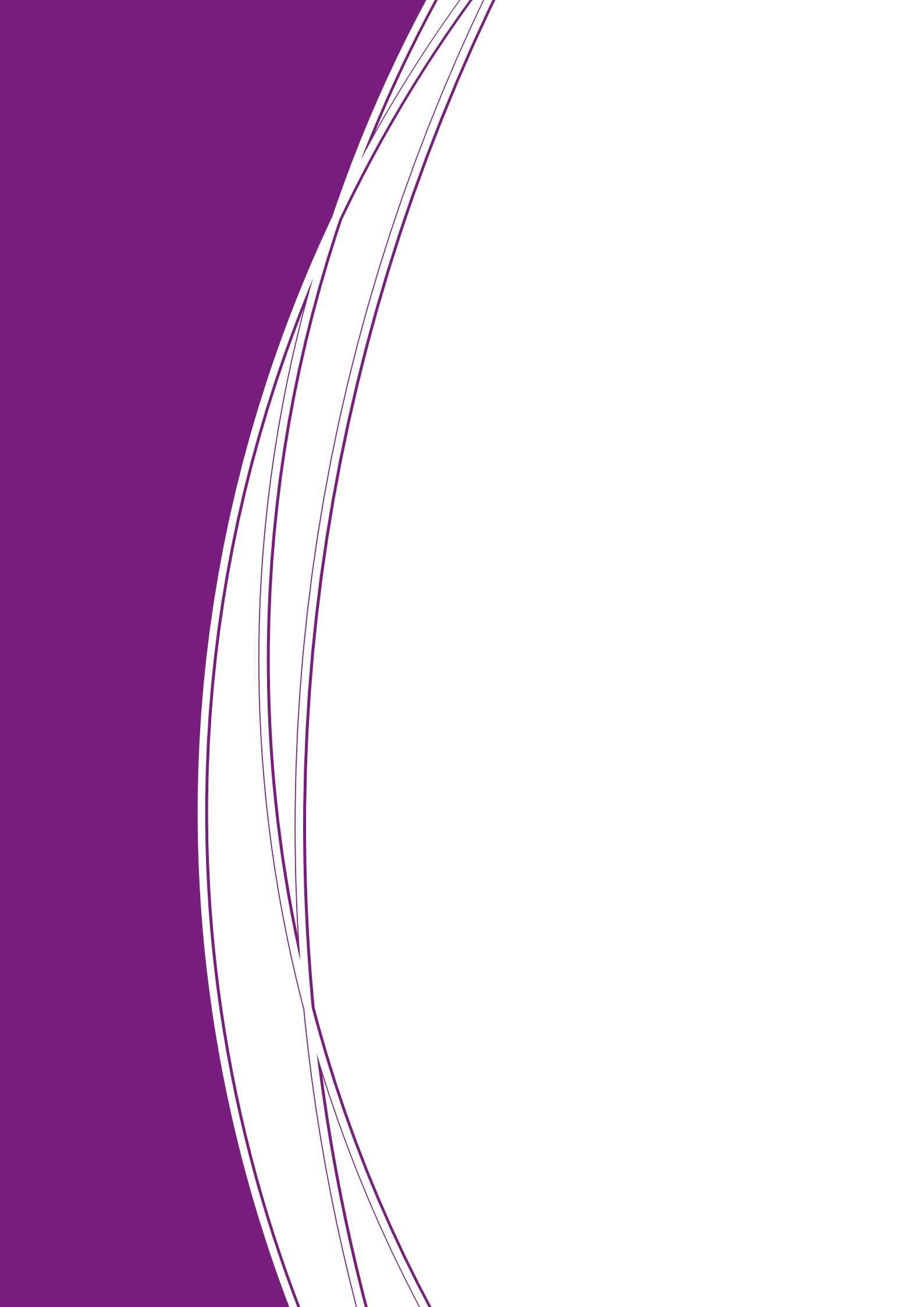
ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION

NEW SOUTH WALES

INVESTIGATION INTO THE REGULATION OF LOBBYING, ACCESS AND INFLUENCE IN NSW

ICAC REPORT
JUNE 2021



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Mr President
Mr Speaker

In accordance with section 74 of the *Independent Commission Against Corruption Act 1988*, I am pleased to present the Commission's report on its investigation into the corruption risks involved in lobbying, accessing and influencing public officials and public authorities in New South Wales.

