Review of the *Integrity Act 2009*

This paper supplements the document I forwarded to the Department of the Premier and Cabinet on 31 May 2011 reviewing the provisions of Chapter 4 of the *Integrity Act 2009* – Regulation of lobbying activities, and deals with other parts of the Act.

I make the following recommendations:

1. **Advice on post-separation issues**. The *Integrity Act* should be amended to allow some former designated persons (former MPs and Minister, former statutory office holders, former chief executives and former staff of Ministers and Parliamentary Secretaries) to seek advice from the Integrity Commissioner about post-separation issues for a period of two years after they cease to be designated persons.

2. **Post-separation employment**. The *Integrity Act* should be amended to include a part detailing the post-separation obligations of former senior government representatives. The part should include sanctions for breaches of the Act.

3. **Requests for advice by a "relevant officer"**. The *Integrity Act* should be amended to allow the Integrity Commissioner the option of providing advice to a "relevant officer" where the officer's Chief Executive has not provided the authority required by s. 15(3).

4. **Review of declarations of interest**. The *Integrity Act* should be amended to give the Integrity Commissioner authority to review all declarations of interest with which he must be provided under a statute. If the Integrity Commissioner identifies a conflict or possible conflict, the Commissioner should be entitled to raise the issue directly with the officer concerned. If the issue is not resolved satisfactorily, the Integrity Commissioner should be permitted to raise the matter with the relevant Minister.

Advice on post-separation issues

A number of designated persons have sought my advice about post-separation limitations on their future activities. Several asked whether it was possible, under the *Integrity Act*, for them to continue to seek my advice about those limitations and their compliance with them once they ceased to be designated persons, i.e. once they had left the public sector. I told them that in my view this was not possible. The Act clearly requires that only designated persons can seek advice.

However I consider it is desirable that some such people should be able to seek advice. This would assist them to avoid acting in a way that might be contrary to requirements of the *Integrity Act* (about lobbying) on codes of contract or contractual obligations (about breaches of confidentiality or business meetings with government representatives in relation to matters where they had had official dealings). It would demonstrate the importance that the Government attaches to strict compliance with the post-separation rules.

The Act could be changed to achieve this result in several ways. However the simplest way would be to amend s. 15 – Request for advice. A new sub-section could be added to provide that a former designated person, for a period of two years after they cease to be a designated person, may by written request to the Integrity Commissioner, ask for the Integrity Commissioner's advice on a post-separation issue concerning the person.

However I believe any such amendment should be restricted to a relatively small number of people – not the 5,000 or more people who are currently designated persons. In my view the people who should be entitled to seek such advice after they cease to be designated persons are former Members of the Legislative Assembly (including Ministers), former statutory office holders, former Chief Executives of a Department of Government or public service office, and former staff of Ministers or Parliamentary Secretaries.

An amendment added to s. 15 of the *Integrity Act*, could take the following form:

> A person who was a designated person because of s. 12(1)(a), (b), (c), (f) or (g) may, for a period of 2 years after they cease to be a designated persons, ask the Integrity

Commissioner for advice about conforming with any lobbying or employment restrictions that might apply to them.

It would be desirable to define "post-separation issue".

Post-separation employment

While the *Integrity Act* in s. 70 regulates the activities of lobbyists who are former senior government representatives, banning them from acting for a third party client for 2 years, it does not cover lobbying by a former senior government representative who is in-house, as an employee or director of an entity that wishes to lobby government.

However codes of conduct and employment contracts that did apply to the former government representative are intended to prevent business meetings with government representatives. That only applies, however, when the meeting is concerned with any matter which the former government representative had "official dealings" during the relevant quarantine period.

The limitations on post-separation provisions are currently listed in a policy document issued by the Public Service Commission. The policy brings together the bans and limitations in s. 70 of the *Integrity Act*, and those that flow from the Criminal Code and the common law (concerning duty of confidentiality) employment contracts, codes of conduct and any relevant standards of practice.

The policy document is necessarily directed primarily at public servants, not the former senior government representatives whose activities are sought to be restrained or limited. Paragraphs 4.2.1 and 4.2.2 summarise the duties of public servants in this regard:

4.2.1 Obligation of government representatives to not allow a former senior government representative to undertake related lobbying activity

4.2.2 Obligation of departmental staff to not allow a former senior government representative to conduct business meetings with government representatives

4.2.3 Lists the "allowable lobbying and business meeting activity".

The Government decided that in relation to lobbying, it was not sufficient to rely on directions to public servants not to have any lobbying contact with former senior government representatives. The *Integrity Act* s. 70 also tells those former senior government representatives they must not lobby for a third party client. However the law does not seek to impose any sanction for a breach.

The question arises whether other proscribed (by codes of conduct etc.) post-separation activity should also be prohibited by law.

A recent OECD survey (*Post-Public Employment – Good practices for preventing conflict of interest*, OECD 2010) says that "a variety of instruments has been used for preventing and managing post-public employment conflict of interest" (at p. 43) but it says the "principal source of post-public employment prohibitions and restrictions [in OECD countries] is primary legislation" (at p. 44).

