

Trading in Influence

a research agenda for New Zealand?

Trading in influence – a new criminal offence

In November 2015 the Organised Crime and Anti-corruption Legislation Bill was passed by Parliament. An omnibus bill, it amended numerous different acts in relation to (among other things) money laundering, organised crime, corruption and bribery offences. One of its stated aims was to bring New Zealand legislation up to date to enable New Zealand to finally ratify the United Nations Convention against Corruption (UNCAC), which it did in December that year. The merits and potential demerits of the bill have been discussed previously (Macaulay and Gregory, 2015), but one thing that requires further attention is the creation of a new offence of ‘trading in influence’.

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The offence was created as an amendment to the Crimes Act 1961 and is set out in section 105F:

Every person is liable to imprisonment for a term not exceeding 7 years who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, a bribe for that person or another person with intent to influence an official in respect of any act or omission by that official in the official’s official capacity (whether or not the act or omission is within the scope of the official’s authority).

Its wording is clearly based on the relevant passage from UNCAC, albeit in a much abbreviated form: The wording of the new offence is admirably succinct, as is its refusal to distinguish between domestic and overseas jurisdictions, which is in stark contrast to other

Article 18. Trading in influence

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State

Party an undue advantage for the original instigator of the act or for any other person;

(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.

amendments made by the Organised Crime and Anti-corruption Legislation Bill. Even following the amendments, for example, bribery is still permitted under the Crimes Act as long as (a) the bribe is to a foreign official; (b) the value of the bribe is small;¹ and (c) it is paid to expedite a 'routine government action', rather than for any extra service (s105C(3)). To be fair, such routine government actions are now more tightly defined than in the past, and one final caveat is that businesses must now keep a register of such bribes under amendments to the Companies Act, section 194(1A). Nevertheless, it still seems incongruous to many that such a defence exists, and it is certainly against the wording of UNCAC, which allows for no exceptions to any form of bribery.²

The new offence also has substantial coverage, taking into account central and local government, as well as education. Its interpretation (s.99) usefully defines an official as:

any person in the service of the Sovereign in right of New Zealand (whether that service is honorary or not, and whether it is within or outside New Zealand), or any member or employee of any local authority or public body, or any person employed in the education service within the meaning of the State Sector Act 1988.

In light of the above, the creation of the new offence of trading in influence

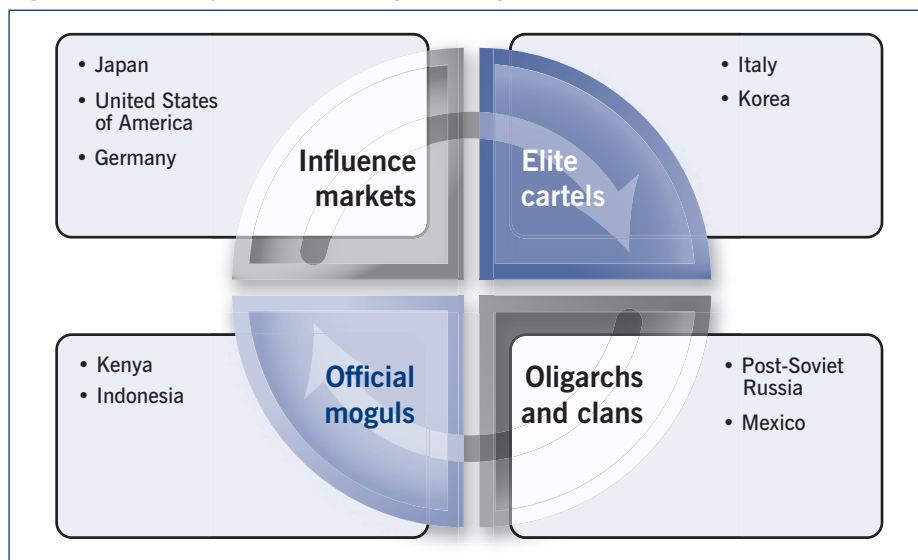
can be admired both for its adherence to the letter and spirit of UNCAC, and also because it is potentially more far-sighted than may first appear.

Syndromes of corruption

Perhaps the most remarkable aspect of the new offence is that trading in influence (often referred to as influence marketing) has long been identified as the most common form of corruption in developed, Western economies. Most notably, Michael Johnston (2005) has labelled trading in influence as one of the four 'syndromes of corruption' that can be used to describe and explain corrupt practices in different jurisdictions around the world, alongside official moguls, clans and oligarchs, and elite cartels (see Figure 1).

