Submission on

Integrity and Accountability in Queensland

Queensland's Integrity and Accountability Systems

Before considering the issues raised in the Discussion Paper, we wish to note that the integrity and accountability systems operating in Queensland are more extensive than those available elsewhere in Australia. The Queensland government is to be congratulated on its determination to strengthen those systems. In doing so it is providing leadership to the rest of Australia. Our submission offers what is hoped to be constructive comment to aid that process.

We strongly support the commitments made by the Queensland Government[1] to ban

- The payment of success fees to lobbyists and
- The appointment of registered lobbyists to government boards or other significant government positions

and to require

- Labor Members of Parliament to meet annually with the Integrity Commissioner to discuss their pecuniary interests and how the Member intends to manage any potential conflicts of interest, and
- Government Members not to take part in exclusive political fundraisers attended by the private sector.

Much, of course, will depend on the detail of the final proposals. But a major driver has been the recognition that integrity and accountability systems should be kept under review, and as long as that commitment continues, any deficiencies that may emerge can be addressed.

One of the major drivers has been recent highly publicised episodes of corrupt and unethical practice[2]. We refer in particular to the case of Mr Nuttall. He was convicted on charges concerning 36 transactions over a period of 3 years. He came to attention as a result of articles

[1] Discussion Paper, *Integrity and Accountability in Queensland*, p.6.
[2] Speech by the Premier, Anna Bligh at the Australian Public Sector Anti-Corruption Conference, 29July 2009 – www.crikey.com.au/2009/07/29.

run in the Sunshine Coast Daily concerning dealings relating to land for a hospital. We suggest that his case raises important underlying issues as to how the integrity and accountability systems can be improved to minimise the incidence of such practices and, when they occur, to identify and act on them speedily. The above commitments will have some effect on such practices but more is needed. We submit that the proposals we put forward should strengthen the systems presently in place and further reduce the opportunities for corrupt behaviour.

We address the issues by taking in turn the specific topics and questions raised in the Discussion Paper

Issues raised in the Discussion Paper

Guidelines for decision makers

1. Queensland has an extensive range of codes of conduct in place - are any key individuals or groups missed?

2. Should the codes be strengthened in any way? If so, how should they be strengthened?

Response

1. We confine our submissions to the Code of Ethical Standards for Members of Parliament[3] and the Minister's Code of Ethics[4].
   (a) Code of Ethical Standards for Members of Parliament
   The statement of the purpose of the Code and of the fundamental principles covers most of the essential issues, but it should reflect the fact that their relationship with the people has the elements found in fiduciary relationships[5] and their role in the Westminster system generally strengthened. The proposed changes are set out in ***Attachment A.***

   (b) Minister's Code of Ethics

[3] Code of Ethical Standards, Legislative Assembly of Queensland, September 2004 (Amended 2006 and February and May 2009)
[4] Appendix 19, Ministerial Handbook
[5] See, for example, Professor P.D. Finn (as he then was) *"A Sovereign People, A Public Trust"* In *"Essays on Law and Government"* Vol. 1, (1995) Law Book Co.,1; Owen J, *The Crown as Fiduciary, paper presented in 1996 at Law Society of Western Australia Seminar on Recent Developments in the Law of Fiduciary Obligations;* Report of the WA Inc. Enquiry (1992) and discussion of the "Trust principle", paras 1.2,3.1.7, 4.4 and the statement of principle in *Driscoll v Burlington Bristol Bridge Co.*86 A 2d 201, 222-3.(1952) See also *Question of Law Reserved (No 2 of 1996)* (1996) SASR 63; A Crim R 417, where Doyle CJ, after holding that the offence existed but could not be defined with precision, described the scope of the offence as follows –

> "I consider, that the generic offence.. strikes at the public officer who deliberately acts contrary to the duties of the public office in a manner which is an abuse of the trust placed in the office holder and which, to put it differently, involves an element of corruption. It may be that the mere deliberate misuse of information is sufficient to give rise to an offence, but the further allegation of an intent to receive a benefit clearly, in my opinion, brings the matter within the ambit of the common law offence."

The Code is comprehensive and covers most issues and does so well. It extends to Parliamentary Secretaries. It should, however, be strengthened to enhance transparency and accountability. They are essential for good government, minimising the risk of corruption and improving the standing of Members in the community. Suggested changes are included in Attachment B. In support of those changes we make the following submissions;

(i) *Guiding principles*. The fiduciary nature of the obligations of Ministers to the people who elected them into office should be acknowledged[6].

(ii) Responsible *Government*. There is considerable uncertainty about the nature and extent of the accountability obligations of Ministers to the Parliament. The principles were developed in much simpler times when

- government services were provided by government not outsourced and
- infrastructure projects were conducted by government rather than Private Public Partnerships.

There has also, for some time, been confusion between the issue of the accountability obligations of ministers and the issue of whether they should be held personally responsible.

Attachment B includes suggested changes, first advanced in papers produced by the ASPG Accountability Working Party. [7]

(iii) *Post Ministerial employment.* We submit that the present provision is inadequate. It will allow the continued damaging of the reputation of Ministers generally and provides fertile ground for corruption.

- It provides that Ministers and Parliamentary Secretaries shall not for 2 years and 18 months respectively

  "lobby, advocate or have any business meetings with members of the government or public service on any matters on which they had official dealings as a Minister in their last two years in office."

  The embargo does not prevent the ex-Minister being employed or engaged by lobbyists to advise them during the embargo period commencing from the moment they cease to be Ministers. The only safeguard provided is a requirement of an undertaking not to take personal advantage of information to which they had access as Ministers and which is not generally available or accessible to the public.

  We submit that the undertaking does not address reality and, notwithstanding the warning in the Code of the risk of breaching the Criminal Code, offers little or no protection of substance because of the difficulty of ever proving a breach of the undertaking. It is also not clear what the penalty is for breach of the undertaking.

[6] see footnote 5

[7] The most recent being "*Be Honest, Minister! Restoring Honest Government to Australia"(*2007); Hon John Button., Associate Professor Hon Dr Ken Coghill, Mr Bruce Grant, Ms Genevieve Grant, Professor Graeme Hodge, Hon Alan Hunt AM, Ms Anne Mancini, Hon Dr Race Mathews, Mr Victor Perton, Hon Kevin Rozzoli, Professor Spencer Zifcak It contained a restatement of the then Prime Minister's Guide to Ministerial Responsibility.

We submit that, allowing such employment or engagement, breaches the "Guiding Principles" of the Code which require "high standards" of Ministers when in office and the same "high standards when they are no longer in office". Taking such employment or engagements severely damages the reputation of the individual and Ministers generally because the former Minister appears to be gaining a financial or other personal advantage from the expertise, information and influence obtained while entrusted with powers to be exercised on behalf of the public and at the taxpayer's expense.

- Finally, the period of embargo is too short. We submit that the scheme provides obvious opportunities for corruption. A five-year "cooling off" period would address the above concerns.[8]

We propose that legislation be enacted to provide that it be a condition of appointment as a Minister or Parliamentary Secretary that, for a period of five years after ceasing to hold such appointment, he or she may not accept any substantial benefit (e.g. employment, a directorship, provision of services pursuant to a contractual relationship, gift or other relationship) -

- from any person who, or entity that, was subject to any regulatory, contractual or other relationship with any government entity for which he or she had responsibility; or
- from their engagement directly or indirectly in lobbying the government of which they were a member or any other body for the exercise of government discretion, legislative authority or the allocation of public resources.

(c) Compliance with Codes of Conduct.

(i) Code of Ethical Standards for Members of Parliament

The Code contains a Complaints Procedure that can be activated by members (in the House or by writing to the Speaker), a committee of the House and the Speaker. Any complaints are referred to the Members' Ethics and Parliamentary Privileges Committee. Obviously the effectiveness of that system depends on the Members and on the independence of the Committee.

(ii) *Minister's Code of Ethics*

The Code does not appear to contain any procedures for considering alleged breaches of the Code. Its enforcement would appear to depend on the Parliament performing its Westminster role of holding Ministers to account and on the Premier taking action where appropriate. Party control of the Lower House, and the absence of an Upper House, however, significantly limits the capacity of the Parliament to perform that role.

