



**Regulating influence and access: Submission to
the Inquiry into the Lobbying Code of Conduct
by the Senate Finance and Public Affairs
Committee**

10 June 2008

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that seeks to promote a just and democratic society by making strategic interventions on public interest issues. PIAC identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC also receives funding from the NSW Government Department of Energy and Water for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

Senate Finance and Public Affairs Committee Inquiry into the Lobbying Code of Conduct

On 14 May the Senate referred the following matter to the Finance and Public Administration Committee for inquiry and report by 28 August 2008:

- a. the *Lobbying Code of Conduct* issued by the Government;
- b. whether the proposed code is adequate to achieve its aims and, in particular, whether:
 - i. a consolidated code applying to members of both Houses of the Parliament and their staff, as well as to ministers and their staff, should be adopted by joint resolution of the two Houses,
 - ii. the code should be confined to organisations representing clients, or should be extended to organisations which lobby on their own behalf, and
 - iii. the proposed exemptions are justified; and
- c. any other relevant matters.

Summary of Recommendations

- That consideration be given to amending the Code so as increase reporting requirements of both lobbyists and Members of Parliament.
- That any agreed Lobbying Code of Conduct be extended to all Members of both Houses of the Parliament and their staff.
- That organisations representing paying clients or individuals lobbying on behalf of a for-profit corporation be required to comply with all aspects of the Code of Conduct.
- That not-for-profit organisations that lobby on their own behalf or on behalf of a client community be required to comply with sections 7 and 8 of the Code of Conduct.
- That consideration be given to the establishment of a Parliamentary Standards Officer or Commissioner, or similar agent, independent of government, to ensure high standards in all aspects of the workings of the Parliament.
- That both Members and lobbyists be required to show that they made reasonable effort to satisfy themselves of the truth.
- That sanctions for breach of the lobbying Code be strengthened.
- That there be ongoing independent evaluation of the effectiveness of any codes of conduct for lobbyists and Members of Parliament, as well as of any Officer charged with monitoring, educating or enforcing such codes and that such evaluations be tabled in the Parliament at regular intervals to be determined by the relevant Standing Committee.

Response to term of reference (a): the *Lobbying Code of Conduct* issued by the Government

PIAC is pleased to have the opportunity to comment on the Government's Proposed Lobbying Code of Conduct (the Proposed Code).

Lobbying is an important and influential aspect of a healthy participatory democracy but it can have a corrupting influence and damage public trust in the Parliament and Public Service if such activity is not governed by high standards, and seen to be accountable, ethical and fair in terms of access to and influence on decision makers. Responsibility for ensuring such high standards lies not only with the lobbyists but also with all public office holders.

PIAC congratulates the Government for this initiative. There are, however, a number of areas of concern in respect of the Code that PIAC believes require further consideration and amendment to the Proposed Code.

Response to term of reference (b): whether the proposed code is adequate to achieve its aims

PIAC supports the broad aims of the Government in progressing this proposal but does have concerns about some elements, including its narrow coverage, lack of procedural fairness, accountability and enforceability. These matters are discussed in more detail below.

PIAC notes that if a central aim of the Proposed Code is to shine light on lobbying activities much more could be done than just disclose whose interests paid lobbyists represent. Julian Fitzgerald, in his Discussion Paper for the Democratic Audit of Australia, argues for national registration of the lobbying industry supported by a

Secretariat of the Federal Parliament—not a Minister—with regulation and registration power. Under Fitzgerald’s proposal, minimum requirements of lobbyists would include submitting annual reports each financial year, information to be publicly available online and a searchable database of companies and consultants hosted on a website. Information would include how much was spent on lobbying activities and on what, such as entertainment, travel, advertising and so on.¹

Equally, transparency would be improved if greater responsibility was taken by Ministers and Members of Parliament to make publicly available information about by whom they are being lobbied and on what issues. As suggested by Jack Waterford, Editor of the *Canberra Times*:

What would be nice would be to have simple lists, available to the public, about all those who made representations and to whom. In cases where the representations were made through third parties, such lists should include the actual client. In my ideal legislation, there would be a running, online, list for each major decision of government. It would record all representations made by people with financial interests in the outcome and, briefly, who was seen and on whose behalf.²

Similar recommendations from the Accountability Working Party Australasian Study of Parliament Group (ASPG) in its report, *Be Honest Minister Restoring Honest Government in Australia*, include that legislation regulating lobbying should ensure online registration of each instance of lobbying activity via a website of every agency and Minister being lobbied. It also recommended that the Ministers be responsible for ensuring that a record of the content of lobbying activities is kept for each instance of lobbying related to the portfolio.³

PIAC supports the prohibition set out in section 7 of the Proposed Code on lobbying activities by former Ministers and Parliamentary Secretaries for 18 months after leaving office, and for 12 months for senior ministerial staff and public servants.

