CORRUPTION VERSUS CONFLICT OF INTEREST: THE BRITISH EXPERIENCE

DR ROBERT KAYE

ESRC CENTRE FOR ANALYSIS OF RISK AND REGULATION
LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE

1969: The Salmon Commission on Standards in Public Life states "Parliament should consider bringing corruption, bribery and attempted bribery of a Member of Parliament acting in his Parliamentary capacity within the ambit of the criminal law" (para. 311)

1995: The Nolan Committee on Standards in Public Life urges the Government to "now take steps to clarify the law relating to the bribery of or the receipt of a bribe by a Member of Parliament"

1999: Joint Committee on Parliamentary Privileges recommends that "Members of both Houses should be brought within the criminal law of bribery by legislation containing a provision to the effect that evidence relating to an offence committed or alleged to be committed under the relevant sections shall be admissible notwithstanding Article IX" (para. 167)

2000: The Government proposes specifically to include Members of Parliament in its draft corruption bill

The Committee on Standards in Public Life notes that it has twice recommended that the law on bribery of MPs be clarified. It anticipates that new legislation will be introduced in 2001/2

2002: The Committee on Standards in Public Life issues its third report examining Standards of Conduct in the House of Commons. It notes that the Government is committed to making bribery of an MP a criminal offence, but that no parliamentary time has yet been found.

May 2003: The Government publishes its Draft Corruption Bill, Clause 12 providing that no evidence should be made inadmissible by any rule of law preventing parliamentary proceedings being impeached or questioned.

July 2003: A Joint Parliamentary Committee on the Draft Bill rejects the government's principal/agent formulation of corruption, and argues that Clause 12 should be weakened

December 2003: The Government withdraws its Draft Corruption Bill for revision.

Regulating Bribery, Conflict of Interest and Corruption in Westminster

The offer of money, or other advantage, to a Member of Parliament for the promoting of any matter whatsoever, depending or to be transacted in Parliament is a high crime and misdemeanour[1] (House of Commons, 1695)

~

British Members of Parliament do not enjoy immunity from prosecution. They are subject to the criminal law as any other citizen.

But it probably not illegal to bribe a British MP, and it is probably not illegal for a British MP to accept a bribe.

~

This anomaly has, alongside the OECD anti-bribery convention, been a prime driver in attempts to change the law on corruption in the UK over the past decade. The events leading to the Nolan Report, in particular the revelation that at least three MPs – Neil Hamilton, Tim Smith and Michael Grylls – had been paid to lobby for Mohammed al Fayed, and a *Sunday Times* sting operation in which two MPs accepted £1000 each for tabling parliamentary questions – showed that bribery of MPs was not just a theoretical problem.

At the heart of Nolan's response was a toughening of the disclosure regime for MPs outside interests. A bungled attempt by Conservatives to avoid this meant that this was complemented by an additional ban on paid advocacy – participation in proceedings that directly involved an outside organisation in which the MP had an interest, and initiation of proceedings relating less clearly to the organisation. This non-statutory regime, however, was buttressed by a clear expectation that MPs could no longer be exempt from the law on bribery – a position consistently supported in later reports.

In the intervening decade there has been considerable reform of the internal rules which govern MPs' conduct. And while reform of the law on corruption has become bogged down in legal and definitional difficulties, conflict of interest regulation has suffered from the very opposite – piecemeal reforms, a lack of joined-up thinking, unintended consequences

[1] *Commons Journal* 1693-97 311

This paper follows largely unsuccessful attempts to criminalise corruption of MPs, and the alternative strategy of regulating them by rules on conflict of interest, over the past decade. This comparison aims to draw out general lessons on the relative merits of bribery/corruption and conflict of interest as regulatory strategies.

The root of the difficulty is something which bedevils all regulation – the over- or under-inclusiveness of rules (Baldwin, 1990). In the case of conflict of interest regulation, rules are simultaneously over- and under-inclusive.

The Chief Mischief of Bribery

It is assumed here that the prime reason for regulating MPs' conduct, whether through bribery or conflict of interest rules is to prevent corruption – broadly speaking to ensure that MPs are not influenced in their work by the existence of any payments, gifts, benefits, or other pecuniary interests. While corruption has on occasion been viewed in terms of damage to the public interest[2], or even as Machiavelli uses the word, in terms of simple degeneration from a political ideal, the most widely understood used is in referring to the use of public office for private gain. The scope of conflict of interest regulation is somewhat broader, but any broader objectives are related in some way to this core proposition.

There is, however, no general law of corruption in the UK. Rather a glut of late-Victorian and early 20th Century Acts, as amended by subsequent legislation.

These are:

- Corrupt Practices Act 1889
- Prevention of Corruption Act 1906
- Prevention of Corruption Act 1916
- Representation of the People act 1983 ss. 107, 109, 111-115

Common law also provides an offence of misconduct or misfeance in public office. There are also a number of more specific acts to target particular abuses:

- Sale of Offices Acts 1551 and 1809
- Honours (Prevention of Abuse) Act 1925
- Licensing Act 1964 s. 178
- Criminal Law Act 1967 s. 5
- Local Government Act 1972 s. 117(2)

[2] Friedrich (1966)

- Customs and Excise Management Act 1979 s. 15 (Law Commission, 200x)

Plus at least the common law offence of embracery (bribery of a juror), attempting to bribe a police constable, and attempting to bribe a Privy Councillor.

The vast majority of these concentrate not on corruption generally, but on bribery specifically. The same is true of the government's Draft Corruption Bill. As the government acknowledges, other forms of corruption – including misappropriation – are outwith the scope of the Bill. But bribery is only a sub-set of corruption. As Philp puts it:

> Core cases of corruption involve four key components:
>
> – an official (A), who, acting for personal gain,
>
> – violates the norms of public office, and
>
> – harms the interests of the public (B)
>
> – to benefit a third party (C) who rewards A for access to goods or services which C would not otherwise obtain. (Philip, 2001)

This is, in essence, bribery realized. But Philp acknowledges,

> Cases which lack one of these features are often also recognised as corrupt. The two necessary conditions are the existence of (1) a public official (A) who acts for gain in ways which cut across his/her formal responsibilities (2)"

There are numerous variations on a bribe. Instead of using an inducement to secure a breach of bribery, a third party might do so by means of a threat (which would be covered by the offence of blackmail), or by misrepresentation lead the official to believe that the third party interest *was* the official's duty. In addition, an official might secure inducements where C's interest coincides with his public duty, by threatening *not* to perform this duty without an inducement (extortion to the bribee, a facilitation payment to the briber).

In addition, however, some forms of corruption do not include a third party providing incentives. Nye, for instance, argues convincingly that corruption also includes nepotism and misappropriation[3]. But in neither nepotism nor 'cronyism' – the distribution of favours to friends – is the official rewarded[4]. In the case of *Porter v Magill*, in which it was held that councillors deliberately and illegally targeted a policy

[3] Nye (1989); *cf* Gambetta (2001) who argues that misappropriation can be reconstituted as bribery where A and C are the same person.
[4] Meades (2002); Doig, MacIvor & Moran (1999) 679-680

of selling council homes at marginal constituencies in order to 'shore up' support for their party, Lord Scott held:

> 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.

