers, ministers and as the head of 10 Downing Street Policy Unit.[115]

(iv) Applying Institutional Diversion

The examples above highlight concerns about political equality under Part 1 of the framework. The two core elements of political equality are engaged because those with significant financial resources gain an unequal opportunity to influence office-holders. In the context of this section, they use those resources to access the marketplace of ideas, control it and use their advantage to ensure their voice is heard loudest (sub-elements of political equality).

The control is deep and pervasive, infiltrating all corners of the marketplace which then forms the basis of influence over the decision-making process. The examples of the tobacco industry highlight how industry hires professional lobbyists. The lobbyists make detailed plans and concerted efforts to fight potential Government policies that could undermine their profits. A significant part of that plan is to 'recruit' third parties to convey their messages which gives them the appearance of being independent and credible. Instead of the push against tobacco regulations being fronted by tobacco firms, the struggling corner shop is presented which conceals the true source of the idea.

At the same time, the lobbyists seek to influence from all directions. Think-tanks, academics and journalists are recruited. A consistent, broad and loud message appears from many sectors of the marketplace which is supportive of the tobacco lobby. PR companies, law firms and the mainstream media shape that message. Petitions by grassroots campaigns funded by the industry are used to influence. The tactics used for obtaining signatures are sometimes deceptive or fraudulent. Public consultations are flooded by hundreds of thousands of responses by the tobacco industry, dwarfing and drowning out the voice of others. Fake consumer websites are created. The vast majority of research and public communications arises from the lobbying efforts of the tobacco lobby. Only wealthy lobbyists can access the marketplace in such a manner, control it and generate such a loud voice.

[115] ibid 53–55.

Further, the sub-element of 'controlling the decision-making process' is engaged. Once the target of delaying a law was achieved, the lobbyists went further, attempting to remove the idea from the agenda entirely. At times, public officials were used to achieve this aim. Potential future MPs were lobbied and encouraged to sign pledges. Former police officers funded by the industry would publicly support the objectives of the industry. Open letters were signed by dozens of MPs (some of whom received hospitality from the industry) opposing tobacco regulations. On the example of think-tanks, the analysis shows how control can infiltrate directly into Government. Many think-tanks do not reveal their funding sources and have their research outputs influenced. They either seek to influence policies directly or to shape the framework in which policies are developed. This reflects the depth of control which lobbyists try to attain. They not only control various 'sectors' which perpetuate their narrative, but they also strive to shape and control the decision-making process itself. Ultimately, members of think-tanks have taken up key positions in Government and Parliament.

It may be entirely legitimate for lobbyists to seek to control the marketplace of ideas and pursue a certain narrative. However, most people simply cannot afford to compete for control and influence. Most cannot afford to hire expensive professional lobbying firms, law firms, recruit the media, pay for academic research, influence the output of think-tanks and ultimately infiltrate Government and Parliament.

Under Part 2 of the framework, integrity and objectivity are potentially undermined. For objectivity, officials are undermined in their ability to show equal respect and concern for the preferences of citizens if the information they derive is unknowingly and heavily influenced by lobbyists (Question 1). That ability could also be undermined if the decision-maker was once a member for a think-tank that pursues a narrow agenda funded from secret sources. When the marketplace of ideas is controlled in this way, to the extent that public consultations are flooded with questionable inputs, the objectives of broad public deliberations are undermined (Question 2). Instead of having access to a wide variety of information, narrow evidence is presented from a controlled marketplace. In these circumstances, the decision-making environment is not

offering balanced information which undermines decision-making based on merits. It may become very difficult for officials not to give greater weight to the influence of lobbyists because the information before them is almost entirely dominated by those interests (Question 3). Objectivity is, therefore, undermined. Integrity is also potentially undermined because of a lack of independence (Question 3 on Integrity); especially where key decision-makers have held positions on think-tanks or have strong ties to them.

Where integrity and objectivity are undermined, officials are diverted from their purpose of acting in the public interest or their ability to do so is weakened. Plans are delayed or shelved, and the public trust in the institutions is undermined. In this regard, it can be seen how the institutional diversion framework identifies the lobbying concerns and tests whether a diversion has occurred in a rich and detailed manner. On regulation, Hatchard argues for greater transparency:

> In order to help countries guard against tobacco industry interference, awareness can be raised of the effects of their activities on public and political debates. And steps could be taken to make their relationships with tobacco companies clearer. A compulsory register of tobacco companies' memberships, political activities and associated spending would be a strong first move.[116]

(b) Controlling Decision-makers and the Political Process

(i) All Party Parliamentary Groups (APPGs)

Much concern has been expressed about all-party parliamentary groups (APPGs) which are a particularly useful vehicle for lobbyists to influence and potentially control the decision-making process itself. APPGs are cross-party groups with expertise in specialist areas. They are recognised but minimally regulated. Over 550 exist and have received millions of pounds in external funding.[117] A practice has developed in which lobbyists provide support in money or in kind to assist

[116] Hatchard (n 87).
[117] Rajeev Syal and Caelainn Barr, 'Lobbying Tsar Investigates All-Party Parliamentary Groups' (*The Guardian*, 6 Jan 2017) <https://www.theguardian.com/politics/2017/jan/06/lobbying-inquiry-registrar-parliamentary-secretaries> accessed 23 Feb 2017.

with the work of the groups.[118] This has led to an inquiry by the Registrar of Consultant Lobbyists in the UK about whether APPGs are being used to bypass the provisions of the TLA 2014.[119] There are also concerns about the access that lobbyists have to APPGs with some acting as secretaries for them.[120]

For example, the All-Party British-Maldives Parliamentary Group Chair David Amess MP had attended the Maldives on at least nine occasions.[121] One trip in February 2016 was an all-expenses-paid trip funded by the Maldives.[122] On that trip, Amess, who visited with another two members of the APPG, stated that he applauded the former President for bringing democracy to the Maldives.[123] That praise was given at a time when the Maldives was being criticised internationally for its human rights record.[124] The three members argued that their trip 'does not indicate in any way that we are in their pocket'.[125] Another APPG, the China APPG, raised over £160,000 from firms and Chinese state-funded bodies who flew a 'succession of MPs to Beijing and beyond'.[126] The APPG on Unconventional Oil and Gas has received donations of over £50,000 and has been accused of being a front for the shale gas industry because it was almost entirely funded by it.[127]

This has led one lobbyist in his book, Zetter, to argue that APPGs are 'thinly veiled fronts for commercial organisations'.[128] He notes how lobbyists can engage with APPGs by sponsoring them, providing the secretariat, arranging speakers, arranging site visits and suggesting topics for APPG reports.[129] The

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118 David Hine and Gillian Peele, *The Regulation of Standards in British Public Life: Doing the Right Thing?* (Manchester University Press 2016) 202.
119 Syal and Barr, 'Lobbying Tsar' (n 117).
120 ibid.
121 Rajeev Syal and Caelainn Barr, 'Are APPGs a 'Dark Space' for Covert Lobbying?' (*The Guardian*, 6 January 2017) <https://www.theguardian.com/politics/2017/jan/06/are-appgs-a-dark-space-for-covert-lobbying> accessed 23 Feb 2017.
122 ibid.
123 Philip Sherwell, 'British MPs Praise Maldives' Democracy After Indian Ocean Country Funds Fact-Finding Visit' (*The Telegraph*, 21 Feb 2017) <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/maldives/12166924/British-MPs-praise-Maldives-democracy-after-Indian-Ocean-country-funds-fact-finding-visit.html> accessed 23 Feb 2017.
124 ibid.
125 ibid.
126 Syal and Barr, 'Are APPGs' (n 121).
127 ibid.
128 Zetter (n 34) Section 4.3.18.
129 ibid.

APPGs receive little support and no funding from Parliament and are thus 'grateful' for outside help.[130] Whilst there have been greater initiatives for more transparency surrounding APPGs, the push for transparency has gone too far. A 600-page register is published every few weeks which makes the sheer volume of information difficult to decipher.[131]

(ii) Peers, Ministers and Regulators

In 2010, a private-sector membership body and industry advocacy group promoting the financial services industry, TheCityUK, was formed.[132] TheCityUK offers its paying members (sponsors) access to policymakers. The sponsors are guaranteed a position on the advisory council and access to senior domestic and international influencers and decision-makers.[133] In 2012, a report revealed that five members of the House of Lords, regulators (members from the Financial Services Authority) and senior civil servants sat on the advisory board and other committees of TheCityUK.[134] Having supported a trade deal between the UK and India, TheCityUK released the following extract in its 2011 annual report:

> We are fortunate to have HM Treasury and UK Trade & Investment as partners of the [India] group, and the regular briefings from the government departments and key players from the British High Commission in India ensure the group is on the leading edge of the vital information […] That access also allows us to give feedback to government in relation to the problem areas–protectionist legislation, and significant restrictions on market access, investment, and equality of treatment with domestic suppliers.[135]

130 ibid.
131 Hine and Peele (n 118) 205.
132 Melanie Newman, 'Inside the City's Best-Connected Lobby Group' (*The Bureau of Investigative Journalism*, 11 July 2012) <https://www.thebureauinvestigates.com/stories/2012-07-11/inside-the-citys-best-connected-lobby-group> accessed 22 Feb 2017.
133 ibid.
134 ibid.
135 Melanie Newman, 'How City Lobby Supported Controversial Indian Trade Deal' (*The Bureau of Investigative Journalism*, 11 July 2012) <https://www.thebureauinvestigates.com/stories/2012-07-11/how-city-lobby-supported-controversial-indian-trade-deal> accessed 22 Feb 2017.

That access contrasted with the Trades Union Congress (TUC) who had to rely on leaks for detailed information on negotiations which took place in secret.[136] This led to arguments about inequality:

> Industry is allowed to be fully engaged in the negotiations while other stakeholders like consumers or civil society organisations are not allowed to know anything. The secrecy means the consequences of certain positions are not being examined or discussed before they are agreed.[137]

The direct links between the Government and TheCityUK were also questioned. Lord Brittan, who was appointed by the Cameron Government as a trade adviser, produced a white paper advocating an increase in overseas skilled workers entering the UK.[138] At the same time, he attended two meetings of the advisory council of TheCityUK (whom he was involved with since its inception) which aggressively lobbied on an EU-India Free Trade Agreement which would allow more skilled workers from India into the country.[139] Some have claimed that bank representatives were not merely talking with officials but setting the agenda: 'representatives from banks were giving civil servants their orders […] The master-servant relationship was obvious'.[140]

The reach of lobbyists also extends to the regulatory process itself. A BIS investigation in 2012 revealed how the Financial Services Authority (FSA), which regulates the financial services industry in the UK, was coordinating lobbying strategies with industry.[141] The FSA agreed on a coordinated effort to influence UK regulatory reforms by opposing plans a for a new super-watchdog, discussed blocking new transparency rules, and discussed the best time for the financial services industry to lobby on regulatory rules.[142]

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136 ibid.
137 ibid.
138 Melanie Newman, 'Lord Brittan: The Lobbyist Who Wrote a White Paper' (*The Bureau of Investigative Journalism*, 10 July 2012) <https://www.thebureauinvestigates.com/stories/2012-07-10/lord-brittan-the-lobbyist-who-wrote-a-white-paper> accessed 22 Feb 2017.
139 ibid.
140 Newman, 'How City Lobby' (n 135).
141 Melanie Newman, 'Whose Side is the City's Watchdog On?' (*The Bureau of Investigative Journalism*, 10 July 2012) <https://www.thebureauinvestigates.com/stories/2012-07-10/whose-side-is-the-citys-watchdog-on> accessed 22 Feb 2017.
142 ibid.

(iii) Applying Institutional Diversion

Whilst this section has explored political equality sub-elements, the examples also raise show how those elements can identify institutional corruption concerns in Part 1 of the framework. In the case of APPGs, a benefit is being given to them in the form of donations or staff. Whether a systematic service is being given in return would require more information to determine, but it appears that there are significant benefits for lobbyists. Until 2013, many were granted unrestricted access to Parliament itself with passes being given to them. Today, many lobbyists have direct access to the APPGs, sitting as secretaries or in other roles. It is also not far-fetched to hypothesise that lobbyists are seeking some form of benefit by funding APPGs.

If a service is being given or if some benefit is being derived in return for those donations or help, then an exchange has taken place. That exchange could be underpinned by an improper dependency on those donations or help given. Indeed, APPGs are very dependent on outside donations since there is little or no financial support offered internally. Whether the dependency is improper can be proven by establishing the elements of political equality. Specifically, lobbyists exert control over the political process by offering assistance to APPGs. It is the donors who fund foreign visits, staff and costs of the APPGs. In this regard, they are exerting control at the very heart of Parliament. Lobbyists are controlling the environment and may be influencing the outputs of APPGs (whether the members of APPGs are consciously aware of it or not). Underlying that concern about control are the two core principles of the equality of the opportunity to influence and the equality of arms. Only those with the resources to donate to APPGs can hope to gain the opportunity to influence them, and there may be competition between various lobbyists seeking to gain the opportunity to influence by exerting control over the APPGs.

Institutional corruption aside, political equality concerns are also identified in isolation. In the case of TheCityUK, members of the Lords, civil servants and regulators sat on their advisory board. Thus, key decision-makers became part of the lobbying entity itself, and there were accusations that lobbyists set the agenda that office-holders were merely expected to follow. In this regard, they exerted

control over officials. Independence is also clearly a concern because those officials are part of the advisory board for lobbyists they are meant to regulate. At the same time, other lobbyists such as the TUC are omitted entirely from that process, relying on leaks for information. A related issue is the economy of attention. The Government (in the examples highlighted) clearly did not want to engage the TUC to the same extent as TheCityUK. That might be for ideological reasons, the significant control exerted by TheCityUK or both.

Under Part 2 of the framework, both integrity and objectivity are potentially undermined. Integrity is undermined because independence is compromised (Question 3). For objectivity, it is unlikely, for example, that APPGs funded by the Maldives are going to engage in broad public deliberations with human rights groups and show equal respect and concern for citizen preferences (Questions 1 and 2). In the case of TheCityUK, the views of others such as the TUC were not given equal respect or concern (Question 1). Further, broad public deliberations are clearly not being favoured where officials are sitting on the board and helping that entity (Question 2). By excluding others from the process, citizens and officials do not have access to the widest possible variety of information (Question 3). Consequently, office-holders may be giving greater weight to the ideas of those lobbyists and their ability to assess ideas on their inherent worthiness might be weakened. Thus, office-holders may be diverted from their purpose of acting the public interest, or their ability to do so may be weakened which undermines public trust.

(c) Economy of Attention

(i) Sham Consultations

There are times when Government consultations are a façade. In 2005, the Labour Government under the then Prime Minister, Tony Blair, launched a consultation on nuclear power. It was premised on the need for debate on the future of nuclear energy. However, the process was called a 'charade' because a decision had already been made two months earlier to develop a new generation

of nuclear facilities.[143] There are two relevant issues. The first concerns the process being a charade and the second concerns the tactics of the nuclear lobby. On the former, the House of Commons Trade and Industry Committee criticised the process, noting that:

> It is vital that the Government's energy policy is based on full consideration of the evidence and has broad political and public support […] However, the Government's Energy Review risks being seen as little more than a rubber-stamping exercise for a decision the Prime Minister took some time ago.[144]

The consultation process was subject to a judicial review challenge by Greenpeace on the basis that there 'was a legitimate expectation that there would be "the fullest public consultation" before such a final decision on the future role of nuclear energy was decided'.[145] The High Court was scathing in its assessment of the consultation process holding that it was unlawful, upholding the application for judicial review.[146] Mr Justice Sullivan held, amongst other things, that the consultation exercise was 'very seriously flawed' having gone 'clearly and radically wrong', that it was 'manifestly inadequate' and 'seriously misleading'.[147] A second consultation was conducted by the Government of Gordon Brown two years later. It promised that the views of the public would help to shape the policy on nuclear power. A website was created, and citizens were encouraged to contribute their opinions which would be listened to.[148] However, that consultation was also revealed to be a 'farce' after Brown 'let the cat out of the bag when he told MPs that the government had made the decision to continue with nuclear power halfway through the consultation'.[149]

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[143] Andy Rowell, 'Plugging the Gap' (*The Guardian*, 3 May 2006) <https://www.theguardian.com/environment/2006/may/03/energy.society> accessed 20 Feb 2017.
[144] Trade and Industry Committee, 'No Special Favours Needed for Nuclear' (*House of Commons*, 2005-06) <http://www.parliament.uk/business/committees/committees-archive/trade-and-industry/tisc-pn45-0506/> accessed 20 Feb 2017.
[145] See *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311, [2007] Env LR 29, [H1].
[146] ibid [118] (Sullivan J).
[147] ibid [116] (Sullivan J).
[148] Cave and Rowell (n 2) 173.
[149] ibid; see also Paul Dorfman, *Nuclear Consultation: Public Trust in Government: Framing the Nuclear Consultation* (Nuclear Consultation Working Group, 2008) 15.

