Submission to the Independent Commission Against Corruption's investigation into the regulation of lobbying, access and influence in NSW

4 October 2019

Table of contents

Opening

Local Government NSW (**LGNSW**) is grateful for the opportunity to make a submission to the Independent Commission Against Corruption (**ICAC**) on its investigation into the regulation of lobbying, access and influence in NSW.

LGNSW is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

This submission outlines LGNSW's response to questions put to LGNSW by the ICAC in July 2019 as part of the ICAC's examination of legislation, policies and practices impacting how lobbying and influencing activities are regulated in NSW.

This submission has been endorsed by the LGNSW Board.

1. Should the LOGO Act apply to local councils generally, being the Mayor, councillors and council staff?

LGNSW strongly supports the importance of disclosure, transparency and accountability in local government. LGNSW circulated the ICAC's questions to members seeking their views and whilst there is overwhelming agreement within the sector that local government must be transparent and accountable to the community, there was a wide diversity of views regarding the extension of the *Lobbying of Government Officials Act 2001* (**LOGO Act**) to local government.

It is LGNSW's position that the LOGO Act should be extended to local government. However, LGNSW notes that the *Local Government Act 1993* (**LG Act**) and in particular Chapter 14 of the LG Act, already contains an extensive framework for regulating conduct, honesty, disclosure of interests, misconduct, corruption and for the making and investigating of complaints. Contained within this framework are provisions related to the Model Code of Conduct for Local Councils in NSW, which is prescribed under the Local Government (General) Regulation 2005.

The Model Code of Conduct contains further provisions for:

- General conduct
- Submitting returns of interest
- Conflicts of interest (including pecuniary conflicts)
- Gifts and benefits
- Interactions between mayor and councillors and council staff.
- Use of council information and resources
- Making complaints under the code of conduct

Further, the *Electoral Funding Act 2018* (**EF Act**) contains detailed provisions dealing with reporting requirements for local government electoral donations and expenditure.

While the NSW Government is similarly captured by the EF Act, the Code of Conduct for Members (Adopted 7 May 2019) is not as restrictive or onerous as the Model Code of Conduct for Local Councils in NSW.

Any extension of the LOGO Act to councils should take into account the existing and extensive regulation of local government under legislation other than the LOGO Act and steps should be taken to avoid duplicative or unnecessary regulation.

Lack of administrative support within councils

A possible implication for councils if the LOGO Act is amended to include local government officials in the definition of *"Government official"* under that Act is that it might impose additional administrative cost on councillors to ensure for example, that meetings with lobbyists are properly recorded and attended by senior council staff, which councils cannot resource. Unlike state and federal members of parliament, councillors are not employed on a full-time basis and generally do not have access to administrative support. However, councillors are nonetheless required to comply with extensive regulatory obligations under the LG Act and the EF Act.

At LGNSW's 2018 Annual Conference, councils resolved for LGNSW to call on the NSW Government to investigate options for full-time councillors. LGNSW wrote to the Minister for Local Government on this matter, and in August 2019 the Minister responded that while the role of a councillors is an important one in the local community, it is also viewed as a voluntary one.

It is important that this distinction between part time elected representatives at the local level, and full-time, adequately remunerated elected representatives at the state level is duly accounted for in any consideration of extending LOGO provisions to local government. It is particularly relevant to note that many councillors have full-time roles that are distinct from their positions as elected representatives.

Councillors generally do not have access to administrative support and it is likely that such support would need to be provided to councillors by the council. However, councils are not resourced to comply with increasing legislative obligations. Councils in NSW already operate in a constrained financial environment as a result of rate-pegging set by IPART, cost shifting onto local government and state and federal funding arrangements that are no longer fit for purpose. If additional regulatory cost increases were to be imposed on councils (and thus ratepayers), councils may be forced to cut services for the community.

