Dr Betty Con Walker

T: 9360 4537 M: 0409 360 453

walkerbob@bigpond.com

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The Hon Peter Hall QC
Chief Commissioner
NSW Independent Commission Against Corruption
GPO Box 500
Sydney NSW 2001

RESPONSE TO ICAC ON
THE REGULATION OF LOBBYING AND INFLUENCE IN NSW:
A CHANCE TO HAVE YOUR SAY

1. Measures to improve transparency

Register of Third-party Lobbyists

2. Who should be required to register on the Register of Third-party Lobbyists?
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?

The NSW Register of Third-party Lobbyists is defective because as noted in ICAC's Discussion Paper, and as the name suggests, only a narrow category of lobbyists are required to register their details. This requirement captures just a small proportion of lobbyists while the majority of lobbyists including in-house lobbyists, peak organisations, charities, public officials including Members of Parliament are not required to register.

One key flaw in the operation of the NSW legislation is the fact that so-called 'peak organisations' are not required to register even though, by definition, they are lobbyists. Ironically, this has arisen from the strong 'lobbying' of government by some of these peak organisations to gain the exclusion.

This exemption is important because the actions of some peak organisations can have a significant impact on the State Budget. A case in point is the club industry represented by the lobby group, ClubsNSW. Through its lobbying of politicians at all levels, this lobby group has been able to retain gaming machine tax concessions which have cost the State Budget billions of dollars in the last two decades in revenue forgone totalling over $13 billion.[1] According to the 2018-19 NSW Budget, the tax concessions to the club industry are expected to cost $914 million in just one year.[2] This means that the value of the tax concessions are greater than the tax the government collected from clubs for being allowed to operate poker machines – continuing a trend commenced since 2012.

1. NSW Budget Papers 1996–97 to 2018–19.
2. *2018-19 NSW Budget Paper 1.*

In contrast, I as a sole professional trader, and with little potential to influence the State Budget, have been registered as a lobbyist since the policy was introduced and a register was administered by the Department of Premier and Cabinet in 2009.

As a former Treasury official and with a Doctorate in Economics, the work I undertake mainly involves providing professional technical advice on public finances and the operations of government. Nevertheless, at the time of the register's inception, I requested advice from the Premier and Cabinet and was told that, just to be on the safe side, I should register as a lobbyist which I did. I have continued to do so, in case I need to directly represent any client to government.

This raises the issue of the exemption from the register of 'in-house lobbyists' who in some cases may be professionals or technical advisers. So while some professionals such as lawyers who may act as 'in-house' lobbyists may not be required to be registered before they represent their clients to government, this is not the case for other professionals such as economists who are not 'in-house' lobbyists.

It is ***recommended*** that this anomaly be rectified. Either all or none of the professional/technical advisers should be required to register.

Question 4 refers to 'repeat players'. A change to a more targeted approach of the registration of only 'repeat players' would not necessarily resolve issues described above in response to question 2. For example, significant players (such as peak organisations) may only need to hold a few meetings with a key Minister and one meeting with a Premier just before an election to achieve a significant financial advantage on behalf of their industries. This may be regarded as 'ad hoc' lobbying but would have greater impact on the State's finances than a lobbyist who may be regarded as a 'repeat player'. Possibly that issue may be resolved by a targeted approach to certain industries.

A further flaw in the Register arises from the activities of some parliamentarians. Some Members of Parliament undertake direct lobbying on behalf of interest groups to such an extent that may prove costly to the State's Budget and which may raise questions as to motivation. More on this issue below.

Suffice it to say that in one case, a peak organisation lobbied Members of Parliament and others in an attempt to overturn a government decision aimed at reducing concessional tax treatment for the club industry with the potential of costing the NSW Budget hundreds of millions of dollars per annum.

In one of the interviews reported at page 157 in my book, *Casino Clubs NSW: Profits, tax, sport and politics (*Sydney University Press, 2009), former Premier of New South Wales, the Hon Bob Carr, was so concerned by the activities of one Member of Parliament that he made the following statement:

> One member of the Labor Caucus was in and out of the headquarters of ClubsNSW so often that in my view it wasn't inconceivable that he may have warranted an ICAC inquiry, I believe, in muddying his role as a legislator with his role as a lobbyist for the club movement. I believe a threshold may have been crossed there.

While it may be difficult to identify internal lobbying on behalf of interest groups amongst Parliamentary colleagues, it is ***recommended*** that this requires further consideration.

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?

Before considering changing disclosure responsibilities of lobbyists, there is a need to improve disclosure responsibilities of government officials.

The dependence on disclosures in ministerial diaries for information on the extent of lobbying activity in New South Wales is questionable since those diary entries are limited in detail and scope. Actions in relation to disclosures as raised in ICAC's Discussion Paper are ***supported*** as follows:

- Disclosures about meetings in ministerial diaries should specify the subject matter, and whether it relates to any legislative bills (which should be specified), grants or contracts.