On the nuclear lobby tactics, it was noted how the decision was a 'huge victory for the nuclear industry, which has been employing a sophisticated multimillion pound public relations campaign to win its case'.[150] Involved in the process was a special adviser, Geoffrey Norris, who had been a long-term advocate of nuclear power and Sir David King, a scientific adviser who had been in favour of nuclear power for many years.[151] Regarding the lobbying strategy, a government-owned nuclear company, British Nuclear Fuel (BNFL) hired public relations companies to help shape arguments that nuclear power was climate friendly.[152] They attempted to deliver this message through third parties such as 'independent' scientists because 'the public would be suspicious if we started ramming pro-nuclear messages down their throats' noted a public affairs director of BNFL.[153] BNFL targeted independent researchers, academics, parliamentarians, the media and trade unions because, as they put it, the 'Government does put store by what independent bodies/ experts have to say'.[154] BNFL offered financial support to members from a number of trade unions and administrative support facilities to campaign groups.[155]

(ii) Special Advisers

Whilst the focus of the institutional diversion framework is on the influence directed towards MPs, peers and ministers, it is also concerned with the decision-making environment that influences those decision-makers. Special advisers form a key part of that environment and are a big target for lobbyists. They are sometimes 'core participants in policy thinking [who] will often have a greater influence on the Secretary of State's eventual decision than the junior ministers in the department'.[156] Likewise, some special advisers have 'had more personal influence on government policy decisions than the relevant departmental

150 Rowell, 'Plugging the Gap' (n 143).
151 ibid.
152 ibid.
153 ibid.
154 ibid.
155 ibid
156 Peter Waller, 'Special Advisers and the Policy-Making Process' in Ben Yong and Robert Hazell (eds), *Special Advisers: Who they are, what they do and why they matter* (Hart Publishing 2014) 87.

secretaries of state'.[157] In undertaking their role, they will be concerned whether proposals are in line with the overall policy position of the Government.[158]

In developing and deciphering policy, they will maintain 'significant external contacts, notably with the political parties, think-tanks and other stakeholders in the work of the Department. They will be a channel for new ideas and proposals'.[159] In doing so, they will 'keep an eye open for new policy thinking whether being promoted by think tanks, the Opposition, interest groups or emerging media lobbies'.[160] Some have argued that there are 'no real concerns' with this process.[161] A 'benign' reality persists whereby special advisers are helpful to lobbyists because they can spot political issues quickly, and be an effective way of raising quickly the profile of a matter in Government (making sure it is understood at a senior level).[162] However, it is also recognised in the same research that special advisers provide direct access to ministers and, at the same time, block access to them.

Extracts from interviews with public officials who have worked with special advisers reveal that some ministers had large teams of advisers making it 'incredibly difficult to deal' with them because it was 'very difficult for officials to get into the room for meetings'.[163] One adviser to the then Prime Minister Gordon Brown, Shriti Vadera, restricted officials' access to Brown because 'she just had the view that her was Brown's view, so it did not need to be tested'.[164] Whilst the research found that such instances were the exception and not the rule, special advisers are relevant to the economy of attention in a significant way because they can filter whose influence ultimately reaches key decision-makers.

(iii) Applying Institutional Diversion

The examples above highlight sub-elements of 'equality of arms' and 'opportunity to influence' under Part 1 of the framework. The specific concern is that

[157] ibid 88.
[158] ibid 89.
[159] ibid 93.
[160] ibid 94.
[161] ibid 100.
[162] ibid.
[163] ibid 102.
[164] ibid.

politicians give greater attention to some rather than others. At times, the restriction of their attention is cynical as can be seen with the examples of sham consultations where decision-makers gave the appearance of giving meaningful attention to all citizens through a deliberative process. However, a decision had already been made, ensuring the process was a façade. With regard to special advisers, they form a central part of the decision-making environment in Government. It was noted that they will keep an eye open for policy ideas from think-tanks, interest groups and media lobbies. This suggests that they give greater attention to lobbyists or those controlled by them. It also suggests that to gain the attention of special advisers, one needs to have significant resources or influence and must compete with other lobbyists to gain attention. This means that lobbyists are 'often debilitated by the sheer range of groups and interests involved'.[165] They cannot compete unless they have enough resources. Having direct access to, or control over, special advisers increases the opportunities for influence.

Further, special advisers may consciously filter out which information reaches ministers, believing either that some information is more valuable than other information in terms of the Government's goals, or attributing their own views to those of the Government. Conflicts of interest also arise in the economy of attention examples. Politicians who have a stake in the companies that are seeking to lobby them may give greater attention to the lobbying of those companies. They may have greater sympathy for their cause, they could have personal relationships with the relevant stakeholders and may derive a personal benefit.

Under Part 2 of the framework, the criterion of objectivity is most likely undermined. Officials are clearly not showing equal respect and concern for the preferences of citizens (Question 1) where sham consultations are given or where staff filter out which information reaches key decision-makers. For question 2, information is also clearly not arising from broad public deliberations because, in the examples above, those consultations were proven to be a façade. For question 3, officials do not have access to the widest possible variety of information where

[165] Dorey (n 95) 65.

their staff prevent information reaching them. For these reasons, office-holders could be giving greater weight to ideas which gained prominence from problematic lobbying. Their ability to assess ideas on their merits is weakened. Thus, objectivity is undermined which causes a diversion from acting in the public interest, weakening public trust.

2.1.4 Summary

The case studies analysed highlight the pervasive nature of lobbying which infiltrates much of society. Most of the concerns above were structured to help explain the usefulness of the sub-elements of political equality identified in Chapter 5. These case studies have not previously been tied to a coherent and comprehensive framework which identifies the underlying concerns in a structured manner and tests whether there is a diversion.

2.2 Case Law and Institutional Diversion

The poor understanding of lobbying issues and the need for a framework can be seen in the case below. The relevant background facts are summarised and the lobbying issues are highlighted. The problems with the court's approach is examined, and the diversion framework is applied.

2.2.1 *Broadview*: 'Impossible to Conclude'

The case of *Broadview Energy Developments Ltd v Secretary of State for Communities and Local Government*[166] concerned an MP lobbying a Minister. Whilst this thesis is not concerned with lobbying between decision-makers in office, nor of the correct procedures used in the administrative law context, the case helps to highlight a general lack of understanding about how lobbying works and thus, potentially, the ability of the courts to reach fully informed conclusions. Had the outcome of this case been applied to a scenario involving the lobbying of a minister from an outside party, serious concerns would have arisen.

[166] *Broadview Energy Developments Ltd v Secretary of State for Communities and Local Government* [2016] EWCA Civ 562.

The facts were that Broadview (a company) sought to develop a new wind farm near the villages of Helmdon and Greatworth. Constructing the wind farm required permission from the Council which was refused. Broadview appealed that decision and the appeal was recovered by the Secretary of State (Minister) because the matter involved renewable energy development. The Minister refused planning permission to Broadview on the grounds that the wind farm would undermine the desirability of the area. Broadview sought to quash the decision on the grounds that a local MP, Andrea Leadsom, had extensively lobbied the Minister to refuse planning permission which breached the law and several guidance rules.

The judges held that there was no breach because the Minister did not consider any new evidence by virtue of the lobbying. The *audi alteram partem* principle was applied which requires decision-makers to consider all sides of the argument in planning application decisions. A minister making a planning decision must make clear to any person giving oral representations that he cannot listen to them. Leadsom had lobbied the Minister in the tea room in Parliament but the Minister did not state at the beginning of those conversations that they should not continue which was a breach of the rules.

However, Lord Justice Longmore found it 'impossible to conclude that the tea room conversation played any part in his decision-making process' and that the Minister being receptive to the lobbying was 'at the most, a technical breach which cannot have made any difference to the ultimate decision'.[167] Since there was a time gap of one year between the direct face-to-face lobbying and the decision, Longmore found it impossible to conclude that such lobbying could affect the final decision. Whilst the lobbying amounted to a technical breach of the decision-making process, the time difference between the breach and the decision meant that there were no grounds for quashing the Minister's decision. Further, Lord Justice McCombe stated that 'had the chronology been otherwise, and if the conversation had been more closely proximate in time to the decision

[167] ibid [30] (Longmore LJ).

taken, then it seems to me that the lawfulness of the decision might well have been in peril'.[168]

Additionally, the court had discounted a number of correspondences between Leadsom and the Minister. Eleven oral and written communications were highlighted which showed that Leadsom had lobbied the Minister for over one year.[169] These were not considered by the court because they did not contain any new information to what was already known to the Minister and thus did not engage the relevant planning application laws and rules.[170]

2.2.2 Applying Institutional Diversion

It is important to note that the outcome of the case was not problematic. Leadsom was representing her constituents throughout and the Minister refused to grant planning permission because the wind farm would undermine the desirability of the area for constituents. However, what is of concern was the judges' understanding of lobbying which could have led to unjust results in a different scenario.

Longmore and McCombe found that the lobbying technically amounted to breach of the rules pertaining to granting planning permission. Nevertheless, their conclusion was that it was 'impossible' for lobbying occurring one year prior to a decision to affect that decision. Only lobbying nearer to the time of a decision could potentially affect the decision and thus put the decision-making process in peril. Those conclusions are highly questionable when one considers the many case studies highlighted above pertaining to the elements of individual corruption, institutional corruption and political equality under Part 1 of the framework. They reveal that much lobbying is undertaken over a period of months or years and lobbyists are successful when using a variety of methods to influence decision-makers. Those methods are both direct and indirect, and collectively, they exist to gradually and systematically influence outputs.

[168] ibid [41] (McCombe LJ).
[169] ibid [9].
[170] ibid [30] (Longmore LJ).

The judges' conclusion that lobbying one year prior to a decision being made can have no effect is therefore doubtful. It is even more doubtful in this case when one considers that there were many other instances of lobbying both orally and in writing over a period of one year. The courts disregarded those communications because they did not reveal any new information. Thus, they did not engage the rules and laws on the need for the Minister to disclose communications that do not reveal new information. Nevertheless, it is submitted that the courts erred in not considering the potential impact of those communications alongside the tea room lobbying that they sought to focus on in isolation. That is because, taken together, the tea room lobbying and the other communications could have gradually and systematically influenced the final decision. That is how lobbying works and Part 1 of the framework would have revealed that to the judges.

Part 2 of the diversion framework is not engaged in this case because Leadsom's actions did not amount to individual corruption nor institutional corruption. Whilst political equality might technically be engaged because, as an MP, Leadsom had an unequal opportunity to influence that Broadview was not offered as an outsider, the framework does not cover decision-makers lobbying each other; particularly where decision-makers are acting on behalf of constituents. However, had the scenario been different so that Broadview was lobbying the minister in their self-interest and had special access to the Minister—lobbying in the tea room in Parliament and lobbying through numerous correspondence—the diversion framework would have been engaged in its entirety. In such a scenario, Broadview would have an unequal opportunity to influence that others do not by virtue of their special access raising questions about the objectivity of the decision-maker.

Therefore, this case reveals how some judges may have little understanding of how lobbying works in practice which could undermine their ability to reach fully informed conclusions. Part 1 of the diversion framework can highlight the pervasive nature of lobbying where such knowledge is lacking. This is important because one could envisage cases where private interests (and not just office-holders) are influencing decisions which would fully engage the framework. It would be very concerning, for example, if judges concluded that lobbying by

nuclear lobbyists attempting to influence the building of a new nuclear power plant should be disregarded because it occurred one year prior to a decision being made.

2.3 Legislation and Institutional Diversion

This final section analyses the impact of lobbying on legislation by reference to two case studies; the Water Act 2014 and the Mesothelioma Act 2014. The examples demonstrate that the framework is useful for identifying how lobbying involves, in many cases, a battle between self-interested entities which pertains to the equality of arms.

2.3.1 The Water Act 2014

The purpose of the Act was to create an insurance fund for premises at high risk of flooding which several groups had an interest in. Namely, the Association of British Insurers (ABI) which represents the insurance industry, the British Property Federation (BPF) which represents property owners, the British Insurance Broker's Association (BIBA) which represents brokers, and the World Wide Fund for Nature (WWF) which is concerned with conservation issues. Each group lobbied public officials in pursuance of their cause in relation to the Act.

The ABI, as the provider of the fund, lobbied the Government on the rules surrounding the fund. This led to both parties agreeing to a Memorandum of Understanding in June 2013 on the creation of the fund called Flood Re. The purpose of the fund was to allow for the provision of affordably priced insurance under the Water Act 2014.[171] It was agreed between the ABI and the Government that business premises would be excluded from the fund because businesses would not have difficulty in obtaining insurance at normal prices, so would not need the protection of Flood Re.[172] Other groups such as the BPF argued that the fund would also not cover properties in large blocks, private rented homes,

[171] Association of British Insurers, 'The future of flood insurance: what happens next' (*ABI*, 8 January 2015) <https://www.abi.org.uk/Insurance-and-savings/Topics-and-issues/Flooding/Government-and-insurance-industry-flood-agreement/The-future-of-flood-insurance> accessed 13 January 2015.
[172] Practical Law, 'Water Act 2014 Receives Royal Assent: Property Implications (Full Report)' (*Practical Law*, 16 May 2014) <http://uk.practicallaw.com/3-568-2265#> accessed 13 January 2015.

properties in council tax band H and determined that premiums for small businesses would increase because of the exclusion of business premises.[173] Lobbying by this and other groups such as BIBA led to Band H homes in Wales being included in the flood protection scheme.[174] In addition to Flood Re, the WWF and other conservation groups were successful in lobbying for environmental safeguards to be included in the Water Act 2014 such as reducing water company abstraction on rare chalk streams.[175]

Thus, several groups participated in the decision-making process. The ABI, BPF, BIBA and the WWF argued their cases, represented their member views and influenced change. Sometimes this change was for causes which would be considered as universally good such as the WWF's successful lobbying bringing about positive change for the environment. The groups provided a medium through which people with similar concerns could discuss their problems, and a concentrated voice to lobby decision-makers. However, the example also highlights how more powerful lobbyists can have more influence on decision-making resulting in decision-makers being less responsive to other groups. Indeed, the Government most strongly agreed with the views of the ABI which represents 90% of the UK insurance market.[176] The Government was willing to change its stance once other groups such as BIBA and BPF had lobbied their case more loudly. However, the rules were only changed months later following much lobbying which suggests that the Government was not responsive enough to those other groups during the creation of the Act. Smaller, less well-resourced and less powerful groups had to work harder and longer to have their voice heard.

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[173] Judith Ugwumadu, 'British Property Federation reiterates Flood Re concerns' (*The Actuary*, 29 September 2014) <http://www.theactuary.com/news/2014/09/british-property-federation-reiterates-flood-re-concerns/> accessed 13 January 2015; Richard Dyson, 'Government flood insurance scheme 'failing'' (*The Telegraph*, 27 June 2014) <http://www.telegraph.co.uk/finance/personalfinance/insurance/10930445/Government-flood-insurance-scheme-failing.html> accessed 13 Jan 2015.

[174] BIBA, 'BIBA Welcomes Flood Re Announcement and Inclusion of Band H Properties' (*British Insurance Brokers' Association*, 18 December 2014) <http://www.biba.org.uk/MediaCenterContentDetails.aspx?ContentID=3773> accessed 13 January 2015; Dyson (n 173).

[175] WWF, 'Recent Successes' (*World Wide Fund for Nature* 2014) <http://en.wikipedia.org/wiki/World_Wide_Fund_for_Nature> accessed 13 Jan 2015.

[176] Association of British Insurers, 'About the ABI' (*ABI*, January 2015) <https://www.abi.org.uk/About> accessed 13 January 2015.

2.3.2 The Mesothelioma Act 2014

The purpose of the Act was to introduce a payment scheme to compensate sufferers of mesothelioma (a type of cancer) following exposure to asbestos. The interested groups were the sufferers of mesothelioma, their employers and the insurance industry. A grassroots lobbying campaign was undertaken by the Independent on Sunday newspaper for the creation of a fund for victims.[177] Sufferers had also lobbied decision-makers for years on the issue of receiving compensation. Insurers lobbied the Government as they were concerned about the cost of the compensation scheme. Grassroots lobbying was paramount to raising awareness of injustices suffered by those with cancer. It was also critical for negotiating a compensation package for sufferers. Lobbying was also effective from the perspective of insurers who could provide technical expertise on the provision of insurance for sufferers. The Government was thus able to decipher the views of the main interested parties and act accordingly.

