Responses to reviewer

The piece isn't easy to read. The article is bit convoluted, so it is easy to get lost in it (it has many sections and sub-sections). Particularly, sections 4 and 5 have too many subsections.

I have removed all third and fourth level subheadings (i, ii, ii etc and A B C etc).
I have integrated previous sections 3 and 4 into a single section (3) discussing the legislative and policy capture at a high level of generality, before analysing the evidence in sections 4-6.
I have reduced the overall number of headings/subheadings in the discussion of the evidence, and in the discussion of the problems caused by the capture
combined a number of previous subsections (4 a-c) into one single section (4)
I have added text to explain the connections between sections and arguments more clearly.

Yet, the argument is very interesting and informative, Also, the article raises some interesting points regarding lawmaking.

Perhaps, the author could streamline the argument of the article and make its components more cohesive. It's better to add one or two additional sections (instead of working with all these subsections).

As explained above, I have removed most of the subsections and added a (much smaller) number of sections.
I have also added clarification in a number of places to reinforce the arguments made and their interrelationship.

I have highlighted the main changes in turquoise. The main changes made in response to the previous review remain highlighted in yellow.

Limited partnership law and private equity: an instance of legislative capture?

Elspeth Berry[*]

Abstract

The number of limited partnerships in the UK has grown rapidly since the 1980s, largely due to the use of the limited partnership vehicle by private equity. The political and economic influence of private equity has enabled it to exert considerable influence on the UK government amounting to legislative capture, and this in turn has driven reforms to limited partnership law, predominantly deregulation, for the sole benefit of private equity. This distortion of the partnership legislation disadvantages other users or potential users of the limited partnership vehicle, since the private equity-inspired reforms do not apply them, and other reforms which would be of benefit to them have been ignored. Furthermore, reduced regulation is in some respects harmful to private equity itself, and the overall result is harm to the wider economy.

Keywords

Limited partnerships
Private equity
Partnership law
PFLPs
Legislative capture
Regulatory capture

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1 Introduction

The limited partnership might appear to be a Cinderella on the business organisations stage, having been comprehensively outcompeted since its introduction in the Limited Partnerships Act 1907 (LPA) by the limited company, and combining key disadvantages of both companies and general partnerships. In fact, it has been used consistently by a range of businesses, although its most high profile user currently is private equity. This use, together with private equity's power and economic importance (and now its vulnerability post-Brexit), has led successive governments to attempt to reform limited partnership law for the benefit solely of private equity firms, most recently introducing substantial deregulation for the new "private fund limited partnership" (PFLP) variation on the limited partnership. The PFLP legislation exemplifies the influence of private equity, being rushed through Parliament despite a simultaneous government consultation on whether limited partnerships should be subjected to increased regulation to combat their use in criminal activities.

This article first considers (in sections 2-3) why limited partnerships are used so extensively by private equity. It next examines (in sections 4-6) the extent to which private equity has shaped partnership legislation for its own purposes, and argues that these reforms pose risks to third parties, including creditors, investors and managers themselves, and the wider economy. It then argues (in sections 7-9) that the focus on private equity-inspired reforms has deprived actual and potential limited partnerships in other sectors of much needed reforms which would have benefited a wide range of businesses, and that at very least the private equity reforms should be extended to all types of limited partnership. Finally, it concludes by noting that in addition to these solutions, the government must resist legislative capture by private equity in the future.

2 The limited partnership vehicle and its competitors

The importance of the limited partnership as a business vehicle might seem surprising. Over the course of the 20th century, and continuing into the 21st century, it is the private limited company which has become the business vehicle of choice in the UK,[1] although general partnerships formed under the Partnership Act 1890 continue to be an important part of the small business landscape, offering tax transparency combined with maximum flexibility, informality and privacy. Meanwhile, limited liability partnerships (LLPs) formed under the Limited Liability Partnerships Act 2000 have established themselves as the vehicle of choice for professional firms, offering limited liability for all members, together with tax transparency, considerable flexibility and informality, and a greater degree of privacy than limited companies.

The question that arises, then, is what place – if any – is left for limited partnerships. Long before its introduction, the UK was "almost alone, among the civilized countries of the world" in not having such a vehicle.[2] In a foreshadowing of the capture of limited partnership legislation which has taken place in the early part of the 21st century, a contemporary commentator noted of the introduction of the LPA "How it happened that the interests back of this measure were able to secure from the present government the support necessary to its enactment, I don't know".[3] However, by the time the UK finally introduced the limited partnership, its comparative advantage over a general partnership - limited liability for some partners - was of little importance when set against its comparative disadvantage in relation to a company which could offer limited liability to all members; in the same year as the LPA was enacted, the Companies Act 1907 enhanced the existing option of incorporation with limited liability, which had been

[1] There are 3.7 million registered private limited companies (only half estimated to be active), 421,000 general partnerships, 60,000 LLPs and 45,000 limited partnerships (Department for Business Innovation & Skills, 'Business Population Estimates for the UK and Regions 2016' and Companies House, Statistical release Companies Register Activities 2016/2017).

[2] Sir Frederick Pollock, *Essays in jurisprudence and ethics* (Macmillan 1882) 100 and Francis M Burdick, 'Limited Partnership in America and England' (1908) 6(7) Mich L Rev 525, 525.

[3] Burdick (n 2) 526.

available from 1855-1856,[4] by reducing disclosure requirements for a private limited company and making it subject to less onerous rules than a public company. Furthermore, the limited partnership combines many of the disadvantages of a general partnership - such as the need to have at least some partners with unlimited personal liability and the lack of continuity on a change of such a partner - with those of a company or LLP - such as the need to register. In fact, as will be discussed in this article, special pleading by the investment industry has resulted in many investment partnerships being given reduced disclosure requirements, and some even benefiting from limited liability for all partners, but these are recent developments and have not been extended to other types of partnership (which is just one of the many harms caused to those other limited partnerships by the government's focus on the demands of the investment industry).

It might therefore have been expected that the limited partnership would wither on the vine, and indeed there were scarcely more than 1500 on the register for most of the 20th century.[5] However, from the mid 1980s numbers increased rapidly, from 1500 in 1986, to 2000 in 1989, and currently 45,000.[6] What, then, explains the persistence of the limited partnership as a viable and popular vehicle? It may be used to carry on "any trade, occupation or profession",[7] and can thus be used by any type of business. It offers to all a unique combination of privacy (principally since accounts are not publicly available), flexibility[8] (since there is little regulation of the internal structure or agreement), tax transparency[9] (because the partnership itself is not taxed) and - unlike a general partnership - limited partners with limited liability (so long as they do not engage in management of the business[10]).[11] However, it is valued in particular by a number of niche sectors, including family businesses (due to its flexibility and tax transparency),[12] tax planning (in particular to generate trading losses which can be set against a taxpayer's other profits)[13] and, most significantly, by private equity.[14]

3 The dominance of the limited partnership vehicle by private equity

[4] Limited Liability Act 1855 and Joint Stock Companies Act 1856; see also Timothy W Guinanne, Ron Harris, Naomi R Lamoreaux and Jean-Laurent Rosenthal, 'Ownership and Control in the Entrepreneurial Firm: An International History of Private Limited Companies' (Dec 2007) Yale University Economic Growth Center Discussion Paper No. 959 pp703-705.

[5] 'Companies: Eighteenth General Annual Report by the Board of Trade' (London, 1909) and subsequent Annual Reports, variously pp6 or 7; 'Companies: General Report by the Board of Trade for the Years 1939-1945' (London, 1947); 'DTI: Companies in 1986-1987' (1987) Table 17, and subsequent reports, Table G2 (1987-1988 to 1989-1990) or Table E2 (1990-1991 onwards); 'Companies House: Companies Register Activities 2006-2007' et seq, Table E2 (2006-2007 to 2014-2015) or Table 1 (2015-2016 onwards). The relevant reports for 1946-1985 do not include statistics for limited partnerships.

[6] Companies House, Statistical release Companies Register Activities 2016/2017 (n 1).

[7] Partnership Act, s 45.

[8] Joseph A McCahery and Erik PM Vermeulen, 'Limited partnership reform in the United Kingdom: a competitive, venture capital oriented business form' (2004) 5(1) EBOR 61 at 71 and Julien Ruderman, 'Private equity fund structuring' (2007) 3 IBLJ 422, 425.

[9] Ruderman (n 8) at 424 and Jennnifer Payne, 'Private Equity and its Regulation in Europe' (2011) 12 EBOR 559 at 570.

[10] LPA, s 6(1).

[11] BVCA and Travers Smith Braithwaite, 'Limited Partnership Agreement: Explanatory Notes' (October 2002) 1 <http://www.bvca.co.uk/Portals/0/library/Files/StandardIndustryDocuments/LPAgreement.pdf> accessed 25 September 2017 and Michael Bell and Clara Howard, 'Investment Partnerships' (2008) Tax J 23, 23.

[12] Arabella Saker and Corinne Staves, 'Capital gains tax and partnerships' (2010) 1 PCB 29, 31

[13] For example, *R (on the application of de Silva and another) v Commissioners for HMRC* [2016] EWCA Civ 40, [2016] STC and *Reed v Young* [1986] 1 WLR 649; see also JJ Henning, 'Limited partnerships reform: Part 1' (2011) Comp Law 178, 178.

[14] For example, *Rose v Lynx Express Ltd* [2003] EWHC 2937 Ch, [2004] BCC 714; see further the Law Commission and the Scottish Law Commission, *Limited Partnerships Act 1907: a Joint Consultation Paper*' (Law Com CP No 161 and Scot Law Com DP No 118, 2001) paras 1.3 to 1.6 and *Partnership Law* (Law Com No.283 and Scot Law Com No 192, 2003) paras 1.1 to 1.4, and D. Walker, 'Guidelines for Disclosure and Transparency in Private Equity' (November 2007) (the Walker Guidelines) 8–9 and 17, <http://privateequityreportinggroup.co.uk/wp-content/uploads/2015/11/wwg_report_final.pdf> accessed 25 September 2017. Part V of the Walker Guidelines was updated in 2014 and is available at <(http://privateequityreportinggroup.co.uk/wp-content/uploads/2015/11/gmg_guidelines-jul14_final.pdf> accessed 25 September 2017.

