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Submission to ICAC's consultation on the conduct and regulation of lobbying in NSW

Danielle Wood and Kate Griffiths

Summary

We welcome the opportunity to present our views on the conduct and regulation of lobbying in NSW. Our submission is structured around the five key areas and 37 questions posed by NSW ICAC ('the Commission') in its April 2019 consultation paper.

We support the Commission's efforts to promote transparency of lobbying activity. Transparency reduces the risk that well-resourced groups will have improper influence over decision makers. Visibility of lobbyists and their activities helps the public, media and Parliament to hold officials to account. And greater public scrutiny increases the likelihood that policy makers will seek out alternative voices.

The NSW register of lobbyists should be expanded to include all those that lobby regularly, whether for a client, a peak body, union or other employer. Lobbyists on the register should declare who and what they are lobbying for.

Wherever possible, the burden of regulation should be borne by the lobbied rather than the lobbyist. The goal is not to deter advocacy but to underscore the responsibilities of public officials. However, lobbyists should be required to abide by minimum ethical standards of conduct.

All public officials – including MPs – should be obliged to act with integrity and fairness and uphold public trust, including in dealings with lobbyists.

Regulation of post-separation employment for senior public officials is essential. A cooling-off period of at least 18 months would help to minimise the risks associated with inside information and key relationships.

Citizen engagement – a core responsibility of politicians and public servants – should be improved through more inclusive policy review processes. Supporting advocacy for disadvantaged groups and diffuse interests would help to boost countervailing voices in public debates, giving politicians and public officials better information with which to adjudicate the public interest.

NSW has better transparency of lobbying activity than most Australian states and territories, but there is still significant room for improvement. The recommendations outlined in this submission would help to better align the NSW regime with its core purpose of promoting transparency, integrity, fairness and freedom in lobbying.

1 Measures to improve transparency

NSW can improve transparency of lobbying activity by broadening its lobbyist register, capturing more meaningful information on lobbying activity, and making the information more accessible for journalists and the public.

The 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?

All Australian states and territories (except the Northern Territory) have some controls on lobbying. However, the NSW regime is more developed than most. Grattan Institute's State Orange Book benchmarked integrity regimes across state and territory governments in Australia. It found that the NSW and Queensland lobbying and donations regimes are more transparent than the rest. Other states do not publish ministerial diaries, for example.[1] But there are still areas where there is room for improvement.

Overseas examples may be more helpful. Canada has long-established controls on lobbying which are designed to balance the legitimacy of lobbying with the need for transparency.[2]

Canada also has a broader lobbyist register that includes all individuals who are paid to communicate with federal public office holders.[3]

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

The NSW register captures only third-party lobbyists – those who are paid to lobby politicians on behalf of a client. Ideally the register would include all those paid to lobby regularly ('repeat players'), whether they are lobbying for a client, a peak body, union or other group. The challenges are in defining 'repeat players' and enforcing registration.

An expanded register should include, at a minimum, any lobbyists with an 'Authorised Visitor' access pass to the NSW Parliament. A lobbyist with an access pass is clearly a repeat player, and their access could be denied if they fail to register or breach the code of conduct.

3. Should there be a distinction between lobbyists on the register and lobbyists bound by the code of conduct?

The lobbyists' register should apply to 'repeat players', while the code of conduct should apply to anyone lobbying – whether they are 'repeat players' or 'ad hoc lobbyists'. The code is not onerous

[1] Daley et al. (2018, Chapter 11).
[2] Canada's Lobbying Act is based on four key principles: (1) Free and open access to government is an important matter of public interest; (2) Lobbying public office holders is a legitimate activity; (3) It is desirable that public office holders and the general public be able to know who is engaged in lobbying activities; (4) The system of registration of paid lobbyists should not impede free and open access to government. Office of the Commissioner of Lobbying of Canada (2019a).
[3] Office of the Commissioner of Lobbying of Canada (2019b).

– it specifies minimum ethical standards of conduct that should apply to anyone lobbying. These include disclosing conflicts of interest and not engaging in misleading or corrupt conduct. A broad code of conduct is difficult to enforce but at least gives government officials an avenue to raise a complaint if they observe unethical lobbying.