However, the Justice Select Committee found that a Government review of mesothelioma claims was not prepared in an even-handed manner.[178] The report followed accusations by a Partner at a law firm and others that the Association of British Insurers (ABI) had unduly influenced the Government's proposals.[179] The Committee found that the undue influence was caused by an informal agreement between the Government and the ABI which was not disclosed to other interested parties. The Committee expressed 'concern that the Government has not been transparent or open about the fact that its policy on mesothelioma has been shaped by an agreement […] with insurers'.[180]

2.3.3 Applying Institutional Diversion

The case studies provide an illustration of how various groups seek to influence the formation of legislation. Equality concerns are highlighted in Part 1 of the

[177] Emily Dugan, 'Exclusive: Victims Blame Insurers for 'Insulting' Asbestos Payouts' (*The Independent*, 5 May 2013) <http://www.independent.co.uk/news/uk/home-news/exclusive-victims-blame-insurers-for-insulting-asbestos-payouts-8604128.html> accessed 17 January 2015.
[178] House of Commons Justice Committee, *Mesothelioma Claims (third report)* (HC 305, 2014-15) 4.
[179] Leigh Day, 'Lawyer condemns Government proposals for Meso claims' (*Leigh Day*, 2 October 2013) <http://www.leighday.co.uk/News/2013/October-2013/Lawyer-condemns-Government-proposals-for-Meso-clai> accessed 17 January 2015.
[180] Justice Committee (n 178) 3.

framework. For the Water Act 2014, the Government sided with the more powerful insurance lobby. It amended rules following a concerted lobbying effort from other groups, but those groups were required to put in a much greater lobbying effort than the insurance lobby to achieve their aim. This highlights the arms advantage that some lobbyists have over others. For the Mesothelioma Act 2014, the Government made a secret informal agreement with insurers following a concerted effort which shaped policy. Thus, some lobbyists had a greater opportunity to influence others because they were able to make agreements secretly.

Under Part 2 of the framework, these scenarios highlight how integrity may be undermined because of the Government's independence being compromised by the agreement (Question 3). They also show how 'objectivity' can be undermined where the process is dominated by a battle between self-interested entities where the strongest group wins. Equal respect and concern is not being shown for the preferences of all citizens (Question 1), and greater weight is being given to the representations of some lobbyists over others (Question 2). These factors might lead to a diversion from acting in the public interest and public trust being undermined.

Conclusion

The purpose of this chapter was to apply and evaluate the usefulness of the institutional diversion framework for an analysis of lobbying concerns in the UK. At the outset, several questions regarding the institutional diversion were asked.

First, does the framework help in identifying the lobbying concerns (whether they are in isolation or whether they cross over)? Yes: numerous examples of lobbying were given, and they were categorised into broad concerns about individual corruption, institutional corruption and political equality. Within those broad umbrellas, the analysis revealed deeper underlying issues highlighted by the sub-elements of political equality. The crossover between issues was illustrated well in the examples of institutional corruption where an 'improper exchange' was established by identifying the elements of political equality. Second, are the integrity and objectivity tests useful for identifying why those

concerns are problematic and for establishing a diversion? Yes, the questions help to establish clearly whether those criteria have been undermined by the identified problem thereby causing a diversion.

Third, does the concept of an 'institutional diversion' help to conceptualise the problems clearly? It is argued that it does. Officials are not acting in the public interest, or their ability to do so is weakened where integrity and objectivity are undermined by the issues identified. This is a clear conception of the problem. Fourth, does that assist with identifying potential issues which require regulation? From the identification of the issues in Part 1, it could be seen how issues requiring potential reform were flagged in the analysis that followed. Fifth, is the framework a better tool for analysing lobbying concerns than the current approach in academic literature? In the case of *Broadview,* it was seen how the court poorly understood how lobbying works and could have understood the main issues using the framework. Further, from the examples that were considered, numerous issues were raised. Other literature does not offer a framework for identifying those concerns in a rational, clear and structured way. Thus, it is submitted that the diversion framework is a better tool than what currently exists elsewhere. Sixth, are there any drawbacks to the framework? All the examples analysed fell within the scope of the issues envisaged by the framework. Thus, it is submitted that the concept of an 'institutional diversion' works to achieve its aim of helping to offer a better conceptualisation of the problems with lobbying than currently exists in other literature that does not provide an overarching and holistic framework. The next chapter develops Part 3 of the framework called 'Solve'.

7

Guiding Lobbying Reform: An Analysis of the TLA 2014 and Interview with the Registrar

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Introduction

The previous chapters developed and applied Parts 1 and 2 of the diversion framework. This chapter creates guidelines for the development of regulatory solutions under Part 3 of the framework called 'Solve'. These guidelines arise from an interview conducted for this thesis with the Registrar of Consultant Lobbyists whose post was created by the TLA 2014.

It is evident from the previous chapters that lobbying is regulated in various ways such as under the BA 2010, codes of conduct, resolutions and the TLA 2014. There is scope for a detailed evaluation of lobbying regulations, but such a study is far beyond the scope of this chapter. Therefore, the analysis here is limited to the TLA 2014. Attempts have already been made to repeal the TLA 2014 but have failed. Indeed, the Lobbying (Transparency) Bill 2016/17 was intended to replace it but that attempt was unsuccessful because the Bill was so broad and unworkable in practice. The TLA 2014 has received much criticism and is likely to be targeted either for amendment or repeal again. Therefore, any further attempts at reform should be steered by guidelines that take into account the practical and political realities of statute being enacted by Parliament on this issue.

This chapter is divided into three parts. First, it examines what the TLA 2014 regulates and whether it addresses the concerns it was meant to address. It is argued that the TLA 2014 does not deal with those concerns and that regulatory solutions ought to be developed more carefully moving forward. Second, the

interview with the UK's Registrar of Consultant Lobbyists is analysed.[1] The challenges facing the Registrar in her role are identified which is important for determining how regulation should be developed to resolve the issues highlighted by the diversion framework. Third, ten guidelines are synthesised from the interview for Part 3 of the framework called 'Solve' that help to shape solutions moving forward.

1. What the TLA 2014 Regulates

The TLA 2014 requires certain lobbyists to register on a publicly available register. Namely, those working professionally as 'consultant lobbyists' who 'in the course of a business and in return for payment […] makes communications […] on behalf of another person or persons'.[2] A person is prohibited from carrying on the business of consultant lobbying unless they are registered on the Register of Consultant Lobbyists.[3] The Act covers oral and written communications made 'in return for payment'.[4] Communications must be 'made personally' to a minister[5] or others in the Cabinet.[6]

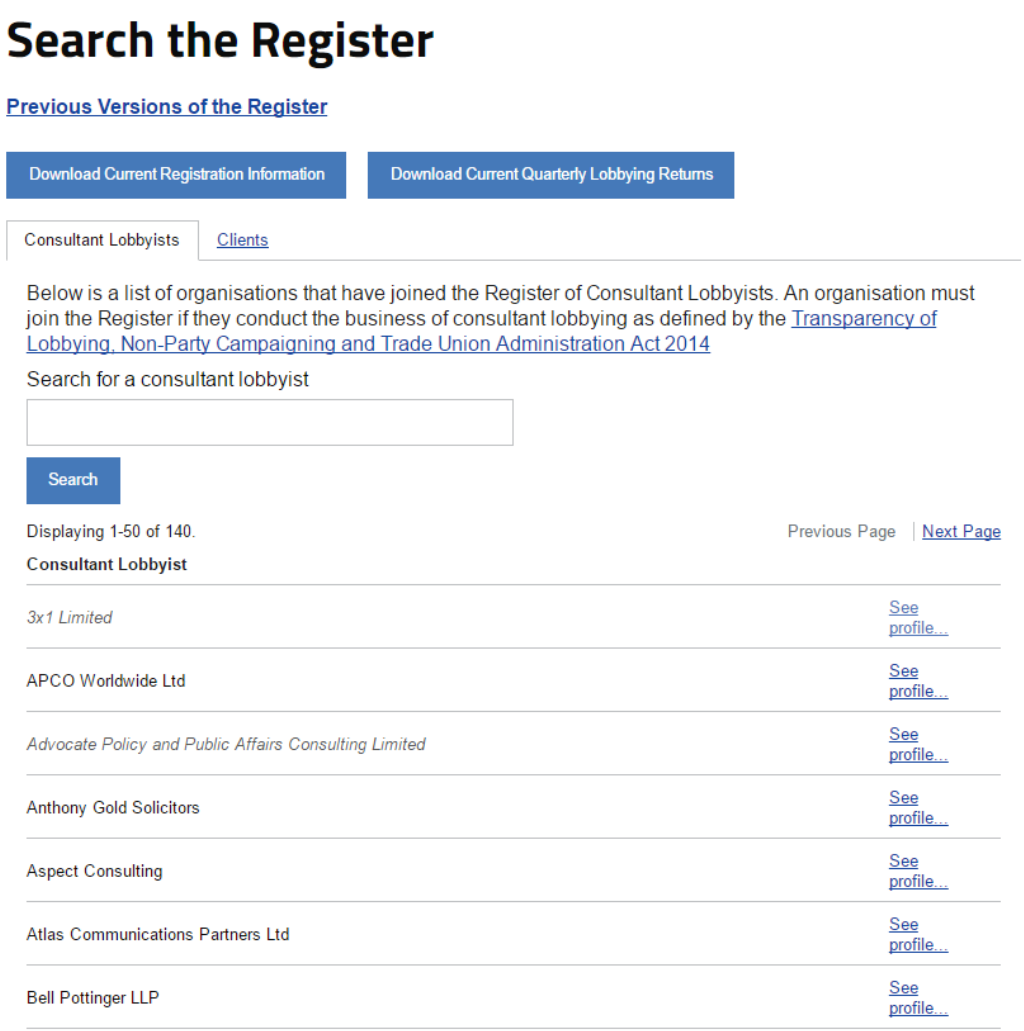
The register itself is a searchable online database. There are minor differences regarding what information companies, partnerships and individuals must provide, but they are all essentially required to provide a name and business address.[7] The Act does not impose a code of conduct but requires that registrants state whether they comply with one.[8] Registrants must state the name of the client on whose behalf they lobby every quarter.[9] The duty of keeping and publishing

[1] It is argued that the conclusions drawn from one individual are sufficient for an analysis of the relevant issues for two reasons. First, this chapter focusses on the challenges of regulation in the UK context and the Registrar is the first person to ever undertake this role in the UK. All the lessons are new and can only reliably be garnered from her first-hand experiences. Second, Scotland is in the process of creating a lobbying register. The forthcoming Scottish Registrar (Billy McLaren) has indicated his support for the regulatory approach of the UK's registrar. See, National Assembly for Wales, 'Inquiry into Lobbying: Evidence Session 2 - Video' (*Standards of Conduct Committee*, 4 April 2017) <http://www.senedd.tv/Meeting/Archive/8c3bf014-8158-4430-8411-871382dd74df?autostart=True> accessed 10 June 2017.
[2] Section 2(1) TLA 2014.
[3] ibid section 1(1).
[4] ibid section 2(3).
[5] ibid Sch 1, Part 2.
[6] ibid Sch 1, Part 3.
[7] ibid sections 4(2)(a), (b) & (c).
[8] ibid section 4(2)(g).
[9] ibid section 4(3) & 5(1).

the register falls on the Registrar[10] who is currently Alison White.[11] She monitors compliance with the Act[12] and can serve a notice requiring a person to supply information whether the person is registered or not.[13] An offence is committed where a person carries on the business of consultant lobbying whilst being unregistered,[14] or if the details on the register are inaccurate or incomplete and the person has failed when required to submit an information return.[15] There are both criminal and civil penalties available to the Registrar.[16] The lobbying register went live in 2015 on the website of the Office of the Registrar of Consultant Lobbyists and appears as follows:

[10] ibid section 4(1).
[11] UK Government, 'Alison White' (*Registrar of Consultant Lobbyists*, 2015) <https://www.gov.uk/government/people/alison-white> accessed 15 April 2015.
[12] TLA 2014, section 8.
[13] ibid section 9 & 9(2).
[14] ibid section 12.
[15] ibid section 12(1).
[16] ibid section 12(7) & 16.

Figure 1: The UK Register of Consultant Lobbyists.[17]



The register is simple, providing a search box, a list of consultant lobbyists by name and a link to further details. Figure 2 below provides a comparison of the different types of registration provided.

[17] Office of the Registrar of Consultant Lobbyists, 'Register of Consultant Lobbyists' (*ORCL*, 2017) <https://registerofconsultantlobbyists.force.com/CLR_Search> accessed 3 April 2017.

Figure 2: Entries on the Register of Consultant Lobbyists.[18]

APCO Worldwide Ltd

Key registration information

Registered since

02 April 2015

Address

90 Long Acre
London
UK
WC2E 9RA

Company Number
2516364

Telephone number
02075263654

Website
http://www.apcoworldwide.com

Clients

'Clients' are the individuals or organisations for whom a consultant lobbyist has conducted the business of consultant lobbying in return for payment as defined by the Act.

Current client list (January to March 2017)

Client	Client
Equinix	Palo Alto Networks
Frugalpac	Teollisuuden Voima Oyj (TVO)
GML Ltd	Zaluvida
Healthcare Distribution Association (HDA)	

Displaying 1-7 of 7. Previous clients | Next clients

Previous client lists

- October to December 2016
- July to September 2016
- April to June 2016
- January to March 2016
- October to December 2015
- July to September 2015
- April to June 2015
- January to March 2015

Relevant code of conduct details

Is there in place an undertaking by this organisation to comply with a relevant code of conduct?
Yes

Details of where the code of conduct could be inspected:
This organisation adheres to the Association of Professional Political Consultants' (APPC) code of conduct.

[18] ibid.

Mr Ronald Bailey

Ceased the business of consultant lobbying on 1 January 2017

Key registration information

Registered since

29 October 2015

Address

The Longhouse
off Haylings Grove
Leiston
Suffolk
England
IP16 4DX

Telephone number

01728 831515

Clients

'Clients' are the individuals or organisations for whom a consultant lobbyist has conducted the business of consultant lobbying in return for payment as defined by the Act.

Current client list (October to December 2016)

Client	Client
Sustainable Energy Association	

Displaying 1-1 of 1.

Previous clients | Next clients

Previous client lists

- July to September 2016
- April to June 2016
- January to March 2016
- October to December 2015
- July to September 2015

Relevant code of conduct details

Is there in place an undertaking by this organisation to comply with a relevant code of conduct?

No

The details required from the different entities are largely the same. Namely, the name, the date registered, address, telephone number, website, a list of clients and a statement regarding whether they are signed up to a code of conduct. The biggest differences in content are usually the addresses and phone numbers of individuals compared with businesses. Further, some registrants will have voluntarily signed up to a code of conduct whereas others will not have done so (circled in red above).

1.1 Whether the TLA 2014 Addresses Lobbying Concerns

This issue is considered in two parts. First, and most narrowly, the goals of the TLA 2014 and the policy underlying its creation (identified in Chapter 2) are revisited to determine whether the register achieves what the law set out to do. Second, and more broadly, there is consideration of the concerns highlighted by the diversion framework on individual corruption, institutional corruption and political equality to explore whether the register addresses those concerns. This section is supplemented with extracts from the interview with the Registrar (although the main analysis of that interview is undertaken in section 2 below). It is argued that the TLA 2014 does not address most of the concerns that led to its creation nor those identified by the diversion framework.

1.1.1 The Policy Objectives Underlying the TLA 2014

The policy underlying the TLA 2014 is that:

> It is not always transparent whose interests are being represented when consultant lobbyists meet with ministers and senior officials. This information asymmetry may lead to suboptimal policy making.[19]

Further, according to the then Government, the problem with a lack of transparency is that it can fuel a perception of undue influence.[20] It stated that 'there is public concern that some lobbying activity is opaque, allowing some to

[19] Cabinet Office, *A Statutory Registry of Lobbyists (as part of the Transparency Lobbying, Non-Party Campaigning and Trade Union Administration Bill)* (Impact Assessment, 9 July 2013) 3.
[20] ibid.

exert a hidden, sometimes inappropriate, influence on Government'.[21] Additionally, it noted how it would 'continue to be vulnerable to asymmetric information unless this is prevented by statute, perpetuating this lack of transparency [where lobbyists] do not declare their clients up front'.[22] Below, the register is analysed to determine whether it covers each issue in turn.

(a) It is not always transparent whose interests are being represented when consultant lobbyists meet with ministers and senior officials.

The register offers more transparency than before because there was previously no such register. It provides a list of consultant lobbyists who lobby ministers in certain situations and a list of the lobbyist's clients. However, that is too narrow for several reasons. First, the requirements under section 2(3) TLA 2014 are easily circumvented. This defines 'communications' as those which are *made personally* to a *Minister of the Crown or permanent secretary*.