It is suggested here that corruption involves a breach of trust, by a person in a position of trust, who acts on the basis of an illegitimate private-regarding[5] consideration. One cannot assume that a corrupt decision must necessarily work against the public interest – for this will frequently be open to debate. Nor should one concur with Waldron that the problem is solely (or mainly) that corruption leads to a 'wrong' decision[6]. Both of these approaches neglect the legitimate margin of discretion that officials enjoy. Bribery will on occasion involve inducing an official to do something s/he could not legitimately have done. More often it will involve inducing an official to exercise his discretion in a particular way, or to exercise it in a way that she could but wouldn't have done.

By "private regarding"[7] is meant that there must be some sort of relationship by which the interest of the official and the interests of the person or group benefited are linked. In the case of a payment to the official the nature of this link is clear. In cases where the official is also dependent on the benefited group – such as for support from a political party – there is also a personal benefit. If distributing political offices and rewards offends against prevailing norms, then this – 'spoils' – constitutes corruption, because the official and his party have a shared interest. If we were to consider nepotism or cronyism, though, there need not be personal advantage to the official. Nye suggests that close private cliques could also corrupt. To take an extreme Burkean position (see below) one might even argue that to show favour to one's own constituents is corrupt, and conclude that 'pork-barrelling' is a form of corruption. A summary of possible types of corruption is at Table 1. This is not exhaustive, and if the activity does not contravene norms of political ethics, it would not constitute corruption. So to talk of a spoils system, might be purely descriptive, devoid of normative judgement. Pork-barrel politics might be regrettable or undesirable, without being corrupt. (A danger in allowing this degree of relativism is

[5] This expression is taken from Nye (1967)
[6] Waldron (1995)
[7] Nye (1967)

that in a highly corrupt system, where ostensibly corrupt activity no longer breaches social norms, corruption is not actually possible).

Intervening Factor	**Type of Corruption**
Personal gain	Graft (including bribery)
Family relationship	Nepotism
Friendship	Cronyism
Party politics	Spoils
Electoral constituency	Pork-barrelling
Unrelated political ends	Horse-trading

Table 1: Forms of corruption

For the most part, regulation within Westminster has concerned personal gain, thereby neatly avoiding the empirical question. A series of cases after 1999, however, showed how conflict of interest provisions in the MPs' Code of Conduct also cover misappropriation of resources for political parties[8] and to profit MPs' close families[9]. Nepotism is rife at Westminster, and indeed many MPs fail to see it as a form of self-dealing. As one put it, ""What does it matter if I employ a relative? … As it happens, I employ someone [who] was recommended by someone I met at a dinner party".

The Chief Mischief of Bribery

The mischief at the heart of corruption is the breach of duty, the official acting for personal gain rather than in accordance with his formal duties. The mischief at the heart of bribery is the *inducement* to do so. The Prevention of Corruption Acts are framed in terms of a principal-agent relationship, but it is not the breach of civil law duty that is seen as the chief mischief – which could be non-corrupt, if it arose through ignorance or negligence, and could in any case be pursued through the civil law – but the inducement. As Buckley put it during the trial of Harry Greenaway MP for bribery: "corruption is complete when the bribe is offered or given, solicited or taken". But an inducement is only one sort of corrupting influence: concentrating on bribery neglects cases where the breach is prompted by an agent allowing his private interest to take priority within existing incentive structure. Viewed as a macro-level political problem, it matters little whether the problem is one of individuals being

[8] 2000/01: HC 89
[9] 2001/02: HC 319; 2001/02: HC 625; 2003/04: HC 476

deliberately and knowingly corrupted or whether we are simply concerned about a general problem of politicians being influenced by private interests.

The Draft Corruption Bill, however, adds a further requirement that the inducement must be made or received 'corruptly'. Clearly this creates a circularity – a bill that is designed to define the offence of corruption ultimately relies on a jury have a prior idea of what corruption is. The government's response to this anomaly was to vary the definition so that an inducement was only corrupt is it was offered or accepted as the *primary* motivator of an agent's action. But the sort of ranking of motivations that the government has in mind seems muddled and confused. Consider the following example:

> Let us say that the advantage is a "free gift" of minimal value, such as an item of promotional stationery. The only reason for C to give A promotional stationery is to influence him in the performance of his functions – the stationery has advertising slogans on it and C hopes the slogans will stick in A's mind when he is making the decision as to which company to buy from. A, of course, understands this when he accepts the stationery. However, C does not believe that it will be primarily the stationery that will influence A to buy a product from him.

The example confuses two of three motivations:

1. The benefit of free stationery
2. The associated benefits of the stationery such as free advertising
3. The 'purer' considerations for the buyer such as economy, paper quality, etc.

The gift should not be corrupt even if the main reason was (2) – although the government seems to think otherwise. There is no corruption if the official has simply been overwhelmed by the quality of the advertising and does not care at all about any person benefit.

Instead the government seems to be suggesting both that (3) must trump (1) and (2), and that as long as (3) trumps (2) **and (1)** then no problem arises. So presumably if the inducement, to take the government's own counterexample, was 'a large sum of money conferred secretly into A's bank account' there would still be no problem as long as (3) remained the prime motivator. As one witness put it,

> regardless of the value of the advantage conferred, obtained or anticipated, the test of whether an offence of corruption has been committed involves determining whether the person receiving, or expecting to receive, the

> advantage acts or acted primarily in return for that advantage. If such is not the case, then even a substantial payment, gift or other advantage is, on the face of it, neither corruptly conferred nor so received".

This also causes problems for 'facilitation payments' whereby bribes are extracted by officials:

> facilitation payments are made to a person who is already under a duty to do something and a facilitation payment is one which is designed to make him either do that duty or do it more quickly or more efficiently

Therefore such bribes would probably fall outside the bill provided the primary motivation remained the official's duty to do his duty in any case.

But this case merely highlights the difficulty in creating a hierarchy of motivations. Should a bribe really be permissible if it is only a secondary consideration?

If the government is confused about whose motivation and for what is important, there is at least clarity that *somebody's* motivation is important. But arguably this is misplaced – what really matters is that somebody's decision is affected.

British Bribery Law and the House of Commons

The 1889 Act was concerned with local public bodies alone, chiefly city, town and county councils (although the 1916 Act extended this to "public authorities of all descriptions"). The 1906 Act applies to all "agents", 'any person employed by or acting for another', and an inducement under this Act need not refer to any particular matter. There would be an argument for subjecting public bodies to higher standards – but in fact the 1889 and 1906 Acts do not discriminate in this way. Instead they create the potential for lacunae: police officers and local councillors may not be covered by the 1906 Act[10] and magistrates and judges are probably not covered by either. Crucially, although the Law Commission did not cover this point, MPs may not be covered by either.

