Dissenting report by Senator Rhiannon on behalf of The Australian Greens

Overview

1.1 The Australian Greens are disappointed but not surprised that this inquiry has failed to take up the opportunity to properly regulate lobbying activity, making not one recommendation for reform. We have made eight recommendations for reform (below).

1.2 It was clear from the start that the government lacked an appetite for reform. The Australian Greens brought on this inquiry after the government sidestepped its obligation to initiate a review recommended by the same Committee in 2008.

1.3 The inquiry has overlooked the clear evidence from many that current regulation is deficient.

1.4 The Lobbying Code of Conduct and Register scheme lags well behind other countries such as Canada and the United States.[1] It is also out of step with The Organisation for Economic Co-operation and Development (OECD) reports and guidelines on lobbying to which Australia is a party. The Department of Prime Minister and Cabinet admitted in the inquiry that the government has not responded to the OECD's work.

1.5 The Queensland Integrity Commissioner Dr David Solomon AM succinctly summed up the flaws in the scheme during the public hearing:

> The problem simply is that we have a system that suggests that lobbying is being regulated, but the amount of lobbying that is being regulated is a relative small amount of the lobbying that goes on. The risk is that people will think that there is proper regulation of lobbying, when the fact is that that is not what the system is designed to give us.[2]

1.6 The legacy the public is now left with is inadequate regulation that Dr Solomon describes as:

> ...too narrowly focused on relatively few lobbyists...[that] do(es) not provide for adequate and timely disclosure of lobbying activities...ignore(s) the lobbying of non-government legislators and...contain(s) no real mechanism for supervision or policing and very few sanctions for breaches of the various codes and laws.[3]

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1 See Office of the Commissioner for Lobbying Canada: http://www.ocl-cal.gc.ca/eic/site/lobbyist-lobbyiste1.nsf/eng/home

2 Transcript of Inquiry Public Hearing, Tuesday 21 February 2012, p 18.

3 ibid p 15.

1.7 The inquiry accepted the argument that the status quo is adequate, partly on the basis of the spurious reasoning that because there has been a high level of compliance then reform is not necessary.

1.8 This ignores the fact that a large slab of lobbying that does occur, for example by in-house lobbyists and of non-government MPs, is not caught by the scheme. The Department of Prime Minister and Cabinet estimates that around 5,000 would be required to register if in-house lobbyists were covered by the scheme, compared to 934 entities and individuals currently on the register.[4]

1.9 The inquiry gives excessive weight to the argument that the scheme meets its defined objectives set by Senator Faulkner upon establishing the Code in 2008: 'to ensure Ministers and other Government representatives know whose interests are being represented by lobbyists before them..."

1.10 The inquiry relies on this to rebut calls for greater regulation. The argument is put that it is clear to MPs whose interests in-house lobbyists represent and therefore there is no need to bring them within the scheme.

1.11 Unfortunately this overlooks the additional and very important objective spelt out by Senator Faulkner – the right of 'the public to know who stands to benefit from the efforts of lobbyists'.

1.12 While Ministers might know who is being represented when in-house lobbyists meet with them, the public remains blind to what goes on behind closed doors under the current scheme.

1.13 It remains virtually impossible for the public to find out who is lobbying and for what purpose.

Report failings

1.14 Some key issues are totally absent in this report, such as whether there should be more detailed public reporting of lobbying activity. This is despite the Queensland Integrity Commissioner Dr David Solomon AM in his public appearance before the Committee identifying this as 'crucial' and describing current reporting obligations as 'very minor'. He named a lack of transparency as one of the scheme's major failures.

1.15 While the additional costs of tightening lobbying regulation are warmly embraced as barriers by the Inquiry, the benefits to the public and democracy of adopting a system such as that seen in Canada are not explored.

1.16 The overseas experience is paid short shrift, despite excellent regulatory models in Canada and the US. The report ignores OECD reports and guidelines that set out what constitutes appropriate regulation and fails to consider high profile

4 Transcript of Inquiry Public Hearing, Tuesday 21 February 2012, p 1.

corruption scandals involving lobbyists in Queensland, NSW, United States and United Kingdom which serve as a warning of the need to better protect against corruption risks.

1.17 The Australian Greens are also concerned that there may have been a tendency to provide more weight to the views of the lobbyist industry who oppose additional regulation than to academics, accountability campaigners and non-government groups who made submissions to the inquiry.

1.18 This follows the trend set by the government when it began its first 'review' of the scheme in 2010 and invited a select group of lobbyists to a roundtable (five of which had made political donations to either the Government, the Coalition or both).