I presided at the public inquiry held in aid of the investigation.

The Commission's findings and recommendations are contained in the report.

I draw your attention to the recommendation that the report be made public forthwith pursuant to s 78(2) of the *Independent Commission Against Corruption Act 1988*.

Yours sincerely

The Hon Peter Hall QC
Chief Commissioner

Contents

Glossary

This report uses the following terminology and abbreviations.

DPC

Department of Premier and Cabinet

DPIE

Department of Planning, Industry and Environment

GIPA Act

Government Information (Public Access) Act 2009 (NSW)

Government official

As defined in s 3 of the *Lobbying of Government Officials Act 2011* ("LOGO Act"). Note, this has a narrower meaning than the term "public official" in s 3 of the *Independent Commission Against Corruption Act 1988*

ICAC Act

Independent Commission Against Corruption Act 1988

In-house lobbyist

A lobbyist who is an employee, or permanent staff member, of the organisation for which s/he carries out lobbying activities. By definition, an in-house lobbyist is not a third-party lobbyist

Lobbying

As defined in s 4 of the LOGO Act

Lobbyist

As defined in s 3 of the LOGO Act

Lobbyists Code

The NSW Lobbyists Code of Conduct set out in the Lobbying of Government Officials (Lobbying Code of Conduct) Regulation 2014

Lobbyists Register

The NSW Register of Third-party Lobbyists as described in Part 3 of the LOGO Act

LOGO Act

Lobbying of Government Officials Act 2011 (NSW)

Lobbyists Watch List

Section 12 of the LOGO Act requires the NSW Electoral Commission to maintain a lobbyists watch list which can contain the names and details of lobbyists that have contravened the Lobbyists Code or the Logo Act.

NSWEC

NSW Electoral Commission

OECD

Organisation for Economic Co-operation and Development

Operation Halifax

The name of the Commission's investigation into lobbying, resulting in the report, *Investigation into corruption risks involved in lobbying*, released in November 2010

Professional lobbyist

A lobbyist whose primary occupation involves lobbying. In practice, this will be a third-party lobbyist or an in-house lobbyist

SIRU

Strategic Intelligence and Research Unit of the Independent Commission Against Corruption

Third-party lobbyist

As defined in s 3 of the LOGO Act. By definition, a third-party lobbyist is not an in-house lobbyist

Executive summary

Operation Eclipse is an investigation by the Independent Commission Against Corruption ("the Commission") into the regulation of lobbying, access and influence in NSW. Unlike most investigations conducted by the Commission, Operation Eclipse was not concerned with whether any individual had engaged in corrupt conduct. Instead, it examined factors that could either allow, encourage or cause corrupt conduct or detract from the integrity and good repute of public administration.

The Commission has power to make findings, form and state opinions, and make recommendations, even if the relevant conduct is not corrupt conduct for the purposes of the ICAC Act but is otherwise a matter within the Commission's statutory functions.

Lobbying, although widely accepted as an integral and legitimate activity for the functioning of a democratic system, carries inherent risks of corruption, undue influence, unfair access and biased decision-making that are detrimental to the public interest and effective public policies.

An examination of lobbying practices in NSW was first undertaken by the Commission in an investigation known as Operation Halifax. A number, but not all the 17 recommendations made in its 2010 report, *Investigation into corruption risks involved in lobbying*,[1] were adopted. Consequently, many of the inherent risks referred to above continued to prevail and the activities of a great many lobbyists were not made subject to robust regulation. The catalysts provided for Operation Eclipse were a minimalist legislative approach to the regulation of lobbying in NSW, in particular in relation to lobbying in a transparent and accountable way, combined with declining levels of public trust in government officials to conduct their duties and obligations.

In this investigation, the Commission considered to what extent the regulation of lobbying under the existing statutory regime, found in the LOGO Act, is working in practice. Or, whether enhancements were needed to ensure both the actuality and the perception that access and influence in government and public administration are in accord with accepted standards of transparency and accountability.