The term 'made personally' is a glaring loophole. Where communications are not 'made personally', consultant lobbyists will not have to sign the register. They could simply ask someone else to communicate on their behalf. In this regard, the following extract from the interview with the Registrar is illuminating:

> If an organisation was to draft a letter and the letter says: 'Dear Minister. Just to let you know about this particular piece of proposed legislation. We don't think it's a very good idea for X, Y, Z reasons. We'd like to have a meeting with you. Signed X'. Now the letter is written by the consultant lobbyist, but it is signed by their client, so the letter is not registerable. If it was signed by the lobbyist, it would be. However, in most cases, it is signed by the client, so it is not registerable. A common misunderstanding at the outset was 'we drafted the letter. Therefore, it's registerable'. No, it is not. The letter might be written by you but it has actually been signed by your client, so the letter itself is not registerable. But my next question is how did that letter go to the minister? Did it go to the minister's private email address? Answer, 'yes it did'. What did the email say? Did it just say:

[21] ibid 1.
[22] ibid.

> 'Dear Minister, please find attached a letter. Yours sincerely, consultant lobbyist'. If so, that is not registerable. If the email says: 'Dear Minister, please find attached my letter from our client X Corporate which lays out a number of issues to do with this particular Government policy to which we would like you to have a meeting'—registerable.[23]

Thus, consultant lobbyists can simply bypass the need to register by asking their client to sign a letter. Further, even if lobbyists want to err on the side of caution by seeking to register, that does not lead to more transparency. The Registrar explains that:

> Lots of people say to me: 'Well I think I better err on the side of caution; better to over declare rather than under declare'. However, it means the register is not correct. They are doing things that the legislation doesn't require them to do. It is my job to make sure they do what the legislation requires them to do.[24]

As a result, the narrow definition of 'communications' leads to a loophole being created. Even where lobbyists want to register, that does not lead to more transparency because that is not what the legislation requires.

The second term highlighted under section 2(3) TLA 2014 above: 'Minister of the Crown or permanent secretary' highlights how most office-holders are not covered. Indeed, one omission which led to considerable criticism from MPs was that of special advisers who are often lobbied.[25] Such omissions create loopholes because lobbyists can simply lobby office-holders who are not covered. Consequently, for the first part of the policy, the register does not achieve its aims regarding transparency and information asymmetry because only a very a narrow range of communications are registrable and can easily be circumvented.

(b) A lack of transparency can fuel a perception that undue influence has taken place.

[23] Appendix 1, 9.
[24] Appendix 1, 3.
[25] HC Deb 9 September 2013, Vol 567 Col 742; HL Deb 22 October 2013 Vol 748, Col 896.

This raises questions about the nature of the transparency mechanism itself. A lobbying register may or may not tackle the perception of undue influence. It might do when it provides adequate information. However, too much information (such as on the APPG registers) would make it impossible for most individuals to find the time to analyse it all. Too little information might raise even more suspicions of undue influence with people drawing incorrect conclusions. The right balance is hard to determine, but the lobbying register in its current state is clearly inadequate for tackling perceptions of undue influence. It provides a name and address of the lobbyist as well as their clients, but other critical information is omitted such as whom the lobbyist met, when they met, what was discussed, what the lobbyist sought to influence, the interests of the lobbyist's clients and so on. A further point is that the Ministerial Diaries exist to provide information about lobbying that cannot be found in the register. The Government publishes a quarterly register regarding whom ministers met, what was discussed, details of gifts received and overseas travel. A sample of this is given in Figure 3 below:

Figure 3: David Cameron's Meetings from 1st April to 30th June 2014.[26]

MEETINGS WITH EXTERNAL ORGANISATIONS (INCLUDING MEETINGS WITH NEWSPAPER AND OTHER MEDIA PROPRIETORS, EDITORS AND SENIOR EXECUTIVES)[2]

1 APRIL 2014 – 30 JUNE 2014

Prime Minister, The Rt Hon David Cameron MP		
Date of Meeting	**Name of External Organisation**	**Purpose of Meeting**
April	John Lewis	To discuss John Lewis' business
April	Accenture	To discuss announcement on new jobs
April	Vodafone Group	To discuss issues connected to rollout of broadband and Vodafone's UK operations
April	Somerset Floods Action Group	To discuss flood response and recovery on Somerset levels
April	Walmart, Asda	To discuss announcement of new jobs
April	BCC, CBI; EEF, Forum of Private Business; FSB; IoD	General discussion on business issues
April	Westbridge Furniture Ltd	To discuss developments in the local economy
April	Skanska	To discuss developments in the construction sector
April	Martin Ivens, Sunday Times	General discussion
April	Deloitte UK, Allocate Software Plc, BTG PLC, Caxton Fx Limited, Intelligent Energy Holdings Plc, Kelway Holdings Limited, Baringa Partners LLP, Delta Display Holdings Ltd, Gemfields Plc, Impello Plc, Kobalt Music Group Limited, Perform Group Plc, The Reflex Group	To discuss sector specific business issues and trade matters
April	Financial Times, Evening Standard, Daily Express, The	General discussion

[2] Does not normally include meetings with Government bodies such as other Government Departments, NDPBs, Non-Ministerial Departments, Agencies, Government reviews and representatives of Parliament, devolved or foreign governments. Visits, attendance at seminars, conferences, receptions, media, interviews etc would not normally be classed as meetings.

Whilst the information is useful, it is a poor complement to the lobbying register. The details in the diaries cannot be cross-checked with those in the register because specific dates are not given in either. Also, the diaries are inconsistent. Some entries provide details of the meetings, and some do not. Therefore, even when considered together, the register and diaries offer little information that can be used to tackle the perception of undue influence.

[26] Cabinet Office, 'Cabinet Office: Ministerial Gifts, Hospitality, Travel and Meetings, April to June 2014' (*UK Government*, 13 March 2015) <https://www.gov.uk/government/publications/cabinet-office-ministerial-gifts-hospitality-travel-and-meetings-april-to-june-2014> accessed 23 April 2015.

(c) There is public concern that some lobbying activity is opaque, allowing some to exert a hidden, sometimes inappropriate, influence on Government.

Whilst this concern crosses over with points (a) and (b) above, several separate matters arise. First, the concern mentions the need to reveal 'lobbying activity', yet the register does not disclose the details of lobbying activities; only that some lobbying activity has taken place. Second, whether influence was 'inappropriate' will not be revealed by the register in its current state as, again, no details of the lobbying are given. Third, the register covers less than 20% of lobbyists overall (consultant lobbyists) and, in any case, only covers less than 1% of consultant lobbyist activities because they rarely meet Ministers or Permanent Secretaries.[27] Therefore, the register does little to bring transparency to the activities of consultant lobbyists, never mind others such as in-house lobbyists. During the Bill stages, the Government claimed that it is clear whose interests in-house lobbyists represent. For example, it is clear whose interests HSBC represent when they lobby.[28] However, it is not merely the identity of the lobbyist that is relevant but also the subject matter of the lobbying; HSBC could have a huge range of interests. This inadequacy is underlined by information contained in the European Union Lobbying Transparency Register in Figure 4 below:

[27] PRCA, 'PRCA Lobbying Bill Briefing – Report stage' (*PRCA*, 2013) <http://www.prca.org.uk/assets/files/PRCA%20Lobbying%20Bill%20Briefing%20-%20Report%20stage.pdf> accessed 24 April 2015.
[28] HC Deb 3 September 2013, Vol 567, Cols 178 & 179.

Figure 4: Lobbyists Headquartered in the UK and Registered on the European Transparency Register.[29]

Search the register

Change my search criteria

1 - 25 of 881

1 2 3 4

Identification number:	(Organisation) name	Section	Registration date	Head office country
80794027935-22	ABM Analytics Ltd	I - Professional consultancies/law firms/self-employed consultants	02/02/2012	United Kingdom
71031367582-11	ABTA - The Travel Association (ABTA)	II - In-house lobbyists and trade/business/professional associations	04/01/2012	United Kingdom
948363814168-95	Academy of Medical Sciences	III - Non-governmental organisations	06/08/2014	United Kingdom
459047614442-80	Academy of Social Sciences (AcSS)	III - Non-governmental organisations	16/09/2014	United Kingdom
467615113800-87	Access Partnership	I - Professional consultancies/law firms/self-employed consultants	13/06/2014	United Kingdom
411382614318-60	ACE Recycling Group (ACE)	II - In-house lobbyists and trade/professional associations	21/09/2014	United Kingdom
933381915459-41	ADAS UK Limited	III - Non-governmental organisations	14/01/2015	United Kingdom
11220347045-31	Advertising Information Group (AIG)	II - In-house lobbyists and trade/business/professional associations	27/10/2011	United Kingdom
27712995385-90	Age UK	III - Non-governmental organisations	25/02/2011	United Kingdom
123852915269-65	Agricultural Industries Confederation Ltd (AIC)	II - In-house lobbyists and trade/business/professional associations	15/12/2014	United Kingdom
625976815556-92	Agriculture and Horticulture Development Board (AHDB)	VI - Organisations representing local, regional and municipal authorities, other public or mixed entities, etc.	13/01/2015	United Kingdom
85420851545-81	Aidan Stradling Consultancy - North East England	I - Professional consultancies/law firms/self-employed consultants	20/04/2009	United Kingdom
204544710479-48	AIG Europe Limited (AIG)	II - In-house lobbyists and trade/professional associations	18/01/2013	United Kingdom
53802347380-76	Air Conditioning and Refrigeration Industry Board (ACRIB)	II - In-house lobbyists and trade/business/professional associations	08/12/2011	United Kingdom
699753914807-82	Airmic	II - In-house lobbyists and trade/professional associations	29/10/2014	United Kingdom

Figure 4 shows lobbyists that have their head offices in the UK, registered from 2009 to 2015. They are divided into different categories such as in-house lobbyists, consultant lobbyists, law firms and so on. It is quite an indictment of the TLA 2014 when one can search the details of lobbying by UK-based consultant and in-house lobbyists in the EU (with specific details regarding their

[29] Europa EU, 'Search the Register (For UK Lobbyists)' (*Transparency Register*, 23 April 2015) <http://ec.europa.eu/transparencyregister/public/consultation/reportControllerPager.do?ftePersOperator=EQUAL&acreditedPersStart=&regEndYear=&countries=230&regStartDate=&_countries=on&_countries=1&_hasActivityExpertGroups=on&_interests=on&_hasActivityIndustryForums=on&_=on&_actionFields=on&financialCostStart=&ftePersEnd=&regEndMonth=&financialTurnoverEnd=&regEndDate=&_hasActivityInterGroups=on&membersOperator=EQUAL&regStartDay=&_hasActivityHighLevelGroups=on&financialTurnoverOperator=EQUAL&financialTurnoverStart=&_hasActivityConsultCommittees=on&_hasBelgiumOffice=on&ftePersStart=&regStartMonth=&regEndDay=&membersEnd=&_categories=on&acreditedPersOperator=EQUAL&financialCostOperator=EQUAL&financialCostEnd=&regStartYear=&membersStart=&_inAllEuCountries=on&euFunding=Not_applicable&acreditedPersEnd=&d-7390322-p=1> accessed 23 April 2015.

lobbying activities) but cannot search the details of lobbying by UK based lobbyists in the UK.

Overall, the UK Government's policy underlying the TLA 2014 was to tackle a lack of transparency surrounding lobbying activities because poor transparency can fuel perceptions of undue influence. However, the register is inadequate for solving these problems. 'Communications' are defined too narrowly, only consultant lobbyists are covered, most office-holders are not covered, and minimal information is provided on the register which will do little to alleviate the highlighted concerns.

1.1.2 Institutional Diversion Concerns and the TLA 2014

The register also does little to deal with the concerns highlighted by the institutional diversion framework. Since it reveals nothing about the influences involved, whom the lobbyists met and what was discussed, it is impossible to identify whether individual corruption has arisen or whether political equality is an issue. A registered lobbyist will have communicated directly with a minister, but questions remain about whether the lobbyist has greater opportunities for influence than others or whether others are afforded the same opportunity to communicate with the minister. Further, institutional corruption concerns cannot be analysed. The subject matter of the lobbying is unknown as are any reciprocal benefits moving from a minister to the lobbyist. Since the name of the official is not revealed, a basic analysis of whether a service is returned (one of the elements of institutional corruption) cannot be ascertained. Little in the register helps to determine whether integrity and objectivity have been undermined causing a diversion from the public interest.

One aspect of the register, however, is helpful. In Figure 2 above, entries on the register are shown which highlight whether a registrant subscribes to a code of conduct. That is helpful because it highlights different codes that lobbyists subscribe to. The requirements under those codes are inconsistent, and the definitions are different to those of the House of Commons, House of Lords and Ministerial code. For example, in Figure 2, PwC subscribe to the Chartered

Accountants in England and Wales' (ICAEW) Code of Ethics.[30] In that code, 'integrity' means 'to be straightforward and honest in all professional and business relationships' and 'objectivity' means 'to not allow bias, conflict of interest or undue influence of others to override professional or business judgments'.[31] APCO subscribe to the APPC Code of Conduct which states that:

> Save for entertainment and token business mementoes, political practitioners must not offer or give, or cause a client to offer or give, any financial or other incentive to any member or representative of an institution of government, whether elected, appointed or co-opted, that could be construed in any way as a bribe or solicitation of favour. Political practitioners must not accept any financial or other incentive, from whatever source, that could be construed in any way as a bribe or solicitation of favour.[32]

This demonstrates some alignment with the principle of 'integrity' arising from the codes and legislation applying to office-holders. However, there are inconsistencies between the rules that lobbyists adhere to and how closely those rules align with those applying to office-holders. In this regard, the register is helpful for highlighting those inconsistencies and, therefore, suggests possible future areas for research and reform. At the same time, however, it highlights how the register is simply not designed to deal with the conduct issues highlighted by the diversion framework.

2. Regulatory Challenges: An Interview with the Registrar

The Appendix in this thesis contains an interview conducted with the Registrar of Consultant Lobbyists, Alison White, whose post was created by the TLA 2014. The purpose of this section is to identify the regulatory challenges faced by the Registrar which are unique to the administrative and political system in the UK by analysing that interview. From that analysis, guidelines are synthesised and incorporated into Part 3 of the diversion framework. The framework would be

[30] ICAEW, *Chartered Accountants in England and Wales' Code of Ethics.* (ICAEW, 2017).
[31] ibid, Fundamental Principles, rule 100.5.
[32] Association of Professional Political Consultants, 'APPC Code of Conduct' (*APPC*) <https://www.appc.org.uk/code-of-conduct/appc-code-of-conduct/> accessed 3 April 2017.

more helpful if it not only helps with identifying and testing the concerns with lobbying but also offers guidelines for the development of regulatory solutions that can realistically be achieved (ie, be enacted in legislation by Parliament).

2.1 The Objectives of the Registrar

To achieve what the legislation requires her to do, the Registrar outlines five objectives for her role. They are to:

> (a) Administer an accessible, up-to-date and accurate Register of Consultant Lobbyists;
> (b) Ensure that all those who are required to register do so, by making potential registrants aware of their obligations under the Act;
> (c) Provide clear and accessible guidance on the requirements for registration and compliance;
> (d) Monitor and enforce compliance with the Act's legal requirements; and
> (e) Operate the Register and the Office in a way that demonstrates good governance through delivery of my statutory obligations in a cost effective and accountable manner.[33]

The objectives are analysed to decipher how the Registrar achieves them and whether any obstacles arise in achieving them. Other relevant issues arising from the interview are also examined.

2.2 Achieving the Objectives and Challenges

2.2.1 Objectives A, B and C

The register has been criticised for covering only consultant lobbyists. Nevertheless, the Registrar has registered others who might not have been expected to fall within its remit because their activities are covered under the Act including 'lawyers, management consultants, accountants and think-tanks'.[34] As such, a challenge for the Registrar has been ensuring that people register who

[33] Alison J White, *ORCL Business Plan 2016-2017* (Office of the Registrar of Consultant Lobbyists, 2016) 5.
[34] Appendix 1, 2.

'would not at all think of themselves as being traditional lobbyists'.[35] A registrar cannot 'make the assumption that they will have read [the] guidance or that they will even know about the register'.[36] She notes that needing to register 'will probably be the last thing on your mind when you are setting up an organisation and trying to find clients'.[37] Thus, it is incumbent upon the Registrar to communicate effectively with potential registrants and educate them about their responsibilities.