4. Should there be a distinction between 'repeat players' and 'ad hoc lobbyists'?

Yes. If 'repeat players' can be defined, then they should be included on the register of lobbyists, alongside third-party lobbyists. Ad hoc lobbyists should not be required to register.

5. Should there be targeted regulation for certain industries? If so, which industries should be targeted?

Our research shows that access and influence are skewed towards certain sectors.[4] But this does not mean that separate regulation is justified. Separate regulation makes sense only where the controls being proposed are burdensome and there is a clear distinction between industries at 'high risk' and 'low risk' of undue influence.

Neither of those criteria are met. The reporting requirements and constraints proposed on lobbyists are not unduly burdensome. The distinctions between industries at 'high risk' and 'low risk' of undue influence are grey and ever-changing, given the moving policy agenda.

Consistent rules reduce the compliance burden on lobbyists and are easier for regulators to monitor and enforce.

Disclosure of lobbying activity

6. What information should lobbyists be required to provide when they register?

An important purpose of the lobby register is to ensure that the public can see lobbying activities. The current register requires third-party lobbyists to identify their clients, employees and owners. The register could be improved by also listing the industry or industries in which the client operates.

An expanded lobbyist register that includes in-house lobbyists as well as third-party lobbyists should provide largely the same information. In-house lobbyists should be required to list employees in their advocacy team but not their entire organisation.

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?

Lobbyists should be required to record their lobbying contacts – who was lobbied, the date, the party represented (for third-party lobbyists), and the subject matter – and provide this information to the relevant body to make publicly available. The Queensland Integrity Commissioner administers a register of lobbying contacts

[4] Wood et al. (2018, Chapter 2).

that could provide a guide.[5] NSW should look to make a similar register downloadable and searchable.

8. Should lobbyists be required to disclose how much income they have received and/or how much they have spent on their lobbying activities?

This issue is beyond the scope of our work.

9. How should lobbying interactions with ministerial advisers, public servants, and Members of Parliament be recorded and disclosed?

A published register of lobbying contacts should include lobbying interactions with MPs, advisers and senior public servants. We also recommend that ministerial diaries continue to be published and should include meetings with advisers where the minister was not present.[6]

If it can be demonstrated that publishing diaries is not a heavy burden, then diaries that record the external meetings of all MPs and senior public servants should also be published.

10. What information should ministers be required to disclose from their diaries and when?

Ministerial offices should publish details of all official meetings, both in the office and offsite, all scheduled phone calls, and all events attended by a minister in an official capacity. 'Official meetings' should include those at which a minister was present as well as those held with ministerial advisers only. Records of meetings should identify those present and key issues discussed.[7]

To be useful, ministerial diaries must be published in a timely manner and an accessible form. For example, all meetings for one month could be published by the end of the following month, as already happens in Queensland. The publication should be searchable and exportable, to facilitate scrutiny.[8]

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?

Lobbying information, ministerial diaries and political donations data should be made publicly available in an online database. At a minimum, the information should be searchable and downloadable, to facilitate scrutiny.

Names of individuals and organisations should be validated. Abbreviations should be discouraged, and spelling mistakes eliminated. An ABN or ACN should be provided where available.

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

[5] Queensland Integrity Commissioner (2019).
[6] Wood et al. (2018, pp 57-58).
[7] Wood et al. (2018, pp 57-58).
[8] Wood et al. (2018, pp 57-58).

passes; (vi) details of each lobbying contact (if reform occurred)?

Yes – ideally information on these different channels to access and influence public officials would be publicly available in a single searchable database. The cost of developing and maintaining such a database should be assessed.

13. Should the NSW Electoral Commission be required to present an annual analysis of lobbying trends and compliance to the NSW Parliament?

Yes – this would help to integrate lobbying information and boost parliamentary and public scrutiny of lobbying activity. An annual report would also enable regular evaluation of the effectiveness of, and the compliance burden associated with, lobbying rules.

2 Measures to improve integrity

NSW can improve the integrity of lobbying interactions by clarifying the responsibilities of current and former public officials, including MPs. To help minimise the risks associated with inside information and key relationships, senior public officials should not engage in lobbying activities related to their official dealings for at least 18 months after departing office.