The dramatic increase in the number of limited partnerships from the mid 1980s began immediately after confirmation by HM Revenue and Customs (HMRC) in 1987 that a limited partnership used as a venture capital investment fund would be treated as a partnership for tax purposes and thus as tax transparent.[15] This confirmation was crucial to the use of limited partnerships by investment firms and, as will be discussed in the following sections of this article, the increase in such use has been accompanied by increasing pressure on, and policy and legislative capture of, the government by the private equity industry.

Had some of the results of this capture (discussed in sections 4-6 of this article) – for example increased availability and extent of limited liability, reduced disclosure, and the provision of a 'safe harbour' list of activities in which limited partners can engage without losing their limited liability - been extended to limited partnerships generally, it is likely that these numbers would have increased still further, with concomitant benefits to the wider economy and society. However, it is not just the failure to extend to all limited partnerships the benefits accorded to investment partnerships which leaves other limited partnerships (and potential limited partnerships) with an unnecessarily unsatisfactory business vehicle. It is also the damaging effects of the focus on private equity when reforming partnership law which, as discussed in sections 7-9 of this article, have meant that potentially valuable reforms have not been forthcoming, either because they are contrary to the interests of private equity, or because private equity is insufficiently interested in them and the government's focus is on what private equity wants.

The use of limited partnerships by private equity might seem surprising, not least because it could be argued that managing investments is not within either the spirit or the letter of the definition of a partnership in s1 of the Partnership Act as "carrying on business". Indeed, the courts have ruled that investment management falls outwith s1 where the investors have invested "once for all".[16] However, they have also suggested that "a repetition of investments" would be sufficient to satisfy the definition,[17] while the Law Commission and the Scottish Law Commission have emphasised that the definition of "business" is not exhaustive, merely "includ[ing]" any trade, occupation or profession, and argued that it clearly covers "investment activities as a commercial venture".[18] Indeed, when they consulted on whether to rename the limited partnership vehicle in order to avoid confusion with the LLP, the fact that two of their three suggestions were "investment partnership" and "limited investment partnership" demonstrates the extent to which the limited partnership is considered to be synonymous with investment business.

Nonetheless, UK limited partnerships are now the most commonly used structure for European (including UK) private equity, hedge funds and venture capital funds,[19] as well as various other types of private fund.[20] Although the term "venture capital" is used by

[15] BVCA statement approved by the Inland Revenue and the DTI on the use of limited partnerships as venture capital investment funds' (26 May 1987) <https://www.bvca.co.uk/Portals/0/library/Files/StandardIndustryDocuments/UseofLPsasPEVCfunds.pdf> accessed 25 September 2017, supplemented by the Memorandum of Understanding between the BVCA and Inland Revenue on the income tax treatment of Venture Capital and Private Equity Limited Partnerships and Carried Interest (25 July 2003) available at <https://www.bvca.co.uk/Portals/0/library/Files/StandardIndustryDocuments/PDF_2.pdf?ver=2013-06-14-112836-650> accessed 25 September 2017.
[16] *Smith v Anderson* (1880) 15 Ch D 247, 279.
[17] *Smith v Anderson* (n 16) 279.
[18] Law Commission and Scottish Law Commission, *Partnership Law: a Joint Consultation Paper* (Consultation Paper No 159 and Discussion Paper No 111, July 2000) para 5.10.
[19] Both private equity and hedge funds commonly used the limited partnership form, and although the investment strategies and the terms of the partnership tend to differ, the distinctions are often blurred (Payne (n 9) 564 and 566.
[20] Law Commissions, *Partnership Law* (n 14) para 19.2, Payne (n 9) 564 and the Financial Services Authority, 'Private equity: a discussion of risk and regulatory engagement' (Discussion Paper 06/6, November 2006) para 2.18.

the investment industry primarily to denote start-up funds for new ventures, particularly in the US, whereas "private equity" usually refers to the buying of existing companies and subsequent sale at a profit, the UK government has used the terms synonymously, along with other terms including "collective investment fund" and "private fund".[21] This use of limited partnerships has continued despite the advent of LLPs, which offer the additional advantages of separate legal personality and limited liability for all members, but also the disadvantages of greater regulation (resulting from the application of much of the companies legislation), including the publication of accounts and other information, and the Secretary of State's powers to investigate.[22]

Indeed, although "predict[ions of] the eclipse of the public corporation by private equity…have not been borne out in practice",[23] private equity funds being unsuitable for some types of investor since they are illiquid and normally require a substantial minimum investment, and for some types of investment since they are predicated on the investment having the potential for significant added value by management intervention, which is not always the case,[24] private equity fund raising has at times outstripped public market capital raising in the UK.[25] Institutional investors take a longer term view of returns and so the fact that shares in limited partnerships are not publicly tradable is less important,[26] and private equity can be particularly beneficial for start-up businesses, as banks tend to be less keen to lend, and the public less keen to invest.[27] Further, investment in private equity may be preferable to direct investment in a publicly traded company because funds are actively managed,[28] and can yield superior returns,[29] and partnerships do not have to pay commission to brokers to sell fund shares to the public.[30] In addition, limited partner investors are permitted to vote on important issues such as changes to the agreement, whereas investors in public companies are frequently in a poor position to discipline management.[31]

The majority of the literature on limited partnership structures and their use in the financial markets comes from the US,[32] although much of it is relevant to the UK given the similarities in the limited partnership form in the two countries.[33] There is relatively little literature on the influence of private equity on limited partnership reform, and in so far as this is recognised as an issue, the literature is largely supportive of this influence. However, there is another story to be told; that the empowerment of private equity is at the cost of harm (discussed in sections 7-9) to other types of business which use the limited partnership, and to the public interest because of its effects on the wider economy.

It is well established that regulators often end up being "captured" by the firms they are supposed to discipline,[34] and a similar phenomenon has been observed in relation to

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[21] Robert Peston, *Who Runs Britain* (Hodder & Stoughton 2008) p57.
[22] Joseph A McCahery and Erik PM, 'The Evolution of Closely Held Business Forms in Europe' (2001) J Corp L 855, 867.
[23] Payne (n 9) 570.
[24] Frank Curtiss, Ida Levine and James Browning, 'The Institutional Investor's Role in "Responsible Ownership"' in Iain MacNeil and Justin O'Brien (eds), *The Future of Financial Regulation* (Hart 2010) 310-311.
[25] Financial Services Authority (n 20).
[26] Michael Jensen 'Eclipse of the Public Corporation' (1989) 67 Harvard Bus Rev 61, 62.
[27] Leslie AJ Jeng and Philippe CW Wells, 'The determinants of venture capital funding: evidence across countries' (2000) 6 J Corp Finance 241, 245-247.
[28] Jensen (n 26) 62.
[29] Payne (n 9) 563.
[30] See further Carol J Loomis, 'The Jones Nobody Keeps Up With' Fortune (April 1966) (republished in Fortune Dec 29 2015).
[31] Henry Hansmann, *The Ownership of Enterprise* (Harvard University Press 2000) 57.
[32] Jeng and Wells (n 27) 259 and 277. See further Loomis (n 30) on the development of private equity and hedge funds using the US limited partnership as a vehicle.
[33] Elspeth Berry, 'Limited partnership law in the US and the UK: teaching an old dog new tricks?' (2013) 2 JBL 160.
[34] For example, George J Stigler, 'The theory of economic regulation' (1971) 2(1) Bell J Econ 3, Jean-Jacques Laffont and Jean Tirole, 'The Politics of Government Decision-Making: A Theory of Regulatory Capture' (1991)

legislators.[35] This is particularly likely to occur where there is a concentration of economic and political power in the hands of an organised interest group[36] or a wealthy elite[37] which is thereby enabled to participate disproportionately in the legislative process,[38] and where countervailing influences are absent or weak[39] - both of which factors are present in the case of private equity and its influence on limited partnership law. Private equity includes both a wealthy elite of investors, and a well-financed interest group in the form of investment fund managers and their professional advisors, who can more easily monitor, promote or challenge decisions that will affect them. It is easier for government to work with them than against them, particularly where, as in the case of limited partnership reform, there is no organized countervailing influence and government activities are unlikely to be the subject of sustained (or indeed any) public attention.[40] Indeed, in some circumstances the mindset of the policymakers can be captured (so-called "cognitive capture").[41] Further, both elected representatives and officials are often from economic or political elites, and not only bring their own beliefs and assumptions to bear on their decisions but may have personal or professional relationships with members of the interest groups,[42] including the scenario of the "revolving door" where former policymakers subsequently obtain employment or consultancy with a member of an interest group.[43] Thus the extensive use of limited partnerships by the private equity industry, combined with its political influence[44] and much-vaunted contribution to the UK economy (estimated by the industry itself as 1% of GDP and tax revenue, 50,000 employees, and billions of funds raised annually[45]), has led to its capture of the policymakers and legislators.[46] As will be discussed in detail in sections 4-6 of this article, this has driven the reform of limited partnership law for the benefit of private equity[47] in the form, in particular, of the provisions of minimal liability to outsiders, maximum secrecy and favourable tax treatment. Yet the policies promoted by elites or interest groups are not those which the wider community (including the wider business community) would or do seek,[48] and it cannot be assumed that they always possess superior wisdom,[49] or provide unbiased information;[50] such "[o]rganized

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106(4) QJ Econ 1089, 1089-1091 and William J Novak, 'A Revisionist History of Regulatory Capture' in Daniel Carpenter and David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit it* (Cambridge University Press 2014).

[35] For example, Bruce M Owen, 'Communication Policy Reform, Interest Groups and Legislative Capture' (2012) Stanford Institute for Economic Policy Research (SIEPR) Discussion Paper No 11-006, 2 <http://siepr.stanford.edu/sites/default/files/publications/11-006.pdf> accessed 25 September 2017, Daniel Carpenter, 'Detecting and Measuring Capture' in Carpenter and Moss (n 34) and Kate Andrias, 'Separations of Wealth: Inequality and the Erosion of Checks and Balances (2015) 18 U Pa J Const L 419.

[36] Martin Gilens and Benjamin I Page, 'Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens' (2014) 12(3) Perspectives on Politics 564, 574.

[37] Andrias (n 35) 424, Jacob S Hacker and Paul Pierson, 'Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States' (2010) 38(2) Politics & Society 152, 175-177.

[38] Andrias (n 35) 425, Hacker and Pierson (n 37) 175-177.

[39] Andrias (n 35) 424-425 and 441, Hacker and Pierson (n 37) 179-180 and Rachel E Barkow, 'Insulating Agencies: Avoiding Capture Through Institutional Design' (2010) 89 Tex L Rev 15, 21-22.