Both have been a 'big challenge since the beginning'.[38] She notes that many misunderstood and misinterpreted their obligations despite the guidance produced and the education given.[39] Consequently, she has devoted her time 'very largely' on education and communication by creating 'good guidance and a good interpretation in usable language; accessible language that the layperson could understand'.[40] Once that information is communicated, it is imperative to 'keep it fresh in people's minds otherwise, they forget'.[41] This is achieved through newsletters, meetings and an annual stakeholder conference.[42] Further, there is the added difficulty that those to whom information is communicated may not be in their post in the future, or that when companies file their quarterly return, different people undertake that role—people who have not had their obligations under the Act communicated to them.[43]

Additionally, in achieving these objectives, the Registrar highlights the importance of being accessible and being someone who can be relied upon. Being accessible enables people to 'conform better' because they can avoid making mistakes by simply asking.[44] Being reliable fosters a culture of trust. Lobbyists will be more likely to ask questions about their obligations if they can ensure their

[35] ibid.
[36] ibid 3.
[37] ibid.
[38] ibid.
[39] ibid.
[40] ibid 4.
[41] ibid.
[42] ibid.
[43] ibid.
[44] ibid 9.

confidentiality is protected.[45] That trust is developed over time as relationships are built:

> I have spoken to lots of organisations on the phone, and I have addressed all sorts of meetings, sometimes meetings of partners of individual firms. I address the compliance officers of the lobbying trade bodies. I have spoken at all sorts of different events. I go to meetings of the APPC (Association of Professional Political Consultants) and the PRCA (Public Relations and Communications Association) and other bodies. We have an annual stakeholder event as well.[46]

The Registrar also highlights some of the investigatory challenges that arise. For example, at the time of the interview, she was conducting an investigation into APPGs (analysed in Chapter 6). Her investigation was to determine whether lobbyists involved with APPGs were undertaking registrable activities and should, therefore, have been registered:

> I went through the whole list and looked to see who was providing their support services and then looked to see whether they were registered. I came up with a combination of providers of services on my register and declaring clients; on my register and not declaring clients; and not on my register […] For the ones that are not on my register, you have to communicate with them through publicly available channels. In some cases, some of them do not have websites. To find their contact details, I use publicly available sources of information, internet searches, Companies House, etc.[47]

In general, most people are helpful where information is requested, however 'some of them need to be shown why it is important to be cooperative; sometimes I have to be firm. Sometimes they think that perhaps I will just go away, but I do not'.[48]

[45] ibid 10.
[46] ibid.
[47] ibid 17.
[48] ibid 18.

2.2.2 Objective D

As noted above, there are civil and criminal penalties available to the Registrar. At the time of the interview, a civil penalty of about £2,000 had been imposed on one organisation, and other smaller penalties of a few hundred pounds were imposed for the late payment of fees.[49] It is important that penalties act as a deterrent for those not taking their obligations seriously: 'I am quite sure that they will for those organisations that [had the penalty imposed upon them] I hope that other organisations will look at that and be similarly weary'.[50] She also states that 'the potential threat of failing to comply with any legislation, including this one, would be a 'very serious issue' for organisations regarding their ethical obligations.[51] In terms of enforcing compliance, there have not been any difficulties so far, with fines being accepted and paid.[52]

In terms of monitoring, she has conducted investigations into those advertising public affairs services by meeting with the relevant people to determine whether they should be registered. One obstacle to her undertaking her compliance function has arisen from the under-resourcing of her office. Her office is small with officials being seconded from the Cabinet Office. However, whilst the Registrar has had to do more than she would have 'preferred to', she has been able to 'cover the gaps' so that there would not be a hiatus in undertaking the necessary tasks.[53] She also reveals that under-resourcing has been 'an unhappy series of accidents more than anything else', and that she is 'experiencing the same kind of difficulties that they are experiencing [in Government and the Civil Service] with recruitment and retention of staff and so on. I am just on the receiving end of the same difficulties'.[54]

Thus, whilst the Registrar has managed despite these issues, her experience highlights the potential challenges that can arise further in the administrative chain. Her circumstances illustrate that assisting the lobbying Registrar appears not to be a priority for the Government. It is a small office and staff are seconded

[49] ibid 5.
[50] ibid.
[51] ibid.
[52] ibid.
[53] ibid 7.
[54] ibid 6.

to it. Consequently, if there are recruitment difficulties, the Registrar's needs may not be prioritised, and much will be left to the Registrar herself to do. One person may not be able to fulfil the objectives effectively if they are overstretched.

An additional matter is the cost of conformance for organisations. It costs an organisation about £1,000 per year to register. Separate issues arise from this for small and large organisations. For small organisations, that cost can be high; inhibiting their ability to operate. To overcome this hurdle, the Registrar has allowed organisations to pay their fees in instalments.[55] For larger organisations, the bigger cost of conformance is not the registration fee but the compliance process:

> If you are a big organisation with lots of partners, you have to have processes in place which capture all the activities that your partners are doing with ministers, in order that you as compliance officer can make sure that they are registered. That means that you have to put in place appropriate processes to make sure your organisation complies across the board. If you are a 'one man band', there is only you to worry about. If you have got 50 partners, or if you are PwC you could have a hundred or a thousand partners, and all of them have to comply and all your other staff as well. […] that can be expensive.[56]

This cost of compliance is exacerbated by the regulatory scheme that is developing in the UK and the Republic of Ireland. There is now the TLA 2014, the Republic of Ireland's Regulation of Lobbying Act 2015, Scotland's Lobbying Act 2016 and Wales are considering lobbying legislation.[57] The Registrar notes that 'organisations that are UK-wide or international, will potentially have to confirm to a number of different regimes all of which require separate compliance procedures'.[58] She states that 'it is incumbent on the regulators to try to work together as best they can to alleviate the compliance burden on registrants because I can see that being, in due course, a very difficult situation for organisations.

[55] ibid 10.
[56] ibid 10–11.
[57] ibid 11.
[58] ibid.

However, there is not anything in the legislation that requires any of us to do that'.[59]

2.2.3 Objective E

The Registrar proposes a budget at the start of the year which is approved by the Minister for Constitutional Reform. She must work within that budget, adhering to the responsibilities of the Accounting Officer in the Civil Service. She notes how her needs are 'quite modest':

> I have written all my guidance myself. I have sought some legal advice from the Government legal department. We have a small office. I use the Institute of Directors to meet people. I am not what you describe as a large spending profligate department. I am a small, modest Registrar for a small piece of legislation, and my needs are suitably modest. I do not need an expensive office in order to be able to administer what needs to be administered.[60]

Overall, the ongoing costs of the register (now that it has been set up) are about a quarter of a million pounds per year.[61] One practical challenge, however, that does arise is in the administration of collecting fees for the register. Registrants pay their fees in different ways, whether by Bacs transfer, cheque or credit card. Providing those payment facilities is challenging: 'we end up on the receiving end of having to deal with putting practical systems in place and making sure they work'.[62] There is no centralised payment system meaning the Registrar must work across different systems to ensure that fees reach the Cabinet Office's bank account; a time-consuming process:

> My officials have to become experts in dealing with some of the practicalities of handling money because that is what we are required to do. We have to collect cash, that is our responsibility, so we have to we have to find methodologies to enable us to collect cash.[63]

[59] ibid 16.
[60] ibid 7.
[61] ibid 11.
[62] ibid 15.
[63] ibid.

2.2.4 Other Issues

(a) The Costs of a Broader Regulatory Regime

The costs of regulation will increase if the TLA 2014 is broadened. Most (if not all) legislation in other jurisdictions covers both consultant and in-house lobbyists. If UK legislation were to cover in-house lobbyists, a pertinent question becomes whether the current regulatory structure can be easily and cost-effectively adapted. The Registrar notes that 'the more information that is required to be collected, the more staff, the more IT [information technology] and the more of everything else will be required'.[64] She states that:

> In order to be able to make sure that the register is correct, the team is fully engaged. […] At the end of the quarter when the returns come in, that is a very very busy period at the end of the year when we have to collect the annual registration fee. If more information is required […] there would have to be a complete rethink about how the register works. I am not saying that we would have to start again, but certainly, the technical solution, the guidance and the general approach will all have to be reviewed and revised.[65]

Linked to this is the cost of educating potential registrants about the new requirements which may take time. This entire process would also take longer if the current office is replaced in its entirety.[66]

(B) Covering the Costs of a Broader Regulatory Regime

An additional issue is how the costs of broader regulation would be covered. Whilst the scheme of funding is a political decision and not for the Registrar to answer, she highlights how the UK Government 'has decided that industry would cover the cost' by registrants paying annual fees.[67] In Scotland, the Government 'is doing it at the taxpayers' expense'.[68] The reluctance of the UK Government to

[64] ibid 11.
[65] ibid 12.
[66] ibid 13.
[67] ibid 14.
[68] ibid.

adopt a taxpayer funded register correlates strongly with the recalcitrance of political parties towards publicly funded regulatory schemes. It is, therefore, unsurprising that such a view extends to lobbying regulation.

(C) Regulating Conduct

A final issue is the challenge of creating a code of conduct for registrants. This would be an essential method of ensuring that the criteria of integrity and objectivity are upheld. For this, it is envisaged that the starting point for determining reform would be to look to the processes implemented by the self-regulating lobbying bodies in the UK such as the APPC which implement codes of conduct. If the Registrar had similar powers, she notes that there would have to be a separate enforcement process involving an investigation and a hearing.[69]

2.2.5 Summary

One can identify the problems with lobbying and suggest solutions to them, but that analysis is frivolous unless it is informed by the practical and political constraints that exist which determine whether such reform ideas are achievable. Taking into account the details of the interview, the next section develops guidelines that can help to guide future reform analyses.

3. Guidelines for Future Reform Analyses

The TLA 2014 does not deal with the concerns that justified its creation nor those highlighted by the diversion framework. New or amended legislation would be required to deal with those concerns, and there were attempts to do so between 2016 to 2017 when Lord Brooke of Alverthorpe sponsored the Lobbying Transparency Bill 2016/17. That Bill was ultimately unsuccessful although it did pass the House of Lords. The purpose of this section is not to analyse what form a reformed system might take since that is beyond the scope of this thesis. Instead, guidelines are synthesised from the interview above for Part 3 of the diversion framework. Having identified a diversion in Parts 1 and 2, solutions should be devised that take into account the guidelines.

[69] ibid.

3.1 Guidelines for Developing Solutions

First, the Registrar must undertake a continuous campaign of investigation and education to ensure compliance. Many do not understand their obligations even when they are explained, and people change roles resulting in the need to educate new staff. Second, an accessible registrar will enable registrants to fulfil their obligations properly. It is important to develop relationships over time, build trust and foster an environment in which registrants feel confident asking the Registrar about their obligations. Third, whilst most lobbyists are helpful in providing information, at times they do not, and it can be hard to find information, particularly when it is not publicly available. Regulators must be firm with those who do not take their obligations seriously. Fourth, civil and criminal sanctions can act as a deterrent for those who do not fulfil their obligations. They are a valuable tool for the Registrar to ensure that legislation is taken seriously.

Fifth, a regulator should be properly resourced. Whilst the Registrar has coped, one could envisage a regulator becoming overstretched and unable to fulfil their statutory obligations. The size of a potential regulator should take into account any recruitment difficulties in the Civil Service and the Government. Sixth, different regulators within the UK must work together to ensure that the cost of conforming to the different regimes does not become overly complex, burdensome and bureaucratic for larger organisations.

Seventh, at present, it is a political reality in the UK that extensive regulation will not be enacted. For the regulation of standards in British public life, successive governments for almost three decades have pursued a mantra of light-touch regulation which looks set to continue.[70] Indeed, the TLA 2014 is a reflection of that; as is the abolition of the Standards Board in 2012 which heavily regulated standards in local government under the Local Government Act 2000.[71] Ewing, Rowbottom and Tham advise that 'perhaps the best we can do is to recognise that change can best take place incrementally, dictated by the

[70] See generally, David Hine and Gillian Peele, *The Regulation of Standards in British Public Life: Doing the Right Thing?* (Manchester University Press 2016).
[71] See quote of the then Local Government Minister, Robert Neill who stated that a 'light-touch' regulatory approach was being favoured moving forward, HC Deb 16 January 2013, Col 291WH.

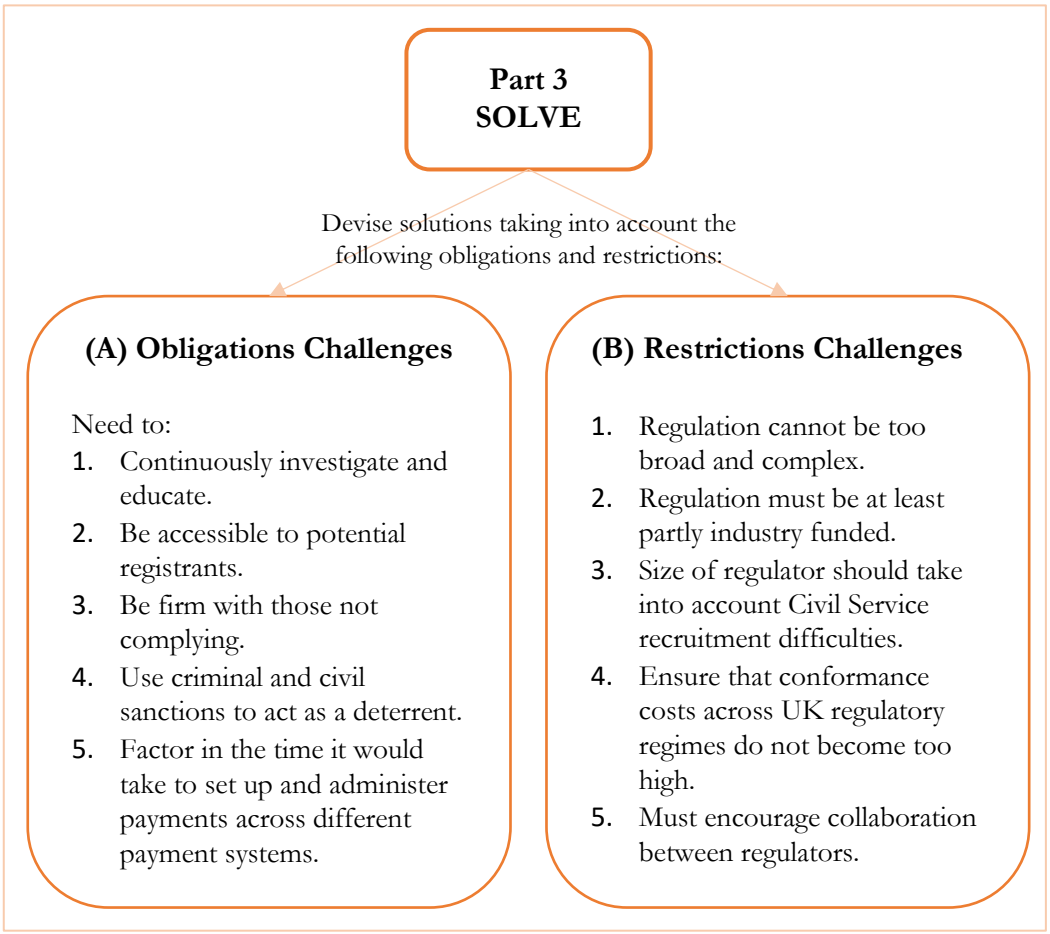
organisational and institutional structures of the system in which they are to operate. There is no magic bullet'.[72] Therefore, any reformed lobbying regulation will likely continue to operate on the payments of those in the industry rather than the taxpayer. Solutions should be designed to keep that limitation in mind as well as the issues of staff resources and the costs of conformance. Eighth, as a corollary of that, the UK regulator must also factor into their schedule the amount of time it takes to put in place the practical systems for receiving payments and ensuring they work. There is no centralised payment system which means that it takes time to process payments.

3.2 Institutional Diversion Developed: Part 3

From the evaluation above, ten abbreviated guidelines called 'obligations' and 'restrictions' challenges are synthesised and added below to Part 3 of the diversion framework called 'Solve':

[72] Keith D Ewing, Jacob Rowbottom and Joo-Cheong Tham (eds), *The Funding of Political Parties: Where Now?* (Routledge 2012) 8.

Figure 5: Developing Part 3 of the Institutional Diversion Framework



3.3 The Lobbying (Transparency) Bill [HL] 2016/17

The Bill was intended to create a new lobbying register and a registrar with much broader powers than under the TLA 2014. The purpose of this section is not to analyse the Bill in depth; although, there is scope to do so in future studies. Instead, this section highlights reasons that contributed to the failure of the Bill taking into account the guidelines above.[73]

First, the Bill was far too broad and complex in its definition of a public official. Under Section 2(5), not only were office-holders in Government and Parliament covered but all executive agencies, non-ministerial governmental departments, non-departmental public bodies and regulatory bodies. Currently, there are 376 agencies and public bodies which would require a behemoth sized

[73] Further, space does not permit a more detailed evaluation of the guidelines in this thesis although, again, it is envisaged that future studies could undertake that evaluation.

regulator.[74] Considering the recruitment difficulties in the Civil Service, the adversity towards anything other than light-touch regulation in British public life and the desire to pay as little as possible, the Bill was destined to fail from the beginning.