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[8] Approaches taken in other jurisdictions vary and were surveyed in Ian Holland (2002) 'Post-separation Employment of Ministers' *Department of the Parliamentary Library* available at http://www.aph.gov.au/Library/pubs/rn/2001-02/02rn40.htm and Deirdre McKeown, (2006) 'A survey of codes of conduct in Australian and selected overseas parliaments' *Department of the Parliamentary Library* available at http://www.aph.gov.au/library/intguide/POL/conduct.htm. For example, where a Code approach is taken and bans imposed on related employment, it will be found that there is a general ban of two years in South Australia and a permanent ban prohibiting the changing of sides in the USA and Canada. A five year ban on lobbying was enacted in 2006 in Canada in *The Federal Accountability Act 2006* and is now provided for in the Canadian *Lobbying Act 2008*

In considering these issues we have had regard to the following understanding of the role of the Integrity Commissioner and the Crime and Misconduct Commission.

- *Integrity Commissioner.* The position of Integrity Commissioner was created for the "purpose of helping Ministers and others avoid conflicts of interest…"[9]. A "conflict of interest issue, involving a person" is defined as
  > "..an issue about a conflict between the person's personal interests and the person's official duties"[10]

  The Commissioner is empowered to give advice to
  - Members[11] on "conflict of interest issues",
  - the Premier, if requested, on ethics and integrity issues and
  - "to contribute to public understanding of public integrity issues". [12]

  The Commissioner does not have an investigative or disciplinary power but is required to advise the Premier if the recipient of advice continues to be involved in a conflict of interest situation[13]. Otherwise it appears that confidentiality is provided to those who seek advice.

- *The CMC*. Under the Crime and Misconduct Act, public officials are under a duty to notify the Crime and Misconduct Commission of conduct that could, if proved, be a criminal offence.[14] The definition of "public official appears to include all public servants and local government employees, but not Members of Parliament.[15]

It should be noted that the Independent Commission Against Corruption Act 1988 (NSW) provides a qualification to the general definition of corrupt conduct in that, in addition to the offences named, a minister or member may be found to have acted corruptly if the member has committed a substantial breach of an applicable code of conduct being either the ministerial code of conduct or a code of conduct adopted by resolution of either House of parliament. In relation to ministers and members, under section 9(4), the commission may investigate "conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of the parliament into serious disrepute". Section 9(5) specifies:

> the Commission is not authorized to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct could also constitute a breach of a law (apart from this Act) and the Commission identifies the law in the report.

[9] Part 7 of the Public Sector Ethics Act 1994 created the Office
[10] Dictionary, Public Sector Ethics Act 1994
[11] In practice this is the situation; Submission of Integrity Commissioner to Parliament of Victoria, Law Reform Committee,29.05.09, p.1
[12] Public Sector Ethics Act 1994,s 28
[13] Submission of the Commissioner, above,p.2; and see s34(5) of the Public Ethics Act 1994
[14] Crime and Misconduct Act s38.
[15] Dictionary, Public Sector Ethics Act 1994

It is also necessary to bear in mind the *Register of Members' Interests* and *Register of Related Persons' Interests* set up by the Parliament under Standing Rules and Orders. It covers, among other things, financial business and financial interests, assets and liabilities, gifts and sponsored travel. The Clerk of the Parliament is the Registrar. A member who fails to comply with the Register obligations is guilty of contempt of Parliament.[16]

In these ways it may be said that the Parliament and governments of Queensland have attempted to address the challenge of obtaining

> "an appropriate balance between the sovereignty of the Parliament and the benefit it could gain from outside assistance"[17]

We support the above approach but submit that steps should be taken to extend and strengthen the role of the Integrity Commissioner drawing in part on proposals developed by the Accountability Round Table for a "Parliamentary Standards Commissioner". See **Attachment D.** In particular, we submit that consideration should be given to the following;

- Amend the Public Sector Ethics Act Dictionary to ensure that all those who can seek advice from the Integrity Commissioner can seek advice generally on ethical issues and are not limited to conflict of interest issues.
- Amend s 28 of the Public Sector Ethics Act to empower the Commissioner to
  - monitor the operation of the Codes and to propose modifications to them and
  - report annually to the Parliament, and thereby the public, upon the nature and extent of compliance with the principles and spirit of each code, doing so in such a way as to protect identities and other confidential information;
- If the Commissioner does not presently have the obligation, amend the relevant legislation to require the Commissioner to refer to the CMC, as well as the Premier, cases where the recipient of advice from the Commissioner continues to be involved in a conflict of interest situation[18], being a situation that could, if proved, constitute a criminal offence.

Finally, we raise the question whether non-Members should have the power to alert the Commissioner to possible unethical conduct on the part of Members which the Commissioner could then explore with the Member. It is particularly important that unethical behavior, such as that revealed in the Nuttall case, be identified before it becomes a habit and is assumed to be acceptable. Because of the potential for abuse, the right should be restricted to raising issues of possible criminal offences and failure by Members to comply with their personal Register of Interests requirements (which we understand are publicly available). We make this recommendation on the assumption, in particular, that the receipt

[16] Discussion Paper,27
[17] Submission of the Commissioner, above, p.3
[18] Submission of the Commissioner, above,p.2; and see s34(5) of the Public Ethics Act 1994

of loans or payments from voters that are retained by Members must be declared and registered. If that is not so, the rules should be changed to cover them.

Pecuniary interests registers and managing conflicts of interest

3. Should the requirements for disclosure and managing conflicts of interest be set out in legislation?

   Response: Yes

4. How could safeguards to ensure conflicts of interest are appropriately managed be improved?

   Response: We refer to the discussion above. The requirement of initial notification and of subsequent changes within one month of the member becoming aware of the changes is probably a reasonable time frame and is similar to the one we have recommended to the Victorian Law Reform Committee Review (28 days). The consequence of non-compliance should be made clearer and more effective to encourage compliance. At present it appears that only knowing non-compliance with the Standing Orders gives rise to any consequences and the member is then exposed to the range of consequences that flow from contempt of parliament.

   We recommend that upon the Presiding Officer being satisfied (on the basis of evidence from any source) after reasonable inquiry and natural justice that the Member has failed to disclose, within 28 days, full details of a material interest of which he or she should reasonably have been aware, the Presiding Officer should "name" the Member and recommend that the Member should be suspended from the House. The suspension should provide that it be lifted only when the Presiding Officer has established that the Register's record has been corrected.[19]

5. The Premier has committed to require that all Government Members of Parliament be required to meet with the Integrity Commissioner annually to discuss their pecuniary interests and how they intend to manage any potential conflicts of interest which may arise - should this requirement also apply to opposition and independent Members of Parliament?

   Response: Both steps should be taken. The integrity of the opposition and independent parties is critical to the proper functioning of the Parliament and, in

[19] Part of Submission by Dr Coghill to the Law Reform Committee, Parliament of Victoria on the *Review of the Members of Parliament (Register of Interests) Act 1978.*

particular, to the role of the opposition and independent members of holding the government of the day to account. It is also critical to the confidence of the community in the democratic system.

Gifts and hospitality

6. Should policies regarding gifts and hospitality be the same for Ministers, Members of Parliament and public sector employees?

Response. It appears that under the present regime, Members must disclose gifts over $500 retail value on the Register of Members' Interests but the gifts are not treated as public property. Ministers, Parliamentary Secretaries and their personal staff must report gifts over $300 wholesale value. They are treated as public property but may be purchased by the recipient for an amount less the $300 threshold amount. Gifts below the threshold may be retained at no cost. Under the policy issued by the Public Service Commission in 2008, public servants must report gifts over $100 in market value. Gifts over $350 in market value cannot be retained unless the circumstances are exceptional and the chief executive officer has approved. Individual agencies can implement their own policies provided they are consistent with the above.

The immediate question arises as to why the three groups are treated differently? Is it thought that they or their circumstances vary in their corruptibility? In particular;

- Why the different thresholds for reporting?
- Why the different thresholds for retention without payment?
- Why aren't all gifts public property, which the recipient can only retain if the recipient pays the State the market value?
- Why are there three standards of value, 'retail', 'wholesale, and "market"?

One can understand the concern that it would be excessively burdensome for any system if every time a Member, Minister, staff member or Public Servant was bought a drink or a meal or given a lift in a motorcar, it had to be reported and the State paid. But we suggest that the basic problem with the present system is that all involved in government are allowed to receive and retain gifts. Members in particular, it seems, can retain very substantial gifts as long as they are disclosed. Thus the system creates real opportunities for corruption. We suggest that consideration be given to banning the receipt of gifts and hospitality for all the above persons. They will have to pay their own way and explain to their would be benefactors that they have no choice. If, however, there is a case for retaining a modified system, we can point to no good reason why gifts and hospitality over $100 in market value should not be reported by all and why the recipient should not have to reimburse the State.