> "An attractive feature of primary legislation is that is provides strict standards for sanction and can, therefore, be a more effective deterrent than other instruments. However, while primary legislation may be a powerful deterrent to post-public employment conflict of interest, it can also be a strong disincentive to prospective public officials who may view these prohibitions and constraints as unduly restrictive of their rights."
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> …
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> "Secondary legislation – in the form of **directives, rules, regulations and decrees** – is usually authorised by, and directly related to, a piece of primary legislation in order to provide further specificities. Secondary legislation would, for example, elaborate on the provisions of a statute dealing with conflict of interest in generally, or with post-public employment conflict of interest in particular."
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> …
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> "Secondary legislation enhances the deterrent value of primary legislation by giving greater specificity to its application and enforcement. An advantage of using secondary legislation to implement primary legislation is that it can be amended relatively easily to take account of desirable changes in a country-s post-public employment scheme."

In my view the present integrity system in relation to post-separation employment relies for enforcement too heavily on current public servants. It would send a stronger message to departing senior government representatives if they were aware that there were legislative restrictions on them. This would also ensure that there could be no successful challenge to former contractual provisions that might be considered by the courts contrary to public policy as restraint of trade because of the length of time that bans apply.

Because "former senior government representative" is defined so broadly (in the *Integrity Act*) to include former Ministers, Parliamentary Secretaries and their staffs, and local government councillors and officials, it would probably be necessary to put such legislative controls on post-separation employment in the *Integrity Act*. It should also include sanctions, if it is to be taken seriously by the people at whom it is directed, as well as by the public.

Requests for advice by a "relevant officer"

Section 15(3) provides that a relevant officer (senior executive, senior officer or senior officer equivalent) can only seek advice from the Integrity Commissioner if they obtain a signed authority from their chief executive authorising them to do so. This has a number of drawbacks. First, it may cause (and in some cases has caused) a significant delay in obtaining the advice even though the matter about which advice is sought may need to be resolved quickly. Second, it may inhibit the seeking of advice because the relevant officer does not want their chief executive to know about the issue. (On the other hand it may be argued that the chief executive needs to know.) Third, the chief executive may refuse to provide the necessary authority in circumstances where the officer (and the agency) would have been better served if the advice had been obtained.[1]

I consider that the subsection should give the Integrity Commissioner the option of providing advice in circumstances where the chief executive has not given the necessary authority to the officer. This could perhaps be achieved by amending s. 15(3) to add a proviso that if the

[1] Since July 2009 nine requests have been made to chief executives for the necessary authority. On one occasion it was declined. On another the authority was not forthcoming and the officer did not persevere with the request.

relevant officer fails to obtain the authority the Integrity Commissioner may in his or her discretion provide the advice.

Review of declaration of interests under the *Public Service Act 2008*, s. 101

Chief executives must provide the Integrity Commissioner with a copy of their declarations of interest. Under the *Integrity Act 2009* so must the statutory officers mentioned in Schedule 1 of the Act. Under some other Acts, several other statutory officers must also provide the Integrity Commissioner with copies of their declaration of interests.

The Integrity Commissioner has powers under the *Integrity Act* that relate to functions described in s. 7 of the Act. There are no powers stipulated in relation to the receipt of the declarations of interest mentioned above other than the requirement in s. 85 that the Integrity Commissioner must provide details of compliance, including identifying statutory office holders and chief executives who did not comply with the requirements to provide declarations of interest.

I suggested last year in conjunction with the Public Service Commission, that the Integrity Commissioner should be given authority to examine the various declarations and to raise with their authors any issue about possible conflict of interest the Commissioner thought might arise from the contents of the declaration. I also suggested that if such conflicts could not be resolved the Commissioner should be able to raise the matter with the responsible Minister.

The Department of the Premier and Cabinet agreed and because amendments to the *Integrity Act* were scheduled to be introduced into Parliament a few days later, decided that an amendment incorporating this proposal should be introduced during the Committee stages of the Bill.

Meanwhile the Explanatory Notes were changed to reflect the contents of the proposed amendment.

The Notes say, at p. 34 –

> The provision of these statements of interests to the independent monitor of integrity standards for the Queensland Government, the Integrity Commissioner, will allow independent review of possible conflicts between an office holder's public duties and private interests. If the Integrity Commissioner identified a conflict of interest or possible conflict of interest through a statement provided by a statutory office holder under this Act, or by a chief executive in accordance with section 101 of the *Public Service Act 2008*, the Integrity Commissioner would be able to raise the conflict or potential conflict directly with the officer involved. Where identified conflicts are not resolved, the Integrity Commissioner would also be able to raise the conflict, or potential conflict, with the relevant Minister, who would also have been provided with the statement in accordance with the requirements of the Acts.

However because of the way the Parliament dealt with the Bill I understand there was no opportunity to introduce the amendment.

I **recommend** that the amendment be revived and included in the next set of amendments to the *Integrity Act 2009*.