INTEGRITY AND OTHER LEGISLATION AMENDMENT BILL 2023

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Queensland
Integrity Commissioner

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PRIVATE AND CONFIDENTIAL

24 July 2023

Committee Secretary
Economics and Governance Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Secretary,

Thank you for the opportunity to provide a submission on the Integrity and Other Legislation Bill 2023. My submission relates only to proposed amendments to the *Integrity Act 2009* (the Integrity Act).

The purpose of this Bill is to implement certain recommendations from Professor Coaldrake's report *Let the sunshine in – Review of culture and accountability in the Queensland Public Sector* (June 2022) and Mr Kevin Yearbury's report on the *Strategic Review of the Integrity Commissioner's Functions* (September 2021).

In relation to my office, the Bill will make amendments to the Integrity Act in five areas:

- The long title of the Act and Chapter 2 (Queensland Integrity Commissioner and Office of the Queensland Integrity Commissioner).
- Chapter 3 - Advice on integrity and ethics issues.
- Chapter 4 - The regulation of lobbying activities.
- Chapter 5 – Administrative provisions for the integrity commissioner, deputy integrity commissioner and integrity office.
- Chapter 6 – Strategic reviews of integrity commissioner's functions.

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I am supportive of the majority of the amendments contained in the Bill, however there are some clauses and new sections of the Bill, several of which relate to Chapter 4 (regulation of lobbying), where, in my view, the amendments are not consistent with a Coaldrake recommendation, create a vulnerability or opportunity to circumvent what is intended, or where ambiguity may make implementation in practice challenging.

I enclose my submission regarding the Bill and would be pleased to provide any further information which may assist the Committee in its consideration. I would also welcome the opportunity to meet with the Committee to discuss any aspect of my submission.

Yours sincerely,

Linda Waugh
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Office of the Queensland Integrity Commissioner

Submission to the Economics and Governance Committee on the Integrity and Other Legislation Amendment Bill 2023

July 2023

Table of contents

Section 1. Overview

The purpose of the Integrity and Other Legislation Amendment Bill 2023 is to implement certain recommendations from Professor Coaldrake's report *Let the sunshine in – Review of culture and accountability in the Queensland Public Sector* (June 2022) (the Coaldrake Report) and Mr Kevin Yearbury's report on the *Strategic Review of the Integrity Commissioner's Functions* (September 2021) (the Yearbury Report).

In relation to the Office of the Queensland Integrity Commissioner (OQIC), the Bill will make amendments to the *Integrity Act 2009* (the Integrity Act) in five areas:

- The long title of the Act and Chapter 2 (Queensland Integrity Commissioner and Office of the Queensland Integrity Commissioner)
- Chapter 3 - Advice on integrity and ethics issues
- Chapter 4 - The regulation of lobbying activities
- Chapter 5 – Administrative provisions for the integrity commissioner, deputy integrity commissioner and integrity office
- Chapter 6 – Strategic reviews of integrity commissioner's functions.

I have outlined my general comments in relation to each of these areas in Section 1 – issues on which I wish to make submissions for the consideration of the Economics and Governance Committee are noted, and the substantive detail on each submission is made in Section 2 and Section 3 of this document.

1.1 Amendments to Long title and in Chapter 2 (Queensland Integrity Commissioner and the Office of the Queensland Integrity Commissioner)

Clause 28 (amending the long title of the Act) and Clause 29 (amending the Queensland Integrity Commissioner's (Integrity Commissioner) function relating to lobbying) both omit the important responsibility the Integrity Commissioner to set lobbying standards through the development, and after consultation with the parliamentary committee, approval of the registered lobbyists code of conduct. This is discussed further in Section 2 discussed (see p. 9).

1.2 Amendments in Chapter 3- Advice on integrity and ethics issues

Clauses 30 to 35 amend the Integrity Act to:

- require a Chief of Staff or acting Chief of Staff[1] to give notice to their Minister of an advice request (clause 31)

[1] The *Integrity and Other Legislation Amendment Act 2022* implements Yearbury's recommendation 5 to remove a Ministerial staff member who gives, or person engaged to give, advice to a Minister as a designated

- remove references to Senior Officer (clause 32 and clause 33).

These amendments will implement Yearbury Report recommendation 5(a) (ensure Ministers are aware of advice requests being made) and recommendation 3 (remove Senior Officers as Designated Persons).

1.3 Amendments in Chapter 4- The regulation of lobbying activities

Clause 36 replaces Chapter 4 of the Integrity Act with new Chapter 4 which provides a different structure to existing Chapter 4 and introduces several new sections (in addition to relocating without change, existing sections in the Integrity Act).