Regulation of the lobbyists

14. What duties should apply to lobbyists in undertaking lobbying activities?

The lobbying code of conduct sets an appropriate standard, with additional reporting requirements for registered lobbyists (see Section 1).

15. Should NSW Members of Parliament be allowed to undertake paid lobbying activities?

No – this could pose a serious conflict of interest.[9]

16. Should lobbyists be prohibited from giving gifts to government officials?

It is more effective and appropriate to regulate government officials in this case. There should be clear rules for government officials to avoid conflicts of interest under their code of conduct. In particular, public officials should not accept sponsored travel,[10] sizeable gifts[11] or other income[12] because these can, or can appear to, influence decision-making in current or future roles.[13]

Regulation of the lobbied

17. Should the definition of 'government official' be expanded to include Members of Parliament?

Yes. Obligations on public officials to act with integrity and fairness and uphold public trust – including in dealings with lobbyists – should be extended to MPs under their code of conduct.

18. What obligations should apply to government officials in relation to lobbying activities?

Government officials should comply with lobbyist legislation and disclose conflicts of interest under their codes of conduct. They should also be aware of the Lobbyists Watch List (which identifies lobbyists who have breached the Lobbying Act or code of

[9] Wood et al. (2018, pp 60-62).
[10] See for example the Queensland ministerial code of conduct, which specifies that ministers should not accept sponsored hospitality (Queensland Government, 2016). See also Wood et al. (2018, pp 24-25).
[11] Small gifts (e.g. under $300) may be an appropriate exception to allow presentation and receipt of gifts as a gesture of 'good manners, goodwill and the respect for other countries' customs' (see PM&C, 2018).
[12] Personal farms and family businesses may be an appropriate exception if they were established before the politician entered parliament and do not conflict with official duties.
[13] Wood et al. (2018, pp 60-62).

conduct) and abide by associated procedures if they choose to meet with a lobbyist on the list.

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?

Ideally yes, but this is tricky to comply with and enforce. The NSWEC could occasionally audit lobbying activity to identify any lobbyists who should be registered. The primary goal would be to improve the integrity of lobbying information and educate lobbyists and public officials on their responsibilities. Public officials should assist these audits by providing information on meetings if requested by the NSWEC.

20. Should government officials be required to comply with certain meeting procedures when interacting with lobbyists? If so, what procedures are appropriate?

Government officials should uphold their code of conduct at all times and abide by specific procedures if meeting with someone listed on the Lobbyists Watch List.

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?

Yes. A cooling-off period helps to minimise three main risks. First, senior officials could make a decision while in office with a view to their future employment. Second, they may bring privileged information with them to their new role. And third, their relationships may enable privileged opportunities to influence.[14]

Each of these risks 'cools' over time – for example, privileged information may no longer be relevant after a tender process is complete, or a change of government might make relationships less valuable to the new employer. The length of the cooling-off period should strike a balance between minimising these risks and minimising restrictions on people's careers. We recommend a cooling-off period of at least 18 months.

22. How should a post-separation employment ban be enforced?

The first challenge in enforcing a post-separation employment ban is determining whether a breach has occurred. NSW ministers are already required to seek the advice of the Parliamentary Ethics Adviser and table this advice in Parliament. This could be used to determine whether a breach has occurred.

If a breach is determined, then the relevant political party should encourage resignation from the new role or deferral of employment. If the individual continues in the role, then their access to public officials should be denied where possible. For example, access to the NSW Parliament should be restricted and the individual should be listed on the Lobbyists Watch List.

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

[14] Wood et al. (2018, pp 20-29).

government official and, if so, when they left their public office?

Yes.

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?

No. Provided there is a sufficient post-separation employment ban then former government officials should be treated consistently with other lobbyists.

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?

This issue is beyond the scope of our work.

3 Measures to improve fairness

NSW can help to 'level the playing field' in public policy debates by actively seeking out under-represented views and supporting advocacy for disadvantaged groups.

Fair consultation processes

26. Should there be NSW Government guidelines on fair consultation processes?

Yes, in principle, but the effectiveness of such guidelines will depend on how they are implemented and communicated.