Recommendation

That consideration be given to amending the Code so as increase reporting requirements of both lobbyists and Members of Parliament.

Response to term of reference b(i): whether a consolidated code applying to members of both Houses of the Parliament and their staff, as well as to ministers and their staff, should be adopted by joint resolution of the two Houses

According to statements on the website of the Department of Prime Minister and Cabinet, the Code of Conduct underpins the Register of Lobbyists:

¹ Julian Fitzgerald, *The Need for Transparency in Lobbying, Democratic Audit of Australia Discussion Paper 16/07*, 2007.

² Jack Waterford, ‘We need to know who is blowing into the ear of government’, *Canberra Times* (Canberra), 5 April 2008, <<http://canberra.yourguide.com.au/news/opinion/editorial/general/we-need-to-know-who-is-blowing-into-the-ear-of-government/132264.aspx>> at 6 June 2008.

³ Accountability Working Party Australasian Study of Parliament Group, *Be Honest Minister-Restoring Honest Government in Australia*, 2007.

... by defining lobbyists, clients, Government representatives and lobbying activities. It sets out the requirements for contact between lobbyists and Government representatives and indicates what will be publicly available on the register and the conditions for successful registration of lobbyists.⁴

It further states that:

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.

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 the lobbyist represents so that informed judgments can be made about the outcome they are seeking to achieve.

While some lobbyists work directly for a single client to advance the interests of that client, others lobby on behalf of a number of different clients. The Government believes it is important for Government representatives to know precisely who these lobbyists represent when they have dealings with them.⁵

While PIAC agrees with the above statement that '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', it also must be acknowledged that in the Westminster system the legislature has a critical role in holding the Executive of the day to account. The whole legislature equally must work with integrity if there is to be public confidence in the institutions not only of government but of our democratic system.

PIAC believes the case for excluding Opposition and Cross Bench members from complying with such a Code of Conduct fails to recognise that all members can be the target of intense lobbying because their vote can be critical. This is particularly the case where the Government does not hold a majority in both houses and balance of power is held by other Members of Parliament, and is also the case before an election when a change of government is possible. If integrity of the process is a key aim of the Proposed Code then it should apply to all Members of Parliament.

Recommendation:

That any agreed Lobbying Code of Conduct be extended to all Members of both Houses of the Parliament and their staff.

Response to term of reference b(ii): the code should be confined to organisations representing clients, or should be extended to organisations which lobby on their own behalf

It is argued on the Department of Prime Minister and Cabinet website⁶, and quoted above that the Code of Conduct underpins the Register of Lobbyists, and the Register will allow Government representatives who are approached by lobbyists to establish whose interests they represent so that informed judgments can be made about the outcome they are seeking to achieve.

⁴ Australian Government's Lobbyist Register: Questions and Answers, (2008) Department of Prime Minister and Cabinet, <<http://lobbyists.pmc.gov.au/lobbyistsregister/index.cfm?event=faq>> at 6 June 2008.

⁵ Ibid.

⁶ Australian Government's Lobbyist Register: Questions and Answers, (2008) Department of Prime Minister and Cabinet, <<http://lobbyists.pmc.gov.au/lobbyistsregister/index.cfm?event=faq>> at 6 June 2008.

There is a clear distinction made between lobbyists who work directly for a single client to advance the interests of that client and those who lobby on behalf of a number of different clients. The problem with this claim is that if indeed the only aim of the Code was to support the Register, it would only include requirements relevant to being on the register, such as how often information must be updated, type of information and so on.

However this Code goes much wider and includes in section 8 on 'Principles of Engagement with Government Representatives'⁷ requirements such as to not engage in any conduct that is corrupt, dishonest or illegal, to reasonably satisfy themselves of the truth and accuracy of all statements and information provided by them, to not make misleading, exaggerated or extravagant claims about the nature or extent of their access to decision makers, and to strictly separate personal political ties from lobbying activities.