[40] Andrias (n 35) 450 and 464, Hacker and Pierson (n 37) 172 and 173-174, Barkow (n 39) 22 and Laffont and Tirole (n 34) 1358-1359.

[41] Joseph E Stiglitz, *The Price of Inequality* (Penguin 2013) pp59-60.

[42] Andrias (n 35) 447 and Laffont and Tirole (n 34) 1091.

[43] Barkow (n 39) 23 and Laffont and Tirole (n 34) 1091.

[44] For example, two members of the House of Lords Delegated Powers and Regulatory Reform Committee declared interests in limited partnerships, including at least one investment partnership (House of Lords Delegated Powers and Regulatory Reform Committee, '17th Report of Session 2016-17', Appendix 2).

[45] The Walker Guidelines (n 14) 7 and HM Treasury, 'Proposal on using Legislative Reform Order to change partnership legislation for private equity investments: Consultation on draft legislation' (July 2015) para 1.4.

[46] See Payne (n 9) 572 and Razeen Sappideen, 'The regulation of hedge funds' (2016) 7 JBL 537 on the insufficiency of regulation.

[47] Peston (n 21) pp56-64 and Chs 2 and 3 and Josh Kosman, *The Buyout of America — How Private Equity Will Cause the Next Great Credit Crisis*, (Penguin 2009) 160-164.

[48] Gilens and Page (n 36) 575 and John Rawls, *Political Liberalism* (Columbia University Press 1996) pp360-361.

[49] Gilens and Page (n 36) 576.

[50] Lee Drutman, *The Business of America is Lobbying* (OUP 2015) pp40-42.

wealth has corrosive effects upon constitutional structure's functional goals – namely to diffuse political power…in order to promote …democratic accountability".[51]

In fact, the economic importance of the financial sector can be overestimated; its benefits to the domestic economy are reduced because of its overseas investors and investment in overseas companies, and the industry contributes far more to London and the south east of England than the rest of the UK.[52] Nonetheless, its importance to the economy undoubtedly "imposes political constraints on the extent to which tighter regulation leading to contracting and job losses can be countenanced".[53] Advocates of its influence note the importance of business organisation law per se to private equity and applaud the UK's "responsive legislature" developing "its business organization law regime in response to demands in the marketplace".[54] They also cite similar influence exerted by professional services firms to obtain a UK LLP vehicle by threatening to make use of offshore LLP status,[55] and this influence presumably also lies behind the curious omission of UK LLPs from the Partnerships (Accounts) Regulations 2008[56] (and the underlying Directives), which require partnerships to disclose their accounts if all their general partners have de facto limited liability because they are limited companies – but not if they are LLPs - or are unlimited companies/Scottish partnerships all of whose members/general partners are limited companies – but again not if they are LLPs. This influence is likely to be exerted even more strongly – as evidenced by the government's revival in 2017 of its 2015 proposals for the PFLP - in the light of the sector's potential vulnerability post-Brexit[57] owing to its international nature, so that the UK limited partnership faces competition not only from domestic alternatives such as the UK company but from vehicles offered by other jurisdictions such as Luxembourg[58] and Delaware.[59]

As the following analysis of private equity's capture of partnership policy and legislation will demonstrate, the government has no coherent rationale for its reforms to partnership law, other than pressure from the private equity industry.

5 The capture of policy and legislation by private equity 1987-2013

The earliest evidence of the capture by private equity of government policy[60] on limited partnerships is provided by HMRC's 1987 confirmation that, as discussed in section 3 of this article, a limited partnership used as a venture capital investment fund would be treated for tax purposes as tax transparent.[61] A further example of policy capture is provided by the Law Commissions' proposals in 2003 for a special limited partnership. This was prompted by their recommendation, as part of their proposals for the wholesale reform of general and limited partnership law, that partnerships be given separate legal personality.[62] This risked overseas tax authorities ceasing to recognize UK partnerships as tax transparent, which would be a particular problem for private equity given its

[51] Andrias (n 35) 426.
[52] House of Commons Library, 'Financial services: contribution to the UK economy' (Briefing Paper No 6193, 31 March 2017) 6.
[53] Iain MacNeil, 'The trajectory of regulatory reform in the UK in the wake of the financial crisis' (2010) 11(4) EBOR 485, 484.
[54] McCahery and Vermeulen 2004 (n 8) 76, citing Brian R Cheffins, *Corporate Ownership and Control: British Business Transformed* (OUP 2008).
[55] McCahery and Vermeulen 2001 (n 22) 859 and 866-867.
[56] SI 2008/569.
[57] See, for example, the House of Lords European Union Committee, 'Brexit: Financial Services' (9th Report of Session 2016-2017, 15 December 2016) and 'Brexit: the future of financial regulation and supervision' (11th Report of Session 2017-2018, 27 January 2018) and the House of Commons Library 'Brexit & financial services' (Briefing Paper 07628, 9 March 2017).
[58] Ruderman (n9) 428-435 and HM Treasury, 'Legislative Reform Order on the Limited Partnership [sic] Act: explanatory document' (January 2017) paras 1.9 and 2.15.
[59] See further Ruderman (n 10) 426-427.
[60] Susan Webb Yackee, 'Reconsidering Agency Capture During Regulatory Policymaking' in Carpenter and Moss (n 34).
[61] BVCA statement approved by the Inland Revenue and the DTI (n 15).
[62] Law Commissions, *Partnership Law* (n 14) Chapter V.

overseas dimensions. The Law Commissions therefore proposed an additional type of limited partnership, the special limited partnership, which would continue to lack personality in order to ensure continuing tax transparency in other jurisdictions.[63] It is notable that its use was not in terms restricted to any particular type of business, and so it could have benefited partnerships carrying on any type of business. However, again foreshadowing the capture of limited partnership legislation in subsequent years, the Law Commissions made it clear that it was targeted at private equity[64] and commentators argued that, had the proposals for separate personality been adopted (which they have not been), the special limited partnership vehicle would have been "forced" upon UK lawmakers by "the importance of tax considerations in choosing a business form [and] the possible uncertainty about tax authorities' reaction to the introduction of bestowing partnerships with legal entity status".[65]

Moving on from policy, private equity's capture of partnership legislation was clearly demonstrated in 2008-2009 when, despite the government being unpersuaded by the Law Commissions' case for the reform of partnership law generally, the Department for Business Enterprise & Regulatory Reform (BERR) nonetheless proposed a series of Legislative Reform Orders in 2008[66] and 2009[67] based largely (though not entirely) on the Law Commissions' proposals but applicable to limited partnerships only. In doing so, it was responding to pressure in the form of the "strong economic case" put forward by private equity,[68] whose chief interest was in limited rather than general partnerships. Although only three relatively minor reforms were enacted at the time, many of the other proposals reappeared in 2017 for the private fund partnerships only (discussed in section 6 of this article),[69] including the introduction of a "white" list of activities which do not constitute management, the removal of limited partners' duties and mandatory capital contributions, reduced disclosure, and winding up by the limited partners.

A more significant example of legislative capture occurred in 2013, when the government introduced a new form of limited partnership, the partnership scheme, in response to three key private equity interests: favourable tax treatment, minimum liability and maximum secrecy. A partnership scheme allows investors to achieve economies of scale resulting from the pooling of assets while retaining the tax transparent treatment applicable to direct investment, and accommodates a range of institutional investors.[70] It is defined by the Collective Investment in Transferable Securities (Contractual Scheme) Regulations[71] (the Regulations) as a collective investment scheme[72] that is a limited partnership but not a PFLP, but the Regulations give it a number of advantages over other limited partnerships by modifying the application of the LPA. While some modifications are inherent in the structure of a

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63 Law Commissions, *Partnership Law* (n 14) paras 19.9-19.11, McCahery and Vermeulen 2004 (n 8) 79, and John Buckeridge, 'Together clear' Tax Adviser (1 October 2015).
64 Law Commissions, *Partnership Law* (n 14) paras 19.2, 19.6 and 19.12.
65 McCahery and Vermeulen 2004 (n 8) 79.
66 BERR, 'Reform of limited partnership law. Legislative Reform Order to repeal and replace the Limited Partnerships Act 1907: a consultation document' (August 2008), pp12-13, <http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/files/file47577.pdf> accessed 25 September 2017.
67 BERR, 'The Legislative Reform (Limited Partnerships) Order 2009: Explanatory Document' (June 2009) <http://webarchive.nationalarchives.gov.uk/20090609043220/http://www.berr.gov.uk/files/file51586.pdf> accessed 25 September 2017.
68 BERR 2008 (n 66) para 50.
69 BERR 2008 (n 66) paras 40, 42-43. Responses to the consultation ('Responses to the 2008 draft reforms') are archived at <http://webarchive.nationalarchives.gov.uk/20090413112312/http://www.berr.gov.uk/files/file50724.pdf> accessed 25 September 2017.
70 HM Treasury, 'Contractual schemes for collective investment: summary of consultation responses and Government response' (March 2013) paras 3.7 and 3.12, and KPMG, 'UK Authorised Contractual Schemes are making an impact' (2014) < http://kpmg.co.uk/email/05May14/OM019684A/OM019684A_v1.5.html> accessed 25 September 2017.
71 SI 2013/1388.
72 Defined in FSMA, s 235.

partnership scheme (it can only have one general partner and, on formation, only one limited partner nominated by the general partner, and must have a partnership deed containing certain specified terms),[73] others are not and instead reflect private equity's interests. First, and most significantly, general partners have no personal liability to third parties for the debts of the partnership if the partnership is wound up under the Insolvency Act 1986,[74] unlike general partners in an ordinary limited partnership.[75] Second, limited partners have no liability "for the debts or obligations of the firm beyond the amount of the partnership property which is available to the general partner to meet such debts or obligations". They are thus, unlike limited partners in an ordinary limited partnership, not liable for any capital which they withdraw.[76] Third, the Regulations expressly provide that the exercise of rights conferred on limited partners by contractual scheme rules drawn up by the Financial Conduct Authority will not constitute management,[77] and thus will not render them personally liable for the partnership's debts. This is the first (though, as discussed in section 5 b) of this article, not the last) instance of statutory protection of limited partner activity. Fourth, the identities of the limited partners (other than the nominated limited partner) and their capital contributions are not publicly disclosed,[78] unlike in an ordinary limited partnership.

This demonstrates legislative capture going even further than the industry itself requires, at least at present, since no such schemes have actually ever been set up.[79] However, limited partnerships could have benefitted from the application of these reforms more widely. In particular, general partners would benefit from limited liability, but limited partners would also benefit from increased privacy, particularly where the business is one which might receive negative attention for engaging in legal but controversial activities such as conducting experiments on animals or testing genetically modified crops.

