Review of the *Integrity Act 2009*, Chapter 4 ("Regulation of lobbying activities")

Dr David Solomon A.M., Queensland Integrity Commissioner

The *Integrity Act 2009* came into force on 1 January 2010. The provisions in Chapter 4 regulating lobbying activities replaced an administrative scheme that had operated throughout most of 2009. It was then the responsibility of the Department of the Premier and Cabinet. The Government had decided to regulate lobbying by requiring that its Ministers, their advisors and public servants generally should have no dealings with any unregistered lobbyist. It established a register of lobbyists and the registration system essentially adopted the scheme established by Western Australia and the Australian federal government in creating such a register – a precedent later followed also by other States.

Lobbying entities were required to put on the register details of their business, who they employed to work as lobbyists, and who their clients were, and any other clients they had in the previous 12 months. They were required to provide a statutory declaration that they did not have a criminal history and had not been convicted of fraud or dishonesty.

A number of important changes to the scheme were incorporated in the new *Integrity Act*. These included –

> First, responsibility for the administration of the register of lobbyists was transferred to the Integrity Commissioner.

> Second, the Integrity Commissioner was given power to develop a new Lobbyists Code of Conduct, with which "lobbyists must comply". Failure to comply would be a reason for the Commissioner to refuse registration to the lobbyist, and that would come with a cost – not being able to do business with government.

Third, the reach of the licensing system was extended. In particular, under the Act, local government and Government Owned Corporations were also required to have no dealings with a lobbyist who was not registered under the Act.

Fourth, lobbyists could not ask for or receive success fees for their efforts in lobbying government. If a lobbyist offended this prohibition they would not only be fined but would also forfeit the fee to the Government.

Fifth, former senior government representatives were prohibited, for two years after they left government, from doing any lobbying involving areas in which they had had "official dealings". That term is not defined. "Former senior government representative" is defined in a very broad manner to include, for example, anyone who had worked in the office of a Minister or parliamentary secretary, as well as senior public servants, down to senior executive level or equivalent. (There are some other limitations on the post-separation activities of former senior government representatives but these are not included in this, or any other, Act. They arise from the Criminal Code and the common law – duties of confidentiality – and/or from contract – limitations on business meetings with current government representatives.)

The Act has now been in operation for almost a year and a half. At the time of writing the register contains the names of 140 lobbyist entities, with 369 individual persons identified as lobbyists. These entities represent 2,750 clients.

This review of the provisions of the Act and the operation of the scheme has been prompted by a number of concerns and developments. These include criticisms about the design of the scheme, and in particular the fact that it is intended to regulate only a small proportion of the lobbying activity to which government is subjected; problems in determining which entities need to register as third party lobbyists; difficulties in applying the legislation in particular to local government in relation to planning approvals; and decisions by legal and accountancy firms not to register, though arguably some of them are involved in lobbying activities. Further, in New South Wales the Independent Commission Against Corruption (ICAC) conducted an investigation towards the end of last year into "corruption risks involved in lobbying". Its report recommended major changes in the regulation of lobbying in that State, several of which have been implemented by the new government. (Those

changes ban success fees and lobbying by former Ministers and Parliamentary Secretaries for 18 months about matters where they had had official dealings. The NSW Government has also decided to restrict the membership by lobbyists of official boards and committees.) The NSW Government has not indicated yet what further recommendations made by ICAC that it intends to implement.

I notified registered lobbyists and other stakeholders including government departments and local government about my intention to conduct this review. It was also advertised on the Integrity Commissioner website. I received 35 responses. I propose to publish this review on the website and will suggest that any comments on it be directed to the Department of the Premier and Cabinet.

A number of the submissions I received advocated more uniformity across the various Australian jurisdictions in the requirements for registration of lobbyists and the different banning periods put on former Ministers and government representatives. At a recent meeting attended by those responsible for administering the lobbying schemes throughout Australia, it was universally considered that the political imperatives driving the various schemes were such that being able to obtain such uniformity was most unlikely, and in the short term at least probably not worth pursuing.

In what follows I have referred relatively briefly to the content of the submissions I received. Nevertheless, I have carefully read them all and noted and taken account of their various recommendations.

