

Your Ref: Lobbying Reforms

Quote in reply: Direct Advocacy

14 March 2011

The Integrity Commissioner
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Dear Commissioner

REVIEW OF THE OPERATION OF THE LOBBYING PROVISIONS OF THE INTEGRITY ACT 2009

The Queensland Law Society is pleased to be able to provide its comments to you as a part of your review of the operation of the lobbying provisions of the *Integrity Act 2009*.

I note that you requested input to your review by 12 March 2011 (being a Saturday), however, due to a major migration of our technology we are unable to meet your proposed timeframe. I apologise for the slight delay in providing this submission to you.

The ICAC Report

We note that you are especially keen to receive comments on the desirability of implementing the reforms proposed by the New South Wales Independent Commission Against Corruption in its November 2010 Report "Investigation into Corruption Risks involved in Lobbying" (the ICAC Report). We note that the Law Society of NSW made a submission to ICAC in response to the initial issues paper issued prior to that report and a copy of that submission is attached for your information. We find the views of the Law Society of New South Wales to be compelling in many respects and do not believe that ICAC fairly took into account their views in coming to its final position.

The overall scheme of the ICAC Report and its recommendations is to not to create a register and impose regulation of those who lobby State Government in NSW for its own sake, nor to create an additional bureaucracy to manage its administration. It is commendably about making lobbying in NSW more transparent by facilitating public access to information about lobbying held in Government by linking lobbying activities to the right to information regime. In that regard, the ICAC Report proposal for the NSW Information Commissioner to be both the keeper of the lobbyist register and facilitator of public information would efficiently and cost-effectively contribute to the public transparency of Government.

This is an initiative which could be considered for introduction into Queensland in the interests of reducing bureaucracy and increasing public access to Government decision-making.

QLS Position

In summary and for the reasons stated below the QLS does not consider the model of lobbyist regulation proposed in the ICAC Report to be superior to the system presently implemented in Queensland nor desirable. The Society is principally of the view that:

- there is already in place an extensive statutory regulatory regime for the conduct of Australian Legal Practitioners in engaging in legal practice and there is little utility in further overlapping and repetitious compliance obligations being imposed;
- there is significant uncertainty in the operation of many of the ICAC Report proposals and this will merely serve to frustrate clarity of obligation and compliance (especially for Australian legal practitioners in regard to the 'day-to-day work' test proposed in the exemption to what is a lobbying activity);
- the proposals for the regulation of not-for-profit and industry bodies in the ICAC Report appears unjustified by quantifiable risk and subject to a variable view of public interest with respect to when an organisation should not have to register. The QLS has a very significant concern that Executive Government should not impose additional regulation without a consistent rationale in response to a demonstrable mischief; and
- there is a serious concern that the ICAC Report proposal would characterise making an application for legal aid on behalf of a client a lobbying activity. The QLS would be deeply troubled if any scheme of lobbyist regulation was directed at frustrating access to justice for those at risk in our community. Such a result is not currently a part of our Queensland scheme and must not be introduced.

The ICAC Definitions

At the root of the ICAC Report are three key definitions which are the foundation of the system of lobbyist registration:

- Third party lobbyist;
- Lobbying entity; and
- Lobbying activity.

Definition of Third Party Lobbyist

The ICAC Report proposes the definition of 'third party lobbyist' to be:

A person, body corporate, unincorporated association, partnership, trust or firm who or which is engaged to undertake a Lobbying Activity for a third party client in return for payment or the promise of payment for that lobbying.

This proposed definition is extremely broad in scope and does not contain any of the exemptions found in the current Queensland legislation. Most relevantly to legal practitioners is the exemption in section 41(6) of the *Integrity Act 2009* which is relevant to an entity which undertakes a business primarily directed towards the delivery of technical or professional services. The rationale of the current exemption was summarised in the Explanatory Memorandum to the *Integrity Reform (Miscellaneous Amendments) Bill 2010* which stated at page 30:

“It is considered that activity which is already subject to regulation under specific legislation should not be subject to additional regulation under lobbying provisions of the Act.”

