

LOBBYING WA STYLE: INFLUENCE WITHOUT OFFICE
OR A PARTIAL CAPTURE OF GOVERNMENT?

Allan Peachment

Investigations by Western Australia's Corruption and Crime Commission have placed the reputations of all lobbyists in WA under a cloud, particularly the reputation of former premier Brian Burke and of former senior minister Julian Grill. Their bad press compares with many reports on lobbyists elsewhere and over a long period of time, particularly reports from the United States where modern lobbying began.

Most American reports on lobbyists refer to corruption and unethical behaviour. One nineteenth century American Senate staff member stated, 'most of them are blackmailers. They are so crafty and treacherous that public men, men of reputation and means, are always on the alert against them.' American Presidents too have been critical of them, President Buchanan writing they are 'all desirous ... on any and every pretext to get their arms into the public treasury.' President Truman also held adverse views on them.

However, lobbyists everywhere have a friend in President, John F Kennedy who in 1956 stated:

Lobbyists are in many cases expert technicians and capable of explaining complex and difficult subjects in a clear, understandable fashion. ... (those) lobbyists who speak for the various economic, commercial and other factional interests of this country serve a very useful purpose and have assumed an important role in the legislative process.¹

Lobbyists Burke and Grill possess these same attributes and this should not surprise given their years spent as Premier of a reformist government in one case and as a senior minister, in the other.

Other aspects of their political behaviour are however less desirable and, I suggest, have been partly responsible for seriously undermining the integrity of both representative and responsible government and the idea of an apolitical public service in WA.

Judging from the triple C's investigations, Burke and Grill are very privileged lobbyists with a seemingly inexhaustible supply of cross-party, ministerial, bureaucratic, cabinet and factional contacts. These contacts they exploited assiduously. Unfortunately, their focus has been on the needs of their clients alone with an almost complete disregard for the principles and conventions surrounding cabinet government, the dignity of parliament, the policy and legislative processes and the public interest.

Burke and Grill would likely disagree with this last point arguing that deontological decision making, that is embracing the notion of duty, rules, standards and codes, does not necessarily produce good policy whereas their teleological or 'end justifies the means', or so-called 'situational' ethics is more likely to do so.

This view has some validity but it misses the point, which is more about safeguarding the structure and processes of our form of government than it is about achieving good policy.

For his part Mr Burke is reported as saying that he could rely on at least two current Carpenter government ministers and five different ministerial officers to provide him with confidential Cabinet information. Of course, lobbyists have good reason to claim higher levels of influence than they may actually have. However, we now know the pair had intimate

access to some of the very highest levels of the WA public service, specifically, the Environmental Protection Authority, Water and Planning & Infrastructure. In terms of access rules, standards and codes have no place in Burke's lobbying style.

Whether employing rule following or end seeking approaches, influencing the decisions of both ministers and public servants in these matters is crucial, not only because of the advice that senior and other public servants give to ministers but also the extent to which officials and departments exercise discretion and make judgments in the course of their operational duties.

Burke and Grill's approach to lobbying and the access they were given to key areas of government and the public service, raises the question: how damaging has the affair been to the notion of good governance and what potential does it have for inflicting further damage in the immediate future?

Importantly, triple C investigations have so far been concerned with only a handful of clients of the 40 the two lobbyists are reported to have. These 40 are serviced by a vast communications effort resulting in a reported 12,900 outgoing phone calls (that is approximately 35 per day, seven days a week) plus an unknown number of incoming calls. All this in a single calendar year!

The current investigation clearly has the potential for significant growth and it may be no exaggeration to suggest that, given what the investigation has so far revealed, what the larger picture may amount to is evidence of a partial but effective takeover of the higher echelons of several

politically sensitive areas of government. The short term damage to good governance and an effective public service is already significant, but the longer term cost is inestimable.

To date the toll in ministerial scalps resulting from these events has no precedent in WA and is worthy of a brief mention.

