Review of the Integrity Act 2009

Submission of the Accountability Round Table

Executive Summary

The Issues Paper identifies 2 principal policy objectives of the Integrity Act relevant to the regulation of government lobbying

> *Access to government in a democracy*. "Free and open access to the institutions of government is a vital element of our democracy."...
>
> *Ethical and transparent lobbying.* "The public has a clear expectation that lobbying activities will be carried out ethically and transparently....".

The Act fails to serve these objectives because of the significant gaps in its coverage of lobbying activity, the failure to address the issue of the "revolving door" between senior government officers and lobbyists and business and the absence of specific direct sanctions for breaches of the Lobbying Code.

What is required to serve the identified policy objectives is:

- the extension of the registration of lobbyists to all who take part in lobbying activity professionally and of the regulatory scheme to all who do so whether for third parties or not and whether paid or not.
- a real and timely reporting and publishing of all lobbying activity including information about the subject matter discussed;

- the closure of the “revolving door” for a cooling off period of five years. Alternatively, a procedure should be established in the Act, under which former senior government officers could seek exemption from that cooling off period.

Having regard to the policy objectives, and their importance, in considering the ambit of any regulatory system for lobbying, the onus is on those attempting to exclude particular lobbying activity from regulation, or to qualify protections, to demonstrate a clear need to do so.

The Submission

Introduction

This submission will focus on the lobbying regime of the Integrity Act 2009 and the Issues of policy and implementation it raises[1]. We propose to discuss those issues and to then turn to the questions posed in the Issues Paper which relate directly to the lobbying regime, questions 4 to 8.

The Issues Paper -- Lobbying Issues

Underlying Assumptions of principle and fact and guiding principles

The Issues Paper[2] identifies the following important propositions.

> ***Definition of lobbying***. “In effect, lobbying can be any communication by a member of the community seeking to express their views or interest to a government representative on a matter that is subject to a decision of government”.
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> ***The role of professional lobbyists in a democracy.*** Professional lobbyists play a legitimate role in the democratic process by assisting individuals and organisations to communicate their views on matters of public interest to government, and so may help to improve outcomes for individuals and the community as a whole.”

[1] They have been the subject of reviews at Federal and State level recently. The Accountability Round Table 2010 and 2011 submissions to the Federal government and Parliament are available on the ART website – www.accountabilityrt.org .

[2] See “Background” Issues Paper p.3.

Policy Objectives.

> ***Access to government in a democracy***. "Free and open access to the institutions of government is a vital element of our democracy...."
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> ***Ethical and transparent lobbying***. "The public has a clear expectation that
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> (i) lobbying activities will be carried out ethically and transparently, ***and that***
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> ***(ii)*** government representatives who are approached by lobbyists are able to establish whose interests lobbyists represent so that informed judgement can be made about the outcome they are seeking to achieve" [3].

The Accountability Round Table supports the above propositions but submits that further elaboration is needed of the policy objectives before considering the issues raised in the Issues Paper[4].

- *Free and open access to government in a democracy and good government*. Implicit in the proposition of free and open access is free and open access for all. But bearing in mind the limited time available to those in government and Parliament and the disparities in resources, influence and power of people and organisations in the community, some will achieve more and better access than others. Further unless the community knows in ample time who has had access about what, those in the community concerned may not be aware of the need to exercise their right of access. This situation has the potential to result in bad government because the government may hear only one view.

  Parliaments cannot legislate for equal access but they can improve the opportunity for equal access by requiring real transparency. That involves not only timely recording and disclosure of all those involved in lobbying but also the timely disclosure and recording of all lobbying activity, including its subject matter, and the ready availability of that information to the community. Only in that way can the public have confidence that democracy is being served by the use of third party and in-house lobbyists. [5]

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[3] Subparagraph numbers and emphasis added.

[4] See also the OECD Principles for Transparency and Integrity in Lobbying" cited in Dr Solomon, "Is lobbying:Is registration sufficient?", Paper delivered to the APSAC Conference 2011 .

[5] While it is no doubt desirable, as the Issues Paper points out, that government representatives are informed about the identity of those for whom the lobbyists are making representations, we submit that thast should be obvious in most cases and the ready availability to the community of the above information more important for the functioning of democracy and good government.