Second, in its initial incarnation, before amendments were made, the Bill omitted entirely civil penalties and stipulated for a reduced criminal penalty under Section 9.[75] The Bill thus did not provide for sufficient deterrents for those who might fail to comply. These omissions were in addition to many others that were subsequently added, and whilst they were added, it meant that the Bill was simply not adequate at the outset and, therefore, an easy target for criticism which contributed to its failure.

Third, in terms of funding the proposed regulatory regime, the original incarnation of the Bill under Section 1(5) stated only that the Secretary of State would fund the regime and provide staff and premises. It is telling that the amended version of the Bill added Section 22 which allowed the registrar to impose charges on registrants. This highlights how there is no appetite for a taxpayer funded regime in the UK; the original Bill overlooked that entirely.

Thus, it can be seen from this very brief analysis how the guidelines developed in Part 3 are essential for shaping workable solutions. The Bill missed, entirely, fundamental political realities which ensured it would fail.

Conclusion

The diversion framework helps to identify specific concerns with lobbying in the UK and test whether a diversion has occurred. From those concerns, one can begin to identify issues for reform. However, it is not enough merely to state that something ought to be reformed and develop a solution accordingly. That process must be shaped by specific guidelines which can help to avoid solutions that are simply destined to fail in the UK context because of political or practical realities. Thus, in this chapter, guidelines were developed from an interview conducted

[74] UK Government, 'Departments, Agencies and Public Bodies' (*UK Government*, 4 April 2017) <https://www.gov.uk/government/organisations> accessed 4 April 2017.
[75] Lobbying (Transparency) Bill 2016/17 version of 24th May 2016.

with the UK's lobbying Registrar which are intended to help shape regulatory solutions that are more likely to succeed.

The TLA 2014 has been roundly criticised for not dealing with the issues that justified its creation. It also does not address concerns highlighted by the institutional diversion framework. For those reasons, there have already been attempts to repeal the TLA 2014 and replace it with the Lobbying (Transparency) Bill in 2016. However, that attempt illustrates why guidelines are needed. The Bill failed to consider fundamental practical and political realities about regulation in British public life. Consequently, it was destined to fail and accordingly did so. Solutions would be more likely to succeed if the guidelines in Part 3 of the diversion framework are considered and adhered to.

8

Conclusion

In this thesis, it has been argued that the problems with the lobbying of Parliament and Government in the UK need to be identified more clearly so that targeted regulatory solutions can be determined. Currently, lawmakers, organisations and academics have struggled to propose clear pathways to achieving that objective due to a failure to agree on certain fundamental issues: the nature and scope of the central problems associated with lobbying, the relationship between them, and how they are relevant to the model of democratic government in the UK. The result is that discussions about reform and proposed solutions are poorly informed, not fully considered and sometimes misguided.

To solve this problem, a framework has been created called 'institutional diversion' which was developed, tested and evaluated. The framework has three purposes. First, it identifies the underlying lobbying issue that is of concern. Second, it tests whether that problem has caused the institution, or officials within it, to divert from their purpose of acting in the public interest. Third, it offers guidelines that help to guide regulatory solutions that are likely to be enacted in the UK.

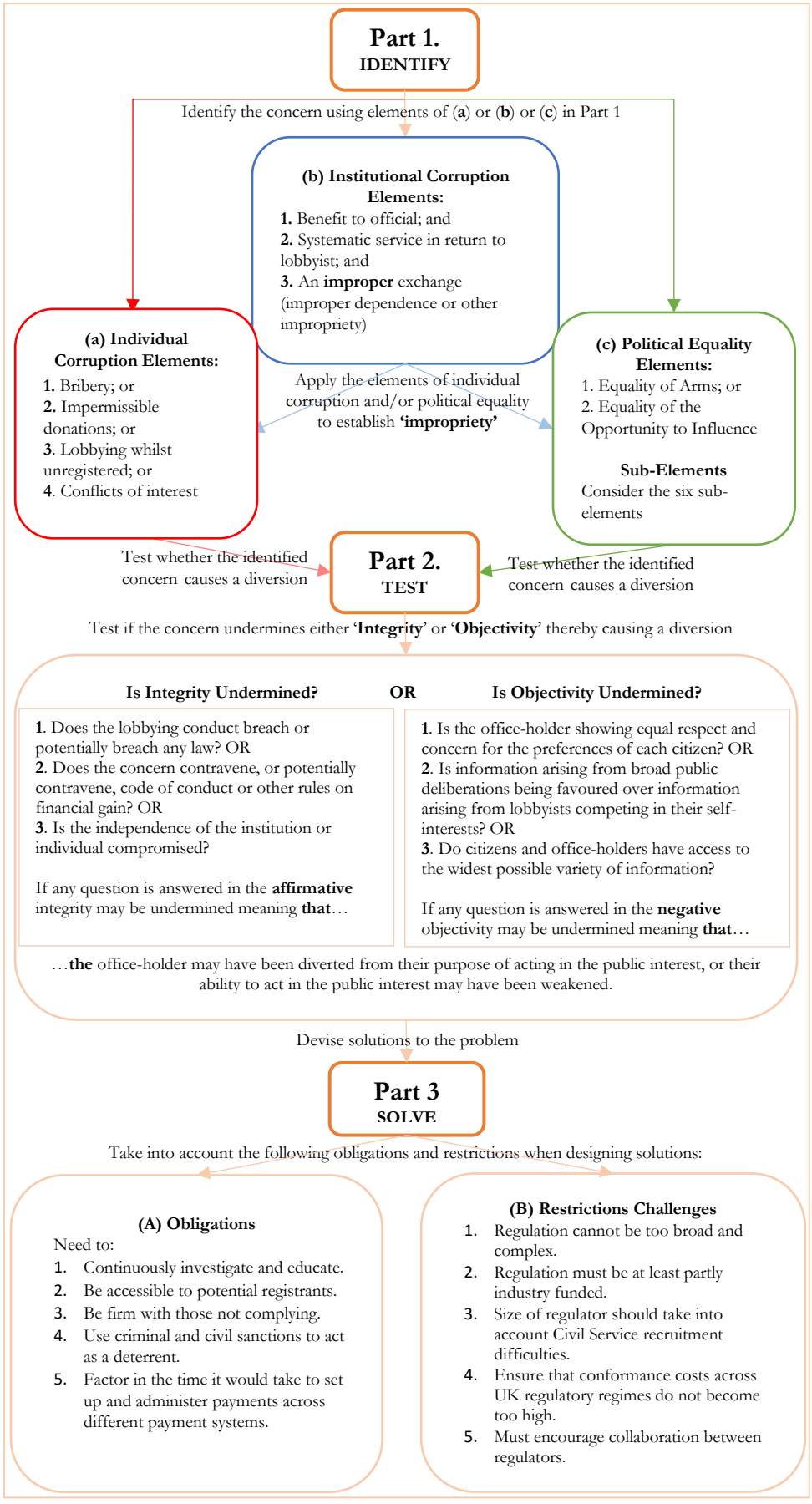
The aim is for the framework to be helpful to anyone seeking to identify and understand lobbying concerns and those who are looking to develop solutions to those concerns such as academics, judges, policy-makers and lawmakers. It is also intended that the framework acts as a starting point for future research into lobbying in the UK by offering a foundation from which issues can be explored. The following sections review the research undertaken, explain how it relates to previous studies, analyse the limitations of the framework, consider its implications, possible future uses and developments of it.

1. Research Review

1.1 Summary

The institutional diversion framework has been developed in three parts which are outlined in Figure 1 below. Part 1 is called 'Identify' which means to identify the concern in question whether that is individual corruption, institutional corruption or political equality. Part 2 is called 'Test' and offers tests in the form of questions that help to determine whether 'integrity' or 'objectivity' have been undermined thereby causing a diversion from the purpose of 'acting in the public interest'. It is not necessary for both criteria to be undermined for there to be a diversion: a diversion can occur either because integrity has been undermined or because objectivity has been undermined. Part 3 is called 'Solve' and offers guidelines which help to shape solutions to reform that are practical and workable. These are suggested guidelines, it may not be necessary to follow them all in every case but what applies to the scenario in question. The framework is outlined in Figure 1 below.

Figure 1: The Institutional Diversion Framework Concluded



1.2 Hypotheses and Aims

Four main hypotheses were made at the outset which are evaluated here. First, 'institutional diversion' will help to identify the concerns with lobbying with greater precision than currently exists elsewhere through a clear structure, and will offer a rich account of the underlying concerns. Second, the framework will offer clear tests to determine when a diversion has occurred. Third, it will act as a starting point for normative enquiries into reform by highlighting issues of concern that require changing. Fourth, it will help to guide the development of solutions that are workable within the UK political and administrative context.

For the first hypothesis, Part 1 of the framework was divided into three concerns about lobbying: individual corruption, institutional corruption and political equality. To identify those concerns, clear elements and sub-elements were developed. By following those elements in Chapter 6, a detailed and rich account of the underlying concerns was provided in a more structured, coherent, consistent and holistic manner than has been offered elsewhere. Thus, the framework succeeds in identifying the concerns with greater precision than exists elsewhere and offers a rich account of those concerns.

The second hypothesis pertains to Part 2 of the framework. It was first necessary to identify a clear purpose of Parliament and Government. The analysis in Chapter 3 was both analytical and normative. It is clear the MPs and peers are required to act in the public interest, but that is not a requirement of the ministers. It was, therefore, argued, that ministers should act in the public interest in the context of problematic lobbying. To test for a diversion from the public interest, two criteria were developed called 'integrity' and 'objectivity'. Integrity means that 'holders of public office should not place themselves under any financial or other obligation to lobbyists that might influence them in the performance of their official duties'.[1] Objectivity means that officials should assess ideas on their merits or inherent worthiness in the sense that they should not give greater weight to ideas that have gained prominence because of lobbying underpinned by corruption or political inequality. Both definitions arose from the rules that MPs,

[1] Adapted from House of Commons, *The Code of Conduct together with The Guide to the Rules Relating to the Conduct of Members* (HC 2015, 1076) 4.

peers and ministers subscribe to. In Chapters 4 and 5, questions were developed to test when those criteria are undermined thereby causing a diversion from acting in the public interest. The questions proved effective in Chapter 6 when applied to examples of lobbying. The answers offered a rich explanation of why the concern identified in Part 1 of the framework undermined the relevant criteria in Part 2 thereby causing a diversion. Thus, the second hypothesis is satisfied.

Third, at the end of several case studies analysed in Chapter 6, issues for potential reform were highlighted by the application of Parts 1 and 2 of the diversion framework. In that regard, this hypothesis is satisfied because the framework helped to highlight the pertinent reform issues following a dissection of each case study. However, whether the issues highlighted were the most important can only be determined in future research analysing potential regulatory solutions in detail. It could be that the framework requires refining to highlight more relevant reform issues.

For the fourth hypothesis, it was illustrated in Chapter 7 why the TLA 2014 is problematic and highlighted why its proposed replacement, the Lobbying (Transparency) Bill 2016/17 was destined to fail because it did not account for the political and practical restrictions operating in the UK political climate. Those restrictions were synthesised from an interview with the UK's lobbying Registrar, Alison White, conducted specifically for this thesis. From that interview, ten guidelines were developed, and it was shown how the Bill simply did not adhere to them. Their creation will, therefore, help to shape solutions that are more likely to succeed moving forward. Thus, the fourth hypothesis is satisfied.

In addition to the hypotheses noted above, the aim of the framework more generally is to help anyone seeking to identify and understand lobbying concerns and those who are looking to develop solutions to those concerns such as academics, judges, policy-makers and lawmakers. In that sense, the framework is helpful because it offers clear, structured, coherent and consistent tests to analyse lobbying concerns. The literature that currently exists does not offer a framework to analyse these issues holistically nor offer guidance within one logical framework. It is submitted that institutional diversion does so; at the very least, to an extent greater than what exists elsewhere.

It is also intended that the framework acts as a starting point for future research into lobbying in the UK by offering a foundation from which issues can be explored. Lobbying is a complex issue, and it would be helpful for anyone researching lobbying to refer to the framework. They could identify what topic they are examining and how it fits into the bigger picture. A researcher or judge could avoid many of the pitfalls that others have fallen into—exploring matters in isolation, using terminology inconsistently and incoherently, and devising solutions that are misguided.

Finally, it is hypothesised that the framework could be adapted to studies of lobbying in other jurisdictions. The problems with lobbying should be the same in any country (ie, individual corruption, institutional corruption and political equality; albeit, to different degrees). Even if there is a unique problem elsewhere, one could simply amend Part 1 of the framework to account for those concerns. Part 2 should also be adaptable by changing the criteria and questions applicable to certain jurisdictions. The purpose of 'acting in the public interest' could be changed to a purpose specific to whichever jurisdiction is being considered by an analysis of the constitution in each jurisdiction. The guidelines in Part 3 could be developed by reference to the specific political and administrative challenges in the jurisdiction examined. Thus, adapting the framework could be helpful to analyses beyond the UK.

2. Relationship with Previous Research and Contribution

This research builds upon the literature on political corruption, political equality, lobbying, campaign finance/election law and legislative ethics, as well as learning from the experiences of those in practice. Most importantly, Ewing, Rowbottom, Lessig, Thompson, Ringhand and Alison White.

For the structure of the diversion framework, Thompson's work on institutional corruption (and Lessig's development of it through dependence corruption) has provided the main foundation. The origin of institutional diversion is firmly rooted in those theories with a broadly similar definition applying. Further, the work of Ringhand on political equality in the British

election law context was pivotal to the structure of political equality elements within the framework as well as the tests for the criterion of 'objectivity'.

For the theory underlying the diversion framework, the work of Ewing and Rowbottom (amongst others) has been essential. They highlight many important factors such as the need to account for corruption and political equality issues, which political equality concepts are relevant to lobbying, how political corruption should be defined, the shortcomings in the field, the need for standards, the relevance of the 'public interest' and what may undermine it, and a myriad of regulatory issues relevant to the UK context amongst many other factors. This framework constitutes an attempt to account for those issues, to complement their work and to offer new conceptions of the issues, within a new and coherent structure.

For the regulatory guidelines in the diversion framework, the first-hand experience of the UK lobbying Registrar, Alison White, was fundamental to understanding the practical and political challenges to reform in the UK. That insight will be pivotal to future analyses of reforming the Statutory Register of Consultant Lobbyists created by the TLA 2014.

Regarding contributions to the field of lobbying, several observations can be made about this research. First, in Chapter 3, this research offers a unique attempt to decipher a measurable purpose of decision-makers working within Parliament and the Government by developing the literature on political corruption. The 'public interest' and 'norms of office' approaches are combined, and both are defined through an examination of the model of democratic government in the UK. To test when the 'public interest' has been undermined, Chapters 3, 4 and 5, identify and define the criteria of 'integrity' and 'objectivity'. These criteria are applied in a similar way by Thompson in his institutional corruption framework, but they are developed in this thesis with meanings specific to the UK context through an analysis of corruption and political equality literature. This approach follows Rowbottom's recommendation that political equality literature should be used to define the standards from which office-holder deviate. This approach also merges the work of both Thompson and Ringhand but also represents a bespoke development of those criteria for 'institutional

diversion' in the UK. Whilst such a determination is very challenging and the outcome open to criticism (see below on limitations), it nevertheless provides a unique attempt at testing problematic lobbying conduct influencing decision-makers by reference to a defined purpose.

Second, the work undertaken in Chapter 4 represents a unique attempt to harmonise the theories of both Thompson and Lessig within a reformulated theory of institutional corruption. In the US, there has been significant debate amongst academics about whether Lessig's theory, in particular, is a political equality theory rather than a corruption theory. This research suggests a path forward and, in doing so, develops a less contingent test for institutional corruption which is developed for deciphering concerns with lobbying in the UK.

Third, Chapter 5 builds upon Ringhand's research on political equality by adapting her findings (rooted in British campaign finance literature) in a new direction to the analysis of lobbying in the UK. Her concepts and principles (called 'elements' in this thesis) are redefined, restructured and reformulated in places. They are developed with significant depth to account for the complex lobbying processes via the exploration of derivative sub-elements. All of this is achieved in a new structure consisting of two core elements and six sub-elements. At the same time, this complements Rowbottom's research which highlights similar principles (although, more principles are covered in this thesis and are given a specific structure for examining lobbying concerns).

