

June 17, 2019
NSW ICAC
Level 7, 255 Elizabeth St
Sydney, NSW 2000

Dear ICAC,

Submission to the NSW ICAC: Operation Eclipse.

Thank you for the opportunity to make a submission in response to your discussion paper, which is part of your ongoing inquiry Operation Eclipse.

Both the introductory paper, *The regulation of lobbying access and influence in NSW: a chance to have your say*, and the discussion paper *Enhancing the democratic role of direct lobbying in NSW*, are broad and wide ranging. Each rehearses many worthwhile arguments around the impacts and regulation of influence in the NSW political system (and beyond). What these documents also underline is that we do lack a convincing evidence base as to (i) how existing regulatory schemes work and (ii) the performance of such systems (design versus implementation). To really gain leverage over these questions, we ought to thoroughly map and assess the evolving set of *different* practices among the Australian states. The experimentation among the states offers the chance to test what works, and what the implications of certain definitions and regulatory regimes is. It would seem ideal to capture this diversity and to use it as the foundation for conversations as to ‘what’s next’? As will become evident, the research base is largely limited to the Federal level, guides my remarks¹. Where relevant I offer insights based on research elsewhere.

While I have views on many of the themes the inquiry raises, for the reason of time, I restrict my input to the following core observations:

1. What constitutes lobbying?

The ICAC document spends some time focussing on lobbying effort, which manifests itself as ‘contact’ – written or oral – between lobbyists and public officials (civil servants or elected officials). However, lobbying in this conventional insider sense – so called direct lobbying - is not the entirety of lobbying effort. For instance, lobbying efforts are expended on media coverage, social media campaigns, and advertising which targets the general public. This indirect lobbying is referred to in the paper only

¹ This is certainly true of academic published studies. The Grattan Institute report “Who’s in the room? Access and Influence in Australian Politics” does, however, provide a good empirical assessment of some other schemes.

tangentially in the context of fake news and misinformation. I would encourage more attention to this indirect form of lobbying – which is often most prevalent on high salience issues (or issues where advocates seek to engage and mobilise the public). While this does not easily fit with the existing conception of lobby regulation as direct contact, it is important nevertheless. How might this be incorporated into regulatory effort? It might be addressed in terms of reporting on expenditure in relation to advertising in traditional and online media on ‘policy’ questions (outside of electoral periods).

2. Expanding Coverage to ‘In-house’ lobbyists

The definition of lobbyist should be expanded to ‘in-house’ staff within interest groups, associations and corporates. The argument to exempt in-house lobbyists seems to be made on the basis that third party lobbyists need declare who their client is, given they have multiple, otherwise the target of lobbying is not clear on who the principal is (see Halpin and Warhurst 2017). With in-house lobbyists, their client is never in question. Yet, there are other arguments that would render this logic problematic. There seems to be value in providing details of lobbying by such agents in order to reassure the *public* that there is transparency. As is noted in the report, the perception of integrity in routine and often valuable dealings between public officials and organised interests is maintained. This is a low cost way of so doing.

These will have cost in relation to administrative burden for those included within a definition of lobbying, which will likely be felt hardest by those with the fewest resources. More work would need to be done to striking the right balance between the burden of increasing levels of data gathering and reporting, and the desire not to impede the pluralistic expression and voice of views on matters of public policy.

That this move has already occurred to some degree in Victoria offers at least some up front data on the implication of such a scenario. Some work to evaluate it might inform subsequent ICAC recommendations and government decisions.

While no empirical work has been done, my hunch is that the lobbying industry would raise few concerns with more expansive coverage and higher reporting/compliance measures. Evidence for this can be gleaned from the previous NSW ICAC and Federal Parliamentary inquiries on this theme, which noted few objections raised by the lobbying industry.

3. The ‘market’ for lobbying services

One perspective rarely raised in popular debate is the way regulatory efforts may or may not foster transparency in the ‘market’ for lobbying services from a ‘client’ perspective. While not the key focus of this inquiry,

the provision of data on which lobbyist works for whom, and on what, will arguably enable those ‘purchasing’ lobbying services to be aware of potential conflicts of interest. These general principal-agent problems in the market for lobbying services have been raised in the academic literature of US lobbying (see Lowery and Marchetti 2012). It is important that this perspective is incorporated into discussions of regulatory schemes. Efforts by those engaging lobbyists to hold them to account in the work they do, is surely an important way to bolster efforts at integrity within the system.

4. Adding Depth of Data on Interactions/Contact

If we restrict the regulatory focus on lobbying to direct contacts, there are multiple ways in which data on these interactions can be bolstered.

In the parliamentary context, what is known as ‘Door Pass’ data – lists of those who are granted access to the legislative building – would be one easy way to make apparent to the public who is accessing key decision makers on a routine basis. This is now standard in many European democracies and at the European Parliament. It enables civil society groups and academic researchers to easily and authoritatively speak to patterns of access by organised interests. This has not occurred at the Federal or State levels (to my knowledge).

The same opportunities exist for the administrative arena, where lobby submissions to consultations, inquiries and others routinized input are regularly received, but often not systematically made available to the public. I say more on this in point 6 below.