5 The introduction of the PFLP in 2017

The most recent evidence of private equity's power and importance in relation to partnership legislation is provided by the Limited Partnerships (Private Fund Limited Partnerships) Order 2017 (PFLP LRO),[80] which enacted most of BERR's 2008-2009 proposals but only for a new type of limited partnership, the PFLP. The government's 2015 consultation on the PFLP stated that it was "intended to ensure that the UK limited partnership remains the market standard structure for European private equity and venture capital funds as well as many other types of private fund in an increasingly competitive global market".[81] It is defined as a limited partnership, other than a partnership scheme,[82] which is designated as a PFLP under s8(2) of the LPA. A limited partnership is defined as a relation between two or more persons carrying on business in common with a view of profit,[83] at least one of whom is a general partner and one a limited partner,[84] and it must be registered.[85] Section 8(2) provides that the registrar must designate it as a PFLP if the application is made in accordance with s8D, which requires a PFLP to be constituted by an agreement in writing and be a collective

[73] FSMA, s 235A(6) as inserted by the Contractual Scheme Regulations, Reg 3.
[74] Regs 16(3)(a) and 18.
[75] Partnership Act 1890, s 9.
[76] Reg 16(3)(b) and (c).
[77] Reg 16(4)(a).
[78] Reg 16(6)(a)-(b).
[79] HMRC, 'Authorised contractual schemes: reducing tax complexity for investors: Summary of Responses' (December 2016) para 2.1.
[80] SI 2017/514.
[81] HM Treasury 2015 (n 45) para 1.6 and Stephanie Biggs, 'Private Equity: a practical guide' (2008) 8(4) LIM 247, 249.
[82] FSMA, s 235A(6)(aa).
[83] Partnership Act, s 1.
[84] LPA, s 4(2).
[85] LPA, s 5.

investment scheme.[86] The latter requirement means that the regulatory regime established by the Financial Services and Markets Act 2000 (FSMA) applies, including having a manager who is an authorised person under the FSMA, and some elements in the private equity industry have criticised the requirement, both because the need to satisfy it at the time of registration could impose constraints on the initial structure of some funds which would otherwise only be structured as such a scheme at a later stage of the investment process,[87] and because not all funds constitute such schemes at any stage: single investment vehicles, master funds (in which some investors participate, one of whom is another "feeder" vehicle in which the remaining investors participate[88]) and joint ventures are commonly used, yet these could fall outside the definition and thus outwith the PFLP rules.[89]

However, the PFLP LRO largely accords with what private equity wanted. It reduced the regulation of PFLPs as compared to ordinary limited partnerships and indeed was rushed through Parliament despite the inconsistency[90] of deregulating PFLPs while the Department for Business, Enterprise and Industrial Strategy (BEIS) was simultaneously consulting on whether limited partnerships should be subjected to increased regulation to combat their use in criminal activities,[91] and despite the House of Commons Select Committee which examined the PFLP LRO recommending (after hearing evidence from the author to this effect) that the government refrain from adopting the LRO until the responses to BEIS had been considered "to check for any significant or urgent concerns which would cast doubt on making the changes in [the LRO]".[92] The PFLP LRO not only adopted some of the same reforms of limited partnership law as partnership schemes, but went further in reducing regulation and reinforcing the economic power of private equity[93] by extending those reforms. For example, it removed not merely the obligation to register limited partners' capital contributions and their liability for withdrawn capital, but their obligation to contribute capital at all; and specified not merely one activity that would not constitute management and thus not result in the loss of limited liability, but an extensive list of such activities. Yet, as these reforms are only available to private equity, the PFLP does nothing to enhance the range of vehicles available to businesses generally.

The most significant of the reforms to the limited partnership legislation introduced by the PFLP LRO, and the problems which they cause, will now be discussed in more detail.

a) Removal of liability for limited partners in a PFLP

The nature of a private equity partnership is such that the financial contributions of its partners are likely to be much more substantial than in other types of partnership, and so the exposure of those partners to liability is also likely to be higher. They therefore stand to benefit significantly from the exemption of PFLP limited partners from the requirements to contribute capital[94] and register the amount at Companies House,[95] and from the exemption from liability imposed for any withdrawn capital.[96] The government's rationale is that this reflects reality, because the obligation is commonly avoided in practice by making only a nominal capital contribution and the rest of the investment by way of loan, particularly where investors contemplate withdrawing part of their

[86] As defined in s235 of the FSMA and ignoring any legislative exemptions of certain arrangements from the definition (LPA, s 8D(4)).
[87] Amelia Stawpert and Erik Jamieson, 'Joining up the pieces' (2015) 165(7662) NLJ 20, 21.
[88] Matthew Hudson, *Funds: private equity, hedge and all core structures* (2014 Wiley) 17-18.
[89] Stawpert and Jamieson (n 87) 20-21.
[90] Financial Reporting Council, 'Written Evidence from the Financial Reporting Council (LRO 04): Legislative Reform Order (LRO) to change partnership legislation for private equity investments' (February 2017).
[91] BEIS, 'Review of Limited Partnership Law: call for evidence' (16 January 2017).
[92] House of Commons Regulatory Reform Committee, 'Draft Legislative Reform (Private Fund Limited Partnerships) Order 2017: Second Report of Session 2016-17' (HC 1042, 6 March 2017) para 36.
[93] Wyn Grant, 'Pressure Groups and British Politics' (Macmillan 2000) 36 and 64-66.
[94] LPA, s 4(2A) and (2B).
[95] LPA, s 8A.
[96] LPA, s 4(3).

contribution before the end of the life of the fund.[97] However, there is no evidence that capital requirements deter investors from becoming limited partners,[98] and their removal could cause a number of problems.

First, it disadvantages third party creditors of private equity funds, since one purpose of a compulsory capital contribution is to confirm limited partners' liability to them.[99] Without this the firm will have fewer resources from which to meet its liabilities, which exposes it to the risk of insolvency, and hence transfers risk to its creditors and employees.[100] Any loan which a PFLP limited partner makes instead will provide much less certainty.[101]

Second, another intention behind the mandatory capital contribution is for limited partners to provide working capital, rather than merely a guarantee to contribute in the future,[102] and the removal of the requirement clearly defeats this purpose.[103]

Third, capital contributions are also intended to determine limited partners' voting rights and shares in income and capital gains; whereas partner loans provide less certainty in this respect because of their variability.[104]

Fourth, where a limited partner chooses to make a capital contribution, the removal of his liability for subsequent withdrawals is over generous when compared to private company shareholders. If a shareholder withdraws share capital through the purchase of those shares by the company itself, and is thus released from future liability, that withdrawal is subject to legal safeguards for other members and creditors including a statutory declaration of solvency and an annual limit on the total capital withdrawn.[105] Equivalent safeguards should therefore be applied to capital withdrawn by PFLP limited partners.[106]

Fifth, reducing a limited partner's liability may increase the moral hazard of him engaging in risky investment (or other) decisions for which he can avoid the costs, because he can withdraw capital without incurring liability to creditors[107] (albeit that fund agreements usually only permit withdrawal of contributions prior to the end of the life of the fund in limited circumstances), or contribute his whole investment by way of a loan which is then repayable ahead of other partners' capital contributions in a solvent winding up.[108]

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[97] In both *Dickson v MacGregor* [1992] SLCR 1 and *MacFarlane v Falfield Investments Ltd* [1998] SC 14 the limited partners had contributed £10 each. See HM Treasury 2015 (n 45) paras 3.13-3.14 and Alan Kelly, 'MacRoberts Insights: Bringing private fund limited partnerships into the 21st Century' 28 July 2015 <https://www.macroberts.com/bringing-private-fund-limited-partnerships-into-the-21st-century/> accessed 25 September 2017.
[98] See further Richard DeFusco, Paul Shoemaker and Nancy Stara, 'Controlling the Moral Hazard Created by Limited Liability' (1996) 12(3) JABR 9, 16.
[99] Law Society of Scotland, 'Consultation Response – Proposal on using Legislative Reform Order to change partnership legislation for private equity investments: Consultation on draft legislation' (October 2015) 3-4 and Scott Kerr, Harper MacLeod Insights,' Changing limited partnership legislation for private equity investments: consultation response' (26 October 2015) <https://www.harpermacleod.co.uk/hm-insights/2015/october/changing-limited-partnership-legislation-for-private-equity-investments-consultation-response/> accessed 25 September 2017.
[100] DeFusco et al (n 98) 16.
[101] Law Society of Scotland (n 99) 3-4.
[102] *Rayner and Co v Rhodes* (1926) 24 Ll L Rep 25.
[103] Financial Reporting Council (n 90).
[104] Law Society of Scotland (n 99) 3-4.
[105] CA 2006, ss692 et seq.
[106] Berry 2013 (n 33) 442-443. The Law Society of Scotland argued that capital should only be capable of being withdrawn if the PFLP is solvent (n 98) 3.
[107] DeFusco et al (n 98) 12-14, Deniz Igan, Prachi Mishra and Thierry Tressel, 'A fistful of Dollars: Lobbying and the Financial Crisis' (IMF WP/09/287, 2009) 5-6 and 9-10 and Marie-Laure Djelic and Joel Bothello, 'Limited Liability and its moral hazard implications: the systemic inscription of instability in contemporary capitalism' (2013) 42 Theor Soc 589, 606-609.
[108] Partnership Act 1890, s 44.

Sixth, to the extent that removing the obligation to contribute capital benefits limited partners, it is unfair that only partners in private equity firms benefit, and not those in other sectors.