In a previous submission we have made to the Premier prior to the amendments to the *Integrity Act 2009*, which we also provided to you, we argued:

Presently the *Legal Profession Act 2007* sets out an extensive regulatory regime for legal practitioners engaging in legal practice, which includes:

- extremely high levels of professional responsibility including fiduciary duties;
- a complaints and disciplinary regime through the Legal Services Commission and the Courts;
- professional indemnity insurance and fidelity fund obligations;
- fee agreement restrictions and disclosure obligations as well as a comprehensive, independent, cost assessment regime;
- stringent admission requirements and ongoing registration requirements to ensure practitioners are fit and proper individuals and remain so; and
- overarching duties to the Court for professional conduct and standards that precede duties to clients.

In light of these existing strong mechanisms applied to Australian legal practitioners it seems inconceivable that the *Integrity Act 2009* was intended to add a further layer of regulation upon legal practitioners acting within the ordinary scope of their legal practice.

Should, however, an Australian legal practitioner act beyond the boundaries of engaging in legal practice within the *Legal Profession Act 2007* regime and act primarily as a lobbyist, then they must no longer be exempt from registration, as while they may be a legal practitioner they are not acting in that capacity.

We continue to consider these as compelling arguments against introducing overlapping and repetitious compliance obligations for Australian legal practitioners through the lobbyist register. We do note, however, that the exclusion to the ICAC Report definition of ‘lobbying activity’ contained in sub-paragraph (j) of that definition may be analogous to our section 41(6), or may possibly be more expansive, as it states:

This definition does not include:

- j. communication with a Government Representative as part of the normal day-to-day work of persons registered under an Australian Government scheme or a NSW Government scheme, regulating the activities of members covered by that scheme

Due to the way this exclusion is drafted and the fact that ‘scheme’ in this context is itself not clearly defined the scope of such an exclusion is not immediately apparent. It is, however, fairly arguable that the *Legal Profession Act 2004* (NSW) is a ‘NSW Government scheme’ which registers persons and regulates their activities. In this regard it might be fairly argued that NSW legal practitioners would not be conducting a lobbying activity if their communication with the a Government Representative were ‘as part of the normal day-to-day work’ they conducted.

In our view this merely invites dispute about whether any particular communication was rightly within the scope of a legal practitioner’s ‘day-to-day work’ or outside of it. In that regard we see the current Queensland approach as superior as, in effect, it operates that while an Australian Legal Practitioner is

engaging in conduct within the scope of legal practice regulated by the *Legal Profession Act 2007* (Qld) the exclusion in section 41(5) will apply. We have always maintained that if an Australian Legal Practitioner goes beyond the boundaries of engaging in legal practice and is acting a commercial third party lobbyist they should be registered and regulated as such.

In this regard and for these reasons we do not consider the definition proposed in the ICAC Report as suitable for Queensland.

Definition of Lobbying Entity

The ICAC Report proposes the definition of 'Lobbying Entity' to be:

A body corporate, unincorporated association, partnership, trust, firm or religious or charitable organisation that engages in a Lobbying Activity on its own behalf.

The proposed definition is again extremely broad and would extend to any organisation that performs or has ever performed a single instance of a 'lobbying activity'. It is curious matter of drafting that the proposal deems a single occurrence of a lobbying activity to make an entity a lobbying entity – there is no proposed element of frequency, regularity or even intention. This surely could not be what was intended and may prove exceedingly burdensome for small not-for-profit organisations who may not even be aware that they have performed a 'lobbying activity' and may have a registration obligation.

The current Queensland *Integrity Act 2009* specifically excludes (and names) the Queensland Law Society as 'an entity constituted to represent the interests of its members' in section 41 (3)(b). In the Premier's Second Reading Speech introducing the *Integrity Bill 2009* on 10 November 2009 she spoke about the Bill being directed at the 'lobbying industry' and the current provisions of the Act are indeed addressed toward enhancing the transparency of lobbyists engaged to pursue the benefit of a third party client. The Act was directed toward remedying some form of mischief in that area.