Amendments providing new activities, duties and powers to the Integrity Commissioner

New sections which give additional activities, duties and powers to the Integrity Commissioner include:

- Issuing a notice requiring an applicant for registration, to give further information or a document reasonably required to decide the application (Clause 52).
- Requiring registered lobbyists to undertake approved training within a stated period and at least annually (Clause 53); and requiring the Integrity Commissioner to approve the mandatory training course (Clause 56).
- Allowing the Integrity Commissioner to impose other appropriate conditions on the registration of an entity (Clause 53).
- Requiring the registered lobbyists Code of Conduct to include a policy relating to conflicts of interest (Clause 55).
- Giving the Integrity Commissioner the power to make directives relating to the regulation of lobbying (Clause 57) and requiring registered lobbyists to comply with those directives (Clause 57).
- Issuing a notice to a registered lobbyist or another person, to give information or a document where the Integrity Commissioner suspects a registered lobbyist has failed to comply with certain requirements (Clause 66D).
- Issuing a compliance notice for a failure to comply with a requirement where the Integrity Commissioner believes the failure can be rectified and it is appropriate to give the opportunity to the registered lobbyist to rectify the failure in compliance (Clause 66F).
- Providing the Integrity Commissioner with a range of actions to deal with non-compliance (impose condition, vary or remove condition, suspension for up to 12 months or cancellation) (Clause 66H).

All of these amendments are supported – they will ensure that registered lobbyists are clear and informed of their obligations through mandatory training, and the Integrity Commissioner will have a range of options for dealing with non-compliance and conduct

person – these provisions will commence later this year so the Integrity Act currently still includes this category of staff as a Designated Person.

contrary to the registered lobbyists Code of Conduct and the Integrity Act – this will allow the Integrity Commissioner to take action that is commensurate to the issue under question (as opposed to currently where the Integrity Commissioner can only issue a warning or show cause notice). These amendments in combination will significantly enhance the regulatory scheme.

Amendments which are inconsistent, contain risk, create a gap or are ambiguous

There are some amendments contained within Clause 36 of the Bill, which in my view, do not meet the intent of the recommendation they are designed to implement, which raise ambiguity or inconsistencies, or which create a vulnerability or opportunity to circumvent what is intended.

My submission on each of the new sections are detailed in Section 2 of this document and cover:

- Definitions 'entity', 'official dealings' and 'third party client' (new section 41, see pp. 10-13)
- New sections on what lobbying is and is not, and any inconsistency between the relevant provisions (new section 42 and 43, see pp. 13-17)
- The dual hatting provisions relating to professional and technical services firms (new subsection 43(k), see pp. 15-17)
- The dual hatting provisions relating to lobbyists and election campaigning (new section 49 and 41, see pp. 17-21)

1.4 Amendments in Chapter 5 – Administrative provisions

The Bill proposes various amendments which:

- Provide a role for the parliamentary committee in approving the appointment of the Integrity Commissioner and in setting remuneration, allowances and terms and conditions of office (clauses 37 and 38).
- Establish the OQIC as a statutory body (clause 40)
- Establish a process for dealing with funding proposals made by the OQIC which includes a role for the parliamentary committee and its Chair (clause 41)

I support all these amendments.

I consider the establishment of my office as an independent statutory body as a necessity given my jurisdiction and functions. As an Officer who provides integrity and ethics advice to all Members of Parliament, independence from the Government of the day, whichever party that is, is an important element of the governance arrangements for the office.

For all Designated Persons, trust and independence are both paramount in deciding to seek confidential advice on sensitive ethics and integrity matters. Similarly, office independence has importance for the effective performance of my regulatory function in relation to registered lobbyists whose work involves lobbying government and opposition representatives alike.

I note clause 41 of the Bill which establishes a process for dealing with funding proposals made by the OQIC – the Bill makes similar amendments to the legislation establishing each Integrity body and their various functions, powers and administrative arrangements, to ensure the funding proposal mechanism is consistent across each. The Bill proposes a role of the respective parliamentary committees in approving (or not) a funding proposal by an integrity body, and aims to enhance transparency around funding decisions (e.g. by requiring the Minister to table the parliamentary committee's report and their response to the proposal).

The purpose of this amendment is to implement Professor Coaldrake's recommendation that "the independence of integrity bodies in Queensland be enhanced by aligning responsibility for financial arrangements and management practices with the Speaker of Parliament and the appropriate parliamentary committee, rather than the executive government." [2]

The amendments achieve the intent of the recommendation in respect of giving greater accountability and transparency to the funding approval process, however Professor Coaldrake's recommendation also proposes that funding arrangements and practices (and presumably decisions about funding) be made independent of Executive Government and involve the Speaker of Parliament – the Bill does not achieve either.

