The regulation of lobbying access and influence in NSW - a chance to have your say (April 2019)

From Dr David Solomon AM.
Questions posed in the paper, and my responses.

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?*

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

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

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?*

1. In my view, the Canadian system is the most appropriate for Australia to adopt. Because it is concerned with those who actually lobby, rather than with a small class of lobbyists (third-part professional lobbyists) it addresses all lobbying rather than just a small proportion (say, 20 per cent) of it.
2. The register should be of all those who lobby, including peak bodies and those who lobby on their own behalf (as in Canada).
3. No – all should be bound by the Code.
4. Preferably, no, though it may be necessary to draw some distinctions for ad hoc lobbyists.
5. Perhaps for those who make political party donations.

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?*

6. The present requirements for initial registration are probably sufficient.
7. Yes, and it should be publicly accessible on a register that lobbyists are required to update regularly (say, monthly).
8. Probably not.
9. Certainly – including backbench MPs who may influence party decisions.
10. Who they meet with, all attendees, nature of the matters discussed.

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?

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 passes

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

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

11. In a publicly accessible on-line register.
12. Yes, but this would involve co-operating between a number of (independent) agencies.
13. Certainly.

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?

14. As outlined in the current Qld code.
15. No – and they should be banned from doing so for 5 years after they leave Parliament.
16. Yes, over a set, small amount (ie, the occasional lunch or football ticket need not be banned, but should be declared.)

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?

17. Yes.
18. Requirement to document attendance and subject matter discussed, such material to be able to be accessed by the public.
19. Yes.
20. Yes, as in 18 above.

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?

21. Yes, 5 years.
22. By legislation – civil penalties should generally apply, but there should be the possibility of prosecution where the possibility of corruption arises.
23. Yes.
24. Yes. They should not be able to lobby for 5 years. The obligation for disclosure should continue for 5 years after they take on a lobbying role.

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?*

25. Yes, but it is difficult to set down a particular rule. Almost all Cabinet decisions should fall within this requirement.

Fair consultation processes

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

26. 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?

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

25-7. I don't wish to comment on this.

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?*

29. I have no comment.

Promoting the balance of freedom, restrictive measures and proportionality

28. 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?

29. 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?

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

lobbying?

31. Is there adequate support for lobbyists and government officials to enable them to understand their obligations under the lobbying legislation?

32. 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?

28-32 At this stage I can only suggest that the Canadian system should be our guide.

Promoting independent supervision to enforce lobbying laws

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

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

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

33-35. The lobbying regulations need to have legislative backing and the legislation should provide the Electoral Commission with full investigative powers and contain penal provisions covering all significant (enforceable) aspects of the regulations.

Current mechanisms for the registration of lobbyists

Dr David Solomon AM

Paper to be presented at a conference of the Australian Institute of Administrative Law, 19 July 2019

The title of my paper indicates that it is about the registration of lobbyists. But taking my cue from the theme of this session, concerned as it is with 'transparency and accountability' I intend to go a lot further. There are a number of resources that provide the details of the current mechanisms for the registration of lobbyists in Australia – among them the Commonwealth Parliamentary Library's research publication, 'Who pays the piper? Rules for lobbying governments in Australia, Canada, UK and USA'.[1] I don't intend to do other than summarise the main features of the systems for regulating lobbyists that have been adopted in Australia at the Commonwealth level and to detail some of the ways in which different States have developed and adapted them. Instead I propose to devote most of the paper to an examination of the supposed purpose of these regimes and whether it is sufficient, particularly in the light of international experience. In doing so I will also refer to 'Operation Eclipse', an examination currently being undertaken by the New South Wales Independent Commission Against Corruption of how the NSW government regulates lobbying, access and influence.

The Commonwealth lobbying scheme

The mainspring of the Commonwealth scheme (and the other state schemes) is a lobbying code of conduct. It provides definitions, establishes a register of lobbyists and sets out the rules governing contact between lobbyists and government representatives. The code 'is intended to promote trust in the integrity of government processes and ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty'.[2]

The lobbyists with which the Code is concerned are those people, companies or organisations that conduct 'lobbying activities on behalf of a third party client or whose employees conduct lobbying activities on behalf of a third party client'.[3] This is a very narrow definition, designed to include relatively few of the people who actually lobby government ministers, their staff and senior public servants. Among those the definition says are not lobbyists that will be regulated under the scheme are (1) non-profit organisations 'constituted to represent the interests of their members'[4] and (2) people, companies or organisations and their employees 'lobbying on their own behalf rather than for a client'[5]. Also excluded are (3) professionals such as doctors, lawyers or accountants or other service providers who make 'occasional' representations to government in a way that is 'incidental'

[1] Deidre McKeown, 1 August 2014.
[2] Lobbying Code of Conduct, 1.4.
[3] Code, 3.15.
[4] Code, 3.5.2.
[5] Code. 3.5.6.

to the provision of their professional or other services.[6] I will discuss later the consequences and effect on the regulation of lobbyists that flow from these three particular exclusions.

Those lobbyists who are covered by the definitions are required to register various details about the business, its employees and the clients for which it lobbies. The register is a public document. There is little else about lobbying that is publicly available, other than what can be gleaned from Freedom of Information searches.

The lobbying scheme is not statutory – it depends for its effectiveness on the Code forbidding Government representatives from allowing themselves to be lobbied by a lobbyist (as defined above) who is not on the Register of Lobbyists, and on the willingness of lobbyists to comply with its demands. Being registered facilitates acquiring the necessary pass to enter and roam through Parliament House.