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?

Citizen engagement is a core responsibility of politicians and public servants.[15] But it's not easy. One way to get better, more inclusive policy debates is to embrace policy review processes that actively seek out a range of voices.

Various institutions and processes already facilitate this and could provide a guide.[16] For example:

- The Productivity Commission inquiry process is a best-practice example of broad consultation. It requests input from groups on all sides of a debate, publishes their submissions, holds public hearings to test the views of interested parties, publishes a draft that includes recommendations, and then holds another round of consultation on the draft. The government is required to table the Commission's findings and respond to recommendations within 25 sitting days.[17]
- The Commonwealth Senate and House committee hearing processes, while not exhaustive, also draw out views from a range of parties and puts them on the public record. The recent House of Representatives inquiry into the implications of removing refundable franking credits, while highly politicised, adopted an innovative approach to consultation. Time was allocated at every public hearing for interested members of the public to make 3-minute representations to the committee.

The One Nation proposal[18] to improve the effectiveness of the NSW Legislative Council draws on many aspects of best practice policy making. If adopted by the parliament, it could significantly improve consultation on difficult policy issues.

The proposal will introduce a Green and White Paper process for all highly contentious legislation before it passes the Legislative Council. It specifies that public responses be sought on the Green Paper including impartially-chaired focus groups representative of the wider public (suburban, regional and country NSW).

[15] Holmes (2011); and Information and Privacy Commission NSW (2018).
[16] Wood et al. (2018, pp 67-68).
[17] PC (2014).

[18] https://nsw.onenation.org.au/policies/better-government-in-nsw-a-more-effective-legislative-council/

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

See above.

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?

Disadvantaged and diffuse interests are often under-represented in policy debates. For groups without an obvious publicly-funded advocate, government should offer financial support – for example to not-for-profit organisations that represent the interests of young people, older Australians, consumers, the homeless, or people with a disability.[19]

The NSW Government should consider creating an advocacy contact office to help such groups navigate the process of making contact with parliamentarians and public servants.

[19] Wood et al. (2018, pp 67-68).

4 Measures to improve freedom

NSW can improve freedom and encourage advocacy by regulating the lobbied rather than the lobbyist wherever possible.

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?

The aim should be to promote transparency of lobbying activity and accountability of public officials. Transparency enables the public, media and Parliament to hold officials to account.

The resources of those lobbying and being lobbied should be considered where measures to improve transparency and accountability impose a burden. For example, registering as a lobbyist and providing information on lobbying activities imposes an administrative burden on lobbyists so should be restricted to the minimum critical information and to those paid to lobby regularly ('repeat players') rather than ad hoc lobbyists (see Section 1).

Regulation should be borne by the lobbied rather than the lobbyist wherever possible, because this encourages advocacy while underscoring the responsibilities of public officials.

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?

This issue is beyond the scope of our work.

32. Could existing or new regulatory requirements drive improper lobbying practices underground or have a dampening effect on legitimate lobbying?

It is difficult to see how reporting on lobbying approaches would dampen legitimate lobbying activity. That groups or individuals affected by a policy change would seek to discuss it with government officials should neither surprise nor attract opprobrium.

The dual reporting processes we propose would remove some of the risk that either the lobbyist or public official fails to disclose lobbying contacts. If lobbyists are required to disclose contacts and officials release their diaries, non-disclosure will only be effective if both parties agree to breach their obligations.

Some parties may seek to exploit the targeted nature of reporting, to avoid disclosures. For example, we recommend disclosure requirements be restricted to 'repeat players' and the most senior policy makers. Parties could avoid disclosure by shifting lobbying activities to those not covered by reporting requirements (backbenchers or party officials for example are not required to disclose their diaries). However, these workarounds come at a cost for lobbyists – they are likely to be significantly less effective at influencing policy decision-making.

5 Measures to improve compliance and enforcement

NSW could consider random audits to improve compliance, and restricting access to senior policy makers as a sanction for lobbyists who fail to meet minimum ethical standards under the code of conduct.

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?