1.19 In the two and half short hours given over to public hearings for this Inquiry no academics or non-government organisations which made submissions critical of the scheme were invited to present, with Labor and Coalition MPs on the Committee refusing my request to invite them in the interests of balance.

1.20 Only three invitations were extended and accepted – the QLD Integrity Commissioner, bureaucrats from the Department of the Prime Minister & Cabinet and a major lobbying firm (also a donor to the major parties).

1.21 In conclusion, this inquiry has been a missed opportunity to reform a scheme described by Dr Solomon as a 'very light touch system that does not really investigate anything'.[5]

Greens vision for regulation of lobbying

1.22 The Australian Greens have a strong interest in strengthening the democratic system by making the decision making process more transparent and accountably.

1.23 In 2007, prior to the current scheme, Australian Greens Leader Bob Brown introduced the Lobbying and Ministerial Accountability Bill 2007 to regulate the industry.

1.24 While we believe lobbying is a legitimate activity, the Australian Greens share the concerns of many that the current Lobbying Code of Conduct and Register is inadequate to meet public expectations that what happens behind closed doors between lobbyists and politicians is appropriately regulated and that the lobbying 'footprint' is clear for all to see.

1.25 Corruption risks are real, as has recently been witnessed in three high profile US and UK lobbyist scandals. They can range from direct bribing of those with decision-making power to a culture of 'policy capture' where governments tend to favour lobbyists' interests over those of the community.

5 Transcript of Inquiry Public Hearing, Tuesday 21 February 2012, p 20.

1.26 With the light off lobbyists in Canberra, or at the very best substantially dimmed, it is impossible to see who is gaining access to politicians and high level bureaucrats and whether deals are being done.

1.27 The Australian Greens believe the public has a legitimate right to know the 'who', 'what', 'where' and results of lobbying. The current system is not delivering this.

1.28 There is legitimate concern in the community that not everyone has the same opportunity to lobby decision makers and that those with the deepest pockets and the most power and connections are better able to influence policy making.

1.29 The public cannot be confident that decisions are being made on merit after considering a broad range of views, or because of relationships the public is not privy to.

1.30 The Australian Greens believe it is possible and desirable to strengthen the current scheme, without creating unreasonable barriers to groups participating in the democratic process.

Summary of recommendations

1. Establish an Office of the Commissioner of Lobbying

Recommendation 1

1.31 The Australian Greens believe oversight of lobbying should rest with an independent body similar to the Canadian Commissioner of Lobbying. This independent body would report direct to federal parliament and have auditing and investigative powers and a mandate to enforce a new Lobbying Act and Lobbyists' Code of Conduct.

2. Provide a legislative framework

Recommendation 2

1.32 The Australian Greens support a legislative framework for the regulation of lobbying.

3. Expand who is the subject of lobbying

Recommendation 3

1.33 The Australian Greens believe there is a strong case for expanding the target of lobbying from government ministers to include all MPs and Senators, including cross benchers and opposition MPs, as occurs in the US and Canada.

4. Widen who is defined as a lobbyist

Recommendation 4

1.34 Expand the scope of lobbying to include corporations and organisations employing in-house lobbyists, many of whom are in a position to influence government policy.

5. Strengthen disclosure requirements

Recommendation 5

1.35 The Australian Greens believe the scheme should require the disclosure, in a timely manner, of when the lobbying occurred, who stood to benefit, who was lobbied, the subject matter of the lobbying and the meeting outcome.

6. Enhance compliance and review

Recommendation 6

1.36 The Australian Greens support: the proposed Commissioner for Lobbying receiving and investigating complaints; strengthened and meaningful sanctions applying to MPs, public servants and lobbyists and proper appeal rights.

7. Strengthen post separation employment provisions

Recommendation 7

1.37 The Australian Greens believe there should be a five year ban on ex-ministers working as lobbyists.

8. Ban success fees

Recommendation 8

1.38 The Australian Greens support a ban on the payment of success fees to lobbyists.

Australian Greens' proposal in detail

Establish an Office of the Commissioner of Lobbying

The Australian Greens believe oversight of lobbying should rest with an independent body similar to the Canadian Commissioner of Lobbying. This independent body would report direct to federal parliament and have auditing and investigative powers and a mandate to enforce a new Lobbying Act and Lobbyists' Code of Conduct.

1.39 Currently regulation of the scheme rests with the Executive. An independent authority, with the capacity and integrity to ensure regulations are applied equally to

all concerned, will ensure decisions are not left to the discretion of political representatives.