Johnston argues that, despite what common wisdom suggests, corruption of varying degrees occurs throughout the world. The form it takes is dependent on the social, political and economic regimes in which the behaviour takes place. Most academic attention is paid towards corruption in developing nations, a bias that is strongly reflected if not reified in the broader international policy and development climate. Yet Johnston suggests that as a result of this, the corruption that is manifested in many highly developed economies (and frequently in liberal democracies) goes either unnoticed or ignored. Indeed, not only are such activities not regarded as corruption, but they are actually seen as legitimate.

Figure 1: The four syndromes of corruption (adapted from Johnston, 2005)



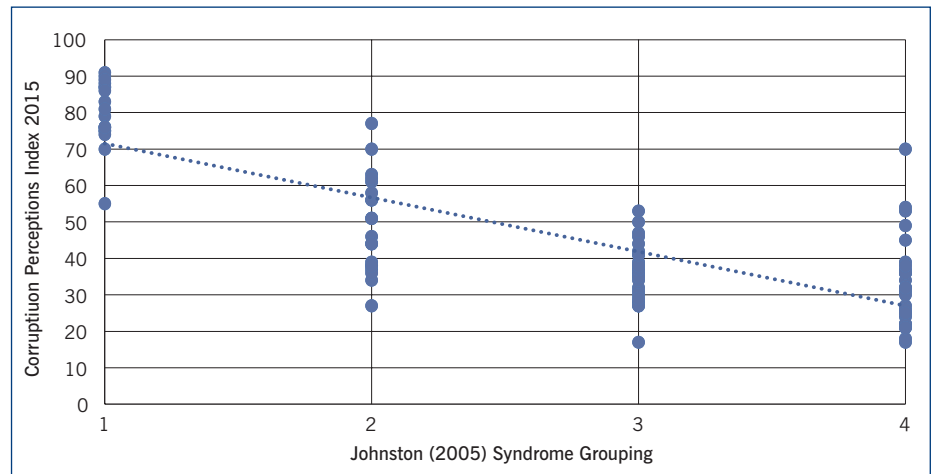
The four syndromes Johnston identifies are ideal types which are useful in expanding on how corruption can be viewed, but they also have a statistical backing: Johnston groups nations into the four types through a cluster analysis across a wide range of political and economic indicators.³ This subsequently broadly corresponded to the Corruption Perceptions Index ranking of the nations in each group, and on further analysis of the countries Johnston categorised, the groupings still correspond well.

For developed liberal democracies, which are the locus of the ‘influence markets’ syndrome, Johnston refers to institutions that are strong enough to avoid being circumvented by forms of corruption such as blatant bribery. The corruption that does exist in such nations, therefore, happens within the remit of those institutions – political parties and government ministries, for example – and is usually well within the bounds of how such institutions are in fact designed to work. What is a key problem, and a reason why trading in influence should be seen as corruption, is that it damages and degrades the trust the public has in these structures. Citizens do not believe that they can have influence over what occurs in government, and this perception is, in Johnston’s view, a serious problem.

Johnston suggests that political influence is essentially a commodity that can be bought or sold (or traded) through different channels, most of which are accepted as part of the political landscape. Indeed, many of them have effectively had industries built around them. Typically these include areas such as lobbying, political party funding, patronage, revolving doors of post-ministerial appointments, misuse of corporate hospitality, gifts and various others.

As previous studies have indicated, one of the key issues for debate here is the problem of access versus influence. Access to politicians is easy to determine: it is usually clear who has access to politicians and decision makers. What is less clear is the extent to which this may, or may not, lead to any influence being passed around. This highlights the limitations of transparency: ‘we used to think that sunlight was the best disinfectant, but

Figure 2: Johnston’s corruption syndrome groupings⁴ versus Transparency International’s Corruption Perceptions Index 2015



now we see that it only creates more shadows in which to hide’ (Macaulay, 2011).

Johnston focused his attention on three nations to explore trading in influence: the United States, Germany and Japan. Particularly interesting is how the situation in the United States has changed in the decade or so since he wrote *Syndromes of Corruption*. He identifies the problem of political donations in the US and how it means that political competition, even in ‘free elections’, is crippled. This is perhaps even starker now, with the 2010 *Citizens United* decision opening up even greater amounts of money for favoured political causes. In an example of the expanded legitimacy of money in government, the corruption charges against Robert McDonnell during his tenure as governor of Virginia have been vacated by the Supreme Court, an act which Johnston himself commented on in the media as constituting a new, and overly narrow, definition of corruption (Johnston, 2016). Johnston and the wider literature (Johnston and Dana, 2012; Etizoni, 2014) have also commented more recently on political capture and the undermining of political legitimacy by influence peddling.