Nature of lobbying at the local government level

Since the introduction of the LOGO Act in 2011, there have been significant reforms to the planning system in NSW, particularly in Greater Sydney and Wollongong. In 2017, the NSW Government introduced changes to make local planning panels (**LPPs**), formerly known as independent hearing and assessment panels, mandatory for all councils in these areas. In late August 2019, the NSW Government announced the extension of the LPP framework to the Central Coast. The NSW Government has claimed that:

> *This means panels of qualified, independent experts will be determining the most sensitive and complex development applications, which will improve planning outcomes and the probity of the system.*
>
> *Other changes in the Act build on this by strengthening the rules for Sydney and district regional planning panels in line with the LPPs. This includes reducing corruption risks by ensuring property developers and real estate agents cannot sit on panels, improving*

> *accountability by making sure all meetings are held in public and increasing transparency through recording meetings.*[1]

LGNSW is opposed to the mandatory application of LPPs, which in our view, erode community and local government planning powers. It is essential that communities have a say in the future of their communities through a planning process led by democratically elected representatives.

In considering whether the LOGO Act provisions should be extended to local government, due consideration should be given to the considerable authority (and any associated lobbying risk) that has been transferred to LPPs in relation to development applications and planning proposals and whether the LOGO Act should apply to LPPs.

As the closest sphere of government to the community, councillors and councils frequently engage with community members on a broad range of matters, reflective of the broad area of responsibility of local government. Indeed, section 232 of the LG Act makes clear that one of the roles of a councillor is to facilitate communication between the local community and the governing body. Community engagement processes of councils are an essential part of informed decision making.

Principle 1 of the NSW Government's Better Regulation Principles is that:

> *The need for government action should be established. Government action should only occur where it is in the public interest, that is, where the benefits outweigh the costs.*[2]

In this instance, the case for an extension of the LOGO Act has not been made, particularly as doing so would be duplicative and of unclear benefit.

Recommendation 1: The LOGO Act should be extended to local government provided that consideration is given to the range of legislation and regulation that already exists to hold the local government sector to account and that any changes avoid unnecessary duplication.

Recommendation 2: Any consideration of extending the LOGO Act to councils should take into account:

(a) the unique local government context and the importance of community consultation at a local level, and

(b) the existing and extensive regulation of local government under mechanisms other than the LOGO Act, in order to avoid duplicative or unnecessary regulation.

Recommendation 3: Noting the constrained financial environment in which councils operate and the capacity of councillors as volunteers, if the LOGO Act is applied to councils, the NSW Government must commit to fully funding any increased compliance costs.

[1] Department of Planning, Industry and Environment, Part 2 – Local Planning Panels, 6 July 2018, available at: www.planning.nsw.gov.au/Policy-and-Legislation/Environmental-Planning-and-Assessment-Act-updated/Guide-to-the-updated-Environmental-Planning-and-Assessment-Act-1979/Part-2-Local-planning-panels

[2] NSW Government, Guide to Better Regulation, January 2019, available at: www.treasury.nsw.gov.au/sites/default/files/2019-01/TPP19-01%20-%20Guide%20to%20Better%20Regulation.pdf

2. Should the LOGO Act be expanded to cover other classes of lobbyist, such as town planning consultants, architects or lawyers who make representations to local councils on behalf of individual clients?

Town planning consultants, architects and lawyers who make representations to local councils on behalf of individual clients have a legitimate, direct, professional role to play in the development application process. Inclusion of these professionals within the scope of the LOGO Act may fail to draw a distinction between the professional services they provide and the professional lobbying activities which appear to be the target of the LOGO Act.

Furthermore, across NSW there are very different systems of planning and decision making (for example, metropolitan Sydney councils have no ability to make decisions about development applications, however this is not the case across NSW), and these differences would need to be carefully considered should the LOGO Act be expanded to cover those in these professional groups seeking to exert an influence on a decision.

Given the diversity of activities these professional groups may undertake within a council, and the diversity of planning consent mechanisms between councils, maintaining one lobbying register of all such professionals is likely to provide little or no additional protection against any undue influence without further, detailed consideration of how this might practicably might be applied. In addition, a range of measures to protect the integrity of the planning system are already provided for in the LG Act and in the *Environmental Planning and Assessment Act 1979*.

Recommendation 4: That ICAC recognise that town planning consultants, architects and lawyers have a legitimate, direct and professional role to play in local government and significant further refinement would be required prior to any expansion of their obligations.