- *Ethical and transparent lobbying*. Australia now has a significant lobbying industry. The success of a lobbying business will depend significantly on its reputation for influence and its success. There has also been a significant increase throughout the country in the commercialisation of government services, projects and of the services needed by government through privatisation, PPPs and outsourcing. It has also become common for former senior ministers, members of parliament, ministerial staff and public servants to move to lobbying firms and large businesses and for movement in the opposite direction – the "revolving door". The pressures on political parties to obtain more and more funding continue to increase. Singly and in combination, these developments have significantly increased the opportunities for government corruption and the temptation to corrupt.[6]

Queensland is better placed than other jurisdictions in having the CMC, its Right to Know system of access to government information, the Integrity Commissioner and a legislative regime to regulate lobbyists. But its protection against the risk of corruption remains significantly weakened by the lack of real and timely transparency of lobbying activity.

We submit that, having regard to the fundamental policy objectives, and their importance, in considering the ambit of any regulatory system for lobbying, the onus is on those attempting to exclude particular lobbying activity from the regime, or to qualify protections, to demonstrate a clear need to do so.

We turn to the Issues Paper questions relating to Lobbying

The Issues Paper Questions

Question 4. What are your views on how the lobbyist provisions (chapter 4 of the Integrity Act) are working in practice?[7]

Question 5. Do you consider that the sanctions for lobbyists who breach lobbying provisions are adequate and appropriate?

Chapter 4 of the Act focuses on the activities of lobbyists for third parties. They must Register and are forbidden from lobbying if they are not registered. But there is no sanction for such

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[6] See discussion, Adjunct Professor Tim Smith, "Corruption- The abuse of entrusted power in Australia", The Australian Collaboration,(2010) Ch. 6.; www.australiancollaboration.com.au .

[7] Question 4 also included " ***Do you consider that there is a need to further clarify the operation of the Integrity Act In the context of town planners?"*** This raises issues of the detailed operation and experience of the Act and, therefore, is an aspect that the ART will not address.

behaviour (s71)[8]. Third party lobbyists must comply with the Lobbyists Code. The sanctions for breaches of the Lobbying Code are cancellation of registration, or suspension of it or a warning by the Integrity Commissioner.[9] There are no penalties such as fines for breaches of the Code.

Queensland with its legislative approach has been in a position to include specific legislated sanctions as part of its regulation of lobbying and the lobbying industry. The failure to do so may be, to some extent, the result of the initial development of Codes of Conduct federally and elsewhere unsupported by legislation and the reality, therefore, that sanctions for breach other than cancellation or suspension of registration were not available. The view that uniformity was desirable might also have been a factor in the Act following that approach. But the result is that the Integrity Act suffers from similar failings to the Lobbying Codes adopted in other jurisdictions. In particular;

- it applies only to lobbyists for third parties and, therefore, does not apply to
    - in-house lobbyists (notwithstanding that they form a large part of the lobbying industry)
    - entities constituted to represent the interests of their members (some of the most powerful and influential entities) or entities carrying out incidental lobbying activities.
- It does not apply to the lobbying of members of Parliament notwithstanding that they are lobbied from time to time and have the capacity, and use it, to influence decisions of Government and Oppositions through their parties and through Parliamentary Committees. This is particularly so where governments do not have a majority in the Lower House.[10]
- It does not require the recording and publication by government of contacts between lobbyists and senior government representatives and the subject matter of those contacts and existing public service requirements do not appear to have the desired result.[11]

As a result of these omissions, the Queensland lobbyist registration scheme is not able to meet public expectations of transparency and integrity or ensure free and open government. We submit that what is needed is

- a legislated Lobbying Code to apply to all lobbying activity and specific legislative sanctions for breaches of the Lobbying Code together with

[8] Such behaviour, however, may be relevant when the unregistered lobbyist applies for registration.

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[10] In jurisdictions with Upper Houses, it is, of course not uncommon also for governments not to have control of the Upper House.

[11] Note the Integrity Commissioner's description of the current situation s in his submission (p 17) to the government available on his web-site.

- a system for registration of all who engage professionally in lobbying activity with sanctions for breaches of their obligations additional to cancellation or suspension of registration.

Ultimately, what is critical to give effect to the fundamental objectives identified in the Issues Paper is that anyone who lobbies government must be required to do so openly and transparently and comply with the code of conduct when lobbying.

Question 6. Are the post-separation employment requirements for senior government representatives appropriate?

Question 7. Is there any further material required to guide contact between government, the lobbying industry and former senior government representatives?

S70 of the Act forbids a " former senior government representatives" carrying out "a related lobbying activity for a third-party client" for a period of two years after ceasing to be a senior government representative. This provision applies to former Ministers and Parliamentary Secretaries and their staff. It also applies to public sector officers, who were chief executives, senior executives or senior executive equivalent and local government councillors and officials. "A related lobbying activity" means "a lobbying activity relating to the former senior government representative's official dealings as a government representative in the two years before becoming a former senior government representative." Lobbying activity" is defined in s42(1) as contact with a government representative in an effort to influence State or local government decision-making.