Government representative is defined to mean ministers and parliamentary secretaries and their staff, agency heads, public servants, contractors and consultants and members of the Australian Defence Force.[7]

The Code bans former ministers and parliamentary secretaries from engaging in lobbying relating to any matter that they had official dealings with in their last 18 months in office, for a period of 18 months after they cease to hold office. Similar bans apply to former ministerial staff, senior defence staff and senior public servants, though the relevant periods are 12 months rather than 18.

A person who has been sentenced to a term of imprisonment of 30 months or more, or convicted of a dishonesty offence in the previous 10 years, cannot be registered as a lobbyist. Nor can members of political party executives. Breaches of the Code are punishable only (for lobbyists) by removal from the register of lobbyists. The Secretary has power to remove a lobbyist from the register at the direction of the relevant minister.

Policy responsibility for the Lobbyist Code of Conduct and Lobbyist Register was transferred from the Department of Prime Minister and Cabinet to the Attorney-General's Department in late 2018. The day-to-day operation of the Register was moved on 10 May this year, when the Secretary of the Attorney-General’s Department became responsible for the administration of the Code and Register.

In this paper I will not examine the Foreign Influence Transparency Scheme that came into effect last year and similarly falls within the responsibility of the Attorney-General’s Department. This also deals with lobbying as defined in the Code together with lobbying on a much broader scale (such as general political lobbying for the purpose of political or governmental influence and communications activities for the purpose of political or government influence) on behalf of foreign principals. Some lobbyists will be caught up in both schemes.

The states

The basic structure adopted by the Commonwealth to register and regulate lobbyists – a code, a requirement for third party lobbyists to register and restrictions on lobbying access to government officials to registered lobbyists - forms the basis of the regulation of lobbyists in the states. Former

[6] Code, 3.5.6.
[7] Code 3.3.

ministers and senior public servants are prevented from lobbying for various periods. But there are some important differences between the Commonwealth and some of the states, and among the states, that should be noted.

Three states – New South Wales, Queensland and Western Australia – began with administrative schemes like that of the Commonwealth, but later gave them statutory force.[8] The NSW legislation has a penal provision concerning the cooling off period that former ministers and parliamentary secretaries must observe. The WA legislation imposes a financial penalty for breaches of the registration requirements.

The same three states, plus Victoria, ban lobbyists from obtaining what are described as 'success fees'.

All the states except NSW are concerned only with third party lobbyists, though in WA the definition includes such lobbying when done gratuitously. In Victoria there is a special provision to cover lobbying by Government Affairs Directors (GAD) who lobby (an extended definition applies) in a paid capacity for an organisation or business or professional or trade organisation. Elsewhere, those who lobby for such organisations are not covered by the respective codes. But the definition of a GAD is very restricted and applies only to a person who has previously held a position as a senior staff member of a Commonwealth or State minister or parliamentary secretary.

The position is different in NSW where the legislation and the code apply to almost all lobbyists, though only third party lobbyists (with exceptions for those in the some of the professions) are required to register. A contravention of the code can lead to a lobbyist being placed on the Lobbyist Watch List, which may require special procedures to apply when lobbying takes place.

In Queensland, the legislation covers the lobbying of local government as well as the state government.

Queensland's code requires lobbyists to report monthly (on a publicly accessible online register) their contacts with ministers and government officials, together with some details of the lobbying. Ministerial diaries are published monthly. NSW has a requirement for ministers to publish their diaries online quarterly.

The administration of the lobbyist schemes has been given to a variety of bodies. In NSW it is the Electoral Commissioner, in Victoria the Public Sector Standards Commissioner, in Queensland the Integrity Commissioner, in WA the Public Sector Commissioner, while in South Australia and Tasmania it is the Department of Premier and Cabinet.

Why regulate lobbyists?

The preamble to the Commonwealth code says:

> 1. Respect for the institutions of Government depends to a large extent on public confidence in the integrity of Ministers, their staff and senior Government officials.

[8] NSW – *Lobbying of Government Officials Act* 2011 as amended by the *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act* 2014. Queensland – *Integrity Act* 2009. Western Australia – *Integrity (Lobbyists) Act* 2016.

> 2. Lobbying is a legitimate activity and an important part of the democratic process. Lobbyists can help individuals and organisations communicate their views on matters of public interest to the Government and, in doing so, improve outcomes for the individual and the community as a whole.
> 3. In performing this role, there is a public expectation that lobbying activities will be carried out ethically and transparently, and that Government representatives who are approached by lobbyists can establish whose interests they represent so that informed judgments can be made about the outcome they are seeking to achieve.
> 4. The *Lobbying Code of Conduct* is intended to promote trust in the integrity of government processes and ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty. Lobbyists and Government representatives are expected to comply with the requirements of the *Lobbying Code of Conduct* in accordance with their spirit, intention and purpose.

The notion of 'legitimacy' is taken up in most of the state codes as well. For example, the Queensland code includes the following re-wording of the second and third items in the Commonwealth code:

> Professional lobbyists are a legitimate part of, and make a legitimate contribution to, the democratic process by assisting individuals and organisations to communicate their views on matters of public interest to the government, and so improve outcomes for the individual and the community as a whole.
>
> The public has a clear expectation that lobbying activities will be carried out ethically and transparently, and that government representatives who are approached by lobbyists are able to establish whose interests the lobbyists represent so that informed judgments can be made about the outcome they are seeking to achieve.

Item 2 in the Commonwealth code and its Queensland equivalent seem designed to reassure lobbyists (and the world at large) that even though they are being regulated, the government acknowledges that they make a positive contribution to the democratic way of life. However the following paragraph in each preamble then provides a 'nevertheless' justification for imposing some restrictions on how the lobbyists are allowed to operate.

Much that should be relevant to the regulatory exercise is missing from these preambles, and I will return to that later. For the moment, however, I want to concentrate on just who is being regulated in the codes.

The lobbyists with whom they are concerned are those that are strictly defined in the codes or the Act – third party professional lobbyists[9].

