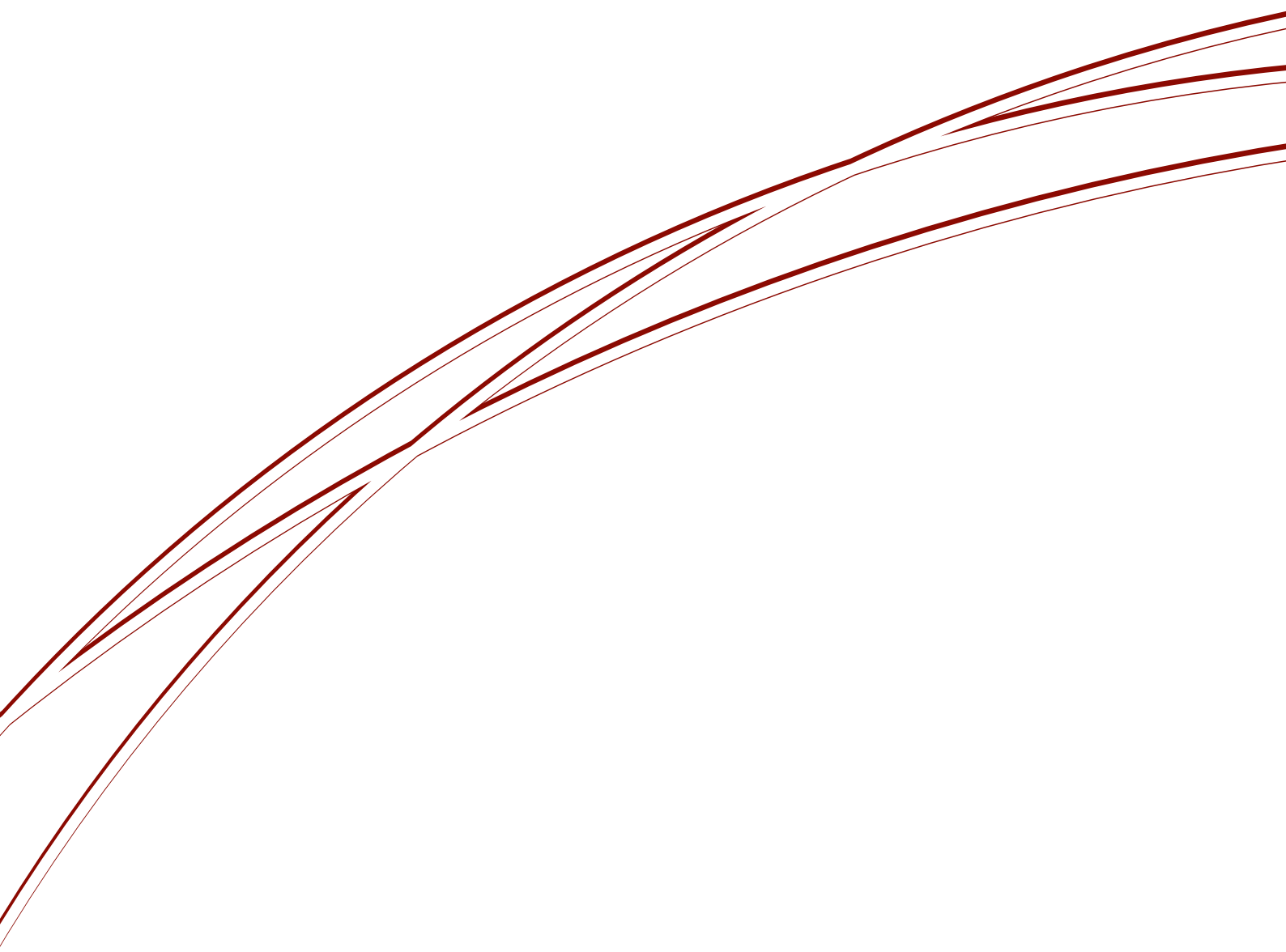
THE REGULATION OF LOBBYING, ACCESS AND INFLUENCE IN NSW: A CHANCE TO HAVE YOUR SAY

ICAC
INDEPENDENT COMMISSION AGAINST CORRUPTION
NEW SOUTH WALES

APRIL 2019



I·C·A·C

INDEPENDENT COMMISSION AGAINST CORRUPTION

NEW SOUTH WALES

THE REGULATION OF LOBBYING, ACCESS AND INFLUENCE IN NSW: A CHANCE TO HAVE YOUR SAY

APRIL 2019

ISBN: 978-1-921688-86-7

This publication and further information about the Independent Commission Against Corruption can be found on the Commission's website at www.icac.nsw.gov.au.

Public sector organisations are welcome to refer to this publication in their own publications. References to and all quotations from this publication must be fully referenced.

ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION
NEW SOUTH WALES

Level 7, 255 Elizabeth Street
Sydney NSW 2000 Australia

Postal Address: GPO Box 500
Sydney NSW 2001 Australia

T: 02 8281 5999
1800 463 909 (toll free for callers outside metropolitan Sydney)
F: 02 9264 5364
TTY: 02 8281 5773 (for hearing-impaired callers only)

E: icac@icac.nsw.gov.au
www.icac.nsw.gov.au

Business Hours: 9 am - 5 pm Monday to Friday

Contents

Foreword

In general terms, a citizen having access and capacity to influence the policy-making process is a fundamental element in the democratic process. It is equally important – in relation to a range of matters – that elected officials and other officials hear a wide range of views to ensure their decision-making is rounded and well informed.

Lobbying, when conducted on proper lines, can have beneficial outcomes; in particular, by informing government and public officials as to the detailed factual matters and merits concerning a proposed project that would not otherwise be properly understood.

It may be argued that lobbying could lead to decisions by government and/or by public officials in circumstances of unjustified secrecy. Such processes are sometimes criticised as lacking any form of transparency or accountability and that particular groups or the public generally, who may be affected by decisions, are denied the opportunity of being heard.

The validity of any such criticisms needs to be ascertained. They would appear to be based on two concerns.

First, that secret lobbying by certain individuals or organisations, in their nature, undermines democratic processes. Secondly, such secret activities carry the risk of inappropriate or improper decision-making and, hence, a risk of corruption.

Measures already in place in NSW go some way towards providing transparency of lobbying activities and decision-making, and safeguarding against undue influence and self-interest. However, there is an arguable case that they do not go far enough.

In its 2010 report, *Investigation into corruption risks involved in lobbying* (Operation Halifax), the NSW Independent Commission Against Corruption ("the Commission") made a number of recommendations to tighten the lobbying legislative and regulatory framework. Some, but not all, of the key elements recommended by the Commission have since been implemented. The failure to adopt all recommendations has left open the issue of transparency in government decision-making.

Although the Commission regards the implementation of the recommendations made at that time as a step in the right direction, regulatory practice in other jurisdictions suggests that a review of lobbying practices in NSW is now overdue.

Given the importance of trust and confidence in government and public administration, it is timely for the Commission to:

- consult further on lobbying practices
- examine whether the interrelated principles of transparency, fairness, integrity and freedom of political communication are being upheld or not
- examine the options that are available for lifting standards of probity so as to ensure integrity in public office and protect the public interest in official decision-making.

This consultation is not intended to be a comprehensive review of the *Lobbying of Government Officials Act 2011* in its every aspect. Rather, the Commission is aiming to work with key stakeholders, interested professionals (including both academic and practising members of the legal profession), public officials, lobbyists and other members of the community, in examining the contemporary lobbying practices and, where reform or change is needed, make proposals for law reform. The overall objective is to strengthen integrity and good repute in government and in public administration.

I look forward to considering the responses of all interested parties.

The Hon Peter Hall QC
Chief Commissioner
NSW Independent Commission Against Corruption

Introduction

All NSW constituents, community groups and businesses should expect to have fair and equitable access to influence public officials and public authorities, and, in return, to expect that government decisions will advance the common good of the people of NSW. When elected representatives do not meet the standards expected of them, the general public are rightly concerned.

The fluctuating levels of public trust and confidence in government decision-making have prompted the Commission to examine the lobbying legislation and related procedures in NSW. Section 13(1) of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") makes provision for the Commission to examine and provide advice about ways in which the integrity and good repute of public administration can be promoted.

In 2010, the Commission released *Investigation into corruption risks involved in lobbying*, which made 17 recommendations for change. The NSW Government implemented a number of measures to promote transparency, integrity and fairness in the lobbying regime, including a register for third-party lobbyists, publication of ministerial diaries, and ethical codes of conduct applicable to all lobbyists and public officials. As an independent body, the NSW Electoral Commission was tasked with oversight of the lobbyist register and imposing sanctions for non-compliance.

Many of the Commission's recommendations were not, nevertheless, adopted. Almost a decade later, the NSW legislative and regulatory framework does not fully accord with the "10 Principles for Transparency and Integrity in Lobbying" recommended by the Organisation for Economic Co-operation and Development. Additionally, legislative and other regulatory measures now in place in other jurisdictions have raised and reinforced standards of accountability for lobbying practices.

Not everyone who engages in lobbying is considered a lobbyist for the specific purposes of conduct regulation, nor do all lobbyists need be subjected to the same level of regulation. The purpose of this consultation is to gather information and views from a wide range of sources that are interested in both the conduct and regulation of lobbying.

To provide the reader with a fuller understanding of the issues, the Commission engaged two academic experts in the field to prepare a discussion paper, a copy of which is provided in the appendix. The authors of *Enhancing the democratic role of direct lobbying in NSW* are Dr Yee-Fui Ng, Senior Lecturer, Monash University Faculty of Law, and Professor Joo-Cheong Tham, Melbourne Law School, University of Melbourne.

The consultation questions and the discussion paper are intended to generate debate on the appropriate form and level of regulation required to address the significant concerns and associated risks that may be posed by different types of lobbyists. Your feedback will allow the Commission to develop necessary and practical recommendations.

The Commission's aim is that such well-informed recommendations for lobbying reform will ensure both the actuality and perception that access and influence in government and public administration are in accord with accepted standards of transparency and accountability.

All responses received during this consultation exercise will be thoroughly analysed and considered by the Commission when formulating its final position and recommendations.

Next steps

This investigation (Operation Eclipse) differs from those usually conducted by the Commission in that it is not concerned with whether any particular individual has engaged in corrupt conduct. Rather, it seeks to examine the corruption risks involved in the lobbying of public authorities and officials.

In addition to seeking consultation responses, the Commission will invite key stakeholders to discuss lobbying practices in a public inquiry expected to be held in late July/early August this year. This will allow the Commission to examine practices that may give rise to actual or perceived corruption, or otherwise undermine public confidence in the integrity of government decision-making and public administration.

Indicative timeline of the Commission's investigation process

12 April 2019	Discussion paper is released and consultation responses are invited
24 May 2019	Closing date for consultation responses
May-June 2019	Analysis and follow up with respondents and experts
July/August 2019	Public inquiry
October 2019	Final report

Submitting your response

There is no expectation that responses to all questions will be made. We would be grateful, however, if you would clearly indicate in your response which questions or parts of the consultation paper you are responding to, as this will aid our analysis of the responses received.

The deadline for responses is Friday, 24 May 2019.

Please send your response by email to:

E: lobbying@icac.nsw.gov.au.

Hardcopies can be mailed to:

Chief Commissioner
NSW Independent Commission Against Corruption
GPO Box 500
Sydney NSW 2001

If you have any queries, please email:

Lewis Rangott
Executive Director, Corruption Prevention
E: lrangott@icac.nsw.gov.au or

Iris Kirkpatrick
Senior Corruption Prevention Officer
E: ikirkpatrick@icac.nsw.gov.au.

Handling your response

It is important that you let us know how you wish your response to be handled, and whether you are happy for your response to be made publicly available on the Commission's website. Although it is the Commission's preference that responses be made public, if you request that yours not be made public, we will regard it as confidential and treat it accordingly.

As such, when you submit your response, please let us know (1) your contact details and (2) if you are happy for your response to be made public.

The Commission may contact you to discuss the issues you have raised in your response.

Principles, issues and consultation questions

The discussion paper, *Enhancing the democratic role of direct lobbying in NSW* (see appendix), sets out the fundamental principles that the Commission believes will constitute an ideal model for lobbying in NSW.

The principles of transparency, integrity, fairness and freedom are those that frame the issues and questions upon which the Commission wishes to consult.

Embedding the interrelated principles in both political decision-making processes and public administration is crucial to safeguarding the public interest and promoting a level playing field for businesses. Importantly, they significantly reduce the risk of undue influence and access that can otherwise distort, and even corrupt, such processes and additionally support trust and confidence in government and in public administration.

The Commission is particularly interested in how to improve the effectiveness of compliance and enforcement mechanisms without imposing onerous administrative conditions that could otherwise drive lobbying underground. It is hoped that, by providing lobbyists, public authorities and officials with the incentive to do the right thing, behavioural and cultural change will be strengthened.

There are 37 questions posed by the Commission below. Please let us know your thoughts on any or all of these in your submission.

1. Measures to improve transparency

The Commission is concerned that corruption is more likely to occur where there are opaque lobbying processes and inadequate standards of accountability. Ensuring integrity and transparency in lobbying procedures significantly reduces the likelihood of undue access and influence on government decisions. Integrity and transparency are also critical measures that allow the public to make judgments about the impact of lobbyists' influence on government decisions.

In Operation Halifax, the Commission examined how unregulated lobbying and related influencing activities can produce outcomes that are inimical to the public interest. Practices such as "cash for access" to public officials or the making of prohibited donations to political parties often mask the real identity of vested interests.

A further risk of corrupt practice is astroturfing through the use of social media and fabricated or "fake news" created with the intent to mislead decision-makers into benefiting a particular cause or campaign. Without the principles of integrity and transparency, public officials may proceed to make decisions based on seriously distorted facts.

Further information on the principle of transparency can be found in pages 16-24 of the discussion paper in the appendix.

Register of Third-party Lobbyists

1. Are there any examples of lobbying laws/practices in other jurisdictions (interstate or overseas) that seem to work well?
2. Who should be required to register on the Register of Third-party Lobbyists?
3. Should there be a distinction between lobbyists on the register and lobbyists bound by the code of conduct?
4. Should there be a distinction between "repeat players" and "ad hoc lobbyists"?
5. Should there be targeted regulation for certain industries? If so, which industries should be targeted?

Disclosure of lobbying activity

6. What information should lobbyists be required to provide when they register?
7. Should lobbyists be required to provide, or at least record, details of each lobbying contact they have, as well as specify the legislation/grant/contract they are seeking to influence? Should this information be provided only to regulatory agencies or be publicly available?
8. Should lobbyists be required to disclose how much income they have received and/or how much they have spent on their lobbying activities?
9. How should lobbying interactions with ministerial advisers, public servants, and members of Parliament be recorded and disclosed?
10. What information should ministers be required to disclose from their diaries and when?

Promoting accessibility and effectiveness

11. How can disclosures of lobbying regulation best be presented and formatted to better enable civil society organisations to evaluate the disclosure of lobbying activities?
12. Should there be greater integration of lobbying-related data? For example, should there be integration of:
    (i) information on political donations made by lobbyists
    (ii) the register of lobbyists
    (iii) ministerial diaries
    (iv) details of investigations by the Commission
    (v) list of holders of parliamentary access passes
    (vi) details of each lobbying contact (if reform occurred)?
13. Should the NSW Electoral Commission be required to present an annual analysis of lobbying trends and compliance to the NSW Parliament?