1.40 The Office, based on the Canadian model, would ensure transparency and accountability in the lobbying of public office holders and contribute to confidence in the integrity of government decision-making. It functions would include maintenance of the register, compliance, prevention and education work. A similar model exists in QLD where the Integrity Commissioner administers the lobbyist registration scheme.

Provide a legislative framework

The Australian Greens support a legislative framework for the regulation of lobbying.

1.41 Creating a legislative framework would strengthen the regulation of lobbying, for example providing for appropriate sanctions and appeal rights. Overseas jurisdictions such as Canada as well as Western Australia, Queensland and NSW have taken this step.

1.42 It has been argued that a legislative structure may encroach on the separation of powers between the judiciary and the parliament and risks a constitutional challenge based on the implied freedom of political communication.[6] However this freedom is by no means absolute.[7]

Expand who is the subject of lobbying

The Australian Greens believe there is a strong case for expanding the target of lobbying from government ministers to include all MPs and Senators, including cross benchers and opposition MPs, as occurs in the US and Canada.

1.43 The current scheme which regulates only lobbying of 'Government representatives'[8] wrongly assumes that it is the Executive that has hold of parliament and decision-making and that there will always be majority government and disciplined parties. This ignores the reality of our Australian political system where there can be factions within parties which attracts lobbying of all MPs (eg on same-

6 Mr Harry Evans, former Clerk of the Senate, discussed in "Knock, knock…who's there?" Report of the Standing Committee on Finance and Public Administration, September 2008, p 12.

7 David Rolph, Matt Vitins and Judith Bannister, Media Law: Cases, Materials and Commentary, Oxford University Press 2009, pp 270-271. In Lange v Australian Broadcasting Corporation it was found that the freedom would not invalidate a law provided: 1) that "the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government…."; and 2) "that the law is reasonable appropriate and adapted to achieving that legitimate object or end".

8 Defined in the Code to include Ministers, parliamentary secretaries, ministerial staff, agency heads, public servants and members of the Australian Defence Force, cl 3

sex marriage, refugees) as well as minority governments where independents and minor parties may be key to decision-making. The reality is that those with power to allow or disallow a bill to pass may be the target of intense lobbying.

Widen who is defined as a lobbyist

Expand the scope of lobbying to include corporations and organisations employing in-house lobbyists, many of whom are in a position to influence government policy.

1.44 The revised scheme should go beyond third party professional lobbyists to adopt the NSW Independent Commission Against Corruption's (ICAC) proposed definition of a "lobbying entity:

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

1.45 This would require registration of industry peak bodies and most religious and charitable bodies and all corporations that lobby by use of their own in-house staff, including board members.[9]

1.46 Dr David Solomon points out the definition echoes Canada's definition of in house lobbyists (organisations) and in house lobbyists (corporations).[10]

1.47 Limiting the code to third party lobbyists, or 'hired guns', is like using a butterfly net to capture a lion. It misses those such as in-house lobbyists in big corporations such as BHP Billiton and Telstra and interest groups such as the AMA, industry bodies such as the Australian Hotels Association, the Minerals Council of Australia or the Australian Industry Group, unions, churches, and not-for-profit community groups like GetUp!:

> "... if the point ... is to shed light upon those who seek to influence the government, then the federal lobbying code of conduct, as currently constituted, fails to fully do that. Many of the lobbyists active in Canberra, as well as many of those who are the focus of their lobbying, are being missed out entirely by the code, as it is currently constituted".[11]

1.48 The government employs a jaundiced argument that the scheme does not need expanding because the Code's main aim is to allow government representatives to know who they are meeting with and who is represented. This ignores a key function of the regulatory scheme: to provide transparency so the public can scrutinise how decisions are made.

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9 Dr David Solomon, *Lobbying: Is registration sufficient?*, APSAC Conference Paper, November 2011, p 12.

10 Ibid p 12.

11 Chari, Hogan and Murphy, "Regulating lobbying: a global comparison", Manchester University Press, 2010, p 94.

1.49 ICAC takes odds with the argument that non-profit making peak bodies should remain beyond the reach of the scheme:

> "The difference in motive was claimed as a reason why the regulation of the lobbying of peak body organisations was unnecessary. This argument did not address the problem of undisclosed dealings, and the lack of public access to information and to decision-makers. It also did not address the existence of undisclosed opponents. There is no difference in principle, in method or in its effect between lobbying conducted by third party lobbyists and that conducted by any other entity seeking to persuade government of its view. All seek to use or have an effect on the resources or powers of government, all draw from the same group of methods and tactics to persuade government of the merit of their view, and most seek to make use of a friendly relationship."[12]

1.50 Canada and the US capture in-house lobbyists. To qualify they must be renumerated (eg in Canada they must be paid or expect to be paid in excess of "reimbursement of reasonable expenses such as travel") and meet a workload threshold (eg in Canada lobbying must exceed the equivalent of 20 percent of the duties of a single paid employee over a month).

