The Centre for Public Integrity

Reforming lobbying oversight in Tasmania

Submission **July 2022**

"Lobbying can provide decision-makers with valuable insights and data, as well as grant stakeholders access to the development and implementation of public policies. However, lobbying can also lead to undue influence, unfair competition and regulatory capture to the detriment of the public interest and effective public policies. A sound framework for transparency in lobbying is therefore crucial to safeguard the integrity of the public decision-making process".[1]

Lobbying is a reality of government decision-making in all Australian jurisdictions. It is also an aspect of government decision-making capable of further eroding the already tenuous public trust in government,[2] and although the Organization for Economic Cooperation and Development (***OECD***) recognises that lobbying can make a contribution to the democratic process, it warns that where transparency and integrity are lacking, lobbying can be used "*to steer public policies away from the public interest*".[3] Indeed, laissez-faire regulation of political lobbying – like laissez-faire regulation of political party funding – breeds a trinity of vices: secrecy, corruption and unfairness.

An effective lobbying regulatory regime is therefore critical. Key features of such a regime include:

- regulation via legislation;
- broad applicability, capturing in-house lobbyists;
- a meaningful post-employment separation period;
- enforcement through a well-resourced regulator and real sanctions;
- enhanced disclosure of lobbying activity, including via the Lobbyists' Register and the publication of ministerial diaries; and
- the abolition of success fees.

Choice of regulation

In Tasmania, lobbying is regulated via the *Tasmanian Government Lobbying Code of Conduct* (***Code***) and associated Register of Lobbyists. The Code is not enshrined in legislation – a feature that the Tasmanian lobbying regime shares with the regimes of the Commonwealth, Victoria and the Australian Capital Territory.

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[1] Organization for Economic Cooperation and Development, "Transparency and integrity in lobbying" https://www.oecd.org/corruption/ethics/Lobbying-Brochure.pdf , 2013, accessed 13 July 2022.
[2] Australian National University, "Trust in government hits all time low", https://www.anu.edu.au/news/all-news/trust-in-government-hits-all-time-low, 9 December 2019, accessed 13 July 2022.
[3] Organization for Economic Cooperation and Development, "Setting the rules for lobbying" https://www.oecd.org/about/impact/setting-the-right-rules-for-lobbying.htm, accessed 13 July 2022.

This 'light touch' approach (as the Australian National Audit Office has described it)[4] contrasts with the approach taken in New South Wales, Queensland, South Australia and Western Australia, all of which enshrine their lobbying regulation in legislation.[5] New South Wales regulates lobbying via the *Lobbying of Government Officials Act 2011* (NSW): pursuant to s 19 of that Act, enforcement of the Act and the *Lobbyists Code of Conduct* is a function of the Electoral Commission. Queensland's equivalent is the *Integrity Act 2009* (Qld) and *Lobbyists Code of Conduct*, administered by the Integrity Commission, while South Australia's *Lobbyists Act 2015* (SA) and *Lobbyists Regulations 2016* (SA) are administered by the Department of Premier and Cabinet and Western Australia's *Integrity (Lobbyists) Act 2016* (WA) and *Contact with Lobbyists Code* by that state's Public Service Commission.

For the Tasmanian Code to have a real likelihood of incentivising compliance, deterring breach and substantially increasing the transparency and accountability of lobbying, it must be given the force of law.

Application of regulatory regime

Tasmania's Code is limited in its application insofar as it does not apply to in-house lobbyists (that is, persons or entities – or the employees of such persons or entities – who engage in lobbying on their own behalf rather than for a client: cl 3). This is a failing common to most Australian jurisdictions: only New South Wales' regime (partly) applies to in-house lobbyists,[6] and Victoria's Code of Conduct captures persons meeting the definition of "Government Affairs Directors".

There is no justification for excluding in-house lobbyists from lobbying regulation. After all, their *raison d'être* is identical to that of third-party lobbyists – that is, to promote the interests of a specific person or entity to decision-makers and seek favourable outcomes.

Closing the revolving door

The revolving door — whereby government officials become lobbyists after departing government, and ex-lobbyists become government officials — gives rise to grave conflicts.

One of these is the prospect of future employment, whereby public officials (including ministers) may modify their conduct by making decisions favourable to prospective private sector employees.