Although Johnston did not focus his attention on the United Kingdom, it has seen numerous examples in recent years of a variety of forms of trading in influence. To start with an obvious example, the Conservative Party Leader’s Group allows members direct meetings and engagements with the prime minister

for an annual fee of £50,000.⁵ The Leader’s Group is certainly transparent and the list of its donors is readily available for public view.⁶ What can never be clear, however, is the extent to which this access ever becomes translated into something more. What is clear is that the Leader’s Group donated £43 million to the Conservative Party during 2012–14 alone (Graham, 2014).

A further example has recently emerged in terms of the power of patronage. Confirming what many have suspected for decades, a 2015 study from Oxford University demonstrated a conclusive link between political party donations and government appointments to the House of Lords. These are no mere vanity appointments, as party donations can buy people a direct seat at the legislative table (Mell, Radford and Thévoz, 2015). This study was undertaken at a time when the British government has been making an anti-corruption push on the global stage, even hosting an international summit on the subject (United Kingdom Government, 2016). Others in the public arena (Sachs, 2016; Oxfam, 2016) have criticised this because of the role developed nations have in allowing corporations to exploit developing nations; but in addition to this, corruption *within* the United Kingdom has come under public scrutiny (Short, 2016).

Between the UK summit and the prominence of UNCAC, anti-corruption legislation and pressure has been mounting. Many developed nations,

Table 1: An overview of trading in influence in New Zealand

Lobbying	Failure of Register of Lobbyists Bill
Political donations	Cabinet Club
Revolving doors	Appointments to public boards
Patronage	Debate in Hansard, 19 March 2014: Tony Astle – \$60,000 Officer of New Zealand Order of Merit Chris Parkin – \$66,000 Companion of New Zealand Order of Merit Sir William Gallagher – \$25,000 knighthood
Cronyism	Appointment to GCSB

however, have pushed away from some of the themes in the international discourse, and in particular trading in influence. As stated before, New Zealand is one of the first countries to have explicitly criminalised it, despite international agreements calling for such legislation to be passed. Article 12 of the Council of Europe’s Criminal Convention on Corruption has called for the criminalisation of trading in influence since 1999, and yet, even for those states that have ratified the convention, over a quarter have expressed reservations about article 12. Slingerland (2011) applies article 12 to two prominent cases of trading in influence – the management of DSB Bank (Dirk Scheringa Bank) and the financing of Nicolas Sarkozy’s 2007 election campaign – and explores the difficulty of trying to apply a rigid definition of the phenomenon. The unclear nature of trading in influence is, according to Slingerland, a primary reason why states are reluctant to criminalise it, for fear of sweeping up ‘legitimate’ political influence such as lobbying.

The difficulty of defining corruption is not limited just to writing international law, however. Johnston devoted pages to trying to set a definition (2005, pp.1-15), and even then simply settled on one that was usable for his project. There are multiple comparisons of anti-bribery and corruption legislation (for example, CMS, 2014), and the absence of a definition of corruption is commented on. Part of the issue is that many pieces of legislation define corruption using terms such as ‘undue influence’, ‘acting contrary to their duty’ or, tautologically, ‘corruptly offering’. What seems clear is that there is a qualitative component to corruption implied in most, if not all, legislation

regarding corruption, and this includes the New Zealand case.

A New Zealand problem?

New Zealand prides itself on its reputation for integrity and a lack of corruption. Yet many of these forms of trading in influence have been identified as being prevalent in the political system. Transparency International New Zealand’s 2013 National Integrity System study found that there are problems around ‘grey areas’: party funding; patronage; perceived nepotism and/or cronyism; unresolved conflicts of interest; misuse of lobbying, etc. Essentially these problems are of the same type as identified by Johnston, and which can be found throughout the US, UK and continental Europe.

There is also, of course, a New Zealand equivalent of the Leader’s Group: the Cabinet Club. Although this has been dismissed by some as ‘no suggestion of cash for access’ (3News, 2014), there is an obvious concern that anonymous donations can grant a person direct contact (however innocent) with a member of the government. Although we do not seek to offer a comprehensive overview here, it is useful to flesh out some recent examples that suggest a prima facie case of trading in influence within New Zealand (see Table 1).