2. Measures to improve integrity

The root cause of corruption stems from a lack of integrity. The integrity of both lobbyists and public officials is critical for key standards of conduct to meet public expectations. The holders of entrusted power, however, have responsibilities to serve the public interest.

Despite there being codes of conduct to guide all lobbyists and public officials, the Commission regularly receives complaints about self-interested individuals that deviate from the behaviour required of them. The Commission has raised awareness of the risk of corruption occurring when former public officials become lobbyists and use their previous relationships to gain a corrupt advantage – from lobbying that comes from within the parliamentary ranks or when parliamentarians take on secondary employment as lobbyists.

Further information on the principle of integrity can be found in pages 25-34 of the discussion paper in the appendix.

Regulation of the lobbyists

14. What duties should apply to lobbyists in undertaking lobbying activities?
15. Should NSW members of Parliament be allowed to undertake paid lobbying activities?
16. Should lobbyists be prohibited from giving gifts to government officials?

Regulation of the lobbied

17. Should the definition of "government official" be expanded to include members of Parliament?
18. What obligations should apply to government officials in relation to lobbying activities?
19. Should public officials be obliged to notify the NSW Electoral Commission if there are reasonable grounds for suspecting that a lobbyist has breached the lobbyist legislation?
20. Should government officials be required to comply with certain meeting procedures when interacting with lobbyists? If so, what procedures are appropriate?

Regulation of post-separation employment

21. Should there be a cooling off period for former ministers, members of Parliament, parliamentary secretaries, ministerial advisers, and senior public servants from engaging in any lobbying activity relating to any matter that they have had official dealings in? If so, what length should this period be?
22. How should a post-separation employment ban be enforced?
23. Should lobbyists covered by the NSW Register of Lobbyists be required to disclose whether they are a former minister, ministerial adviser, member of Parliament or senior government official and, if so, when they left their public office?
24. Should lobbyists covered by the NSW Register of Lobbyists, who are former government officials, be required to disclose their income from lobbying if it exceeds a certain threshold? If so, what should be the threshold? And for how long should this obligation apply after the lobbyist has left government employment?

Promoting the integrity of direct lobbying – other measures

25. Should there be a requirement on the part of the NSW Government to make a public statement of reasons and processes in relation to significant executive decisions? If so, what circumstances would trigger such a requirement and how might it operate in practice?

3. Measures to improve fairness

Fair and equal access to public decision-making creates a level playing field for balanced views to be heard, and is essential to reinforce public trust in representative democracy. Not only is there significant public interest in ensuring the transparency and integrity of lobbying, but a diversity of participation and opportunity is necessary to inform policy debate and develop effective public policies.

Unfair access and influence is likely to occur when lobbying is secret, giving weight to public perceptions that political decisions are more in favour of vested industry interests than community interests. The Commission has investigated allegations of corruption that occurred because both lobbyists and those lobbied deviated from the principle of fairness.

Further information on the principle of fairness can be found in pages 35-38 of the discussion paper in the appendix.

Fair consultation processes

26. Should there be NSW Government guidelines on fair consultation processes?
27. If so, what should be provided under these guidelines in terms of these processes being inclusive, allowing for meaningful participation by stakeholders and promoting adequate responsiveness on the part of government officials?
28. If so, how should these guidelines be integrated with a requirement to provide a statement of reasons and processes with significant executive decisions?

Resourcing disadvantaged groups

29. How can disadvantaged groups be supported by the NSW Government in their lobbying efforts (for example, ongoing funding of organisations, and public service dedicated to supporting community advocacy) to promote openness in the political process and to promote advocacy independent of government?

4. Measures to improve freedom

Freedom of political communication is the cornerstone of democracy. Lobbying is a legitimate activity and any regulatory regime should not impede on individual rights to participate and contribute to public decision-making. Without transparency, integrity and fairness in the system, however, those without political connections or sufficient resources are excluded from the lobbying process.

Further information on the principle of freedom can be found in pages 39-40 of the discussion paper in the appendix.

Promoting the balance of freedom, restrictive measures and proportionality

30. How can the measures to promote the democratic role of direct lobbying be designed so as to have a proportionate impact on the freedom to directly lobby?
31. Should there be provision for exemption from restrictions on direct lobbying such as the ban on post-separation employment when undue hardship can be demonstrated?
32. Could existing or new regulatory requirements drive improper lobbying practices underground or have a dampening effect on legitimate lobbying?

5. Measures to improve compliance and enforcement

The NSW Electoral Commission can impose a range of sanctions for non-compliant lobbyists, such as the suspension or deregistration of lobbyists, or by placing them on a Watch List (a position that triggers additional meeting protocols). However, sanctions are limited to registered, third-party lobbyists.

Effective rules and guidelines for transparency, integrity, fairness and freedom should be an integral part of the wider policy and regulatory framework that sets standards for good public governance. The Commission is keen to hear of national or international best practice examples with regard to systematic monitoring and compliance mechanisms that oversee lobbying practices.

Further information on mechanisms to improve compliance and enforcement can be found in pages 41-43 of the discussion paper in the appendix.

Promoting the role of education and training

33. Is there adequate support for lobbyists and government officials to enable them to understand their obligations under the lobbying legislation?
34. To understand their obligations in relation to lobbying, should there be training and/or education programs for:
    (i) lobbyists
    (ii) public servants
    (iii) ministers
    (iv) ministerial advisers?

If so, what sort of training or education program is needed?

Promoting independent supervision to enforce lobbying laws

35. Does the NSW Electoral Commission have adequate powers and resources to enforce lobbying regulations in NSW?
36. How can the enforcement of the lobbyist regime be improved?
37. Are the sanctions under the lobbyist legislation adequate (that is, suspension of lobbyists, placement on the Watch List and deregistration)?

Appendix

ENHANCING THE DEMOCRATIC ROLE OF DIRECT LOBBYING IN NEW SOUTH WALES

A Discussion Paper Prepared for the New South Wales Independent Commission against Corruption

April 2019

By Dr Yee-Fui Ng* and Professor Joo-Cheong Tham**

* Senior Lecturer, Faculty of Law, Monash University.
** Professor, Melbourne Law School.

TABLE OF CONTENTS

I THE PARADOXES OF REPRESENTATIVE DEMOCRACY AND DIRECT LOBBYING

There is a deep paradox at the heart of representative democracy: it is a form of rule by the people that distances itself from the people. The central justification for representative government is popular sovereignty. As the Universal Declaration of Human Rights proclaims, '(t)he will of the people shall be the basis of the authority of government'.[1] Yet as representative but not direct democracy,[2] there is structured distance between 'the people' and those who exercise governmental power.

The aspiration of representative democracy is that this distance is bridged by strong mechanisms of accountability[3] and responsiveness as well as an ethos based on the public interest, all of which seek to ensure that government officials rule 'for the people'. The obvious risk is that this distance becomes a gulf and that government officials instead of ruling 'for the people' govern for a few – that an oligarchy operates rather than a democracy.

It is a startling fact that many Australians believe – and increasingly so - that government functions as an oligarchy. Survey evidence shows that perceptions that 'People in government look after themselves' and 'Government is run for a few big interests' have risen significantly since 2000s, so much so that in 2017, more than 70% of respondents agreed with the first statement and more than half with the second.[4] Disturbingly, there has been a 9% increase since 2016 in perceptions that federal members of parliament are corrupt (85% saying "some" are corrupt, 18% responding that "most/all" are corrupt).[5] These perceptions undeniably have an impact on trust in government with a recent survey finding less than half of Australians having trust and confidence in government.[6] More fundamentally, this lack of trust is likely to undermine support for representative democracy as a system of government.

This challenging context highlights the importance of carefully assessing the various channels of political influence and ensuring that they operate according to

---

[1] Universal Declaration of Human Rights, Article 21(3).
[2] John Stuart Mill, *Considerations on Representative Government* (Parker, Son, & Bourn, 1861).
[3] Accountability for the purposes of this paper is the ability for an external body to hold someone to account, and mechanisms of accountability seek to keep 'the public informed and the powerful in check'. Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan, 2003) 1.
[4] Danielle Wood and Kate Griffiths, 'Who's in the Room? Access and Influence in Australian Politics' (2018) *Grattan Institute,* Figure 1.2 <https://grattan.edu.au/wp-content/uploads/2018/09/908-Who-s-in-the-room-Access-and-influence-in-Australian-politics.pdf>.
[5] 'Griffith Research shows Trust in Government Slides' (2018) <https://app.secure.griffith.edu.au/news/2018/08/20/griffith-research-shows-trust-in-government-slides/>.
[6] Ibid.

democratic principles. The goal should be to ensure that these channels provide the connective tissues of accountability and responsiveness, support an ethos of public interest decision-making and foster community confidence in government. The danger to be avoided is a closed environment of decision-making where the dominant mind-set is one of self-interest, where trust in government is an inevitable casualty.

Of particular importance – and the focus of this discussion paper – is the role of direct lobbying (communication with public officials aimed at influencing public decision-making), whether solicited or unsolicited.[7] The central purpose of this paper is to stimulate discussion and debate on how the democratic role of direct lobbying can be enhanced in New South Wales in relation to State government.[8]

It does so by, firstly, explaining the democratic role of direct lobbying, highlighting how this role is underpinned by four principles (transparency, integrity, fairness, and freedom). It then briefly describes contemporary regulation of direct lobbying in New South Wales. This is followed by a discussion of possible reform options with sections dedicated to the four principles underpinning the democratic role of direct lobbying and to effective compliance and enforcement mechanisms.

---

[7] Although the definition used by the OECD has defined 'lobbying' as 'solicited communication, oral or written, with a public official to influence legislation, policy or administrative decisions', the Commission is interested in unsolicited communication as well. OECD, *Lobbyists, Governments and Public Trust: Volume 1* (OECD Publishing, 2009) 18.

[8] This is not to downplay the risks of direct lobbying with local government processes, see New South Wales Independent Commission Against Corruption, *Investigation into Corruption Risks involved in Lobbying* (2010) ch 11 ('ICAC Lobbying Report'). See also New South Wales Independent Commission Against Corruption, *Lobbying Local Government Councillors: A Guide for Councillors, Constituents And Other Interested Parties* (2006); Queensland Crime and Corruption Commission, *Operation Belcarra: A Blueprint for Integrity and Addressing Corruption in Local Government* (2017); Joo-Cheong Tham, *Regulating the Funding of New South Wales Local Government Election Campaigns* (2010) <http://www.efa.nsw.gov.au/__data/assets/pdf_file/0007/128716/Regulating_the_Funding_of_NSW_Local_Government_Election_Campaigns_final.pdf>.

II THE DEMOCRATIC ROLE OF DIRECT LOBBYING: FOUR PRINCIPLES[9]

Direct lobbying is essential to the proper workings of democracies. As the British Neill Committee on Standards on Public Life recognised, '[t]he democratic right to make representations to government – to have access to the policy-making process – is fundamental to the proper conduct of public life and the development of sound policy'.[10] The New South Wales Independent Commission Against Corruption (NSW ICAC) has similarly observed:

> lobbying is not only an essential part of the democratic process but that it can positively enhance government decision-making. It does this by ensuring that arguments being put forward are well-researched, clearly articulated and address relevant government concerns. Lobbying assists government to consult widely in a timely manner, and better understand the potential implications of its decisions.[11]

These statements identify a key principle underlying the democratic role of direct lobbying, the principle of freedom (to directly lobby).

At the same time, direct lobbying can undermine democratic processes. As the OECD has observed, '(l)obbying is often perceived negatively, as giving special advantages to "vocal vested interests" and with negotiations carried on behind closed doors, overriding the "wishes of the whole community" in public decision-making'.[12]

The principle of freedom alone cannot guard against these consequences. Three other principles are essential:

- The *principle of transparency*, which is the government's obligation to share information with members of the community, thus allowing the community to hold their public officials accountable;
- The *principle of integrity*, which relates to the moral qualities of government officials of acting with honesty, probity, and avoiding conflicts of interest as well as processes that promote these qualities; and

---

[9] For a fuller discussion, see Joo-Cheong Tham and Yee-Fui Ng, 'Report for New South Wales Electoral Commissioner: Regulating Direct Lobbying in New South Wales for Integrity and Fairness' (2014) <https://www.elections.nsw.gov.au/__data/assets/pdf_file/0004/188140/Regulating_Direct_Lobbying_in_New_South_Wales_for_Integrity_and_Fairness.pdf> 29-64.

[10] Committee on Standards in Public Life, *Reinforcing Standards: Sixth Report of the Committee on Standards in Public Life: Review of the First Report of the Committee on Standards in Public Life* (2000) 86.

[11] *ICAC Lobbying Report*, above n 8, 20.

[12] OECD, above n 7, 9.

- The *principle of fairness*, which turns on equality of treatment by the decision-maker of all parties who ought to be heard in decision-making processes.

These principles can be found in the OECD's *10 Principles for Transparency and Integrity in Lobbying.*[13] They also correspond to those advanced by Tony Fitzgerald, former chair of the Queensland Fitzgerald Inquiry into Queensland Police corruption:

1. Govern for the peace, welfare and good government of the State;
2. Make all decisions and take all actions, including public appointments, in the public interest without regard to personal, party political or other immaterial considerations;
3. Treat all people equally without permitting any person or corporation special access or influence; and
4. Promptly and accurately inform the public of its reasons for all significant or potentially controversial decisions and actions.[14]

The principle of transparency corresponds to the fourth Fitzgerald principle; the principle of integrity to the first and second; and the principle of fairness to the third.

It is departures from these three principles that constitute the primary risks of direct lobbying to democracies: secrecy; misconduct and corruption; and unfair access and influence.[15]

Secrecy is anathema to accountability, which requires transparency; it promotes corruption and misconduct; and it also constitutes a form of unfairness. Direct lobbying can be shrouded in secrecy in various ways. In some cases, the fact and details of such lobbying are never known. In other situations, the fact of lobbying is known but not its details, including lobbying occurring through the purchase of access and influence, in particular, discussions during 'off the record' briefings.[16] A third type of secret lobbying occurs when the fact and details of lobbying are not known at the time the law or policy is being made, but are exposed later.

Misconduct and corrupt conduct result from departures from the principle of integrity. At its core, this principle is underpinned by the notion that governmental processes should operate for the public interest.[17] Closely associated with the public interest

---

[13] OECD, 'Transparency and Integrity in Lobbying' (2013) <http://www.oecd.org/corruption/ethics/Lobbying-Brochure.pdf>.

[14] Accountability Roundtable, 'The Fitzgerald Principles' <https://www.accountabilityrt.org/the-fitzgerald-principles/>.

[15] For fuller discussion, see Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (UNSW Press, 2010) ch 9.

[16] Ibid 81-87.