In line with evidence submitted during the investigation, the Commission has made nine key findings and 29 recommendations for lobbying reform.

The recommendations made in this report emphasise the importance of lobbying regulation that promotes transparency of process and accountability in decision-making. They are directed to reassuring the community that lobbying practices are not conducted in unaccountable secrecy.

The principal features of proposed regulatory reform are set out below.

Key findings

Key finding 1

New legislation, or significant reform of the LOGO Act, is required to safeguard the public interest against the inherent lobbying risks of corruption and undue influence.

A key finding of the Commission is that the LOGO Act fails to provide a proper and sufficiently robust framework to manage corruption risks. It does not provide the required level of assurance to the general public that democratic principles of transparency, accountability, integrity and fairness are being met.

The enactment of new legislation for the regulation of lobbying is necessary to ensure accountability in the

[1] Available from the Commission's website at www.icac.nsw.gov.au.

exercise of public office and public power. Strengthening transparency and accountability in lobbying will only be achieved through legislation that ensures such transparency and accountability. The LOGO Act falls well-short in these respects.

The Commission is of the view that lobbying regulation in NSW can be readily strengthened by drawing on best practice standards. The recommendations in this report include proposals to adopt, as appropriate, specific concepts and mechanisms operating in other jurisdictions, including Scotland, Ireland and Canada.

Key finding 2

Oversight of improper lobbying and compliance with the LOGO Act could be improved.

A dedicated lobbying commissioner should be appointed to focus on regulating lobbying activity and take on the new and expanded functions recommended by the Commission in this report.

The regulation of lobbying currently falls within the remit of the NSWEC. However, the NSWEC operates under a statutory framework that was designed for the regulation of elections, not lobbying.

Regulatory oversight of lobbying in NSW can be expected to be improved by creating a dedicated office. The Commission sees the need for expanded regulatory functions, which an appointed lobbying commissioner would be well-suited to perform, such as:

- oversight of an expanded Lobbyists Register
- greater oversight of government officials, including through the use of investigative powers
- additional scope to publish regulatory findings
- duties to prevent undue influence and other forms of improper lobbying conduct.

A related function would include the provision of guidance and education on integrity standards.

Key finding 3

The existing regulatory regime does not address or set out the ethical obligations for government officials who are lobbied.

The LOGO Act makes provision for a Lobbyists Code of Conduct that is applicable to all lobbyists. A key finding of the Commission is that a robust lobbying regime must additionally address the obligations and conduct of government officials in processing and determining lobbying proposals.

A statutory codification of common law and ethical obligations and standards in the form of a new "Lobbying Code of Conduct" should be formulated to apply to both lobbyists and those government officials being lobbied.

Key finding 4

There is insufficient information available to the public, civil society groups and the media about lobbying activities.

The Commission notes that the current NSW Lobbyists Register only covers a small amount of the lobbying activity that takes place in NSW. As a result, it can be difficult to determine which groups or individuals have influenced key government decision-makers.

A revised online NSW Lobbyists Register should be designed to make information available to the public about who is lobbying whom and about what. Those required to register should extend beyond third-party lobbyists, subject to exemptions for lower risk lobbying activities.

While online lobbying registers in Canada, Ireland and Scotland differ in the range of information that regulated lobbyists are required to disclose, some elements of transparency are common to them all, including:

- the identity of those on whose behalf lobbying is being carried out
- the designated public official being lobbied
- the purpose of the lobbying
- intended results of the lobbying.

Key finding 5

The local government sector faces considerable risk of undue influence and should be regulated by the LOGO Act.

Investigations conducted by the Commission and interstate anti-corruption commissions indicate that local councils are often the target of improper lobbying. However, local government officials are not "government officials" as defined by, and for the purposes of, the LOGO Act. *The Model Code of Conduct for Local Councils in NSW* does not explicitly refer to lobbying; however, it does contain general obligations in relation to ethical and honest conduct, as well as more detailed material covering:

- improper and undue influence
- inappropriate interactions
- use and security of confidential information
- recordkeeping.