By limiting their focus in this way these preambles concern themselves with just a small part of the effect of lobbying on the democratic process. At one point the codes refer to lobbyists they are regulating. They then generalise about the beneficial impact of all lobbying, including lobbying that is not regulated. It is simply not correct to say that <u>all</u> lobbying of government is legitimate, and/or that lobbying by people and organisations that are <u>not</u> third-party professional lobbyists 'improve outcomes for the individual and the community as a whole'. Because lobbying by those who are not third-party professional lobbyists is not regulated in any way, the public is not and cannot be assured 'that lobbying activities will be carried out ethically and transparently, and that Government

[9] Except, as noted earlier, in NSW.

representatives who are approached by lobbyists can establish whose interests they represent so that informed judgments can be made about the outcome they are seeking to achieve.'

It can be argued – and I return to this later – that governments federal and state, of both major political parties, have chosen to regulate those lobbyists who have the least influence over government policies, actions and administration. The most powerful lobbyists have deliberately been left untouched by regulation, a demonstration perhaps of the strength of their influence over government decision-making.

However the argument that **all** lobbying needs to be regulated is put powerfully in the Commonweath preamble quoted above. 'Respect for the institutions of Government depends to a large extent on public confidence in the integrity of Ministers, their staff and senior Government officials…The *Lobbying Code of Conduct* is intended to promote trust in the integrity of government processes and ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty.' But the Code fails to deliver on its promise, by being so narrowly focused as to only cover third party lobbyists.

Who is missing?

Before referring to the categories of lobbyists excluded from scrutiny by the limited very narrow definitions in the codes I should note that at least some of those intended to be covered by the scheme have found ways of avoiding its reach. The Queensland Integrity Commissioner reported in his 2016-17 annual report that a slowdown in registration of lobbyists in that state appeared to have been the result of a change in the business model of many lobbyists, who were now offering their services as 'consultants' and providing little actual lobbying contact.[10]

The more important of those lobbyists who are excluded from the Commonwealth regulatory system are covered by the exemptions listed in the definition of lobbyists. These are:

> (1) non-profit organisations 'constituted to represent the interests of their members'[11]
> (2) people, companies or organisations and their employees 'lobbying on their own behalf rather than for a client'[12].
> (3) professionals such as doctors, lawyers or accountants or other service providers who make 'occasional' representations to government in a way that is 'incidental' to the provision of their professional or other services.

(1) The non-profit organisations 'constituted to represent the interests of their members' include such bodies as:

> The Property Council of Australia
> The Minerals Council of Australia
> The Business Council of Australia
> Australian Medical Association
> Medicines Australia
> Australian Petroleum Production and Exploration Association

[10] Queensland Integrity Commissioner, Annual Report 2016-17, p. 11.
[11] Code, 3.5.2.
[12] Code. 3.5.6.

Australian Bankers Association
Financial Planners Association
Association of Superannuation Funds of Australia
Australian Institute of Company Directors
The Australian Council of Trade Unions (ACTU)
Organisations representing some religions.

These and other peak organisations make frequent representations to government[13]. Often, the government takes the initiative in consulting them to get their views, because it considers them to be 'stakeholders'. In its last annual report, the Property Council of Australia said it spent more than $8 million on 'advocacy'[14]. The Minerals Council of Australia regards itself as a lobbyist and declares that it 'voluntarily adheres' to the Lobbyists' Code of Conduct ('where applicable')[15].

Lobbying can be extremely effective. John Menadue, who was Secretary of the Department of Prime Minister and Cabinet in 1975-76 and of three other departments between 1980 and 1986, has written about the 'scourge of lobbyists' and provided 'three recent instances of how they have corrupted open and good government':

- The Pharmaceutical Benefits Advisory Committee recommended that for 143 of the most commonly prescribed medicines, doctors could double the drugs dispensed from a single prescription. This would have saved costs for both the taxpayer and the patient. After lobbying by the Australian Pharmacy Guild (APG) the Minister, Greg Hunt, ran for cover. We now also know that the APG makes donations to One Nation in expectation of support in the Parliament.
- The National Health and Medical Research Council recommended that a range of 'alternative' clinical services no longer receive government subsidies through private health insurance. As a result some subsidies were withdrawn. So the industry lobby group, Complementary Medicines Australia went to work on Minister Hunt and he ordered that a review be made of the withdrawal of the subsidies.
- The Hayne Royal Commission recommended that trailing commissions by mortgage brokers be banned from 2020. The Government accepted the recommendation. So the 16,000 well-organised and influential mortgage brokers went to work and Treasurer Frydenberg changed his mind. There was no sign that borrowers or the public were consulted in any way. The lobbyists won again.[16]

(2) People and organisations lobbying on their own behalf. Menadue's last example, of the campaign against trailing commissions, illustrates this type of lobbying. According to a report published in the *Australian Financial Review*, the campaign was led by Mark Bouris, a friend of the Prime Minister, who personally lobbied both the Prime Minister and the Treasurer and also their departments. He was actively assisted by hundreds of mortgage brokers lobbying their own MPs.[17]

Most of the lobbying that falls under this heading, however, is for the benefit of single individuals or companies, or small groups. Those with access to Ministers, their staff or officials (access is a

[13] For an extensive review, see Michael West, *Corporate lobbying a billion dollar business*, Nov 6 2017. michaelwest.com.au.
[14] Property Council of Australia, Annual Financial Report, 30 June 2018. P. 14.
[15] MCA Code of Conduct: working with governments.
[16] John Menadue – Pearls and Irritations, *The scourge of lobbyists is part of our political mal*aise. An update. Posted on 29 April 2019.
[17] John Kehoe, *How mortgage brokers won*, Australian Financial Review, 14 March 2019, p. 6.

separate issue, discussed below) are able to press particular concerns about government policies that affect them – beneficially or detrimentally. This is usually is done in private. The public is normally not aware of the contacts being made or their subject matter and has no opportunity to voice an opinion about whatever is being proposed.

