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24 May 2019

Dear Chief Commissioner,

**Submission to NSW ICAC on lobbying regulation**

Thank you for the opportunity to provide comment in response to your discussion paper *The Regulation of Lobbying Access and Influence in NSW: A Chance to Have Your Say* of April 2019 (**Discussion Paper**). The Human Rights Law Centre (**HRLC**) welcomes the NSW Independent Commission against Corruption's (**Commission's**) investigation into the regulation of lobbying in NSW, and strongly supports reforms to achieve greater transparency.

The HRLC is concerned about the risk of corruption and undue influence that is facilitated by a lack of transparency in lobbying. As part of our core work ensuring that democratic freedoms are respected and integrity in government is upheld in Australia, the HRLC is advocating for significant reforms to lobbying regulation across Australia. We are optimistic that NSW could lead the way, if it introduced robust laws similar to those canvassed below.

Note, however, that the HRLC is currently undertaking broad consultation to achieve a carefully balanced legislative proposal for reform at Federal level. This process is in its nascent stages, so at this stage we are only able to provide broad observations in response to the Discussion Paper's detailed questions. We anticipate being able to provide more detailed policy suggestions in a number of months.

We encourage the Commission to engage in much broader consultation with civil society before making final recommendations.



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Our submission is structured as follows:

1. The connection between public trust in government and democracy, and how lobbying reform is crucial to restoring that trust.
2. The risks associated with regulating lobbying, and how to avoid them.
3. Broad principles and minimum standards for meaningful reform in this space.

## The case for lobbying reform: democracy and equality

The scale and secrecy of lobbying in NSW is part of a national phenomenon that is undermining political equality and the integrity of our democracy. The estimated hundreds of millions<sup>1</sup> spent by industry groups on lobbying Federal and State governments each year is proof that they believe it to be an effective strategy to maximise profits. We also know that the access that highly-regulated industries, and industry in general, get to government decision-makers far exceeds that of non-business interests.<sup>2</sup>

The risks this situation poses go beyond *quid pro quo* corruption. Industry lobbying leads to deep connections between the politically powerful and the incredibly rich, at the expense of the community's interests. Secret lobbying damages the legitimacy of government institutions and leads to a loss of public support and trust.

Extensive polling indicates that this is a pressing reality: public trust in democratic governance has plummeted to 41%, from 86% in 2007.<sup>3</sup> In NSW, 41% of people polled thought that politicians did not

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<sup>1</sup> M O'Neill, "The Influence Game: How to access power in Australia", *ABC News*, 28 September 2018, available at <https://www.abc.net.au/news/2018-09-24/lobbying-gifts-jobs-relationships-and-donations-affect-democracy/10282852>.

<sup>2</sup> D Wood, K Griffiths, "Who's in the Room? Access and Influence in Australian Politics" *The Grattan Institute*, 23 September 2018, 17.

<sup>3</sup> Trust in politicians and government is down to 41%, its lowest point since data has been available: G Stoker, M Evans, M Halupka, *Trust and Democracy in Australia: Democratic decline and renewal*, December 2018, 9, available at <https://www.democracy2025.gov.au/documents/Democracy2025-report1.pdf>.



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care, or cared little, about people.<sup>4</sup> There are complex reasons for this trend, but one of the top three causes polled by Australians was that “big business has too much power”.<sup>5</sup>

Furthermore, unequal lobbying power translates to inequality in the community. Those who have the least political and economic power are often the most impacted by government decisions concerning public health, social services and environmental protection. Lobbying also contributes to the enormous disparity in wealth: typically only industry has the resources to engage fully on complex issues such as tax law reform, which is fundamental to the distribution of wealth.

The failure of both major parties to introduce meaningful lobbying reforms, while disappointing, is not surprising: they are part of the broken system. The NSW public are owed candid transparency with respect to who is influencing (and occasionally dictating) government policy.

## The importance of balance in lobbying regulation

Important as lobbying reform is, it is not without risk. Legislation must be carefully tailored to take account of how organisations operate in reality, to ensure it targets the corrosive influence of the powerful and well-resourced, and does not merely create greater barriers to access for under-resourced community voices. The status quo is untenable, but misguided reforms would worsen the political imbalance.

The best way to ensure lobbying reforms are balanced is to:

- (i) undertake careful, active consultation with both big and small civil society organisations before making formal recommendations; and
- (ii) seek input from organisations and decision-makers in countries that have more comprehensive lobbying regulation, such as Ireland, Scotland and Canada.

Public support, including the support of civil society groups, is vital to create the political will for reforms. In 2011, NSW Parliament led the reform movement in Australia when it passed caps on

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<sup>4</sup> G Stoker, M Evans, M Halupka, *Trust and Democracy in Australia: Democratic decline and renewal*, December 2018, 31, available at <https://www.democracy2025.gov.au/documents/Democracy2025-report1.pdf>.

<sup>5</sup> G Stoker, M Evans, M Halupka, *Trust and Democracy in Australia: Democratic decline and renewal*, December 2018, 10, available at <https://www.democracy2025.gov.au/documents/Democracy2025-report1.pdf>.



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political donations and electoral expenditure and increased public funding for election campaigns. NSW again has the opportunity to lead the country in creating a system that has the highest standards of transparency and accountability, and restoring public trust in government.