[17] The preamble to the New South Wales Ministerial Code of Conduct stipulates that New South Wales Ministers should 'pursue and be seen to pursue the best interests of the people of New South Wales to the exclusion of any other interest'. *Independent Commission Against Corruption Regulation 2017* (NSW), Appendix, NSW Ministerial Code of Conduct, cl 1. Similarly, the preamble of code of conduct for Members of the New South Wales Legislative Assembly states that these parliamentarians should use 'their influence to advance the common good of the people of New South Wales': New South Wales Legislative Assembly, *Code of Conduct for Members* (Adopted 5 May

imperative is the principle of merit-based decision-making. As the Western Australian Corruption and Crime Commission has noted, '[t]o protect the public interest, decision making must be impartial, aimed at the common good, uninfluenced by personal interest and avoid abuse of privilege'.[18] NSW ICAC has similarly emphasised that:

> Public officials will be lobbied. How should they respond? If they are decision-makers, the answer is simple. They base their decision on the merits. The identity of the lobbyist is irrelevant. At least, that is the way it should be.[19]

Departures from the principle of integrity can be characterised as misconduct; and when these departures occur to secure improper gain for the wrongdoer, corrupt conduct results. Understood in this way, misconduct and corrupt conduct can be undertaken by both lobbyists and those lobbied (The standards of integrity are not, however, identical for both groups; for public officials, there is the 'constitutional obligation to act in the public interest').[20]

The risks of corruption and misconduct are acute when the fact and details of direct lobbying are secret as transparency and the accountability it enables is absent.[21] Another form of secrecy that risks corruption and misconduct occurs when those lobbying do not fully disclose their interests (e.g. disclosure of commercial lobbyists of their clients).

The risks of corruption and misconduct are heightened when the financial interests of government officials (and those closely related to them) are implicated in the process of lobbying – these situations throw up the prospect of improper gain that defines corrupt conduct. They include situations when lobbyists or their clients make political contributions to the elected official or his or her party.[22] These contributions do not necessarily need to be made proximate to a particular decision. Systemic practices of contributions can give rise to a form of corruption which the High Court has described as 'clientelism'. As the High Court puts it, clientelism 'arises from an

---

2015, *Votes and Proceedin*gs, pp. 53-5) (the code of conduct for Members of the New South Wales Legislative Council is identical: see Legislative Council, Code of Conduct for Members, adopted by the Legislative Council for the purposes of section 9 of the *Independent Commission Against Corruption Act 1988* (NSW) on 26 May 1999, preamble).

[18] Corruption and Crime Commission of Western Australia, *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup* (2007) 100.

[19] New South Wales Independent Commission Against Corruption, *Report on Investigation into North Coast Land Development* (1990) 33 (pt 5) ("*North Coast Report*").

[20] Western Australia, *Report of the Royal Commission into the Commercial Activities of Government and Other Matters* (1992) WA Government Printer, 1-2.

[21] See, for example, findings in Corruption and Crime Commission of Western Australia, *Report on the Investigation of Alleged Misconduct concerning Dr Neale Fong, Director General of the Department of Health* (2008) 5; Corruption and Crime Commission of Western Australia, *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup* (2007) 101.

[22] *ICAC Lobbying Report*, above n 8, 19.

office's holder's dependence on the financial support of a wealthy patron to a degree that is apt to compromise the expectation, fundamental to representative democracy, that public power will be exercised in the public interest'.[23] The regular contributions made to the major political parties by organisations that also lobby government are of particular concern here.[24]

Another situation implicating financial interests of government officials that risk undermining the integrity of direct lobbying results when parliamentarians are engaged in secondary employment (employment in addition to their parliamentary duties) involving lobbying.[25] A further situation occurs when government officials have a reasonable prospect of being employed by lobbyists and/or their clients after leaving government (post-separation employment). As NSW ICAC has observed, '(t)wo corruption risks arise from former public officials becoming lobbyists: relationships they developed with other public officials may be used to gain an improper or corrupt advantage; and confidential information, to which they had access while public officials, may also be used to gain such an advantage'. [26] These risks are particularly significant given the high proportion of lobbyists who are former government officials.[27]

These circumstances, where financial interests of government officials are implicated, may lead to bias, or at least an apprehension of bias, where decision-makers with a financial interest to them (or their party) may be seen to be more favourably predisposed to make decisions to benefit those lobbying.

It is not only financial conflicts of interest that give rise to the risk of corruption and misconduct with direct lobbying. Conflicts of interest can also arise through the relationships between those lobbying and government officials (including those based on friendship, family ties, professional and political networks). To a degree, such relationships are inevitable: in many government portfolios, there will be regular exchanges between government officials and key stakeholders leading naturally to relationships; each government will experience lobbying from within each own political party, whether by the party's parliamentarians or its members.

That these relationships are inevitable does not mean that direct lobbying should be carried out on the *strength of these relationships* – that influence of government decision-making through direct lobbying should occur based on these relationships. On the contrary, this would run strongly counter to the public interest imperative and

---

[23] *McCloy v New South Wales* (2015) 257 CLR 178, [36].
[24] Wood and Griffiths, above n 4, 10.
[25] See generally New South Wales Independent Commission Against Corruption, *Regulation of Secondary Employment for Members of the NSW Legislative Assembly* (2003).
[26] ICAC Lobbying Report, above n 8, 58.
[27] Wood and Griffiths, above n 4, 20, 22.

the principle of merit-based decision-making. As the second Fitzgerald principle states, governmental decisions should be made 'in the public interest without regard to personal, party political or other immaterial considerations'. Government operating on the currency of relationships, particularly one oiled by political and financial interests, not only calls into the question the integrity of the *persons* involved but more broadly, suggests a corruption of governmental *processes* – it would point to an oligarchy.

Turning finally to the principle of fairness. Fairness in government decision-making is achieved when government decision-making accords with the principle of political equality - that each citizen is of equal status regardless of wealth, power, status or connections. The very first principle of the OECD's *10 Principles for Transparency and Integrity in Lobbying* states that '(c)ountries should provide a level playing field by granting all stake-holders fair and equitable access to the development and implementation of public policies'.[28] The principle of fairness has profound consequences in terms of who has the opportunity to influence public officials, the balance of resources amongst those lobbying and the weight government officials give to the views communicated.

Unfair access and influence occurs with direct lobbying when it is secret. When lobbying or the details of the lobbying are unknown, those engaged in such clandestine activities are able to put arguments to decision-makers that other interested parties are not in a position to counter simply because they are unaware. Even when there is no problem with secrecy, unfair access and influence can still result from direct lobbying. It occurs when there is a gross disparity amongst key stakeholders in terms of their resources to engage in direct lobbying. Conflicts of interest, financial or otherwise, also pose a risk of unfairness. Relationships between those lobbying and government officials can also produce an insidious form of unfairness with 'insiders' and 'outsiders'.[29]

---

[28] OECD, 'Transparency and Integrity in Lobbying' (2013) <http://www.oecd.org/corruption/ethics/Lobbying-Brochure.pdf>.
[29] Wyn Grant, 'Pressure Politics: The Changing World of Pressure Groups' (2004) 57(4) *Parliamentary Affairs* 408; Mark Civitella, 'Insiders and Outsiders: How Australian Democracy is Failing its Stakeholders' in Mark Sheehan and Peter Sekuless (eds), *The Influence Seekers: Political Lobbying in Australia* (Australian Scholarly Publishing, 2012).

III THE REGULATION OF LOBBYING IN NEW SOUTH WALES

A *The necessity for internal and external regulation of direct lobbying*

Whether direct lobbying fulfils its democratic role depends on a complex range of factors, including how lobbyists conduct themselves and the norms they bring to their tasks; and how those lobbied conduct themselves and their respective norms. This highlights the significance of *internal regulation* by lobbyists and those lobbied.

While clearly necessary, internal regulation is not sufficient to ensure that direct lobbying fulfils its democratic functions. *External regulation* – regulation administered by bodies other than those directly engaged in lobbying – is also essential. External regulation in this context takes various forms. It includes general mechanisms of political accountability such as parliamentary accountability (including through the operation of the doctrine of responsible government); accountability provided through competitive party politics; and scrutiny by the media and civil society organisations.

The necessity of internal and external regulation of direct lobbying cautions against a sharp distinction between these two forms of regulation. Both types of regulation should be geared towards ensuring the democratic role of direct lobbying and, ideally, operate in a symbiotic manner.

In the following section, we will focus on regulation that is specifically directed to direct lobbying. As will be seen shortly, such regulation takes the form of internal and external regulation.

B *Lobbying-specific regulation*

Lobbying in New South Wales is regulated by a combination of legislation, delegated legislation, executive arrangements and parliamentary resolutions. The *Lobbying of Government Officials Act 2011* (NSW) provides for a Register of Third-Party Lobbyists, a Lobbyists Code of Conduct,[30] a Lobbyist Watch List, and certain offences relating to direct lobbying. Premier's memoranda require the disclosure of ministerial diaries as well as stipulate meeting protocols for lobbyists on the Lobbyist Watch List.[31] There are also codes of conduct for New South Wales Ministers and

---

[30] The Code is prescribed through the *Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014* (NSW).

[31] Premier's Memorandum M2014-07 'Publication of Ministerial Diaries' (2014); Premier's Memorandum M2015-05 'Publication of Ministerial Diaries and Release of Overseas Travel Information' (2015). At the time of writing, the NSW Government announced their proposed anti-corruption measures for MPs to publicly disclose their diaries; recording who they have held meetings with and when, as well as disclosing their overseas travel. The Opposition indicated their intent to improve the scrutiny of politicians to include political advisers and senior public servants, as well as extending the measures to local governments.

Parliamentarians, the former promulgated by executive order[32] whilst the latter established by parliamentary resolutions. Both codes may in certain circumstances trigger the jurisdiction of the NSW ICAC under the *Independent Commission Against Corruption Act 1988* (Cth).[33]

1 *Lobbying of Government Officials Act 2011 (NSW)*

(a) Register of Third-Party Lobbyists

The Lobbying of Government Officials Act 2011 (NSW) is administered by the New South Wales Electoral Commission (NSWEC). In particular, the NSWEC has responsibility for establishing a Register of Third-Party Lobbyists. As the name of the register suggests, only a narrow category of lobbyists are required to register their details on the lobbyist register in New South Wales: third party lobbyists, that is, individuals or bodies carrying on the paid business of lobbying government officials on behalf of another individual or body.*[34]* In-house lobbyists, peak organisations and charities are not required to register. Beyond registration, lobbyists are not required to disclose details of each lobbying contact, including who they lobby, the subject matter, or the frequency. A registered third-party lobbyist is required to keep their information updated within 10 business days after a change occurs and confirm their details to the NSWEC thrice a year.[35] The NSWEC also has the power to investigate alleged breaches and impose sanctions, which could result in third party lobbyists being removed from the Register; or third party or other lobbyists being placed on a Watch List and their access to government restricted.

(b) *Lobbyists Code of Conduct and the Lobbyists Watch List*

The Lobbyists Code of Conduct under the Act applies more broadly than the Register – the Code applies to third party lobbyists, and other individuals and organisations that lobby government.[36] This code of conduct, which is prescribed through the *Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014* (NSW), obliges lobbyists to behave ethically and refrain from misleading, dishonest, corrupt or other unlawful conduct, and to disclose any conflicts of interest.[37] Third party lobbyists must also disclose the identity of their clients.[38]

---

[32] *Independent Commission Against Corruption Regulation 2017* (NSW), Appendix, NSW Ministerial Code of Conduct.
[33] See Peter Hall, *Investigating Corruption and Misconduct in Public Office* (Thomson Reuters, 2nd ed, 2019).
[34] New South Wales Electoral Commission, 'The Register of Third-Party Lobbyists' <http://www.lobbyists.elections.nsw.gov.au/whoisontheregister>.
[35] *Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014* (NSW), Reg 5.
[36] *Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014* (NSW).
[37] New South Wales Lobbyists Code of Conduct.
[38] New South Wales Lobbyists Code of Conduct cl 10.

Lobbyists on the Watch List are subject to stricter controls by regulating the conduct of the lobbied. Codes of conduct of government officials may specify special procedures for communication by officials with lobbyists on the Watch List.[39]

(c) Offences

Certain lobbying activities are prohibited by the Act. A former Minister or former parliamentary secretary is prohibited from lobbying a government official in relation to an official matter dealt with by them in relation to their portfolio responsibilities during the 18 months before they ceased to hold office.[40] The maximum penalty for this offence is 200 penalty units ($22,000).[41] The Act also bans success fees being paid to, or received by, a lobbyist,[42] with a maximum penalty of 500 penalty units for corporations ($55,000) or 200 penalty units for individuals ($22,000).

2 *Premier's Memoranda*

Alongside external regulation through the *Lobbying of Government Officials Act 2010* (NSW), there is internal regulation through Premier's Memoranda on ministerial diaries and meeting protocols for those on the Lobbyist Watch List.

(a) Ministerial Diaries

A Premier's Memorandum requires all Ministers to publish quarterly diary summaries detailing scheduled meetings held with stakeholders, including third-party lobbyists, from 1 July 2014.[43] The summary must disclose the organisation or individual with whom the meeting occurred, details of any registered lobbyists present, the name of the lobbyists' client, and the purpose of the meeting. The Department of Premier and Cabinet administers the publication of diaries, and will notify the Premier if the memorandum is not complied with. The Premier is then able to reprimand the errant Minister and request that he or she comply.

(b) Lobbyist Watch List

Another Premier's Memorandum provides that the lobbying activities of entities on the Lobbyists Watch List are to be subject to stricter meeting protocols, that is, having two New South Wales governmental officials present during any

---

[39] *Lobbying of Government Officials Act 2011* (NSW), s 12(2).
[40] Ibid s 8.
[41] Ibid.
[42] Ibid s 5. NSW Lobbyists Code of Conduct cl 14.
[43] New South Wales, Premier's Memorandum, *Publication of Ministerial Diaries and Release of Overseas Travel Information* (2015) M2015-05 <http://arp.nsw.gov.au/m2015-05-publication-ministerial-diaries-and-release-overseas-travel-information>.

communication with the lobbyist.[44] One of those officials is required to take notes of the communications with the lobbyist and provide the notes to the agency head.[45]

3 *Ministerial and Parliamentary Codes of Conduct*

(a) Ministerial Code of Conduct

The New South Wales Ministerial Code of Conduct specifies that a Minister must not knowingly breach the law and the Lobbyists Code of Conduct.[46] Ministers are also subject to the duty to act honestly and in the public interest, to avoid conflicts of interest, and to refuse to accept a private benefit as an inducement in the course of their official duties.[47] This could apply to prevent Ministers from accepting benefits from lobbyists where it might create a conflict of interest. Ministers are also prohibited from misusing public property or confidential government information for their private benefit or those of others, including lobbyists.[48]

Ministers must also continually disclose all pecuniary and other interests, as well as gifts received on the Ministerial Register of Interests.[49] Further, Ministers are not to accept gifts that could be perceived as an inducement for reward or could reasonably give rise to a conflict of interest.[50] This suggests that they should not receive gifts from lobbyists that might create a conflict.