Strengthen disclosure requirements

The Australian Greens believe the scheme should require the disclosure, in a timely manner, of when the lobbying occurred, who stood to benefit, who was lobbied, the subject matter of the lobbying and the meeting outcome.

1.51 Current disclosure requirements are very weak and do not allow the public to effectively scrutinise lobbying activities. The online lobbyist register does not detail when lobbying occurred, who stood to benefit, who was lobbied, what was the subject matter of the lobbying or the meeting outcome. There is no requirement to disclose the actual interest being represented.

1.52 In contrast, in Canada lobbyists are required to submit monthly communication reports with details of who they met, date of the meeting and general subjects covered. In the UK the Prime Minister's website has a record of 'Who Ministers are Meeting'.[13] In NSW from July 2011 the NSW Department of Planning and Infrastructure has begun keeping a register on its website which lists contact between staff and registered lobbyists in relation to planning proposals.[14]

1.53 There should be clear direction on precisely what is required to ensure the disclosure is not so vague as to be meaningless.[15] It should include a general

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12 Quoted in Solomon, op cit, pp 12-13.

13 http://data.gov.uk/whoslobbying

14 http://planning.nsw.gov.au/?tabid=508

15 Independent Commission Against Corruption, "Investigation into Corruption Risks Involved in Lobbying" Sydney, ICAC, November 2010, p 54.

description and details (eg names and descriptions of specific legislative proposals, bills, regulations, policies, programs of interest and grants, contributions or contracts sought).[16] A capacity should also exist for the regulators to demand further clarification of subject matter where existing provisions seeking specific information have not been met.[17]

1.54 Some argue that requiring this level of disclosure may inhibit frank exchange and that the disclosure of issues that are commercial-in-confidence may damage the interests of a lobbyist or client. Detailed minutes of meetings would however face existing, time limited, privacy and other legal protections.[18] There is an option for initial disclosure to be more limited, while supplementary disclosure could be more detailed after legitimate privacy concerns have become less important. The Australian Greens believe, however, that those seeking to withhold disclosure should be required to show a legitimate reason to keep information from the public.

Enhance compliance and review

The Australian Greens support: the proposed Commissioner for Lobbying receiving and investigating complaints; strengthened and meaningful sanctions applying to MPs, public servants and lobbyists and proper appeal rights (see above).

1.55 The current scheme is toothless, relying on guidelines with no clear enforcement framework. The onus is on Government representatives to report breaches and the power to sanction, or remove a lobbyist from the Register, rests with the Secretary of the Department of Prime Minister and Cabinet. There are no appeal rights or independent scrutiny of the decision. The Canadian and US lobbying legislation provides for large fines and criminal penalties for those breaching the code.

1.56 The Australian Greens support a range of financial penalties as well as criminal penalties for serious offences which apply to third party and in-house lobbyists. Consideration should be given to the capacity of a new Office of the Commissioner of Lobbying to publicly name those breaching the scheme in parliament.

Strengthen post separation employment provisions

The Australian Greens believe there should be a five year ban on ex-ministers working as lobbyists.

16 Dr David Solomon, op cit, p 9.

17 Organisation for Economic Co-operation and Development, "Lobbyists, Government and Public Trust", p 70.

18 ICAC, op cit, pp 37-38.

1.57 The federal requirements lag behind jurisdictions like Queensland and South Australia which set the ban at two years. The revolving door provisions in Canada and the US are much stronger than in Australia. For example in Canada 'Designated Public Office Holders' (all MPs and Senators, their staff, very senior executives) face a ban of five years after leaving their positions, but the Lobbying Commissioner can exempt certain individuals (eg students employed in a Minister's office) and it does not stop individuals from working for non-profit organisations as long as their duties do not require them to lobby the government, or working for corporations if lobbying the federal government is not one of their main duties.

Ban success fees

The Australian Greens support a ban on the payment of success fees to lobbyists.

1.58 This will minimise the incentive created for lobbyists to use corrupt methods to achieve an outcome that will attract a bonus fee. Canada and the US prohibit lobbyists from receiving any payment that is in whole or in part contingent on the outcome of their lobbying. NSW and Queensland have both made it a criminal offence to pay or receive a success fee for lobbying.[19]

Senator Lee Rhiannon

19 The ban in Queensland came after a former QLD and Federal government minister were paid $500,000 for successfully lobbying to win a contract to build the Brisbane Airport Link tunnel.