The current lobbying registers are poorly designed and make it quite difficult for third parties – such as researchers, journalists or other transparency groups – to monitor activity. The ICAC discussion paper mentions US Congressional Lobbying requirements, under the Lobby Disclosure Act (LDA), which has transformed the capacity for government and the public to monitor direct lobbying from all lobbyists who exceed a minimum annual spend. The data supplied is quite detailed in quarterly returns (albeit these are made available only as PDFs). It has led some civil society groups to clean and provide the data for the use of researchers and other interested parties (see OpenSecrets website managed by the Centre for Responsive Politics). Crucially it has created a very large research base revealing patterns of lobbying at the aggregate level, right down to the level of an issue area or even a bill. Such a system in Australia – and its states – would enable similar opportunities for civil society groups and the media to scrutinise relationships characterised as lobbying. In the absence of such data, the media and commentators will likely rely on crude measures and sensational cases that come to light periodically. In my view, this approach tends to lead to a poor public debate led by scandals.

In short, I would suggest already collected contact data be made available, systematically (and for free), in a form that are able to be used by third parties, like journalists and researchers. In addition, reforms to lobby registration systems should engage with the US congressional case, specifically in respect of the data fields that are collected.

5. Revolving Door

The report seeks input on what is often referred to as the revolving door: where elected officials, or those serving within government, move from those roles and into jobs in the advocacy sector. The movement of individuals between, say, industry, civil society and government – with required cooling off periods – is not in and of itself problematic. Indeed, one view might have that it promotes mutual understanding and opportunities for shared problem solving efforts. Yet, the direct movement from senior levels of government to the lobbying industry – especially where the individual possesses contacts and knowledge of key processes and issues – does create an impression that the insights of public/government service have been opportunistically monetised. Rightly, there are measures to enforce cooling of periods that limit such movements. If these are set, it is crucial that they are noted, monitored and enforced. The trickle of media ‘scandals’ in this regard is arguably one dynamic undermining trust in the motives of public officials in their career choices.

Earlier work I conducted showed that up to 30% of all those on the Federal Lobby Register were former government officials as defined by the guidelines (Halpin and Warhurst 2017). More recent fine-grained work, as yet unpublished, shows that in fact when one checks the veracity of entries against publically available information – such as LinkedIn accounts and lobbying firm websites – the figure is more like 56%. This figure itself is not alarming, it merely highlights that any collection – or indeed, a register – needs to be adequately resourced so as to convey information that is accurate and timely. I am aware of no such studies of the various schemes across the States in Australia (the best I am aware of is the Grattan Institute report). Clearly this would be useful in firming up any options for NSW.

6. Resourcing Disadvantaged Groups

The academic literature on the organised interest system in Australia shows that it is *numerically* skewed towards economic and professional interests (Fraussen and Halpin 2016). There is somewhat of a double disadvantage in the sense that many groups advocating for non-economic interests in turn have lower staff resources with which to engage in advocacy – and many of their staff no doubt juggle advocacy and service delivery functions. Moreover, the analysis of the commercial lobbying

register shows that the client base is overwhelmingly private businesses (Halpin and Warhurst 2017). This is not peculiar to Australia, and in fact is a common finding in many OECD nations.

While there is a normative view that plural political systems ought to provide equal opportunity for interested parties to exercise voice in the context of public policy decisions, there are few clear ways to ensure this actually occurs. Various schemes have been floated – which remain only theoretical propositions. For instance, in the US, Drutman and Mahoney (2017) have proposed a POST, MAP and ASK system for congressional lobbying. It would entail that advocacy groups POST their position papers on the web – on a site maintained by the Congressional Library. In turn, that the Library would MAP the group policy positions and then make these positions publically available. Finally, congressional committees would ASK for comments from groups that represented views that the MAP process showed were missing.

Elements of this framework exist in Australia, which might be adapted to a similar effect. Departments routinely run policy consultations and Federal/State parliamentary committees run inquiries: in both cases, interested parties provide formal written submissions. However, in the former case, the access to these submissions is haphazard, and there is not direct mapping of submissions until after the consultation is over. The only way to systematically access these submissions is by way of FOI requests, which are routinely denied on the grounds of the work involved to gather them or that requests are too vague. While there is little doubt that public servants ‘ask’ for groups to provide input – that is, they solicit input – there is no formal and public mechanism to demonstrate this has occurred (nor that it addresses apparent gaps in respect of voice). This brief proposal is merely a hint at the ways that existing practices and routines might be formalised and built on to aid the task of demonstrating pluralistic policy advice systems.

7. Party financing

The report tangentially refers to ongoing ‘clientelism’ between decision makers and lobbyists, whereby the former comes to rely on donations from the latter. This inquiry is not focussed on electoral funding and regulations. However, there is a clear link. If there is transparency around who talks to whom about what issue of public policy, then the public will no doubt wonder what pre-existing relationship in terms of funding dependencies may exist. Real time reporting of electoral spending and donations to parties would alleviate these concerns (along with lowering thresholds for reporting).

I hope you find these comments and points of some value in your work. I am happy to elaborate on these and related issues at some point in the future should this be of interest.

Sincerely,

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References

Drutman, L., and Mahoney, C. (2017) 'On the advantages of a well-constructed lobbying system: toward a more democratic, modern lobbying process'. *Interest Groups and Advocacy*, 6, 290–310

Fraussen, B., and Halpin, D. (2016). 'Assessing the Composition and Diversity of the Australian Interest Group System'. *Australian Journal of Public Administration*, 75(4), 476-91.

Halpin, D. and Warhurst, J. (2016) 'Commercial lobbying in Australia: Exploring the Australian Lobby Register', *Australian Journal of Public Administration*, 75(1) 100-11.

Lowery, D. and Marchetti, K. (2012) 'You don't know Jack: Principals, agents and lobbying', *Interest Groups & Advocacy*, 1, 139–170.