The decision to approve or reject a funding proposal remains with Executive Government and there is no role for the Speaker in the process. I note however, the proposed process will bring a new level of transparency and accountability to the consideration given to a funding proposal by an integrity body by both the relevant parliamentary committee and Minister, and will place on the public record Government decision-making and reasoning for not supporting such a proposal. This will no doubt be monitored and reported by the media bringing such issues into the minds of the broader community, which in itself is a mechanism of public accountability.

I would welcome any further consideration of a model which affords greater independence than what is proposed but acknowledge that any proposal would require careful consideration in terms of practical operation and what amendments would be needed to achieve that operation including to the *Constitution of Queensland 2001*.

[2] Professor Peter Coaldrake AO, *Let the sunshine in – Review of culture and accountability in the Queensland public sector*, 28 June 2022, p. 71.

1.5 Amendments in Chapter 6 – Strategic reviews

The amendments in Chapter 6, provides:

- a role for the parliamentary committee (the Economics and Governance Committee) in approving a strategic reviewer (clause 42)
- requires the Strategic Review Report to be provided to the parliamentary committee at the same time as it is provided to the Minister and the Integrity Commissioner (Clause 43)
- for the Chair of the parliamentary committee to table the report of the Strategic review to table the report (clause 43).

I support these amendments and recognise the important role of the Economics and Governance Committee in overseeing the OQIC.

Section 2. Submissions on Long title and Integrity Commissioner's lobbying function (s. 7)

The Bill amends both the 'Long Title' of the Act and the function of the Integrity Commissioner related to lobbying under section 7(1)(c).

Both amendments omit reference to a key responsibility of my role, which is to develop, and after consultation with the parliamentary committee, approve a registered lobbyists Code of Conduct. This is an important element of the scheme and will represent a substantive piece of work for my office later this year when I commence a review of the current Code of Conduct. The Code sets requirements and standards that must be met by registered and lobbyists, and failure to comply with, or meet those requirements and standards, can result in significant consequences, including de-registration.

The Long Title is important when applying legal interpretation to the proposed legislation as it determines the strategic purpose of the legislation to the reader. It is this strategic purpose statement which influences how the remainder of the legislation is to be interpreted and applied. As one of the fundamental roles of my office is to set, after consultation with the parliamentary committee, and approve standards regarding lobbying matters it is essential that the long title include this function.

Similarly, section 7 of the Integrity Act sets out all functions of the Integrity Commissioner and would commonly be the starting point for the ordinary reader to understand what my statutory functions are. As above, including this particular aspect of my function would ensure the reader understands from reading section 7(1)(c) all key responsibilities of the Integrity Commissioner relating to lobbying.

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Section 3. Submissions on the regulation of lobbying (Chapter 4)

3.1 Definitions (new section 41)

The Bill provides for several definitions, which play an important role in the application of the proposed legislation. These defined words provide the reader of the legislative text with clear guidance regarding how those words are to be understood. It is important that these definitions reflect the policy intent and are clear and unambiguous. With this in my mind, it is my view there are a number of the prescribed definitions in the Bill which require further consideration.

No definition of 'Entity'

The Bill includes numerous references to an 'entity', 'person' and 'individual' to describe the requirements and obligations imposed by the proposed legislation. In order to understand each term and how they relate to each other in the Integrity Act, you need to refer to the *Acts Interpretation Act 1952*. This will clarify that 'entity' includes a person and unincorporated body, and a reference to an individual includes a natural person, and person includes a reference to an individual and a corporation as well. That is to say, entity, person and individual can be read interchangeably throughout Chapter 4 of the Integrity Act, which can be confusing to a lay person reading the proposed legislation.

The different groups of stakeholders who may read the Integrity Act is broad and would include lobbyists, businesses, members of the public, public servants and so on – not all would know to refer to the *Acts Interpretation Act 1952* to understand the terms used in the proposed legislation. To assist the ordinary reader of the Integrity Act, it would be helpful and minimise misunderstanding of the terms if a definition of 'entity' is included in the Bill to clarify that the term applies to individuals and all other types of legal personality and/or business structures. This would assist readers to understand the obligations, and to whom the new sections apply.

Definition of 'Official dealings'

The definition of 'official dealings', which is a fundamental term in the Bill, only has application to Chapter 4, Regulation of lobbying activities (and I note this is the case in the Integrity Act currently). However, my advice functions prescribed in Chapter 3 of the Integrity Act require me to provide ethics and integrity advice to former senior government representatives in relation to their post separation obligations, whether that advice relates to lobbying or not. To achieve consistency in the application of the definition of 'official dealings' across the lobbying function and the advice function, I submit that the definition should apply to Chapter 3 and Chapter 4 of the Integrity Act. To achieve this, the definition of 'official dealings' would be included in Schedule 2 (Dictionary) of the Integrity Act where it would have application across both Chapter 3 and Chapter 4.