First, Norm Marlborough, Minister for the SW, a long time friend and supporter of Brian Burke, was promoted to cabinet by incoming Premier, Alan Carpenter. A day after Marlborough was sworn in as a cabinet member Mr Burke gave him a dedicated mobile phone in the name of Marlborough's wife. Of 355 calls made on this phone 209 were to or from Brian Burke including 10 calls on one day alone. Burke used the secret mobile to keep in intimate contact with Marlborough including coaching him on how to answer a question asked of him in parliament. This while Marlborough was in the chamber!

At this time Burke was a consultant for a controversial land development at Smith's Beach where, it was alleged, six candidates for local election received a total of \$50,000 from IAG, a retail lobby organization. Duncan Kerr MHR has commented perceptively on this circumstance, but in another context '... mixing political parties that need money with developers that need favours often leads to ethical meltdown.²' That was the case at Smith's Beach.

Premier Carpenter had sought an assurance from all his ministers who admitted contact with Mr Burke that they had done nothing improper. Marlborough gave an assurance that he could separate his ministerial responsibilities from his friendship with Burke, an assurance he failed

dismally to keep. Marlborough resigned from parliament in November 2006 and Burke agreed to resign from the Labor party.

Second, there is John Bowler Minister for Resources & State Development. Bowler had a very long standing friendship with Julian Grill and admitted to having frequent contacts with him, some in relation to Bowler's ministerial responsibilities. Bowler also gave an assurance to the Premier that he had done nothing improper. However, in January 2006 Bowler had spent nine days as acting environment minister during which time he granted approval for a coal fired power station to go ahead without the EPA recommendations thus failing to impose any specified requirements on the plant to phase in carbon reduction measures or implement offsetting arrangements such as planting trees. Reportedly, this saved the owners, Griffin, tens of millions of dollars. The CCC also found that Bowler had sent a confidential parliamentary report on a mining dispute to Julian Grill, a lobbyist for the company embroiled in the fight. Bowler quit as minister and resigned from the ALP in February 2007.

Third, there is Tony McCrae, Minister for Environment and Climate Change who was sacked in late February, 2007 for what the Premier called a 'major error of judgement' in that he discussed fundraising with Julian Grill while at the same time saying he was considering a planning proposal lodged by one of Mr Grill's clients.

What these three ministerial resignations suggest is that the concept of ministerial responsibility has a new lease of life in WA albeit, only with the aid of phone taps and high-tec surveillance. This is hardly an advance.

In addition to ministers there at least four senior public servants caught up in this scandal, including Dr Neale Fong, head of the Health Department of WA and reputedly, Australia's highest paid public servant. Fong admitted to receiving nine emails from Brian Burke and to taking a 'myriad' of phone calls from both lobbyists. Two of the remaining three officials were regarded by CCC lawyer Phil Urquhart as suffering from "collective amnesia"³

Two Federal politicians have also been caught up in this scandal. One, the Federal Opposition leader, Kevin Rudd and second the Federal Minister for the Environment, Senator Ian Campbell who resigned from parliament in mid 2007.

The evidence set down here reveals a situation in WA that goes far beyond mere 'influence without office'. The Burke-Grill team has been able of infiltrate the public service at the highest level and the government to Cabinet level. The evidence suggests that 'influence without office' may well have been superseded by the partial and select 'capture' of both the ministerial and the official arms of government.

There is a place for the lobbyist in this process, especially those of the kind described by President Kennedy. But Kennedy's words should be balanced by those of President Truman who wrote: 'The President is the only lobbyist 150m Americans have. The other 20m are able to employ people to represent them.'⁴ The dilemma is: those who were able to employ Burke and Grill to make representations to government crowd out the policy arena. Citizens with opposing views but without the access available to Burke and Grill have no effective voice and may only 'heckle the steamroller'.

This lobbying scandal is of a different nature to any of the eight major commissions of inquiry held into scandals in WA in the thirteen years since the WA Inc report was tabled in 1992⁵. In this context the steps that should be considered for adoption to prevent lobbying type scandals from recurring should relate to the differing circumstances of ministers and officials.