Under the ministerial code, Ministers are prohibited from undertaking any paid or unpaid secondary employment, including as lobbyists, except with the consent of the Premier.[51]

Substantial breaches of the New South Wales Ministerial Code of Conduct can constitute 'corrupt conduct' and be investigated by ICAC under the *Independent Commission Against Corruption Act*.[52]

---

[44] New South Wales, Premier's Memorandum M2014-13, *NSW Lobbyists Code of Conduct* (2014) 2.
[45] Ibid.
[46] *Independent Commission Against Corruption Regulation 2017* (NSW), Appendix, NSW Ministerial Code of Conduct, cl 3.
[47] *Independent Commission Against Corruption Regulation 2017* (NSW), Appendix, NSW Ministerial Code of Conduct, cll 6-10.
[48] *Independent Commission Against Corruption Regulation 2017* (NSW), Appendix, NSW Ministerial Code of Conduct, cll 6-10.
[49] *Independent Commission Against Corruption Regulation 2017* (NSW), Appendix, NSW Ministerial Code of Conduct, Schedule, pts 2-5.
[50] *Independent Commission Against Corruption Regulation 2017* (NSW), Appendix, NSW Ministerial Code of Conduct, Schedule, pt 5.
[51] *Independent Commission Against Corruption Regulation 2017* (NSW), Appendix, NSW Ministerial Code of Conduct, Schedule, pt 1, cl 3.
[52] *Independent Commission Against Corruption Act 1988* (NSW) ss 8, 9(d).

(b) Parliamentary Code of Conduct

New South Wales Members of Parliament must continually disclose all pecuniary and other interests, as well as gifts received on the Register of Disclosures of the House.[53]

Unlike Ministers, under the MPs' code of conduct and the Regulations underlying the NSW Constitution, New South Wales parliamentarians are allowed to undertake secondary employment or engagements, including paid lobbying activity, provided that they disclose such employment and the income derived from it.[54] However, the code also prohibits parliamentarians from undertaking paid advocacy,[55] which seems to be inconsistent with the ability to undertake paid lobbying activity.

Substantial breaches of the New South Wales MP Code of Conduct can constitute 'corrupt conduct' and may be investigated by ICAC under the *Independent Commission Against Corruption Act*.[56]

---

[53] *Independent Commission Against Corruption Regulation 2017* (NSW), Appendix, NSW Ministerial Code of Conduct, Schedule, pts 2-5.
[54] NSW Code of Conduct for Members (adopted May 2015, Votes and Proceedings, pp 53-5), cl 2 (under review); *Constitution (Disclosure by Members) Regulation 1983* (NSW), Regs 7A, 15A.
[55] NSW Code of Conduct for Members (adopted May 2015, Votes and Proceedings, pp 53-5), cl 2 (under review); Proposed Revised Code cl 2.
[56] *Independent Commission Against Corruption Act 1988* (NSW) ss 8, 9(d).

IV Possible Reform Options

In this section, we canvass possible reform options according to the four principles underpinning the democratic role of direct lobbying (transparency; integrity; fairness; freedom) and also specifically discuss effective compliance and enforcement mechanisms.

In this discussion, we draw significantly upon two major reports that have issued a series of recommendations for the proper regulation of direct lobbying. The first is the 2010 report of the NSW ICAC, *Investigation into the Corruption Risks Involved in Lobbying* ('ICAC Lobbying Report')[57] and the second is the 2014 report we wrote for the New South Wales Electoral Commission, *Regulating Direct Lobbying in New South Wales for Integrity and Fairness.*[58] The recommendations of these reports frame much of the following discussion, in particular those which have not been adequately implemented: of the 17 recommendations in the NSW ICAC report, we consider that only five have been adequately implemented;[59] of the 22 recommendations made in our 2014 report, we consider that only six have been adequately implemented.[60]

A *Measures to improve the transparency of direct lobbying*

There are three dimensions to the principle of transparency: significance; accessibility; and effectiveness.

Significance goes to: what information is disclosed regarding direct lobbying. It relates to:

- those who have significant power in the decision-making process (whether the lobbied or lobbyists);
- lobbying activity which has a significant impact on the process (whether by lobbyists or other individuals and entities); and
- government decisions having significant consequences.

Accessibility goes to: how information is disclosed regarding direct lobbying. It implies that such information should be:

- physically accessible (including being easy to find); and

---

[57] New South Wales Independent Commission Against Corruption, *Investigation into Corruption Risks involved in Lobbying* (2010). See also New South Wales Independent Commission Against Corruption, *Lobbying in NSW: An Issues Paper on the Nature and Management of Lobbying in NSW* (2010).

[58] Joo-Cheong Tham and Yee-Fui Ng, 'Report for New South Wales Electoral Commissioner: Regulating Direct Lobbying in New South Wales for Integrity and Fairness' (2014) <https://www.elections.nsw.gov.au/__data/assets/pdf_file/0004/188140/Regulating_Direct_Lobbying_in_New_South_Wales_for_Integrity_and_Fairness.pdf>.

[59] See Table 1, Appendix B.

[60] See Table 2, Appendix B.

- intelligible in the sense of being comprehensible to ordinary members of the public.

Effectiveness goes to the extent to which disclosure promotes accountability. Mere disclosure of information regarding direct lobbying will not bring about accountability – unless such information is acted upon. This requires:

- integration of mechanisms of disclosure with external regulation through parliament, the media, and civil society organisations; and
- information being disclosed in a way that aids the 'connecting of the dots' between direct lobbying activity and governmental decisions; and between direct lobbying activity with other political strategies (e.g. indirect lobbying; political contributions).

1 *Register of lobbyists*

Which lobbyists are covered by the Register of Lobbyists is a foundational question for the design of the regulatory scheme. The regulatory goal here is to provide disclosure of who is lobbying. There is a variety of individuals, groups and organisations that engage in direct lobbying, including:

- Third party or professional lobbyists;
- Government relations staff and directors of corporations and other commercial entities;
- Technical advisers who lobby as a part of their principal work for clients (e.g. architects, engineers, lawyers, accountants);
- Representatives of peak bodies and member organisations;
- Churches, charities and social welfare organisations;
- Community-based groups and single-interest groups;
- Members of Parliament;
- Local councillors;
- Head office representatives of political parties; and
- Citizens acting on their own behalf or for their relatives, friends or local communities. [61]

As noted earlier, the Register of Third-Party Lobbyists only covers third-party lobbyists. Such restrictive coverage fails to provide proper transparency of government decision-making in terms of direct lobbying by 'repeat players'. For instance, Dr David Solomon - when Queensland Integrity Commissioner - estimated that the Queensland regime which only extended to third party lobbyists covered 'only a small proportion – perhaps 20 per cent – of the corporate lobbying that does occur'.[62] This means that the element of significance is not met – many significant

---

[61] *ICAC Lobbying Report*, above n 8, 22.

[62] David Solomon, Queensland Integrity Commissioner, 'Ethics, Government and Lobbying' (Speech delivered at a seminar conducted by Transparency International, Brisbane, 21 June 2013) 5

lobbyists are not covered by the register. Such restrictive coverage also constitutes unfair treatment of third party lobbyists, as there is no justifiable basis for distinguishing their direct lobbying activities from those by other 'repeat players' (e.g. in-house lobbyists). By contrast, in Victoria, both third party and in-house lobbyists are required to register on separate registers.[63]

One approach is to require registration of all those who undertake direct lobbying - both on an ad-hoc basis and by 'repeat players'. The appeal of this approach is its clear and simple logic flowing from the goal of disclosing who is undertaking direct lobbying.

This would, however, capture all lobbyists, whether they are significant or insignificant players. Another (narrower) approach is to restrict coverage to 'repeat players' - organisations and individuals that regularly engage in direct lobbying. As the OECD report on *Lobbyists, Governments and Public Trust* emphasised, '(t)he primary target is *professional lobbyists* who receive compensation for carrying out lobbying activities, such as consultant lobbyists and in-house lobbyists'.[64]

This targeted approach on 'repeat players' has key advantages as it targets only significant players. It avoids the undue burden on those engaged on ad-hoc lobbying that would result from requiring such individuals and groups to register given the intermittent nature of lobbying activity. 'Repeat players', on the other hand, should be able to bear the administrative burdens of registration given the regularity of their direct lobbying. Requiring those engaged in ad-hoc lobbying to be registered may also exacerbate unfairness in government decision-making as it may result in ad-hoc lobbying being stifled, with the effect that direct lobbying becomes the preserve of repeat players.

Another possibility is to have regulation that targets certain industries. The evidence (from States that release ministerial diaries) is that businesses in highly regulated areas, such as mining, transport, gambling, energy, and property construction, are more successful in securing meetings with senior government officials, compared to consumer and community groups.[65] This means that access to politicians is skewed

---

<http://www.integrity.qld.gov.au/library/document/catalogue/speeches-articles/ethics_government_and_lobbying_dr_solomon.pdf>.

[63] Victorian Public Service Commission, *Lobbyists Register* <https://www.lobbyistsregister.vic.gov.au/lobbyistsregister/main/index.htm>.

[64] OECD, above n 7, 12 (emphasis original).

[65] Analysis of data from ministerial diaries in New South Wales and Queensland. Wood and Griffiths, above n 4, 18. See also Hannah Aulby and Mark Ogge, 'Greasing the Wheels: The Systemic Weaknesses that Allow Undue Influence by Mining Companies on Government: A Qld Case Study' (2016) *The Australia Institute* <http://www.tai.org.au/sites/defualt/files/P266%20Greasing%20the%20Wheels%20160726_0.pdf>.

towards well-resourced corporate channels, compared to community groups.[66] There is a question as to whether targeted regulation for these 'high-risk' industries is thus justified.

Another possible method is to regulate the issuing of passes to lobbyists for access to Parliament House. At the federal level, 1,755 people hold sponsored 'orange' security passes for Parliament House that permit them to walk unescorted through the building.[67] The Grattan Institute has recommended that the lobbyists register be linked to the security passes to identify commercial and in-house lobbyists with privileged access to Parliament House.[68]

In New South Wales, there is a one-year "Authorised Visitor" category pass that is used for regular visitors to the New South Wales Parliament, where a Minister, Member of Parliament, or parliamentary official sponsors the application. Authorised visitors could be lobbyists, but also could be departmental officials, members of the administration of a political party, or volunteers. For a security pass to be linked to the lobbyist register in New South Wales, there needs to be a differentiated pass system implemented for lobbyists.

Discussion Questions

1. Are there any examples of lobbying laws/practices in other jurisdictions (interstate or overseas) that seem to work well?
2. Who should be required to register on the NSW register of lobbyists?
3. Should there be a distinction between lobbyists on the register and lobbyists bound by the code of conduct?
4. Should there be a distinction between 'repeat players' and 'ad hoc lobbyists'?
5. Should there be targeted regulation for certain industries? If so, which industries should be targeted?

2 *Disclosure of lobbying activity*

Information of the extent of lobbying activity in New South Wales occurs mainly through the disclosures provided in ministerial diaries.[69] This is a commendable measure that enhances transparency concerning meetings of elected

---

[66] The pattern of access also provides support for what George Monbiot has labelled as the Pollution Paradox ('The dirtiest companies must spend the most on politics if they are not to be regulated out of existence, so politics comes to be dominated by the dirtiest companies'): George Monbiot, *Out of the Wreckage: A New Politics for an Age of Crisis* (Verso Books, 2018) 134.
[67] Wood and Griffiths, above n 4, 16.
[68] Ibid 58.
[69] Queensland has been publishing ministerial diaries since 2013, NSW since 2014, and in January 2018 the ACT also began publishing ministerial diaries. See Queensland Cabinet and Ministerial Directory, 'Ministerial Diaries' <https://www.cabinet.qld.gov.au/ministers/diaries.aspx>; New South Wales Department of Premier and Cabinet, 'Ministers' Diary Disclosures' <https://www.dpc.nsw.gov.au/publications/ministers-diary-disclosures/>.

representatives. This measure also incorporates an element of significance in focussing on Ministers, as the heads of the executive structure in government.

However, the disclosures in ministerial diaries in New South Wales could be expanded to further enhance transparency. Disclosures in New South Wales are currently limited to scheduled meetings with external stakeholders who are seeking to influence government policy or decisions, but do not cover official events, town hall meetings, and community functions, where lobbying frequently happens. By contrast the diary disclosures in Queensland include these events, and thus provides more comprehensive data.[70] In addition, the quality of the disclosures is poor and expressed at a high level of generality, which does not allow for meaningful scrutiny. Disclosures should be required to specify the subject matter, and whether it relates to any legislative bills (which should be specified), grants or contracts.

A more major weakness of the New South Wales scheme is that it leaves out details of interactions between lobbyists and other significant public officials, such as ministerial advisers (particularly chiefs of staff) and senior public servants. Yet these government officials are logical targets for lobbyists, as they often have great power and influence in decision-making and policy-making due to their privileged positions within the Westminster advisory system.[71] There is strong justification to require disclosure of lobbying interactions between ministerial advisers and public servants who are senior, as well as those who provide significant public policy advice or make significant decisions. There may be less justification, however, to subject more junior public servants and ministerial advisers to extensive disclosure requirements, as they would generally not be targets for lobbyists.

Specifically excluded from disclosure through the ministerial diaries are meetings between Ministers and parliamentarians, whether of the New South Wales Parliament or other jurisdictions. Yet, Members of the New South Wales Parliament sometimes engage in direct lobbying of Ministers. Indeed, they may be doing so in a paid capacity. As noted earlier, the Codes that apply to New South Wales Parliamentarians allows them to undertake secondary employment or engagements, including paid lobbying activity, provided that they disclose such employment and the income derived from it.[72]

One option is to provide a proactive disclosure scheme for the diaries of Chiefs of Staff, senior departmental staff and Members of the New South Wales Parliament. Diaries of Chiefs of Staff may potentially be accessible through Freedom of

---

[70] See Queensland Cabinet and Ministerial Directory, 'Ministerial Diaries' <https://www.cabinet.qld.gov.au/ministers/diaries.aspx>.
[71] Yee-Fui Ng, *The Rise of Political Advisors in the Westminster System* (Routledge, 2018); Yee-Fui Ng, *Ministerial Advisers in Australia: The Modern Legal Context* (Federation Press, 2018).
[72] NSW Code of Conduct for Members (adopted May 2015, Votes and Proceedings, pp 53-5).

Information processes,[73] but a proactive disclosure scheme will enhance transparency.

Another option is to require lobbyists to disclose details of each lobbying contact with all government officials (Ministers, ministerial advisers and public servants). This information could either be provided to regulators only, or be publicly published. In Queensland, the latter option has been adopted with third-party lobbyists being required to inform the Integrity Commissioner within 15 days after the end of every month details of every lobbying contact, including the name of the registered lobbyist, whether the lobbyist complied with the code of conduct in arranging the contact, the date of contact and client of the lobbyist, the title and/or name of the government or opposition representative, and the purpose of contact.[74] This information is made publicly available on the Integrity Commissioner's website.