In terms of the definition itself, the definition proposed by the Bill will have a significant impact on the scope and interpretation of the term 'official dealings' because of the words 'regularly' and 'ordinary duties'. The amendment adopts the following definition:

> ***official dealings*** in relation to a person who is a former representative, means any of the following dealings the person engaged in as part of the person's ordinary duties on a regular basis –
> (a) government or Opposition business or activities;
> (b) negotiations, briefings, contracts and the making or receipt of representations relating to government or opposition business or activities.

The word 'regularly' would be defined through an ordinary dictionary definition and can be taken to mean 'at regular times or intervals' or 'according to plan'[3]. Normally the duties performed by representatives at a senior level are not repetitive in nature therefore it is likely the definition in its current form would exclude the most important or significant official dealings undertaken by a former senior representative during their term of service. The application of 'regularly' will also be subject to different interpretation by different stakeholders. For example, a senior project officer who spent three weeks working on a draft policy about planning laws a year and a half ago – they have now commenced work as a lobbyist and want to represent a client in relation to proposed changes to planning laws that were canvassed in the draft policy. The policy work was once off so the senior project officer argues it was not a regular duty and therefore the prohibition does not apply to them.

Similarly, 'ordinary duties' may also serve to limit the definition, for example, a senior public official who is in charge of service delivery for a department and their position description duties do not include legislative review. They are asked to provide practitioner input on some draft legislation. A year later, they are engaged as a lobbyist and want to represent a client on a matter connected to the draft legislation. Despite having spent some weeks reviewing the draft legislation, the officer argues the review of legislation was not an ordinary duty of their role, and consequently the prohibition does not apply to them.

I submit the definition should remove 'regularly' and 'ordinary' so as to not restrict the application of the term, particularly when that definition is critical to the operation of a scheme aimed at prohibiting former representatives from lobbying on matters on which they worked as a representative.

The definition uses the word 'means' rather than 'includes'. The use of the word 'means' also limits the application of the definition which will result in a more restrictive or narrow interpretation of the term. Alternatively, using 'includes' will allow a broader application of the definition and capture all official dealings regardless of frequency.

[3]Regularly definition and meaning, 'Macquarie Dictionary', Eighth Edition, 2020

If the above submissions were accepted, the definition of 'official dealings' would be:

> ***official dealings*** in relation to a person who is a former representative, includes any of the following dealings the person engaged in as part of the person's duties –
> (a) government or Opposition business or activities; and
> (b) negotiations, briefings, contracts and the making or receipt of representations relating to government or opposition business or activities.

Definition of 'election period'

The definition of 'election period' is discussed in Section 3.3 about the dual hatting provisions relating to lobbying and election campaigns (see pp. 17-21).

Definition of 'third party client' and offence (new section 46)

The definition of 'third party client' requires that the fee or reward 'is agreed to ***before*** [emphasis added] the other entity provides the services'. This requirement is operationally impractical and may not reflect business practices.

In a commercial context, a quote may be agreed upon with a third party client before the provision of services commence, but payment is often dependent upon the amount of services that are provided. It can therefore be argued that no fee or reward was agreed to prior to providing the services. Similarly, it is easy to deliberately thwart the intent of the scheme by simply undertaking lobbying work without formally agreeing on an exact fee or reward until after the services have been delivered.

In practice it should not matter when the amount of commission, payment or reward (whether pecuniary or not) was agreed or given, the trigger need only be that a lobbying service was provided in exchange for a commission, payment or reward. To support a clearer more and practical application of the scheme, the definition of 'third party client' should exclude the requirement for the amount to be agreed before the services are provided.

Another inconsistency in the Bill is between the definition of 'third party client' and new section 46 (Lobbying activity by unregistered entity prohibited) – the former refers to:

> ***Third party client*** means an entity that engages another entity to provide services constituting, or including, a lobbying activity *for a fee or other reward* [emphasis added] that is agreed to before the other entity provides the services.

While new section 46 refers to:

> (1) An unregistered person must not carry out a lobbying activity for a third party client for a commission, payment or other reward, whether pecuniary or otherwise [emphasise added].

These two new sections referring to the same issue should be consistent, and as new section 46 is more specific and clearer, the definition of 'third party client' should be amended to state "for a commission, payment or other reward, whether pecuniary or otherwise".

Consequently, if the above two suggestions were adopted, the definition of 'third party client' would be as follows:

> ***third party client*** means an entity that engages another entity to provide services constituting, or including, a lobbying activity for a commission, payment or other reward, whether pecuniary or otherwise.