The main recommendations I make are:

1. That the lobbyists registration scheme be made to meet public expectations of transparency and integrity by requiring the registration of some of those third party lobbyists that are excluded at the moment and by making special provision to ensure that in-house lobbyists are also covered, though not by precisely the same regime as third party lobbyists.

2. That s. 41(3)(b) of the *Integrity Act* be amended to provide an exemption only for representatives of employers and employees and professional bodies such as the Queensland Law Society and that there be no general exemption for entities constituted to represent the interests of members.

3. That subsections 41(3)(d) and 41(6) be deleted from the Act.

4. That there be a requirement (added to s. 71) that a government representative must not allow themselves to be lobbied by an unregistered entity unless that entity undertakes to observe the relevant parts of the Lobbyists Code of Conduct in its dealings with the government.

5. That s. 42(1)(e) of the *Integrity Act* be deleted and instead its provisions be included under s. 42(2) as matters that are not a lobbying activity.

6. That a sanctions regime be introduced for breaches of s. 71(1) and (2) of *the Integrity Act.*

7. That s. 72A be amended to make it clear that a "responsible person for a government representative" has an obligation to disclose to the Integrity Commissioner, if requested, information about contacts that amount to lobbying, whether by registered lobbyists or otherwise.

8. That s. 72A should include a note pointing out that the *Public Records Act* requires that records must be made and kept of all contacts where entities seek to influence government decision making, whether the entity is registered or not.

31 May 2011

Who should register? Section 41 – Meaning of lobbyist and related concepts

Section 41(1) Lobbying for a "third party client"

In my 2009-10 annual report, I noted that I had given evidence to the ICAC inquiry on lobbying and indicated that I favoured an increase in the regulatory regime to cover many people who lobby government but do not fall within the current statutory definition of what (or who) is a lobbyist. At that stage I suggested that the definition of who is a lobbyist should be greatly broadened to include organisations that employ in-house lobbyists, representative organisations of doctors, engineers, property developers etc, and all other organisations that seek to influence State or local government decision-making. As it transpired, this was also the view taken by ICAC in its report.

In retrospect, I consider that adoption of something like the Canadian system of registering lobbyists (on which the ICAC proposals appear to be based) is neither necessary nor desirable. The legislative and policy aims of the registration system can be achieved through a modest expansion of the requirement for registration and/or through a legislative extension of the requirement for those who engage in lobbying (whether they are required to register as lobbyists or not) to adhere to the ethical standards prescribed by the Lobbyists Code of Conduct. At the same time, government representatives need to adopt the strict record-keeping requirements of the *Public Records Act* where meetings are held with people seeking to lobby them, whether or not those people are registered lobbyists or are exempt from registration. The last two matters will be considered later in this submission.

It is important, first, to examine and be clear about the purpose of the registration system.

A critical question is whether the reason for establishing a register and code for lobbyists is met sufficiently when registration is limited to third party lobbyists. A recommendation "that coverage of the Code be expanded to embrace unions, industry associations and other businesses conducting their own lobbying activities" was made in a minority report by the Senate Finance and Public Administration Committee in 2008. The Commonwealth Government provided this response –

> "The Government does not support Recommendation 3 of the Minority Report.
>
> The purpose of the Register of Lobbyists is to allow Ministers and officials to establish whose interests a lobbyist represents when they seek to influence Government officials. Ministers and public servants cannot determine whose interests a third party lobbyist is promoting unless the lobbyist discloses that information to them.
>
> Concerns about transparency do not arise in relation to in-house lobbyists and employees of peak industry bodies, trade unions and religious organisations, as it is clear whose interests they represent when they lobby Government representatives."[1]

The Queensland Government's reasons for introducing the register and code seem to have been much broader than those that prompted the Commonwealth to do so. Both the Queensland Government's green paper on Integrity and Accountability and the Government's response to it refer to public expectations of "**transparency, integrity and honesty**" in contacts between government representatives and lobbyists. These public expectations would seem to go beyond the mere need for third party lobbyists to disclose to government who they are representing.