Finally, the new provisions also lack clarity. Section 4(2B) of the LPA states that limited partners have no liability for the debts or obligations of the firm "beyond the amount of the partnership property which is available to the general partner to meet such debts or obligations".[109] This somewhat unclear phrase is borrowed from the provisions on partnership schemes,[110] whose limited partners are obliged to make a capital contribution and so their liability is clearly limited to their actual capital contribution. In contrast, PFLP limited partners are not obliged to make a capital contribution at all,[111] and it is therefore unclear what their liability is. HM Treasury has explained that the phrase includes any undrawn capital contribution, but this is not clear from the legislation and nor is whether it includes undrawn profit shares,[112] even though this could have a considerable impact on limited partners and creditors, particularly where a PFLP only allows the withdrawal of profits when the partnership term expires.

b) Increased role in management for limited partners in a PFLP

PFLP limited partners who want to take an active role in managing their investments or other aspects of the firm are subject to the prohibition in s6 of the LPA on limited partners taking part in management of the partnership business, and to the accompanying sanction of personal liability for the firm's debts and obligations. This sanction could effectively transfer to a PFLP limited partner's personal assets the liability from which his investment is now protected by the removal of the mandatory capital contribution from PFLP limited partners. However, the PFLP reforms have reduced the risk of this occurring by providing that a PFLP limited partner is not to be regarded as taking part in management to the extent that he engages in anything listed as a permitted activity in s6A of the LPA. He will therefore be able to engage in these activities without losing his limited liability. Many of the activities listed reflects a similar list provided in the United States' Uniform Limited Partnership Act (ULPA) of 1976 as amended in 1985, and it remains to be seen whether this is the start of a move towards the current US position; ULPA 2001 now removes any sanction for limited partners taking part in management.

It is true that the management prohibition has been criticised,[113] and it has been argued investors want more active involvement in the monitoring and control of their portfolios.[114] However, the LPA already enables limited partners to monitor management,[115] and the reforms give rise to a number of problems.

First, such a list "might blur the different roles of the limited partner and the general partner", as well as thereby reducing the justification for limited liability; the Law Commissions rejected "an extensive list" on this ground, even though they favoured a list in principle for all limited partnerships.[116]

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[109] Limited Partnerships Act 1907, s 4(2B)(b).
[110] Contractual Scheme Regulations, Reg 16(3)(b).
[111] Limited Partnerships Act 1907, s 4(2B)(a).
[112] *Reed v Young* [1986] STC 285, Mark Blackett-Ord and Sarah Haren, *Partnership Law* (5th edn, Bloomsbury 2015) para 24.5 and Roderick I'Anson Banks (ed), *Lindley & Banks on Partnership* (19th edn, Sweet & Maxwell 2010) paras 31-10 and 31-11.
[113] Gillespie Macandrew, 'Responses to the 2008 draft reforms' (n 69).
[114] James Burdett, Priya Kumar and Zöe Pople, 'The limited partnership: a fresh look at a trusted model' (2013) 27(4) PLC, internet, 10.
[115] LPA, s 6(5) and Hansmann (n 31) 36.
[116] Law Commissions, *Partnership Law* (n 14) para 17.15.

Second, like the removal of liability for capital contributions, the reduction in the scope of the management prohibition, and thus of the scope for personal liability to be imposed, potentially gives rise to moral hazard.[117]

Third, although the courts have raised concerns about the difficult distinctions to be drawn as to what constitutes management,[118] the list goes beyond merely clarifying the boundaries of the management prohibition in order to provide legal certainty. Instead, it modifies the prohibition by excluding core management activities which should properly be caught by the prohibition.[119] These include taking part in a decision about the incurring of partnership debt[120] or whether to dispose of the partnership business or to acquire another business,[121] and "advising with a general partner about the affairs of the partnership"[122] even though in *Inversiones Frieira SL and another v Colyzeo Investors II LP and another*[123] the court held that scrutinising and commenting on business decisions would constitute management. As the court noted in *Certain Limited Partners in Henderson PFI Secondary Fund II LP (a firm) v Henderson PFI Secondary Fund II LP (a firm) and others*, s6 LPA "shows just how limited the limited partner's involvement can be without so participating [in management]".[124]

Finally, to the extent that the courts have raised concerns about grey areas in what constitutes participation in management, guidance in the form of a 'safe harbour' list would be welcome in the interests of providing legal certainty to all limited partners, not just those in a PFLP. Indeed, the House of Commons Select Committee which examined the PFLP LRO concluded that the government should consider introducing such a list for all limited partnerships.[125]

c) Reduced duties for limited partners in a PFLP

Private equity successfully argued that since limited partners often invest in more than one fund, and these funds may finance competing businesses, PFLP limited partners should be exempted from the two statutory duties which apply to other limited partners[126] - to disclose to the other partners true accounts and full information concerning the business,[127] and to account for profits made by a competing business.[128] However, it is not obvious why limited partners should not be subject to these duties;[129] it is well established that partners are in a fiduciary relationship,[130] and that fiduciaries

[117] Djelic and Bothello (n 107) 606-609.
[118] *Inversiones Frieira SL and another v Colyzeo Investors II LP and another* [2011] EWHC 1762 (Ch), [2012] Bus LR 1136 and *Certain Limited Partners in Henderson PFI Secondary Fund II LP (a firm) v Henderson PFI Secondary Fund II LP (a firm) and others* [2012] EWHC 3259 (Comm), [2013] QB 934.
[119] Stawpert and Jamieson (n 87) 21, the Law Society of Scotland (n 99) 2-3, Berry 2013 (n 33) 177, and the Association of Chartered Certified Accountants (ACCA) and the Chancery Bar Association and Gillespie Macandrew in their respective 'Responses to the 2008 draft reforms' (n 69).
[120] LPA, s 6A(2)(n)(v) and (vi). The author previously considered that the importance of advising on or overseeing investment decisions made their inclusion desirable (Elspeth Deards [Berry], 'Limited Partnerships: limited reforms?' (2003) JBL 435, 442), but on reflection it is considered that these constitute management activities, particularly where the business of the firm is investment (Berry 2013 (n 33) 177.
[121] LPA, s 6A(2)(n)(i). See Law Society of Scotland (n 99) 2-3.
[122] LPA, Art 6A(2)(i); see Law Society of Scotland (n 99) 3.
[123] *Inversiones* (n 118).
[124] *Henderson* (n 118) [62].
[125] House of Commons Regulatory Reform Committee, 'Draft Legislative Reform (Private Fund Limited Partnerships) Order 2017: Second Report of Session 2016-17' (HC 1042, 6 March 2017) at para 39.
[126] LPA, s 6(5)(f).
[127] Partnership Act, s 28.
[128] Partnership Act, s 30.
[129] BVCA, 'BVCA response to HM Treasury's proposal on using a Legislative Reform Order to change partnership legislation for private equity investments' (5 October 2015) p12 <http://www.bvca.co.uk/Portals/0/library/Files/Government%20Submissions/151005%20BVCA%20response%20to%20HMT%20consultation%20on%20LP%20reform.pdf> accessed 25 September 2017.
[130] *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 WLR 605 (Ch) and the Law Commission, *Fiduciary Duties of Investment Intermediaries* (Law Com No 350, 2014) para 3.15.

owe a duty of loyalty[131] which includes avoiding a conflict of interest and not making unauthorised profits by virtue of their fiduciary status.[132] It is also well established that trustees are fiduciaries, and some or all partners in a firm are likely to hold partnership property as trustees for all partners beneficially.[133] Although the Explanatory Notes to the original PFLP consultation[134] asserted that limited partners should be able to passively invest in a number of competing funds, the new list of permitted activities enables them to become more active in such investments. Since they could thereby influence the activities of the firm, it may be inappropriate in some circumstances for them to have conflicting interests or fail to disclose information.[135] It is inconsistent for limited partners to simultaneously gain greater rights to become involved in managing the business yet be relieved of duties on grounds of their alleged lack of involvement. Private equity partnerships often have an advisory board composed of limited partners, who are involved in decisionmaking, for example consenting to or reviewing decisions made by the general partner, in respect of matters in which they have competing interests through their other investments,[136] and commentators have warned that the potential for conflicts of interest to adversely affect a firm's finances has been overlooked by regulators.[137]

It may also be that the reform is either an unnecessary complication of the LPA, or ineffective. The statutory duties only apply in the absence of contrary agreement, and therefore a partnership which wishes to exempt its partners may do so. Although it has been argued that parties may be reluctant to contract out of fiduciary duties even where they are merely default rules,[138] it is common for a limited partnership agreement to include a provision allowing limited partners to engage in the same or similar business activities without being liable to account for profits derived for them.[139] Alternatively, the reform may be ineffective, since equivalent duties may continue to apply as part of the common law duty of good faith which all partners owe each other.[140] In *BBGP Managing General Partner Ltd and others v Babcock & Brown Global Partners* the court noted that aside from any specific contractual obligations, "each of the partners owed to the other a duty of honesty and good faith in relation to the partnership business (including a duty not to use for personal advantage powers which are conferred as partner). The principle applies as much to limited partnerships as to other partnerships".[141]

Finally, insofar as the exemption of limited partners from some of the duties contained in the LPA is indeed effective, it is unfair to bestow on PFLP limited partners but not on those in other businesses the benefit of removing the need to negotiate limitations on their duties in their partnership agreement. Indeed, the same reform was proposed by the government in 2008 for all limited partnerships.[142]

d) Reduced disclosure by PFLPs

[131] *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 18 (Millett LJ) and the Law Commission, *Fiduciary Duties of Investment Intermediaries* (n 130) para 3.28.
[132] *Thompson's Trustee* (n 130) and the Law Commission, *Fiduciary Duties of Investment Intermediaries* (n 126) para 3.15.
[133] *Re Hallett's Estate* (1880) 13 Ch D 696 and the Law Commission, *Fiduciary Duties of Investment Intermediaries* Law (n 130) para 3.15.
[134] HM Treasury 2015 (n 45) para 3.26.
[135] Financial Services Authority (n 20) 73, Technical Committee of the International Organisation of Securities Commissions (IOSCO), 'Private Equity Conflicts of Interest: Final Report (FR11/10 Nov 2010) pp12 and 14 and David Gregory, 'Private Equity and financial stability' (2013) Bank of England Q1 Quarterly Bulletin 38, 41.
[136] Burdett et al (n 114) 15-16.
[137] MacNeil 2010 (n 51) 523.
[138] McCahery and Vermeulen 2004 (n 8) 82-83.
[139] Burdett et al (n 113) p10.
[140] *Const v Harris* (1824) T&R 496, 37 ER 1191.
[141] [2010] EWHC 2176 (Ch), [2011] Ch 296, para 11.
[142] Draft Legislative Reform (Limited Partnerships) Order 2009, Annex to BERR 2008 (n 66), s44H(2) and (3).

The private equity industry is noted for its secrecy[143] and has accordingly ensured that, unlike ordinary limited partnerships, PFLPs do not need to register the nature of the business, any term or the conditions on which the PFLP exists or, the amount of any capital contributed by the limited partners.[144] Designation as a PFLP may provide as much information about the nature of the business as would otherwise be registered, but any term or conditions on which it exists and any capital contributed by a limited partner is relevant to the assessment of its financial viability by potential creditors,[145] and this reform is therefore regrettable. The importance of disclosure by those who trade with limited liability, such as limited partners, has frequently been emphasised by the courts. In *Re Grayan Building Services Ltd (In Liquidation)*[146] the court stated that

> The concept of limited liability….carries with it the discipline that those who avail themselves of those privileges must….abide by the regulatory rules and disciplines in place to protect creditors and shareholders.