3.2 Lobbying Activity – definition and exclusions

Arguably the definition of what lobbying is, and what lobbying is not, is fundamental to the success or otherwise of the regulatory scheme. These definitions must be precise and easily understood by those who have to apply it day to day (e.g. lobbyists or representatives who maintain their own records of contacts with registered lobbyists) – it is also critical in monitoring compliance with the scheme that it is clear what activities constitute lobbying and those which do not. New section 42 and 43 provides these definitions, much of which is consistent with what is currently contained in the Integrity Act. The following outlines my submissions on these two amendments.

Including 'exercise of discretionary power' as a lobbying activity (new section 42)

New section 42(1)(a) is an inclusive list, which as an example, includes a number of matters where the new section applies. One matter, in my view, that is an important one to be included is 'the exercise of discretionary power' that is often bestowed on a government representative. It would be an illustrative and useful inclusion, given that a lobbyist is likely to be engaged by a client on a matter where the Government representative has a discretion, for example, appointing a person or recommending a person for appointment to a Board.

Inconsistency between new section 42 and the application of new section 43

The new subsection 42(2) prescribes that the new subsection 42 is subject to the application of new section 43. By virtue of the inclusion of new subsection 42(2) into the Bill, any ambiguity, or questions of interpretation between new section 42 and new section 43 will now be resolved by reference to new subsection 43 only.

It is important that the Bill is clear as to 'what is a lobbying activity' and 'what is not a lobbying activity' as it is integral to the operation of the proposed legislative scheme. To require that the interpretation and application of new section 42(1) be read subject to the list of activities in new section 43, unnecessarily complicates the question of *what does* and *what does not* constitute a lobbying activity for the purposes of the proposed legislation. New subsection 42(2), on its application to new subsection 42(1), may create conflict and limit the application of new section 42(1).

One such conflict presently exists when applying new subsection 42(1)(v), which would be subject to the application of subsection 43(i). New subsection 42(a)(v) provides that lobbying activity includes 'the making of a decision about planning or the giving of a development approval under the *Planning* Act 2016'.

However, new subsection 43(i) also provides that lobbying activity does not include communicating with a representative in the ordinary course of making an application, or seeking a review or appeal about a decision, under an Act'. Given that 'communicating with a representative in the ordinary course of making an application' under the *Planning Act* 2016 would ordinarily involve some reference to those things required to achieve a desired outcome (i.e. a decision approving the application), the practical effect of new subsection 42(2) is that a registered lobbyist communicating with a representative about any aspect of an application made under the *Planning Act 2016* (including the desired outcome i.e. the decision) does not appear to constitute a lobbying activity.

New sections 42 and 43 of the Bill are foundational provisions to implement the policy intent of the Coaldrake Report therefore I suggest that it is necessary that subsection 42(2) be removed and that the conflict or ambiguity created by the new subsection 42(1)(v) and 43(i) be resolved so that there is certainty as to what does, and what does not constitute lobbying activity in relation to planning.

What is not lobbying activity (new section 43)

New section 43 provides an exhaustive list of activities that will not be considered lobbying activity for the purposes of the Bill. The majority of matters that constitute the list are supported and meet the policy intent. There are two issues however, where further clarification or change may assist with implementation.

Defining 'constituency matter' (new subsection 43(b))

New subsection 43(b) prescribes that 'communicating with a member of the Legislative Assembly or a councillor in the member's or councillor's capacity as local representative on a constituency matter', is not a lobbying activity for the purposes of the Bill.

In the Western Australia *Integrity (Lobbyists) Act 2016*, the division of work for Ministers and Parliamentary Secretaries between constituency matters and their official duties is distinguished in defining what is not a lobbying activity:

> '4. Term used: lobbying activity
> …
> (3) The following are not lobbying activities —
> …
> (d) communicating with a person who is a Minister or a Parliamentary Secretary, in that person's capacity as a member of either House of Parliament and not as a member of the Executive Government of the State, in relation to a matter that is not within that person's responsibilities as a Minister or a Parliamentary Secretary;
> …'

Such a provision would be beneficial in bringing clarity to what is not a constituency matter for a Minister or Parliamentary Secretary.

Better defining lobbying on personal matters (new subsection 43(h))

New subsection 43(h) attempts to deal with lobbying on private and personal matters by stating what it is not. Not providing a meaning of what is a private or personal matter introduces a subjective and ambiguous element to the interpretation and application of the new subsection 43(h).

The Western Australia *Integrity (Lobbyists) Act* 2016 provides a better and clearer example of how to deal with personal matters for the purposes of new section 43, and this should be considered as an alternative to the proposed amendment in the Bill:

> Section 4 The following are not lobbying activities:
> (3)…
> (j) communicating about a personal matter on behalf of —
> (i) the person making the communication; or
> (ii) a friend or relative of that person;
> …
> (5) For the purposes of subsection (3)(j), a **personal matter** is a matter that relates only to a person's personal, family or household affairs and is not related to any business or commercial activity.