In 2012 the Lobbying Disclosure Bill was drawn. First introduced by Sue Kedgley, and subsequently reintroduced by Holly Walker, the bill sought to ‘bring a measure of transparency and public disclosure around the lobbying activity directed at members of Parliament and their staff, and in so doing to enhance trust in the integrity and impartiality of democracy and political decision making’ (Lobbying Disclosure Bill, 2012,

explanatory note). It passed the first reading and was sent to the government administration select committee, where it was not recommended for further passage. Instead it was recommended that Parliament use non-legislative measures to strengthen departmental reporting and guidelines for how ministers report their activity. Much of the political and media response to the bill was negative, and focused on two areas: the belief that New Zealand does not have the same problems with lobbying as exist worldwide; and the argument that by mandating that lobbyists be registered, it would discourage ordinary citizens from talking to their representatives. Submissions on the bill, including from unions (for example, the Service and Food Workers’ Union) and businesses (for example, McDonald’s Restaurants (New Zealand)) spoke about the ‘chilling effect’ legislation might have if ‘ordinary citizens’ were caught up and labelled as ‘lobbyists’. The debate during the first reading often brought up New Zealand’s ranking in Transparency International’s Corruption Perceptions Index (Hansard, 2012) and opponents used this to argue that while examining the role of lobbyists was a useful and important task, New Zealand did not have a problem of corruption. It will be interesting, however, to see if the bill will gain a second wind in the years to come, as the new offence of trading in influence could well provoke a legal conundrum for lobbying.

Alongside the issue of lobbying often comes the question of political donations. Often those speaking against the Lobbying Disclosure Bill compared New Zealand favourably to America, and the phenomenon of lobbying is closely related to that of political donations: they are both discussed by Johnston, and both can cause perceptions of disempowerment among citizens. In New Zealand there has been some recent scrutiny of the Cabinet Club, where individuals pay a certain amount to National Party electorate organisations in return for being invited to dinners and other social functions with members of Parliament and ministers (3News, 2014). Representatives who have taken part in these ‘clubs’ vehemently deny any notion of ‘cash for access’,

pointing out that the donations are declared and that anyone can set up an appointment to see a minister about an issue by contacting their office. Similarly to the defence Judith Collins gave about her association with Oravida – ‘just popping around for a cup of tea’ – the Cabinet Club has been described as ‘pizza politics’ – casual, informal interaction between politicians and citizens. Ministers have also claimed that they are not acting in any way as ministers, just members of Parliament, when they go to such dinners (although the name Cabinet Club might make such a response less convincing). Nevertheless, the majority of citizens would not be able to afford to join the Cabinet Club, and this again raises the question of access, influence, and who gets to have them.

Judith Collins’ dinner at Oravida during a state-funded visit to China is one of the more well-known and commonly seen as ‘corruption’ scandals of the National government. Oravida, a New Zealand company which exports goods to China, had a history with the National Party and with Judith Collins in particular: it had made donations to National in the past (Gower, 2014); Collins had opened the company’s Auckland headquarters that same month; and one of the directors of the company was her husband (3News, 2014). This visit to the company while in China was not reported in the minister’s report; nor was it notified before she left. This was picked up by the media and the opposition, and Collins came under concerted criticism for her actions. She denied any conflict of interest in her visit (Collins, 2014) and in the media described it as ‘popping in for tea’, focusing on the casual nature of the dinner as a defence against corruption allegations. It was apparent from the rebuttal that for such an event to be seen as corruption by the government there would need to be an obvious, knowledgeable financial advantage to be made: in effect, there would have to be a bribe. The concept of trading in influence and the syndromes of corruption that Johnston discusses are, however, broader than this and could be applied to the Oravida scandal.

Interestingly enough, that very same day in Parliament saw the passage of the

Families Commission Amendment Bill, within which another aspect of potential influence trading came under debate: the appointment of individuals to public boards. Both sides of the House were accused of political placements to the Families Commission, and of trying to use legislatively independent bodies to further ideological agendas. It seems almost inevitable that any government will run into accusations that they are making ‘political appointments’, and this is an accusation that has been levelled at both Labour (Farrar, 2013) and National (Macasky, 2013) governments. Like with

the media (Watkins, 2009). This has continued through to recent years when the honouring of business people, especially those who have made large donations to the governmental party, could be seen as problematic. It may be worth asking, however, how much citizens care about this when no legislative role is involved. Even with the reaction to UK prime minister David Cameron’s resignation honours earlier this year there was a sense from some that people getting titles wasn’t a big deal (Clark, 2016). It too can be viewed, however, through the lens of influence peddling. A potential

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lobbying, the appointment of people to boards and commissions in the public sphere is an area where the line between legitimate and corrupt is difficult to clarify. Naturally those who are appointed to positions involving advocacy or public work need to have experience and exposure in that area, and often the only way to get such experience and exposure is through the political sphere. Similarly to lobbying, however, there is an issue of capture: if such appointments are not viewed with scrutiny there is a risk that supposedly ‘independent’ organisations become overly bound to the government of the day’s policy direction, enhancing the feeling of exclusion on the part of the public which Johnston identifies as a key outcome of such syndromes of corruption.