The comprehensive disclosure regime in Queensland of lobbyists disclosing each contact combined with disclosure of ministerial diaries, has allowed the Queensland Integrity Commissioner to report on the extent of lobbying activity and underlying factors impacting trends, requests, and meetings in relation to lobbying. The Commissioner also reported the results of a systematic comparison of lobbying activity reported by lobbyists against other sources (ministerial diary extracts, entity records).[75]

A further option, as recommended by the ICAC Lobbying Report, could be to require those who are lobbied to create records of the lobbying activity, and for those records to then be accessible to the public through the operation of the *Government Information (Public Access) Act 2009* (NSW).[76] This could be supplemented with a meeting protocol that requires the presence of two or more government officials to attend meetings with lobbyists, and to require notes to be recorded specifying when, where, by whom, and with whom lobbying occurred, what it was about, and the outcome.[77]

Overseas jurisdictions, such as the United States federal and Washington State regimes, require lobbyists to disclose even more detailed information compared to all Australian jurisdictions, including their income and expenditure on lobbying activities. It is a requirement in both jurisdictions that lobbying firms disclose the total amounts of income received from their clients for lobbying activities and third party lobbyists

---

[73] *Office of the Premier v Herald and Weekly Times Pty Ltd* (2013) 38 VR 684.
[74] *Integrity Act 2009* (Qld), s 68(4).
[75] Queensland Integrity Commissioner, *Annual Report 2015–16* (2016) <https://www.integrity.qld.gov.au/assets/document/catalogue/annual-reports/annual-report-2015-16.pdf>.
[76] *ICAC Lobbying Report*, above n 8, 41.
[77] Ibid.

disclose the total expenses incurred in connection with lobbying activities.[78] In Washington State, there are additional requirements for lobbyists and their employers to disclose monthly reports showing the identities of those entertained, provided gifts and contributed to and the amounts involved, as well as amounts spent on political advertising, public relations, telemarketing, polling, or similar activities if the activities, directly or indirectly, are intended, designed, or calculated to influence legislation or the adoption or rejection of a rule, standard, or rate by an agency under the *Administrative Procedure Act*.[79]

Discussion Questions

6. What information should lobbyists be required to provide when they register?
7. Should lobbyists be required to provide, or at least record, details of each lobbying contact they have, as well as specify the legislation/grant/contract they are seeking to influence? Should this information be provided only to regulatory agencies or be publicly available?
8. Should lobbyists be required to disclose how much income they have received and/or how much they have spent on their lobbying activities?
9. How should lobbying interactions with ministerial advisers, public servants, and members of Parliament be recorded and disclosed?
10. What information should ministers be required to disclose from their diaries and when?

3 *Measures to promote accessibility and effectiveness*

If disclosures could be provided in a format that assists civil society organisations and the media to easily access, analyse, and disseminate the data, this would enable civil society to better perform a watchdog function. Individuals and organisations are often time-poor and resource-limited, and their ability to analyse disclosure data may be impeded if it is provided in a 'clunky' format. This goes towards the dimension of accessibility. Thus the presentation of data on the lobbyist register and from ministerial diaries should be easily accessible and user-friendly.

One possibility is to present material on the NSWEC website in a more accessible manner such as *The Guardian*'s Transparency Project,[80] which allows individuals to explore which company or organisation has hired a lobbyist and 'connect the dots' through a visual infographic. Another example is the Scottish lobbyist register, which has a greater functionality, such as the ability to conduct searches for individual Ministers, Members of Parliament, ministerial advisers, and public servants. The

[78] Office of the Clerk, *Lobbying Disclosure Act Guidance* (17 June 2014), US House of Representatives <http://lobbyingdisclosure.house.gov/amended_lda_guide.html>; *Public Disclosure Law*, 42.17A Wash Rev Code §§615, 630 (2012).
[79] *Public Disclosure Law*, 42.17A Wash Rev Code §§615, 630 (2012).
[80] Nick Evershed and Christopher Knaus, 'Lobbying in Australia: How Big Business Connects to Government', *The Guardian* (online), 2018 <https://www.theguardian.com/australia-news/ng-interactive/2018/sep/19/lobbying-in-australia-how-big-business-connects-to-government>.

Scottish register also provides detailed information about the person/organisation who is lobbying, as well as the location, date, and subject matter of lobbying.[81] Alternatively the NSWEC could collaborate with the media to assist them to present such information in a user-friendly format.

The disclosures of pecuniary interests, conflicts of interest and gifts by Ministers and MPs in accordance with their codes of conduct (discussed above) could also be made more accessible. For example, in 2015 *The Guardian* created an easily searchable database of the New South Wales register of pecuniary interests, with the assistance of *Guardian* readers and members of the open government community.[82]

Further, in order to facilitate media and public scrutiny, disclosures need to be provided in a timely fashion, which goes towards the element of effectiveness. In New South Wales, disclosures of ministerial diaries occur every quarter, which is less frequent than in Queensland, where disclosures occur monthly.[83] In the 12 month review of the New South Wales diary disclosure scheme, the Department of Premier and Cabinet decided not to increase the frequency of the ministerial diary disclosure regime due to administrative cost considerations.[84]

In addition, to enhance the effectiveness of disclosures, there is scope for the existing disclosures provided by agencies to be compiled and triangulated. For instance, there could be greater integration between the information on political donations made by lobbyists, the register of lobbyists, ministerial diaries, details of investigations by ICAC, and the list of holders of parliamentary access passes. If lobbyists are required to disclose each lobbying contact, and the name of the legislation, regulation, contract or award they are seeking to influence, this data can also be integrated. In this way, individuals and organisations will be able to conduct investigations more easily. Further, a harmonisation of the lobbyist registers nationally between the Commonwealth and States would facilitate ease of access for lobbyists and civil society alike.

Another possibility is to require the NSWEC to table an annual report to Parliament or a parliamentary committee that presents an analysis of trends in lobbying activity

---

[81] The Scottish Parliament, Lobbyist Register <https://www.lobbying.scot/SPS/LobbyingRegister/SearchLobbyingRegister>.
[82] Nick Evershed, Todd Moore and Guardian Readers, 'Search the NSW Register of Pecuniary Interests' (2015) *The Guardian* (online) <https://www.theguardian.com/global/datablog/ng-interactive/2015/mar/27/search-the-nsw-register-of-pecuniary-interests-to-see-what-politicians-have-declared>.
[83] The Queensland Cabinet and Government Directory, *Ministerial Diaries* <https://www.cabinet.qld.gov.au/ministers/diaries.aspx>.
[84] New South Wales Department of Premier and Cabinet, *Publication of Ministerial Diaries: 12 Month Review* (2015) <https://archive.dpc.nsw.gov.au//__data/assets/pdf_file/0009/174645/Report_-_Publication_of_Ministerial_Diaries_-_12_month_review.pdf>.

that integrates data from ministerial diaries, political donations disclosures, the list of holders of parliamentary access passes, and details of lobbying contacts (if reform occurs and this is required to be provided). The report should also contain information about compliance rates and sanctions imposed for breaches. Having a regulator undertake this analysis will advance the principle of effectiveness.

Discussion Questions

11. How can disclosures of lobbying regulation best be presented and formatted to better enable civil society organisations to evaluate the disclosure of lobbying activities?
12. Should there be greater integration of lobbying-related data? For example, should there be integration of:
    - (i) information on political donations made by lobbyists
    - (ii) the register of lobbyists
    - (iii) ministerial diaries;
    - (iv) details of investigations by the Commission
    - (v) list of holders of parliamentary access passes
    - (vi) details of each lobbying contact (if reform occurred)?
13. Should the NSW Electoral Commission be required to present an annual analysis of lobbying trends and compliance to the NSW Parliament?

B *Measures to improve the integrity of direct lobbying*

The principle of integrity is informed by three cross-cutting distinctions - the distinctions between:

- integrity of individuals and integrity of processes;
- integrity of those lobbied and those engaging in lobbying; and
- safeguards to prevent misconduct and corruption and positive measures to promote integrity.

1 *Regulation of the lobbyists*

In New South Wales, both third party and other lobbyists are subject to the Lobbyists Code of Conduct. The code provides that lobbyists who seek a meeting to lobby government officials must disclose to the officials prior to the meeting the nature of the matter to be discussed. They must also disclose any financial or other interest they have in the matter to be discussed at the meeting.

Lobbyists are also prohibited from engaging in any misleading, dishonest, corrupt or other unlawful conduct in connection with a meeting or other communication for the purpose of lobbying government officials. Lobbyists are also enjoined to provide true and accurate information to government officials.

Third party lobbyists are subject to additional requirements. They must disclose that they are third-party lobbyists and the identity of their clients. They must not make exaggerated or misleading claims to their clients about the nature or extent of their access to political parties, the government, or government agencies. In addition, third party lobbyists are banned from receiving success fees.

As discussed above, Members of Parliament in New South Wales are allowed to undertake secondary employment or engagements, including paid lobbying activity, provided that they disclose such employment and the income derived from it.[85] Thus, New South Wales parliamentarians are allowed to be paid lobbyists, which seems incompatible with the perceived integrity of elected representatives and may create conflicts of interest. It would also seem to be inconsistent with the prohibition on paid advocacy in the Codes applying to these parliamentarians.[86]

The ICAC Lobbying Report recommended that the lobbyist code of conduct stipulates mandatory standards of conduct and procedures when contacting a government representative, including the requirements that lobbyists must:

---

[85] NSW Code of Conduct for Members (adopted May 2015, Votes and Proceedings, pp 53-5); *Constitution (Disclosure by Members) Regulation 1983* (NSW), Regs 7A, 15A.
[86] NSW Code of Conduct for Members (adopted May 2015, Votes and Proceedings, pp 53-5), cl 2 (under review); Proposed Revised Code cl 2.

a) inform their clients and employees who engage in lobbying about their obligations under the code of conduct
b) comply with the meeting procedures required by Government Representatives with whom they meet, and not attempt to undermine these or other government procedures or encourage Government Representatives to act in breach of them
c) not place Government Representatives in the position of having a conflict of interest
d) not propose or undertake any action that would constitute an improper influence on a Government Representative, such as offering gifts or benefits.[87]

These explicit requirements are not specified in the current Lobbyists Code. The duties on lobbyists can be broadly categorised in the following way. There are, firstly, duties of *legal compliance* – which would include the obligation not to engage in any corrupt or unlawful behaviour, duties to comply with meeting procedures laid down by government officials, and the duty to inform clients and employees who engage in lobbying about their obligations under the code, as recommended by the ICAC. This set of duties is plainly directed at protecting the integrity of representative government by buttressing the rule of law.

Another group of obligations are *duties of truthfulness* which would have – at their heart - the obligation on lobbyists under the code to 'use all reasonable endeavours to satisfy themselves of the truth and accuracy of all material information that they provide in connection with a meeting or other communication for the purpose of lobbying New South Wales government officials'.[88] These duties too are directed at protecting the integrity of representative government by promoting transparency of government decision-making and also by assisting to prevent corruption and misconduct.

There is also a set of duties specifically aimed at preventing corruption and misconduct – *duties to avoid conflicts of interests.* Included in this group of duties is the obligation recommended by ICAC that lobbyists not place government officials in the position of having a conflict of interest; the duty of lobbyists under the code to keep their activities as lobbyists strictly separate from their involvement in a political party[89] also falls within this category.

The last obligation also comes within the category of *duties to avoid unfair access and influence.* So does the requirement under the code prohibiting lobbyists from making 'exaggerated or misleading claims to their clients about the nature or extent of their access to political parties, the Government or Government agencies or to persons associated with them'.[90]

---

[87] *ICAC Lobbying Report*, above n 8, 47.
[88] *New South Wales Lobbyist Code of Conduct*, cl 8.
[89] Ibid cl 13.
[90] Ibid cl 12.

The duties can be enhanced in these ways:

(a) Duties of truthfulness

The Queensland Lobbyists Code of Conduct imposes the following obligation on the lobbyists it covers:

> if a material change in factual information that the lobbyist provided previously to a government or Opposition representative causes the information to become inaccurate and the lobbyist believes the government or Opposition representative may still be relying on the information, the lobbyist should provide accurate and updated information to the government or Opposition representative, as far as is practicable.[91]

This obligation makes the duty of truthfulness an ongoing obligation rather than one restricted to the point of information being provided.

Additionally, the obligation of truthfulness could explicitly preclude hidden lobbying behaviour, such as lobbyists making political donations through other entities to avoid disclosure; or 'astroturfing', that is, creating a fake grassroots campaign to project the appearance of genuine community support or opposition to an issue; or generating 'fake news' to advance their cause.

(b) Duties to avoid conflicts of interest

The Queensland Lobbyists Code of Conduct requires the lobbyists it covers to:

- not represent conflicting or competing interests without the informed consent of those whose interests are involved,[92]
- advise Government and Opposition representatives that they have informed their clients of any actual, potential or apparent conflict of interest, and obtained the informed consent of each client before proceeding/continuing with the undertaking.[93]

Additionally, to prevent risks of corruption and the perception of undue influence, lobbyists could be prohibited from giving gifts to government officials. For example, in Operation Artek, the ICAC investigated corrupt procurement practices, and identified that a number of public officials engaged one of the agency's suppliers to perform minor works and renovations in their home, one of which was at a significant discount, which the Commission found to be a corrupt payment.[94] Other examples include lobbyists awarding a 'prize' to a public official, which may or may not have

---

[91] Queensland Integrity Commissioner, *Lobbyists Code of Conduct* (2013), cl 3.1(e).
[92] Ibid cl 3.1(j).
[93] Ibid cl 3.1(k).
[94] Independent Commission Against Corruption, *Investigation into the Conduct of a Former NSW Department of Justice Officer and Others* (2017).

been genuinely won, that includes large sums of money, overseas travel, or accommodation.

Another practice aimed at building relationships might be lobbyists offering lucrative jobs to public officials once they leave government, in the hope of securing favourable decisions while the official is in office. This may have contributed to the large numbers of Ministers, ministerial advisers and public servants who have gone on to become lobbyists, which will be discussed under 'post-separation employment' below. A related practice is offering jobs to children of public officials. In the United States, in a case involving violations of the US Foreign Corruption Practices Act, the Securities and Exchange Commission found evidence of 'a systematic bribery scheme by hiring children of government officials and other favoured referrals who were typically unqualified for the positions on their own merit'.[95]

Another activity that might be expressly prohibited is for lobbyists to engage in lobbying in relation to the recruitment or dismissal of a particular decision-maker who is thought to be favourable (or unfavourable) to a particular cause, or to make tendentious accusations of bias or apprehended bias to have them replaced. The campaigning for a favourable decision-maker or maligning of an unfavourable one creates a conflict of interest.

(c) Duties to Avoid Unfair Access and Influence

This cluster of duties could include the following obligation:

> Lobbyists shall advocate their views to public officials according to the merits of the issue at hand, and shall not adopt approaches that rely upon their wealth, political power or connections; or that of the individuals and/or organisations they represent.

The reasons for this duty are obvious: it orientates the advocacy of the lobbyists towards the public interest and requires them to avoid strategies that involve unfair access and influence.

Discussion Questions

14. What duties should apply to lobbyists in undertaking lobbying activities?
15. Should NSW members of Parliament be allowed to undertake paid lobbying activities?
16. Should lobbyists be prohibited from giving gifts to government officials?

[95] SEC Press Release, 'JP Morgan Chase Paying $164 Million to Settle FCPA Charges', 17 November 2016.

2 *Regulation of the lobbied*

Another issue is what type of public officials should be covered by the rules. A large range of public officials are lobbied in both the legislative and executive branches of government: Ministers, ministerial advisers, public servants, and Members of Parliament, especially those with significant power (e.g. Shadow Ministers, MPs holding balance of power). As discussed earlier in the report, public officials are under obligations to act with integrity and fairness, and uphold public trust, including in their dealings with lobbyists.

New South Wales' coverage of government officials under the lobbyist register includes Ministers, parliamentary secretaries, ministerial staff, electorate staff, public servants, government contractors, and members of statutory bodies, but does not include local government officials and MPs. There is broader coverage of public officials under the Queensland register compared to New South Wales, as it includes local government lobbying, as well as lobbying of certain Opposition Members.[96] At the federal level in the United States, both legislative and executive branch officials are covered by the lobbying provisions.[97]

The New South Wales lobbyist legislation only imposes obligations on lobbyists, but not government officials. The obligations on Ministers,[98] ministerial advisers,[99] and public servants[100] in relation to lobbyists are provided for in codes of conduct. This includes explicit requirements to comply with lobbyist legislation, combined with duties to disclose conflicts of interests. New South Wales MPs are not required to comply with the lobbyist legislation under their code and, as noted above, are not within the definition of 'government official' under the Act.