An independent body should have an educative role to help parliamentarians, ministerial staff and lobbyists understand their responsibilities and disclosure obligations.[20] In NSW this could be ICAC or the NSW Electoral Commission. We have not assessed the adequacy of existing education initiatives in NSW.

An ethics adviser should be available to MPs to provide advice when they are in doubt. Professional development for MPs is also worth considering.[21]

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?

This issue is beyond the scope of our work, but see Coghill et al. (2008a and 2008b).

Promoting independent supervision to enforce lobbying laws

35. Does the NSW Electoral Commission have adequate powers and resources to enforce lobbying regulations in NSW?

This issue is beyond the scope of our work.

36. How can the enforcement of the lobbyist regime be improved?

The recommendations provided in this submission would improve transparency of lobbying activity and encourage compliance. Occasional random audits of the register against ministerial diaries and the (private) records of other public officials (with their cooperation) would improve the integrity of lobbying information.

37. Are the sanctions under the lobbyist legislation adequate (that is, suspension of lobbyists, placement on the Watch List and deregistration)?

Additional sanctions should be considered, including:

- Restricting access to the NSW Parliament for lobbyists who breach the code of conduct.
- Requiring political parties to assist in denying access to lobbyists on the Watch List (for example by not allowing anyone on the Watch List to attend party functions).

[20] Wood et al. 2018, p 61.

[21] See Coghill et al. (2008b).

References

Coghill et al. (2008a). Coghill, K., Donohue, R. and Holland, P. "Parliamentary Accountability To The Public – Developing MPs' Ethical Standards". *Australasian Parliamentary Review* 23.1, pp. 101-120.

Coghill et al. (2008b). Coghill, K., Holland, P., Donohue, R., Rozzoli, K. and Grant, G. "Professional development programmes for members of parliament". *Parliamentary Affairs* 61.1, pp. 73-98.

Daley et al. (2018). Daley, J., Duckett, S., Goss, P., Terrill, M., Wood, D., Wood, T. and Coates, B. *State Orange Book 2018: Policy priorities for states and territories*. Grattan Institute: https://grattan.edu.au/report/state-orange-book-2018/.

Holmes, B. (2011). *Citizens' engagement in policymaking and the design of public services*. Research Paper No. 1 2011–12. Parliamentary Library: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/%5C%20pubs/rp/rp1112/12rp01?print=1.

Information and Privacy Commission NSW (2018). *Charter for Public Participation – A Guide To Assist Agencies And Promote Citizen Engagement*. June. NSW Information and Privacy Commission: https://www.ipc.nsw.gov.au/charter-public-participation-guide-assistagencies-and-promote-citizen-engagement.

Office of the Commissioner of Lobbying of Canada (2019a). *The Lobbying Act*. https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_00008.html

Office of the Commissioner of Lobbying of Canada (2019b). *Are You Required to Register in the Federal Registry of Lobbyists?* https://lobbycanada.gc.ca/eic/site/012.nsf/eng/h_01085.html

PC (2014). *A quick guide to the Productivity Commission.* Productivity Commission: https://www.pc.gov.au/about/glance/quickguide/productivity-commission-quickguide-2014.pdf.

PM&C (2016). *Best Practice Consultation*. Guidance Note. Department Of The Prime Minister and Cabinet, Office Of Best Practice Regulation: https://www.pmc.gov.au/sites/default/files/publications/bestpractice-consultation.pdf.

PM&C (2018). *Guidelines relating to Official Gifts received*. https://www.pmc.gov.au/government/official-gifts/guidelines-relating-official-gifts-received.

Queensland Government (2016). *Ministerial Code Of Conduct*. Department Of The Premier And Cabinet. https://www.premiers.qld.gov.au/publications/categories/policies-andcodes/handbooks/ministerial-handbook/appendices/appendix-1.aspx.

Queensland Integrity Commissioner (2019). Register of lobbying contacts: https://lobbyists.integrity.qld.gov.au/ContactLog.aspx.

Wood et al. (2018). Wood, D., Griffiths, K., and Chivers, C. *Who's in the room? Access and influence in Australian politics*. Grattan Institute: https://grattan.edu.au/report/whos-in-the-room/.