It is not clear that Parliament is a "public authority" under the 1889 Act as amended by the 1916 Act, although Graham Zellick has argued that the Act is so broad as to include Parliament. Zellick argues that the national Parliament is of a sufficiently similar nature to the local bodies under the 1889 Act that it would be perverse to exclude it, without explicit language to support such an exclusion. But it unlikely that the 1906 Act can be read in the same way (which creates a problem where the bribe

[10] English law holds that a police officer is not an agent; Scots law that she is.

is not related to a particular matter – the focus of the 1889 Act – but is a general 'sweetener').

Zellick also argues that the Salmon Commission was wrong to conclude that MPs are not considered to hold public office for the Common Law offences of bribery and misfeance and malfeance in public office. Office, he contends, is framed in law in terms of duties – indeed the MPs' Code of Conduct identifies obligations and duties of MPs. Public officer can mean either that the office-holder is paid from public funds, or that he is appointed to discharge a public duty. On either ground, MPs would seem to qualify, but despite Australian rulings that judges hold public office, conventional judicial and political wisdom pointed to the opposite conclusion (often without giving reasons).

This was shaken by the judgement in *R v Greenaway.* The judge noted that payments to voters had been held to constitute 'bribery', while voters are in no sense holders of public office, and that while most cases of bribery had been couched in terms of 'office', "the reason or principle underlying the offence of bribery is the corruption of someone, even temporarily, in a position of trust who has a duty to discharge in which the public has a legitimate interest"[11]. He concluded:

> That a Member of Parliament against whom there is a prima facie case of corruption should be immune from prosecution in the courts of law is to my mind an unacceptable proposition[12].

Unfortunately for scholars of corruption, Greenaway was acquitted after the Crown presented no evidence, meaning that the judge's findings were not appealed in a higher court.

The chief problem with tackling bribery is an evidential one. This is not the same as the empirical problem discussed below, concerning the judgement of the office-holder. Bribery is complete one the decision-maker accepts a gift that is intended to influence him; it does not matter whether or not he *is* influenced, although that might affect his punishment. However, the need to prove that there was an agreement in circumstances in which any such agreement would invariably be covert is a high hurdle. Indeed, for this reason the 1916 Act reversed the burden of proof for one particular high-risk category. It introduced a rebuttable presumption of corruption in the case of a reward given to a person employed by the Crown, or a Government Department, or public body by a person seeking a contract from the Crown,

---

[11] *R.* v *Greenaway and Others*, Public Law, Autumn 1998
[12] *R.* v *Greenaway and Others*, Public Law, Autumn 1998.

Government or public body. This is not strictly speaking a conflict of interest provision – the presumption is after all rebuttable – but it means that in ambiguous circumstances an official must decline a gift, etc, where it cannot be proved not to be a bribe.

However, there is a further evidential difficulty, explicitly addressed in the Draft Corruption Bill, Article IX of the Bill of Rights[13]. This provides that "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament".

Article IX is not an absolute barrier. The judge in *Greenaway* argued:

> Corruption is complete when the bribe is offered or given, solicited or taken … It owes nothing to any speech, debate or proceedings in Parliament[14].

Likewise, Geoffrey Robertson, the *Guardian* barrister in the abortive libel case brought by Neil Hamilton MP and lobbyist Ian Greer, notes "the scene of alleged crime" – Mohammed Fayed's payments to MPs – "was not the floor of the House, but Harrods"[15]. However, proving that an MP was paid to transact some proceeding in parliament, without being able to adduce evidence that the proceeding was ever transacted introduces a substantial evidential hurdle. Moreover, according to some, including the Attorney General, once transacted, the proceedings are accorded some sort of special status, which means that the motivation behind them cannot be questioned, without infringing Article IX, even if this can be done without citing the proceedings themselves. If this is true, then it creates a truly bizarre result: that an MP who was bribed to say something in Parliament, and did, could not be prosecuted; but an MP who had accepted a bribe but had a last-minute change of heart *could* be prosecuted, as one would only be questioning proposed proceedings – which are not protected under Article IX!

Article IX is not inviolable. It was undermined by a legislative amendment in 1996 to allow proceedings to be questioned where a person chooses to waive the protection of Article IX in a defamation case. This was done after the *Guardian* accused Trade Minister Neil Hamilton of accepting cash payments from Mohammed Fayed for tabling parliamentary questions. Hamilton was never prosecuted for this, but he did try to sue the newspaper (and subsequently Fayed – the former case collapsed, and the second was lost after the jury found that he had accepted improper cash

---

[13] Nolan (1998)
[14] *R.* v *Greenaway and Others*, Public Law, Autumn 1998
[15] Robertson (1997a); Robertson (1997b) 18

payments). Because the *Guardian* could not produce its evidence due to Article IX the judge stayed the trial. Although clearly unsatisfactory, there was at least a nice symmetry – MPs could not be proven be corrupt, but nor could they be proven not to be corrupt. The widely-criticized amendment, Article 13 of the Defamation Act 1996 was designed to redress the latter, but not the former problem.

Article IX having been undermined in 1996, the Government has attempted a similar manoeuvre in its Draft Bill. Article 12(1) provides that:

> No enactment or rule of law preventing proceedings in Parliament being impeached or questioned in any court or place out of Parliament is to prevent any evidence being admissible in proceedings for a corruption offence.

However, the Joint Committee on the Draft Bill pointed out that the protections of Article IX go beyond words by MPs that may be the subject of the corruption allegation. The Liaison Committee was concerned that without the protection of Article IX witnesses before a Select Committee might feel inhibited (although it is questionable whether to allay this it is necessary to give them immunity from prosecution for bribery). The case for Article IX was probably not helped by the comments of the then Clerk of the House that "to ask a Member what he meant by what he said … is too high price to pay for the remedying of a very serious, but very rare, mischief". However, they concluded that Article 12(1) needed refining: it would only apply where the words spoken were evidence in a case against the MP who spoke them.

Conflict of interest

Conflict of Interest regulation, in truth, does little to tackle the most egregious cases of corruption. The most that can perhaps be said in cases of outright corruption is that there is an alternative crime if the evidential burden for corruption cannot be overcome. So just as Al Capone was eventually jailed on tax charges, the person who takes bribes but denies that payments were linked to his official behaviour, can be penalised for failing to disclose those payments.

However, the notion of inducement in bribery means that it does not cover those situations where the influence of a payment or benefit is unconscious, even unconscionable. While we can define corruption in theory, identifying it in practice is difficult, if not impossible. This is because it depends on an unknowable counterfactual – how the politician or official would have behaved in the absence of the payment, or pecuniary interest, or family connection, etc. (Even if we could prove bribery, i.e. offer and acceptance of an inducement, we still have no way of knowing

that this is the determinative cause of the politician's actions; although we would probably not want to allow the 'Francis Bacon' defence that although the politician took bribes, he did not allow them to influence his judgement.) There may be situations in which what the agent does is so far outside the interests of his principal that we can say without hesitation that he was actually influenced, there was an observed breach of duty. For the most part, however, we will be dealing in the realm of legitimate discretion. For instance, in the Neil Hamilton case (see below) one of Hamilton's defences was that he was acting on a point of political principle and his support for Mohammed Fayed would have been the same had he not received benefits from Fayed. Likewise, the Westminster case hinged on whether a policy that was pursued for party advantage could be legitimated if a justifiable reason for proceeding with that policy could be formulated. The House of Lords held that it could – hence a councillor who rejected the original partisan strategy could still vote for it if, having set aside party considerations, he genuinely believed that it was justified on the merits. However, a councillor who was merely seeking a 'fig leaf' for his original strategy could not. (Unfortunately for some of the Westminster councillors, but not all, there was a paper trail that showed an observable search for a fig leaf).

