



Ref: A3204424

The Hon. Peter Hall QC  
Chief Commissioner  
Independent Commission Against Corruption  
Level 7, 255 Elizabeth St  
SYDNEY NSW 2000

Dear Chief Commissioner

I refer to the Commission's correspondence to the Premier, the Special Minister of State and myself in mid-October 2019, inviting a response to issues raised in the Commission's Interim Paper prepared for Operation Eclipse: *Lobbying, Access and Influence in NSW*.

The Premier and Minister Harwin have asked me to respond.

I appreciate the opportunity to respond to issues raised in the Interim Paper.

### **A risk-based approach**

The Interim Paper says (at page 5) that, 'There is a strong argument to the effect that, given the disparate areas in which lobbying takes place, it is inappropriate to have a single regulatory regime across the board for all forms of lobbying.'

Similarly, the risk profiles of various government departments vary with the nature of their functions and activities.

NSW supports a risk-based approach to the regulation of lobbying, including protocols governing meetings with third-party lobbyists and other external stakeholders. A 'one-size-fits-all' approach, imposing, for example, the Department of Planning's meeting protocols on all Departments, would create an unnecessary administrative burden for most Departments.

### **Proper decision-making processes**

To manage corruption risks, the focus is and should be on prevention through quality processes, people and cultures that ensure routine accountability.

Imposing additional transparency and accountability measures should be by exception, where there is evidence (from internal or external audits, or other investigations) that standard management processes, properly followed, are insufficient to meet the risk level in a particular environment.

### **Improving transparency**

The Government considers that the best mechanism to increase transparency is through diary disclosures, which provide better disclosure and minimise administrative and regulatory burden.

In February 2019, the Premier proposed the extension of the requirements for the publication of diary and overseas travel information (currently imposed on Ministers by Premier's Memorandum M2019-02) to all Members of Parliament. The application of diary and overseas travel disclosure requirements to Members of Parliament other than Ministers could be achieved by a resolution of

both Houses of Parliament imposing disclosure requirements on Members in relation to scheduled meetings and overseas travel information.

### **Regulating the conduct of public officials**

The following statement is made on page 9 of the Interim Paper:

‘.. neither the LOGO Act nor the code set out meaningful conduct obligations for public officials.’

The Government regulates the conduct of public officials through the *Government Sector Employment Act 2013* (the **GSE Act**), and agency codes of conduct.

The Public Service Commissioner’s Direction No. 1 of 2015 made under the GSE Act requires agency heads to implement the *Code of Ethics and Conduct for NSW government sector employees* (the **PSC Code**) and requires employees to comply with the PSC Code. The PSC Code applies at all times when employees are acting in the course of, or in connection with, NSW government sector employment. The PSC Code also specifies actions to be taken if there are breaches, or allegations of breaches, of the PSC Code.

The PSC Code requires that all government sector employees and heads of government sector agencies must comply with Premier’s Memorandum M2014-13 *NSW Lobbyists Code of Conduct*, as amended from time to time. The current version of this Memorandum is M2019-02 *NSW Lobbyists Code of Conduct*. It sets out the obligations on public officials (Ministers, Parliamentary Secretaries and public servants) that govern their interaction with lobbyists.

The fact that these obligations are enforced through a separate legislative framework makes them no less meaningful. Public servants are also subject to their agency’s code of conduct. Public servants are subject to disciplinary action, including termination of employment, for breaches of applicable codes of conduct.

Similarly, under the *NSW Ministerial Code of Conduct* (the **Ministerial Code**), Ministers must not knowingly breach the *NSW Lobbyists Code of Conduct*. The Ministerial Code is an applicable code of conduct under the *Independent Commission Against Corruption Act 1988* (NSW).

These codes of conduct also govern the receipt and disclosure of gifts, and the management of conflicts of interests.

### **Lobbying and Local Government**

The different nature of lobbying in the local government context, and the need for a different approach to regulating lobbying in that context, was identified in the ICAC’s 2010 report *Investigation into corruption risks involved in lobbying* (Operation Halifax). On page 61 of the Operation Halifax report the Commission states:

‘The Commission does not consider that lobbying at local government level should be subject to the same regulatory regime as lobbying at NSW State Government level.’

