ICAC
Independent Commission
Against Corruption
SOUTH AUSTRALIA

Discussion Paper

Lobbying and Influence

July 2023

MAKE A SUBMISSION BEFORE FRIDAY 15 SEPTEMBER 2023:

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Lobbying: A risky necessity

The lobbying of Government officials can play a positive role in informing Government policies and priorities, and an important role in a democratic society.

> *Lobbyists, as well as advocates and all those influencing governments, represent valid interests and bring to policy makers' attention much needed insights and data on all policy issues. Such an inclusive policy-making process provides opportunities for more informed and ultimately better policies.*[1]

However, the extent to which lobbying exerts a positive influence on policy making and Government decision making will be impacted by the extent to which it is inclusive, transparent and ethical. Where access to decision makers is granted only to a privileged few, where it is not possible to confidently ascertain what factors have influenced Government decision making, and where there may be reason to doubt the accuracy of representations made to Government, the risks of undue influence and decision making tainted by bias, self interest, dishonesty or other matters inconsistent with the public interest, are increased.

In February 2023 the Commission published its report, *Yes Minister – Corruption Risks Associated with Unsolicited Proposals*[2]. The corruption risks associated with lobbying can be considered similar to the matters raised in that report.

The risks associated with lobbying are not merely theoretical. In the worst cases, conduct amounting to criminal offences such as bribery of a public officer or abuse of public office, may occur. Such risks have been realised in other jurisdictions.

Perhaps the most notorious examples are those involving former NSW MLC and Minister, Eddie Obeid.

> In 2016 Mr Obeid was convicted of misconduct in public office after he lobbied a public official to influence the outcome of a leasing process for commercial tenancies in Circular Quay. He did so under the guise of acting for constituents, but in reality, he and his family stood to benefit directly.
>
> In 2021 Mr Obeid and his son, Moses Obeid, were convicted of conspiracy to commit wilful misconduct in public office for their part in a plan to have (then) NSW Resources Minister, Ian Macdonald, grant a coal exploration license over a farm owned by the Obeid family in Bylong Valley, resulting in a $30 million gain to the Obeid family.

These cases illustrate clearly the potential for influencing activity to facilitate corruption where individuals act out of self interest, and where the structures sitting around decision makers – the targets of influencing activity – are opaque and lack rigour.

1 OECD, R*ecommendation of the Council on Principles for Transparency and Integrity in Lobbying*, OECD/LEGAL/0379.

2 The report can be found at https://www.icac.sa.gov.au/publications/published-reports/yes-minister.

Re-thinking regulation

The nature of regulation of lobbying and lobbyists in Australian jurisdictions ranges from statutory schemes which impose criminal sanctions, to administrative schemes with more limited consequences in the event of a breach. The lobbying specific regulatory schemes operate within a broader context of regulating the conduct of Ministers, Members of Parliament and public service employees within each jurisdiction (for example, by codes of conduct) and legislative and administrative schemes relating to public access to documents (for example, through Freedom of Information legislation).

An overview of the regulatory framework in South Australia can be found at **Appendix A**.

In recent times, integrity agencies in a number of Australian jurisdictions have examined the regulatory schemes surrounding lobbying and the corruption risks of improper influence on public administration:

- the NSW Independent Commission Against Corruption conducted *Operation Eclipse* and released a report in June 2021, *Investigation into the Regulation of Lobbying, Access and Influence in NSW*;
- the Independent Broad-based Anti-corruption Commission in Victoria released its *Special Report on Corruption Risks Associated with Donations and Lobbying* in October 2022;
- the Crime and Corruption Commission of Queensland released a report, *Influence and Transparency in Queensland's Public Sector*, in January 2023; and
- the Integrity Commission of Tasmania released its framework report *Model for reform of lobbying oversight in Tasmania* in June 2023.

How does South Australia compare?

The reports referred to raise a number of broad issues which are pertinent to consider in the South Australian context. The Commission is calling for submissions relating to lobbying regulation in South Australia to inform whether – and what – further work should be undertaken in this space.

Your submission may address the issues and questions detailed below, or any other aspect of lobbying, which you consider important.

Issues for consideration

THE DEFINITION OF 'LOBBYING' AND 'LOBBYIST'

The definition of 'lobbying' and/or 'lobbyist' is not uniform across Australian jurisdictions. Common to all jurisdictions, however, is the fact that 'in-house lobbyists' (that is, persons employed within an organisation to conduct government liaison-type activities) are not captured by current regulations; but is there anything inherent in 'third-party' lobbying which elevates the risks of corruption as compared with 'in-house' lobbying, such that this distinction is justified?

The question of who should be included in lobbying regulation – and, more specifically, whether 'in-house lobbyists' should be regulated – was considered by each integrity agency. The universal answer to this question was that the current definitions (regardless of jurisdiction) are too narrow to capture much of the influencing activity currently occurring. While compliance with lobbying regulation was reportedly high, a significant proportion of influencing conduct fell outside the regulatory schemes.