But genuine belief is not easily observable; and this still leaves a problem if a politician is highly-skilled in self-delusion. In the 'Mittalgate' case, Tony Blair was accused of lobbying a foreign government on behalf a donor to the Labour Party. There was no real suggestion that what Blair had done was corrupt in a legal sense – the allegation was that he had allowed himself to be influenced by an irrelevant consideration. No one doubted that *Blair* thought there was a public interest in furthering Mittal's business interests, but as the facts increasingly strained the idea that Mittal's business was British, placing the action almost, if not actually, outside the range of permissible actions, the question became whether that belief was justifiable. As the Lord Chief Justice put it in *Locabail* "the insidious nature of bias" means that one cannot take at face value a statement – even honestly held – from a person asserting that some factor was not a bearing on his judgement. What matters is whether, on the facts, a reasonable observer would conclude that there was a real danger of the person being influenced.

But this does not require such subjectivity as to be wholly arbitrary. Stark has criticized provisions designed to punish the mere appearance of misconduct. Such 'appearance' of official impropriety "may emerge in situations where the act in question is clearly prohibited … but in which the official did not in fact commit the act - even though the public, to a greater or lesser extent, believes that he did [and] may

also arise in situations in which the official uncontroversially committed the act in question, but in which no ethics law prohibits … that particular act – even though, to a greater or lesser extent, some part of the public believes that there should have been a law" (Stark, 2000: 208). Such behaviour might be the subject of a separate 'disrepute' provision of a code of ethics. But it is quite permissible to use appearance, based on the facts, to overcome the problem that it is impossible to look inside the legislator's mind.

This means that we face a dilemma between two errors – either we take actions which will prevent not only corrupt behaviour but also non-corrupt behaviour where there is a conflict of interest, or we allow the possibility of genuinely corrupt behaviour. Regulation requires a balancing between these two risks. Consequently, conflict of interest regulation is an exercise in risk management, not only punishing corruption, but also preventing the circumstances in which it occurs[16]. Seeking to eliminate conflict of interest places burdens on politicians which go beyond the purpose of the regulation.

To take one example, if we bar MPs from initiating parliamentary proceedings in which they have an interest, this would 'bite' on those MPs whose primary motivation was to advance their own interest, but it would also 'bite' on those where this was not a consideration at all.

Conflict of interest involves over-regulation because it imposes similar requirements regardless of propensity to be influenced. Therefore the MP who would not be influenced by a payment of £560 is forced to register his interest just like the MP who might be. It also involves under-regulation because the MP who would be influenced by £540 does not need to register his payments. When the strategy is not prophylactic but involves disclosure, there is further under-regulation because the MP, having declared his interest, might still be influenced by it.

This problem is intractable. The first problem is one of 'drawing a line', in the case of conflict of interest, identifying the point at which an interest might be so substantial as to cause a conflict of interest, and excluding interests where there in only a theoretical risk of improper influence. This involves a search for what Onora O'Neill has termed 'smarter regulation' – which is presumably like other regulation, only smarter. But this is not without its difficulties, as one person's 'nuanced' is another's 'complex'.

[16] McMunigal (1998)

But even if the rules could be sufficiently nuanced, when applied in practice this involves subjecting *every* MP to standards designed for the average MP. This is not a problem limited in any way to conflict of interest. The speed limit is the same for all motorists, notwithstanding that some drivers (for instance, trained police officers and Formula 1 racing drivers) are better than others at driving at speed, while some people are presumably unsafe however slowly they are driving. There will always be cases where the rigid application of universal rules to particular circumstances creates absurdities.

The problem of intractability becomes even more intractable as one moves from the obvious 'cash for questions' scenario, through direct personal interest, and into wider forms of influence. There is no such thing as an unencumbered legislator – MPs have families, they have parties, they have friends, colleagues – and they are even forced to deal with their opponents. If we prevent MPs from doing anything which smacks at all of helping themselves or their 'kind', then we have very little left for them to do. Nor is it clear that 'unencumbered' legislators are less interested. One could ensure that MPs were not encumbered when voting on the rate of income tax by exempting them from paying the tax – but as recipients of public funds they would still have an interest, and at least while they remain taxpayers their interests balance one another, albeit imperfectly.

How should the costs to the public of undetected corruption be balanced against the benefits unnecessarily foregone by legislators? Were this solely a question of preventing corruption, the arguments might be finely balanced. However, there are additional considerations which would support a precautionary stance against pecuniary interests. One danger is that even if perceptions of corruption are unfounded, they may encourage genuinely corrupt behaviour[17]. Moreover, considerations of legitimate political behaviour cannot be considered in isolation from the behaviour of other agents[18]: If corruption is widespread – or even perceived to be so – then for the individual it may be morally permissible, even necessary to join in. Regulation thereby provides a means for providing collectively what cannot be ensured individually.

In addition one could argue that stricter regulation than is necessary to counter corruption is desirable to prevent profiteering, or 'private gain from public office' (Stark, 2000). This case is not widely accepted. Dennis F. Thompson, for instance, claims:

---

[17] Doig, McIvor & Moran (1999)
[18] Thompson ( )

> We should not object simply because a legislator gains from holding office … The objection must be not to personal gain but to its effects on legislative judgement[19].

However, some, such as Searle (1987) have seen profiteering by politicians as bordering on corruption. Consider this real-life example: an MP is asked to help a leading international company. He tables an amendment to the Budget on behalf of that company. There is no agreement that he will be rewarded for doing so. However, afterwards he bills the company £10,000 for his services (the MP in this case was the infamous Neil Hamilton). Or the example of the MP who realises from conversations with colleagues that there is a distinct possibility that the forthcoming election for Speaker will be won by someone considered by bookmakers to be an outside. He places a large bet on that person before voting for him. In both cases there is a possibility that the possibility of benefiting has influenced their behaviour within the chamber. But there is also something *else* distasteful about the brazen exploitation of a privileged public position.

One critic of private gain from public office is Michael Walzer, who argues that both corruption and profiteering involve a 'blocked exchange'. Indeed, Walzer explicitly states, 'the use of power to gain access to other goods is a tyrannical use"[20]. A Walzerian approach provides an argument for rigorously 'policing the boundary' between money and public office. Another critic is Andre (1995), and see political office as a position of trust. It is a basic principle of English trust law that one cannot profit from a position of trust. Since public office is exercised in trust for members of the political community, the rewards of public office belong to that community. Therefore, if MPs seek to profit from privileged information, or to sell books exploiting their understanding of Parliament, then the proceeds for that rightly belong to the public. This would not prevent MPs from undertaking employment separate from their political careers, but the separation must be genuine. For instance, an MP might be offered a seat on the board of a company. If this is a position for which s/he has experience, insight, and is eminently capable, it might be justified. If, however, the company simply wants the cachet that would accrue from having an MP on the board, then this would be an abuse of office.