Removing application of 'Incidental meeting' to registered lobbyist (new subsection 43(j))

New subsection 43(j), which is identical to section 42(2)(h) of the Integrity Act, provides registered lobbyists with the opportunity to engage in unregulated lobbying activity. The example given in both the Integrity Act and the Bill is:

> A Minister or the Leader of the Opposition speaks at a conference and has an unscheduled discussion [on a lobbying matter] with a lobbyist who is a conference participant.

In the above example, lobbying activity by a registered lobbyist has still occurred but under the Integrity Act and the Bill, it is not required to be recorded as a lobbying contact.

The policy intent of the recommendations of the Coaldrake Report and the Yearbury Report is to capture all lobbying activity undertaken by a registered lobbyist. To achieve this, the application of subsection 43(j) could be narrowed to exclude incidental meetings involving representatives and registered lobbyists. It would mean whether the lobbying activity was scheduled or not, it would be required to be entered into the lobbying register.

Dual hatting provisions – professional services and technical firms (new sub-section 43(k))

In his report, Professor Coaldrake commented that:

> …**the legislative definition of 'incidental lobbying' should be amended so that individuals cannot escape regulation simply by virtue of their position of employment within an accounting or consulting firm.** The focus of regulation should be on the type of activity, and not the nature of the person's employment[4].

[4] *'Let the Sunshine in Review of Culture and Accountability in the Queensland Public sector',* Professor Coaldrake, 28 June 2022, page 51.

Professor Coaldrake also noted his particular concerns in relation to professional services firms:

> The Review is not concerned with work that is *truly* incidental, for example, a lawyer calling an officer of a department in order to clarify a point relevant to a client's position. The Review *is* concerned with individuals situated within professional services firms whose entire work, or a substantial part thereof, comprises of contact with government representatives in an effort to influence State or local government decision-making for the benefit of their third party client. **All persons for whom a substantial part of their work involves representing the interests of a third party as a paid service should be required to register as lobbyists, including persons operating out of consulting and accounting firms**[5].

New section 43 specifies what is not a lobbying activity and includes:

> (k) communicating with a representative in the ordinary course of providing professional and technical services to a person.
>
> Example –
>
> > An entity is engaged by a person to provide accounting, architectural, engineering or legal services. The entity communicates with a representative on behalf of the person. The communication is not a lobbying activity if the communication is part of the ordinary course of the entity providing the services to the person.

Although framed slightly differently, the above amendment has the similar problems in practical application and implementation as current section 41(6):

> An entity carries out *incidental lobbying activities* if the entity undertakes, or carries on a business primarily intended to allow individuals to undertake, a technical or professional occupation in which lobbying activities are occasional only and incidental to the provision of professional or technical services.

Both are ambiguous and difficult to apply in the real world. It is well recognised that professional service firms, and most likely many technical firms, provide a suite of services to a client, only one of which may include government relations. Given this, it is very difficult to ascertain when communication with a representative, which would otherwise be lobbying activity, ceases to be in the ordinary course of services and becomes a lobbying activity that is captured under the regulatory scheme. In short, I do not believe this amendment, in practice and in application, will achieve the intent of Professor Coaldrake's comments and recommendation.

In my view, which is consistent with Professor Coaldrake, the scheme can only be effective when it is defined *by the activity itself* – that is, lobbying activity – and that applies consistently across the board to all entities that are captured by the scheme.

[5] Ibid, 51.

The definition of lobbying activity is clear – it is communication with a representative in an effort to influence decision-making – it applies when an entity engages another to undertake lobbying activity on their behalf for fee, reward or benefit. These are the key elements that apply (unless it is an entity excluded entirely from the scheme).

What the amendment is attempting to do is include professional and technical services firms, but limit the way it works, and arguably in a way which differs to that applied to professional lobbying firms. From a practical point of view, implementation of Professor Coaldrake's recommendation cannot be achieved through nuanced statutory provisions, these create confusion and can often be worked around such is the case, in my view, with the proposed amendments.

If the intent is to capture professional and technical services firms, then this can only be done by removing new subsection 43(k). This places professional services and technical firms on the same footing as a professional lobbying firm. If they wish to undertake work for a paying client which constitutes lobbying activity (irrespective of what proportion of services to the client it forms), then they must be registered. If in the course of providing services to that client, they communicate with a representative in an attempt to influence decision-making as defined in new section 42, then they must record that contact.