On the day Brian Burke quit the ALP, a number of backbenchers threatened to defy the Premier's edict not to have contact with Mr Burke. In response Premier Carpenter threatened to resign. This high regard and loyalty towards Burke appears to come from friendship, mateship, past political achievements and acknowledgement of leadership and political skills, makes the Burke-Grill team different from other lobbyists. Past career favours may also play a role based on Mr Burke's considerable factional influence.⁶

That some parliamentarians may feel more loyalty and regard towards a former leader than for the dignity of parliament and the principles and conventions of the political system suggests that the problem will not be solved by the creation of a parliamentary standards commissioner. The problem in large part relates to the manner in which the party is organized into factions which in turn determine intra-party and parliamentary-party allegiances.

A possible solution to this situation comes not from academics but from senior WA Labor minister, Alannah MacTiernan. While the CCC hearings into the influence of Burke and Grill were underway, MacTiernan initiated the Labor Reform Forum one aim of which was to help break the hold of Labor power brokers. The reforms proposed by the Forum included

secret ballots for pre-selections and the abolition of the contentious “show and tell” practice, which enables factional bosses to see delegate votes before they are lodged.

Other reforms were aimed at giving rank-and-file members more voting power in the party’s state executive and at State conference, a direct say in the election of the state president and overcoming branch stacking by union and political bosses.⁷

At State conference last June a ‘watered down’ version of these proposals was adopted. This destroyed the hopes of one delegate who had hoped that the party would “address the credibility gap between the rhetoric of the ALP’s rules and the average party member’s experience of participating in party processes. This result ensured that both ministers and members of the ALP remained more beholden to often unelected faction bosses than to any principle of government or parliamentary process.⁸ Regrettably, this outcome did little to close of the access routes to ministers and officials revealed by the lobbying style of Burke and Grill. Creating a lobbyists register or abolishing success fees would have even less impact.

Several developments will have an immediate impact on the future behaviour of those officials who may be said to ‘cross the line’. First, the CCCs widely reported public hearings, second, former Commissioner Hammond’s statement that ‘Inevitably, charges will be laid as a result of those investigations’⁹ third, Attorney-General, Jim McGinty’s comment that ‘disciplinary action has already begun, with at least one public servant targeted for inappropriate behaviour’, adding that he expected Premier

Carpenter will deal with public servants as severely as he had dealt with ministers.¹⁰

Finally, in the longer term an educational program aimed at upgrading or refreshing officials' understanding of the ethical and legal parameters governing their professional behaviour would be appropriate.¹¹

¹ All of the quotations on lobbyists are taken from : Nicholas Comfort: *Brewer's Politics: A Phrase and Fable Dictionary*, Cassell, London. P.355

² Duncan Kerr, MHR *Public Administration Today*, January-March 2007, 14-15, p.14

³ *The West Australian*, December 6, 2006

⁴ Comfort, Ibid

⁵ Allan Peachment(ed)(2006) *The Years of Scandal: Commissions of Inquiry in Western Australia 1991-2004*. University of Western Australia Press.

⁶ *The West Australian*, 10.11.06

⁷ *The West Australian*, 11.4.07

⁸ *The West Australian*, 4.6.07

⁹ Kevin Hammond, Corruption and Crime Commission of Western Australia. "Corruption, Integrity & The Public Sector" 20 March 2007, 34pp, p.3

¹⁰ ABC Online- PM CCC finishes WA public hearings. 1.3.07

The National Interest, ABC Radio National. Lobbyists Unite. 11.3.07

¹¹ For purposes of any discussion the following definition of corrupt conduct is given by MG Sexton SC SG in "The NSW Landscape: Investigative Bodies Examined." AIAL 3rd National Lecture Series, Australian Institute of Administrative Law 2006 Pp40-79, 42-43.

"Corrupt conduct is: (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group of body of public officials or any public authority, or (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or (d) any conduct of a public official that involves a misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person."