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22 May 2019

Mr Lewis Rangott
Executive Director Corruption Prevention
NSW Independent Commission Against Corruption
GPO Box 500
Sydney NSW 2001

By email: lobbying@icac.nsw.gov.au

Dear Mr Rangott,

The regulation of lobbying, access and influence in NSW

Thank you for the opportunity to provide submissions on the consultation paper 'The regulation of lobbying, access and influence in NSW: a chance to have your say'. The Law Society's comments are informed by its Public Law Committee.

We appreciate the purpose of the consultation paper is to examine contemporary lobbying practices, however in our view this should include a comprehensive evaluation of the existing system of regulation in NSW. The consultation paper does not identify any evidence to support the view that the current system is not working.

In 2017 the Department of Premier & Cabinet conducted a Statutory review of the *Lobbying of Government Officials Act 2011* ("the Statutory Review"), which found the *Lobbying of Government Officials Act 2011* ("the Act") objectives remain valid and that the terms of the Act remain broadly appropriate for securing the Act's objectives.¹ We understand that there were several recommendations made, some which have been adopted, to improve the efficacy of lobbying regulation in NSW and consider several of these proposals to address concerns raised in the consultation paper.

1. Measure to improve transparency

The Law Society agrees with the need for transparency and accountability in lobbying procedures. We consider that the current system of regulation provides for transparency and accountability. This includes the applicability of the Lobbyist Code to all lobbyists,² and the requirement for third-party lobbyists, as defined in the Act, to register on the Lobbyists Registers.³

¹ NSW Premier & Cabinet, 'Statutory review of the *Lobbying of Government Officials Act 2011* (2017), 3

² *Lobbying of Government Officials Act 2011* (NSW), ss 3 & 5;

³ *Ibid*, s 9.

(a) Register of Lobbyists

We strongly disagree with the approach in the consultation paper 'to require registration of all of those who undertake direct lobbying' and suggest that any move to expand the types of lobbyists required to register will create an unnecessary and unmanageable system of regulation. This reflects our position in a previous submission to ICAC on 'Lobbying in NSW: An Issues Paper on the Nature and Management of Lobbying in NSW' that a very broad definition of lobbyist can be criticised as an excessive intrusion into the democratic process.⁴

The Senate Finance and Public Administration References Committee (2012) addressed the 'coverage of lobbyists' in relation to the Commonwealth Lobbyist Register. It was noted that the purpose of the Lobbyist Register is to ensure that Ministers and other Government representatives know whose interests are being represented by lobbyists. It therefore follows that certain individuals and organisations, such as peak industry bodies and trade unions, are excluded from the definition of lobbyists as it is obvious whose interests they represent.⁵ We consider this to be also applicable to the NSW system.

We suggest that any expansion of the definition of lobbyists required to register on the Lobbyist Register may capture unintended individuals, professionals or organisations. This is evident from practical issues experienced with the existing definition of 'third-party lobbyist'. We note that the Statutory Review recommended that the definition of 'third-party lobbyist' clarify that it does not include professionals (such as doctors, lawyers or accountants) who as part of their day to day professional services to a client, represent that client's view to a Government official.⁶ This was adopted in amendments to the *Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014* ("the Regulation").⁷

We note that the following recommendation from the Statutory Review was adopted in amendments to the Act in May 2018:⁸

*...clarify that the general objects of the Lobbying Act are to promote transparency, integrity and honesty by ensuring third-party lobbyists and other individuals and organisations who communicate with NSW Government officials for the purpose of representing the interests of others comply with the ethical standards of conduct.*⁹

This aims to improve transparency and we consider that it sufficiently places transparency at the forefront of the regulation of lobbying.

We suggest that transparency may also be enhanced with amendments to the *Government Information (Public Access) Act 2009* to create a presumption of release or a requirement of proactive release of submissions made to a Minister by a third-party lobbyist.

(b) Disclosure of lobbying activity

We support the expansion of disclosures in ministerial diaries to cover events where lobbying frequently happens and increased specificity in the information required to be

⁴ Law Society of NSW, *Submission to ICAC on 'Lobbying in NSW: An Issues Paper on the Nature and Management of Lobbying in NSW'* (2010), 3.

⁵ The Senate Finance and Public Administration References Committee, *'The operation of the Lobbying Code of Conduct and the Lobbyist Register'* (2012), 2.8-2.21.

⁶ NSW Premier & Cabinet, *'Statutory review of the Lobbying of Government Officials Act 2011'* (2017), 3.

⁷ *Lobbying of Government Officials (Lobbyist Code of Conduct) Regulation 2014* (NSW), r4A.

⁸ *Lobbying of Government Officials Act 2011* (NSW), s2A.

⁹ NSW Premier & Cabinet, *'Statutory review of the Lobbying of Government Officials Act 2011'* (2017), 3.

disclosed. Further, we suggest that this should be done in real time, allowing 48 hours for disclosures to be made.

The Law Society suggests that the implications of the approach to require lobbyists to disclose details of each lobbying contact with all government officials (Ministers, ministerial advisers and public servants) be fully considered. Given that this approach may have implications for small businesses,¹⁰ we suggest that this approach should be supported by the development of simple forms and processes to assist with record keeping and disclosure.