While PIAC strongly supports such standards being included in a Code of Conduct, the question has to be asked why such standards would not apply to all lobbying activity. Aspects of the Code relevant to the requirements of the Register could be confined to organisations representing clients but the wider ethical requirements of the Code as set out in section 8 could usefully be extended to organisations that lobby on their own behalf or on behalf of their client community, such as welfare agencies and community legal centres.

It is interesting to note the development of similar law in Canada. Initially professional lobbying firms had to give more detailed information on their clients and finances than those lobbyists representing corporations and interest groups but this two-tier system was found to be unsatisfactory and was amended in 1993.

The Canadian *Lobbyists Registration Act 1988* covers three types of lobbyists:

- consultant lobbyists who are paid to lobby for clients;
- in-house lobbyists (corporate): these are employees who, as a significant part of their duties, lobby for an employer that carries out commercial activities for financial gain;
- in-house lobbyists (organisations): these are not-for-profit organisations in which one or more employees lobby, and the collective time devoted to lobbying amounts to the equivalent of a significant part of one employee's duties.⁸

Recommendations:

That organisations representing paying clients or individuals lobbying on behalf of a for-profit corporation be required to comply with all aspects of the Code of Conduct.

That not-for-profit organisations that lobby on their own behalf or on behalf of a client community be required to comply with sections 7 and 8 of the Code of Conduct.

⁷ *Lobbying Code of Conduct* (2008) Department of Prime Minister and Cabinet <<http://lobbyists.pmc.gov.au/lobbyistsregister/index.cfm?event=contactWithLobbyistsCode>> at 6 June 2008.

⁸ Ken Coghill and Joo-Cheong Tham, Submission to the Electoral Matters Committee Inquiry into Conduct of the 2006 Victorian State Election and matters related thereto (2007).

Response to term of reference b(iii): the proposed exemptions are justified

As already discussed PIAC does not support the exemption of organisations that lobby on their own behalf (rather than for a client) from aspects of the Code of Conduct not relevant to the Register. Neither does PIAC support the exemption of the following entities as set out in the section 3 'Definitions' of the Proposed Code:

- (a) charitable, religious and other organisations or funds that are endorsed as deductible gift recipients; or
- (b) non-profit associations or organisations constituted to represent the interests of their members that are not endorsed as deductible gift recipients.⁹

The argument for inclusion of these groups is essentially the same. If it is desirable for lobbying activity to be guided by a set of high standards then such high standards must apply to all those involved in the lobbying.

PIAC supports the exemption for individuals making representations on behalf of relatives or friends about their personal affairs. PIAC would argue that in a participatory democracy such individual activity should be encouraged rather than be made more difficult.

The other exemptions are reasonable.

Response to term of reference (c): any relevant matters

Procedural fairness and enforceability

While PIAC is supportive of the need to structure standards more effectively into the business of lobbying, care must be taken to ensure that any system introduced is fair and equitable. There are several aspects of the Proposed Code that PIAC believes fail in this regard.

The first is procedural fairness. PIAC is of the view that if the introduction of a Code of Conduct for lobbyists does not include procedurally fair processes, public confidence in the integrity of Ministers, their staff and senior Government officials will be negatively affected.

The Proposed Code gives ultimate power to the Secretary of the Department of the Prime Minister and Cabinet to manage the process and deal with breaches of the Code. There is no apparent appeal right or independent scrutiny of the decision available for lobbyists who are alleged to have breached the code.

The Secretary will investigate any statement reporting an alleged breach of the Code. If he or she considers that a breach has occurred and that it is sufficiently serious to warrant the possible removal of the lobbyist from the Register, the Secretary will advise the individual concerned of the reasons why he or she proposes to remove him or her from the Register and give the lobbyist an opportunity to state why the proposed course of action should not be followed. The Secretary will take any response into account before making his or her decision.¹⁰

⁹ *Lobbying Code of Conduct* (2008) Department of Prime Minister and Cabinet <<http://lobbyists.pmc.gov.au/lobbyistsregister/index.cfm?event=contactWithLobbyistsCode>> at 6 June 2008.

¹⁰ *Australian Government's Lobbyist Register: Questions and Answers*, (2008) Department of Prime Minister and Cabinet, <<http://lobbyists.pmc.gov.au/lobbyistsregister/index.cfm?event=faq#23>> at 6 June 2008.