Many large corporations and firms employ in-house lobbyists. While these people may be employed part-time or even full-time to lobby governments, they are not covered by Australia's lobbying regulations.

(3) Professionals such as doctors, lawyers and accountants. Also architects, engineers and town planners in relation to local government. These professions are exempt because the lobbying they may do is characterised as incidental to the provision of their professional services. Applying this definition, it is nevertheless true that many of these professionals should register as lobbyists, but don't.

Some of the larger accountancy and legal firms include non-accountants and non-lawyers (and sometimes ex-politicians) among their number, who are involved in 'government relations'. The larger firms win contracts to provide various services to government that fall outside their 'professional' fields. This often occurs because of the way the way the public service has been denuded. Some of these professional groups hold boardroom lunches attended by selected clients and to which politicians and senior public servants are invited. But the discussions that take place are unlikely to be restricted to specific legal or accountancy issues.

In the local government area, which is covered by the Queensland legislation, town planners, architects and engineers spend a great deal of time trying to persuade council officers and/or councillors that particular planned developments, or buildings, fall within planning schemes, or that those schemes should be amended to permit particular developments.

But these professional people understandably resist putting their names down as lobbyists – a black mark it would seem.

A better approach

The three exemptions I have referred to above mean that perhaps five out of every six people involved in lobbying in Australia are not required to register as lobbyists. This is an estimate I made almost a decade ago, based on a comparison with the Canadian (national) system of regulating lobbying[18]. The Canadian approach is not to specify the groups that should be registered and indicate exemptions, but to require everyone who spends 20 per cent or more of their time actually lobbying, to register.

The definition of lobbyist in Canada's national system includes a person:

> any part of whose duties is to communicate with public office holders on behalf of the employer or, if the employer is a corporation, on behalf of any subsidiary of the employer or any corporation of which the employer is a subsidiary, in respect of

[18] For example, in evidence I gave to the Senate Finance and Administration References Committee inquiry into *Operation of the Lobbying Code of Conduct and the Register of Lobbyists*, 21 February 2012, at p. 19 of the Hansard report.

- **(i)** the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons,
- **(ii)** the introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament,
- **(iii)** the making or amendment of any regulation as defined in subsection 2(1) of the *Statutory Instruments Act*,
- **(iv)** the development or amendment of any policy or program of the Government of Canada, or
- **(v)** the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada…[19]

The Canadian *Lobbying Act* identifies three types of lobbyists:

Consultant Lobbyist

- A person who is hired to communicate on behalf of a client. This individual may be a professional lobbyist but could also be any individual who, in the course of his or her work for a client, communicates with or arranges meetings with a public office holder.

In-House Lobbyist (Corporations)

- A person who works for compensation in an entity that operates **for profit**.

In-House Lobbyist (Organizations)

- A person who works for compensation in a **non-profit** entity.[20]

In Australian terms, a consultant lobbyist is what I have referred to in this paper as a third-party (professional) lobbyist; an in-house lobbyist (corporations) is a lobbyist falling with the second category of exemption that I have referred to – people, companies or organisations lobbying on their own behalf; an in-house lobbyist (organizations) is a lobbyist within the first of those categories, involved with a non-profit organization representing the interests of their members. (In Canada, this includes professional organisations, trade unions, religious groups and charitable organisations). Australia's third exemptions – lawyers, accountants and other professionals, would fall within the in-house lobbyist (corporations) category. Canada requires registration when a person, or group of people, is involved in lobbying as defined above, for 20 per cent of the time of one person, or its equivalent.

As at 5 June this year, the Canadian register had on its books 1064 consultant lobbyists (representing 3,614 clients), 2056 in-house corporation lobbyists (from 405 firms) and 2932 in-house organization lobbyists (from 576 organisations)[21]. The ratio of lobbyists who would be required to register under the Australian schemes to those lobbyists who would not but are required to do so in Canada, remains about the same as when I first measured it – one to five.

[19] *Lobbying Act* 1985 (Canada), s. 7(1)
[20] Office of the Commissioner of Lobbying of Canada, home page. lobbycanada.gc.ca.
[21] ibid. Active Lobbyists and Registrations by Type.

The revolving door

The Australian codes acknowledge in their rules one of the public criticisms made about lobbying, namely that some politicians and senior public servants move seamlessly into lobbying shortly after they cease to hold office. To quote one such complaint:

> The ministerial code ostensibly prohibits ministers from joining the industries they were responsible for in their portfolio for 18 months. Yet when Ian Macfarlane retired from [the Commonwealth] parliament to head the Queensland Resources Council, having been industry and science minister just before retirement, and formerly the resources minister, the Prime Minister's office found there was no conflict.
>
> This is the stuff of farce. Macfarlane clearly breached the wording and spirit of the code, but its application is subject to wholly partisan arbitration. There is also an enforceability issue here: the ministerial and lobbying codes contain no details on the punishment for breaches.
>
> As a result, while a lobbyist may be deregistered, there are few theoretical consequences for a former minister. In practice, the proliferation of revolving doors suggest there are no consequences at all.[22]

Three issues are mentioned here: the revolving door, the regulator and enforcement. Once again I will draw on Canada's answers to these problems.