In *Sebry v Companies House*[147] the court noted that the requirement to supply information to Companies House was part of the basis on which limited liability was granted, and cited the Registrar's evidence to the Business, Enterprise, and Regulatory Reform Committee that

> In order to allow business access to easy and readily accessible information, and in order to allow people to assess the performance of companies and assess the track record of directors in companies, in return for that limited liability status that information is provided. That enables people to make informed decisions about who they want to do business with, who they want to work with as their clients, who they want to work with as suppliers and who indeed they believe to have good credit.

This list of interested parties is not exhaustive and also includes, for example, employees and landlords. The EU Court of Justice has similarly emphasised that the purpose of corporate disclosure is "to protect in particular the interests of third parties….since the only safeguards [firms] offer to third parties are their assets".[148] Although these statements concerned businesses whose members all had limited liability, and could apply with less force where some members have personal liability, a limited partnership may have only one such member and that member may (and in private equity firms will) be a limited company or LLP and hence in practice have limited liability.

The disclosure requirements of the LPA therefore remain important to third parties and, contrary to some assertions,[149] are not onerous[150] but a proportionate response to the availability of limited liability. Indeed, there is a case to be made that they are too minimal: the Walker Guidelines[151] suggest that private equity firms should publish an annual review on their general approach including details of their limited partners by type and location of investor; and BEIS is currently investigating the extent to which Scottish limited partnerships (which have the advantage over English and Welsh partnerships of separate legal personality[152]) are being used for criminal purposes

[143] The Walker Guidelines (n 14) 17-18.
[144] LPA, ss8A and 9 of the LPA.
[145] Response of the Association of Chartered Certified Accountants (ACCA) (Responses to the 2008 draft reforms (n 69)) to the same proposal in BERR 2008 (n 66) and Law Society of Scotland (n 99) 5.
[146] [1995] Ch 241, 257.
[147] [2015] EWHC 115 (QB), [2015] BCC 236 [51].
[148] *Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Manni* C-398/15, EU:C:2017:19, para 49.
[149] Christopher Morris 'The private fund limited partnership: the reform company lawyers have been waiting for?' (2017) 38(6) Co Law 192, 193.
[150] Burdick (n 2) 526.
[151] The Walker Guidelines (n 14) 26.
[152] Partnership Act, s 4(2).

because of their relative secrecy.[153] It has been alleged that the limited partnership vehicle is being used to hide such activities as money laundering, terrorist financing and selling deceptive financial products,[154] and Transparency International has published a damning report on their use and made a number of urgent recommendations for reform, including the verification of registered information and the increase of such information.[155] The government has already adopted one recommendation, the extension to Scotland (but not England and Wales) of the requirement already applicable to companies and LLPs to register details of persons with significant influence over the partnership or its partners,[156] but there are already substantial criticisms of this regime which have not been addressed.[157] Furthermore, the other key element of partnership secrecy is the non-disclosure of accounts. Even in the rare circumstances when disclosure is mandated by the Partnerships (Accounts) Regulations 2008 - because all general partners effectively have limited liability (discussed above) and so their employees, investors and creditors have the same interest in the information as those of publicly traded companies, which have to disclose their accounts at Companies House[158] - it is difficult to locate the accounts because they are required to be disclosed by the partners, not by the partnership directly, and there is no mechanism to indicate on the partnership's registered details that such accounts are available or where they are available.

As with the partnership scheme discussed at section 4 above, to the extent that secrecy is attractive to legitimate businesses, it is unfair that only partners in private equity firms benefit, and not those in other sectors.

e) Limited partners enabled to wind up the partnership

Limited partners in ordinary limited partnerships are not entitled to wind up the partnership even where there are no general partners, unless they obtain a court order.[159] The government's 2008-2009 proposals recognised that this was a problem for all limited partnerships,[160] but only private equity exerted sufficient influence to achieve a solution for its firms and so only PFLP limited partners can appoint a third party to conduct the winding up without a court order.[161]

6 Future tax reforms for investment partnerships

The final evidence of the influence of private equity, and in particular its interest in achieving favourable tax treatment, is provided by recent government proposals on partnership taxation, which indicate that it is not pursuing its original proposal to require partnerships to include in their return the ultimate recipients of partnership property where connected partnerships are utilised,[162] structures which are more likely to be used

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[153] BEIS (n 91).
[154] See, for example, Richard Smith, 'How Scotland's tax haven limited partnerships could be reformed', The Herald, 31 July 2016 <http://www.heraldscotland.com/opinion/14653298.Richard_Smith__How_Scotland_s_tax_haven_firms_could_be_reformed/> accessed 25 September 2017 and David Leask and Richard Smith, 'Firm expands from sex and diet pills to gambling on financial markets', The Herald 27 May 2017 <http://www.heraldscotland.com/news/15313933.Firm_expands_from_sex_and_diet_pills_to_gambling_on_financial_markets/> accessed 25 September 2017.
[155] Transparency International UK, 'Offshore in the UK: Analysing the use of Scottish limited partnerships in corruption and money laundering' (June 2017) < http://www.transparency.org.uk/publications/offshore-in-the-uk/> accessed 25 September 2017.
[156] Scottish Partnerships (Register of People with Significant Control) Regulations 2017, SI 2017/694.
[157] Richard Smith, 'Trust, the UK PSC Register, and the Squiggle Family' (*Naked Capitalism*, 9 September 2017) <https://www.nakedcapitalism.com/2017/09/trust-uk-psc-register-squiggle-family.html> accessed 25 September 2017.
[158] Chris Higson, 'The Privacy of Private Equity' (2007) p2 <http://faculty.london.edu/chigson/profile/pdfs/PrivacyandPrivateEquity.pdf> accessed 25 September 2017.
[159] LPA, s 6(3).
[160] Draft Legislative Reform (Limited Partnerships) Order 2009, Annex to BERR 2008 (n 66), s44K.
[161] LPA, ss6(3B) and 6A(2)(b).
[162] HMRC, *Partnership taxation: proposals to clarify tax treatment – Summary of Responses* (March 2017), para 3.22

by the investment industry. They also include legislative amendments designed solely for investment partnerships, which would mitigate administrative problems where there are a large number of partners, many of whom are non-UK resident or not taxable entities,[163] by removing the obligation to report the full details of partners in the partnership tax return from those partnerships which are already subject to the OECD Standard for Automatic Exchange of Financial Account Information.

These tax reforms are in substance only relevant to investment partnerships, and HMRC should not be distracted by the influence of such partnerships but instead should consider the possibility of tax reforms (including simplification) which would be useful to all partnerships.[164] However, the dangers of such distractions are not limited to tax law, as the following section will demonstrate.

7 Private equity capture has meant that reforms needed by other business partnerships have not been made

The focus on private equity when reforming partnership law, as evidenced above, is damaging because it has meant that other potentially valuable reforms to partnership law have not been made, either because they are contrary to the interests of private equity, or because private equity has insufficient interest in them and the government's focus is limited to what private equity wants. Further, to add insult to injury, the reforms made for the benefit of private equity partnerships have not been made available to the many other limited partnerships, such as family partnerships or indeed investment partnerships which do not qualify as partnership schemes or PFLPs.[165] As commentators noted when the government put forward legislation in 2008 to enact many of the Law Commissions' proposals, but only for limited partnerships,

> if improvement is necessary, why is it to be limited to limited partnerships? The same fundamental issues apply to general partnerships. Do not these also merit attention? Or have limited partnerships been chosen because although so much fewer in number than are general partnerships, they are the favoured business organisation of the rich and powerful and not of ordinary people operating small businesses.[166]

Similar comments might be made of partnership schemes and PFLPs as compared to ordinary limited partnerships.

These three categories of missed reforms will now be considered in more detail.

a) Reforms which would be contrary to the interests of private equity: separate legal personality and its consequences

The introduction of separate personality, as recommended by the Law Commissions in 2003,[167] would be highly useful for partnerships generally, providing a simple and comprehensive solution to various problems which result from its absence, including continuity on a change of partner, ownership and transfer of partnership property, and litigation by or against the firm.[168] Currently, at best, English partnerships have to solve these problems in somewhat complex (and thus often expensive) ways; at worst, they fail to solve them. It would also provide a more accurate reflection of commercial reality, greater conceptual clarity, and consistency with developments in other jurisdictions such

[163] HMRC, *Partnership taxation: proposals to clarify tax treatment – Consultation Document* (9 August 2016), paras 4.1-4.3.
[164] Stiglitz (n 39) 343.
[165] HM Treasury estimates that only 20% of existing funds will convert to PFLP status (House of Commons Regulatory Reform Committee, 'Oral evidence: Legislative Reform Order (Private Fund Limited Partnerships) 2017', HC 1042, Q13).
[166] Terry Prime and Gary Scanlan, 'Limited partnership reform – the entity, the fiduciary duties and the execution of deeds' (2007) 28(9) Co Law 262, 269.
[167] Law Commissions, *Partnership Law* (n 14) para 5.3.
[168] See further Prime and Scanlan (n 166).

as the US.[169] However, as discussed above, separate personality could lead overseas authorities to disregard the tax transparency of private equity partnerships,[170] and it was rejected by the government despite considerable support for the Law Commissions' recommendation. More recently, the government claimed that it was not possible to introduce separate personality for PFLPs because further work was required to explore the implications and necessary legislative changes;[171] but these were comprehensively examined by the Law Commissions and it seems unlikely that further analysis will produce a different conclusion to the potential incompatibility of separate personality and tax transparency, especially as any future adoption of the EU's recommendation for mutual recognition of the tax status of a fund structure which is fiscally transparent in its home Member State[172] is unlikely to apply to the UK.

b) Reforms which are of insufficient interest to private equity

Although private equity has no particular objection to the following important reforms, they have not been enacted because the government has limited legislative capacity and, so far as partnerships are concerned, it has been allocated to private equity. The same criticism may be made of the tax proposals set out at section 9 above and the simultaneous failure to simply partnership taxation generally.