3.3 Dual Hatting provisions- lobbying and election campaigning (new sections 41 and 49)

The Coaldrake Report recommendation

In his report, Professor Coaldrake made the following observations in relation to lobbyists' participation in both election campaigns and lobbying activities:

> The appearance of guiding a political party to office one week and then advocating a client's case for a government or council decision a few weeks later naturally raises suspicion which cannot be remedied by promises to impose 'Chinese walls'. Suspicions about 'dual hats' may be heightened if subsequent government decisions favour clients of the firms engaged to run election campaigns…
>
> A sound approach would be for political parties and the lobbying firms themselves to recognise the damage to confidence in the system that arises from a willingness to create such conflicts. But this recognition of understandable community concern has been slow and can only be dealt with by regulation which prohibits professional lobbyists who work on a party political campaign from lobbying for a period before and after an election. Access to government is a privilege which, like all privileges, comes with expectations.
>
> … the Review proposes to go further and suggest that if an individual plays a substantive role in the election campaign of a prospective government, they should be banned from engaging in lobbying for the next term of office[6].

[6] Ibid, p.57.

Professor Coaldrake recommended:

> Lobbying regulation be strengthened by… an explicit prohibition on the 'dual hatting' of professional lobbyists during election campaigns. They either lobby or provide professional political advice but cannot do both;[7] …

Concerns with the effectiveness of dual hatting provisions (new section 49)

The draft Bill in the new section 49 (Disqualification of previously registered individual who performed a substantial role in election campaign of political party) in conjunction with the definition of 'election period' in the new section 41, seeks to address this recommendation.

In my view however, by way of their construction and the definitions proposed, they may not effectively and fully achieve the intent of Professor Coaldrake's recommendation. My concerns relate particularly to:

- the disqualification period, and whether as currently defined, that period would cover the timeframe within which a person may play a substantive role in an election campaign; and
- the definition of 'substantive role' and whether it includes all activities that would reasonably be viewed as falling under that term.

Disqualification period (new section 49(1) and 'election period' definition in new section 41)

Principle for setting length of the disqualification period

In constructing legislation to give effect to Professor Coaldrake's recommendation, it is necessary to identify the timeframe or length of the time the disqualification period should apply for, so as to capture the activities or behaviour that is intended to be prohibited.

The disqualification period would need to have regard to when substantive work on an election campaign might be done, for example, when does a political party commence its work on developing their election strategy or developing policy which will form part of their election campaign (both activities included in the definition of substantial role in the Bill)?

It would be reasonable to conclude, given what is required to mount an election campaign, that political parties and individual candidates commence planning and strategizing for an election campaign well before polling day. As any person in the community can appreciate, preparing for and organising a political campaign is time-consuming and onerous.

[7] Ibid, p.58.

The disqualification period in the Bill

New section 49 (Disqualification of previously registered individual who performed a substantial role in election campaign of political party), subsection (1) applies to an individual who –

(a) immediately before an election period for an election (the relevant election period) was a registered lobbyist; and
(b) on or after the start of the relevant election period was required to give a notice under the new section 66A; and

Note –
See the new section 66N(3) for removal of the individual's name from the lobbying register

(c) after the end of the relevant election period applied under the new section 48 for registration as a lobbyist.

Under the new section 41 (Definitions for chapter), 'election period' is defined as commencing on the day on which the writ for the election is issued and ending at the end of the day on which the election is held. Under section 19C (Normal dissolution day) of the *Constitution of Queensland 2001*, the normal dissolution day is 26 days before the polling day and is the day when the Governor issues the writ for a general election.

The use of the word 'immediately' in the new section 49(1)(a) can only be given its ordinary dictionary definition. The word 'immediately' means variously 'without lapse of time; without delay; instantly; at once[8]. By applying this definition, it is likely to be interpretated as meaning "at the time the election period commences." Taking new section 49 and the definition of 'election period' together, the disqualification period is the three weeks and five days before polling day – it can be argued that this close to an election, the substantive work on the long-term election campaign strategy (including most if not all policy development) is completed, and at this point political parties would be well into the implementation stage and strategizing on unexpected and emerging issues that often arise in those last few weeks of an election.

The Bill amendments would permit:

- A registered lobbyist to play a substantial role in an election campaign and on policy development for a political party up until close to when the writ for the election is issued. At that point the lobbyist could cease all involvement in the campaign and consequently still be able to lawfully engage in lobbying activity in the next term of office.
- A registered lobbyist to de-register a short time before the writ for the election is issued after being substantially involved in the election campaign to that point, and then continue to play a substantial role. Following polling day, the person could re-register

[8] Immediate definition and meaning, 'Macquarie Dictionary', Eighth Edition, 2020

as a lobbyist and be able to lawfully engage in lobbying activity in the next term of office.

The above two scenarios which are permissible under the Bill, are not in my view, consistent with the intent of Professor Coaldrake's recommendation.

What disqualification period would more effectively implement the recommendation?

Implementation of Professor Coaldrake's recommendation could be better achieved if the starting point for designing the dual hatting prohibition is identifying when substantive work is typically done in formulating an election campaign strategy (including policy development) and implementing it. A reasonable person could speculate that might be at least a six or twelve month period before a general election.