Political donations

In introducing our responses on this topic, we refer to the overview we provided in our submission to the Commonwealth Government's Green Paper on Electoral Reform. We stated -

> "Electoral funding may be inextricably linked to participatory democracy yet it can so easily be construed as a vehicle for both good and evil. Old sayings like, "he who plays the piper calls the tune" rings in ones ears but if contributions to political parties are spontaneously given as a true reflection of popular opinion then the electoral outcome that follows such opinion can be seen as an honest and viable action. But the latter is to see the world through the brightest and clearest of spectacles. More often in our modern world we view it through a glass darkly, unable to readily see the shifty eyed intention of many a large donor.
>
> To take a recent example, there is no doubt the huge moneys raised by Barack Obama reflected popular opinion but anecdotal evidence from the United States and Australia in recent years of obscurely sourced donations and insidious links between corporate donations and the appearance of political favour have tainted the view that the money genuinely follows public opinion. Freeing himself of the baggage of political patronage will be but one of the challenges facing President Obama.
>
> Participatory democracy is a constantly changing dynamic. There is never a lasting or perfect solution. The ever fertile human brain will seek to turn to advantage whatever system we put in place and in terms of political honesty the current love affair with marketing as the be all and end all of selling the political product has moved the funding of campaigns into dangerous territory.
>
> So is it time for a radical rethink of how we fund political campaigns? Or is it not so much a radical rethink so much as a refocus of our current laws? This submission explores a concept that may either be construed as radical or simply a further step in a current regulatory trend. It depends on how wedded one is to the current system.
>
> Our starting premise is that the cost of election campaigns should be borne entirely by the State. Lest this be seen as a further impost on the ever-suffering taxpayer it has to be pointed out that the majority of privately funded donations, whether from corporations or individuals, are a cost borne by the consumer, and one which in the case of corporations and trade unions may not necessarily be in accord with the wishes of the ultimate source. More rigorous standards and monitoring of advertising expenditure by incumbent governments would also release funds for these purposes.
>
> Our next premise is that the purpose of election campaigning should be to enable voters to go to the ballot box with a reasonably informed view of how they want to cast their vote rather than to sell the political party or candidate.
>
> A third premise would be that elections should be fixed term, held on predetermined dates as occurs in a number of States[20]. "

We would add that as election campaign expenditure has grown[21], so too has the time that has to be spent raising money by those we elect to govern for us. Such time would be better spent considering the complex policy issues that we face.

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[20] For example, New South Wales, Western Australia, the Northern Territory and the ACT. See also, the USA, Canada and the European Parliament.

[21] For a recent overview of political funding see, Sawer,Abjorensen and Larkin, *Australia, the State of Democracy",* in particular at 108-14,127-9,196-7.

As to the level of funding needed, it should be sufficient to ensure that parties and candidates can communicate adequately with the voting public. There is no reason to think that current levels of aggregate expenditure resulting from public and private funding are anything but excessive. In addition to funding advertising, public funding should cover other campaign expenditure such as campaign rooms, preparation of advertising material, pre-poll and postal vote canvassing and so on. We note the statement in the Discussion Paper,[22]

> "The Queensland Government strongly supports nationally consistent reform of donation laws, to ban donations outright or cap them at a very low level."

We strongly urge the Queensland Government to pursue the first of these options with the Federal Government while it is considering its response to submissions on its Green paper and, to assist the proposal for banning private donations, press for the introduction of broadcasting licence conditions requiring that campaign information be broadcast as community service announcements.

As to timing, public funding should be provided from the dissolution of the Parliament.

There should be no pre-condition such as securing a percentage of the vote. There is no reasonable democratic basis for restricting public funding to parties or candidates by such means. Major parties which achieve a strong electoral support receive disproportionate funding which has the effect of giving the incumbent government parties an unfair advantage at the following election. That anomaly could be addressed by placing a ceiling in the amount received such that the governing party or coalition should not receive more than the Opposition party or coalition e.g. an average of the total entitlements (per vote) that each of the Government and Opposition parties would other-wise receive.

Public funding of parties and candidates should be contingent on compliance with bans or caps on private funding.

7. Should donations to political parties be banned altogether? If so, how should political parties be funded?

Response: Our preferred position is that private funding of political parties and candidates should be banned and that they should be funded by the State and thus by the whole community.

We refer to the submissions above. We refer to those that follow on aspects of alternatives.

8. If donations from an individual, corporation or organisation (including trade unions) were to be capped at a certain amount per year, what should the amount be:

[22] Discussion Paper, p 14

- o $1,500?
- o $1,000?
- o another amount?

Response. If private funding is to be permitted, it should be limited to membership dues and donations in all forms by natural persons totalling not more than $1,000 per person in each calendar year to each registered party and candidate. We note the precedent established on this and other issues by Canada[23] and the fact that adoption of the Canadian model was recommended at the 2020Summit. Such funds could be applied to a variety of purposes, for example, administration, research, training of candidates and so on during the period between elections but not during the three months immediately prior to the general election.
Critical to the operation of any such scheme is its transparency. That in turn requires timely disclosure of donations. Also critical is the level at which disclosure is required. We submit that the present system does not adequately address these issues.

The Discussion Paper records[24] that the Electoral Act 1992 requires that

- donations over $1000 from a single donor over 6 months must be disclosed
- donations of $1000 made during an election campaign must be disclosed within 15 week of the election
- donations in excess of $100,000 from the one donor in 6 months must be disclosed within 14 days of the last donation.

In addition, we note that under the Electoral Act 1992, loans received by candidates must be disclosed within the same 15 week period

With modern technology, the recipient or the recipient's agent within a very short time of the receipt of any donation can easily and rapidly convey the information to the authorities. The recipient or the recipient's agent[25] should be required to disclose any donation or commitment over $200[26] and its original source and do so within 24 hours of the making of the donation. Electronic lodgement of the information and verification of it should be mandatory and facilitated.
We also submit that any donations over the legal limit of $1000 should be forfeited to the Crown[27]

We note that, in Canada,[28] direct and indirect donations by corporations and unions are effectively no longer permitted. This issue needs to be addressed. Relevant to its consideration is whether and to what extent donations should be allowed from organisations existing to serve the social and political interests of their members and whether they should be limited, consistent with the argument

[23] For the details of the Canadian scheme see Sebastian Spano, *Political Financing*, http://www.parl.gc.ca/information/library/PRBpubs/prb0750-e.htm
[24] Discussion Paper,13.
[25] Re "agent" see Electoral Act 1992 s 209 and 304
[26] This appears to be the Canadian requirement; Canada Election Act 2000 s 424 in quarterly returns filed within 30 days of the end of the period to which it relates approach and under s 451 and 453 within four months following the polling day re contributions received; see also Spano, above,p.15. For reasons above, we regard the periods specified in the Canadian legislation also as being excessive.
[27] As provided in Canada Election Act s 405(4)
[28] Spano, above, p.3

put by Joo Cheong Tham (2008) in ''`A Case Against Uniform Contribution Limits`, Democratic Audit Discussion Paper 6/08'.

9. Should there be a ban on all Members of Parliament taking part in exclusive political fundraising functions with members of the private sector?

Response. Yes; such functions provide a significant opportunity for corruption and convey the cynical and damaging message that some are more equal than others and that that situation is acceptable in a democracy

10. How should this be regulated to ensure it does not limit legitimate grassroots fundraising?

Response. See above response to question 8

11. Should Members only be allowed to attend fundraisers where the price for attendance is less than a certain amount?

Response. We assume that this question is raised because of a concern about the practice of charging large sums to attend fundraisers and in return giving the opportunity to those attending to have exclusive time with government Ministers or shadow Ministers. The problem should be addressed directly by outlawing that practice –as is proposed by the government.

12. Should there be a cap on the amount of money political parties can spend on an election campaign?

Response. Yes.[29] Caps should apply to all participants in the political process. The aggregate expenditure cap should be limited to the highest previous current level of public funding and be increased periodically by the CPI increment. Caps for different types of participants should reflect the proposal above for a ceiling on the amount received such that the governing party or coalition should not receive more than the Opposition party or coalition

All campaign expenditure should be caught by the cap. It is important that the caps should apply throughout the entire electoral cycle paralleling disclosure regimes for contributions.

All expenditure should be subject to disclosure and subject to aggregation similar to that provided in reporting by public sector agencies. Continuous disclosure should apply throughout the entire electoral cycle paralleling disclosure regime for contributions.

[29] See the Canadian Model details for caps on election spending in Spano, above, at p.9

Public funding of political parties and candidates should be contingent on compliance with caps on campaign expenditure.

13. Should there be a specific limit on expenditure on political advertising?

Response. No. It should be left to parties and candidates to determine how best to use the funds received under the proposed system.

Lobbying

14. The Queensland Government has announced it will ban success fees, using the Canadian model - are there any additional changes to regulating lobbyists that would enhance integrity and accountability in public administration?