A further question to ask in this context is whether a legitimate distinction can be drawn between corporate 'in-house lobbyists' (for example, persons employed by large mining, finance or manufacturing organisations) and those who are employed by charitable organisations, or other not-for-profit organisations (for example, trade unions, religious groups, professional and industry organisations and other interest groups).

Prompt questions:

- 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)?
- Should lawyers and accountants who directly offer government relations services be included in the definition of lobbying?
- Should lobbying disclosure requirements be heightened in the lead up to elections?

THE REGULATION OF THE 'LOBBIED' PARTY

Most regulatory schemes focus on the conduct of the lobbyist, with only secondary attention directed towards the lobbied party. However, lobbying is clearly a 'two way street', and the question arises whether the public officials to whom representations are made should also be subject to regulation. This may include not only Ministers and other government decision makers, but also those in positions to influence those decision makers, such as ministerial advisors. Regulation may be statutory, or may be in the form of, for example, a specific code of conduct relating to lobbying.

A particular area of focus to emerge from the reports from other jurisdictions relates to record keeping by lobbied parties and the capacity for the public to interrogate those records, either through ongoing publication requirements, or by utilising schemes already in place to allow for public access to government records. The quality of records produced, in terms of the degree to which they make plain the content and purpose of lobbying activity and the rationale or justification for decision making, is critical to the usefulness or otherwise of access schemes.

Prompt questions:

- 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 risks associated with lobbying?
- Should lobbied parties also 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?
- Should all activity directed towards influencing legislation (e.g. making, amending or retaining legislation) be publicly disclosed?

THE 'REVOLVING DOOR' OF LOBBYING

The concept of the 'revolving door' of lobbying relates to the high incidence of former public officials (Ministers, Members of Parliament, Ministerial advisers, high-ranking public servants) who move from their public role into lobbying, either directly or after a short interval.

This brings with it risks to the integrity both of lobbying and government decision making; for example, lobbyists who are former public officials may leverage relationships built or knowledge acquired whilst in public office to gain an unfair advantage for their clients, and public officials may give preference to particular interest groups with a view to gaining lucrative employment after public service.

South Australia already imposes restrictions on some public officials in this regard. However, questions arise regarding, for example: *who* is covered by these restrictions; *how long* the restrictions ought to be; and, adequacy of existing enforcement measures (including the ability to detect any breaches).

The issue is also closely linked to the question of the definition of 'lobbying'. Given that 'in-house lobbying' falls outside of the scope of the South Australian regulatory scheme, the question arises how well post-separation employment restrictions guard against the risks associated with the 'revolving door' of lobbying.

Prompt questions:

- Should the restrictions on lobbying activity be expanded to a wider range of people affiliated with political parties (e.g. former MPs, candidates, politicians from other jurisdictions) or those employed by political parties to work on election campaigns?
- Would post-separation employment reporting requirements assist in ensuring compliance with lobbying restrictions?

LOBBYING AND LOCAL GOVERNMENT

At present, activities directed towards influencing decision making at a local government level are not captured by the South Australian regulatory scheme. However, local government decision makers are not immune from the risks associated with lobbying, and are likely to be a target of influencing activity, particularly in the context of grants administration, development applications and procurement.

The benefits of regulation need to be weighed against issues like the costs associated with administration and compliance, and the risk of reducing access to decision makers. These matters may assume greater importance when considered at the local level. This may particularly be the case in South Australia where local governments have less involvement in planning approvals than local governments in other jurisdictions.

HARMONISATION

In addition to the above, the issue of harmonisation of regulatory schemes across Australian jurisdictions was considered by all integrity agencies. There are a number of significant benefits to jurisdictions enacting similar regulatory schemes, not only for lobbyists, but also for regulators and members of the public. However, it may be that there are factors peculiar to the South Australian context which dictate a different approach being taken in one or more aspects of lobbying regulation.

Make a submission

The Commission will receive submissions about lobbying and influence in South Australia until Friday 15 September 2023. The above topics and prompt questions are of particular interest, but all responses will be considered carefully.

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APPENDIX A: Overview of the regulatory framework in South Australia

Lobbyists Act 2015 and Lobbyists Regulations 2016

Lobbying activity in South Australia is directly regulated by the *Lobbyists Act 2015* ('the Lobbyists Act') and the *Lobbyists Regulations 2016* ('the Lobbyists Regulations').

The Lobbyists Act and Regulations are directed towards persons who engage in 'lobbying'. They do not regulate the conduct of persons who are the subject of lobbying activity.

A person engages in 'lobbying' if they, for money or other valuable consideration, communicate with a public official on behalf of a *third party* for the purpose of influencing the outcome of:

- legislation, or a government decision or policy (existing or proposed);
- an application for any approval, consent, licence, permit, exemption or other authorisation or entitlement under any Act or law of South Australia;
- the awarding of a contract or grant or the allocation of funding; or
- any other exercise by the public official of their functions or powers.