To ensure complete coverage of the obligations of government officials to deal with

---

[96] *Integrity Act 2009* (Qld), ss 42, 44-47B.

[97] Covered executive branch official, i.e. the President, the Vice President, any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President, any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order, any member of the uniformed services whose pay grade is at or above O–7 under section 201 of title 37, United States Code; and any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2)(B) of title 5, United States Code: *Lobbying Disclosure Act of 1995*, 2 USC § 1601-3.
Covered legislative branch official, i.e. a Member of Congress, an elected officer of either House of Congress, any employee of, or any other individual functioning in the capacity of an employee of a Member of Congress, a committee of either House of Congress, the leadership staff of the House of Representatives or the leadership staff of the Senate, a joint committee of Congress, and a working group or caucus organised to provide legislative services or other assistance to Members of Congress; and any other legislative branch employee serving in a position described under section 109(13) *Ethics in Government Act 1978* (5 USC App).

[98] *Independent Commission Against Corruption Regulation 2017* (NSW), Appendix, NSW Ministerial Code of Conduct, cl 3.

[99] NSW Office Holder's Staff Code of Conduct, Government Office Holder Staff cl 6.

[100] The Code of Ethics and Conduct for NSW Government Sector Employees, cl 3.7.

lobbyists appropriately, the obligation on public officials not to permit lobbying by unregistered lobbyists covered by the Register of Lobbyists could be enshrined in legislation rather than provided for through executive regulation (including codes of conduct) - this obligation is a cornerstone of the Register.

This could be supplemented with a requirement for government officials to notify the NSWEC if there are reasonable grounds to suspect that a lobbyist has breached the rules. This obligation will enhance the enforcement of the code by providing crucial intelligence to the enforcement agency, the NSWEC; and in doing so, constitute an important deterrent to breaches of the code of conduct.

Another set of obligations that can provide appropriate standards for public officials when they are lobbied are meeting protocols. The ICAC Lobbying Report recommended that the New South Wales Premier develop a model policy and meeting procedure to be adopted by all departments, agencies and ministerial offices about the conduct and recording of meetings with lobbyists. ICAC recommended that as a minimum the procedure should provide for:

> a. a Third Party Lobbyist and anyone lobbying on behalf of a Lobbying Entity to make a written request to a Government Representative for any meeting, stating the purpose of the meeting, whose interests are being represented, and whether the lobbyist is registered as a Third Party Lobbyist or engaged by a Lobbying Entity
> b. the Government Representative to verify the registered status of the Third Party Lobbyist or Lobbying Entity before permitting any lobbying
> c. meetings to be conducted on government premises or clearly set out criteria for conducting meetings elsewhere
> d. the minimum number and designation of the Government Representatives who should attend such meetings
> e. a written record of the meeting, including the date, duration, venue, names of attendees, subject matter and meeting outcome
> f. written records of telephone conversations with a Third Party Lobbyist or a representative of a Lobbying Entity.[101]

Discussion Questions

17. Should the definition of “government official” be expanded to include members of Parliament?
18. What obligations should apply to government officials in relation to lobbying activities?
19. Should public officials be obliged to notify the NSW Electoral Commission if there are reasonable grounds for suspecting that a lobbyist has breached the lobbyist legislation?
20. Should government officials be required to comply with certain meeting procedures when interacting with lobbyists? If so, what procedures are

[101] *ICAC Lobbying Report*, above n 8, 42.

appropriate?

3 *Regulation of post-separation employment*

Former government officials form a large and growing share of commercial lobbyists in the last five years, with more than one third (37%) of lobbyists on the Commonwealth register being former government officials.[102] Since 1990, a quarter of former federal ministers have taken on roles with special interests after politics.[103] This has been dubbed a 'revolving door' or 'golden escalator' in politics, with a significant proportion of politicians, advisers, and senior government officials leaving the public sector to become well-paid lobbyists. As discussed in Part II above, there are two main issues underlying this phenomenon: (1) the possession of confidential information by former officials; and (2) unfair access to and influence of key decision-makers.

Lobbyists in New South Wales are not obliged to disclose whether they are former public officials, i.e. Ministers, ministerial advisers, or public servants; thus there is no such information on the New South Wales register. By contrast, the Commonwealth register of lobbyists provides this information, which assists in identifying possible conflicts of interest and counteracting unfair access and influence due to the large number of public officials who become lobbyists.

Another way to mitigate the 'revolving door' issue is to enforce a post-separation or 'cooling off' period, where former government officials are banned from being employed as a lobbyist in the portfolio area they worked in for a certain period. This ban is justified by the corruption risks from the 'revolving door' between public officials and lobbyists.

The 18 month post-separation ban in New South Wales only covers Ministers and parliamentary secretaries, and does not include ministerial advisers and senior public servants, which is weaker than many other Australian jurisdictions. For instance, the 'cooling off period' at the Commonwealth level is 18 months for Ministers taking up lobbying positions in their former portfolio area and 12 months for ministerial advisers and senior public servants.[104] Canada has a five year post-separation ban for Ministers, MPs, ministerial advisers, and senior public servants from being third party or in-house lobbyists.[105] They may, however, be employed by

---

[102] Wood and Griffiths, above n 4, 22.
[103] Ibid 23.
[104] Australian Government, Lobbying Code of Conduct <https://lobbyists.pmc.gov.au/conduct_code.cfm>; Department of the Prime Minister and Cabinet, Statement of Ministerial Standards <https://www.pmc.gov.au/sites/default/files/publications/statementministerial-standards.pdf>.
[105] *Lobbying Act,* RSC 1985 (4th Supp), s 10.11.

a corporation as an in-house lobbyist, if lobbying activities do not constitute a 'significant part of their duties'.[106]

It should also be noted that the post-separation ban has historically not been well-enforced in Australia.[107] This points to the need of an independent regulator who is willing to enforce breaches, as will be further discussed in Part E.

Another requirement worth considering is an obligation upon lobbyists who are former public officials to disclose their income from lobbying if it exceeds a certain amount for a certain period after leaving government employment. The rationale for such a requirement is that it shines light on situations where the risk of conflicts of interest is highly significant. Moreover, it is a measure that is less restrictive than a ban on employment.

Discussion Questions

21. Should there be a cooling off period for former ministers, members of Parliament, parliamentary secretaries, ministerial advisers, and senior public servants from engaging in any lobbying activity relating to any matter that they have had official dealings in? If so, what length should this period be?
22. How should a post-separation employment ban be enforced?
23. Should lobbyists covered by the NSW Register of Lobbyists be required to disclose whether they are a former minister, ministerial adviser, member of Parliament or senior government official and, if so, when they left their public office?
24. Should lobbyists covered by the NSW Register of Lobbyists who are former government officials be required to disclose their income from lobbying if it exceeds a certain threshold? If so, what should be the threshold? And for how long should this obligation apply after the lobbyist has left government employment?

4 *Other measures to promote the integrity of direct lobbying*

As noted earlier, the principle of integrity in relation to direct lobbying is underpinned by the public interest imperative and also merit-based decision-making. Broader measures affecting governmental decision-making are likely to be necessary in order to adequately give effect to this principle. This would include measures to promote fair consultation processes, which will be discussed in Part C below.

Another set of measures draws upon an established administrative law technique, a statement of reasons by government decision-makers.[108] As explained by the Administrative Review Council, '[d]isclosure of the reasoning process can also

[106] Ibid s 10.11.
[107] Wood and Griffiths, above n 4, 30.
[108] Eg *Administrative Decisions (Judicial Review) Act 1977* (Cth).

assist decision makers to reflect more carefully on their task and to be more diligent and careful in decision making'.[109] In the context of direct lobbying, an obligation to make a public statement of reasons *and processes* could promote not just sounder decision-making by government officials but also greater integrity in lobbying.

This obligation could apply to significant executive decisions. In this way, the statement of reasons and processes could perform for these decisions a similar role to Second Reading Speeches for proposed legislation. It, however, would go beyond what is usually covered by Second Reading Speeches to include:

- A list of meetings that are required to be disclosed under the Register of Lobbyists and Ministerial diaries;
- A summary of key arguments made by those lobbying;
- A summary of the recommendations made by the public service;
- If these recommendations were not followed, a summary of the reasons for this action.

These various details, in effect, parallel subject matter typically covered by reports of parliamentary inquiries.

In order to further support the public interest imperative and merit-based decision-making, the obligation to provide a statement of reasons and processes could incorporate a requirement to explain the extent to which the processes have adhered to the principles of sound policy-making. These principles could be sourced from those developed by Professor Kenneth Wiltshire of the University of Queensland Business School.[110] In addition, guidelines for community consultation, if developed, could also be integrated into this obligation.[111]

Meeting these obligations will obviously require additional resources. For this reason, these obligations should be confined to significant executive decisions. That said, the resource concerns should not be overstated. Many of the proposed obligations involve compiling information that should already exist. More fundamentally, whatever resources are committed to meeting these obligations should be considered in the context of resources saved by these obligations through their impact on better decision-making.

---

[109] Administrative Review Council, *Practical Guidelines for Preparing Statements of Reasons* (2002) 1.

[110] This criteria were proposed in a paper Professor Wiltshire wrote for the Committee for Economic Development of Australia (CEDA). The Wiltshire principles have been used in a series of studies, see Institute of Public Administration Australia, *Public Policy Drift: Why Governments should Replace 'Policy on the Run' and 'Policy by Fiat' with a 'Business Case' Approach to Regain Public Confidence* (2012) <http://www.ipaa.org.au/documents/2012/05/public-policy-drift.pdf>; Institute of Public Affairs, *Evidence Based Policy Research Project: 20 Case Studies* (2018); Per Capita, *Evidence Based Policy Analysis: 20 Case Studies* (2018).

[111] See text below accompanying nn 115-24.

Discussion Questions

25. Should there be a requirement on the part of the NSW Government to make a public statement of reasons and processes in relation to significant executive decisions? If so, what circumstances would trigger such a requirement and how might it operate in practice?

C *Measures to improve the fairness of direct lobbying*

In the book, *Money and Politics: The Democracy We Can't Afford,* one of the authors of this paper said '(t)he problem of lobbying involving unfair access and influence is perhaps the most intractable form of illegitimate lobbying'.[112] The difficulty of the problem may, in fact, be suggestive of its significance. If the central risk to be avoided is oligarchy then countering unfair access and influence through direct lobbying is pivotal.

Fairness in this context has three essential elements:

- *Inclusion:* those who ought to be heard in decision-making processes are, in fact, being heard;
- *Meaningful participation:* those who ought to be heard in these processes can effectively participate in them; and
- *Adequate responsiveness:* those making decisions should accord proper weight to the views expressed.

Measures to promote transparency and integrity in relation to direct lobbying clearly aid the cause of fairness. By casting light on direct lobbying relating to significant decision-makers, lobbyists, lobbying activity, and governmental decisions,[113] transparency measures allow those on the 'outside' to speak out and better influence government decision-making. By addressing the conflicts of interest, misconduct and corrupt conduct that might arise from direct lobbying, integrity measures also reduce sources of unfair decision-making; and so do measures to promote merit-based decision-making.[114]

Other measures are, however, likely to be necessary, particularly in relation to: fair consultation processes and resourcing disadvantaged groups.

1 *Fair consultation processes*

When there is direct lobbying, the lobbied government official is obviously undertaking a form of consultation – consultation with those lobbying. Such consultation is hardly a guarantee of fair consultation processes. As the OECD has explained:

> When concern is related to the **accessibility of decision makers,** measures to provide a level playing field for all stakeholders interested in the development of public policies is indispensable – for instance to ensure that not only the "privileged", but also the "public" have a voice.[115]

---

[112] Tham, *Money and Politics: The Democracy We Can't Afford*, above, n 15, 253.
[113] See discussion above accompanying p 16.
[114] See discussion above accompanying pp 25-34.
[115] OECD, above n 7, 21-22 (emphasis in original).

One way to promote fair consultation processes - processes based on inclusion, meaningful participation and adequate responsiveness – is to promulgate government guidelines for community consultation. The New South Wales Government does not presently have such guidelines.

The UK Cabinet Office, on the other hand, has published such principles for government consultation.[116] These guidelines promote meaningful participation through provisions on the quality of the information provided in the consultation process and the time allowed for submissions;[117] and also for adequate responsiveness through provisions stipulating that '(c)onsultations should have a purpose'[118] and requiring government to respond to responses received in a timely fashion.[119]

The New South Wales government's guidelines on community consultation could include further provisions to promote inclusion, including an obligation to 'actively seek out a range of voices'[120] and setting out circumstances where broad-based public consultation processes are warranted[121] (including the use of 'mini-public' deliberation by randomly-selected members of the public).[122] They could also support adequate responsiveness by requiring that there be consultation to establish the need for public policy and also separate consultation on the implementation measures.[123] These guidelines could also be integrated with the requirement to provide a statement of reasons and processes with significant executive decisions – these statements could include an explanation of the extent of adherence to these guidelines.[124]

Discussion Questions

26. Should there be NSW government guidelines on fair consultation processes?
27. If so, what should be provided under these guidelines in terms of these processes being inclusive, allowing for meaningful participation by stake-holders and promoting adequate responsiveness on the part of government

---

[116] United Kingdom Cabinet Office, 'Consultation Principles: Guidance' <https://www.gov.uk/government/publications/consultation-principles-guidance>.
[117] See Principles C) & G).
[118] Principle B).
[119] Principle I)-J).
[120] Wood and Griffiths, above n 4, 66.
[121] Ibid.
[122] Lyn Carson and Tyrone Reitman, 'Constructively Incorporating Stakeholders in Public Decision-Making' (2018) *New Democracy* <https://newdemocracy.com.au/wp-content/uploads/2018/05/docs_researchnotes_2018_May_RampD-Note-Incorporating-Stakeholders.pdf>; Chris Reidy and Jenny Kent, 'Systemic Impacts of Mini-Publics' (2017) <https://newdemocracy.com.au/wp-content/uploads/2017/06/docs_researchpapers_2017_nDF_RP_20170613_SystemicImpactsOfMiniPublics.pdf>.
[123] See also Principles 1 and 7 of the Wiltshire Principles, see n 110.
[124] See text above accompanying nn 108-10.

officials?

28. If so, how should these guidelines be integrated with a requirement to provide a statement of reasons and processes with significant executive decisions?

2 *Resourcing disadvantaged groups*

Consultation processes opens up government decision-making but for those with inadequate resources, such access may prove to be ineffectual. Their paucity of resources will adversely affect their ability to effectively lobby, specifically, their ability to understand the issue/s at hand; to assemble the necessary evidence, knowledge and expertise to formulate a viewpoint; and to engage in persuasive advocacy. Worse, they may be faced with opposing organisations which are well-resourced and practised in the art of lobbying. Formal inclusion in the context of unequal resources fails to secure meaningful participation and, in turn, undermines adequate responsiveness on the part of government officials.