The OECD has recently published a study of the way lobbyists are regulated by legislation in its member countries. It states –

> "Where **transparency and integrity** are the principal goals of legislation, effectiveness is best achieved if definitions are broad and inclusive, and the theatre of lobby activities is also defined broadly and inclusively."[2]

[1] Government response to Senate Standing Committee on Finance and Public Administration report *Knock, Knock…Who's there? The Lobbying Code of Conduct*, January 2009, p. 4.

[2] OECD, *Lobbyists, Government and Pub Trust, Volume 1, Increasing transparency through legislation*. OECD 2009, p. 14. (Emphasis added.)

The study pointed out –

> "In defining the scope of lobbying activities, a balance should be reached by effectively taking into account the different types of entities and individuals that may engage in lobbying activities and the need to provide a level playing field for all stakeholders. The primary target is **professional lobbyists** who receive compensation for carrying out lobbying activities, such as consultant lobbyists and in-house lobbyists. However public concern may demand a more inclusive definition of lobbying activities to provide a level playing field for all interest groups intending to influence public decisions."[3]

Finally, the purpose for regulation is stated in the *Integrity Act* itself, in s. 4(b) –

> b) regulating contact between lobbyists and State or local government representatives so that lobbying is conducted in accordance with public expectations of transparency and integrity.

The question is whether that is achieved by regulating only the activities of third party lobbyists – and not all of them.

I **recommend** that the lobbyists registration scheme be made to meet public expectations of transparency and integrity by requiring the registration of some of those third party lobbyists that are excluded at the moment and by making special provision to ensure that in-house lobbyists are also covered, though not by precisely the same regime as third party lobbyists.

[3] Ibid, p. 12. (Emphasis in original.)

Section 41(3)(b) – an entity constituted to represent the interests of its members

This sub-section says "an entity constituted to represent the interests of its members" is not a lobbyist. It lists three examples – an employer group, a trade union and a professional body, for example, the Queensland Law Society. I accept that these three bodies should not be regulated as lobbyists. This is because they are already regulated, the first two under Commonwealth law, the third under a Queensland statute. The Local Government Association of Queensland is in a similar position.

However most representative entities are not regulated by legislation. One of the main reasons most of these bodies are established and operate is to lobby governments to progress the collective interests of their members (although on some occasions they lobby for the interests of one or a few of their members). Most of them are well-funded and their lobbying is usually performed in-house. Many are among the most active lobbyists that governments deal with. They include, for example, the Property Council of Australia, the Real Estate Institute, the Mining Industry Council, the Australian Chamber of Commerce and Industry, the Housing Industry Association, the Australian Medical Association, the Motor Trades Association and the RACQ. These would be among the more active lobbying groups in the State, and would do more lobbying than most third party lobbyists.

Public expectations of transparency and integrity would appear to require that such organisations should register as lobbyists – because lobbying is one of their primary functions – and be required to submit to the requirements of the Lobbyists Code of Conduct.

I recommend that s. 41(3)(b) of the *Integrity Act* be amended to provide an exemption only for representatives of employers and employees and professional bodies such as the Queensland Law Society and that there be no general exemption for entities constituted to represent the interests of members.

Section 41(3)(d) – an entity carrying out incidental lobbying activities

This has proved to be one of the most difficult and contentious of the provisions of the Act. Two major issues are involved. The first is the extent to which professionals are meant to be excluded from the provisions of Chapter 4 of the *Integrity Act*. The second is the way the following phrase is applied – "lobbying activities are occasional only and incidental to the provision of professional or technical services"

The sub-section has to be read in conjunction with s. 41(6) which defines "incidental lobbying activities" (using the phrase quoted above) and provides four examples, which were replaced in an amendment to the Act last year in an attempt to clarify the meaning of the provision. The Explanatory Notes dealing with the amended examples stated –

> This amendment is included in order to clarify the operation of the exclusion for incidental lobbying which occurs when an entity undertakes a business primarily directed towards the delivery of technical or professional services. The examples are replaced to include reference to the relevant regulatory frameworks under which such technical or professional businesses operate. It is considered that activity which is already subject to regulation under specific legislation should not be subject to additional regulation under the lobbying provisions of the Act.[4]

I consider the last sentence is the key to understanding and applying the exemption. What the exemption for professionals does not cover is activity conducted by them that is not regulated by the specific legislation covering their profession. In my view, lobbying is not an activity covered as a "legal service" by the *Legal Profession Act 2007*, nor is it an activity regulated by the various accountancy institutes nor by the *Professional Engineers Act 2002*.