Response. We strongly support the ban proposed. The Canadian model should be fully adopted to cover success fees in respect of anything that lobbyists might achieve in the course of their lobbying activities, including making communications and arranging meetings. The government has indicated it is committed to that action.[30] Legislation should include penalties for breaches of its requirements, as is done in the Canadian legislation.

In addition the requirements for the lobbying industry should, like the Canadian, be spelt out in legislation. Offences should also be specified.

15. Is the Department of Premier and Cabinet the appropriate body to oversee the Lobbyist Register? If not, who should oversee the register?

Response. The present arrangement should have the consequence that the Premier is accountable to the Parliament, and ultimately responsible, for the supervision and operation of the Register. It may be said that it is appropriate in this area that the "buck stop" with the Premier, but the job of Premier is demanding enough and inevitably the Premier will be caught up in controversy and his or her reputation damaged whenever issues arise which are not the result of negligence or fault on his or her part.

The new Canadian Lobbying Act 2008 creates an independent office, the Commissioner of Lobbying, who is given the authority to enforce the Lobbying Act and the Lobbyists' Code of Conduct. We submit that that approach is to be preferred.

[30] Discussion paper, p.6

16. Should the Contact with Lobbyists Code be expanded to include other provisions which lobbyists must adhere to?

Response.[31] Whether legislation or a Code is used, the content should be changed from the present Code in a number of respects.

(a) Register of Lobbying Activity;

i) In addition to providing for a Register of Lobbyists**,** legislation should provide for online registration of each instance of lobbying activity ('registrable activity'), as prescribed – see below) via a website linked to every agency/minister being lobbied. (The use of an online registration system would avoid cumbersome, voluminous and inefficient paperwork).

ii) Registrable activity (i.e., lobbying) should be broadly defined as representing the interests of a third party to the Government including to any Minister, Parliamentary Secretary, private office staff, departmental staff or other staff within a portfolio, for reward in payment or kind. (the present detailed definition creates too many loopholes and complications).

iii) The website Registers should be public and accessible "live" i.e. registrations appear when submitted.

iv) Each registration of lobbying activity requires:

- The lobbyist's business name and Australian Business Number (ABN).
- The names of the owners, partners or major shareholders of any corporation/partnerships/etc of lobbyists, as applicable.
- Dates and details of positions held within any political party or as an elected representative.
- Contracts with any government department or other entity previously awarded to the client or related entity on whose behalf the lobbying is intended or has occurred.
- Any payments made to any political party or coalition of parties, whether by way of donation or other fund raising.
- The contact details: name, phone number, email address of the lobbyist. These contact details would be used for communication with the lobbyist.
- Website address (if any).
- The names and positions of all persons employed, contracted or otherwise engaged by the lobbyist to carry out the lobbying activities.
- The names of client/s for whom the lobbying activity is to be (or was) conducted, whether providing paid or unpaid services as a lobbyist.

[31] For overview of the issues and history see Attachment E;. Extract from Submission to Electoral Matters Committee, Parliament of Victoria, *Inquiry into Conduct of the 2006 Victorian State Election and Matters related thereto* by Ken Coghill and Joo-Cheong Tham

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- The name of the Minister or other person/s lobbied and the subject matter/s of the lobbying activity.

v) Persons or entities conducting lobbying activities have the right to voluntary registration to facilitate automated entry of details.

vi) Any regulatory scheme should be subject to annual audit and report by the Auditor-General.

(b) Contact with Lobbyists and Lobbying Activities. In addition to the ban on contact with persons holding themselves out to be lobbyists but unregistered, the following should be provided;

i) Ministers (& all private office, departmental and agency staff under their authority) be required to refuse to receive lobbying that has not been registered, but that, having regard to informal opportunities that arise for lobbying, the scheme allow retrospective registration in such cases (excluding appointments e.g. informal lobbying) within a period of grace of 7 days.

ii) Ministers be responsible for monitoring the register to assure that all lobbying activities related to the portfolio are registered and that any person failing to register lobbying is refused further access for lobbying for one year, except with the approval of the Responsible Minister (e.g. the Special Minister of State, if he/she is the Minister administering the Act).

iii) Ministers be responsible for ensuring that a record of the content of lobbying activities is kept for each instance of lobbying related to the portfolio.

iv) It be an offence for an individual or an organisation to issue a charge (tax invoice or cash in hand!) or receive a benefit for any unregistered lobbying activity and for the client (or related party) to pay such charge.

17) Should a person be required to sign a copy of the Contact with Lobbyists Code to indicate their acceptance of its requirements before they can be placed on the Register of Lobbyists?

Response. Yes, whether the content of the Code is expressed in legislation or not.

18) Should the government require that lobbyist-client contracts contain certain standard provisions?

Response. We support the proposal in the Discussion Paper that legislation be enacted requiring that contracts with lobbyists set out the nature and extent of the permitted scope of their activities.

19) Should registration on the Register of Lobbyists be subject to a good character requirement? Who should assess applications to determine whether an applicant is of good character?

Response. Yes. The Commissioner of Lobbying

Other Matters

In the Preamble the following should be added at the end of the third paragraph;

> "It is not appropriate for the professional lobbyist to seek to subvert the public interest while advancing the private interests of individuals or organisations"

We refer to Clause 7 of Contact with Lobbyists Code. It deals with the question of the time that must pass before former Ministers, Parliamentary Secretaries, their personal staff, and senior public officials can "engage in lobbying activities" in areas in which they had "official dealings". The waiting period is 2 years for Ministers, 18 months for the other people listed. The official dealings are those engaged in over the prior 2 years, except for senior public officials where the relevant period is 18 months.

We submit that there are several serious weaknesses in the provision.

(1) The ban is on "engaging in lobbying activities". "Lobbying activities" are limited by definition to "Communications with a government representative in an effort to influence government decision-making". As a result the Code is not breached by a former Minister joining a lobbyist immediately on retirement so long as he or she does not engage in communications.

(2) There are several exceptions to the ban on communications including

- communications with Ministers or Parliamentary Secretaries in their capacity as local members in relation to non-ministerial activities,
- communications in response to a call for submissions and
- communications of a "grassroots nature".

Depending on the particular issue, these exceptions will permit classic lobbying activity by Ministers or Parliamentary Secretaries immediately on retirement.

(3) The time periods are too short. They should be in line with the periods specified above on the issue of post-retirement employment – 5 years.

What we propose is a more rigorous set of requirements. But if we are to be serious about minimising the risk of corruption, we need to be serious about not permitting opportunities for corruption when that can be avoided.

Procurement processes

20. Government contracts are governed by strict procedures and legislation - are there any further ways in which accountability and transparency can be enhanced?

    Response. We submit that the key is full disclosure of

    - the terms on which tenders were made,
    - the terms of the tenders
    - the bases on which the tenders were accepted, including, where applicable, public sector comparators and like documents and
    - the terms of the contracts made.

21. Should probity auditors be required for all contracts above a financial threshold or should this requirement be assessed on the basis of risk?

    Response. We have not managed to identify the particular problems sought to be addressed. We note that at present both amount and complexity is taken into account in assessing the procurement. We suggest that whatever action is taken, it should not reduce the scope or rigour of scrutiny. We also ask whether there are any issues about the ensuring the independence of Probity Auditors? Is there a Code of Conduct or other Standard? If not, we submit that appropriate steps be taken; for example, that Probity Auditors be encouraged and supported to develop a Code of Conduct. Compliance with the Code of Conduct would be a requirement for the conduct of all probity audits.

22. Should probity audit reports be made public following appointment of the successful tenderer?

    Response. Yes. This is essential because so many government services involving public funds are provided by contracting them out. Disclosure is essential for transparency and accountability.

Transparency

23. Is information about the decision making processes of Government sufficiently available?

24. How else could this information be made available to the public?

Response. The recent enactment of the Right to Information Act has the potential to significantly improve access to such information – in particular by limiting exemptions and generally requiring production unless that is contrary to the public interest. Much will depend, as before, and elsewhere, on the culture that is allowed to operate within government. But we sense that there is a greater appreciation that openness of government increases confidence and trust in the democratic process and, over time, in the government of the day.

Prevention

25. How could prevention measures be enhanced?

26. Are there any other ways the CMC could assist public sector agencies to build capacity to prevent inappropriate conduct?

27. Is there a more effective way that the CMC could deal with complaints regarding police misconduct?

28. How could the current legislative protections for whistleblowers be enhanced?

Response. We are not in a position to respond in detail on these important matters beyond referring to the suggestions made above. As to the enhancement of the position of Whistleblowers, we note the fact that the Whistleblower Protection Act 1994 was amended to allow disclosure to Members of Parliament and to extend protection to people, such as nurses, engaged by public sector entities on individual contracts of service. We also note that the Queensland Government is considering how to best improve the present system in light, in particular, of the findings and recommendations of the three year research project," Whistling while they Work" funded by the Australian Research Council.[32] .