(a) As mentioned above, the Australian codes set times ranging from 12 to 18 months as quarantine periods between when a minister or senior public servant leaves their position and when they may take up a position to lobby their former government. The adequacy of these provisions may be judged by comparing them with Canada where there is a five-year ban on public office holders taking on such positions. (b) The responsibility for overseeing the regulatory system in Australia varies between regular public service departments (the Commonwealth) and (existing) independent authorities (as in NSW and Queensland) that have another primary function. (c) In few jurisdictions is any penalty other than removal from the lobbyists registry available. Canada has opted for a stand-alone statutory body (the Commissioner of Lobbying) that has a full range of investigative powers. Penalties of up to $50,000 and six month imprisonment can apply to breaches of reporting requirements.

The need for regulation

The NSW Independent Commission Against Corruption (ICAC) is currently conducting its second inquiry into lobbying in a decade. The first, 'Investigation into corruption risks involved in lobbying', reported in November 2010. It made 17 recommendations, but only five were adequately implemented by the state government. In the course of its report ICAC said:

> The Commission found that lobbying attracts widespread community perceptions of corruption and involves a number of corruption risks …

[22] George Rennie, *Austalia's lobbying laws are inadequate, but other countries are getting it right*, The Conversation, June 21, 2017.

> A lack of transparency in the current lobbying regulatory system in NSW is a major corruption risk, and contributes significantly to public distrust. Those who lobby may be entitled to private communications with the people that they lobby, but they are not entitled to secret communications. The public is entitled to know that lobbying is occurring, to ascertain who is involved, and, in the absence of any overriding public interest against disclosure, to know what occurred during the Lobbying Activity.
>
> The primary aim of any lobbying regulatory system must be to improve transparency and address other corruption risks in a manner that is practical and not unnecessarily onerous, and one that does not unduly interfere with legitimate access to government decision-makers.[23]

And it referred to the principles underlying its recommendations:

> Any regulatory system for lobbying should address the relevant corruption risks. To do so it must be based on the principles of transparency and accountability. These are the broad principles the Commission applied in reviewing the current lobbying regulatory system in NSW, and in determining what changes to recommend in order to address relevant corruption risks and the community's adverse perceptions of lobbying.[24]

I note in passing that while the primary focus of ICAC is on investigating and preventing corruption it is also required by its Act to promote the integrity and good repute of public administration and that it has to have regard to the protection of the public interest and the prevention of breaches of public trust as its paramount concerns.[25] That is, when making recommendations it is not concerned only with corrupt conduct. One of its aims is good government. As part of its current inquiry, ICAC has included a discussion paper by two academics entitled 'Enhancing the democratic role of direct lobbying in New South Wales',[26] to which I will refer later.

The 2010 ICAC report also referenced (favourably) a study by the Organisation for Economic Cooperation and Development (OECD) of which Australia is a member, that resulted in the OECD's development of '10 Principles for Transparency in Lobbying' (reproduced as an appendix to this paper). The principles are divided into three sections:

1. Building an effective and fair framework for openness and access
2. Enhancing transparency
3. Mechanisms for effective implementation, compliance and review.[27]

These are the OECD principles most relevant to this discussion:

> *1. Countries should provide a level playing field by granting all stakeholders fair and equitable access to the development and implementation of public policies.*
>
> Public officials should preserve the benefits of the free flow of information and facilitate public engagement. Gaining balanced perspectives on issues leads to informed policy debate and formulation of effective policies. Allowing all stakeholders, from the private sector and the public at large, fair and equitable access to participate in the development of

[23] ICAC, *Investigation into corruption risks involved in lobbying*, November 2010, p. 7.
[24] Ibid. p. 16.
[25] Independent Commission Against Corruption Act (NSW), ss. 12, 13.
[26] Dr Yee-Fui Ng and Professor Joo-Cheong Tham, April 2019.
[27] OECD, *The 10 Principles for Transparency and Integrity in Lobbying*, 2013.

public policies is crucial to protect the integrity of decisions and to safeguard the public interest by counterbalancing vocal vested interests. To foster citizens' trust in public decision making, public officials should promote fair and equitable representation of business and societal interests.

4. Countries should clearly define the terms 'lobbying' and 'lobbyist' when they consider or develop rules and guidelines on lobbying.

Definitions of 'lobbying' and 'lobbyists' should be robust, comprehensive and sufficiently explicit to avoid misinterpretation and to prevent loopholes. In defining the scope of lobbying activities, it is necessary to balance the diversity of lobbying entities, their capacities and resources, with the measures to enhance transparency. Rules and guidelines should primarily target those who receive compensation for carrying out lobbying activities, such as consultant lobbyists and in-house lobbyists. However, definition of lobbying activities should also be considered more broadly and inclusively to provide a level playing field for interest groups, whether business or not-for-profit entities, which aim to influence public decisions.

Definitions should also clearly specify the type of communications with public officials that are not considered 'lobbying' under the rules and guidelines. These include, for example, communication that is already on public record – such as formal presentations to legislative committees, public hearings and established consultation mechanisms.

5. Countries should provide an adequate degree of transparency to ensure that public officials, citizens and businesses can obtain sufficient information on lobbying activities.

Disclosure of lobbying activities should provide sufficient, pertinent information on key aspects of lobbying activities to enable public scrutiny. It should be carefully balanced with considerations of legitimate exemptions, in particular the need to preserve confidential information in the public interest or to protect market-sensitive information when necessary.

Subject to Principles 2 and 3, core disclosure requirements elicit information on in-house and consultant lobbyists, capture the objective of lobbying activity, identify its beneficiaries, in particular the ordering party, and point to those public offices that are its targets. Any supplementary disclosure requirements should take into consideration the legitimate information needs of key players in the public decision-making process. Supplementary disclosure requirements might shed light on where lobbying pressures and funding come from. Voluntary disclosure may involve social responsibility considerations about a business entity's participation in public policy development and lobbying. To adequately serve the public interest, disclosure on lobbying activities and lobbyists should be stored in a publicly available register and should be updated in a timely manner in order to provide accurate information that allows effective analysis by public officials, citizens and businesses.