Several submissions claimed that lawyers and accountants did compete with third party lobbyists. Some of the larger firms have dedicated government relations practices and either directly lobby on behalf of clients, or facilitate contact between clients and Ministers they want to lobby – for example, at board room lunches. The ICAC report said –

[4] p.30

> It was pointed out many times in evidence heard by the Commission during its inquiry and in submissions received that the professions of lawyer, accountant, and planner, and other third party professions frequently provide lobbying services. Many of the larger firms have specialist government relations departments, a function of which is to provide lobbying services. The services they provide are identical to, and compete with, those provided by third party lobbyists. Currently these professionals are exempted from registration, while other third party lobbyists are not.
>
> …
>
> Some of the professions objected to being included in the category of third party lobbyist, and to being required to register or submit to a lobbyist code of conduct. They argued that they were a low corruption risk, subject to existing disciplinary regimes (so that submission to a lobbying code of conduct was an unnecessary duplication), and finally, that their actions were part of ordinary professional practice.
>
> These arguments focussed on a claimed lack of corruption and probity issues. They did not address the transparency problem or the perception issues. Whether or not lobbying is part of ordinary professional work, it is still lobbying and it is carried out behind closed doors. It involves lobbying in the full sense of the definition, and it needs to be exposed to the operation of the *GIPA Act*, like any other lobbying activity, in order to allow access to information and to reduce public suspicion about lobbying.[5]

(The *GIPA Act* is the NSW equivalent of the *Right to Information Act*.)

I agree generally with these observations and this argument. However in Queensland there are no legal or accountancy firms that have registered as lobbyists, though I understand at least one accountancy firm operating in Queensland has registered in some other Australian jurisdictions.

The "occasional" and "incidental" exemption is ultimately what has been relied on by professionals seeking to avoid registering as lobbyists. However last year the Office of Liquor and Gaming

[5] Independent Commission Against Corruption, *Investigation into corruption risks involved in lobbying*, November 2010, p. 51

Regulation decided that many of its clients needed to register as lobbyists because it considered they were involved in lobbying as defined in the Act. This year the Gold Coast City Council decided that all of the town planners and other professionals handling development approvals should register as lobbyists because they were in regular contact with council officers, and therefore did not meet the exemption requirement of being "occasional only and incidental to the provision of professional or technical services".

However the exemption is interpreted differently by different departments and local councils. This cannot be avoided given the structure of the Act which puts the onus on each individual "government representative" to determine whether they are being lobbied and whether the entity lobbying them needs to be registered (see s. 71).

That being so, and given the difficulties that ss. 41(3)(d) and 41(6) create, in my view it would be better if this exemption was removed from s. 43. If it was considered necessary it could be replaced by a provision in s. 71 to allow a government representative to permit an unregistered entity to have a lobbying contact in circumstances the government representative considered on reasonable grounds that the contact was rare and was clearly incidental to the provision of professional or technical services. However I do not believed that this is either necessary or desirable. In my view an amendment made to the Act last year gives professionals the justification and means of avoiding registration if they are merely doing their jobs as professionals. The amendment was to add sub-section (j) to s. 42(2) of the Act, exempting from the definition of lobbying activity "contact only for the purpose of making a statutory application". This permits, for example, a lawyer to apply for legal aid, a matter about which the Law Society has expressed concern. However once the lawyer or accountant begins to advocate a change in the law, they are in the business of lobbying and they should register as a lobbyist.

I **recommend** that subsection 41(3)(d) and 41(6) be deleted from the Act.