Are the mechanisms to identify unacceptable behaviour sufficient?

29. Are the current systems and processes in place to manage investigations appropriate?

Response. We are not in a position to respond in detail on the matters raised beyond referring to the suggestions made above. We note that on average the CMC assesses 3000 to 4000 complaints a year. We suggest that bearing in mind the likely constraints on government funding as a result of the GFC one of

[32] Discussion Paper,pp25-26

the main concerns for the future is likely to be ensuring that the CMC is adequately funded.

30. Should the CMC have jurisdiction over Government Owned Corporations which operate in a non-competitive environment?

Response. Yes, together with all Public Private Partnerships

Sanctions for unacceptable behaviour

31. Are current disciplinary proceedings sufficient to deal with the wide range of unacceptable behaviour that public officials could potentially engage in?

32. How can the current regime of sanctions for unacceptable behaviour be further enhanced to allow for appropriate responses?

33. How could the police disciplinary procedures be improved?

34. Should the Commissioner of Police have the power to dismiss an officer the Commissioner has lost confidence in?

Response. We are not in a position to respond in detail on the matters raised beyond referring to suggestions made above, in particular, the suggestion of legislating Codes of Conduct with sanctions for breaches where appropriate.

Further suggestions

35. Are there any other ways Queensland's integrity and accountability framework can be strengthened and improved?

Response. We have nothing further to add

ATTACHMENTS

Attachment A: Suggested Changes[33] to the Code of Ethical Standards, Legislative Assembly[34]

1. PURPOSE OF THE CODE

The purpose of this code is

- assist members to better understand the nature of their public office and the distinct obligations that arise by virtue of that office;

- provide an educative tool to assist members manage conflicts of interest and resolve ethical dilemmas; and

- provide an overview of the current obligations which members are required to observe.

The supremacy of the institution of Parliament in a representative democracy is acknowledged. The underlying basis of this code is that the mandate of a member of the Legislative Assembly ("member") is granted by the free choice of the people and the power conferred is entrusted to each member by the people to be exercised at all times by the member in the best interests of the people.

2. STATEMENT OF FUNDAMENTAL PRINCIPLES

The following six fundamental principles draw together the various concepts underpinning the duties of, and obligations on, a Member of Parliament, to assist members to better understand their representative role and responsibilities.

1. Integrity of the Parliament

The public's confidence in the institution of Parliament is essential. Members are to strive at all times to conduct themselves in a manner which will tend to maintain and strengthen the public's trust and confidence in the integrity of Parliament and avoid any action which might diminish its reputation, standing, authority or dignity.

2. Primacy of the public interest

Members are elected to act in the public interest and make decisions solely in terms of the public interest. Members also have a continuing duty to avoid conflicts of interests and a continuing duty, to declare any private interests relating to their public duties as they arise, and to resolve them in a way that protects the public interest

1A Holding the Executive to Account

[33] Shown with track changes
[34] Adopted by the Legislative Assembly on 17 May 2001. Legislative Assembly (Queensland), *Votes and Proceedings*, No. 12, 17 May 2001, p 112.

The Westminster principles of responsible government apply and members have a continuing duty to hold the Executive Government to account

3. Independence of action

Parliamentary democracy requires that members make decisions, and be seen to make decisions, in accordance with the public interest and not because they are under any financial obligation or influence or motivated by personal or party benefit Therefore, members are not to place themselves, or appear to place themselves under any financial or other obligation to outside individuals or organisations, including the executive government, that might influence them in the discharge of their duties and responsibilities, and must act at all times in accordance with rules set down by the Parliament for outside appointments.

4. Appropriate use of information

In the course of their duties members often receive information which is either confidential or prized (that is, not available to the general public). Members are not to misuse any confidential or prized information, particularly for personal gain.

5. Transparency and scrutiny

It is vital to parliamentary democracy that the public has confidence in the integrity of the decision-making process of Parliament. To ensure transparency, public scrutiny and public confidence, it is necessary that each member disclose their pecuniary interests on a continuing and ad hoc basis when the need arises

6. Appropriate use of entitlements

Members are provided certain entitlements to assist them to discharge their duties and responsibilities. Members are to ensure that they comply with any guidelines for the use of these entitlements.

Attachment B; Suggested changes to the Minister's Code of Ethics

1. Guiding Principles

The mandate of Ministers and Parliamentary Secretaries is granted by the free choice of the people and the powers conferred are entrusted to them by the people to be exercised at all times in the best interests of the people.

2. Accountability.
Extract from "Be Honest Minister"

"Discharge of Accountability

Ministers may discharge their responsibility to be accountable at one or more of six levels. The appropriate level of accountability will vary according to circumstances and judgements related to the details of each case.

The current Guide is silent on how a minister may demonstrate accountability for an event which has occurred or a decision that has been taken within an area for which he or she is assigned responsibility.

The levels at which ministers discharge their responsibilities have been clearly identified by British scholar, Diana Woodhouse. These are adapted here.

There are six accountability levels which may be summarised as:

- **redirecting the question to the relevant minister;**
- **providing all relevant information;**
- **providing full explanations;**
- **taking any necessary remedial action;**
- **accepting personal culpability; or,**
- **resignation.**[*]

The six accountability levels involve the following obligations:

- **redirecting the question applies where the matter falls outside the minister's responsibility and is redirected to the ministerial colleague, other government or non-government entity with responsibility;**
- **providing all relevant information is appropriate when the only requirement is for the minister to provide some factual information concerning a matter within an area for which he or she has responsibility;**
- **providing a full explanation is where, in order to discharge responsibility, a minister provides an explanation of the events or actions taken but where no corrective or remedial action is required;**

[*] see Woodhouse, Diana (1994). *MINISTERS AND PARLIAMENT. Accountability in Theory and Practice.* Oxford: Clarendon: pp.28-38.

- **taking any necessary remedial action concerns instances where some action was or is required in response to events which have occurred, or decisions have been taken by the minister or any subordinate, which require some corrective or remedial action;**

- **ministers are expected to accept personal culpability for their own acts and omissions and for those of:**
    - **their heads of department and their personal staff,**[35] **and**
    - **other instances in which they have participated or of which they were aware or should have been aware;**

In determining whether a minister is personally culpable, ignorance of a matter does not excuse the acts or omissions of the minister where the minister should have known or should have ensured the matter was drawn to the minister's personal attention. Without limiting the circumstances in which ministers should have known of any matter, they are deemed to have the knowledge of their heads of department and others who report directly to them and all members of their personal staff.[36]

Resignation is appropriate where a minister has lost the confidence of the House of Parliament or the Prime Minister in the minister's capacity to satisfactorily discharge the responsibilities of the office. In the rare event that a minister declines to act on advice to resign, the Prime Minister may recommend to the Governor-General that the minister's commission be withdrawn, after which the minister ceases to hold office.

[35] John Quiggin, (2006) *Australian Financial Review*, 2 March. Note also PSU Group Submission, where the point was made that public servants dealing with ministerial staff need to be confident that the actions of ministerial staff are fully authorised (p 2).

[36] ibid.

Attachment C. 13. POST MINISTERIAL OR PARLIAMENTARY SECRETARY CAREER

It is a condition of appointment that, after ceasing to hold appointment as a minister or parliamentary secretary, for a period of five years or two years respectively, he or she may not accept any substantial benefit (e.g. employment, a directorship, provision of services pursuant to a contractual relationship, gift or other relationship)

There has been a perception of impropriety where holders of ministerial office have accepted lucrative employment or directorships shortly after leaving office. This is especially concerning where the corporation benefited from dealings with the minister, parliamentary secretary or his/her department.

It is important to remove the potential for perceptions that favourable treatment of a business could have been in anticipation of any form of benefit or reward.

A five/two year "cooling off" period will ensure that it is much less likely that either party would be party to such an arrangement.

- **relating to contracting or accepting employment with, and making representations to, entities with which they had direct and significant official dealings, or, in the case of former ministers, contacting former Cabinet colleagues[37];[38] or**

in relation to lobbying of the government or any other body for the exercise of government discretion, legislative authority or the allocation of public resources.[39]

[37] Taken directly from s.35, *The Federal Accountability Act 2006* (Canada).