## Principles to guide NSW reforms

The HRLC believes that lobbying reform in NSW should be guided by the following principles:

- (i) The NSW public has a right to expect the highest standards of transparency and accountability in lobbying and the NSW Parliament should strive to set an example for the nation.
- (ii) The level of public interest in lobbying does not stop at *quid pro quo* corruption, but extends to all situations in which wealth is translating into a disproportionate influence over government decision-making.
- (iii) The access that wealthy industry stakeholders have to government decision-makers dwarfs that of voices representing public interests. The expectation of public servants and members of Parliament should be to level the playing field, including by extending resources to community groups where appropriate and actively facilitating consultation.
- (iv) The focus of lobbying reform should be on regulating professional, industry lobbyists, not creating yet another barrier for community groups to be heard. As far as is practicable, transparency should extend to all repeat lobbyists. However, if the different practices of the resourced as compared with the under-resourced are not accounted for, the laws are likely to worsen, not ameliorate, the current power imbalance.
- (v) The risk of driving lobbying further underground should not be regarded as a roadblock to ambitious reform. Carefully considered legislation, appropriate penalties and a properly resourced oversight body would significantly reduce underground lobbying by increasing the personal and reputational risks associated with it.



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## Minimum standard for lobbying reform

### Strengthening the lobbying register

At a minimum, the HRLC considers that the Register of Third-Party Lobbyists in NSW should:

- (i) Be extended to include in-house repeat lobbyists. Until it does, a significant portion of lobbying, potentially the vast majority, will remain in the shadows.<sup>6</sup> However, very careful consideration should be given to who is included in the definition of "in-house lobbyist". Further consultation should be undertaken on this definition, but it should, as far as possible, capture all industry professional lobbyists without imposing a significant administrative burden on those representing community interests.<sup>7</sup>
- (ii) Require lobbyists to make a record of the fact of lobbying communications occurring with members of Parliament, their senior staff and senior public servants and that the record be published publicly online. "Lobbying communications" should not be limited to face-to-face scheduled meetings, but include all attempts to influence a decision, wherever it occurs.<sup>8</sup>
- (iii) Be extended to include the topic of such communications, subject to feedback from civil society.<sup>9</sup>
- (iv) Impose higher standards on lobbyists representing highly regulated industries and "prohibited donors" as defined in s. 51 of the *Electoral Funding Act 2018* (NSW). These standards should be aimed at ensuring meetings held outside of Parliament, such as fundraising dinners, are included on the register.<sup>10</sup>
- (v) Be easy for lobbyists to use.<sup>11</sup>

<sup>6</sup> Refer to q. 2 of the Discussion Paper.

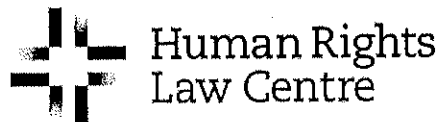
<sup>7</sup> Refer to q. 2 and 4 of the Discussion Paper.

<sup>8</sup> Refer to q. 7 and 9 of the Discussion Paper.

<sup>9</sup> Refer to q. 7 of the Discussion Paper.

<sup>10</sup> Refer to q. 5 of the Discussion Paper.

<sup>11</sup> Refer to q. 9 of the Discussion Paper.



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- (vi) Integrate and make accessible lobbying-related data, including political donations, political expenditure, ministerial diary disclosures and details of investigations by the Commission, in order to facilitate public interest reporting.<sup>12</sup>

### **Promoting fairer consultation**

The HRLC also broadly supports the Discussion Paper's proposal to require government decision-makers to make a public statement of reasons and processes as detailed on page 33.<sup>13</sup> Such a statement would not only lead to greater transparency in decision-making, but foster greater professional distance between lobbyists and decision-makers, and promote fair consultation as the norm.

Likewise, we support the suggestion that the NSW government develop guidelines to oblige decision-makers to actively seek out a range of voices – most importantly from affected communities – as a matter of course.<sup>14</sup>

Further thought and consultation should take place with respect to how disadvantaged groups can be better supported, or "levelled up", to have their interests heard by government decision-makers.<sup>15</sup> All options should be considered, but as foreshadowed in the Discussion Paper, providing government funding to groups to facilitate lobbying could compromise their independence and/or create a new class of government "insiders". A better solution may be to improve the accessibility of government decision-makers, including by going to the places and communities where disadvantaged groups are.

### **Addressing the revolving door**

To address the significant risk of a conflict of interest between government decision-makers and industry, the existing post-separation "cooling off" period of 18 months should be extended beyond Ministers and parliamentary secretaries, to include all members of Parliament; Ministers and Shadow Ministers' senior staff; and senior public servants.<sup>16</sup> The ban should extend to all forms of lobbying activity, be it as an in-house or external lobbyist. Lobbyists should also be required to disclose previous positions in government when registering.

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<sup>12</sup> Refer to q. 12 of the Discussion Paper.

<sup>13</sup> Refer to q. 25 of the Discussion Paper.

<sup>14</sup> Refer to q. 26 of the Discussion Paper.

<sup>15</sup> Refer to q. 29 of the Discussion Paper.

<sup>16</sup> Refer to q. 21 of the Discussion Paper.



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We are happy to further assist the Commission by making oral submissions at a future public inquiry.  
This submission may be made publicly available on the Commission's website.

Yours sincerely



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