Section 41(3)(e) – an entity lobbying to represent the entity's own interests

There is a simple justification for this exemption: government representatives know exactly who they are dealing with when someone from BHP, or Virgin Airlines, or Leighton Holdings makes contact with them. But the "public expectations of transparency, integrity and honesty" test is not satisfied under the existing legislation. There is little transparency. There is no requirement that such entities will, in their lobbying contacts with government representatives, adopt the ethical standards that the Lobbyists Code of Conduct imposes on third party professional lobbyists.[6]

In Canada, entities that have their own in-house ability to lobby government are required to register, and declare the names of those who will lobby on their behalf. The ICAC report recommended that all corporations that lobby using their own in-house staff, including board members, be required to register as a "lobbying entity". The NSW register proposed by ICAC would not require such entities to identify individual officers, lobbyists or owners. That would be a common sense provision, given that in a large firm anyone, from an owner, the CEO, a board member or any senior employee might be in a position where they could be involved in lobbying on behalf of the entity.

That being so, what is achieved by registration? All that would appear on the register would be the names of corporations or other entities that lobby on their own behalf, and their contact details.

But registration would have two other important consequences. The first is the corporation, in its lobbying of government representatives, would be bound by the relevant parts of the Lobbyists Code of Conduct. Second, a government representative would need to record relevant details of any such contact. Both would help satisfy public expectations of transparency, integrity and honesty.

However those objects may be achievable in other ways, without requiring the register to be expanded in the manner ICAC has proposed.

First, there could be a requirement (added to s. 71) that a government representative must not allow themselves to be lobbied by an unregistered entity unless that entity undertakes to observe the relevant parts of the Lobbyists Code of Conduct in its dealings with the government.

[6] Small as well as very large enterprises may opt for self-representation when lobbying. They may be unable to afford to hire a third-party lobbyist and may not be a member of an industry group that can lobby on their behalf.

Second, the requirement, which already exists in the *Public Records Act*, for a proper record of the lobbying contact to be made, should be acknowledged in the Act.

I **recommend** accordingly.

What constitutes lobbying activity? Section 42

Section 42(1)(e) – The making of a decision about planning or giving of a development approval under the *Sustainable Planning Act 2009*

The ICAC report recommended against a lobbyists' register at local government level, a recommendation that has the support of some local governments in Queensland, though the submission by the Local Government Association of Queensland noted that it took the "pragmatic view, so far as the Queensland State Government is concerned, that a blanket exemption for local government from complying with chapter 4 (regulation of lobbying activities) is unlikely to be forthcoming."

ICAC's concern was to better regulate the contact between council officers and developer. To this end it made a series of recommendations about the adoption by the government of various procedures it should require of local government that would achieve this end.

In Queensland it is considered by the LGAQ, and by planners and other professionals with whom I have had contact, that the procedures that are in place legislatively concerning the planning and approval process to be used by local government already achieve the aims of the *Integrity Act* concerning lobbying in this area. Following a meeting with representatives of the Gold Coast City Council, the Department of the Premier and Cabinet, the LGAQ and myself, the Acting Chief Executive Officer of the LGAQ wrote to me and confirmed that "the LGAQ supports the view that development application processes are presently more than adequately regulated by the *Sustainable*

Planning Act 2009 itself, as well as the *Local Government Act 2009* and *Local Government (Operations) Regulation 2010*."

This is particularly important because the present provisions of the *Integrity Act* do not apply to developers who use in-house professional staff to lobby for the adoption of development approvals or other planning changes they may want.

Local government is lobbied in many areas, and I consider it important that chapter 4 of the *Integrity Act* should continue to apply generally. However it does appear that the planning and development approval area is well regulated by the provisions of the Integrated Development Assessment System (IDAS) in the *Sustainable Planning Act 2009* and the *Local Government Act 2009.* The application of the provisions of the *Integrity Act* is therefore unnecessarily burdensome for local government, but achieves little.

I **recommend** that s. 42(1)(e) of the Integrity Act be deleted and instead its provisions be included under s. 42(2) as matters that are <u>not</u> a lobbying activity.

The Lobbyists Register – Section 43

Should it be a register of "lobbyists and consultants"?