It is suggested that the British public are as concerned about the exploitation of parliamentary membership as about the potential for corruption. In polling evidence

[19] Thompson (1987) 98, see also Oliver (1997)
[20] Walzer (1983) 19

for the Nolan Committee in 1995, repeated for the *Guardian* in 2001, respondents were asked whether it was right or not right for an MP to accept various gifts. The difference between those feeling it was right and those feeling it was not right for each benefit is shown in Figure 1 below:

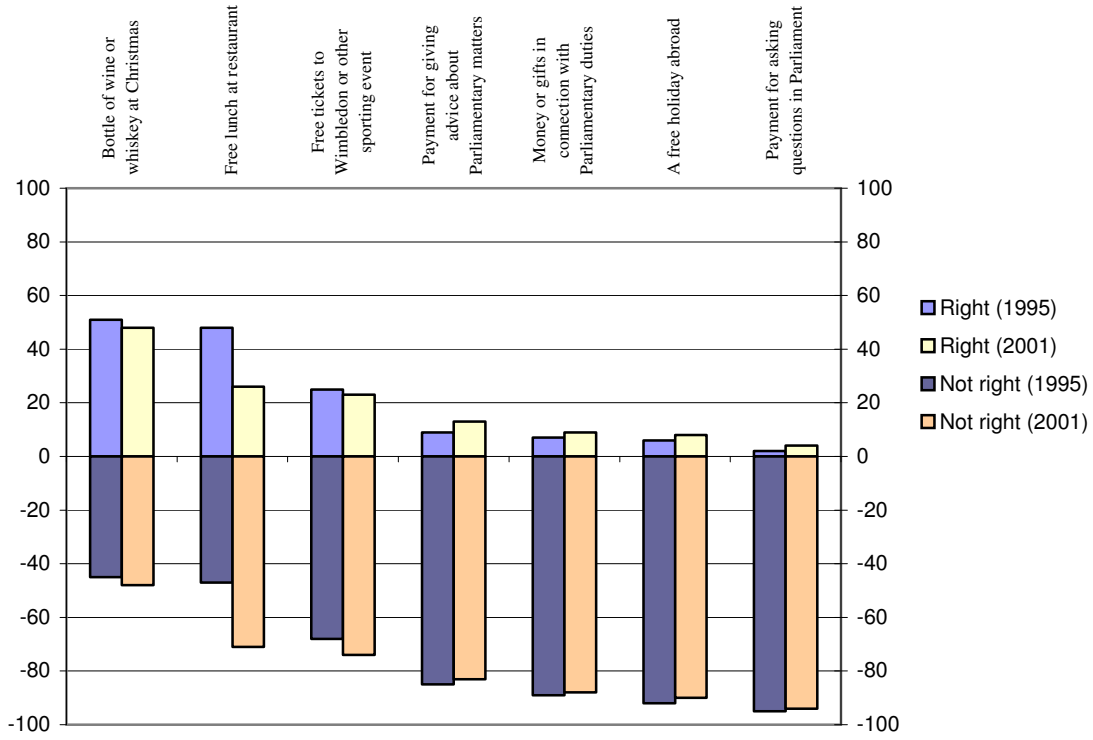

Figure 1: Public attitudes to MPs' benefits

There is only a marginal difference between public attitudes towards the clear instance of corruption (payment for asking questions in Parliament) and the scenario of payment for giving advice about Parliamentary matters, where the MP profits from office without misusing it. There is little difference in public attitudes between ostensibly 'clean' profiteering (payment for giving advice about Parliamentary matters) and the clearly corrupt (cash for questions). If there is a trend it is that on the whole the larger the benefit, the less acceptable it is to accept. This tends to support the conclusion that the public finds is it less tolerable for an MP to accept a gift when it derives from his membership of the House, and that they are as concerned with exploitation of office as with corruption.

One answer, but only a partial answer, to the problem of intractability, is to dilute both the costs and benefits of conflict of interest regulation by using a half-way house – specifically by requiring disclosure, but nothing more, of interests. Disclosure does not stop MPs from participating in proceedings just because the have an interest, so

it does not inadvertently 'bite' on the second class of MPs discussed earlier. But equally its bite is diminished on the first class as well.

Insofar as disclosure might address the problem of corruption, this is based the supposition that where an MPs' private interest is known, then he will be less likely to allow it to override the public interest; he may well also be discouraged from taking payments or remuneration which could be seen as so undermining the public interest, if the payment would become publicly known. As the quote attributed to Dr. Johnson has it, "nothing is so conducive to a good conscience as the suspicion one is being watched"[21]. Or as the Select Committee on Members' Interests put it in 1992, "the obligation to register or declare an interest publicly may occasionally deter a Member from pursuing a course of action which is in conflict with his position as a Member or which is potentially corrupt". But equally "there is a danger that some Members may make the mistake of believing that the correct registration and declaration adequately discharge their public responsibilities in respect of their interests".

Indeed, disclosure acknowledged that MPs have interests which "might reasonably be thought by others to influence their actions". Such a practice will only reassure if followed by the assertion 'might be thought to, but don't'. But it is a curious way to reassure the public. Rather, disclosure of interests relies on a sceptical public to ensure that MPs will only allow a close proximity to subsist between their personal interest and their actions, where they can persuasively argue that the deciding factor was not their interest but the merits of the case. Disclosing interests should not encourage blind trust – that would negate its value – but it might just encourage cynicism.

However, for legislators the attraction of a disclosure strategy is twofold: first, they do not have to forego their perks; second, it is a high-visibility strategy. Debates on conflict of interest among British MPs are generally prefaced with an assurance that there is no 'real' corruption (if this is not the case then the phrase 'few bad apples' will invariably be used – in complete ignorance of what the saying *means*). It will be asserted (usually without evidence, and certainly without thinking about Scandinavia or New Zealand) that British politics is the cleanest in the world, and it will be stressed that the problem is one of *perception*. Given this, it should not be surprising that legislators in the UK have consistently opted for a high-visibility, even cosmetic, solution – every declaration of interest is a public display of probity.

[21] Cited in Mackenzie (2002): 92, although the attribution to Johnson may be wrong.

Regulating Conflict of Interest: a chronology

In 1666, in a statement directed at barristers, the House of Commons resolved that "members of this House … shall not be counsel on either side, in any bill depending in the Lords' House, before such bill shall come down from the Lords' House to this House"[22]. It was a very limited restriction on the ability of MPs to engage in paid advocacy. In 1811, Speaker Abbott gave what was for many years the definitive ruling on MPs' pecuniary interests:

> … a personal interest in a question disqualified a member from voting. But this interest, it should be further understood, must be a direct pecuniary interest, and separately belonging to the persons whose votes were questioned, and not in common with the rest of his Majesty's subjects, or on a matter of state policy[23].

