



**Lobbying, transparency and accountability in
NSW: Submission to the Independent
Commission Against Corruption**

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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 works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the (then) 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 Services Program. PIAC also receives funding from Industry and Investment NSW for its work on energy and water, 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.

PIAC's work on democratic processes

PIAC is pleased comment on elements of the Issues Paper on the *Nature and Management of Lobbying in NSW*, prepared by the Independent Commission Against Corruption. The issues referred to in the paper about lobbyists and their relationship to members of parliament, public servants, and fund raising for political parties are of particular interest. PIAC's work in this area includes that undertaken on political donations and election funding for submissions to both state and Federal inquiries¹ as well as a submission

¹ Kerrie Tucker and Deirdre Moor, *Deepening Democracy: Submission to the Australian Government in response to the Electoral Reform Green Paper* (2009) Public Interest Advocacy Centre
<http://www.piac.asn.au/publications/pubs/sub2009022_20090223.html> at 21 June 2010.

to the Senate Finance and Public Affairs Committee inquiry into the Lobbying Code of Conduct². This submission draws upon this work; it therefore, focuses on improvements that are needed to accountability, reporting and penalty mechanisms that aim to reduce the risk of corruption as relationships form between government officials and lobbyists.

Response to principal issues

What should the guiding principles be of any regulatory scheme for lobbyists?

Lobbying is an important and influential aspect of a healthy participatory democracy. Unless it is governed by high standards and is seen to be accountable, ethical and fair in terms of access to and influence on decision makers. Responsibility for ensuring such high standards lies with the lobbyists as well as all public office holders.

All guidelines, codes of conduct, standards and legislation governing lobbying activities and relationships should:

- aim to free government and the public service from undue influence from third parties;
- apply to all lobbying activity and organisations that undertake these activities;
- be procedurally fair to all parties;
- not inflict unreasonable demands on lobbyists, reducing the capacity for a broad range of voices to be heard by elected representatives.

If lobbyists are regulated should they be self-regulated, regulated by government or a combination of both?

Lobbying is not in itself a problem, and lobbyists on the whole are not dishonest. Care must be taken in any regulatory proposal that measures introduced to ensure high standards do not inflict unreasonable demands on lobbyists.

All parties involved in lobbying activities should be regulated, components of the regulation should provide for:

- an on-line public register to 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;
- sanctions for breaches of codes, standards or regulations;
- public reporting requirements.

Related to the issue of procedural fairness is the question of enforceability. Without meaningful sanctions applying to all parties whatever level of regulation is used will be without effect. For example, Canada extended from two to ten years the period during which possible infractions or violations under the the

² Kerrie Tucker, Regulating influence and access: *Submission to the Inquiry into the Lobbying Code of Conduct* by the Senate Finance and Public Affairs Committee (2008) Public Interest Advocacy Centre
<http://www.piac.asn.au/publications/pubs/sub2008061_20080610.html> at 21 June 2010.

Lobbying Act, 2008 (Canada) and the Lobbyists' Code of Conduct³ 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.⁴

While PIAC is of the view that a system of sanctions for lobbyists who breach regulations should be given serious consideration, this should only occur if procedural fairness exists in the system and there is also an effective means of sanctioning Members of Parliament who breach regulations. Lobbyists have the right to procedural fairness and equal treatment.

Who should be included in the regulatory system?

It 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. For the system to be procedurally fair it is critical that both lobbyists and ministers and members of parliament are required to meet the same burden of responsibility in terms of their obligations.

Ministers should not be able to claim ignorance of the relationship his or her office or department has with lobbyists. 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.⁵

Opposition and cross bench members should also apply such codes, standards and regulations. All members of parliament 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 then codes of practice should apply to all members of parliament.

Codes, standards or regulation should also apply to not-for-profit organisations and organisations representing paying clients or individuals that lobby on their own behalf or on behalf of their client community, such as welfare agencies and community legal centres. 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.

³ Government of Canada, *The Lobbying Act, A Summary of New Requirements*, (2008), Office of the Registrar of Lobbyists

⁴ 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.

⁵ Accountability Working Party Australasian Study of Parliament Group, *Be Honest Minister – Restoring Honest Government in Australia* (2007), 2.

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(Canada)* 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.⁶

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

Should lobbyists be prohibited from organising or arranging the organising of fundraising activities and campaigns for MPs, local councilors political candidates or political parties?

This issue is part of a broader issue about election funding and expenditure, of which there have been major inquiries at both the state and federal level in recent years.⁷ The role of lobbyists in fundraising is considered as part of the discussion about the role of third parties, that is, a person or group, other than a candidate, registered political party or electoral district association of a registered political party.

Fundraising conducted by third parties is of concern because it can be used to exploit loopholes and avoid disclosure requirements or hide the identity of donors. It can also be used as a means of purchasing influence with politicians and members of parliament, putting at risk, either in reality or perception, the belief that public interest is the focus of parliamentary decision making.