Conflicts can also arise where public officials are lobbied by former colleagues or superiors as their prior (and possibly ongoing) association can compromise impartial decision-making. In this way, the revolving door permits the sale and purchase of political influence or privileged access to the political system. When such privileged access can be bought by well-resourced parties, unfairness lurches toward corruption: as the New South Wales Independent Commission Against Corruption has concluded, "*The use of such privilege or influence is destructive of the principle of equality of opportunity upon which our democratic system is based. The purchase or sale of such*

[4] Australian National Audit Office, "Management of the Australian Government's Lobbying Code of Conduct — Follow-up Audit", 26 June 2020, accessed 13 July 2022 at paras 1.11-1.12.
[5] The Northern Territory does not regulate lobbying.
[6] Only third-party lobbyists are required to register, but the State's Code has a broader application.

privilege or influence falls well within any reasonable concept of bribery or official corruption".[7]

Currently, Tasmania's Code states that persons who retire from office as a Minister or a Parliamentary Secretary shall not, for a period of 12 months after they cease to hold office, engage in lobbying activities relating to any matter with which they had official dealings in their last 12 months in office (cl 7.1). Persons who were employed as a Head of Agency under the *State Service Act 2000* (Tas) must not, for a period of 12 months after they cease their employment, engage in lobbying activities relating to any matter that they had official dealings with in their last 12 months of employment (cl 8.1).

This post-employment separation period is equal to that imposed by Western Australia.[8] The Commonwealth,[9] the Australian Capital Territory,[10] Victoria[11] and South Australia[12] require greater separation periods in respect of regulated parliamentarians, while New

[7] NSW Independent Commission against Corruption, "Report on Investigation into North Coast Land Development", 1990 (cited in NSW Independent Commission against Corruption "Investigation into corruption risks involved in lobbying", 2010, accessed 13 July 2022 at p 20).

[8] Under the *Integrity (Lobbyists) Act 2016* (WA), a member of Parliament, a senator for Western Australia in the Senate, a member of the Commonwealth House of Representatives for an Electoral Division in Western Australia, a senior public service executive, or a holder of certain other offices or positions, cannot be registered under the Act or listed as a lobbyist if a period of less than one year has elapsed since the date on which the person ceased to hold that office. However, the Commissioner has a discretion to register the person or list them as a lobbyist even if this restriction applies.

[9] Clause 11 of the Commonwealth Lobbying Code of Conduct provides that Ministers and Parliamentary Secretaries must not engage in lobbying activities relating to any matter in relation to which they had official dealings in their last 18 months in office for a period of 18 months after leaving office. This period reduces to 12 months in the case of advisers, certain members of the Australian Defence Force, agency Heads and certain senior public servants.

[10] Continuing Resolution 8AB of Assembly Standing Orders, Resolution agreed by the Assembly 5 May 2014, ACT Lobbying Code of Conduct. Clause 3(k) of the ACT Lobbying Code of Conduct provides that a lobbyist who was previously a member of the ACT Legislative Assembly shall not, within 18 months of ceasing to hold that office, engage in lobbying activities relating to any matter that they had official dealings with in their last 18 months in office. The prohibition is reduced to 12 months in the case of persons previously employed under *the Legislative Assembly (Members' Staff) Act 1989*, or the *Public Sector Management Act 1994* as a Head of Service, Director-General or Executive.

[11] The Victorian Government's Professional Lobbyist Code of Conduct provides that persons who cease to hold office as a Minister or Cabinet Secretary shall not, for a period of 18 months after they cease to hold office, engage in lobbying activities relating to any matter with which they had official dealings in their last 18 months in office. These periods are reduced to 12 months in the case of Parliamentary Secretaries and persons employed as Executives (or equivalent) or Ministerial Officers under the Public Administration Act.[11]

[12] Section 13(1) of the *Lobbyists Act 2015* (SA) provides that a person who ceases to hold office as a Minister must not, during the period of 2 years after ceasing to hold that office, engage in lobbying; furthermore, the person is not entitled to apply for registration during that period. Section 13(2) of the Act applies to persons who cease to hold office as a Parliamentary Secretary, a member of SAES (within the meaning of the Public Sector Act 2009) or a person engaged as a member of a Minister's personal staff under section 71 of that Act, and prevent the person from engaging in lobbying in respect of matters dealt with by the person in the ordinary course of holding that office during the 12 months after ceasing to hold that office.

South Wales,[13] Queensland,[14] the United Kingdom[15] and Canada[16] require a greater post-employment separation period in respect of all regulated parties.

A 12-month post-employment separation period is not sufficient to allow the dilution of the influence and connections that regulated persons are able to yield, and the Tasmanian period should be at least doubled in order to be meaningful. In addition, the ban on post-separation employment should extend to lobbying-related activities (including advice on how to lobby). The limitation of the restriction to matters in relation to which regulated persons had official dealings should also be abolished, insofar as it allows them to lobby in relation to matters falling within their portfolio but which are not captured by the term "official dealings".

Enforceability

Necessary (though not sufficient) for the success of lobbying regulatory regimes is that the rules are enforceable. According to the OECD, compliance and deterrence can be best achieved through "*a coherent spectrum of strategies and mechanisms*", which includes monitoring and compliance.[17] In respect of compliance, the OCED notes that "*visible and proportional sanctions should combine innovative approaches*", which it describes as including pubic reporting of confirmed breaches, along with financial or administrative sanctions and criminal prosecution". [18]

Sanctions for non-compliance with Tasmania's regime are currently limited to deregistration, as is the case in the Commonwealth and Victoria. In contrast, New South Wales, Queensland, South Australia, Western Australia, the UK and Canada also provide for the issuing of fines; in addition, South Australia and Canada provide for criminal sanctions.