Extending the provisions of the LOGO Act to local government would, among other matters, allow the lobbying regulator to provide guidance about the appropriate policies and procedures that would best suit the circumstances of local councils, particularly regarding matters about planning, land use, the environment and community amenities.

Key finding 6

The movement of certain former public officials between the government sector and lobbying roles is currently unregulated, presenting a risk of undue influence over government.

In NSW, post-employment cooling-off periods are generally confined to ministers and parliamentary secretaries. Other classes of public official, including members of Parliament, ministerial staff and senior public sector executives, do not face the same restrictions. The Commission's view is that post-employment restrictions should be considered for a broader range of officials in high-risk categories.

Greater transparency about the movement in, and out of, key government roles is also recommended and could be achieved by establishing a "Former Public Officials" list. This list would contain the names of relevant former public officials who have moved into lobbying roles.

Key finding 7

The published summaries of ministerial diary disclosures are not sufficiently detailed or meaningful for the public to understand who is meeting whom and why.

Since 2014, extracts from ministerial diaries have been published that record scheduled meetings held with external parties, including lobbyists. In their current format, these ministerial diary disclosures are not easily accessible or searchable, making scrutiny and analysis difficult. Importantly, the published descriptions are usually too short and too vague to adequately explain what the meetings are about.

To ensure accountability, members of the community should be able to know which ministers have met with lobbyists and the purpose of such meetings. For this to happen, the publication of ministerial diary disclosures must be strengthened in terms of content, format and timeliness. The Commission recommends that the oversight of diary disclosures should fall to the regulator of the LOGO Act.

Key finding 8

Lobbyists are not explicitly prohibited from giving gifts to government officials.

The LOGO Act and Lobbyists Code do not place specific obligations or restrictions on lobbyists in relation to gift-giving. Although gift-giving by lobbyists is not commonplace, this anomaly should be corrected.

Key finding 9

Recordkeeping practices in relation to lobbying activities are inadequate.

NSW Government agencies should be required to adopt minimum standards and a model policy on recordkeeping, the disclosure of records, and protocols around scheduling and conducting meetings with lobbyists.

Numerous acts, regulations and procedures require NSW public officials to validate or give an account of their decisions or record information. Open government initiatives, such as the *State Records Act 1998*, the GIPA Act, and Standing Order 52 of the Legislative Council are mechanisms used to acquire information, usually in relation to a government decision, that has become a matter of broad public interest.

A key finding of the Commission is that greater accountability can be achieved by strengthening recordkeeping provisions and their oversight.

List of recommendations

Recommendation 1

That the Lobbyists Code of Conduct be renamed the "Lobbying Code of Conduct" and imposes standards and obligations on public officials with regard to how lobbying proposals are received, considered and determined.

These standards and obligations will be consistent with the obligations at law that apply to the discharge of public functions and the exercise of public powers.

Recommendation 2

That the "Lobbying Code of Conduct" includes general principles that a public official must adhere to when receiving, considering and determining a lobbying proposal, including the obligations:

- to act honestly, impartially and disinterestedly
- to act in the public interest and not for any extraneous purpose
- not to act improperly, including by improper preferencing or favouritism.

Recommendation 3

That the "Lobbying Code of Conduct" also sets out some detailed standards and obligations including:

a) a prohibition on undocumented or secret meetings and communications with lobbyists, which entails obligations to:
   i. document all communications with lobbyists, including those held away from government premises, apart from immaterial or ephemeral communications
   ii. avoid discussing substantive matters with lobbyists in social settings

b) an expectation that a public official makes all reasonable efforts to seek the views of all parties whose interests are likely to be affected by the adoption of a lobbying proposal

c) a prohibition on improper preferential treatment of a lobbyist on the basis of any existing or former relationship (for example, a conflict of interest situation)

d) that a public official should discourage lobbying representations relating to proposals in situations where there are formal assessment procedures in place for determining the merits of the proposal, and that these procedures (for example, those relating to development applications, tenders, grants and unsolicited proposals) offer a more suitable channel through which representations can be made

e) that a public official must not divulge information to lobbyists that would provide them with an unfair advantage over other interested parties, including other lobbyists

f) a requirement to report any reasonably suspected breach of the "Lobbying Code of Conduct" to the lobbying regulator.