A 'public official' means any Member of Parliament and their staff (including staff in an electorate office), a public sector employee, a person contracted to provide services to or on behalf of a public sector agency, or a member of a government board. Members, officers and employees of local government bodies and the Local Government Association are not 'public officials'.

There are some exceptions to the definition of 'lobbying'. A person is *not* engaged in lobbying if they:

- are a public official themselves and communicate with the public official in the ordinary course of their duty;
- are a legal practitioner and communicate with the public official in the ordinary course of their work was a legal practitioner;
- hold particular accounting or financial advisor qualifications (specified in the Lobbyists Regulations) and communicate with the public official in the ordinary course of their work as an accountant or financial advisor.

Further, a person does not engage in lobbying if they act as an 'in-house lobbyist'; that is, if they communicate with a public official on behalf of an organisation or individual by whom they are directly employed.

The Lobbyists Act prohibits a person from engaging in lobbying unless they are registered. Any person who engages in lobbying without being registered can be prosecuted and faces a fine of up to $30,000 or 2 years' imprisonment.

The Lobbyists Act places restrictions on who is entitled to be registered as a lobbyist. Persons are ineligible for registration:

- if they have ever been convicted of an indictable offence (generally, an offence punishable by more than 2 years' imprisonment);
- if they have, in the 10 years prior to applying for registration, been convicted of an offence of dishonesty (for example, theft or dishonestly dealing with documents);
- for a period of 2 years following cancellation of registration under the Lobbyists Act; and
- if they are prevented from engaging in lobbying by reason of section 13 of the Lobbyists Act.

Section 13 of the Lobbyists Act prevents former Ministers and their staff, Parliamentary Secretaries and high-ranking members of the public sector from engaging in lobbying for specified periods after they cease to hold office, and provides that any registration held by the person during the specified period is cancelled.

In the case of former Ministers, the relevant period is 2 years. In the case of the other persons listed, the relevant period is 12 months. Section 13 also prevents members of government boards from engaging in lobbying during the period of their membership.

The effect of section 13 is that any former Minister etc engaged in lobbying during the specified period will be doing so whilst unregistered, and therefore liable to prosecution.

The Lobbyists Act also prohibits a person from giving or receiving, or agreeing to give or receive, a 'success fee' for lobbying activity. A 'success fee' is an amount of money (or other valuable consideration) that is contingent upon the outcome of the lobbying activity. A person who gives or receives a success fee is liable to prosecution and faces a fine of up to $30,000 or 2 years' imprisonment.

The Chief Executive of the Department of the Premier and Cabinet ('DPC') maintains the register of lobbyists. The Lobbyists Act states that the register must be available for inspection by the public and must contain certain information about each registered lobbyist, including: their name (including any business or trading name), business address, the names of any business partners or employees, and each 'return' provided by the person under section 8.

Section 8 requires a registered person to file an annual return which sets out:

- the name of each person/body on behalf of whom the person engaged in lobbying, or with whom the person had an agreement to engage in lobbying;
- the name of each public official lobbied and the subject matter of the lobbying engaged in;
- the name of any person employed by or otherwise engaged by the person to engage in lobbying (whether or not the person in fact engaged in lobbying).

The register is available to be viewed by the public through the DPC website.[3]

The Lobbyists Act states that the Regulations may incorporate, or operate by reference to, a code of conduct. No code of conduct is currently in operation.[4]

3 https://www.dpc.sa.gov.au/responsibilities/lobbyist-registration/active-and-inactive-lobbyists.

4 It should be noted, however, that the *Lobbyists Code of Conduct 2009* – rendered inoperative by the Lobbyists Regulations in April 2016 – can still be found on the DPC website in DPC Circular 32 dated October 2014.

Ministerial Code of Conduct

The Ministerial Code of Conduct, dated July 2002, applies to all Ministers of the Crown in South Australia. The Code of Conduct does not specifically address lobbying, but sets out expectations of Ministers in relation to: general standards of conduct, conflicts of interest, use of information obtained in the course of official duties, use of public property, continuing obligations (i.e. post Ministerial service), relations with the public service, and caretaker conventions.

Public Sector (Honesty and Accountability) Act 1995

This Act imposes obligations of honesty and accountability (including specific duties in respect of conflicts of interest) on corporate agency members, advisory board members, senior public sector officials, corporate agency executives, public sector employees and person performing contract work. Breaches of these obligations amount to criminal offences punishable by fines and/or imprisonment. Civil penalties may also be imposed.

Public Sector Code of Ethics

The Public Sector Code of Ethics applies to all public sector employees. It does not specifically address lobbying, but sets professional conduct standards regarding: professional and courteous behavior, public comment, handling official information, use of government/public resources, conflicts of interest, outside employment, acceptance of gifts and benefits, criminal offences and reporting unethical behavior.

In addition to the above, South Australian Public Sector Agencies each have internal administrative measures which address issues relevant to the risks associated with lobbying, based upon the Public Sector Code of Ethics.

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