(c) Measures to promote accessibility and effectiveness

We support further consideration of harmonising the lobbyist registers nationally between the Commonwealth and States, as outlined in the consultation paper. We suggest that any such approach should take into account the separate lobbying codes among the Commonwealth and States.

2. Measure to improve integrity

(a) Regulation of lobbyists

The Law Society does not consider that it is necessary to further expand the NSW Lobbyist Code of Conduct ("the Code"). The Code applies to all lobbyists and is prefaced by the promotion of transparency, integrity and honesty. The ethical standards in Part 2 of the Code cover the categories of duties identified in the consultation paper, being the duties to legal compliance, truthfulness, avoid conflicts of interest and avoid unfair access and influence.¹¹

We consider that these standards often overlap with existing regulatory regimes. We suggest that the exemption of Australian legal practitioners to the definition of 'third-party lobbyist', as made in the recent amendment to the Regulation,¹² should follow through to the Code. This reiterates the Law Society's position in a previous submission to ICAC that there is already in place an extensive statutory regime for the conduct of Australian legal practitioners in engaging in legal practice and little purpose would be served in providing further overlapping regulatory regimes.¹³

(b) Regulation of the lobbied

We note the concerns of the Senate Finance and Public Administration References Committee (2012) in expanding the Code to all parliamentarians:

...it would be troubled by any regulation that unwittingly limits honest forms of communication by members of Parliament during their day-to-day activities. The committee is not persuaded that the benefits of extending the Code to all parliamentarians would outweigh the disadvantages.

(c) Regulation of post-separation employment

We support a cooling off period for former ministers, members of Parliament, parliamentary secretaries, ministerial advisers, and senior public servants from engaging in any lobbying

¹⁰ The Senate Finance and Public Administration References Committee, 'Knock, knock...who's there? The Lobbying Code of Conduct' (2008), 2.29.

¹¹ Lobbying of Government Officials (Lobbyist Code of Conduct) Regulation 2014 (NSW), sch 1.

¹² Lobbying of Government Officials (Lobbyist Code of Conduct) Regulation 2014 (NSW), r4A.

¹³ Law Society of NSW, Submission to ICAC on 'Lobbying in NSW: An Issues Paper on the Nature and Management of Lobbying in NSW' (2010), 3-4.

activity relating to any matter in which they have had official dealings. We suggest that the duration of the cooling off period may differ according to the role. The *Gaming and Liquor Administration Act 2007* provides a useful model by way of comparison. This Act imposes a two year restriction of Board members and senior executives from Liquor & Gaming NSW from taking a position in industry, with other declared public servants covered by a six month prohibition.¹⁴ In addition, consideration should be given to changes to prevent the movement of lobbyists into ministerial office positions.

(d) Other measures to promote the integrity of direct lobbying

We do not consider the regulation of lobbying to be the relevant place to require the NSW Government to make a public statement of reasons and processes in relation to significant executive decisions, as outlined in the consultation paper. We suggest that this approach, within the regulation of lobbying, would have unintended consequences, fragmenting administrative law practices in NSW.

We note the recommendations from the Statutory Review were adopted in amendments to the Act,¹⁵ to incorporate the 'fit and proper person test' where third-party lobbyists will not be eligible to be registered if they have been sentenced to a term of imprisonment of 30 months, or if they have been convicted, as an adult, in the last ten years, of an offence, where one element involves dishonesty or fraud.¹⁶

3. Measures to improve fairness

(a) Fair consultation processes

We support the suggestion in the consultation paper for the NSW Government to have guidelines that include fair consultation processes such as being inclusive, requiring meaningful participation by stakeholders and promoting adequate responsiveness on the part of government. We are aware that NSW Government Departments have consultation guidelines relevant to the consultation that they undertake. We suggest that fair consultation processes, including adequate timeframes, be a mandatory inclusion of all consultation guidelines for all NSW Government Departments.

(b) Resourcing disadvantaged groups

The Law Society acknowledges the advantages to funding community organisations or providing them with advocacy support to actively support those who are under-represented in the political process. However, we also understand the potential for conflicts of interests to occur in such circumstances.

4. Measures to improve freedom to engage in direct lobbying

(b) Restrictive measures and proportionality

We encourage further research into whether a more prescribed system of regulation would impact on the ability of those unable to afford professional lobbyists to engage with government officials or impact on transparency by driving lobbying practices underground.

¹⁴ *Gaming and Liquor Administration Act 2007* (NSW), s16.

¹⁵ *Lobbying of Government Officials Act 2011* (NSW), s9(8).

¹⁶ NSW Premier & Cabinet, 'Statutory review of the Lobbying of Government Officials Act 2011 (2017)', 3.

5. Measures to improve compliance and enforcement

(a) Education and training

The Law Society supports adequate training and education being provided by the regulators to enable all parties to understand and comply with their lobbying obligations.

(b) The need for independent supervision

The information provided in the consultation paper is that NSW has a broader range of sanctions available when compared to other Australian jurisdictions. In addition, in contrast to the Commonwealth, NSW actively undertakes compliance action. This suggests that the NSW Electoral Commission has adequate powers and resources to enforce lobbying regulation.

We would welcome the opportunity to comment on the findings of ICAC's consultation process. If you have any questions please contact Adele Girdlestone, Principal Policy Lawyer, at (02) 9926 0354 or adele.girdlestone@lawsociety.com.au.

Yours sincerely,



Elizabeth Espinosa
President