As the Issues Paper notes [12], other jurisdictions have similar provisions, some with slightly lesser periods specified for the classes of people addressed. Save for the New South Wales legislation, the other jurisdictions do not have specific sanctions for breaches.

Regrettably, again, like the approach in other jurisdictions, the gaps in the provisions put at risk free and open access to government and the transparency and integrity of lobbying and government. They are confined to lobbying activity that is

- third-party lobbying and
- relates to the former senior government representatives "official dealings" in the two years before retirement

and there are no sanctions for breach.

The result is that the former senior government representative is not forbidden to

- carry out "related lobbying activity" as an in-house lobbyist or

[12] P.10

- to advise or act as a consultant to a third-party lobbyist proposing to engage in lobbying activity.

There is the additional further problem of determining whether the activity of the former senior government representative relates to his or her "official dealings" as a government representative.

Clearly the attempt to address this relatively recent "revolving door" phenomenon can be easily circumvented. Whether and to what extent it has been is unclear but there are many examples of senior ministers and Premiers joining substantial businesses,[13] including lobbying firms, in a senior capacity shortly after retirement. What benefits do the lobbyists and organisations hope to receive? Would they not include assistance in making representations to government to press their interests?

What should be done? We refer to the ART submissions made to the 2010 Commonwealth Inquiry.

> "We strongly support the removal of any qualifications such as the "official dealings" qualification in any revised Code. They simply provide a loophole to be exploited by anyone who wishes to circumvent the Code.[14] That having been said, the proposal does not go far enough.
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> The [Discussion] Paper[15] notes that
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> > "the current policy is aimed at preventing former ministers, parliamentary secretaries, ministerial staff, APS employees and ADF personnel from using knowledge about matters that they had official dealings with while in office if engaged as third-party lobbyists."
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> It goes on to state that criticism of former ministers has not been confined to their lobbying activities in areas relating to their portfolio responsibilities but has extended to them "making improper use of their contacts in government" as well as the use of knowledge acquired while in office. The proposal, it is said, would prohibit Cabinet ministers (and presumably Parliamentary Secretaries) from using their contacts within Government as well as their knowledge of government policies and plans in any subsequent career as a third-party lobbyist for the prescribed period.
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> The Paper asks the question whether
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> > "increasing the length and coverage of the ban [would] contribute to increased confidence in the lobbying industry by members of the public?"

[13] See Tim Smith, op cit pp 51-54

[14] Op.cit, 53-54

[15] The Commonwealth Government Discussion Paper.

We suggest that the limited time extension is unlikely to prevent the use of such knowledge, including contacts, or to increase public confidence in the operations of government. For the proposed regime proceeds on the basis that Ministers and Parliamentary Secretaries will retain their attractiveness to the lobbying industry to be engaged by it after a period of two years. That is likely to be so only if the knowledge, including contacts, acquired as a Minister or Parliamentary Secretary continue to be of value.

In any event, increasing confidence in the system, while an important concern, is an ultimate objective not an immediate one. It will occur as a result of changes to the Code which directly address the causes of any lack of confidence.

Lack of confidence flows from a number of fundamental flaws, namely, a lack of transparency and the fact that the present system

a) increases unequal access to government,
b) has the potential to distort the decision-making process and result in decisions that are not in the public interest, and
c) increases the opportunity to corrupt all those in government.

It can be argued that the understanding of government processes acquired by government representatives is not something generally found within a private sector organisation and is needed by them. But that is a difficulty shared by all. The problem is that such knowledge

> "is likely to be accompanied by personal relationships and political influence" .[16]

Further, the Ministers and Parliamentary Secretaries will be engaged to lobby for what is in their client's interests whether it is in the overall public interest or not.

People who are entrusted by us with the power to govern for us, inevitably obtain that broader knowledge, including valuable contacts, to be used on our behalf. That knowledge is not generally accessible in or to the community they serve. While engaged in government they will be expected to use that knowledge on our behalf, not their own. Much of it will not be of a confidential nature but, because it will include knowledge of a kind which is not generally accessible, it can be of great value and importance to individuals, corporations or particular sections of the community who may wish to gain advantages for themselves from government action. As a result, those who leave their government engagement have an asset that they can use and will be able to benefit financially from that asset that was gained at our cost. They do not have to account to us for any part of such benefit. Further, on occasions, in their new employment, they will use that knowledge, gained while entrusted by us with the power to govern, to seek advantages for their new client or employer, which advantages will, on occasions, succeed because we lack that knowledge and, as a result, will carry a cost to us. There are presently no legal constraints on such conduct

[16] ICAC, 21, citing the example of Messrs Burke and Grill and their use of their political links

and the Code has been ineffective. Allowing such conduct to be unconstrained treats engagement in government as just another form of private employment. It is not and treating it as such damages the reputation of all in government and our confidence in them.