First, all partnerships (including PFLPs), dissolve automatically in the absence of prior contrary agreement, on the giving of notice of retirement by a general partner[173] or on his death or bankruptcy.[174] Unintended dissolution can have significant adverse consequences, particularly in relation to the firm's finances and its contracts with third parties, and so all partnerships would benefit from the reversal of the legislative presumptions to enable continuity.[175] In addition, although a limited partnership is required to have at least one general and one limited partner,[176] the LPA does not make clear whether departure of the last limited or general partner will automatically dissolve the partnership and, if the absence of any general partner does not cause dissolution, whether the limited partners retain their limited liability in such circumstances. If they do, creditors are deprived of recourse to the personal assets of any partner,[177] and therefore the imposition of unlimited liability is to be preferred; if this is a concern to the limited partners, they can ensure that the partnership agreement provides for automatic dissolution.

A second potential reform from which attention has been diverted by the demands of private equity is the introduction of a model partnership agreement, which would reduce the costs of drawing up an agreement and the risk of having an incomplete or no agreement.[178] This would benefit all partnerships, but particularly those with less expertise or fewer financial resources, and different models could be provided for general and limited partnerships, as has been done for different types of company.[179] Even partnerships which chose to draft their own agreement could benefit, since the quality of

[169] Law Commissions, *Partnership Law* (n 14) Pt V, the respondents cited therein at para 5.3 and Berry 2013 (n 33) 165-166.
[170] See further Luc De Broe et al, 'Characterisation of other states' partnerships for income tax' (2002) 5 BTR 375.
[171] HM Treasury 2015 (n 45) para 2.8.
[172] European Commission, 'EU Commission Staff Working Document accompanying the document Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Removing obstacles to cross-border investments by venture capital funds - Glossary and Expert group report' (COM(2007) 853 final) paras 13.2 and 13.3.3, and European Commission 'Report of Expert Group on Removing Tax Obstacles to Cross-border Venture Capital Investments' (30 April 2010).
[173] Partnership Act, ss26 and 32.
[174] Partnership Act, s 33(1).
[175] Prime and Scanlan (n 166) 265.
[176] Section 4(2) of the LPA.
[177] Addleshaw Goddard LLP, 'Responses to the 2008 draft reforms' (n 69).
[178] The Law Commission 1994 Feasibility Study (para 5.63) incorporated in DTI, 'Company Law Review: the Law Applicable to Private Companies – A Consultative Document' (URN 94/529, November 1994).
[179] Companies (Model Articles) Regulations 2008, SI 2008/3229.

such agreements could be improved – and thus the likelihood of disputes, and their complexity, diminished - because there is a natural tendency to adhere to default options.[180]

Third, and similarly, making the limited partnership legislation more transparent and accessible is of considerable interest to small businesses without resources for extensive professional advice,[181] but less to private equity. For example, the consolidation of all the legislation governing UK limited partnerships – that is to say, the Partnership Act and the LPA - into a single statute would make it easier (and so quicker and cheaper) for intending or actual partners and their advisors to access and understand the relevant provisions and might encourage wider take up of the limited partnership. Indeed, this was originally proposed by the Law Commissions and the government,[182] but the latter subsequently decided instead to amend the LPA on an incremental basis, so that the most widely supported reforms could be adopted as soon as possible while discussion continued on the more controversial issues.[183] Further, although the integration of the PFLP reforms into the LPA makes the legislative framework for PFLPs clearer than if separate legislation, requiring cross references to the LPA which itself cross refers to the Partnership Act, had been adopted, it has made the LPA longer and much less clear for other limited partnerships.

c) Private equity reforms which would benefit other partnerships have not been applied more generally

As argued above, most of the partnership scheme and PFLP reforms are inappropriate because they pose risks to third parties and the wider economy and, in some circumstances, to partners themselves. However, some do not (for example, enabling limited partners to wind up the partnership); and, in any event, as has been argued in relation to the reforms discussed in sections 4-6 of this article, it is invidious that reforms have been adopted which confer benefits only on some limited partnerships.[184] Indeed, many of them were originally proposed by the Law Commissions and/or the government for all limited partnerships, and the House of Commons Select Committee which examined the PFLP LRO concluded that a "safe harbour" list should be introduced for all limited partnerships.[185]

The government's argument that the PFLP reforms could not be applied more generally without consultation is unconvincing because almost identical proposals have been the subject of relatively recent consultations, both by the Law Commissions and the government itself and, in any event, the PFLP consultation could easily have been extended to limited partnerships generally and the government should not be able to plead its own failure in this respect. It is difficult to resist the conclusion that lobbying by a special interest group – namely the private equity firms and those who advise them[186] - has produced bespoke legislation despite previous criticisms of substantially similar proposals.

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[180] JR Edwards and KM Webb 'Use of Table A by Companies Registering Under the Companies Act 1862' (1985) Accounting and Business Research 177 and Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (Penguin 2008), pp8, 12, 35 and 83-87.
[181] LS Sealy, *Company Law and Commercial Reality* (Sweet and Maxwell 1984) pp809 and 69-73.
[182] Law Commissions, *Partnership Law* (n 14), Appendix A, and the draft Legislative Reform (Limited Partnerships) Order 2009, Annex to BERR 2008 (n 66), Reg 4.
[183] BERR, 'Reform of Limited Partnership Law: Government Response to the Consultation on a Legislative Reform Order to repeal and replace the Limited Partnerships Act 1907' (25 March 2009) <http://webarchive.nationalarchives.gov.uk/20090609043220/http://www.berr.gov.uk/files/file50705.pdf> accessed 25 September 2016.
[184] Law Society of England and Wales, 'HMT: Proposal on using Legislative Reform Order to change partnership legislation for private equity investments: consultation on draft legislation – The Law Society's response' (October 2015) para 5 and the Financial Reporting Council (n 90).
[185] House of Commons Regulatory Reform Committee, 'Draft Legislative Reform (Private Fund Limited Partnerships) Order 2017: Second Report of Session 2016-17' (HC 1042, 6 March 2017) para 39.
[186] Andrew Evans, 'Limited Partnerships set to be a little less limited' (20 July 2016) <http://www.fieldfisher.com/publications/2016/07/limited-partnerships-set-to-become-a-little-less-

8 The problems for private equity itself

The capture of partnership law and policy by private equity is not just a problem for other businesses: reduced regulation is not necessarily beneficial even for private equity itself.[187] The Financial Conduct Authority has found that price competition is weak, funds do not outperform their own benchmarks after taking fees into account, and fund objectives and charges are unclear.[188] Decisions taken towards the end of the fund's life can be damagingly short term, for example hoarding cash flow or cutting investment.[189] The Alternative Investment Fund Managers Directive,[190] which restricts the marketing of private equity so that fund managers must be authorised and meet minimal capital requirements, has significant exemptions, and in any event the long-term future of the corresponding UK legislation[191] must be in doubt post-Brexit. Conflicts of interest can arise where a fund manager itself participates in transactions and "cherry picks" its investments,[192] or is also the director of a company owned by the fund,[193] or where partners are involved in the running of the portfolio company or the fund management vehicle;[194] or where management fees paid to general partners are not sufficiently sensitive to performance, or are linked to overall profit and thus incentivise excessive borrowing.[195] Although HM Treasury suggested that PFLPs would only involve sophisticated investors,[196] there is contrary evidence that in fact limited partners can fall victim to incompetence[197] or unscrupulous behaviour by private equity firms.[198] As one commentator noted in relation to the alleged sophistication,

> Until quite recently, regulators thought banks were highly sophisticated and treated them accordingly. The crisis has shown that banks cannot be relied on to behave wisely, and the costs are high. Why should regulators still assume that they can rely on "sophisticated investors" as a group? As a matter of urgency, policymakers need to address the issue of the "sophisticated investor". Thirty years of private equity help to show why.[199]

For example, in *The Connaught Income Fund, Series 1 (in liquidation) v Capita Financial Managers Limited and Blue Gate Capital Limited*[200] investors who had suffered losses in an unregulated investment scheme operated through a limited partnership successfully

limited#sthash.XcCBK95A.dpbs> accessed 25 September 2016. The majority of the responses to the draft PFLP LRO came from organisations representing private equity funds or their professional advisors (HM Treasury, 'Proposal on using Legislative Reform Order to change partnership legislation for private equity legislation: summary of consultation responses' (March 2016)).

[187] Stiglitz (n 41) 112.

[188] Financial Conduct Authority, 'Asset Management Market Study: Financial Report' (MS15/2.3, June 2017) paras 1.9-1.19.

[189] Gregory (n 135) 41 and Kosman (n 45) Chs 5 and 6.

[190] Directive 2011/61, (2011) OJ L 174/1.

[191] The Alternative Investment Fund Managers Regulations 2013, SI 2013/1773.

[192] Financial Services Authority (n 20) 2 and Iain MacNeil, 'Private equity: the UK regulatory response' (2008) 1 CMLJ 18, 22.

[193] MacNeil 2008 (n 192) 22 and IOSCO (n 135) 17.

[194] Financial Services Authority (n 20) 9 and 72-73, and the House of Commons Treasury Committee, 'Private equity' (Tenth Report of Session 2006-07, Vol 1) 11.

[195] Peter Morris, 'Private equity, public loss' (No 96, Centre for the Study of Financial Innovation (CFSI) 2010)) 31-32 <https://static1.squarespace.com/static/54d620fce4b049bf4cd5be9b/t/55240ed8e4b047e0ca4a0ac2/1428426456201/Private+Equity+by+Peter+Morris.pdf> accessed 25 September 2017.

[196] HM Treasury, 'Written Evidence from HM Treasury (LRO 02): Draft Legislative Reform (Private Fund Limited Partnerships) Order 2017: Responses to Regulatory Reform Committee follow-up questions' response to Question 5 <data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/regulatory-reform-committee/legislative-reform-order-private-fund-limited-partnerships-2017/written/48019.pdf> accessed 25 September 2017.

[197] Peter Morris (n 195) 2, 37 and 46-47.

[198] Yves Smith, 'The Private Equity Limited Partnership Agreement Release: The Industry's Snowden Moment' (*Naked Capitalism*, 26 May 2014) <http://www.nakedcapitalism.com/2014/05/private-equity-limited-partnership-agreement-release-industrys-snowden-moment.html> accessed 25 September 2017.

[199] Peter Morris (n 195) 2.