7. Countries should foster a culture of integrity in public organisations and decision making by providing clear rules and guidelines of conduct for public officials.

Countries should provide principles, rules, standards and procedures that give public officials clear directions on how they are permitted to engage with lobbyists. Public officials should conduct their communication with lobbyists in line with relevant rules, standards and guidelines in a way that bears the closest public scrutiny. In particular, they should cast no doubt on their impartiality to promote the public interest, share only authorised information and not misuse 'confidential information', disclose relevant private interests and avoid conflict of interest. Decision makers should set an example by their personal conduct in their relationship with lobbyists.

> Countries should consider establishing restrictions for public officials leaving office in the following situations: to prevent conflict of interest when seeking a new position, to inhibit the misuse of 'confidential information', and to avoid post-public service 'switching sides' in specific processes in which the former officials were substantially involved. It may be necessary to impose a 'cooling-off' period that temporarily restricts former public officials from lobbying their past organisations. Conversely, countries may consider a similar temporary cooling-off period restriction on appointing or hiring a lobbyist to fill a regulatory or an advisory post.

The current ICAC discussion paper says the NSW legislative and regulatory framework does not fully accord with the 10 principles[28]. The same may be said of all the Australian codes. They clearly need to be strengthened to come close to, let alone meet, these criteria.

Funding

There is a passing mention in (5) above of 'funding'. This is an area that does not appear to have been addressed in the Australian lobbying codes, despite its obvious important. This is where actual or potential corruption, or the perception that corruption could arise, should enter the discussion. ICAC refers to it in its two investigations into lobbying and raises several questions about funding in its latest discussion paper.[29] It is also mentioned in the discussion paper appended to the 2019 ICAC paper on lobbying (referred to above), where the authors point out that:

> The risks of corruption and misconduct are heightened when the financial interests of government officials (and those closely related to them) are implicated in the process of lobbying – these situations throw up the prospect of improper gain that defines corrupt conduct. They include situations when lobbyists or their clients make political contributions to the elected official or his or her party. These contributions do not necessarily need to be made proximate to a particular decision. Systemic practices of contributions can give rise to a form of corruption which the High Court has described as 'clientelism'. As the High Court puts it, clientelism 'arises from an office holder's dependence on the financial support of a wealthy patron to a degree that is apt to compromise the expectation, fundamental to representative democracy, that public power will be exercised in the public interest'. The regular contributions made to the major political parties by organisations that also lobby government are of particular concern here.
>
> Another situation implicating financial interests of government officials that risk undermining the integrity of direct lobbying results when parliamentarians are engaged in secondary employment (employment in addition to their parliamentary duties) involving lobbying. A further situation occurs when government officials have a reasonable prospect of being employed by lobbyists and/or their clients after leaving government (post-separation employment). As NSW ICAC has observed, '(t)wo corruption risks arise from former public officials becoming lobbyists: relationships they developed with other public officials may be used to gain an improper or corrupt advantage; and confidential information, to which they had access while public officials, may also be used to gain such an advantage'. These risks are particularly significant given the high proportion of lobbyists who are former government officials.

[28] ICAC, *The regulation of lobbying, access and influence in NSW*, 2019. p. 6.
[29] ibid, pp. 10-11.

> These circumstances, where financial interests of government officials are implicated, may lead to bias, or at least an apprehension of bias, where decision- makers with a financial interest to them (or their party) may be seen to be more favourably predisposed to make decisions to benefit those lobbying.[30]

The High Court case to which the authors refer is *McCloy v. New South Wales*[31]. This concerned NSW legislation that banned developers from making electoral donations in that state. In upholding the ban, the majority Justices (French CJ, Kiefel, Bell and Keane JJ) in their joint judgment, relied in part on the fact that since 1990 ICAC had made eight adverse reports concerning land development applications and quoted Commissioner Roden QC, 'A lot of money can depend on the success or failure of a lobbyist's representations to Government.'[32]

That statement could be applied to lobbyists in other fields.

To date, however, the only limits that have been placed on lobbyists, in just a few jurisdictions, concern success fees. But there are risks that should be addressed concerning political donations and other gifts, whether by lobbyists or their clients. Public disclosure of the donations, often many months after the lobbying occurs, is insufficient. As the majority said in *McCloy*:

> Whilst provisions requiring disclosure of donations are no doubt important, they could not be said to be as effective as capping donations in achieving the anti-corruption purpose of the (NSW law).[33]

A related matter, discussed by Justice Gageler in the *McCloy* case, concerns the payment of money for access, where the only object is to gain access to a minister so that a presentation can be put to him or her. However given that Australian governments raise money by selling such access at fund raising dinners to the most senior ministers and even the Prime Minister (as does the Opposition, by selling access to members of the shadow cabinet and the Leader of the Opposition) it is difficult to imagine that this corruption risk will be addressed by any Australian government in the near future.

Nevertheless, the fact is that any donor of a significant sum to a major political party is a potential lobbyist on their own or someone else's behalf. But few if any will appear on any Lobbyist Register. This is an important inadequacy of the present system.