In the context of unequal resources to directly lobby, the *democratic* obligation of government is not to be neutral – for this simply allows financial inequalities to translate into political inequalities. Rather, it should actively support those who are under-represented in the political process in order to 'level up' their position, especially in areas of public policy where there is intensive lobbying by organised interests (e.g. 'high regulation' industries).[125] Such support could take the form of funding of specific community organisations for the purpose of advocacy[126] or could be broadened out into a general scheme to provide ongoing support of advocacy by all community organisations. This support could include the New South Wales government having public service employees dedicated to supporting community advocacy, for instance by providing training in engaging with governmental processes and assistance in writing submissions.

It is essential that such support not detract from the democratic role of direct lobbying. Two risks, in particular, should be guarded against. First, ongoing funding of community organisations should not set up further barriers to fair access and influence by creating another group of 'insiders'. Second, and this risk goes to the principle of integrity, government funding to support advocacy should not result in government shaping the content of advocacy, whether through attempts on the part of government or through self-censorship on the part of recipient organisations.[127]

---

[125] See text above accompanying n 65.

[126] Tham, *Money and Politics: The Democracy We Can't Afford*, above, n 15, 253; Wood and Griffiths, above n 4, 67. See also Bronwen Dalton and Mark Lyons, *Representing the Disadvantaged in Australian Politics: The Role of Advocacy Organisations* (2005) Democratic Audit of Australia Report No 5.

[127] Clive Hamilton, Richard Denniss and Sarah Maddison, 'Silencing Dissent: Non-government Organisations and Australian Democracy' (2004) *The Australia Institute* <http://www.tai.org.au/sites/default/files/DP65_8.pdf>; Sarah Maddison and Andrea Carson, 'Civil Voices: Research Not-for-Profit Advocacy' (2017) *Human Rights Law Centre* <https://minerva-

Discussion Questions

29. How can disadvantaged groups be supported by the NSW government in their lobbying efforts (for example, ongoing funding of organisations, and public service dedicated to supporting community advocacy) to promote openness in the political process and to promote advocacy independent of government?

---

access.unimelb.edu.au/bitstream/handle/11343/198049/CivilVoices_reportfornonforprofitadvocacy_Web.pdf?sequence=1&isAllowed=y>.

D *Measures to improve the freedom to engage in direct lobbying*

1 *Promoting freedom through fairness*

On one view, the measures to enhance the democratic role of direct lobbying come principally at the costs of the freedom to directly lobby - this is a mistaken view. It assumes a partial view of this freedom that reduces it to 'freedom from' governmental regulation. It neglects another vital dimension of such freedom - 'freedom to' directly lobby. A more robust understanding of freedom would clearly see that 'freedom from' governmental regulation can result in 'freedom to' being undermined. When direct lobbying is conducted in secret, those not in the know have no 'freedom to' directly lobby; when relationships are the currency of government decision-making, those without connections have no 'freedom to' directly lobby; and when there is gross disparity in resources, the disadvantaged may not have a meaningful 'freedom to' directly lobby.

A more robust understanding of freedom will then see how governmental regulation can promote 'freedom to' and in a way that does not reduce 'freedom from'. The measures to promote fairness in direct lobbying are of this character. They do not reduce in any significant way 'freedom from' government regulation of those lobbying. And by ensuring transparency, providing for fair consultation processes and the resourcing of disadvantaged groups, they expand the realm of 'freedom to' directly lobby.

2 *Restrictive measures and proportionality*

The measures relating to transparency and integrity, however, do place restrictions on 'freedom from' governmental regulation. Generally speaking, the transparency measures are less restrictive in this respect as they impose disclosure requirements on lobbyists and lobbying activities and do not prohibit certain types of lobbying activities like some of the integrity measures (e.g. bans on secondary employment and post-separation employment).

Such restrictive effects do not necessarily render these measures illegitimate. They are justified if the measures are directed towards a public objective and employ proportionate means. The requirement of a public objective is easily satisfied - these measures are directed at compelling public objectives, transparency and integrity.

Proportionality, however, requires close attention to the design of these measures to ensure that they do not unduly reduce 'freedom from' governmental regulation to directly lobby or have a 'chilling effect' on (legitimate) lobbying activity. Further, proportionality not only applies to the design of measures but also the impact of general rules to particular individuals. Proportionate measures may still have a disproportionate impact in specific cases. There is a concern that particularly

restrictive measures may affect livelihoods such as the ban on post-separation employment.

Discussion Questions

30. How can the measures to promote the democratic role of direct lobbying be designed so as to have a proportionate impact on the freedom to directly lobby?
31. Should there be provision for exemption from restrictions on direct lobbying such as the ban on post-separation employment when undue hardship can be demonstrated?
32. Could existing or new regulatory requirements drive improper lobbying practices underground or have a dampening effect on legitimate lobbying?

E *Improving effectiveness of compliance and enforcement mechanisms*

Like other regulatory measures, the regulation of lobbying will clearly require an effective compliance and enforcement regime. Such a regime translates the letter of law to actual changes in behaviour and culture; it also addresses the risk that lobbying in breach of lobbying regulation be driven 'underground' (concealed from regulators and the broader public).

1 *Education and training*

A major compliance issue is whether there is adequate support for lobbyists and government officials to enable them to understand their obligations under the lobbying legislation. The Commonwealth Auditor-General has recommended that the Department of the Prime Minister and Cabinet implement a strategy to raise lobbyists' and government representatives' awareness of the Commonwealth Lobbying Code of Conduct and their responsibilities under the code.[128]

Lobbyists and public officials may act in breach of their obligations simply out of ignorance or lack of competence with the legislative framework. Thus, it is incumbent on regulators to provide appropriate training and education to enable all parties to understand and comply with their lobbying obligations.

Training can be either in electronic format (via online videos and tutorials), or face to face. Appropriate funding needs to be provided to enable the training programmes to be designed and run.

Discussion Questions

33. Is there adequate support for lobbyists and government officials to enable them to understand their obligations under the lobbying legislation?
34. To understand their obligations in relation to lobbying, should there be training and/or education programmes for:
    - (i) lobbyists
    - (ii) public servants
    - (iii) ministers
    - (iv) ministerial advisers?

    If so, what sort of training or education programme is needed?

2 *The need for independent supervision*

Another key issue is the enforcement of lobbying laws. Having elaborate laws is pointless if breaches are not discovered and punished. The NSWEC has a broader

---

[128] Australian National Audit Office, *Management of the Australian Government's Register of Lobbyists* (2018) Report No 27 <https://www.anao.gov.au/work/performance-audit/management-australian-government-register-lobbyists>.

range of sanctions available compared to other Australian jurisdictions, including suspension or deregistration, or naming lobbyists on a public Watch List, where additional meeting protocols apply.

The *Guardian* has reported dismal enforcement efforts by Australian regulators, where not a single lobbyist has been punished for breaching rules in the past five years federally, or in Victoria, Western Australia, Queensland, and South Australia.[129]

In 2018, the Commonwealth Auditor-General found that the Department of the Prime Minister and Cabinet, which oversees the federal lobbyist register, had not suspended or removed the registration of a single lobbyist since 2013, despite identifying at least 11 possible breaches.[130] The Auditor-General recommended that the Prime Minister's Department assess risks to compliance with the code and provide advice on the ongoing sufficiency of the current compliance management framework.[131] The Secretary of the Department of the Prime Minister and Cabinet responded that they considered their role to be merely administrative rather than regulatory: "As you are aware, the Lobbying Code of Conduct, as established in 2008 and continued by successive Governments, is an administrative initiative, not a regulatory regime."[132] This weak enforcement points to a need for an independent regulator administering a legislative scheme, rather than the responsibility residing within a government department.

By contrast to other Australian jurisdictions, since the NSWEC became responsible for regulating lobbyists on 1 December 2014, it has undertaken a number of compliance actions, where five matters of potential breaches of the lobbyists' code were subject to a compliance review or investigation. All resulted in no further action. In addition, during 2017-18, a number of registered lobbyists received warnings (45), had their registration suspended (4) or cancelled (1), or were placed on the Watch List (4) for failing to confirm their registered details were up to date.

The NSWEC has indicated that it is alerted of breaches of the legislation and Code via the following methods:

---

[129] Christopher Knaus, 'Not a Single Lobbyist Punished for Rule Breaches in Five Years', 18 September 2018, *The Guardian* (online) <https://www.theguardian.com/australia-news/2018/sep/18/not-a-single-lobbyist-punished-for-rule-breaches-in-five-years>.
[130] Australian National Audit Office, *Management of the Australian Government's Register of Lobbyists* (2018) Report No 27 <https://www.anao.gov.au/work/performance-audit/management-australian-government-register-lobbyists>.
[131] Australian National Audit Office, *Management of the Australian Government's Register of Lobbyists* (2018) Report No 27 <https://www.anao.gov.au/work/performance-audit/management-australian-government-register-lobbyists>.
[132] Stephen Easton, 'PM&C Shrugs Off Audit of Toothless Federal Lobbying Rules', 15 February 2018, *The Mandarin* (online) <https://www.themandarin.com.au/88434-pmc-shrugs-off-audit-of-toothless-federal-lobbying-rules/>.

- following up on lobbyists who do not satisfy the confirmation requirements three times a year;
- reviewing and investigating allegations of breaches that are brought to its attention; and
- conducting random audits of the register against published ministerial diaries.

Some overseas lobbying regimes have a more systematic monitoring and compliance regime utilising a programme of proactive verification/audit activities and investigations. For instance, the Office of the Commissioner of Lobbying of Canada conducts monitoring and compliance verification activities to ensure that registrable lobbying activity is properly reported, and information provided by lobbyists is thorough, accurate and complete.[133] Suspected and alleged non-compliance with the Canadian *Lobbying Act* and the Lobbyists' Code of Conduct is reviewed and formal investigations are undertaken where appropriate to ensure that lobbying activities are ethical and transparent. The Commissioner presents findings and conclusions in its Reports on Investigation, which is tabled in the Canadian Parliament. In the United States, the compliance monitoring approach includes the Government Accountability Office conducting annual reviews of lobbyists' compliance with disclosure requirements.[134]

Discussion Questions

35. Does the NSW Electoral Commission have adequate powers and resources to enforce lobbying regulations in NSW?
36. How can the enforcement of the lobbyist regime be improved?
37. Are the sanctions under the lobbyist legislation adequate (that is, suspension of lobbyists, placement on Watch List and deregistration)?

[133] Australian National Audit Office, *Management of the Australian Government's Register of Lobbyists* (2018) Report No 27 <https://www.anao.gov.au/work/performance-audit/management-australian-government-register-lobbyists>.
[134] Ibid.

V CONCLUSION

This paper has identified four pillars underpinning the democratic role of direct lobbying – the principles of transparency, integrity, fairness and freedom. These principles enable the clear delineation of the problems with direct lobbying (secrecy; corruption and misconduct; unfair access and influence; lack of ability to directly lobby).

These principles also point to the building blocks of a robust lobbying regime. Measures to promote transparency of direct lobbying would include an effective register of lobbyists and proper disclosure of lobbying activity; measures to improve integrity would be based on regulation of both lobbyists and the lobbied as well as regulation of post-separation employment; measures to improve fairness would extend to fair consultation processes and resourcing of disadvantaged groups; and the freedom to engage in direct lobbying would be promoted by these fairness measures and respected through proportionate measures. To hold these elements together, an effective compliance and enforcement regime consisting of education and training as well as independent supervision is essential.

APPENDIX A: LIST OF ISSUES AND DISCUSSION QUESTIONS

A *Measures to improve the transparency of direct lobbying*

1. Are there any examples of lobbying laws/practices in other jurisdictions (interstate or overseas) that seem to work well?
2. Who should be required to register on the NSW register of lobbyists?
3. Should there be a distinction between lobbyists on the register and lobbyists bound by the code of conduct?
4. Should there be a distinction between 'repeat players' and 'ad hoc lobbyists'?
5. Should there be targeted regulation for certain industries? If so, which industries should be targeted?
6. What information should lobbyists be required to provide when they register?
7. Should lobbyists be required to provide, or at least record, details of each lobbying contact they have, as well as specify the legislation/grant/contract they are seeking to influence? Should this information be provided only to regulatory agencies or be publicly available?
8. Should lobbyists be required to disclose how much income they have received and/or how much they have spent on their lobbying activities?
9. How should lobbying interactions with ministerial advisers, public servants, and members of Parliament be recorded and disclosed?
10. What information should ministers be required to disclose from their diaries and when?
11. How can disclosures of lobbying regulation best be presented and formatted to better enable civil society organisations to evaluate the disclosure of lobbying activities?
12. Should there be greater integration of lobbying-related data? For example, should there be integration of:
    - (i) information on political donations made by lobbyists
    - (ii) the register of lobbyists
    - (iii) ministerial diaries;
    - (iv) details of investigations by the Commission
    - (v) list of holders of parliamentary access passes
    - (vi) details of each lobbying contact (if reform occurred)?
13. Should the NSW Electoral Commission be required to present an annual analysis of lobbying trends and compliance to the NSW Parliament?

B *Measures to improve the integrity of direct lobbying*

14. What duties should apply to lobbyists in undertaking lobbying activities?
15. Should NSW members of Parliament be allowed to undertake paid lobbying activities?
16. Should lobbyists be prohibited from giving gifts to government officials?

17. Should the definition of “government official” be expanded to include members of Parliament?
18. What obligations should apply to government officials in relation to lobbying activities?
19. Should public officials should be obliged to notify the NSW Electoral Commission if there are reasonable grounds for suspecting that a lobbyist has breached the lobbyist legislation?
20. Should government officials be required to comply with certain meeting procedures when interacting with lobbyists? If so, what procedures are appropriate?
21. Should there be a cooling off period for former ministers, members of Parliament, parliamentary secretaries, ministerial advisers, and senior public servants from engaging in any lobbying activity relating to any matter that they have had official dealings in? If so, what length should this period be?
22. How should a post-separation employment ban be enforced?
23. Should lobbyists covered by the NSW Register of Lobbyists be required to disclose whether they are a former minister, ministerial adviser, member of Parliament or senior government official and, if so, when they left their public office?
24. Should lobbyists covered by the NSW Register of Lobbyists who are former government officials be required to disclose their income from lobbying if it exceeds a certain threshold? If so, what should be the threshold? And for how long should this obligation apply after the lobbyist has left government employment?
25. Should there be a requirement on the part of the NSW Government to make a public statement of reasons and processes in relation to significant executive decisions? If so, what circumstances would trigger such a requirement and how might it operate in practice?

C *Measures to improve the fairness of direct lobbying*

26. Should there be NSW government guidelines on fair consultation processes?
27. If so, what should be provided under these guidelines in terms of these processes being inclusive, allowing for meaningful participation by stake-holders and promoting adequate responsiveness on the part of government officials?
28. If so, how should these guidelines be integrated with a requirement to provide a statement of reasons and processes with significant executive decisions?
29. How can disadvantaged groups be supported by the NSW government in their lobbying efforts (for example, ongoing funding of organisations, and public service dedicated to supporting community advocacy) to promote openness in the political process and to promote advocacy independent of government?

D *Measures to improve the freedom to engage in direct lobbying*

30. How can the measures to promote the democratic role of direct lobbying be designed so as to have a proportionate impact on the freedom to directly lobby?
31. Should there be provision for exemption from restrictions on direct lobbying such as the ban on post-separation employment when undue hardship can be demonstrated?
32. Could existing or new regulatory requirements drive improper lobbying practices underground or have a dampening effect on legitimate lobbying?