However the situation appears to be different for Ministers who are alleged to have breached the Code. The Preamble to the Code states that the *Lobbying Code of Conduct* applies in conjunction with the Australian Government *Standards of Ministerial Ethics* and other relevant codes. In the implementation section of the *Standards of Ministerial Ethics*¹¹, it is stated that if there is a serious breach of the guidelines by a Minister or allegation of improper conduct of a significant kind, the Prime Minister may refer the matter to an appropriate independent authority for investigation and/or advice.

PIAC is of the view that all participants should have equal access to procedurally fair processes and that there should be an agent independent of government to oversee the process.

During the debate regarding a similar Code in Western Australia, the WA Greens called for an independent body to administer the register of lobbyists and police compliance with the code of conduct as well as for the State Administrative Tribunal to hear complaints concerning breaches of the Code of Conduct.¹²

In Canada after the 2006 election amendments were made to the *Lobbying Act* that established a new Commissioner of Lobbying as an independent Agent of Parliament, with expanded investigative powers to ensure compliance with the *Lobbying Act* as well as an education mandate.¹³

The Australasian Study of Parliament Group recommends in *Be Honest Minister* as part of its plan for reform of Australian government, that a Parliamentary Standards Commissioner be appointed as an Independent Officer of the Parliament. The Commissioner's primary role would be to support and assist parliamentarians in the discharge of their responsibilities, including providing guidance and training for all Members of Parliament on matters of conduct, propriety and conflicts of interest. Responsibilities of the Commissioner would include monitoring and proposing modifications to any guides or codes of either House, receiving and investigating complaints, and investigation of possible breaches on the Commissioner's own motion. The Commissioner would report to Parliament—and therefore the people—and be appointed on the recommendation of an all-party Parliamentary Committee.¹⁴

PIAC is supportive of such proposals and recommends that there be further investigation of the establishment of a Parliamentary Standards Commissioner in order to restore and maintain confidence in parliamentary processes.

PIAC commends to this inquiry the following introductory statement in the *Be Honest Minister* report: 'Accountable government, where the rule of law, reason and procedural fairness flourishes, strengthens democracy'.¹⁵

¹¹ Australian Government Standards of Ministerial Ethics (2007) Department of Prime Minister and Cabinet <http://www.dpmc.gov.au/guidelines/docs/ministerial_ethics.pdf> at 6 June 2008, 7.

¹² MLC Giz Watson (Greens), 'Lobbyist Register Toothless' (Media Release, 22 March 2007).

¹³ Ken Coghill and Joo-Cheong Tham, Submission to the Electoral Matters Committee Inquiry into Conduct of the 2006 Victorian State Election and matters related thereto (2007).

¹⁴ Accountability Working Party Australasian Study of Parliament Group, above n3, 61.

¹⁵ Ibid 1.

Recommendation:

That consideration be given to the establishment of a Parliamentary Standards Officer or Commissioner, or similar agent, independent of government, to ensure high standards in all aspects of the workings of the Parliament.

For the system to be procedurally fair it is also critical that both lobbyists and Ministers and Members of Parliament are required to meet the same burden of responsibility in terms of their obligations. PIAC notes that the Proposed Code states in section 4 that a Government Representative shall not 'knowingly or intentionally' be a party to lobbying activities by a lobbyist who is not on the Register of Lobbyists¹⁶ yet lobbyists:

... must use all reasonable endeavours to satisfy themselves of the truth and accuracy of all statements and information provided by them to clients whom they represent, the wider public and Government representatives¹⁷

One could reasonably ask why the Ministers can just claim ignorance, whereas the lobbyist must show they tried to find out the truth.

Some ministers claim that they cannot be held personally responsible for the acts and omissions of others who are involved in the administration of their portfolios because they did not know when they should have known and those directly answerable to them did know but did not tell them. They are not told because of a culture that allows information be withheld so that the minister can say 'I did not know'. Effectively, personal responsibility is denied. 'Bad government is the inevitable result of a lack of accountability' and fertile ground is prepared for corruption.¹⁸

Recommendation:

That both Members and lobbyists be required to show that they made reasonable effort to satisfy themselves of the truth.

