The Centre for Public Integrity

9 October 2023

By email

Dear Dr Russ,

Discussion Paper: Influence and Lobbying

The Centre for Public Integrity welcomes the Commission's efforts to address the corruption risks inherent to lobbying, and thanks you for the opportunity to make a submission in response to your *Discussion Paper: Influence and Lobbying*.

We have considered the issues you have raised, and hope that our submission will be of assistance to you in your work.

We would be pleased to provide any further assistance the Commission might require.

Sincerely,

Catherine Williams
Dr Catherine Williams
Research Director

Lobbying and Influence

Submission **October 2023**

Lobbying is an established feature of government decision-making in all Australian jurisdictions. At its best, it facilitates healthy democratic participation and promotes well-informed decision-making. In the absence of transparency and integrity, however, it risks undermining the democratic process altogether.[1] In the context of deteriorating confidence in government,[2] there is a pressing need to ensure that the significant integrity risks posed by lobbying are properly addressed through an effective regulatory regime. Such regulation should:

- be of sufficiently broad scope, and capture in-house lobbyists;
- require the regular disclosure of lobbying activities;
- set appropriate post-employment separation periods; and
- be supported by an appropriately-resourced enforcement agency with power to impose meaningful sanctions

Application of regulation

The regulatory regime in South Australia is established by the *Lobbyists Act 2015* (SA) (***the Act***). Its definition of 'lobbying' only captures those engaged in lobbying on behalf of a third party,[3] thereby excluding in-house lobbyists from its application. It shares this defect with most other jurisdictions in the country with the exception of Victoria, where the Victorian Government Professional Lobbyist Code of Conduct also captures people who can be characterised as 'Government Affairs Directors'.[4]

There is, in our view, no compelling reason to distinguish between third party and in-house lobbyists for the purposes of lobbying regulation. Both kinds of lobbyists exist to influence decision-making in the interests of a private person or entity. Whether that

[1] Organization for Economic Cooperation and Development, *Transparency and Integrity in Lobbying* (Brochure, 2013) <https://www.oecd.org/corruption/ethics/Lobbying-Brochure.pdf , 2013>.
[2] ANU Communications & Engagement, 'Trust in Government Hits All Time Low', *Australian National University* (online, 9 December 2019) <https://www.anu.edu.au/news/all- news/trust-in-government-hits-all-time-low, 9 December 2019, accessed 13 July 2022>.
[3] *Lobbyists Act 2015* (SA) s 4.
[4] Government of Victoria, 'The Victorian Government Professional Lobbyist Code of Conduct' (Web Page, 17 April 2023) <https://www.lobbyists.vic.gov.au/code-of-conduct>.

private entity is a third-party or the employer of the lobbyist has no bearing on the need to regulate their engagement with public officials.

Disclosure of lobbying activity

The absence of any requirement to disclose lobbying activities in South Australia is a significant deficiency that must be remedied if the public is to have confidence that public power is exercised in the public interest. In the interests of transparency and accountability, lobbying activity should be disclosed through regular publication of:

- diaries of ministers, shadow ministers, and their chiefs of staff; and
- key details of meetings with lobbyists.

The obligation to publish ministerial diaries, provided they include sufficiently detailed disclosures, is a valuable accountability mechanism that has been adopted in comparable jurisdictions such as New South Wales, Queensland, the Australian Capital Territory, and the United Kingdom. Disclosures should include key details such as the meeting attendees and topics of discussion.

There should also be a requirement for registered lobbyists to disclose details of their meetings, including the names of public officials with whom they have met, the person or entity they represented, and the topics that were discussed.

Transparency could be further enhanced by integrating the Register of Lobbyists and disclosures of lobbying activities into the existing system for disclosing political contributions and spending and tasking the Independent Commission against Corruption with analysing trends on an annual basis.

Closing the revolving door

The 'revolving door', whereby former public officials become lobbyists and former lobbyists become public officials, gives rise to actual, potential and perceived conflicts of interest that are capable of compromising the fairness, or perceived fairness, of the political process. For example, the impartiality of public officials (including ministers) is undermined where they:

- make decisions based on the prospect of employment in the private sector, or
- are lobbied by former colleagues with whom they have a previous or ongoing association.

The revolving door effectively allows political influence to be bought and sold, or access to the political system to be granted, on the basis of privilege. The implications, as put by the New South Wales Independent Commission Against Corruption, are dire:

> *The use of such privilege or influence is destructive of the principle of equality of opportunity upon which our democratic system is based. The purchase or sale of such privilege or influence falls well within any reasonable concept of bribery or official corruption.*[5]

Post-employment separation periods are one safeguard against the corruption risks inherent to the revolving door. In South Australia, ministers, members of government boards, parliamentary secretaries, South Australian Executive Service **(SAES**) members under the *Public Sector Act 2009*, and current personal staff of ministers under the *Public Sector Act 2009* are all subject to some form of restriction.[6]

Pursuant to the Act, former ministers are prohibited from engaging in (or being registered for) lobbying for two years after they cease to hold office.[7] Parliamentary secretaries, SAES members, and personal staffers may be *registered* for lobbying immediately upon ceasing to hold office, but are prohibited from *engaging in* it for 12 months after their cessation date – we note, however, that that prohibition applies only in respect of matters the person dealt with in the ordinary course of holding office.[8]