Rather than banning activity, reports on electoral funding reform, generally recommend third parties meet the same accountability requirements as candidates, political parties and associates. A recent report prepared for the NSW Electoral Commission about electoral funding reform is typical of this approach, recommending that donations from third parties be recorded, anonymous donations of \$200 or more be banned and restrictions be placed on third parties' spending on election activities.⁸

⁶ 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).

⁷ Australian Government, Electoral Reform Green Paper: Donations, Funding and Expenditure (2008), <http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf> at 21 June 2010 and Parliament of NSW, Joint Standing Committee on Electoral Matters, Public Funding of Election Campaigns (2010) <[http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/82f12c9fc8e2dbdcca2576f200213db6/\\$FILE/Final%20Report%202-54.pdf](http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/82f12c9fc8e2dbdcca2576f200213db6/$FILE/Final%20Report%202-54.pdf)> at 21 June 2010.

⁸ Joo-Cheong Tham, *Towards a more Democratic political funding regime in NSW*, (2010), NSW Electoral Commission, 3-5.

PIAC recommends that third parties meet the same reporting requirements as political parties and candidates, and that any money raised at events or activities be defined as 'gifts' be limited and meet reporting requirements.

Lobbyists with contracts with any Australian government and foreign citizens should also be prohibited from making donations or being involved in managing fundraising activities for political parties, candidates and associated entities.

Should restrictions be placed on former ministers, ministerial staffers, MPs and public servants acting as lobbyists?

PIAC recommends the prohibition 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. This would create consistency with the Australian Government, *Lobbying Code of Conduct*.⁹

What information should be disclosed by lobbyists?

Transparency would be improved if Ministers and Members of Parliament took greater responsibility to make publicly available information about by whom they are being lobbied and on what issues. The need for improved accountability and reporting requirements is consistently supported in the literature on this issue.

The Accountability Working Party Australasian Study of Parliament Group (ASPG)¹⁰ recommended that legislation regulating lobbying should ensure on-line registration of each instance of lobbying activity via a website of every agency and minister being lobbied. It also recommended that 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.

Julian Fitzgerald, in his Discussion Paper for the Democratic Audit of Australia, also 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 on-line 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 and advertising.¹¹

Dr Joo-Cheong Tham also ¹²recommended in his report to the NSW Electoral Commission that:

⁹ Australian Government, Department of Prime Minister and Cabinet, *Lobbying Code of Conduct* (2008), clause 7.1, 4.

¹⁰ Accountability Working Party Australasian Study of Parliament Group, above, n 5, 61.

¹¹ Julian Fitzgerald, 'The Need for Transparency in Lobbying', *Democratic Audit of Australia Discussion Paper 16/07*, 2007.

¹² Joo-Cheong Tham, Recommendation 18, above, n 7 8, 4

Government Department publish at regular intervals specific information on the meetings between lobbyists and government representatives including the name of the lobbyists, date of contact, meeting attendees and a summary of issues discussed. This obligation should extend to party fundraisers.

How should any regulatory regime be overseen?

A Parliamentary Standards Officer or Commissioner, or similar agent, independent of government should be established to ensure high standards in all aspects of the workings of the Parliament. While PIAC is supportive of the need to improve the accountability of lobbying, care must be taken to ensure that any system introduced is fair and equitable. For example, lobbyists should have appeal rights or independent scrutiny of the decision available when they are alleged to have breached the codes, standards or regulations. All participants should have equal access to procedurally fair processes and there should be an agent independent of government to oversee the process.

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 a model 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.

What mechanisms should exist to review the functioning and effectiveness of the regulatory regime?

There should be an ongoing independent evaluation of the effectiveness of any codes, standards or regulations for lobbyists and Members of Parliament, as well as of any Officer charged with monitoring, educating or enforcing such codes and regulations. Evaluations should be tabled in the Parliament at regular intervals to be determined by the relevant Standing Committee.

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 *Be Honest Minister – Restoring Honest Government in Australia*, above, n 4 , 61

Recommendations

1. *PIAC recommends that consideration be given to introducing regulations that increase the reporting requirements of both lobbyists and Members of Parliament.*
2. *PIAC recommends that any regulations be extended to all Members of both Houses of the Parliament and their staff.*
3. *PIAC recommends that organisations representing paying clients or individuals lobbying on behalf of a for-profit corporation be required to comply with the regulations.*
4. *PIAC recommends that not-for-profit organisations that lobby on their own behalf or on behalf of a client community be required to comply with the regulations.*
5. *PIAC recommends 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.*
6. *PIAC recommends that sanctions be included in the regulations.*
7. *PIAC recommends that there be ongoing independent evaluation of the effectiveness of any regulations, codes or standards 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.*
8. *PIAC recommends that third parties be required to meet the same reporting requirements as political parties and candidates, and that any money raised at events or activities be defined as 'gifts' and be limited and meet reporting requirements.*
9. *PIAC recommends that lobbyists with contracts with any Australian government and foreign citizens be prohibited from making donations or being involved in managing fundraising activities for political parties, candidates and associated entities.*
10. *PIAC recommends that there be regulations to require government departments to publish at regular intervals specific information on the meetings between lobbyists and government representatives including the name of the lobbyists, date of contact, meeting attendees and a summary of issues discussed.*