E *Improving effectiveness of compliance and enforcement mechanisms*

33. Is there adequate support for lobbyists and government officials to enable them to understand their obligations under the lobbying legislation?
34. To understand their obligations in relation to lobbying, should there be training and/or education programmes for:
    (i) lobbyists
    (ii) public servants
    (iii) ministers
    (iv) ministerial advisers?

    If so, what sort of training or education programme is needed?
35. Does the NSW Electoral Commission have adequate powers and resources to enforce lobbying regulations in NSW?
36. How can the enforcement of the lobbyist regime be improved?
37. Are the sanctions under the lobbyist legislation adequate (that is, suspension of lobbyists, placement on Watch List and deregistration)?

APPENDIX B: RECOMMENDATIONS FROM PREVIOUS REPORTS

Table 1: The Implementation of the Recommendations made in the NSW ICAC Lobbying Report

No	Recommendation	Adequately implemented?
1	The Commission recommends that the NSW Government enacts legislation to provide for the regulation of lobbyists, including the establishment and management of a new Lobbyists Register.	✓
2	The Commission recommends that the NSW Premier develops a model policy and procedure for adoption by all departments, agencies and ministerial offices concerning the conduct of meetings with lobbyists, the making of records of these meetings, and the making of records of telephone conversations. As a minimum, the procedure should provide for: a. a Third Party Lobbyist and anyone lobbying on behalf of a Lobbying Entity to make a written request to a Government Representative for any meeting, stating the purpose of the meeting, whose interests are being represented, and whether the lobbyist is registered as a Third Party Lobbyist or engaged by a Lobbying Entity b. the Government Representative to verify the registered status of the Third Party Lobbyist or Lobbying Entity before permitting any lobbying c. meetings to be conducted on government premises or clearly set out criteria for conducting meetings elsewhere d. the minimum number and designation of the Government Representatives who should attend such meetings e. a written record of the meeting, including the date, duration, venue, names of attendees, subject matter and meeting outcome f. written records of telephone conversations with a Third Party Lobbyist or a representative of a Lobbying Entity.	✗
3	The Commission recommends that the NSW Premier requires all government agencies and ministerial offices to ensure that they have adequate measures in place to comply with the *State Records Act 1998.*	✓ (codes of conduct)
4	The Commission recommends that the NSW Government amends the definition of "open access information" in the *Government Information (Public Access) Act 2009* to include records of Lobbying Activities for which there is no overriding public interest against disclosure.	✗
5	The Commission recommends that all agencies subject to the operation of the *Government Information (Public Access) Act 2009* proactively release lobbying information for which there is no overriding public interest against disclosure, including by publishing that information on their websites.	✓ (ministerial diaries)
6	The Commission recommends that the NSW Government develops a new code of conduct for lobbyists, which sets out mandatory standards of conduct and procedures to be observed when contacting a Government Representative. The code should be based on the current NSW Government Lobbyist Code of Conduct, and include requirements that lobbyists must: a. inform their clients and employees who engage in lobbying about their obligations under the code of conduct b. comply with the meeting procedures required by Government Representatives with whom they meet, and not attempt to undermine these or other government procedures or encourage Government Representatives to act in breach of them c. not place Government Representatives in the position of having a conflict of interest d. not propose or undertake any action that would constitute an improper influence on a Government Representative, such as offering gifts or benefits.	✗ (these explicit requirements are not specified in the code)
7	The Commission recommends that the legislation, enacted in accordance with Recommendation 1 of this report, includes a provision that a Government Representative not permit any Lobbying Activity by a Third Party Lobbyist or any person engaged by a Lobbying Entity, unless the Third Party Lobbyist or the Lobbying Entity is registered on the proposed Lobbyists Register.	✗

No	Recommendation	Adequately implemented?
8	The Commission recommends that all Third Party Lobbyists and Lobbying Entities be required to register before they can lobby any Government Representative. This register would comprise two panels; one for Third Party Lobbyists and one for Lobbying Entities. Both Third Party Lobbyists and Lobbying Entities would disclose on the register the month and year in which they engaged in a Lobbying Activity, the identity of the government department, agency or ministry lobbied, the name of any Senior Government Representative lobbied, and, in the case of Third Party Lobbyists, the name of the client or clients for whom the lobbying occurred, together with the name of any entity related to the client the interests of which did derive or would have derived a benefit from a successful outcome of the lobbying activity.	✗
9	The Commission recommends that an independent government entity maintains and monitors the Lobbyists Register, and that sanctions be imposed on Third Party Lobbyists and Lobbying Entities for failure to comply with registration requirements.	✓
10	The Commission recommends that the new code of conduct for lobbyists contains a clear statement prohibiting a lobbyist or a lobbyist's client from offering, promising or giving any gift or other benefit to a Government Representative, who is being lobbied by the lobbyist, has been lobbied by the lobbyist or is likely to be lobbied by the lobbyist.	✗
11	The Commission recommends that, consistent with restrictions currently contained in the Australian Government Lobbying Code of Conduct, the proposed lobbying regulatory scheme includes provisions that former ministers and parliamentary secretaries shall not, for a period of 18 months after leaving office, engage in any Lobbying Activity relating to any matter that they had official dealings with in their last 18 months in office. The Commission also recommends that former ministerial and parliamentary secretary staff and former Senior Government Representatives shall not, for a period of 12 months after leaving their public sector position, engage in any Lobbying Activity relating to any matter that they had official dealings with in their last 12 months in office.	✗ (no limits for ministerial staff and senior officials)
12	The Commission recommends that the new lobbying regulatory scheme includes a prohibition of the payment to or receipt by lobbyists of any fee contingent on the achievement of a particular outcome or decision arising from a Lobbying Activity.	✓
13	The Commission recommends that the NSW Government amends the *Model Code of Conduct for Local Councils in NSW* or otherwise introduces a protocol for the regulation of contact between council staff and applicants for development proposals (including those acting for applicants), similar to that established by the NSW Department of Planning but taking into account the circumstances and resources of local government.	✗
14	The Commission recommends that the NSW Government amends procedures for the making of applications to local councils that require council approval, determination or decision to include provision for a declaration by applicants of affiliation with any council officer. In this instance, affiliation means by way of family, close personal friendship, or business interest with the council officer in the previous six months. Applicants should have brought to their attention the existence of criminal sanctions for false declarations, and that the obligation to disclose an affiliation is ongoing until the conclusion of all council determinations, approvals or decisions with regard to the application.	✗
15	The Commission recommends that sanctions should apply to applicants who submit a false declaration.	✗
16	The Commission recommends that all local councils implement procedures that: a. necessitate an assessment of whether an application, in which a declaration is made that an affiliation exists, requires management b. require the management of such applications to avoid where possible, or supervise if necessary, the role of the affiliated council officer.	✗
17	The Commission recommends that the NSW Government amends the *Model Code of Conduct for Local Councils in NSW* or otherwise introduces a protocol that council officers engage only with applicants who have submitted a declaration of affiliation.	✗

Table 2: The Implementation of the Recommendations made in Joo-Cheong Tham and Yee-Fui Ng's Report

No	Recommendation	Adequately implemented?
1	The following should be statutorily recognised as the central objects of the *Lobbying of Government Officials Act 2011* (NSW): • To protect the integrity of representative government through transparency of government decision-making; • To protect the integrity of representative government through prevention of corruption and misconduct; • To promote fairness in government decision-making; and • To respect political freedoms - particularly the freedom to directly lobby.	✓
2	The Register of Lobbyists in New South Wales should be underpinned by legislation, as provided for by the *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014* (NSW).	✓
3	The New South Wales register of lobbyists should cover all 'repeat players' – in particular professions, companies and interest groups that engage in direct lobbying and third party lobbyists.	✗
4	The legislative provisions establishing the New South Wales Register of Lobbyists should explicitly state that the Register does not prohibit direct lobbying not covered by it.	✓
5	'Government representative' under the register should be defined as a New South Wales minister, parliamentary secretary, ministerial staff, Member of Parliament and public servant.	✗
6	'Lobbying' under the New South Wales Register of Lobbyists should be defined as 'communicating with Government officials for the purpose of representing the interests of others, in relation to legislation/proposed legislation or a current/proposed government decision or policy, a planning application or the exercise by Government officials of their official functions and activities associated with such communication'.	✓
7	All lobbyists covered by the New South Wales Register of Lobbyists should disclose the names and details of their owners and/or key officers.	✓

8	All lobbyists covered by the New South Wales register of lobbyists should disclose on a monthly basis:
	• the month and year in which they engaged in a contact with a Government representative involving lobbying;
	• the identity of the government department, agency or ministry lobbied;
	• the name of any Government representative/s lobbied;
	• whether the purposes of any contact with Government representatives involving lobbying included:
	  ○ the making or amendment of legislation;
	  ○ the development or amendment of a government policy or program;
	  ○ the awarding of government contract or grant;
	  ○ the allocation of funding; or
	  ○ the making a decision about planning or giving of a development approval under the New South Wales planning laws;
	• details of the relevant legislation, policy or program if the disclosed purposes of the contact involving direct lobbying included the making or amendment of legislation, or the development or amendment of a government policy or program;
	• details of the relevant contract, grant or planning/development decision if the disclosed purposes of the contact included the award of a government contract or grant, allocation of funding, making a decision about planning or giving of a development approval under the New South Wales planning laws unless these
		✗

No	Recommendation	Adequately implemented?
	details are 'commercial-in-confidence'; • identities of any individual or entity who has financially contributed to their lobbying; and • in the case of Third Party Lobbyists, the name of the client or clients for whom the lobbying occurred, together with the name of any entity related to the client the interests of which did derive or would have derived a benefit from a successful outcome of the lobbying activity.	
9	The NSWEC should integrate information on political donations made by lobbyists into the Register of Lobbyists.	✗
10	Lobbyists covered by the New South Wales Register of Lobbyists should be required to disclose how much they have spent on their lobbying activities.	✗
11	• Lobbyists covered by the New South Wales Register of Lobbyists should be required to disclose whether they are a former Government representative and if so, when they left their public office. • A list of former New South Wales Government representatives subject to restrictions relating to direct lobbying and the period of these restrictions should be published on the website of the New South Wales Register of Lobbyists.	✗
12	The obligation on public officials not to permit lobbying by lobbyists not covered by the Register of Lobbyists should be established in legislation.	✗
13	The provision rendering officers of registered political parties ineligible for registration should be narrowed to officers of the governing political parties.	✗

14	• The criminal prohibitions under the *Lobbying of Government Officials Act 2011* (NSW) relating to success fees and post-separation employment of former Ministers and Parliamentary Secretaries should be repealed.
	• In its place, the Code of Conduct for Lobbyists should prohibit:
	  ○ success fees;
	  ○ former ministers and parliamentary secretaries from engaging in any lobbying relating to any matter that they had official dealings with in their last 18 months in office for a period of 18 months after leaving office; and
	  ○ former ministerial and parliamentary secretary staff and former Senior Government representatives from engaging in any lobbying relating to any matter that they had official dealings with in their last 12 months in office for a period of 12 months after leaving office.
		✗ (requirements specified in legislation, and no limits for ministerial staff)

15	• The Lobbyists Code of Conduct should be approved by the NSWEC. • The Code should be tabled before each House of Parliament and be disallowable by either House (like regulations). • The NSWEC shall consult the relevant parliamentary committee prior to approving (or amending) the Code.	✗
16	The New South Wales Lobbyists Code of Conduct should cover all 'repeat players' – in particular professions, companies and interest groups that engage in direct lobbying and third party lobbyists.	✓

17	The Lobbyists Code should include:
	• the obligations currently imposed under the 'Principles of Engagement' of the NSW Government Lobbyist Code of Conduct;
	• obligations recommended by ICAC, namely, the duties of lobbyists to:
	  ○ inform their clients and employees who engage in lobbying about their obligations under the Code of Conduct;
	  ○ comply with the meeting procedures required by Government representatives with whom they meet, and not attempt to undermine these or other government procedures or encourage Government representatives to act in breach of them;
	  ○ not place Government representatives in the position of having a conflict of interest;
	  ○ not propose or undertake any action that would constitute an improper influence on a Government representative, such as offering gifts or benefits; and
		✗

No	Recommendation	Adequately implemented?
	○ not offer, promise or give any gift or other benefit to a Government representative, who is being lobbied by the lobbyist, has been lobbied by the lobbyist or is likely to be lobbied by the lobbyist; • certain obligations presently found under the Queensland Lobbyists Code of Conduct, namely, the duties of lobbyists to: ○ not represent conflicting or competing interests without the informed consent of those whose interests are involved; ○ advise government and Opposition representatives that they have informed their clients of any actual, potential or apparent conflict of interest, and obtained the informed consent of each client before proceeding/continuing with the undertaking; ○ provide accurate and updated information to the Government or Opposition representative, as far as is practicable, if a material change in factual information that the lobbyist provided previously to a Government or Opposition representative causes the information to become inaccurate and the lobbyist believes the Government or Opposition representative may still be relying on the information; and ○ if the lobbyist is a former senior Government representative or former Opposition representative within the last 2 years, to indicate to the Government or Opposition representative their former position, when they held that position and that the matter is not a prohibited lobbying activity. • the obligation to advocate their views to public officials according to the merits of the issue at hand and not to adopt approaches that rely upon their wealth, political power or connections; or that of the individuals and/or organisations they represent.	
18	Public officials should be obliged to notify the NSWEC if there are reasonable grounds for suspecting that a lobbyist has breached the Lobbyists Code of Conduct.	✗
19	The codes of conduct applying to New South Wales Ministers, Members of Parliament and public servants should include the following duty: When lobbied, public officials perform their duties and functions according to the merits of the issue at hand and shall not do so in a manner that privileges the wealth, political power or connections of lobbyists and the individuals and/or organisations they represent.	✗
20	The recommendation made in the ICAC Lobbying Report concerning protocols of meetings between New South Wales public officials and lobbyists should be adopted.	✗
21	• Summaries of the diaries of New South Wales Ministers should be published on a monthly basis and provide details of meetings held with stakeholders, external organisations and individuals including the organisation or individual with whom the meeting occurred, details of any registered lobbyists present, and the purposes of the meeting. • The information provided through these summaries should be consistent in form with that provided under the Register of Lobbyists so as to facilitate cross-checking.	✗ (diaries published quarterly)
22	The following clause should be inserted into the codes of conduct applying to New South Wales Ministers, Members of Parliament and public servants: A public official must not improperly use his or her influence as a public official to seek to affect a decision by another public official including a minister, public sector employee, statutory officer or public body, to further, directly or indirectly, his or her private interests, a member of his or her family, or a business associate of the public official.	✗

ICAC

INDEPENDENT COMMISSION
AGAINST CORRUPTION
NEW SOUTH WALES

Level 7, 255 Elizabeth Street
Sydney NSW 2000 Australia

Postal Address: GPO Box 500
Sydney NSW 2001 Australia

T: 02 8281 5999
1800 463 909 (toll free for callers outside metropolitan Sydney)
F: 02 9264 5364
TTY: 02 8281 5773 (for hearing-impaired callers only)

E: icac@icac.nsw.gov.au
www.icac.nsw.gov.au

Business Hours: 9 am - 5 pm Monday to Friday