How are the particular flaws to be addressed? The lack of transparency can be addressed by using the present system of registration by lobbyists, extending it to all engaged in lobbying and requiring the supply of all required information to the Register within one working day of the relevant event occurring.[17] In addition, the matters to be recorded in the register should be extended to include information of the date and time of any contact by a person engaged in lobbying, who was involved and the nature of the matters that they sought to raise with Government representatives.[18]

The other flaws (unequal access to government, potential to distort the decision-making process, and the opportunity to corrupt those in government) also require a direct response. An effective response would be to close the "revolving door"[19] between government and lobbyists.

Because of the seriousness of the issues, and the special nature of all forms of employment in government, a strong case can be made for a permanent ban on the engagement of anyone who has been involved in government in any form of direct or indirect lobbying activity. The fiduciary nature of the obligations on all in government requires a strict approach.

At first glance this may seem harsh to people like ministerial staffers.[20] It has been argued[21] that they are in a special position because their employment is insecure. That is true, but they take up those positions knowing that they have no job security. Further, few workers in the community these days have job security. Even our top research scientists do not have job security.

If a total ban is thought to be too Draconian, or unfairly hampers legitimate political freedoms, an alternative would be to follow the Canadian approach: introduce a ban of 5 years with a right to seek exemption which may be given subject to conditions. The currently proposed Parliamentary Integrity Commissioner could perform that role.[22] A

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[17] Note the current proposal above that professional lobbyists be required to register and that all lobbyists be subject to the Code of Conduct.

[18] Clause 8 (e) (iv) already requires that information to be supplied to the person contacted. It can therefore easily be added to the information on the Register

[19] See ICAC, Issues Paper, 2010 *Lobbying in NSW,* .21

[20] Currently the Code does not apply to ministerial staff below Adviser level

[21] Report, p22, Minority Report, para 1.30

[22] In Canada there is a Commissioner of Lobbying who performs that role: See Lobbying Act,s10.11 and 10.12

> similar approach should be taken for those who have been engaged in lobbying who may wish to enter the public service or be employed as ministerial staff."
>
> If such action is not taken, we are not being serious about addressing the risk of government corruption. "

In Queensland, the Integrity Commissioner could be empowered to perform the role of considering exemption applications. Such an approach would also address the following considerations advanced by the Queensland government in its Issues Paper as justification of the present approach

> "The current administrative regime provides flexibility in responding to emerging issues and ensuring that requirements keep pace with public expectations, which would be difficult to achieve by legislation. The objective of regulation in this area is to provide an accountable and transparent framework rather than a prohibited regime that could be seen as overly restrictive.
>
> Enshrining post-separation employment obligations and sanctions in legislation could be overly onerous and difficult to both monitor and enforce. An alternative could be to adopt a similar approach to the Commonwealth and require registered lobbyists to disclose previous employment as a government representative, including the date of the person became a former government representative."[23]

The A RT submits that those considerations do not, in any event, address the fundamental concerns about the total inadequacy of the present approach to address the policy objectives articulated in the Issues Paper.

Question eight. Do you consider that nationally uniform lobbying regulations would be appropriate?

Plainly a uniform national approach would be desirable if it was a satisfactory one that served the relevant policy objectives. As the Issues Paper notes, a uniform approach would simplify the compliance obligations of lobbyists and government representatives, reduce red tape and could assist compliance. A satisfactory model would "enhance free and open access to the institutions of government" and address "the public expectation that lobbying activities will be carried out ethically and transparently."

But having regard to the obvious difficulties in achieving a satisfactory uniform national approach, we submit that the best way to do so is for the Commonwealth or a State Parliament to pass legislation that sets a benchmark of best practice. This would then provide a model for all other jurisdictions. Any unforeseen difficulties could be rectified in light of experience. The benefits of uniformity for those engaged in lobbying activity would reinforce and support the introduction of the best practice uniformly throughout Australia.

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[23] note Dr Solomon's critique on page 14 of his submission – less restrictive than the present Queensland requirements

Conclusion

Queensland has set the standard for best practice in a number of important government integrity areas. This enquiry gives it the opportunity to set that standard for the regulation of lobbying and lobbyists and start the process for establishing uniform best practice in Australia.

Accountability Round Table

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