However, Speaker Abbott's ruling only applied to *private* bills and does not apply to most parliamentary business today. The scope of the advocacy rule was broadened by a further resolution in 1858 to cover the bringing forward, promotion or advocacy of any measure in which the Member may have received a pecuniary reward – here only applying where there was a causal nexus between the advocacy and the reward.

In 1947 the House declared it illegitimate:

> for any member of the House to enter into any 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…*[emphasis added][24].

Yet despite the language of the final clause, MPs have not been prevented from acting as spokesmen in the House for outside organisations, provided that the MP retains his freedom to speak as he sees fit.

---

[22] *Commons Journal* 1660-67 646
[23] *Parliamentary Debates* 20 (1811) 1000-1012
[24] HC Debs, 15/7/1947, col. 365

Note that such 'prophylactic' measures (Stark, 2000) – i.e. they prevent the MP's official behaviour being influenced by his interest – not only guard against corruption, but they overcome the empirical hurdle, and they prevent MPs' personal interests from influencing the behaviour of their fellow MPs. However, the cost of such a powerful tool is that it must be closely targeted. The earliest provisions were targeted at very specific mischiefs – indeed the 1858 and 1947 resolutions really target actual, if mild, corruption. However, as Marshall has pointed out, cases of outright bribery are rare: "alleged financial impropriety has not invariably been a matter of straight forward bribery, but turned upon the relationships between Members and special interest groups or their representatives"[25].

In 1974 the House resolved that:

> In any debate or proceeding of the House or its Committees or transactions or communications which a member may have with other Members or with Ministers or servants of the Crown, [an MP] shall disclose any relevant pecuniary interest or benefit of whatever nature, whether direct or indirect, that he may have had, may have, or may be expecting to have.

The test of relevance now employed under this rule is whether the benefit "might reasonably be thought by others to influence the speech, representation or communication in question". It is a conflict of interest rule.

Initially a number of MPs, one in particular, simply refused to register their interests, and the Committee on Members' Interests was unable and seemingly unwilling to take any action. It was only from about 1987 that the House of Commons began to clamp down on recalcitrant MPs. In 1989 a Conservative backbencher was suspended after being found to have failed to disclose a series of interests, some of which *had* influenced his parliamentary conduct. The action against Browne highlighted the House's previous laxness as a rush of MPs seeking to belatedly register past interests led to the Registrar having to refuse to accept retrospective entries in previous registers. But it is noticeable that what prompted action was not just a failure to comply with conflict of interest provisions but the fact that there was evidence of improper influence.

The greatest shock to Parliamentary complacency came in September 1993, when Mohammed Fayed, the owner of *Harrods* complained to the editors of the *Guardian*

[25] Marshall (1979)

and the *Sunday Times* that he had been making cash payments to two MPs – Tim Smith and Neil Hamilton – in return for parliamentary questions, motions and approaches to ministers. In January 1994, the *Sunday Times* mounted an operation to test whether MPs could be paid to ask Parliamentary Questions. Ten Labour MPs and ten Conservative MPs were approached by undercover reporters and offered £1000 to table a written question. Two, both Conservatives, accepted the payments, while a third Conservative agreed to do so if the money went to a named charity. A fourth Tory, would not take payment for the question itself but said he would be happy to discuss a future 'arrangement'[26]. The MPs were not prosecuted for bribery. Instead the matter was referred to the Privileges Committee who merely suspended the first two MPs for 20 and 10 days respectively.

In October 1994, the *Guardian*, published Fayed's allegations[27]. Smith immediately resigned as a minister while Hamilton issued writs for libel against the *Guardian*. Within a week, however, Hamilton had been forced to resign as Minister for Trade. It is telling, however, that neither – even Smith, who admitted to having taken about £20,000 in bribes – resigned as an MP, and both stood for re-election (Smith withdrew at the start of the campaign, while Hamilton was defeated).

On the day that Hamilton resigned, John Major announced to the House of Commons the setting up of a Committee under Lord Nolan to examine standards of conduct in public life. It's remit, unlike previous bodies, specifically included MPs. Its main recommendations of the report as they related to MPs were:

- A code of conduct for Members of Parliament
- A ban on the acceptance by MPs of consultancies with lobbying organisations
- Full disclosure by MPs of agreements and remuneration relating to Parliamentary services
- An independent Parliamentary Commissioner for Standards to investigate complaints and prepare a report to a sub-committee of the Privileges Committee

Nolan's recommendation was an exercise in risk management, explicitly acknowledging not only that some types of interest were riskier, but also that countervailing considerations varied between different types of interest. Both

[26] Doig (1998)
[27] *Guardian*, 20/10/1994

considerations justified treating parliamentary services why the provision of 'parliamentary services' should be treated differently from other forms of income:

- "the risk of impropriety is greater"[28]
- "the public, and in particular Members' constituents, have a right to know what financial benefits Members receive *as a consequence of being elected*"[29].
- "several MPs with whom we raised this issue did not object to disclosure of remuneration so long as this related strictly to Parliamentary services".

Nolan also framed his justification for disclosure of remuneration in risk terms::

> A Member who gets £1000 a year as a Parliamentary adviser is less likely to be influenced by the prospect of losing that money than one who receives £20,000 a year. The scale of remuneration is in practice relevant to a full understanding of the nature of the service expected[30].

In other words, disclosure of remuneration for Parliamentary services is a means of ascertaining, albeit imperfectly, whether the relationship is one of advice or advocacy. Major immediately announced that he accepted its 'broad thrust'[31], but subsequently backtrack once it emerged that a large number of Conservative MPs were unsettled by the recommendation to ban MPs from being paid by multi-client lobbyists[32]. Consequently the issue was passed back to a Select Committee of MPs[33]. That Committee accepted Nolan's proposals for an independent commissioner and for a Code of Conduct. But the Conservative majority rejected Nolan's proposals for ban on consultancies with lobbyists (notwithstanding Nolan's criticism of these as a 'hiring fair'[34]) and for disclosure of remuneration.

Instead, they recommended a ban on "paid advocacy". Was this not banned in 1665? Or 1695? Or 1858? Or 1947?

The new ban was essentially – like the 1916 Act – a reversal of the burden of proof.

> When a member has received, is receiving or expects to receive a pecuniary benefit from a body … outside

[28] Nolan (1995-I), para. 2.66
[29] Nolan (1995-I), para. 2.69
[30] Nolan (1995-I), para. 2.69
[31] Seldon (1997) 556; *Times* 12/5/1995
[32] Seldon (1997) p. 556
[33] HC Debs, 18/5/1995, col. 568
[34] Nolan (1995-I), para 2.55

> Parliament the Member may not initiate any parliamentary proceeding which relates specifically and directly to the affairs and interests of that body [or] any client of such a body… When participating in any other Parliamentary Proceeding, advocacy is prohibited which seeks to confer benefit exclusively upon a body (or individual) outside Parliament, from which the Member has received … a pecuniary benefit[35].