Fourth, Chapter 6 offers a unique fusion of the theoretical and the practical. Whilst Rowbottom applies theories to lobbying concerns in his book; this thesis applies an overarching framework consistently to specific case studies about lobbying explored by journalists and others. Aside from Rowbottom's work, other literature has mainly focussed on lobbying from one aspect or the other. Therefore, this thesis complements Rowbottom's work by also applying theoretical concepts to practical concerns. Further, the framework offers a clear and holistic explanation of what the concerns are with lobbying and why.

Fifth, Chapter 7 establishes unique guidelines for future lobbying reform in the UK taking into account the challenges specific to the UK context following an interview with the UK lobbying Registrar. The regulatory regime in the UK is

new, and the guidelines offer a starting point for the development of literature in this area.

Overall, the institutional diversion framework is built upon the shoulders of giants but also offers major contributions to the analysis of lobbying in the UK and, it is argued, abroad (should it be adapted). Other literature does not bring together the various concerns with lobbying under one framework, offering a holistic in-depth evaluation of those concerns fusing both the academic and the practical, a test to decipher when those concerns are problematic and why, and guidelines for developing solutions to those problems based on an interview with the UK's lobbying Registrar. That is not to say that there are not limitations to the framework.

3. Limitations of Research

There are four main limitations of this research. First, it is acknowledged that the greatest debate about the framework will arise from discussions on the 'purpose' of those working within Parliament and the Government. It is submitted that 'acting in the public interest' is a fairly uncontroversial overarching gauge as expressed in Chapter 3. Most decision-makers would agree that they seek to do so and should do so. Further, the criterion of 'integrity' used to test a diversion from that purpose is also uncontroversial because its requirements arise explicitly from statute and other rules on improper financial gain. However, debate will likely arise on the criterion of 'objectivity'.

In this thesis, 'objectivity' means that officials should assess ideas on their merits or inherent worthiness in the sense that they should not give greater weight to ideas that have gained prominence because of lobbying underpinned by corruption or political inequality. It is acknowledged that this is a normative articulation that is open to debate in places. Some will take the view that politicians do not need to make decisions objectively within the scope of the meaning attributed to it in this research—particularly with regard to lobbying that is labelled as 'problematic' because of a political inequality that some would not find concerning. If the opposition to that criterion is vociferous, then it is

acknowledged that it may need to be amended, removed or substituted for a different criterion.

However, it is submitted that, unless one is advocating for an unequal society, the argument that decisions should not be skewed by inequalities in money or power influencing the decision-making environment, are strong. Further, the threat of lobbying skewing objective decision-making is explicitly and implicitly recognised in various sources such as in codes of conduct for MPs and peers. Those sources are strongly underpinned by regulatory developments in the UK over the past three decades—initiated by successive governments—that have arisen in response to lobbying scandals where it has been recognised that lobbying can cause such an undesirable skew. Underlying all the above is the very real concern by decision-makers about public trust being undermined because of lobbying for reasons pertaining to the undermining of objective decision-making. That is why lobbying is afforded substantial space in the codes of conduct and elsewhere. For these reasons, it is submitted that the 'objectivity' criterion as defined in this thesis is justified.

Second, it is acknowledged that determining a diversion from a purpose in practice would require significant evidence; not just media reports that 'join the dots'. That limits the usefulness of the framework because its ability to identify a problem is constrained by the levels of information transparency in the political system. Nevertheless, the framework can point towards areas that require more transparency and, in any case, offers more than other literature to lawmakers and policymakers for identifying areas for reform, and to judges seeking to understand the issues.

Third, the framework is open to criticism by academics in the US for the manner in which it has attempted to harmonise institutional and dependence corruption theories by Thompson and Lessig. It is envisaged that some would prefer that Lessig's analysis is omitted entirely. Others might argue that in making institutional corruption 'less contingent', this research has oversimplified Thompson's excellent work. However, it is submitted, first, that the concept of a 'dependency' is highly relevant to lobbying and it would diminish the analysis to omit it. Second, retaining both theories as defined by Thompson and Lessig

would make the institutional diversion framework needlessly complex in what is already quite a rich framework. Third, nothing in this framework oversimplifies Thompson's approach. Key concepts and principles not only remain but are added to; the greatest change is in the formulation of those concepts and how they are structured. This approach is intended to ensure that the framework is relevant to the UK context.

Fourth, the guidelines developed in Part 3 of the framework might only be useful in the context of lobbying regulation that creates a lobbying register rather than other types of regulation. They were developed from an interview with the lobbying Registrar in the UK and should be understood in that context which might limit the usefulness of Part 3. However, it is submitted that some of the guidelines are applicable regardless of the type of regulation such as the political desire for light-touch regulation in British public life, or the demand for external funding of such regulations. For other guidelines, much will depend on the specific analysis in the future; although, nothing precludes them from being adapted for those studies.

4. Implications of Research

This research identifies concerns about lobbying in the UK. First, it suggests that there are significant problems concerning lobbying pertaining to institutional corruption, political equality, and, to a lesser extent, individual corruption. Most concerning are the case studies in Chapter 6 which detail the pervasive power of professional lobbyists with regard to their control of decision-makers and the control of the marketplace of ideas—significant and hidden issues that will be tremendously complex to regulate.

Second, the research highlights deep concerns about the ability and success of the TLA 2014 in dealing with the concerns that justified its creations as well as those highlighted by the diversion framework. The Registrar is working very effectively, but the limits on her power and scope of the law raise questions about what the law achieves.

Third, the Lobbying (Transparency) Bill 2016/17 demonstrates that—despite the best efforts of very intelligent people—basic political realities can be

overlooked in favour of worthy altruistic goals; meaning that solutions are destined to fail. The need for guidelines such as those developed in Chapter 7 is imperative for there to be any opportunity for successful reform in the future.

5. Future Research and Practical Applications

A number of studies can potentially arise from this research moving forward both internationally and domestically. Internationally, it is envisaged that the framework could be adapted to studies of lobbying in other jurisdictions. Country-specific analyses could be undertaken with the elements in Parts 1, 2 and 3 being added, removed or substituted. Those analyses could reveal much about the problems in those jurisdictions, the purpose of their political institutions and what regulations might succeed there. Since lobbying is a relatively new field for investigation in most jurisdictions, the framework could offer a starting point for investigations in those jurisdictions.

In the UK, the institutional diversion framework itself could be tested and applied to more case studies with specific solutions being devised from those case studies, taking into consideration the guidelines developed. It could be expanded far beyond MPs, peers and ministers to consider local government officials, civil servants, executive agencies and regulators. The issue of office-holders lobbying one another or lobbying by the Monarch could also be encapsulated in future work. Further, Part 3 of the framework could be developed in much greater detail with thorough studies conducted into the regulation of lobbying in the UK. They could explore the potential for collaboration between different regulators in the UK to lower the costs of compliance for organisations, how lobbying regulation might be reformed, whether a code of conduct for lobbyists should be introduced and how that would be overseen and enforced. Research might consider how future lobbying legislation should be drafted, the shortcomings of the TLA 2014, a detailed study of the Lobbying (Transparency) Bill and why it failed, and what lessons can be learnt from other regulators in the UK as well as lessons learnt from lobbying regulators in other jurisdictions.

Further studies could be undertaken on the 'purpose' of decision-makers in Parliament and Government, with interviews being conducted with politicians

to determine their views on the requirements of 'acting in the public interest', and the criteria of 'integrity' and 'objectivity'. An analysis of reforming political party funding could also fall within the scope of the framework since donations can be used to influence the political process. Ultimately, this is a tremendously rich area for potential future research, and these studies could begin to build a detailed body of literature on lobbying in the UK that is, so far, lacking.

Conclusion

In his book on party funding in the UK, Ewing notes that the only thing clear about potential regulatory solutions moving forward 'is the fog ahead'.[2] For lobbying, the array of issues has created a disorienting smog over what the concerns are. In that regard, the 'institutional diversion' framework offers a starting point and a path forward to analysing the critical issue of lobbying. It offers a coherent and rational structure for identifying what the difficulties are, test when they cause office-holders to divert from their purpose of acting in the public interest and guide solutions to those problems. Ultimately, it is hoped that the framework is a step in the right direction; that it can encourage deep and holistic analyses of the issues which generate solutions with the aim of upholding public trust in the political system.

[2] K.D. Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (Hart Publishing 2007) 225.

Appendix

Interview with the Registrar of Consultant Lobbyists, Alison White

5th December 2016 at 13.38

London

Interviewer – Barry Solaiman (S)

Interviewee – Alison White (Registrar) (W)

Background

This interview was conducted to discuss the practical challenges faced by the Registrar of Consultant Lobbyists in the United Kingdom. In particular, the Registrar has set out five objectives relating to her role. They are to:

(a) Administer an accessible, up-to-date and accurate Register of Consultant Lobbyists;
(b) Ensure that all those who are required to register do so, by making potential registrants aware of their obligations under the Act;
(c) Provide clear and accessible guidance on the requirements for registration and compliance;
(d) Monitor and enforce compliance with the Act's legal requirements; and
(e) Operate the Register and the Office in a way that demonstrates good governance through delivery of my statutory obligations in a cost effective and accountable manner.[1]

The challenges of achieving those objectives were primarily explored although other relevant issues arose from those discussions.

Interview

S – What challenges do you face in administering the register to make it accessible and keep it up-to-date?

W – My statutory accountability is to make sure that all of those organisations or individuals that should be registered in accordance with the legislation actually do so. Because of the nature of the legislation, that doesn't only apply to public affairs consultants, what you might describe as traditional lobbyists. There are a number of organisations which would not at all think of themselves as being traditional lobbyists that are required to register. That includes lawyers, management consultants, accountants and think-tanks. All of the above appear is some way on the register.

[1] Alison J White, *ORCL Business Plan 2016-2017* (Office of the Registrar of Consultant Lobbyists, 2016) 5.

It is my responsibility to make sure that—whatever the nature of the organisation—if they are required by the nature of the services that they provide for their clients to register, then they need to do so. I cannot just make the assumption that they will have read my guidance or that they will even know about the register. Particularly, if you are a small 'one-man-band' kind of organisation, you might not even know about it. It will probably be the last thing on your mind when you are setting up an organisation and trying to find clients; to worry about whether or not you should be on the register.

Thus, communication and education have been a big challenge since the beginning. One of the initial challenges which those objectives refer to is making sure that everybody understands what it is that the legislation is actually saying. And here we are, coming up to two years after the register was launched, there are still a lot of organisations that misunderstand—even in the context of my guidance and all of the educational activities that I have been doing over the course of the last eighteen months or so—still lots of organisations that do not understand and misinterpret their obligations. They might be on the register, but they are still not fulfilling the requirements properly. Lots of people say to me 'well I'd like to err on the side of caution'. As a result, they over declare rather than stand in danger of getting it wrong. Trying to make sure that organisations do it correctly so that they are on the register and they do what they are required to do correctly, is an ongoing challenge.

S – Is it a problem if they over declare?

W – It just means that the register is not correct. It is my responsibility to make sure that it is correct in accordance with the legislation because you can get registrants making a client declaration which is incorrect. For example, they communicate with the minister's private office rather than with a minister, or they communicate with somebody who was not a minister or Permanent Secretary, but they make a declaration anyway because they think it is the right thing to do—lots of people say to me: 'Well I think I better err on the side of caution; better to over declare rather than under declare'. However, it means the register is not correct. They are doing things that the legislation doesn't require them to do. It is my job to make sure they do what the legislation requires them to do.

S – Are there consequences for you if they do not do what the legislation requires them to do?

W – Well, the more important problem is that what should be on the register is what the legislation dictates should be on the register. If there are things on the register that should not be there then the user, the citizen, could be misinformed. The citizen has a right to expect that what is on the register will be in accordance with what the legislation says and if it is not, the citizen could potentially be misinformed and draw the wrong conclusions. Therefore, it is an important part of my role. What those objectives are saying is that there has to be a register and that the contents of the register must be strictly in accordance with what the legislation requires of it.

S – In this regard, it is communication and education that are the main challenges?

W – Yes and my focus has been very largely on those. Making sure, first of all, there is good guidance and a good interpretation in useable language; accessible language that the layperson could understand. The sort of person that would be likely to be completing a quarterly return. I have to communicate with them in understandable terminology. Once that is in place you have got to keep it fresh in people's minds because otherwise, they forget. You cannot make the assumption that just because somebody has done something, the objective is achieved. Somebody might leave their post, or the guidance might just get forgotten about because there are other priorities (things like Christmas and New Year or the time of the quarterly returns). People just forget, and if one person does it one-quarter, somebody else does it the next quarter; they do not necessarily do it the same.

S – How do you keep the guidance fresh in their minds?

W – We have to stay on their back. We communicate regularly. We have a newsletter, I have lots of meetings, I talk to lots of groups. We have an annual stakeholder conference. Within the context of fairly modest means, we try to keep things as fresh in stakeholder and registrant minds as possible. There has to be good guidance and an ongoing program. But then over and above, monitoring

and enforcing compliance whereby enforcing compliance is the nuclear option if you like.

This is the set of tools that the Registrar has available in the event that organisations do not comply. If they do not comply, I can enforce compliance. I have a range of civil and criminal penalties. I have not used any criminal penalties, and I hope I will not have to but I have used a small number of civil penalties and that has tended to be in two circumstances. The first one is where there was an attempt to avoid registering when an organisation should have done so. For example, conducting consultant lobbying without being registered and not being transparent about that. Secondly, those organisations that continue to conduct consultant lobbying without paying their annual registration fee. You cannot be on the register without paying your annual registration fee, and if you are not on the register you cannot undertake consultant lobbying (as defined in the Act). You must be on the register before you conduct any relevant communications.

S – What penalties were imposed and do you think they work well as a deterrent?

W – There has only been one, and I think they had a civil penalty of £2,000. The others were quite modest. I think we charged £300 for the three organisations that paid their fees very late. In terms of acting as a deterrent, I am quite sure that they will for those organisations that had to pay them. I hope. It remains to be seen. I hope that other organisations will look at that and be similarly weary, but I think the bigger deterrent is the threat of a civil penalty because for organisations that hold themselves out to be highly ethical—lawyers for example—they have a very strong code of legal ethics. If you are found to be in breach of statute, that would be a very serious issue for your law firm. Thus, I think the potential threat of failing to comply with any legislation, including this one, would be a very serious issue and it would be that I think, that would be the bigger factor.

S – Do you have any difficulties with enforcing compliance?

W – No. None of my civil penalties have been challenged; they have all been accepted and paid. Clearly, the experience is quite limited. I think it is quite likely that in due course there will be a legal challenge and there is a tribunal which we set up which is there, ready, to be able to hear any appeals in the event that that

was required. That is part of the legislation that there should be an appeals process in the event that there was a civil penalty notice issued which somebody wanted to appeal against, they would be able to do so through the tribunal.

S – Do you think you have enough powers to carry out your monitoring task effectively?

W – I have not found any difficulty in being able to carry out those programs of activity that I felt were required. For example, this year (2016), I have carried out a major investigation into law firms that were advertising public affairs services on their websites. I looked at all of those and met with firms to check whether or not they needed to be registered. I have done all that work myself as part of my statutory duty. I have got a small office, but I do not think that in the event that my office is fully resourced there should be a problem. This summer, it was not fully resourced which is why I have done a lot of things myself that perhaps in the future I would hope my office would be able to do. My officials are seconded from the Cabinet Office. There have been some difficulties and challenges with that this year. I hope things are now settled down. That has been the only challenge.

S – You mean in terms of under-resourcing?

W – Under-resourcing, yes. I think that has been an unhappy series of accidents more than anything else. It is just one of those things if you like. It has been a challenge, but it has not precluded me from doing what it was that I said I would do in my business plan and, in fact, I think I have probably done at least as much as what I said in my business plan; probably more. There has been the odd case that I have discovered where organisations should be registered and have not been but, generally speaking, there has only been the odd one, where potentially, there should have been a registration. In most cases, we have been able to arrive at an appropriate conclusion in the public interest.

S – When there have been problems of not having enough resources, was that swiftly resolved once you raised the flag?

W – The difficulty is that my officials are seconded. I am experiencing the same kind of difficulties that they are experiencing with recruitment and retention of staff and so on. I am just on the receiving end of the same difficulties. Basically,

I have covered the gaps, so it has not resulted in a hiatus. I have just worked more perhaps than I would have preferred to.

S – How do you undertake your task in a cost-effective manner that demonstrates value for money?