In terms of the legislation itself, this could be operationalized by applying a term such as 'pre-election period' for the purposes of new section 49(1)(a) and giving that term a definition under the new section 41. For example, "'pre-election period' means the period of six months starting on the day that is six months before polling day for an election".

It is also worth noting that the consequences for a professional lobbyist failing to notify the Integrity Commissioner under clause 66A of the Bill (Individual who is registered lobbyists must give notice of intention to perform substantial role in election campaign) can be significant, including de-registration, so it is important from a practical perspective that whatever the disqualification period is, it is precise, clear, is not subject to interpretation and easy for practitioners to apply.

Definition of 'substantial role' (new section 41)

In addition to defining disqualification period, the other important limb or section to give effect to the prohibition on dual hatting, is the definition of 'substantial' role.

The definition given under the new section 41 is:

> ***substantial role***, in the election campaign of a political party—
>
> (a) means a role at a senior level, whether paid or unpaid that—
>
> (i) involves employment or engagement by the party; and
> (ii) incorporates significant involvement in the party's election strategy or policy development; and
>
> (b) does not include any of the following—
>
> (i) general membership of the party;
> (ii) volunteering for, or advising, a particular candidate;
> (iii) door knocking, placing documents in letter boxes or other campaign communications;
> (iv) media liaison;
> (v) handing out how to vote material.

The intent of the definition is to have broad capture (incorporates any significant involvement in the party's election strategy or policy development) and to include any role whether paid or unpaid. Limitations to the definition are outlined in (b) with the purpose of excluding activities that should not represent having 'a significant involvement' in a party's election strategy or in policy development associated with an election campaign.

There a several elements of the definition that warrant clarification on intent or which raise a policy question of whether there are activities that would represent a 'significant involvement' but which may be excluded under the current amendment. Each are outlined below.

Capturing volunteering or pro bono work

The reference in (a)(i) to 'employment' applies the ordinary meaning of 'employment' in the absence of a definition, which requires there to be work undertaken for wages/payment. However, reference in (a)(i) to 'engagement' is more ambiguous. 'Engagement' is also not defined but could be taken to mean anything other than 'employment' or any form of work for an entity or person that does not invoke employer obligations.

It is important that it is beyond doubt that the definition incorporates voluntary or pro bono work, simply to ensure that the intent of the definition cannot be circumvented by a technical legal argument. It may be prudent to include in the definition 'work done on a voluntary or pro bono basis'.

Broadening the definition to include engagement or employment by a candidate or other entity or person

The amendment limits the application of this definition to 'employment or engagement by the party' (see (a)(i)) as opposed to employment or engagement by a candidate or other person or entity. This means a registered lobbyist could be employed or engaged by a candidate or other person or entity (such as a sponsor), to have significant involvement in a party's election strategy or policy development and this would not be captured under the proposed amendments.

Professor's Coaldrake's observations and recommendations concern the activity itself (a registered lobbyist having significant involvement in a party's election campaign or policy development and then engaging in lobbying activity in the next term of Government). Implementation of this recommendation in the legislation should ensure its intent is not circumvented by unintended consequences arising from framing its operation too narrowly. This can be easily dealt with by modifying the definition to 'involves employment or engagement by the party, a candidate or other entity or person'.

Giving definition to 'media liaison'

The definition aims to exclude involvement in a political campaign or in policy development that is not 'significant'. The new subsection (b) specifies activities that fall within this category, such as advising a particular candidate or door knocking.

It includes 'media liaison' but does not define that term. That term could include services to a political party such as being as a spokesperson or designing and/or implementing a communications or media strategy, of which both could be argued as representing "significant involvement" in an election strategy.

This issue could be dealt with defining media liaison – for example, it is daily or routine media liaison activities including preparing media responses or fielding media enquires but excludes being a party election campaign spokesperson or designing and/or implementing or coordinating a communications or media strategy for a political party (as opposed to a candidate).

3.4 Registration (new section 48)

An issue which has been raised with me on two occasions concerns registered lobbyists circumventing requirements arising from registration, by being employed on a casual or temporary part-time basis (e.g. one day per week) when the registered lobbyists and/or third party client want to avoid reporting contacts as required in the Integrity Act and the Bill. This I am told, is achieved by employing the registered lobbyist as an employee, consequently any lobbying undertaken is done so as an employee (i.e. an in-house lobbyist) so the requirements of the lobbying regulation do not apply.

I have no information on how common or prevalent this practice is, but note it is a practical and easy way to 'work around' the requirements of the regulatory scheme if that is what desired. As this is an issue not specifically tied to either a Coaldrake or Yearbury recommendation, I raise it as a general policy issue the Committee may wish to further consider.