"Lobbyist" is considered by many (including some in the industry) as a pejorative term. The industry much prefers the term "government relations". Other professionals who are involved in lobbying, including lawyers and accountants, town planners and engineers, object to being tagged as lobbyists and some resist registering under Chapter 4 because they do not want the label attached to them.

Whether it would make any difference if the register was a register of "lobbyists and consultants" is difficult to assess. But "consultant" would be a more accurate description of the functions of some of those who are listed as lobbyists. However a major difficulty is adjusting the term is that elsewhere, in Australia and overseas, whenever the activities of people who try to influence government for their clients are regulated, they are referred to as lobbyists.

The term may have negative connotations, but it is universally recognised.

I make no recommendation for change.

Who is a public sector officer? Section 47

Section 47 – Should every employee be covered?

An issue raised by a number of local government councils concerns the liability of relatively junior officers who might have to deal with people who could be said to be lobbying them. The problem is that the officers might be too junior to consider, as they might be required to by s. 71, whether a person was attempting to influence decision-making (and hence lobby them). As the Acting Chief Executive Officer of the LGAQ wrote, "In large Councils (such as the Gold Coast), it is difficult to educate large Council workforces as to what is lobbying (as presently defined), who or what is a

registered lobbyist and the procedures to be adopted if one suspects that they are being lobbied by an unregistered lobbyist." He proposed (as had the Gold Coast City Council) that the relevant parts of the act should apply only to the actual decision makers in every Council. He suggested an amendment to s.42 to add an additional sub-paragraph to the definition of lobbying activity in s. 42, as follows –

42(2)(k) contact with a government representative who

(i) Is a local government employee; and
(ii) Has no authority (by legislation or delegation) to make decisions on behalf of the local government.

An alternative approach would be to amend the definition of public sector officer in s. 47 to add a proviso limiting the employees who fit the description of public sector officer in the same manner.

A difficulty with both approaches is that an employee who does not have a delegated power may still be able to influence the decision that the council (or any other government body) makes through a recommendation or report, and hence lobbying that officer may satisfy the definition of lobbying activity.

The Gold Coast City Council's concern about this issue was one of the reasons why earlier this year it told all the planners and others with whom it had regular contact that they would have to register as lobbyists if they wished to continue to make contact with council officers in seeking planning or development approvals.

The problem would be greatly diminished if my proposal to eliminate obtaining such approvals by amending ss. 41(2)(e) and 41(6). I consider that would be the best answer to the perceived problem.

How long should the quarantine period be?

Section 70 – Related lobbying by former senior government representative prohibited

This section prevents former senior government representatives from "related lobbying activity for a third party client" for two years. There is a similar ban imposed by the Ministerial Code of Ethics on business meetings. The related dealings cover the period for two years before separation.

Similar but not identical bans are imposed in other Australian jurisdictions. However with the exception of South Australia (which also imposes a two year quarantine period) the maximum period is 18 months, the period specified in the recent NSW legislation. The Commonwealth restriction is 18 months for Ministers or Parliamentary Secretaries and 12 months for other specified people. Victoria has a similar scheme to that of the Commonwealth. Tasmania imposes only a 12 months ban.

As I noted earlier, obtaining national uniformity in the regulation of lobbying will be difficult. However the Government may wish to consider whether the two year quarantine period in s.70 should be reduced to 18 months (and similarly, the period specified in the Ministerial Code of Ethics and contracts with senior public servants concerning business meetings, be also reduced.)

Should prohibited conduct be policed, penalised, reported?

Section 71, Lobbying by unregistered entity prohibited

Crown Law has issued several legal updates concerning public sector obligations for dealing with lobbyists. Under the heading, "Consequences of non-compliance", the latest Crown Law advice is in these terms:

> The *Integrity Act* does not make it an offence for a person to fail to comply with the obligations in s. 71(2) and (3)
>
> However, government representatives and responsible persons could still be prosecuted for a criminal offence under s. 204 of the Criminal Code (disobedience to statute law). This section makes it an offence for a person without lawful excuse to do any act the person is forbidden to do, or not to do any act the person is required to do, by the provisions of any public statute in force in Queensland.
>
> In addition, a breach of s. 71(2) or s. 71(3) may have disciplinary consequences for public servants.