While ICAC has proposed the above definition, it acknowledges that the proposed scope may be too broad, at page 52:

Which lobbyists would not have to register?

Those who lobby but would not need to register may be identified in the group of exclusions from the definition of lobbying activity set out above. In general terms, individuals who lobby in their own right or for family or friends, local and grassroots lobbyists, and those who participate in public debate and petitions or lobby their own MP do not have to register. Those who make enquiries of government officers, speak to parliamentary committees, give quotes, submit tenders or contract with government are not engaged in lobbying activity, and do not have to register. ***The government might also consider it appropriate to exclude other categories; for example, those who address issues of clemency, incarceration, other justice issues or mental health detention.*** [emphasis added]

In representing the views of its members to Government the QLS addresses all of the issues raised by ICAC for exemption and many other issues of public benefit. Indeed the QLS is often best placed of all organisations to provide views about unintended consequences of a particular approach to legislative drafting due to that being a specific skill of its members. The number of submissions that the QLS makes to the Parliamentary Scrutiny of Legislation Committee with respect to breaches of fundamental legislative principles in new Bills is a prime example of public interest advocacy. Indeed even in matters which relate to our members, the QLS must take a balanced position as we represent members who are employers and employees, who act for vendors and purchasers, members representing the State and

defendants in criminal matters or plaintiffs and respondents in civil matters, members who act for major corporations and for individuals affected by their actions. In the sphere of legal practice there is no one view and no single interest to be advanced at the expense of all others.

In this regard the QLS has been asked many times to be an 'honest broker' in contentious matters and to provide input at all stages of the policy development cycle to ensure that proposals are fair, balanced and rights are respected. This is an important aspect of the value of the QLS to the Queensland community. Where we have not been approached confidentially we publish our submissions on our website.

We are firmly of the view that the burden of additional regulation needs to be in response to actual quantifiable risk. The ICAC Report does not present any justification for the registration of entities such as the QLS in its proposals, other than it somehow making Government less transparent. Just how and why this is the case the ICAC Report does not say. Imposing additional regulation is a serious matter. It is the exercise of power of the Executive arm of Government which needs to be wholly justified to address some apparent mischief.

We would not support the ICAC Report proposals with respect to the definition and application of 'lobbying entity' for implementation in Queensland.

The ICAC Report proposes the definition of 'Lobbying Activity' to be:

Lobbying Activity

A communication with a Government Representative in an effort to influence government decision-making, including as to the:

- making or amendment of legislation
- development or amendment of a government policy or program
- awarding of a government contract or grant
- allocation of funding
- making of a decision about planning or giving a development approval under the Environmental Planning and Assessment Act 1979.

This definition does not include:

- a. communication with a committee of the Legislative Council or Legislative Assembly
- b. communication with a member of parliament in their capacity as a local representative on a constituency matter
- c. communication with a Government Representative in response to a call for submissions or information
- d. petitions or contacts of a grassroots campaign in an attempt to influence a government policy or decision (unless the lobbying activity is undertaken by a Third Party Lobbyist for reward)
- e. communication with a Government Representative in response to a request for tender or request for quotes
- f. statements made in a public forum
- g. submission of a written application to a Government Representative in a form required by the public sector agency to whom the application is made
- h. representations made on behalf of relatives or friends concerning their personal affairs
- i. communication with a Government Representative on behalf of a trade delegation visiting NSW
- j. communication with a Government Representative as part of the normal day to day work of persons registered under an Australian Government scheme or a NSW Government scheme, regulating the activities of members covered by that scheme

- k. communication with a Government Representative limited to ascertaining the progress of a matter or an enquiry as to the application or interpretation of any law, policy, practice or procedure.

The proposed definition mirrors in large part section 42 of the *Integrity Act 2009* with some variations. We have discussed exemption (j) above in respect of the definition of third party lobbyists and the legal profession.