The framing of the LOGO Act and a series of amendments to the NSW Local Government Model Code of Conduct have been informed by the ICAC’s position in that report, and subsequent consultation between the Office of Local Government and the ICAC when amending the Local Government Model Code in 2013 and 2018. Advice provided by the Office of Local Government is attached (**Attachment A**).

### **Enforcing compliance**

The following statement is set out on page 9 of the Interim Paper:

‘The code has been in place in NSW since late 2014. Other than some instances where third-party lobbyists may have failed to update relevant documentation, no lobbyist has been suspended or placed on the watchlist. This may suggest that the current regulatory

system is not effectively identifying and managing problematic lobbying practices or promoting transparency, integrity and honesty as per the stated purpose of the code.’

The Interim Report does not mention that, in addition to the disciplinary action of imposing suspensions for failure to meet their obligations to keep lobbyist details up to date on the register, the NSW Electoral Commission has commenced reviews or investigations in five matters over the last five years that did not relate to a failure to confirm details or appoint a responsible officer. That figure does not include the investigations transferred by the Department to the NSW Electoral Commission for finalisation in December 2014.

Contrary to the statement in the Interim Paper quoted above, these statistics may in fact indicate that the system is working to discourage and prevent problematic lobbying practices and promote the objects of the regime. There is no evidence that allegations of breaches identified by the regulator or brought to the regulator’s attention have not been adequately dealt with.

Thank you for the opportunity to comment on the Commission’s Interim Paper.

Yours sincerely

A handwritten signature in black ink, appearing to read 'TR', is positioned above the typed name and title.

**Tim Reardon**  
**Secretary**

24 January 2020

## Advice provided by the Office of Local Government to the Department of Premier and Cabinet - 14 May 2019

The policy response of the Office of Local Government (OLG) to ICAC's recommendations in its 2010 report on lobbying practices (Operation Halifax) was informed by its findings that:

- there was little evidence that council officials are lobbied by professional lobbyists
- lobbying that occurs at the local government level is generally done directly by small to medium-sized developers and
- any corruption risks that arise are a result of personal affiliation with councillors or council staff.

The OLG response to the issue was overtaken by a 2012 review of the Model Code of Conduct for Local Councils in NSW. A new iteration of the Model Code of Conduct was prescribed in March 2013. There has since been a further review of the Model Code of Conduct which saw a further iteration of the Model Code prescribed in December 2018. Both iterations of the Model Code were developed following a public consultation process and were developed in consultation with ICAC and others.

The latest iteration of the Model Code of Conduct is available [here](#), on the OLG website.

The Model Code of Conduct addresses the issues identified by ICAC in its 2010 report by prescribing a range of obligations relevant to the exercise of regulatory functions by council officials (including councillors, staff and delegates of councils). In particular:

- In exercising land use planning, development assessment and other regulatory functions, all council officials must ensure that:
  - decisions are properly made
  - all parties are dealt with fairly
  - council officials avoid any occasion for suspicion of improper conduct and
  - that no action, statement or communication with others conveys any suggestion of willingness to improperly provide concessions or preferential or unduly unfavourable treatment (see clauses 3.13 and 3.14)
- Councillors who have lodged an application with the council must not discuss the matter with council staff in staff-only areas of the council (see clause 7.6(d))
- Councillors must not approach members of local planning panels or discuss any application that is either before the panel or that will come before the panel at some future time, except during a panel meeting where the application forms part of the agenda and the councillor has a right to be heard by the panel at the meeting (see clause 7.6(e))
- Council staff must not meet with applicants or objectors alone and outside office hours to discuss planning applications or proposals (see clause 7.6(k))
- Council officials must not use their position to influence other council officials in the exercise of their functions to obtain a benefit for themselves or someone else (see clause 6.14)
- Council officials must not take advantage (or seek to take advantage) of their status or position with council, or of functions they perform for council, in order to obtain a private benefit for themselves or anyone else (see clause 6.15)

More critically given ICAC's 2010 finding that any corruption risks that arise from lobbying at local government level are a result of personal affiliation with councillors or council staff, the Model Code of Conduct contains highly prescriptive requirements for disclosing and managing pecuniary interests (including those of "related persons") (see Part 4) and non-pecuniary conflicts of interest (eg arising from close relationships or affiliations) (see Part 5).