The LGAQ, in its submission, notes that the offence prescribed by s. 204 of the *Criminal Code* carries a maximum penalty of imprisonment for one year. It said, "If this truly is the potential criminal exposure for failing to comply … then, in the LGAQ's submission, the punishment certainly does not 'fit the crime'."

The LGAQ proposed that failure to comply with the subsections should be dealt with –

> For a councillor - as misconduct (as that term is defined in section 176 of the *Local Government Act 2009* and section 178 of the *City of Brisbane Act 2010*); or
>
> For a Council employee – as conduct for which disciplinary action can be taken pursuant to chapter 5, part 3 of *the Local Government (Operations) Regulation 2010* and chapter 5, part 3 of the *City of Brisbane (Operations) Regulation 2010*.

If that approach were to be adopted, it could similarly be provided that it would be a disciplinary offence under the *Public Service Act* for a public servant to fail to comply with the sections. However that general approach would not deal with a breach by a Minister or Parliamentary Secretary. If

sanctions were to be included in the *Integrity Act* it might be desirable to impose a monetary fine with disciplinary action as an alternative.

There being no legislation in other jurisdictions, no penalties are set down for breaches of the administrative codes. However ICAC recommended that NSW should adopt a legislative scheme, and the Western Australian Government has promised to introduce one. NSW recently passed the *Lobbying of Government Officials Bill 2011*. This dealt with two main issues. It banned success fees for lobbying. It provided for a maximum penalty of 500 penalty units for a corporation and 200 penalty units for an individual, plus forfeiture of the success fee. (In NSW a penalty unity is currently $110.) In the *Integrity Act*, s. 69 prohibits success fees and provides for a maximum penalty of 200 penalty units, plus forfeiture.

The second matter deal with in the NSW Bill was the introduction of a cooling off period for ex-Ministers and ex-Parliamentary Secretaries of 18 months. It imposes a maximum penalty for a breach of 200 penalty units. The *Integrity Act* s. 70 imposes a 2 year ban on related lobbying activity on all former senior government representatives, but does not include a penalty provision.

A submission by the Queensland Police Service noted that the only sanctions for a breach of the lobbyists code of conduct appear to be refusing or cancelling registration as a lobbyist. (However an amendment to the Act last year also provided for suspension of registration or issuing a warning.) The QPS said –

> The intent of the legislation appears to indicate that it is more than likely these sanction would only be activated for serious breaches. A similar observation was made in the [ICAC report] with suggestions that a scale of sanctions may be more appropriate to deal with less serious breaches. The QPS is supportive of the sanction regime being more expansive and inclusive.
>
> Further, it may also be advantageous to have in existence as part of the administrative law process, a precedent/comparative sanctions register to ensure consistency and equity in decision making.[7]

[7] At p. 1.

I hesitate to recommend a sanctions regime, but do so for two reasons. First there already exists one sanction, in the shape of s. 204 of the *Criminal Code*, though it is almost impossible to conceive of any breach of the section that could lead to resort to that provision. However government representatives could probably be disciplined under the provisions of the *Public Service Act* or the various Acts dealing with local government as outlined above by the LGAQ.

My second reason is that so far as unregistered lobbyists are concerned, the prohibition against unregistered lobbying in s. 71(1) has no teeth. Some (unregistered) lobbyists can, and do, ignore its provisions so long as they are not refused access by government representatives. I have had several such cases brought to my notice, and all I can do is to write to the lobbyist concerned urging them to register, or raise the matter with the local government, urging them not to have dealings with any unregistered lobbyist. That is not always an easy matter for the local government.

I **recommend** that a sanctions regime should be introduced for breaches of s. 71(1) and (2) of the Integrity Act.

Should all lobbying activity (whether controlled by this Act or not) be recorded?