3. Should LGNSW be obliged to register as a Third-Party Lobbyist under the LOGO Act?

A "*third-party lobbyist"* is defined in the LOGO Act as *"an individual or body carrying on the business (generally for money or other valuable consideration) of lobbying Government officials on behalf of another individual or body"* (s 3).

While it is true that LGNSW carries out advocacy on behalf of its member councils, who pay a membership fee, this is only one service provided by LGNSW to its members and LGNSW does not undertake advocacy on behalf of any other individuals or entities other than local government members, acting in the public interest. In addition to lobbying, LGNSW provides legal and industrial advice and representation to members, learning and development and recruitment services and a suite of other services and functions.

LGNSW is different to third-party lobbyists currently listed on the Register of Third-Party Lobbyists. The objects of LGNSW, which is an association registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) and the *Industrial Relations Act 1996* (NSW), include, among other matters (clause 4 Rules of the Local Government and Shires Association of New South Wales):

- To encourage, promote, protect and foster an efficient and effective autonomous, democratic system of Local Government elected by and responsible to local communities,

- To promote, maintain and protect the interests, rights and privileges of Local Government in New South Wales and of the constituent members of the Association,

- To represent the members of the Association and Local Government generally in their dealings with State and Commonwealth Governments, with statutory and other corporations, with the media and with the public.

LGNSW does not carry on the business of advocacy for a fee. Advocacy undertaken by LGNSW is guided by resolutions formally and transparently passed by members at LGNSW's annual conference. The LGNSW annual conference, held in October each year, is the advocacy setting arena for local government in NSW. All motions are put forward by elected representatives of members, they are scrutinised carefully by the LGNSW Board and debated by delegates at conference. The entirety of LGNSW's advocacy activities relate to public interest matters which are important to the local government sector and the NSW community, such as funding for local libraries, waste and recycling, disability access, child protection, biodiversity, rates, planning, democracy and other matters relevant to local government.

4. Should other approaches be taken to reduce the risk of improper lobbying practices in local government, and
5. Should any other enhancements be made to the way that lobbying in local government is regulated?

LGNSW would support amendments to the Model Code of Conduct for Local Councils to enhance the transparency and accountability of local government practices and looks forward to working further with the ICAC on the details of any changes proposed.

6. What is LGNSW's view on the use of the no reason/38 week payout provision option for terminating the general manager's contract?

It is LGNSW's view that the ability for councils to terminate the employment of a general manager in accordance with clause 10.3.4 of the standard contract of employment for general managers by giving 38 weeks' pay should be retained.

However, in LGNSW's view, consideration should be given to amending the standard contract to provide that where a general manager's employment is terminated pursuant to subclause 10.3.4 of the contract (i.e. by giving 38 weeks' pay or the balance of the contract, whichever if the lesser) and the employee requests the reason(s) for termination, such reason(s) must be provided to the employee in writing.

7. What is LGNSW's view on what consultation in the context of section 337 of the *Local Government Act 1993* should look like in practice?

Since the ICAC approached LGNSW with these questions in July 2019, the Office of Local Government (**OLG**) has published a circular to councils regarding the appointment and

dismissal of senior staff, dated 14 August 2019. LGNSW was a member of the OLG's Employment Matters Reference Group and assisted in the development of that circular.

LGNSW supports the position set out in this circular and shares the OLG's view that general managers must afford all councillors a reasonable opportunity to comment on proposed appointments or dismissals of senior staff and that general managers must consider any such comments before making a decision to appoint or dismiss.

Regarding recruitment panels, the *Local Government Act 1993* does not preclude councillors from being on them and there may be instances where having a councillor on the recruitment panel could be justified, provided there are clear and compelling reasons and no conflicts of interest exist. However, recruitment panels for senior staff positions should not be dominated by councillors.

* * *

LGNSW would welcome the opportunity to assist with further information during this review to ensure the views of local government are considered.

To discuss this submission further, please contact LGNSW Executive Manager, Industrial relations and Legal Jessica Wood on 02 9242 4125 or at jessica.wood@lgnsw.org.au.