Lack of enforceability

Related to the issue of procedural fairness is the question of enforceability. John Warhurst comments that the 'lack of teeth and lack of real sanctions' leaves a question around whether those involved will take the issue seriously.¹⁹

The Preamble to the Proposed Code states that:

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.²⁰

Such statements would be much stronger if they were accompanied by meaningful sanctions; and meaningful sanctions that apply both to Members of Parliament, public servants and lobbyists.

¹⁶ *Lobbying Code of Conduct* (2008) Department of Prime Minister and Cabinet <<http://lobbyists.pmc.gov.au/lobbyistsregister/index.cfm?event=contactWithLobbyistsCode>> at 6 June 2008.

¹⁷ Ibid.

¹⁸ Accountability Working Party Australasian Study of Parliament Group, above n3, 2.

¹⁹ John Warhurst, *The Lobbying Code of Conduct: An Appraisal*, Democratic Audit Discussion Paper 4/08 (2008).

²⁰ *Lobbying Code of Conduct* (2008) Department of Prime Minister and Cabinet <<http://lobbyists.pmc.gov.au/lobbyistsregister/index.cfm?event=contactWithLobbyistsCode>> at 6 June 2008.

Under the current Code lobbyists who represent organisations can be sanctioned for breaches of the Code through their removal from the Register. If the Code of Conduct is extended to other lobbyists, as recommended in this submission, there would need to be consideration of a different system of sanctions. PIAC is of the view that even the current sanction of removal from the Register could be strengthened.

For example, in Canada there has recently been an extension from two to ten years of the period during which possible infractions or violations under the *Lobbying Act* and the *Lobbyists' Code of Conduct* can be investigated and prosecution can be initiated and there has been a doubling of the monetary penalties for lobbyists who are found guilty of breaching the requirements of the *Lobbying Act*.²¹

While PIAC is of the view that such a system of sanctions for lobbyists who breach the Code should be given serious consideration, this should only occur if procedural fairness is radically improved in the system (as recommended in this submission) and there is also an effective means of sanctioning Members of Parliament who breach the Code. Lobbyists have the right to procedural fairness and equal treatment.

The issue of sanctions for unethical conduct of Members of Parliament is complicated by the fact that decisions regarding imposition of sanctions on Members of Parliament are most usually made at a political level, unless the allegation is of illegal activity or it is a Ministerial Administrative Decision that can be reviewed by a tribunal or possibly the Ombudsman and Auditor General.²² While the Australian Government Standards of Ministerial Code of Ethics states that if there is a serious breach of the guidelines by a Minister or allegation of improper conduct of a significant kind, the Prime Minister may refer the matter to an appropriate independent authority for investigation and or advice, it is not clear that such an option exists in relation to other Members of Parliament.²³

As already discussed and recommended, PIAC is supportive of the establishment of a Parliamentary Standards Commissioner or other independent office charged with ensuring high standards, procedural fairness and accountability in the Federal Parliament.

Recommendation

That sanctions for breach of the lobbying Code be strengthened.

Conclusion

Because of the short time frame allowed for submissions to this Inquiry, PIAC has not been able to fully explore all aspects of this complex issue. It is important that any new system is accompanied by ongoing independent evaluation to ensure loop-holes and any unintended consequences can be dealt with promptly.

Lobbying is not in itself a problem, and lobbyists on the whole are not dishonest. Care must be taken in any proposal that measures introduced to ensure high standards do not inflict unreasonable demands on lobbyists, therefore reducing the capacity for a broad range of voices to be heard by elected representatives. It

²¹ Ken Coghill and Joo-Cheong Tham, *Submission to the Electoral Matters committee Inquiry into Conduct of the 2006 Victorian State Election and Matters Related Thereto* (2007) 67

²² Accountability Working Party Australasian Study of Parliament Group, above n3, 7.

²³ *Australian Government Standards of Ministerial Ethics* (2007) Department of Prime Minister and Cabinet <http://www.dpmc.gov.au/guidelines/docs/ministerial_ethics.pdf> at 6 June 2008.

is critical that the Parliament and Government take full responsibility for ensuring high standards in the conduct of Members of Parliament themselves. This would go a long way in ensuring that any attempts to corrupt the public processes would be ineffective.

Recommendation.

That there be ongoing independent evaluation of the effectiveness of any codes of conduct for lobbyists and Members of Parliament, as well as of any Officer charged with monitoring, educating or enforcing such codes and that such evaluations be tabled in the Parliament at regular intervals to be determined by the relevant Standing Committee.