Section 72A – Disclosure of information

ICAC's investigation of lobbying in NSW found that a lack of transparency in the current lobbying regulatory system in NSW was a major corruption risk and contributed significantly to public distrust. "Those who lobby may be entitled to private communications with the people that they lobby, but they are not entitled to secret communications," the report said. "The public is entitled to know that lobbying is occurring, to ascertain who is involved and, in the absence of any overriding public interest against disclosure, to know what occurred during the lobbying activity." ICAC recommended the adoption by the government of policies designed to ensure proper recording of meetings and phone calls and that the right to information law (the *GIPA Act*) be amended to ensure that such records were "open access information".[8]

As noted earlier, the ICAC report also recommended that the definition of "lobbyist" be greatly enlarged, to include those who use in-house lobbyists, and many of the organisations that in the current Queensland laws are by s. 41 not considered to be lobbyists. It did so because these organisations may be active as lobbyists.

If my earlier recommendations are adopted it will continue to be true that lobbying will be conducted in Queensland by some entities that do not fall with the definition by s.41 of lobbyists.

However it is important that all lobbying activities, whether by entities recognised as lobbyists or not, should be properly recorded, and that such records may be accessed under the *Right to Information Act 2009*, though subject to such exemptions as the Act requires. Some local governments have indicated to me that they do not believe they are required to keep lobbying records, even of contact with registered lobbyists. (The CMC has circulated a formal "register of contacts" with drop down

[8] See the ICAC Media Release, 10 November 2010, p. 1.

menus that is intended to make it easier for departments and councils to register such contacts, and to provide uniformity of data collected.)

It should not be necessary to include in the *Integrity Act* a direction for the proper recording of all lobbying activities. This is already required by the *Public Records Act*, s. 7, which says –

> **7 Making and keeping of public records**
>
> (1) A public authority must—
>
> (a) make and keep full and accurate records of its activities; and
>
> (b) have regard to any relevant policy, standards and guidelines made by the archivist.

I raised with the Queensland State Archivist a question whether lobbying by entities other than by those regarded as lobbyists by the *Integrity Act* was required. A copy of her letter of 20 April 2011 is included in the submissions published on the Integrity Commissioner website. She pointed out "that records need to be created and retained of all contact by government representatives with 'all entities seeking to influence government decision making' whether the lobbyist was registered or not."[9]

She continued, "If public authorities routinely make a public record of such contacts there may not be a requirement to extend the definition of a lobbyist. By complying with Principle 7 of IS40, public authorities will achieve the objective of ensuring that lobbying is conducted in accordance with public expectations of transparency and integrity."[10]

Last year, the *Integrity Act* was amended to include s. 72A – Disclosure of information. The Explanatory Notes, at p. 33, said –

> This new section authorises the provision of information regarding lobbying activity by government representatives to the Integrity Commissioner, where the information

[9] Letter from Ms Janet Prowse, Executive Director & State Archivist, 20 April 2011, p. 1.
[10] At p. 1.

is reasonably considered to be relevant to the functions or powers of the Integrity Commissioner.

The information which may be provided may include personal information (as defined in the *Information Privacy Act 2009*) such as names of lobbyists or clients. However, any personal information provided to the Integrity Commissioner would be subject to the provisions of the *Information Privacy Act 2009* in the subsequent handling of that information. The provision of this information to the Integrity Commissioner will ensure that the Integrity Commissioner is able to monitor the extent of lobbying activity in Queensland.

The information is to be provided by the responsible person for the relevant government representative (in accordance with the definition in the dictionary in schedule 2 which applies to this section).

Unfortunately, the wording of the section - "The responsible person for the government representative may give the integrity commissioner information …" – has persuaded some local governments that they may refuse to do so. They say that is their intention. If a change were made to ensure that the Integrity Commissioner can access records concerning all contacts that involve lobbying, as I believe it should, it would be desirable if a further "Note" were included in the section pointing out the obligation that departments and councils have to record all such information, as the State Archivist has explained above.

I **recommend** that s. 72A be amended to make it clear that a "responsible person for a government representative" has an obligation to disclose to the Integrity Commissioner, if requested, information about contacts that amount to lobbying, whether by registered lobbyists or otherwise.

I also **recommend** that s. 72A should include a note pointing out the requirement of the *Public Records Act* that records must be made and kept of all contacts where entities seek to influence government decision making, whether the entity is registered or not.