[200] [2014] EWHC 3619 (Comm), [2015] 1 BCLC 241.

sued the scheme operators for promoting the scheme unlawfully and marketing it in a misleading manner. Lack of transparency poses risks to less experienced and well-resourced investors,[201] since valuations of unquoted investments are subjective and general partners are inclined to overestimate;[202] but it also leaves "a consequent gap in the ability of institutional investors in handling the governance, monitoring and engagement issues….This is not good either for the industry itself or for investors."[203] Even a commentator who suggested that "[t]oo much regulation could cause the private equity industry to migrate to more lightly regulated jurisdictions", also warned that "too little regulation could raise issues of market confidence".[204] The Walker Guidelines emphasised "the priority of improved reporting by private equity…. above all as a means of promoting better understanding of….its actual and potential impact on the UK economy" and the need for "timely and effective communication with non-owner stakeholders" especially employees of the portfolio company.[205] However, as noted above, accounts of the private equity firms themselves remain largely hidden; investors may receive more extensive and detailed information about the funds than investors in public companies,[206] but this is a matter for private negotiation and cannot be guaranteed, and in any event the information is not available to employees, suppliers or the wider public.

9 The problems caused to the wider economy

In addition to being damaging other businesses and indeed to private equity itself, the influence of private equity is contrary to the public interest because it poses significant risks to economic and financial stability, including by reducing efficiency and distributional equity.[207] Its influence is part of the much-criticised "financialisation" of the UK economy,[208] in the sense of profits being sought from financial rather than productive channels, in particular from creating and trading in financial property,[209] and the increasing role of financial institutions and actors in the economy[210] – including their role in legislative capture[211] and associated reduction in regulation.[212] Concerns have been expressed not only about the dominance of private equity in the run-up to the financial crisis of 2008, and its low levels of regulation compared to publicly traded companies, particularly as regards transparency and disclosure,[213] but also about its capacity to endanger financial stability in the future.[214] The allocation of economic risk is often unclear in private equity, both because the complexity of the financial structures used obscures exposure to risk, and because their global nature means that different insolvency regimes may apply.[215] Private equity owned companies are often highly

[201] MacNeil 2008 (n 192) 21-22; see also Financial Services Authority (n 20) p9.
[202] Peter Morris (n 195) 35.
[203] Peter Morris (n 195) 15 citing Ed Balls, then Economic Secretary to the Treasury, speech at the London Business School on 8 March 2007 <http://www.edballs.co.uk/blog/speeches-articles/my-speech-to-the-london-business-school-8th-march-2007/> accessed 25 September 2017.
[204] Financial Services Authority (n 20) para 5.76.
[205] The Walker Guidelines (n 14) 18 and the House of Commons Treasury Committee (n 194) 11.
[206] Payne (n 9) 571.
[207] Stigler (n 34) 10, Hacker and Pierson (n 37) 192-190, Donald Tomaskovic-Devey and Ken-Hou Lin, 'Income Dynamics, Economic Rents, and the Financialization of the U.S. Economy (2011) 76(4) Am Sociol Rev 538, 553-554 and Michael A Livermore and Richard L Revesz, 'Regulatory Review, Capture, and Agency Inaction' (2013) 101 Geo LJ 1337, 1343.
[208] Harold Laski, *A Grammar of Politics* (Allen & Unwin 1925) p476, Hywel Williams, *Britain's Power Elites* (Constable & Robinson 2006) pp24 and 210-216, 'General introduction' in I Erturk, J Froud, S Johal, A Leaver and K Williams (eds), *Financialization at Work* (Routledge 2008), Peston (n 22), Ch 1 and Paddy Ireland, 'Financialization and corporate governance' (2009) 60(1) NILQ 1.
[209] Greta Krippner, 'The financialization of the American economy' (2005) 3 Socio-Economic Review 173, 174-175.
[210] Gerald Epstein, *Financialization and the World Economy* (Edward Elgar 2015) p3.
[211] Hacker and Pierson (n 37) 192-196 and Tomaskovic-Devey and Lin (n207) 542-548.
[212] Stiglitz (n 41) 308.
[213] Peston (n 21) pp56-64.
[214] Gregory (n 135).
[215] MacNeil 2008 (n 192) 21-22; see also Financial Services Authority (n 20) p9.

leveraged,[216] which may pose greater risks of insolvency,[217] and leverage and asset stripping can adversely affect employees, through destruction of jobs[218] or company pensions;[219] it is estimated that 19% of private sector employees[220] and 8% of the total workforce work for private equity-backed businesses.[221] Such behaviour can also affect suppliers[222] and the wider public.[223] Private equity regulation and accountability is thus "imperative for the perceived social legitimacy of private equity in the wake of the acquisition by private equity of rights of ownership and control of major UK companies".[224]

10 Conclusion

Private equity's influence on partnership law and the resulting distortion of the development of the law is a questionable victory for private equity itself, because deregulation can be harmful both to managing and investing partners, but it is a definite disaster for other partnerships, actual and potential. The Law Commissions concluded that a range of reforms were necessary to preserve partnership as a flexible, informal and private business vehicle and to provide a modern law of partnership readily understandable by advisers and clients;[225] and the failure to reform partnership law as it applies to non-private equity businesses is harmful because those businesses could fail to flourish (and new businesses fail to form) as they might had the reforms been adopted. Both the deregulation of private equity partnerships and the lack of wider reforms are likely also to cause harm to the wider economy.

It is unfortunate that the time and effort put into limited partnership reform have not produced greater gains for the range of businesses which the LPA was originally intended to support.[226] While lobbying can facilitate informed decisionmaking by a legislator,[227] lobbying to affect the regulatory environment may result in moral hazard and the range of other harms discussed in this article. In contrast, the quality of law making could be maximised by taking into account a full range of affected interests[228] – so not just private equity managers and advisors, or even investors, but the wider business community. Had such stakeholders been able to lobby as effectively as private equity, the business community could have benefited not only from the missed reforms discussed above, but from others put forward by the Law Commissions and still others to which wider consultation might have given rise.

The immediate legislative solutions are as follows. First, to the extent that administrative and financial burdens on PFLPs have been reduced, those burdens should be reduced similarly for non-PFLP limited partnerships by applying the same reforms to them.[229] Second, many of the reforms proposed by the Law Commissions, and those subsequently proposed by the government in 2008-2009, should be adopted to equip all partnerships for the 21st century.

The longer term solution is for legislators (and the civil service) to resist capture by interest groups such as private equity although, as discussed above, this may be unlikely without a fundamental change in political realities.[230] If they choose not to, there are few

216 Gregory (n 135).
217 House of Commons Treasury Committee (n 194) 11 cf Jensen (n 26) 72-73.
218 House of Commons Treasury Committee (n 194) 11.
219 House of Commons Treasury Committee (n 194)11 and Kosman (n 45) 159-160.
220 Financial Services Authority (n 20) para 4.22.
221 House of Commons Treasury Committee (n 194) 3.
222 The Walker Guidelines (n 14) 41-42 and Iain MacNeil 2008 (n 192) 21.
223 Payne (n 9) 572.
224 The Walker Guidelines (n 14) 18.
225 Law Commissions, *Partnership Law* (n 14) para 3.2.
226 JJ Henning, 'Limited partnerships reform: Part 2' (2011) Comp Law 208, 211-212.
227 Igan et al (n 107) 26.
228 Laski (n 208) p375.
229 Financial Reporting Council (n 90).
230 Stigler (n 34) 17-18 and Andrias (n 35) pp493-499 and 502.

plausible enforcement options;[231] greater judicial oversight of legislation[232] is of limited efficacy in relation to legislation which has already been enacted at the behest of private equity; greater legislative oversight or periodic legislative review[233] is unlikely where legislative capture has already occurred, and indeed the growing use of secondary legislation in the UK reduces legislative scrutiny; greater regulatory power[234] cannot solve fundamental errors or omissions in the legislation; and greater localisation is neither likely nor appropriate in the context of UK financial services regulation or UK business law more generally.[235] Although resisting capture would not, in fact, be difficult as a matter of personal choice on the part of an individual legislators or policymaker, the record to date suggests that it would be wise also to provide an alternative mechanism to counter legislative and policy capture, for example a formal role in legislative consultation for public interest organisations,[236] including those representing small businesses. This could be based on the EU's Economic and Social Committee, which has a mandatory consultative role in the EU's legislative processes and includes representatives of employers, trade unions, and professional and community associations, among others. This would help to counter private equity's influence and, as noted above, improve the quality of the law itself.

Although the UK is under pressure to reduce regulatory and tax burdens because international investors seek those regimes which impose the lowest burdens and countries compete in this respect,[237] the UK limited partnership offers the advantages of the UK's "substantial body of case law and a highly-respected judiciary"[238] and the flexibility of the common law with its judicial discretion,[239] and there is no need for a race to the bottom as exemplified by the PFLP reforms. Instead, the UK should provide a gold standard of accountable and transparent regulation for the benefit of investors, employees and the wider economy. As the Walker Guidelines noted when proposing greater regulation of private equity, "the evolution of guidelines and standards for private equity have a potentially significant international dimension and may also have relevance for a wider group beyond the immediate confines of the private equity industry".[240] Equally, the evolution of UK partnership law freed from the constraints of private equity influence could have a positive impact on the wider range of businesses that use (or might use) the UK limited partnership structure.

[231] Daniel A Moss and Daniel Carpenter, 'Conclusion' in Carpenter and Moss (n 34).
[232] Daniel A Farber and Philip S Frickey, *Law and public choice: a critical introduction* (University of Chicago Press 2004) Ch 5 and p117, Steven P Croley, *Regulation and public interests: the possibility of good regulatory government* (Princeton University Press 2008) 54, Owen (n 35) p8 and Andrias (n 35) 487-493.
[233] Owen (n 35) p8.
[234] Owen (n 35) p8.
[235] Anwar Shah, 'Decentralized provision of public infrastructure and corruption' in Jonas Frank and Jorge Martinez-Vazquez (eds), *Decentralization and Infrastructure in the Global Economy: From Gaps to Solutions* (Routledge 2016) p433.
[236] Daniel Schwarcz, 'Preventing Capture Through Consumer Empowerment Programs' in Carpenter and Moss (n 34) and Andrias (n 35) 499-501 and Barkow (n 39) 27.
[237] Colin Mayer, 'Regulatory Principles and the Financial Services and Markets Act 2000', in Eilís Ferran and Charles A E Goodhart (eds), *Regulating Financial Services and Markets in the Twenty First Century* (Bloomsbury 2001) 31-32.
[238] McCahery and Vermeulen 2004 (n 8).
[239] Cheffins (n 52).
[240] The Walker Guidelines (n 14) 7.