While the two-year separation period that South Australia imposes upon ministers is greater than the period imposed in all other Australian jurisdictions except for Queensland, which also imposes a two-year period, we consider it too short to be likely to achieve its objective. The 12-month separation period imposed on other regulated individuals is also substantially too short to achieve the necessary dilution of the

[5] NSW Independent Commission against Corruption, *Report on Investigation into North Coast Land Development* (Report, 1990) (cited in NSW Independent Commission against Corruption, *Investigation into Corruption Risks involved in Lobbying* (Report, 2010) 20).
[6] *Lobbyists Act 2015* (SA) s 13.
[7] Ibid s 13(1)(a).
[8] Ibid s 13(1)(b).

influence, connections and knowledge that these individuals establish in the course of their employment. At a minimum, the restriction these individuals face should be increased to 18 months. Ideally, however, the post-employment separation period would be extended to five years, for ministers, and to at least two years for other regulated individuals.

A five-year separation period would bring South Australia in line with Canada, which we consider sets the standard amongst comparator jurisdictions on the issue of separation periods. In Canada, Designated Public Office Holders (**DPOHs**) – including ministers, any person employed in their offices, public office holders occupying senior executive positions, as well as various other positions – face a five-year post-employment prohibition on lobbying.[9] Canada's Commissioner for Lobbying is able to make exemptions in appropriate cases:[10] clearly, in the case of such a substantial post-employment separation period, the existence of such an exemption mechanism is essential. In jurisdictions without dedicated Lobbying Commissioners, such as South Australia, this function could be performed by an integrity commission.

We note that South Australia in unique amongst Australian jurisdictions insofar as it prohibits current government board members from engaging in, or being registered for lobbying while in their position.[11] Consideration should be given as to whether these individuals should be regulated in the same way as members of the SAES.

In respect of the application of post-employment restrictions to matters dealt with in the ordinary course of holding office, it is of our view that this distinction is artificial and should be abolished.

Finally, the ban on lobbying should include closely related activities such as advice on how to lobby, in order to prevent circumvention of the restriction.

Enforceability

[9] *Lobbying Act* R.S.C 1985, c. 44, s 2(1)
[10] Ibid s 10(12).
[11] *Lobbyists Act 2015* (SA) s 13(1)(c).

The effectiveness of lobbying regulation depends partly on the extent to which its rules are enforceable. In contrast with other jurisdictions whose regulations are administrative in nature, South Australia has the benefit of having shifted to a legislative model.

Considering this development, it is peculiar that responsibility for compliance still rests with the Chief Executive of the Department of Premier and Cabinet, as it did when the regulations took the form of a Code of Conduct developed by that department.[12] Given the mischief that the Act seeks to address, we submit that the South Australian Independent Commission against Corruption, sufficiently resourced, would be the appropriate body to monitor compliance with the Act and pursue enforcement for breach. Further, the provision of education for public officials by the SA ICAC would complement the Act and ensure that all parties are aware of their obligations.

Government decision-making

Whilst regulation aimed specifically at lobbying is crucial, it is also important to recognise that the issues associated with lobbying go to the way in which governments make significant executive decisions more broadly. Greater oversight over, transparency of, and accountability for lobbying activity is possible when political processes are fair.

Governments must ensure that its processes for undertaking consultation are conducive to equal access and participation through the development of guidelines for fair consultation. This should include ensuring that a lack of resources available to disadvantaged groups does not preclude them from advocating for their interests.

Governments should also give reasons for significant executive decisions that disclose:

- meetings with lobbyists disclosed pursuant to disclosure requirements;
- a summary of arguments put by the lobbyists;
- a summary of recommendations made by the public of service;
- a summary of reasons for any decision not to take public service advice; and
- a report of compliance with fair consultation guidelines.

[12] Department of the Premier and Cabinet (SA), *The Lobbyist Code of Conduct 2009* (1 December 2009).

Recommendations

The Centre for Public Integrity believes that lobbying regulation in South Australia, though advanced insofar as it takes statutory form, remains seriously deficient in some key respects. We submit that reform in this area is necessary to ensure that lobbyists and government interact with transparency, honesty, and integrity, and that the public can be assured of the integrity of government processes. In particular, South Australia should consider:

- **expanding the definition of 'lobbying' to include in-house lobbyists;**
- **requiring the disclosure of lobbying activity;**
- **increasing post-employment separation periods; and**
- **empowering the SA ICAC to monitor compliance and pursue breaches**

About The Centre for Public Integrity

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption, protecting the integrity of our accountability institutions, and eliminating undue influence of money in politics in Australia. Board members of the Centre are the Hon Stephen Charles AO KC, the Hon Pamela Tate AM KC, the Hon Anthony Whealy KC, Professor George Williams AO, Professor Joo Cheong Tham, Professor Gabrielle Appleby and Geoffrey Watson SC. Former board members include the Hon Tony Fitzgerald AC KC and the Hon David Ipp AO KC. More information at www.publicintegrity.org.au.