In effect, this overcomes the evidential problem inherent in allegations of corruption by removing the need for a causal nexus: a simple correlation between interest and activity will do. (Declaration of interest remains for situations where an MP participates in proceedings relating to the general area in which he has an interest.) This was the most clearly prophylactic measure of recent years. It was also probably the least successful of the Nolan reforms (see below).

The Select Committee's recommendations on full disclosure then passed back to the House, where twenty-three Conservative MPs voted for a Labour Party amendment requiring disclosure of earnings from parliamentary services. A further twenty-nine Conservative MPs abstained, and the motion was carried by 322 votes to 271.

The House therefore adopted both strategies – a ban on paid advocacy ranging much further than Nolan's proposed ban on multi-client consultancies, *and* full disclosure of remuneration. Contracts with multi-client lobbyists remain permissible – but with MPs banned from initiating proceedings these links have been all but broken. We might take this as evidence that 'consultancy' arrangements between MPs and lobbyists were a sham; in truth they involved payment for legislative services.

The New Conflict of Interest Rules in Practice

The post-Nolan system was complex and nuanced. There were at least three regulated activities:

(i) initiation of parliamentary proceedings

(ii) participation in parliamentary proceedings

(iii) membership of the House of Commons

And at least three types of interest:

---

[35] 1996/97: HC 688, para. 58

(i) interests arising from the provision of parliamentary services

(ii) other registrable interests

(iii) non-registrable interests

Coupled with three responses:

(i) registration

(ii) declaration

(iii) recusal

This was further complicated by issues such as whether a commitment was “regular” or a shareholding significant. Some interests – such as travel and hospitality from UK sources – are only registrable if they relate to membership of the House; others are always registrable.

Something happened between 1995 and 2001. What this seemed to be was that a system that had been aimed at preventing abuses was now causing difficulties for honest politicians. As far as MPs were concerned whatever problems the 1995 rules were designed to address had – if they had existed at all – been extinguished. The persistence of those rules was a burdensome legacy. (At a more basic level a system that had been designed to punish sleazy Conservatives was now hitting New Labour’s large intake MPs from 1997). Part of the problem was a misunderstanding among certain politicians – including some senior Labour MPs – that the rules should not require registration of ‘acceptable’ interests. Disclosure was seen as implying impropriety. Essentially, such MPs sought a return to a corruption-based regime. But there were also genuine difficulties.

The first case in which these rules were challenged concerned a Conservative spokesman whose name had been amended to a motion opposing the compulsory recognition of unions. He was a director of a company that did not recognise unions. The Parliamentary Commissioner held that this invoked the rule on *initiation* – since it concerned a group of which his company was a member the MP should not have initiated parliamentary proceeding. This was overruled by the Parliamentary Committee which said that ‘companies that do not recognise unions’ was too amorphous a category for the initiation rule. It would still be covered by the *participation* rule, which states that MPs can participate in proceedings where they have an interest but should not seek to confer a benefit on a particular organisation (so the motion was OK as it sought to confer a benefit on the sector generally). The

MPs' interest was also subject to the disclosure regime, meaning that it had to be registered (it had) and it should have been declared in the motion (it hadn't).

Applying the logic of this particular case caused further difficulty when the second Commissioner held that a member who had considerable interests in a small manufacturing company should have declared those interests when speaking on certain economic matters concerning manufacturing and small businesses. It was clearly in line with the previous judgement – indeed one could have made the case, as the previous Commissioner had, that it should have invoked the initiation rule – but it caused disquiet for the Select Committee, who, upholding the Commissioner's finding, described it as their most borderline judgement. They would probably have rejected their finding had the MP concerned not been the Chairman of the Committee itself. The Committee's response to their own conflict of interest was to cast abrogate independent judgement and go for an unimpeachable verdict!

The advocacy rule caused particular problems for foreign travel. Because a country was equated with its government, an MP who accepted hospitality from a foreign government could not initiate any proceedings relating to that country; nor could she seek to confer any benefits on that country. Since there are almost no opportunities for MPs to visit foreign countries – other than holiday destinations – without accepting such hospitality, this meant that the MPs with first-hand experience of a country tended to prevented from contributing to debate.

The Committee for Standards in Public Life under Lord Neill was sympathetic to this problem. (It is less clear that it would have evoked such sympathy if the problem had been framed in terms of non-states such as Northern Cyprus and Bophuthatswana – which have long cultivated support among Parliamentarians by judicious distribution of 'fact finding' missions.) They recommended that foreign travel be excluded from the advocacy rule. Having done so it was a simple step to conclude that the initiation limb of the advocacy ban should be abolished. Such logicality, however, ignores the real world. Companies may not pay for 'participation' as and when the opportunity arises, if it ever does. More likely they will want initiation – as Mohammed Fayed put it, "I want processions in the Parliaments". In most of the 'cash for questions' cases that had prompted the creation of the CSPL, the 'questions' concerned had not sought explicit benefits but had sought ancillary advantages. In the case of Fayed's

lobbying group activity tended to focus on discrediting his opponent, advancing his case only by default. None of this would be caught by the new rules[36].

The advocacy rule was also blamed when the Conservative Party's newly-appointed agriculture spokesman had to step down in May 2002. Having accepted, the MP, with significant interests in farming, asked the Parliamentary Commissioner for advice, who explained that he would not be able to initiate any proceedings relating to agriculture. This was held up to cast doubt on the new rules. But consider what would have happened had he been appointed, and the rules not bitten. Every motion he tabled, every question he asked, every bill he opposed, would have been criticized by government MPs as an example of the spokesman feathering his own nest. And we would have had only his own assertions that his interests were purely coincidental as a response.

A similar problem was exposed by a case involving the Conservative leader William Hague. Hague was supporting the campaign by the now-disgraced Jeffrey Archer to be mayor of London. Archer was the official Conservative candidate, and Hague's support was inevitable once he had been selected. However, Hague was also receiving a personal benefit from him (he used Archer's gym). Clearly the latter could have been reasonably thought by others to influence Hague's action. Clearly however it was also superfluous – and in fact despite appearances it was almost certainly not influencing him. The Hague case became a *cause celebre* used to attack not only the new regime but also the then Parliamentary Commissioner for Standards.

Problems have also been caused by two particular arrangement for using MPs expenses. First, MPs frequently employ their spouse or, less justifiably, their children using parliamentary allowances. The Commissioner has held that the relevant considerations are:

- is the person employed to meet a genuine need in supporting the Member in performing their Parliamentary duties?
- are they qualified/able to do the job?
- do they actually do the job?

[36] In a submission to the Committee on Standards and Privileges I argued (unsuccessfully) that whatever advantages could be brought to bear by allowing participation by 'interested' MPs, in the case of MPs providing lobbying services the flow of information was outward, there was no knowledge to be gained *by* the House, and the risk of a hiring fair was so great that they should remain subject to the initiation rule.

— are the resulting costs, in so far as they are charged to the allowance, reasonable and entirely attributable to the Member's Parliamentary work?