[38] Approaches taken in other jurisdictions vary and were surveyed in Ian Holland (2002) 'Post-separation Employment of Ministers' *Department of the Parliamentary Library* available at http://www.aph.gov.au/Library/pubs/rn/2001-02/02rn40.htm and Deirdre McKeown, (2006) 'A survey of codes of conduct in Australian and selected overseas parliaments' *Department of the Parliamentary Library* available at http://www.aph.gov.au/library/intguide/POL/conduct.htm. For example, where a Code approach is taken and bans imposed on related employment, it will be found that there is a general ban of two years in South Australia and a permanent ban prohibiting the changing of sides in the USA and Canada.

[39] A five-year ban on lobbying is provided for in legislation passed in 2006 in Canada as part of the new Harper Government's election policy program (*The Federal Accountability Act 2006*). It is now found in The Lobbying Act 2008.

Attachment D; Parliamentary Standards Commissioner

"We recommend the following[40];

A Parliamentary Standards Commissioner should be appointed as an independent officer of the Parliament (similarly to the Victorian Auditor General and Ombudsman). The Commissioner's main responsibilities would be:

- Overseeing the maintenance and monitoring the operation of the registers of members' interests;
- Providing advice to each House about the provisions of any code of conduct adopted by either House (code), whether existing or recommended to be introduced;
- Monitoring the operation of the each code and, where appropriate, proposing possible modifications to the Parliament.
- Providing advice on a confidential basis to individual members (including ministers) and to each House about the interpretation of the any code;
- Preparing guidance and providing training for members (including ministers) on matters of conduct, propriety and ethics;
- Reporting to the Parliament, and thereby the public, upon:

  1. Compliance with the principles and spirit of the each code;
  2. Any failure (whether wholly, partly or in spirit) to comply with the provisions of the code;
  3. The extent and seriousness of any failure to observe the code.

The Parliamentary Standards Commissioner would not have investigative responsibilities or powers. Breaches of the code would be a matter for determination by the House, which may include reference to the Privileges Committee. Members should not have immunity from prosecution for breaches of law.
In exercising the functions of the office, the Commissioner should have the privilege of the Parliament. The Commissioner would be appointed on the recommendation of an all-party Parliamentary Committee. The person could be appointed part time. There may well be advantages in appointing the same individual to a number of Australian jurisdictions in which the same or a very similar office is established."

[40] These proposals were advanced by Dr Coghill in his submission to the Law Reform Committee of the Victorian Parliament in the Committee's review of the Members of Parliament(Register of Interests)Act 1978 and developed from original proposals of the ASPG Accountability Working Party.

Attachment E. Extract from Submission to Electoral Matters Committee, Parliament of Victoria

INQUIRY INTO CONDUCT OF THE 2006 VICTORIAN STATE ELECTION AND MATTERS RELATED THERETO

By Ken Coghill and Joo-Cheong Tham

LOBBYING[41]

A. Introduction

Major issues of accountability are associated with lobbying activity. Lobbying has frequently involved unethical or illegal activity which corrupts democratic principles. The dramatic revelations in Western Australia in early 2007 and the prosecution of US Congressional lobbyist Jack Abramoff for corrupt activities are merely the most recent expressions of a long-standing problem. Premier John Cain banned contact with lobbyists, but such an absolute ban also has its problems and denies some opportunities for ethical activities. A major effort to reduce the corrupting potential of lobbying is long overdue in Victoria.

B ***Categorization of approaches:***

In the context of the lobbying of government ministers, regulation may be regarded as 'the control, direction or adjustment of a private or quasi-private activity for the purpose of some public benefit.'[42]

Greenwood and Thomas suggest that schemes to 'regulate interest representation or the interaction between private interests and government' focus on the activities of legislators and/or lobbyists. Attempts to regulate lobbying may be composed of such elements as:

- measures directly aimed at the regulation of lobbying;
- indirect regulations and unwritten rules that resemble regulations;
- schemes aimed at governing the relationship between legislators and outside interests;
- measures based around the regulation of interest groups or their role within governmental structures; and
- co-existing self-regulatory arrangements.[43]

(b) Advantages and disadvantages of regulating lobbying:

The Sixth Report of the House of Commons Committee on Standards in Public Life provides the following useful summary of selected arguments in favour and against the regulation of lobbying activities:[44]

[41] Acknowledgement: Genevieve Grant Llb BA assisted with research for this section.
[42] Justin Greenwood and Clive S Thomas, 'Regulating Lobbying in the Western World', *Parliamentary Affairs*, April 1998.
[43] Ibid.
[44] See pages 88-89.

Advantages

- The lobbying registration schemes currently in existence in the United States and Canada provide a great deal of information to the public about the contacts between governments and those trying to gain access to and influence with them. This makes it more difficult for unfair privileged access to be granted, and reduces the opportunity for secret deals between Government and outside interests.

- Compulsory regulation could force lobbyists who do not take part in voluntary schemes to comply with good practice. At present, it is not known how many people and organisations undertake lobbying; if they were required to register and adhere to a code, their activities would be opened to scrutiny, and they could be made to account for them.

- Formality could bring consistency in regulation, which might be preferable to the present wide range of voluntary registers and codes. It could be said to be unfair on lobbyists, and a distortion of the market for these services, that those who abide by the rules of their professional bodies are disadvantaged by the lack of controls on others who undertake the same sort of work.

Disadvantages:

- International experience suggests that the credibility of compulsory regulation schemes is often diminished by amendments to the rules. An elaborate, frequently-changing system could produce unfairness, evasion and bureaucratic complexity. Perhaps partly as a result, such schemes have little impact on the general public - in many countries few people, apart from journalists and lobbyists themselves in search of market information, consult the registers.

- Defining lobbying, and distinguishing it from the simple provision of information, can be difficult. Regulations on lobbyists would have to be framed in such a way as to avoid the unnecessary recording of hundreds of harmless and informal conversations and contacts.

- Defining a `lobbyist' would also be difficult, given the number of professions now engaged in such work: lawyers, accountants, management consultants and others are employed by companies, charities and other bodies, both `in-house' and on a fee basis, to undertake lobbying work, or work that could be described as lobbying. There is also the danger, as noted in the First Report, that the creation of a category of `registered' or `licensed' lobbyists would give the impression that access to government could only be gained through the employment of that kind of company.

- The self-regulation schemes operated by lobbyists' organisations are already moving towards greater convergence. An important motivation behind this consolidation of standards may be considered to be the need to increase public confidence in their services, which is likely to be at least as effective as any imposed scheme of registration.

Comment

- The above disadvantages seem to arise from regulating lobbyists rather than the activity of lobbying. This could be overcome by regulating of lobbying activity (as opposed to lobbyists).
- Similarly, an emphasis on disclosure and transparency would reduce the reliance on intervention by a regulator.

C. Developments in Australia

(a) The Federal Level

The last concerted attempt to regulate lobbying in the Australian federal sphere occurred in December 1983. The Hawke Government, regarding regulation as inappropriate, established a scheme for the registration of lobbyists and guidelines for ministerial interaction with them.

A general register for lobbyists and their clients was introduced on 1 March 1984 by executive decision rather than legislation. It defined a lobbyist as 'a person or company who for financial, or other advantage, represents a client in dealings with Commonwealth Government Ministers or officials.' Warhurst suggests that '[t]his not only excluded the majority of lobbying and lobbyists (broadly defined), including employees of corporations and national associations, but also excluded some potential targets, such as backbench Members of Parliament, who were certainly targets in the political lobbying of the day - and still are.'

A lobbyist wishing to gain access to ministers and officials and who was engaged in a 'registerable activity' was obliged to provide, on a confidential basis, details of the particular client and a brief description of the activity to be undertaken.'

'Registerable activity was listed as:

(a) to make or amend legislation;
(b) to make or change government guidelines or policies;
(c) to influence government decisions on awarding contracts or tenders, or appointments to public office; and
(d) on other significant matters determined from time to time by the Minister for Administrative Services.

The following activities were deemed to be not registerable and therefore not covered by the scheme:

- inquiries about publicly available information;
- requests for clarification of, or rulings pursuant to, current legislation, guidelines or policies;
- applications for decisions within existing legislation, guidelines or policies other than those applying to the award of contracts or tenders.

In addition the scheme did not apply to:

- appearances before boards, commissions, inquiries, tribunals or other bodies that allow representation on behalf of clients; and
- representations made directly by representative organisations, peak councils, professional associations and community interest groups.

Fitzgerald suggests that '[t]he last exemption made a mockery of the scheme by drawing a distinction between paid lobbyists and representative organisations, peak councils, professional associations and community interest groups, all of which are in the business of lobbying either to advance or protect their interests.'

The Hawke Government's scheme did not establish a public register, but rather there were two confidential registers for lobbyists:

- the Special Register for lobbyists whose clients were foreign governments or their agencies; and
- the General Register for other lobbyists and their clients.