While New Zealand does not give those who are rewarded by the honours system the same legislative role as does the system in the United Kingdom, as mentioned above, the system has been an area where accusations of cronyism have been levelled in the past. Almost immediately after the National government brought back knighthoods in 2009 the spectre of cronyism was raised in

hypothesis to explore might be in what influence honours give individuals, both in the public sphere and private.

Does New Zealand have a case to answer?

Whether or not trading in influence is seen as a problem in New Zealand will very much depend on one’s perspective on what constitutes legitimate political activity. This article does not seek to cast moral aspersions on any of them. What it set out to do was to scope out some of the examples of trading in influence that have been identified elsewhere (both in literature and in practice) and ascertain whether or not these could be found within New Zealand. It is unquestionable that they can: it is no exaggeration to suggest that most of our political institutions and processes rely to some degree or other on influence.

The research agenda now is to look at a number of questions:

- Just how prevalent is each of these forms of trading in influence within the political system?
- Just how detrimental is each of these forms of trading in influence to New Zealand’s political life?

- What are the implications of these activities in light of the new offence in the Crimes Act, section 105F?
- What might constitute the proper forms of such activities?
- What is the most appropriate way to regulate these activities?

We do not doubt that there are more questions that can be asked, but we feel that these are a healthy start. What is needed is serious research and balanced debate: there can be no moral witch-hunts if we are to make constructive progress. We must take these issues seriously. As recent surveys have indicated, trust in politicians and government is at an incredibly low level (Institute for Governance and Policy Studies, 2016). There has been mounting criticism of New Zealand's attitude towards its international commitments in this area, such as the open government partnership.

Answering these questions will involve a number of key methodological challenges, something quite common for projects which seek to implement a degree of empiricism in studying corruption. Corruption by its nature is hidden and not in the open; it cannot be simply quantified. This is likely to be particularly true of trading in influence, since the concept involves so many small-scale interactions between lawmakers and influencers. White (2013) links the

stereotypical nature of international and headline-grabbing corruption (bribes, kickbacks and the like) to a common image of corruption as almost a pantomime of tan briefcases changing hands. For this research, a more subtle and nuanced approach must be taken.

Commonly, perceptions of corruption have been used as a proxy for corruption itself, such as in Transparency International's Corruption Perceptions Index. The problem here is that it is certainly possible for corruption to happen when there is a high perception of transparency on the part of the government, such as the case in Iceland before the financial crisis (Erlingsson, Linde and Öhrvall, 2016). In addition, attempts to curtail lobbying corruption through campaign finance law in the US had little to no effect on perceptions of corruption, making such data of little use in understanding real levels of corruption (Persily and Lammie, 2004).

Different approaches must be taken, therefore, although perceptions do undoubtedly play a role in understanding trading in influence. One possibility is to look at understandings of what is 'normal', both within political circles and in the wider public arena. Looking more closely at instances where potentially corrupt situations have arisen and unpacking the process through which they happened

would also shed some light. In conjunction with such qualitative methods, there are also opportunities to utilise quantitative tools. These would be particularly useful in analysing flows of donations, political activities, and their relation to appointments, honours and (though with more difficulty) favourable policy changes.

We suggest, therefore, that there is a clear research agenda to be taken forward in New Zealand. Each of these forms of trading in influence needs to be thoroughly defined and categorised. More importantly, the impact that they have had needs to be identified and elucidated, not only in terms of hard metrics (for example, who has donated what, and with what outcome), but the more nuanced issue of people's daily lived experiences. Only then can we start to work on solutions to strengthen our collective integrity.

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- 1 'Small value' has not, of course, been defined.
- 2 Australia also kept a defence for such small bribes and was strongly admonished by the UNCAC evaluation team in 2012.
- 3 Johnston (2005) used the polity scores from 1992 and 2001, the Economic Freedom in the World Index from 1990 and 2001, the World Economic Forum's Environmental Sustainability Index from 2002, and the Heritage Foundation's Security of Property Rights Index.
- 4 1=influence markets; 2=elite cartels; 3=oligarchs and clans; 4=official moguls.
- 5 For all Conservative Party donor groups see https://www.conservatives.com/donate/Donor_Clubs.
- 6 <https://www.conservatives.com/~media/Files/Downloadable%20Files/Donors/LG%20Meals%20Q4%202014.ashx>.

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