Transparency

The Commonwealth Code for Lobbyists says 'there is a public expectation that lobbying activities will be carried out ethically and transparently, and that Government representatives who are approached by lobbyists can establish whose interests they represent so that informed judgments can be made about the outcome they are seeking to achieve.' But by 'transparently', the Commonwealth means only what is said in the second half of the sentence – that Government representatives should know on whose behalf the lobbyist is operating[34]. This may be compared

[30] Dr Yee-Fui Ng and Professor Joo-Cheong Tham, *Enhancing the democratic role of direct lobbying in New South Wales*, April 2019. pp. 8-9. (Footnotes omitted).
[31] (2015) 257 CLR 178.
[32] At [51].
[33] At [61]
[34] This was the Government's response to a recommendation in a minority report of a Senate Committee in 2008 'that coverage of the Code be expanded to embrace unions, industry

with these words from the preamble to the Canadian Lobbying Act – 'it is desirable that public office holders **and the public** be able to know who is engaged in lobbying activities'.[35]

The OECD principle states:

> *5. Countries should provide an adequate degree of transparency to ensure that public officials, citizens and businesses can obtain sufficient information on lobbying activities.*
>
> Disclosure of lobbying activities should provide sufficient, pertinent information on key aspects of lobbying activities to enable public scrutiny…
>
> …core disclosure requirements elicit information on in-house and consultant lobbyists, capture the objective of lobbying activity, identify its beneficiaries, in particular the ordering party, and point to those public offices that are its targets. Any supplementary disclosure requirements should take into consideration the legitimate information needs of key players in the public decision-making process.

Transparency demands no less. As ICAC says, 'A lack of transparency in the current lobbying regulatory system in NSW is a major corruption risk, and contributes significantly to public distrust.'[36] But nothing approaching this standard is provided in Australia.

Worse still, the systems nationally and in the states deliberately avoid regulating most of the lobbying that takes place, lobbying that is undoubtedly undertaken in order to influence government decision-making.

> The *Lobbying Code of Conduct* is intended to promote trust in the integrity of government processes and ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty[37].

The problem in Australia is that while the various codes correctly identify a public trust issue associated with lobbying that needs to be addressed, the codes seek only to regulate a limited number of lobbyists. For the Codes' objective to be achieved it is essential that the behavior that is monitored and opened to public scrutiny is lobbying generally. As in Canada, the regulatory regime should cover all lobbying, not merely some small group of narrowly defined lobbyists. And to be effective it must be based in legislation that is enforceable (with penal provisions) by a body independent of government that has broad investigative powers.

……..

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associations and other businesses conducting their own lobbying activities'. It said in part, 'The purpose of the Register of Lobbyists is to allow Ministers and officials to establish whose interests a lobbyist represents when they seek to influence Government officials.' Government response to the Senate Standing Committee of Finance and Public Administration report, *Knock, Knock … Who's there? The Lobbying Code of Conduct*, January 2009, p.4.

[35] Emphasis added.

[36] ICAC, *Investigation into corruption risks involved in lobbying*, November 2010, p. 7.

[37] Australia, *Lobbying Code of Conduct*, preamble.

Appendix

The 10 Principles for Transparency and Integrity in Lobbying

I. Building an effective and fair framework for openness and access

1. Countries should provide a level playing field by granting all stakeholders fair and equitable access to the development and implementation of public policies.

Public officials should preserve the benefits of the free flow of information and facilitate public engagement. Gaining balanced perspectives on issues leads to informed policy debate and formulation of effective policies. Allowing all stakeholders, from the private sector and the public at large, fair and equitable access to participate in the development of public policies is crucial to protect the integrity of decisions and to safeguard the public interest by counterbalancing vocal vested interests. To foster citizens' trust in public decision making, public officials should promote fair and equitable representation of business and societal interests.

2. Rules and guidelines on lobbying should address the governance concerns related to lobbying practices, and respect the socio-political and administrative contexts.

Countries should weigh all available regulatory and policy options to select an appropriate solution that addresses key concerns such as accessibility and integrity, and takes into account the national context, for example the level of public trust and measures necessary to achieve compliance. Countries should particularly consider constitutional principles and established democratic practices, such as public hearings or institutionalised consultation processes.

Countries should not directly replicate rules and guidelines from one jurisdiction to another. Instead, they should assess the potential and limitations of various policy and regulatory options and apply the lessons learned in other systems to their own context. Countries should also consider the scale and nature of the lobbying industry within their jurisdictions, for example where supply and demand for professional lobbying is limited, alternative options to mandatory regulation for enhancing transparency, accountability and integrity in public life should be contemplated. Where countries do opt for mandatory regulation, they should consider the administrative burden of compliance to ensure that it does not become an impediment to fair and equitable access to government.

3. Rules and guidelines on lobbying should be consistent with the wider policy and regulatory frameworks.

Effective rules and guidelines for transparency and integrity in lobbying should be an integral part of the wider policy and regulatory framework that sets the standards for good public governance. Countries should take into account how the regulatory and policy framework already in place can support a culture of transparency and integrity in lobbying. This includes stakeholder engagement through public consultation and participation, the right to petition government, freedom of information legislation, rules on political parties and election campaign financing, codes of conduct for public officials and lobbyists, mechanisms for keeping regulatory and supervisory authorities accountable and effective provisions against illicit influencing.

4. Countries should clearly define the terms 'lobbying' and 'lobbyist' when they consider or develop rules and guidelines on lobbying.

Definitions of 'lobbying' and 'lobbyists' should be robust, comprehensive and sufficiently explicit to avoid misinterpretation and to prevent loopholes. In defining the scope of lobbying activities, it is necessary to balance the diversity of lobbying entities, their capacities and resources, with the

measures to enhance transparency. Rules and guidelines should primarily target those who receive compensation for carrying out lobbying activities, such as consultant lobbyists and in-house lobbyists. However, definition of lobbying activities should also be considered more broadly and inclusively to provide a level playing field for interest groups, whether business or not-for-profit entities, which aim to influence public decisions.

Definitions should also clearly specify the type of communications with public officials that are not considered 'lobbying' under the rules and guidelines. These include, for example, communication that is already on public record – such as formal presentations to legislative committees, public hearings and established consultation mechanisms.

II. Enhancing transparency

5. Countries should provide an adequate degree of transparency to ensure that public officials, citizens and businesses can obtain sufficient information on lobbying activities.

