THE LAW SOCIETY
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15 September 2023

The Hon Ann Vanstone KC
Commissioner
Independent Commission Against Corruption
GPO Box 11066
ADELAIDE SA 5001

By email: prevention@icac.sa.gov.au

Dear Commissioner

Discussion Paper: Lobbying and Influence

1. I refer to the above Discussion Paper ("the Discussion Paper") circulated via email from your office on 11 July 2023.

2. The Discussion Paper provides an explanation of lobbying and the way it can inform Government policies, priorities and projects, as well as an overview of the regulatory regime in South Australia pursuant to the *Lobbyists Act 2015* (SA) ("the Act") and accompanying Regulations. The Discussion Paper poses a series of questions largely focusing on prospective changes to the way lobbying is regulated in South Australia, canvassing matters such as the definition of "*lobbying*" and the potential to expand the reach of the regulatory regime.

3. The Society's Administrative and Public Law Committee ("the Committee") considered the Discussion Paper, having regard to several of the questions therein. The responses below are largely informed by the Committee's work.

Definition of Lobbying

Should the definition of 'lobbying' be expanded? If so, how? What kinds of activities should be captured by 'lobbying'?

Should there be exceptions to lobbying regulation (e.g. for charitable or not-for-profit organisations, or organisations below a certain size) or, conversely, should some industries be more closely regulated (e.g. those industries where 'regulatory capture' of government agencies and decision making is a risk)?

4. The Committee agreed, as recent reviews have indicated and is set out in the Discussion Paper, that the current definitions are too narrow to capture much of the influencing activity that is understood to be occurring. There was some support for the definition being widened so as to include "*in-house lobbyists*". It would however be desirable for any reforms to occur concurrently with other jurisdictions if possible, noting the reference in the Discussion Paper to inconsistent definitions across jurisdictions.

5. As to exceptions, the Society notes existing section 4(4) of the Act which provides for the definition of "*designated organisation*". The Committee considered the definitions currently provided within

this provision appear to be based on a sound and appropriate distinction between the nature of such organisations by comparison to profit businesses or trade organisations. The Committee did however identify a risk in an approach which targets certain industries (rather than providing exemptions based upon the nature and purpose of the organisation), noting that as new industries emerge, they may be at a higher risk of engaging in inappropriate or undeclared influencing.

Should lawyers and accountants who directly offer government relations services be included in the definition of 'lobbying'?

6. The expression "*government relations services*" is not used in the Act and is not an established legal expression. It may be that using such a phrase adds little to the existing definition of lobbying in section 4(1).

7. The Society notes the current exceptions for lawyers within section 4(2)(b) of the Act and that those exceptions only apply to the extent that the person communicates with the public official in the "*ordinary course of that person's profession as a legal practitioner*." If that exception is to be narrowed, a very clear basis would need to be articulated. Given that legal practitioners are subject to some of the most stringent regulation separately from the lobbying regime it may be doubted whether there is any basis for further regulation.

8. It is further noted that legal practitioners who are directly employed by the Government within the public service would also be exempt pursuant to section 4(2)(a), as they hold office as a public official and would be communicating with other public officials in the ordinary course of holding that office.

9. It may be that such concerns could adequately be addressed by further defining what conduct does (or does not) constitute conduct falling within the ordinary course of the practising the profession of the law by reference to (or consistently with) the *Legal Practitioners Act 1981* (SA).

10. In the event it is proposed that the exception for non-public servant legal practitioners will be somehow further limited or constrained, the Society considers it should be afforded the opportunity to consider the precise reform under consideration and consult with Members of the profession. In such circumstances, issues of legal professional privilege might arise. Different considerations may well apply to accountants and financial advisors who are currently exempt in particular circumstances.

Regulation of the lobbied party

Should the conduct of lobbied parties be more closely regulated? For example, should there be lobbying disclosure requirements for ministerial staff or high-level public servants?

Would the publishing of cabinet materials, ministerial diaries and other records of government decision making provide safeguards against the risk associated with lobbying?

11. The Society notes that imposing positive disclosure or publishing requirements on the lobbied party would mark a significant shift in the current Regulation of lobbying activity. From a political perspective, the Committee noted such a move would be unlikely to garner widespread support, noting that it would likely be argued to impose an unnecessary administrative burden on government and would be resisted unless there was a national move towards such requirements.

Should lobbied parties be obliged to register lobbying interactions to allow for cross-referencing, such as is conducted by the Queensland Crime and Corruption Commission?

Should government departments implement policies which prohibit undocumented or secret meetings?

12. The Committee noted the potential to advocate for strengthening record keeping requirements with a view to ensuring both that records of all lobbying activities are made and kept, as well as that sufficient detail is included in such records along with an appropriate prohibition on undocumented or secret meetings.

13. Any changes of this nature, whether by legislation or a code of conduct would also need to consider the applicability of the *Freedom of Information Act 1991* (SA) to such records and whether any changes to that Act are required.

The "Revolving Door" of Lobbying

Should the restrictions on lobbying activity be expanded to a wider range of people affiliated with political parties (e.g. former MP's, candidates, politicians from other jurisdictions) or those employed by political parties to work on election campaigns?

14. The Society notes section 13 of the Act currently distinguishes between Ministers (two year prohibition), Parliamentary Secretaries, Members of the SAES and persons engaged as a member of a Minister's personal staff (12 month prohibition) and members of government boards (prohibited only while a member). The Committee observed that the prohibitions within the Act as currently drafted do appear to be narrow and of short duration but noted that this may be intentional, noting the Act's emphasis on ensuring disclosure and transparency.

Would post-separation employment reporting requirements assist in ensuring compliance with lobbying restrictions?

15. The Committee took a view in favour of such reporting requirements, noting it makes sense to place higher reporting requirements on persons who have left government roles for a period (perhaps five years) given their unique position and potential to influence.

If you have any queries, please do not hesitate to contact me.

Yours sincerely

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