The Society notes that while the *Integrity Act 2009* refers to an exemption in section 42(2)(j) for 'contact only for the purpose of making a statutory application' the ICAC Report has addressed this in a similar way through exemptions (g) and (k) above. It appears to us that exemption (k) is a worthwhile and very practical suggestion and one which could be adopted into our Queensland legislation as this contact is clearly not an exercise in lobbying.

One further issue with the scheme proposed in the ICAC Report for lobbying activities is whether the making of an application for a grant of legal aid on behalf of a client in a criminal matter would be technically considered a lobbying activity. It is possible that this may come within the scope of exemption (j) to the ICAC proposal but this is not clear. It would be a undesirable and somewhat farcical position for such an application to be assessed as a lobbying activity when this is so fundamental to providing access to justice for those marginalised in our community without the resources to fund a private defence. It would be unfortunate if one of the results of the regulation of lobbyists was to reduce the opportunities for people to access legal aid and thereby restrict access to justice. In our *Integrity Act 2009* it is only the operation of section 41(6) which prevents this outcome.

ICAC Recommendations

The ICAC Report makes a number of recommendations and the substance of the proposed scheme has been addressed above through the critical proposed definitions. We do have some further comments with respect to some of the recommendations.

Recommendation 2

The Commission recommends that the NSW Premier develops a model policy and procedure for adoption by all departments, agencies and ministerial offices concerning the conduct of meetings with lobbyists, the making of records of these meetings, and the making of records of telephone conversations. As a minimum, the procedure should provide for:

- a) a Third Party Lobbyist and anyone lobbying on behalf of a Lobbying Entity to make a written request to a Government Representative for any meeting, stating the purpose of the meeting, whose interests are being represented, and whether the lobbyist is registered as a Third Party Lobbyist or engaged by a Lobbying Entity
- b) the Government Representative to verify the registered status of the Third Party Lobbyist or Lobbying Entity before permitting any lobbying
- c) meetings to be conducted on government premises or clearly set out criteria for conducting meetings elsewhere
- d) the minimum number and designation of the Government Representatives who should attend such meetings
- e) a written record of the meeting, including the date, duration, venue, names of attendees, subject matter and meeting outcome
- f) written records of telephone conversations with a Third Party Lobbyist or a representative of a Lobbying Entity.

The proposal does not appear to contemplate when a Government Representative invites stakeholder consultation, which frequently occurs. It also does not appear useful for an organisation which lobbies on behalf of itself or its members to state in recurrent communications that it is doing so. This appears to be otiose and of little practical utility. Indeed, it makes additional regulatory burdens for individuals and representative bodies.

Recommendation 8

The Commission recommends that all Third Party Lobbyists and Lobbying Entities be required to register before they can lobby any Government Representative. This register would comprise two panels; one for Third Party Lobbyists and one for Lobbying Entities.

Both Third Party Lobbyists and Lobbying Entities would disclose on the register the month and year in which they engaged in a Lobbying Activity, the identity of the government department, agency or ministry lobbied, the name of any Senior Government Representative lobbied, and, in the case of Third Party Lobbyists, the name of the client or clients for whom the lobbying occurred, together with the name of any entity related to the client the interests of which did derive or would have derived a benefit from a successful outcome of the lobbying activity.

The Society does not support the implementation of the proposal as stated in the ICAC Report for the comprehensive reasons provided above.

Recommendation 9

The Commission recommends that an independent government entity maintains and monitors the Lobbyists Register, and that sanctions be imposed on Third Party Lobbyists and Lobbying Entities for failure to comply with registration requirements.

The Society can see the wisdom in the proposal of ICAC to make the Office of the Information Commissioner responsible for administration of the Register as it is directed toward making lobbying transparent rather than exposing lobbyists in a punitive manner.

Thank you for providing this opportunity to provide input into your review. As we further digest the ICAC Report I suspect that we will identify other issues associated with its adoption into Queensland and I would be pleased to provide them to you as they arise.

Yours faithfully

Bruce Doyle
President