Disclosure of lobbying activities should provide sufficient, pertinent information on key aspects of lobbying activities to enable public scrutiny. It should be carefully balanced with considerations of legitimate exemptions, in particular the need to preserve confidential information in the public interest or to protect market-sensitive information when necessary.

Subject to Principles 2 and 3, core disclosure requirements elicit information on in-house and consultant lobbyists, capture the objective of lobbying activity, identify its beneficiaries, in particular the ordering party, and point to those public offices that are its targets. Any supplementary disclosure requirements should take into consideration the legitimate information needs of key players in the public decision-making process. Supplementary disclosure requirements might shed light on where lobbying pressures and funding come from. Voluntary disclosure may involve social responsibility considerations about a business entity's participation in public policy development and lobbying. To adequately serve the public interest, disclosure on lobbying activities and lobbyists should be stored in a publicly available register and should be updated in a timely manner in order to provide accurate information that allows effective analysis by public officials, citizens and businesses.

6. Countries should enable stakeholders – including civil society organisations, businesses, the media and the general public – to scrutinise lobbying activities.

The public has a right to know how public institutions and public officials made their decisions, including, where appropriate, who lobbied on relevant issues. Countries should consider using information and communication technologies, such as the Internet, to make information accessible to the public in a cost-effective manner. A vibrant civil society that includes observers, 'watchdogs', representative citizens groups and independent media is key to ensuring proper scrutiny of lobbying activities. Government should also consider facilitating public scrutiny by indicating who has sought to influence legislative or policy-making processes, for example by disclosing a 'legislative footprint' that indicates the lobbyists consulted in the development of legislative initiatives. Ensuring timely access to such information enables the inclusion of diverse views of society and business to provide balanced information in the development and implementation of public decisions.

III. Fostering a culture of integrity

7. Countries should foster a culture of integrity in public organisations and decision making by providing clear rules and guidelines of conduct for public officials.

Countries should provide principles, rules, standards and procedures that give public officials clear directions on how they are permitted to engage with lobbyists. Public officials should conduct their communication with lobbyists in line with relevant rules, standards and guidelines in a way that

bears the closest public scrutiny. In particular, they should cast no doubt on their impartiality to promote the public interest, share only authorised information and not misuse 'confidential information', disclose relevant private interests and avoid conflict of interest. Decision makers should set an example by their personal conduct in their relationship with lobbyists.

Countries should consider establishing restrictions for public officials leaving office in the following situations: to prevent conflict of interest when seeking a new position, to inhibit the misuse of 'confidential information', and to avoid post-public service 'switching sides' in specific processes in which the former officials were substantially involved. It may be necessary to impose a 'cooling-off' period that temporarily restricts former public officials from lobbying their past organisations. Conversely, countries may consider a similar temporary cooling-off period restriction on appointing or hiring a lobbyist to fill a regulatory or an advisory post.

8. Lobbyists should comply with standards of professionalism and transparency; they share responsibility for fostering a culture of transparency and integrity in lobbying.

Governments and legislators have the primary responsibility for establishing clear standards of conduct for public officials who are lobbied. However, lobbyists and their clients, as the ordering party, also bear an obligation to ensure that they avoid exercising illicit influence and comply with professional standards in their relations with public officials, with other lobbyists and their clients, and with the public.

To maintain trust in public decision making, in-house and consultant lobbyists should also promote principles of good governance. In particular, they should conduct their contact with public officials with integrity and honesty, provide reliable and accurate information, and avoid conflict of interest in relation to both public officials and the clients they represent, for example by not representing conflicting or competing interests.

IV. Mechanisms for effective implementation, compliance and review

9. Countries should involve key actors in implementing a coherent spectrum of strategies and practices to achieve compliance.

Compliance is a particular challenge when countries address emerging concerns such as transparency in lobbying. Setting clear and enforceable rules and guidelines is necessary, but this alone is insufficient for success. To ensure compliance, and to deter and detect breaches, countries should design and apply a coherent spectrum of strategies and mechanisms, including properly resourced monitoring and enforcement. Mechanisms should raise awareness of expected rules and standards; enhance skills and understanding of how to apply them; and verify disclosures on lobbying and public complaints. Countries should encourage organisational leadership to foster a culture of integrity and openness in public organisations and mandate formal reporting or audit of implementation and compliance. All key actors – in particular public officials, representatives of the lobbying consultancy industry, civil society and independent 'watchdogs' – should be involved both in establishing rules and standards, and putting them into effect. This helps to create a common understanding of expected standards. All elements of the strategies and mechanisms should reinforce each other; this co- ordination will help to achieve the overall objectives of enhancing transparency and integrity in lobbying.

Comprehensive implementation strategies and mechanisms should carefully balance risks with incentives for both public officials and lobbyists to create a culture of compliance. For example, lobbyists can be provided with convenient electronic registration and report-filing systems, facilitating access to relevant documents and consultations by an automatic alert system, and registration can be made a prerequisite to lobbying. Visible and proportional sanctions should combine innovative approaches, such as public reporting of confirmed breaches, with traditional financial or administrative sanctions, such as debarment, and criminal prosecution as appropriate.

10. Countries should review the functioning of their rules and guidelines related to lobbying on a periodic basis and make necessary adjustments in light of experience.

Countries should review – with the participation of representatives of lobbyists and civil society – the implementation and impact of rules and guidelines on lobbying in order to better understand what factors influence compliance. Refining specific rules and guidelines should be complemented by updating implementation strategies and mechanisms. Integrating these processes will help to meet evolving public expectations for transparency and integrity in lobbying. Review of implementation and impact, and public debate on its results are particularly crucial when rules, guidelines and implementation strategies for enhancing transparency and integrity in lobbying are developed incrementally as part of the political and administrative learning process.

OECD 2013