W – The way that the system works is that I propose a budget at the start of the year for the expenditure that I think is needed in order to be able to carry out my statutory duties. That goes to the relevant minister who is the Minister for Constitutional Reform. Then he approves the budget, and that is the financial envelope within which I work. That works quite well; there has not been any difficulty with that, although, my needs are quite modest. I think, for example, I have written all my guidance myself. I have sought some legal advice from the Government legal department. We have a small office. I use the Institute of Directors to meet people. I am not what you describe as a large spending profligate department. I am a small, modest Registrar for a small piece of legislation, and my needs are suitably modest. I do not need an expensive office in order to be able to administer what needs to be administered. Last year there was a small underspend, this year there will probably be a small underspend. I need to be on the right side of the budget red line.

S – What would happen if you were to go over the budget red line?

W – I cannot. In the Civil Service, there is something called an accounting officer. They have a set of responsibilities which are laid down by the Treasury which you are expected to adhere to. In the event that there was a legal test case, I would approach the Cabinet Office for the necessary funds to secure the required legal resources to be able to take that case forward but that has not happened yet. It may very well happen. I had that discussion with ministers. It may very well happen in the future. In the event that it does, the Cabinet Office has said that it would underwrite the bill because it would be important in terms of the testing of the legislation.

S – Are there any specific obstacles that affect your day-to-day operations of running the register?

W – I would not describe in that way. Part of the challenge of any legislation is helping people to understand it, and the sort of issue that I outlined to you about people erring on the side of caution, making client declarations that they do not need to make because that is not required by the legislation. What I have done is taken legislation and turned it into what I hope is accessible guidance. You can read the guidance and that ought to give you sufficient information to be able to, first of all, register, and then to make your declarations in an informed way. But human beings are human beings. There will always be misunderstandings and so on. Part of my role is to listen to those misunderstandings and if necessary update my guidance, and I have done that. I issued some initial registration guidance ahead of the opening of the register, and we updated it in the course of the last year.

S – You find out things as you go along that you had not initially contemplated?

W – Yes. I have been able to—based on experience—provide more rich guidance. The guidance is better guidance now. I have not changed anything, but I have enriched it to make it more understandable. I think the best example is one I have already given you which is trying to help people to understand in what circumstances a client declaration needs to be made. There is quite a lot of scope in any legislation, and this is no exception for misunderstandings. People read something, they read my guidance, the Act and they say: 'we think it means this'.

For example, if an organisation was to draft a letter and the letter says: 'Dear Minister. Just to let you know about this particular piece of proposed legislation. We don't think it's a very good idea for X, Y, Z reasons. We'd like to have a meeting with you. Signed X'. Now the letter is written by the consultant lobbyist, but it is signed by their client, so the letter is not registerable. If it was signed by the lobbyist, it would be. However, in most cases, it is signed by the client, so it is not registerable. A common misunderstanding at the outset was 'we drafted the letter. Therefore, it's registerable'. No, it is not. The letter might be written by you but it has actually been signed by your client, so the letter itself is not registerable.

But my next question is how did that letter go to the minister? Did it go to the minister's private email address? Answer, 'yes it did'. What did the email say? Did it just say: 'Dear Minister, please find attached a letter. Yours sincerely, consultant lobbyist'. If so, that is not registerable. If the email says: 'Dear Minister, please find attached my letter from our client X Corporate which lays out a number of issues to do with this particular Government policy to which we would like you to have a meeting'—registerable.

Basically, it is not my role to say what is a loophole or what is right or wrong or what should be different. It is my role to take the legislation as it is and interpret it and then make sure that organisations conform to it and so you can see for just that brief explanation, there is lots of scope for this interpretation. Not because people are setting out to get around it: actually, most people want to do the right thing, but sometimes it is quite easy to misinterpret it or misunderstand it or get confused by it. This is why I have made myself very accessible in order to make sure that organisations are able to understand what it is, and if they do not understand, I would much rather they came and talked to me about it. I have had bags of small meetings. Lots of people will send me a letter and ask 'is this registerable?' or send me an email describing a meeting that took place and say 'Is this registerable?'.

S – Are they concerned about the confidentiality of the information they are sending you?

W – Not with me because I think probably I have built a reputation, hopefully, of being somebody that can be relied on. I do not talk about individual registrant issues to anybody else (apart from the office of course).

S – You are building that rapport with them to be more accessible, and you are known for being accessible so that they feel like they can talk to you?

W – Yes, I have set out to make myself accessible rather than remote because I found that enables people to be able to conform better. If they feel they can approach me about anything they are confused about, it is much better that they are encouraged to do that rather than me standing and saying 'that is a far too small issue for me to be engaged with'. I would rather they came and asked

because if they are not sure, they will probably make a mistake. It is better for them not to make a mistake.

S – How have you reached out to them to show that you are accessible?

W – Well, it is over a period of time. I have worked with individual organisations, and through that behaviour, they have learnt that they can come and talk to me. I have spoken to lots of organisations on the phone, and I have addressed all sorts of meetings, sometimes meetings of partners of individual firms. I address the compliance officers of the lobbying trade bodies. I have spoken at all sorts of different events. I go to meetings of the APPC (Association of Professional Political Consultants) and the PRCA (Public Relations and Communications Association) and other bodies. We have an annual stakeholder event as well.

I will also mention something of interest which is not in the question. One of the big issues of any legislation is the cost of conformance. If you are going to be on the register the whole year, it will cost you a thousand pounds. For some smaller organisations, that is a big issue because if you do not generate very much in the way of cashflow; paying to join the register is a big issue. This was an issue which engaged ministers during the time the legislation was going onto the statute book. If organisations, particularly small organisations, cannot afford to join the register, then potentially the organisations that they provide services for, would not be able to receive those services thus endangering democracy. One of the things that I have done as Registrar is to implement an instalment paying plan to help those who cannot afford to write a cheque for a thousand pounds as a lump sum. That is one cost of conformance.

The bigger cost of conformance, however, in my view is the processes that an organisation needs to put in place in order to make sure they can capture all the necessary information to enable them to comply. If you are a big organisation with lots of partners, you have to have processes in place which capture all the activities that your partners are doing with ministers, in order that you as compliance officer can make sure that they are registered. That means that you have to put in place appropriate processes to make sure your organisation complies across the board. If you are a 'one man band', there is only you to worry about. If you have got 50 partners, or if you are PwC (PricewaterhouseCoopers)

you could have a hundred or a thousand partners, and all of them have to comply and all your other staff as well. Therefore, you have to have appropriate procedures in place which enable that compliance to be not only in place but also evidenced, and that can be expensive. Additionally, now for these big organisations not only is there the UK register, but the Government of Scotland is putting in place lobbying legislation. I have been asked to respond to a consultation that the Welsh Government is doing about potential lobbying legislation, and there is already lobbying legislation in the Republic of Ireland. Organisations that are UK-wide or international will potentially have to conform to a number of different regimes all of which will require a separate compliance procedures.

I am meeting the lobbying Registrar of Scotland in January (2017) so that he and I can discuss together whether or not there is anything that we can do between us that will help to reduce the cost of compliance for registrants. I do not know what those might be yet because I have not had the discussion. I am very aware that the cost of compliance can be very intrusive or difficult for organisations (particularly large ones) than just paying the annual fee.

S – How can you help them with their costs of compliance?

W – The difficulty is that there is no requirement for me or on certain regimes to do so. The regime in Ireland is entirely different than the UK regime, and the Scottish Bill appears to require different things too. The more complexity there is (and the Irish regime is a very complex thing: it looks to me that the Scottish regime is complex in a different way) the more information that you wish to collect, the more difficulties for the cost of compliance.

S – If legislation were to cover not only consultant lobbyists but also in-house lobbyists, how might this affect costs?

W – I do not know how much extra it would cost. Now that the register is set up, the ongoing running costs are just over a quarter million pounds a year. In order for me to do what is set out in that list of objectives, it costs about a quarter of a million pounds a year. The more information that is required to be collected, the more staff, the more IT and the more of everything else will be required. The more you want to collect and publish the higher the cost. I cannot tell you how

many extra fields would result in another member of staff. I know we have got about one hundred thirty registrants, a fairly small number. In order to be able to make sure that the register is correct, the team is fully engaged. The team does not sit around twiddling its thumbs. They recognise that their top priority is keeping the register correct and up to date and at the end of the quarter when the returns come in, that is a very very busy period at the end of the year when we have to collect the annual registration fee. If more information is required such as that proposed by the private member's bill (the Lobbying Transparency Bill 2016/17) in the House of Lords (introduction of a Code of Conduct and requiring in-house lobbyists to register), there would have to be a complete rethink about how the register works. I am not saying that we would have to start again, but certainly, the technical solution, the guidance and the general approach will all have to be reviewed and revised.

S – Even your objectives? These five?

W – I think the core would be the same, but I could not say that those objectives would still be relevant in a context of new legislation. They would have to be reviewed in that context. The technical solutions would have to be reviewed; although the technical solution we have got is expandable. If it was just a question of adding extra fields, we could add extra fields relatively cost effectively. But we know enough from experience, that quite often, if you start asking people to do things they have never done before, that will require quite a long process to get them up to speed with the changes, particularly now that they are used to doing it in a certain way. If they were required to do it in a different way it would probably take some time to get them up to speed to make sure that happened without error.

S – Could you imagine any of the existing problems being exacerbated by broader legislation?

W – Well I think what would happen is that there would have to be a new process of education. I do not know whether it would be possible to say we just need to do a bit of updating to the guidance, and we need to add a few extra fields, or whether we would have to say this guidance is now irrelevant. Whether we have to start again so that everybody has to tear up everything they have done and start

doing something different, I do not know the answer to that. The other thing is that they might not want me to do it. If they dispensed with the current legislation introduced new legislation they might not want me to do what was required.

S – Is it the case that anything new is going to be hard to begin with, but if you have got the right sort of person who is being accessible, over time those problems will go away?

W – Yes. I have found that works well, but nobody handed me a guidebook and said you need to do this. I did not get any guidance from anybody. They just let me get on with it. When I became Registrar, I inherited a couple of civil servants, one of whom had been in their post for a few weeks and one who joined the same day as me. I just read the legislation and took it from there.

S – Do you think that lack of guidance is a problem?

W – It was not for me. I had to attend a pre-appointment scrutiny hearing. I was examined on my capabilities to be able to set something up from scratch. You do not get much more scratch than here is an Act of Parliament and go. So, I would like to think that I have had some modest success in doing what I was required to do.

S – If there was a code of conduct, would that change your role significantly?

W – Yes, the Act does not say very much. All it says is that one of the things the registrants are required to do is to declare whether or not they subscribe to a relevant code conduct. I have defined relevant as being relevant to lobbying. However, what the industry has said to me is that it cannot be a relevant code of conduct if it only applies to a single organisation because if there is not any kind of compliance and enforcement process associated with the code, then it cannot be a relevant code. For example, if you sign up to the Association of Professional Political Consultants as a member then you have to subscribe to their code of conduct. If you breach that code and then they can expel you from membership and so their view is that if that cannot happen, you cannot declare a code of conduct to be relevant because it is not.

S – It is only relevant if you can expel someone?

W – Yes, that is their view. I am currently conducting consultations on that. One of the things that I have included in the consultation was if there was to be a voluntary code associated with the register, who should define that voluntary code and who should enforce it because I do not have any statutory powers to do that. I do not know what the response of the respondents would be to that. It will be interesting to see what they have to say. I will publish the outcome of that in due course.

S – If you had powers to set up a code of conduct and enforce it, what difficulties do you think you can envisage with that — ie, more funding, more resources?

W – It is a bit like the APPC. They have a code of conduct. If someone complained to the APPC that a member had breached their voluntary code, then they have to have an enforcement process. There would have to be an investigation and, presumably, a hearing. I am not entirely sure what their code says, but somebody would need to adjudicate on whether or not there was a breach of their code or not. If there was a breach of that code, what would the penalty be? Resources would need to be put in place for those.

S – How do you think raising the funds to cover broader statute might work?

W – I think that has to be a political decision. The Scottish Government is doing it at the taxpayers' expense, and the UK Government has decided that industry would cover the cost. For the UK, the cost is set by secondary legislation. Ministers decide on the legislation, they decide on the legislative framework, and it is the legislative framework that decides how many registrants there are. My responsibility is to interpret, implement and enforce the legislation and to collect the fees that the ministers decide should be paid. The income will be what it is. It is a function of (A) the legislation and (B) the cost of joining the register.

S – Do you think that if there was a charge on in-house lobbyists, that would cover the costs of a broadened register?

W – It depends what your objective is. If your objective is to increase the number of registrants, then you have to change the legislation. Basically, the number of registrants is a function of what the legislation says. So yes, if you wanted more people on the register then you could include in-house lobbyists, or you could include special advisors, or you could include MPs, there is all sorts of things you could do, but that's a political decision.

S – If the legislation were broadened to cover in-house lobbyists, then practically, is it possible to broaden or change the system of charging?

W – Yes but you cannot disaggregate if the legislation were changed, all the other things. There would have to be new guidance, a new technical system and so on, all the things we have been talking about.

S – What are the difficulties in taking payments?

W – Well, in this day and age, people expect to be able to pay a Bacs transfer, by cheque, or by credit card depending on what methodology is most suitable for them, which means we have to provide all those facilities to enable them, and that means that we end up on the receiving end of having to deal with putting practical systems in place and making sure they work. You would have thought that 24/7 payment providers would work 24/7, 365 days a year. Regrettably, one of them went on holiday between Christmas and New Year last year, and until they came back, the problem that had been caused by somebody leaving an apostrophe out or something, one of the algorithms, could not be resolved until they came back to work after the Christmas break.

S – There are different systems that you have to use for different payment methods?

W – Yes. It is in order to be able to get the money into the Cabinet Office's bank account basically. What happens, is that my officials have to become experts in dealing with some of the practicalities of handling money because that is what we

are required to do. We have to collect cash, that is our responsibility, so we have to we have to find methodologies to enable us to collect cash.

S – Can it not just be one centralised system to deal with all types of payments?

W – Across all Government departments? Wouldn't that be nice? Couldn't there just be one recruitment system? Couldn't there just be one any system?

S – You mentioned before that you met with other regulators; do you think lessons can be learnt from them for regulating lobbying?

W – The lady who was appointed by the Irish Government to regulate lobbying in Ireland, came from Canada. Her name is Sherry Perreault. The Irish system is actually quite a complex system; she was a central player in the Canadian lobbying system, and they went to Canada to get somebody to implement their lobbying system.

S – Is there anything you learnt from her that could make what you do more efficient, or does it not apply because it is different statute involved?

W – It is less of an issue for Ireland because it is a different country than it is for Scotland (in that it is part of the UK). The predominant issue is, particularly, if the Welsh and Northern Ireland governments go for their own legislation, you potentially could have four different regimes where the same organisations have to collect four different sets of information and that, to me, I think it is incumbent on the regulators to try to work together as best they can to alleviate the compliance burden on registrants because I can see that being in due course a very difficult situation for organisations. However, there is not anything in the legislation that requires any of us to do that.

S – That is the main issue then with regard to dealing with other regulators? Rather than learning broad lessons from other regulators?

W – Well it is because it is all new. It has not yet happened. What is happening is that each of the governments are potentially drawing up their own requirements

in isolation of what has happened elsewhere and there was a discussion about this. I attended a conference in November of last year which involved Scottish policymakers, MPs, academics and regulators. There was a discussion around the table about these issues. It was run by the University of Stirling.

S – APPGs are increasingly in the spotlight with regard to lobbying, I heard that you have been conducting some work in regard to them.

W – I am doing an investigation of those organisations that provide support services for APPGs. There are a lot of APPGs, and they keep changing and creating new ones. There are about six hundred and fifty. I went through the whole list and looked to see who was providing their support services and then looked to see whether they were registered. I came up with a combination of providers of services on my register and declaring clients; on my register and not declaring clients; and not on my register. I have been working my way through all of them to establish what the nature of the services are that they are providing and whether or not they need to be registered, and if they do need to be registered, how they need to be registered. That is not finished yet. I am still working through that.

S – How do you find out? Do you have to contact them directly and ask 'what is it that you're doing?'

W – Yes. For the ones on the register, it is quite easy because we have all their details. For the ones that are not on my register, you have to communicate with them through publicly available channels. In some cases, some of them do not have websites. To find their contact details, I use publicly available sources of information, internet searches, Companies House, etc.

S – How many have not complied who are on the register?

W – Part of the issue is that I have not issued guidance for providers of services to APPGs. This has been much more of an investigative, educational type of project as far as existing registrants is concerned. The more interesting area of study for me, is those organisations that are not on my register. Whether or not some of the activities that they are pursuing, might involve direct communications with ministers which would bring them into the need to be registered, I have not arrived at a conclusion on that yet, but it is an interesting area of study.

S – Are they being helpful?

W – Yes, nobody is being obstructive. Some of them need to be shown why it is important to be cooperative; sometimes I have to be firm. Sometimes they think that perhaps I will just go away, but I do not because that is my statutory obligation.

Interview Concluded.

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