- Disclosures should go beyond just scheduled meetings with external stakeholders, and include lobbying that occurs at fund raisers, official events, town hall meetings, and community functions. Fund raisers are restrictive and provide a particular advantage of access to those who can afford the entry fee. Official events tend to provide access to the more privileged in society or the more 'socially advantaged' and also to those of the same political party orientation.

- Disclosures should detail interactions between lobbyists and other significant public officials, such as ministerial advisers (particularly chiefs of staff) and senior public servants.

- Disclosures should detail lobbying meetings between Ministers and other parliamentarians. This is imperative since NSW Parliamentarians are allowed to undertake secondary employment including lobbying, and this may be in a paid capacity.

More work is required to determine the most viable and effective form of such disclosures including whether the burden should be on public officials (Ministers, other parliamentarians, ministerial advisers and public servants) or lobbyists. What is

clear is that information provided should specify when, where, by whom, and with whom lobbying occurred, what it was about, and any outcome.

2. Measures to improve integrity

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?

NSW Members of Parliament should not be allowed to be paid lobbyists since there is a possibility of creating a conflict of interest with their role as elected representatives. This is imperative as even a benefit may not be clearly visible since it may be in kind. For example, benefits to MPs (or, for that matter, to candidates) may be provided through the provision of meeting facilities, or by meeting printing expenses etc. – transactions that do not involve cash payments.

Moreover, some Parliamentarians may be 'captured' by lobbyists for peak organisations, not through cash payments but through the promise of electoral support from the members of those bodies.

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?

For reasons noted above, without a shadow of a doubt, the definition of 'government official' ***should be expanded to include Members of Parliament***.

Accordingly, all government officials should comply with all lobbyist requirements.

All public officials, including Parliamentarians, should be obliged to notify the NSW Electoral Commission if there are reasonable grounds for suspecting that a lobbyist has breached the lobbyist legislation

Government officials should be required to comply with certain meeting procedures when interacting with lobbyists. ICAC's recommendations are ***supported*** including 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 and 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 be maintained of telephone conversations with a Third Party Lobbyist or a representative of a Lobbying Entity.

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?

With an increasing proportion of lobbyists coming from the cohort of former Ministers, Members of Parliament, ministerial advisers, and public servants, it is imperative that there be a cooling off period for all before engaging in any lobbying activity relating to any matter in which they had official dealings.

In the public interest, the cooling off period for former Ministers, Chiefs of Staff and senior public servants should be four years. In the case of other Parliamentarians and other ministerial staff, the cooling off period should be two years.

Past lax enforcement of the current limited 18-month post-separation ban in New South Wales points to the need of an independent regulator to enforce breaches.

Disclosure of lobbyists' previous government employment by public officials and the date when that employment ended is supported. Provision of such information would help identify conflicts of interest.

The issue of disclosure of income from lobbying by former public officials requires further consideration having regard to privacy laws.

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?

A 'significant executive decision' would need to be defined.

For instance, if lobbying is involved in an executive decision with significant ***financia***l implications then a requirement for a public statement of reasons and processes is laudable. This would be in addition to a mention in the State Budget which usually does not contain much detail on individual decisions.

The need for such a statement could arise from a reversal of a previous government decision associated with intensive lobbying by an interest group and at a significant cost to the State Budget. Such a requirement may avoid decisions being made for political reasons rather than in the public interest.

Apart from information on the reasons and processes associated with a decision, it is agreed that such a statement could include:

- A list of meetings with lobbyists;
- 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.

Such an approach should assist in the integrity of major decision-making.

3. Measures to improve fairness

Fair consultation processes & Resourcing disadvantaged groups

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?

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?

As a Treasury official, I advocated that Premiers and Treasurers seek annual pre-Budget submissions from community organisations, particularly those representing disadvantaged groups, and to follow up with a consultation. That resulted in useful discussions for both parties.

There is obviously much room for improvement in such an *ad hoc* process including the provision of assistance to the smaller less resourced groups to improve fairness and equal access to public decision-making.

Obviously peak employer groups such as NSW Business Chamber have more resources for preparing such pre-Budget submissions than those representing the less well-off in the community.

Official events, fund raisers and other political party functions provide opportunities for lobbying of Ministers and other public officials by those able to attend those events. The latter may include former politicians and former (and even current) party office holders who may be working as lobbyists. These are opportunities not open to the less resourced disadvantaged groups and individuals.

4. Measures to improve freedom

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?

The recommendations for enhanced disclosures set out in this response would promote the democratic role of lobbying without impacting on the freedom to directly lobby.

Bans on post-separation employment are only for limited time periods and claims about 'undue hardship' should be viewed with great scepticism, particularly as nothing would stop a former Parliamentarian or public official from being paid for providing advice to interested parties – without the former Parliamentarians or paid officials being directly engaged in lobbying.

The notion that regulatory requirements would drive lobbying practices underground ignores the fact that the major part of lobbying currently does take place outside the so-called regulated framework – and thus could be described as already taking place 'underground'. Extending the coverage of regulation can only improve the situation

and surely public officials including Members of Parliament at the very least can be trusted to comply with the law.