Access to the information contained in the registers was to be available only to `ministers and government officials who have a need to know'. Consequently, key among the failings of this system is that it allowed information about the name of the lobbyist, the client and the activity undertaken to remain confidential.

In 'Locating the Target: Regulating Lobbying in Australia', John Warhurst[45] notes that the Lobbyists Registration Scheme was disbanded in 1996 with little opposition and promises to revise the Guide on Key Elements of Ministerial Responsibility to address relations between government and lobbyists. Warhurst suggests that '[t]he scheme had always been largely a public relations exercise, to meet a short-term political need. It had no teeth and had served no useful purpose… [It] is seen not so much as a failure as a non-event.'

In *Lobbying in Australia*,[46] Julian Fitzgerald proposes the reintroduction of a registration system. His key recommendations are that the revised scheme:

- maintain the previous definition of 'registerable activity';
- widen the list of included groups to include the formerly excluded representative councils, professional organisations and community groups,[47] as well as management consultants and law and accountancy firms;[48]
- be publicly accessible; and
- convey the links between the lobbyists and their clients ('It is nonsense to suggest that some commercial-in-confidence provision should prevent the public listing of paid lobbyists and their clients or that their lawyers' privacy is being invaded by being listed on a public document').

Fitzgerald resolves that 'ultimately, the question facing each system is not limiting the access of lobbyists to the government and the legislature, but controlling their influence on policy outcomes, so that the concept of the 'public good' is not undermined in favour of the vested interest.'

(b) New South Wales

The August 2005 Independent Commission Against Corruption *Report on investigation into planning decisions relating to the Orange Grove Centre* cited a number of difficulties with respect to attempts to regulate lobbying, namely:

- It can be difficult for a regulatory regime to definitively capture all lobbying activities and types of lobbyists. For example, information gathering and dissemination cannot always be clearly distinguished from lobbying activities. Furthermore, people like Mr Ryan may not be captured by a legislative definition of a lobbyist.
- Requiring organisations to register as lobbyists could create a barrier to free and open access to decision-makers. A registration requirement could disadvantage small community organisations who may find the provision of the required information a burden. This could also discourage smaller organisations from participating in an important democratic process.
- The registration of professional lobbyists could create a divide between registered lobbyists, and volunteer groups and members of the public who are not registered. This could result in

[45] John Warhurst, 'Locating the Target: Regulating Lobbying in Australia', *Parliamentary Affairs* 51 (4) (Oct 1998).
[46] Julian Fitzgerald, *Lobbying in Australia,* Rosenberg Publishing, 2006.
[47] Fitzgerald notes that in 1983 these groups were excluded on the basis that their interests are publicly known. Fitzgerald suggests that though this may be true in a general sense, when these groups are engaged in lobbying activities 'their interests are very particular.'
[48] The latter call for a more exhaustive approach also supported by lobbyist Bruce Hawker of Hawker Britten. Hawker suggests that a register should extend past professional lobbyists to law and accounting firms, in house lobbyists in corporations, CEOs. See ABC Radio National Breakfast, *Lobbying Industry*, Sheryle Bagwell, 7 March 2007, available for download from http://www.abc.net.au/rn/breakfast/stories/2007/1864936.htm.

a perceived advantage for registered lobbyists as a result of their official status. It could also create a situation where members of the public feel obliged to engage paid lobbyists.

In this context, the Commission encouraged the revision of the NSW Ministerial Code of Conduct to provide better guidance for ministers in their dealings with lobbyists. It concluded that measures to place the onus on public officials to ensure that lobbying is undertaken in accordance with appropriate practices are more desirable than a regulatory regime.

In January 2006 the NSW Premier responded by issuing *Guidelines for Ministers, ministerial staff and public officials in dealing with lobbyists* and the *Protocol for the management of allegations made to Ministers, ministerial staff or public officials during lobbying.*[49]

D. International Developments

(a) Scotland

Recent developments in Scotland are detailed in the ICAC Orange Grove Report.

In 2002 the Scottish Parliament's Standards Committee published a report on lobbying after an 18-month inquiry. The report proposed that the existing lobbying provisions in the Code of Conduct for Members of the Scottish Parliament be enhanced. The existing provisions of the Code focused on statutory lobbying regulations. These included a prohibition on Members advocating any matter on behalf of a person by specified means or urging other members to do so in return for any remuneration. The Committee proposed that the Code be enhanced to include additional practical advice for Members in dealing with lobbyists:

- do ensure that you are aware of which organisation, company etc, if any, a lobbyist may be representing
- do not do or say anything that could be viewed as granting a lobbyist preferential treatment
- always consider whether meeting one group making representations on a particular issue should be balanced by offering other groups a similar opportunity to make representations
- when meeting with lobbyists consider having an assistant or researcher present who can make a note of the meeting
- do not do anything which breaches or may be interpreted as breaching the Code of Conduct and, in particular, be careful about accepting hospitality and gifts from lobbyists
- consider keeping a record of all contact with lobbyists.

Ultimately, proposals were drawn up that sought to regulate lobbying by requiring the registration of 'commercial lobbyists'.

(b) Canada

The Canadian approach has encompassed a code of conduct, a complaints procedure and the statutory registration of commercial lobbyists.

[49] See www.premiers.nsw.gov.au/TrainingAndResources/Publications/MemosAndCirculars/Memos/2006/M2006-01.htm.

The Canadian Federal Government instigated the Canadian Lobbyists Registration Act (1988) in response to the growth of the industry and sleaze allegations against Government Ministers. Statutory regulation was considered as necessary and with this the consequent methods of enforcement and control/arbitration.

Amendments to the Act were made in 1993 to improve and clarify certain aspects. In recognition of the areas of lobbying activity in Canada, lobbyists are required to register their activities whether they be in the legislature, executive or bureaucracy. The Register initially drew a distinction between who should register; professional lobby firms were required to give more detailed information on their clients and finances than those lobbyists representing corporations and interest groups. This two-tier distinction had to be subsequently amended in 1993 as it proved too difficult to draw.

The Canadian Lobbyists Registration Act 1988 required the registration of lobbyists paid to lobby federal public officials in relation to legislative proposals, policies or programmes, and the awarding of grants. The Act covered three types of lobbyists:

- consultant lobbyists who are paid to lobby for clients;
- in-house lobbyists (corporate): These are employees who, as a significant part of their duties, lobby for an employer that carries out commercial activities for financial gain;
- in-house lobbyists (organisations): These are not-for-profit organisations in which one or more employees lobby, and the collective time devoted to lobbying amounts to the equivalent of a significant part of one employee's duties.

The registration process requires the disclosure of certain types of information, including:

- information about the organisation on whose behalf lobbyists are lobbying;
- specific information about the lobbying subject matter;
- the name of each department or other government institution lobbied;
- the communication techniques used by the lobbyist.

The register is available to the public. Lobbyists who fail to comply with registration requirements have been investigated and fined.

Further developments occurred in the wake of the 2006 Canadian election. On December 12, 2006 the *Federal Accountability Act* received Royal Assent. Among the changes that this act makes to Federal statutes are several relating to the *Lobbyists Registration Act (LRA)*. These changes include, but are not limited to, the following:

- Changing the name of the LRA to the *Lobbying Act*.
- Establishment of a new Commissioner of Lobbying as an independent Agent of Parliament, with expanded investigative powers to ensure compliance with the *Lobbying Act* as well as an education mandate.
- Introduction of the concept of a Designated Public Office Holder (DPOH). These individuals are certain senior officials, Ministers and others.
- Monthly disclosure by lobbyists of certain lobbying activity details and the obligation for DPOH to verify this information if requested by the Commissioner of Lobbying.
- A prohibition for DPOH on registering and lobbying the Government of Canada for five years after leaving office.
- A ban on any payment or other benefit that is contingent on the outcome of any consultant lobbyist's activity. As a complementary measure, the Government will amend the *Financial Administration Act* to require that all government contracts and agreements contain provisions that prohibit the payment of contingency fees to a lobbyist specific to that transaction.
- Extension from 2 to 10 years of the period during which possible infractions or violations under the *Lobbying Act* and the *Lobbyists' Code of Conduct* can be investigated and prosecution can be initiated.
- Doubling of the monetary penalties for lobbyists who are found guilty of breaching the requirements of the *Lobbying Act*.

The recent reforms have not proved foolproof, however. As recently as 8 March 2007 Canadian media reported on the story of 'a well-connected Conservative lawyer who represented the prime minister and other Tory MPs while lobbying the government.'[50]

As at that date the reformed Act had been passed but the government was in the midst public consultations prior to drawing the regulations to provide the detail of the restrictive lobbying provisions.