In order for Tasmania's available sanctions to have a real likelihood of incentivising compliance and deterring breach, they should include, at a minimum, financial sanctions. Other, innovative mechanisms should also be considered: these might include the confiscation of parliamentary access passes, and rendering a represented person or entity ineligible to receive government grants or be party to government contracts for a period, in the case of sufficiently egregious breaches.

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[13] Under s 18(1) of the *Lobbying of Government Officials Act 2011* (NSW), a Minister or Parliamentary Secretary who ceases to hold office as a Minister or Parliamentary Secretary must not, for the period of 18 months immediately they cease to hold office, engage in the lobbying of a Government official in relation to an official matter that was dealt with by the former Minister or Parliamentary Secretary in the course of carrying out portfolio responsibilities in the period of 18 months immediately before ceasing to hold office as a Minister or Parliamentary Secretary.

[14] The *Integrity Act 2009* (Qld) provides that for two years after leaving office or the public service, former senior government representatives and former Opposition representatives must not carry out a lobbying activity relating to official dealings they had in the two years before leaving office or the public service (s 70(1)).

[15] Clause 7.25 of the UK Ministerial Code imposes a two-year prohibition on Ministers lobbying government after leaving office. In addition, they must obtain advice from the independent Advisory Committee on Business Appointments (ACoBA) if they wish to take up any appointments or employment within two years of leaving office.

[16] Canada's Lobbying Act and associated regulations provide for a Commissioner of Lobbying. The Commissioner is an independent agent of the Parliament, with investigative powers and an education mandate. Designated Public Office Holders (DPOHs) – a category which includes Ministers, any person employed in their offices, public office holders occupying senior executive positions, as well as various other positions – face a five year, post-employment prohibition on lobbying.

[17] OECD, above n 1.

[18] Ibid.

More broadly, an effective compliance and enforcement regime requires that education and training is provided for lobbyists and public officials, and the Integrity Commission must be sufficiently resourced to monitor compliance and pursue enforcement.

Disclosure of lobbying activity

In order to promote transparency and accountability, lobbying activity should be periodically disclosed via:

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

The current lack of a requirement to disclose the diaries of ministers, shadow ministers and their chiefs of staff is a significant limitation of the Tasmanian integrity framework. Ministerial diaries are published in New South Wales, Queensland, the Australian Capital Territory and the UK, and these disclosures are a valuable accountability mechanism (as long as they record sufficient detail, including meeting attendees and topics of discussion).

Lobbyists enrolled on the Register should also be required to disclose meeting details, including the names of public officials with whom they have met, clients they were representing, and subjects discussed.

The transparency towards which disclosure is directed would also be significantly furthered by the Register of Lobbyists and disclosure of lobbying activity being integrated with disclosure of political contributions and spending, with annual analysis of trends by the Integrity Commission.

Success fees

Tasmania is the only Australian jurisdiction that does not ban the paying or receiving of success fees. The prohibition of success fees is an important aspect of strong lobbying regimes, insofar as it reduces the incentive for parties to engage in misconduct in order to achieve favourable outcomes.

Government decision-making processes

Beyond specific lobbying regulation, reform of the way in which governments approach the making of significant executive decisions is another key element of achieving oversight of lobbying activity, transparency and accountability.

Governments need to commit to fair consultation processes (that is, processes that are inclusive, promote meaningful participation and are adequately responsive), and develop guidelines to ensure this commitment is upheld. They must ensure that disadvantaged groups are sufficiently resourced to enable them to engage in advocacy independent of government, as part of improving fair access to the political process.

In addition, statements of reasons should be provided for significant executive decisions. These statements should disclose:

- meetings required to be disclosed under the Register of Lobbyists and via the publication of ministerial diaries;
- a summary of lobbyists' key arguments;
- a summary of recommendations made by the public service (as well as a summary of reasons to explain why any such recommendations were not followed); and
- a report on compliance with the above-described fair consultation guidelines.

Recommendations

The Centre for Public Integrity believes that Tasmania's lobbying regime must urgently be brought up to standard if it is to achieve the objective of promoting trust in the integrity of government processes and ensuring that contact between lobbyists and government officials is conducted with transparency, integrity and honesty.

This can be achieved by:

- enshrining the Lobbying Code of Conduct in legislation;
- broadening the Code's application to ensure that in-house lobbyists are captured;
- imposing a meaningful post-employment separation period;
- empowering the Integrity Commission to monitor compliance and pursue breaches;
- strengthening available sanctions;
- enhancing disclosure of lobbying activity, including via the Lobbyists' Register and the publication of ministerial diaries; and
- abolishing success fees.

About The Centre for Public Integrity

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