But such satisficing ignores the central question – has the MP's judgement been compromised? It seems inconceivable that so many MPs – as many as one in ten – are independently coming to the conclusion that the right person for the job happens to be a close family member. Rather, within the range of permissible responses, they are choosing the one most personally rewarding. Or as Atkinson and Mancuso (1992) put it: "it is tacitly recognized that MPs are entitled to keep their staff allowances "within the family" as some recompense for their low official salaries"[37].

A similar arrangement has operated with office accommodation (MPs receive an allowance for 'overnight stays' in London or their constituency which many use to pay for their own home). The MP buys a property and 'rents' it from himself using his parliamentary allowance at a market rate; if he were astute and concerned with the propriety of his actions he might even get an independent valuation. The former Commissioner felt that this was fraudulent as the market rent includes an element of profit – indeed the vast majority of the rent would be return on capital. Consequently the MP would be taking a cut from expenses intended to help him provide a service to his constituents. For MPs this was of no concern, there was no loss to the public as a property would still have to be found, and a market rate otherwise paid. However, the question of bias must still arise (can it really be that the ideal property for the MP to serve his constituents from is so often the MP's own property?)

The Select Committee on Standards and Privileges felt that MPs could not be criticized for such arrangements[38], notwithstanding the clear evidence of self-dealing involved. Requiring independent valuations of property would ensure there was no harm to the public interest. Only in the most outrageous circumstances – such as the MP who claimed for a house that he no longer owned – would action be taken (he was suspended for a month).

MPs' disquiet about these rules culminated in the removal in 2001 of the then Parliamentary Commissioner for Standards. She was seen as being over-zealous, indiscreet, and lacking understanding of political life. There may have been a kernel of truth in this. But for the most part the problem lay with rules that MPs had

[37] The annual salary for a backbench MP is £56,358 in 2003/04
[38] Strictly speaking, they refused to address the Commissioner's findings on that point until faced with a case concerning a Minister, whom they cleared.

themselves made and passed. What had changed was the attitude of MPs, their perception of the problem, and the relevant cost-benefit analysis.

The impact of this has been a rolling-back of the Nolan regime. After a consultation exercise the Standards and Privileges Committee decided that the purpose of the Register – "to provide information about benefits which might reasonably be thought to influence a Member's actions" – was not served by the inclusion of relatively insignificant benefits. This had been a recurring issue from the early days of the Committee. Gifts valued at under £125, and other benefits worth less than £235 were already exempt from registration. In its consultation document the Committee suggested that the disclosure trigger *for hospitality received in the course of a member's official duties* should be raised to 1% of the parliamentary salary (about £550). This was based at the time on a concern that the cost of hospitality such as a night in a hotel did not accurately reflect the benefit to a Member, for whom it might be a necessary consequence of an official engagement, with no real benefit in its own right. When the Committee finally reported, however, it had decided that the *de minimis* figure for *all* benefits should be raised to 1% of the parliamentary salary. (This stands in stark contrast to the Model Code of Conduct for local councillors, which had recently been passed by the House, in which the de minimis figure was set at £25.)

The Committee then set about harmonizing all its disclosure levels. Specifying levels relative to the Parliamentary salary meant that they would in future rise along with earnings, but it also involved significant inflation. MPs were required to register property from which they drew a commercial rent, or which was of substantial value. These terms were not defined in the Code. The Committee decided upon 10% of the parliamentary salary for income and – having previously suggested 50% of salary for 'substantial value' – concluded that 100% was a better figure. Having adopted the 100% trigger for property it made sense to apply this to shareholdings. Although the committee had initially suggested £25,000, it would now be about £55,000. The new thresholds have the advantage of simplicity, but it is at the cost of leaving many interests out of the regime altogether. Nor did the Committee tackle the issue of cumulation – that while individual properties or shareholdings might fall below the threshold for registration, taken together a portfolio might be so extensive as to create a possible source of influence on an MP's actions. By spreading his investment across a number of companies a member could amass a huge interest in a particular sector; and with the advocacy rule relaxed, he could lobby for that

industry with parliamentary questions and EDMs, provided they did not relate to any particular company.

Finally, with the introduction of the *de minimis* figure it became convenient to amend the 'bands' in which MPs must disclose remuneration for parliamentary services. Previously, these had been 'up to £1,000', '£1001-£5,000', and thereafter in bands of £5,000. The committee argued that the lowest band "will serve little purpose". So a future reader of the Register of Members' Interests would have no way of knowing whether an MP's consultancy was worth £5000 or £551 – or even less because the committee explicitly contemplated that MPs might want to register interests below the de minimis figure.

In only one category, the registration of political sponsorship, did the committee lower the disclosure threshold. The former level was 25% of allowable election expenses, about £2000. In future it would be £1000, to bring it in line with the figure at which political contributions must be registered with the Electoral Commission. Of course, given that such contributions would be declarable under the Parties, Elections and Referendums Act 2000, there would be little purpose in MPs seeking to avoid putting them in the Register of Members Interests. But perhaps the most frightening aspect of this change was that it prompted the committee seriously to consider whether £1000 might be a suitable *de minimis* figure for all categories. It is worth bearing in mind that in 1995 the Sunday Times had found at least two MPs – from a sample of only twenty – willing to table parliamentary questions for £1000 each.

This deregulation has so far caused little disquiet, but then most political scandals have concerned affairs outside parliament – reflecting the diminished importance of a parliament where the government controlled about three-quarters of the seats. In addition, MPs post-Nolan are probably more attuned to the ethical, and reputational, consequences of conflict of interest. This afterglow is unlikely to last indefinitely.

The result, however, has been that for good or ill the pendulum has swung back towards avoiding catching hapless innocents, with the result it will also catch less corrupt behaviour.

Conclusion

Using corruption legislation to prevent conflict of interest affecting political outcomes is inadequate. It is problematic because action will only be taken in cases that are (i) identified, and (ii) provable. Even then, barring a recognisable bribe, or an otherwise inexplicable alignment of interests and activities, it will be impossible to prove causation. But more importantly, cases of unprovable influence, including those

where a legislator was influenced without even knowing it, undermine the democratic system. Consequently, it is permissible to expect higher standards – that MPs will not only avoid impropriety, but will avoid activities where the facts give rise to an appearance of impropriety.

The difficulty is that once conflict of interest is intractable. There is no such thing as an unencumbered legislator. If we prevent MPs from doing anything which smacks at all of helping themselves or their 'kind', then we have very little left for them to do.

Consequently, conflict of interest regulation requires a finely balanced matching of risks and regulation – nuanced enough to catch most problematic behaviour, while not embracing most unproblematic behaviour, while simple enough to comprehend. It is not an easy task. It also means that conflict of interest regulation cannot exist in a vacuum – rules must be designed to reflect the reality of MPs' relationships, workloads, even their propensity to do wrong. And as all of these things change over time, there is no perfect conflict of interest regime. One cannot simply attack every extension of regulation as creep, every restriction as a burden. Experience at Westminster shows that conflict of interest regulation is more flexible, more reassuring than tackling bribery alone; but it embraces the hapless innocent along with the clearly corrupt.