(c) The European Parliament

Currently all lobbyists dealing with the European Parliament must sign a Register, detailing name and address of firm; client details and subject of interest. They must also sign an accompanying Code of Conduct in order to be issued with a pass. The Register is administered by the College of Quaestors and is open to the public. Note should also be made of the attention given, in drawing up this legislation, to the registration of MEPs' Assistants and secretarial staff.

The European Transparency Initiative was launched in November 2005. One major topic for consideration was the need for a more structured framework for the activities of interest representatives (lobbyists).

The Transparency Initiative was the subject of a Green Paper (Commission of the European Communities - Green Paper: European Transparency Initiative, May 2006).[51] The Green Paper canvassed a voluntary system of registration, with incentives to register. It proposed that

> [t]he Commission could develop and manage a web-based voluntary registration system for all interest groups and lobbyists who wish to be consulted on EU initiatives. Groups and lobbyists which register certain information about themselves would be given an opportunity to indicate their specific interests and, in return, would be alerted to consultations in those specific areas. Consequently, only lobbyists who have registered would be automatically alerted by the Commission. To qualify for entry in the register, applicants would need to provide information on who they represent, what their mission is and how they are funded. Applicants would also have to subscribe to a code of conduct… which would be enforced credibly and transparently. From the point of view of the general public, the register would provide a general overview, open for public scrutiny, of groups engaged in lobbying the Commission.

The Green Paper made further proposals as follows:

> [T]he Commission considers that greater transparency in lobbying is necessary. It considers that a credible system would consist of:
> - a voluntary registration system, run by the Commission, with clear incentives for lobbyists to register. The incentives would include automatic alerts of consultations on issues of known interest to the lobbyists;
> - a common code of conduct for all lobbyists, or at least common minimum requirements. The code should be developed by the lobbying profession itself, possibly consolidating and improving the existing codes; and
> - a system of monitoring and sanctions to be applied in case of incorrect registration and/or breach of the code of conduct. The Commission does not consider that a

[50] See 'Tories defend lobbyist loophole' by Bruce Cheadle (8 March 2007) at http://cnews.canoe.ca/CNEWS/Canada/2007/03/08/pf-3715756.html.
[51] Submissions closed in August 2006 and a report is currently being prepared.

compulsory registration system would be an appropriate option. A tighter system of self-regulation would appear more appropriate. However, after a certain period, a review should be conducted to examine whether self regulation has worked. If not, consideration could be given to a system of compulsory measures – a compulsory code of conduct plus compulsory registration.

(d) European Union

- Following consultation as part of the EU's European Transparency Initiative, the European Commission has determined to produce a code of conduct and establish a voluntary public register for interest representatives working to influence decision making in EU institutions.[52] It is suggested that the initiatives for groups to register are reputational and 'the recognition of their contributions as representative of their specific sectors and the possibility to receive alerts for consultations in their areas of interest.'
- The voluntary register will be implemented from Spring 2008 until Spring 2009, after which time it will be evaluated.
- Criticism of this approach includes the weakness of the incentives and the effect that trialling a voluntary system will simply delay for some years the achievement of effective EU lobbying transparency.

(e) United Kingdom

The First Report of the House of Commons Committee on Standards in Public Life considered the need to introduce a statutory scheme of regulation for lobbyists. This avenue was ultimately rejected however, on the grounds that to do so 'would create the danger of giving the impression, which would no doubt be fostered by lobbyists themselves, that the only way to approach successfully Members or Ministers was by making use of a registered lobbyist. This would set up an undesirable hurdle, real or imagined, in the way of access.'[53]

A ban on paid advocacy was introduced, along with new rules on registration of Members' interests. These developments occurred against a purported background of increasing self-regulation by lobbying firms.

The issue of lobbying was further considered in the Sixth Report of the House of Commons Committee on Standards in Public Life, published in January 2000.[54]

The Sixth Report recommended that Ministers and members of the civil service 'should be required to keep a record of contacts with outside interests. A code to improve the transparency of government consultation exercises is also recommended.' The issue of the public availability of the records kept was deferred to the outcome of the progress of the Freedom of Information Bill then before Parliament. Consideration was also given to the role of All Party Groups,[55] and it was recommended that a public register of these groups be established.

Ultimately however the Sixth Report maintained the previous stance that 'there should be no statutory or compulsory system for the regulation of lobbyists', commenting that 'the current strengthening of self-regulation by lobbyists is to be welcomed.'[56] The Report elaborated that:

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[52] EU's European Transparency Initiative : see http://ec.europa.eu/commission_barroso/kallas/transparency_en.htm,
[53] First Report, p36.
[54] Note that the 'Lobbygate' affair of 1998 had occurred in the intervening period.
[55] All-Party Groups are 'composed of backbench members of the House of Commons, or of both Houses of Parliament, some of which receive financial support from outside organisations. More common is indirect support in the form of administrative and secretarial assistance. There are also a small number of arrangements whereby Parliamentary groups are staffed by a lobbyist or public relations consultant, apparently funded by a commercial or other supporter.' These groups were further considered in the Ninth Report of House of Commons Committee on Standards and Privileges, May 2006.
[56] Sixth Report, p89 (see http://www.archive.official-documents.co.uk/document/cm45/4557/chap7.pdf).

> In the opinion of the Committee, the weight of evidence is against regulation by means of a compulsory register and code of conduct. Lobbyist regulation schemes can help make government more open and accountable, providing useful information about influences on decision-making. But we believe that the amount of information that could be made available through a register would not be proportionate to the extra burden on all concerned of establishing and administering the system. There is also still force in this Committee's original objection, that such a system could give the erroneous impression that only 'registered lobbyists' offer an effective and proper route to MPs and Ministers.

Following is the outline of a suggested scheme which attempts to build on the experience of other jurisdictions and taking advantage of contemporary information technology. It is centered upon each activity of lobbying, rather than upon issue/s. Registration would be through a publicly accessible website. NB All organisations that engage in lobbying could be expected to have access to the internet.

Whilst we acknowledge that there are also concerns about direct lobbying by entities, our current proposals are limited to paid lobbying on behalf of clients.

We, therefore, recommend that:

the Committee recommends legislation to regulate lobbying as follows:

> The Act provide for on online registration of each instance of lobbying activity ('registerable activity', as prescribed – see below) via a website of every agency/minister being lobbied. (The use of an online registration system would avoid cumbersome, voluminous and inefficient paperwork).
>
> Register able activity (i.e., lobbying) be defined as representing the interests of a third party to the Government including to any Minister, Parliamentary Secretary, private office staff, departmental staff or other staff within a portfolio, for reward in payment or kind.
>
> The website be public and accessible "live" i.e. registrations appear when submitted.
>
> Ministers (& all private office, departmental and agency staff under their authority) be required to refuse to receive lobbying that has not been registered, but that, having regard to informal opportunities that arise for lobbying, the scheme allow retrospective registration in such cases (excluding appointments e.g. informal lobbying) within a period of grace of 7 days.
>
> Ministers be responsible for monitoring the register to assure that all lobbying activities related to the portfolio are registered and that any person failing to register lobbying is refused further access for lobbying for one year, except with the approval of the Premier.
>
> Ministers be responsible for ensuring that a record of the content of lobbying activities is kept for each instance of lobbying related to the portfolio.
>
> It be an offence for an individual or an organisation to issue a charge (tax invoice or cash in hand!) for any unregistered lobbying activity
>
> It be an offence for the client (or related party) of a lobbyist to make a payment to any person who conducts unregistered lobbying on behalf of that client.
>
> Each registration of lobbying activity requires:

1. The lobbyist's business name and Australian Business Number (ABN).
2. The names of the owners, partners or major shareholders of any corporation/partnerships/etc of lobbyists, as applicable.
3. Dates and details of positions held within any political party or as an elected representative.
4. Contracts with any government department or other entity previously awarded to the client or related entity on whose behalf the lobbying is intended or has occurred.
5. Any payments made to the governing political party or coalition, whether by way of donation or other fund raising.
6. The contact details: name, phone number, email address. These contact details would be used for communication with the lobbyist.
7. Website address (if any).
8. The names and positions of all persons employed, contracted or otherwise engaged by the lobbyist to carry out the lobbying activities.
9. The names of client/s for whom the lobbying activity is to be (or was) conducted, whether providing paid or unpaid services as a lobbyist.
10. The name of the Minister or other person/s lobbied and the subject matter/s of the lobbying activity.

Persons conducting lobbying activities have the right to voluntary registration to facilitate automated entry of details, especially 1-6 above.

This scheme be subject to annual audit and report by the Auditor-General.