Recommendation 4

That, with respect to the proposed "Lobbying Code of Conduct", the obligations on, and oversight of, government officials should extend to circumstances where an official is "lobbied" by a person or entity acting in their/its own interests; that is, not "representing the interests *of others* ".

Recommendation 5

That the lobbying regulator be empowered and resourced to:

- develop minimum standards and a model policy relating to interactions with lobbyists and others making representations to government, which should:
  - address recordkeeping, disclosure of records and protocols for organising and conducting meetings
  - prohibit undocumented or secret interactions with lobbyists or other persons making representations to government
- assess and report on agencies' compliance with minimum standards
- give advice to agencies and individual government officials about compliance with minimum requirements and better practice
- liaise with organisations such as the State Archives and Records Authority and the Information and Privacy Commission
- direct an agency or public official to provide any lobbying-related documents or records. Such a direction would operate in a manner similar to the power in s 15 of the *State Records Act 1998*. In addition, the lobbying regulator should, subject to a public interest test, have the power to direct an agency to make public any document or record concerning lobbying communications.

Recommendation 6

That all public sector agencies subject to the LOGO Act be required to adopt policies and procedures that conform to minimum established standards issued by the lobbying regulator.

Recommendation 7

That all professional lobbyists (third-party lobbyists and in-house lobbyists) be required to register with the lobbying regulator and make entries into the NSW Lobbyists Register. Exemptions for organisations that are small or lobby infrequently should apply (based on the Scottish or Canadian systems). As is currently the case with third-party lobbyists, all lobbyists should:

- provide relevant details about their organisation and staff that engage in lobbying activities
- complete mandatory training
- disclose if they represent a foreign principal
- file statutory declarations with the lobbying regulator.

Recommendation 8

That all regulated lobbyists on the Lobbyists Register should disclose:

- date and location where face-to-face lobbying communications took place
- the name and role of the government official(s) being lobbied
- a description of their lobbying communications
- a description of the purpose and intended outcome of their lobbying communications
- whether lobbying was undertaken on behalf of another party.

Exemptions, similar to those in Scotland and Ireland, should be introduced.

Recommendation 9

That lobbyists should file information electronically that is then automatically published on the Lobbyists Register. The register should allow any person to alert the lobbying regulator of any information that is considered missing or inaccurate.

Recommendation 10

That the lobbying regulator should have powers to determine whether a person or entity is required to register and whether the information required for the Lobbyists Register is accurate and up-to-date. This could include issuing information notices and making use of the Lobbyists Watch List. Failure to register may require the lobbying regulator to provide an adequate opportunity to comply, as there is with third-party lobbyists.

Recommendation 11

That, in order to reduce the administrative burden, lobbyists required to be registered in NSW should be permitted to provide or rely on registration documentation filed with other jurisdictions, such as a jurisdiction under the Commonwealth. This could include relevant statutory declarations made in order to satisfy fit and proper person requirements.

Recommendation 12

That the diary and overseas travel information of ministers and parliamentary secretaries should be published:

- monthly, not quarterly
- in a single, searchable document or database formatted for easy access to enable public scrutiny
- displaying each minister's name against his/her portfolio.

Recommendation 13

That the NSW Government creates a pre-set menu of options that must be used to indicate the purpose of each meeting disclosed in the diary summaries of ministers. These options could be based on the categories of lobbying set out in s 4(1) of the LOGO Act or another classification that adequately covers the types of disclosable meetings held by ministers. The individual ministers ultimately should be responsible for supplementing the indicated entry by adding a clear description of the specific purpose of the meeting.

Recommendation 14

That the LOGO Act be amended to improve oversight of post-separation employment provisions by providing that the lobbying regulator may require any relevant former public official during the cooling-off period, who has a role in an organisation that employs lobbyists (whether or not a lobbyist themselves), to provide it with information concerning:

a) the terms and conditions of any employment or engagements undertaken by former public officials in the cooling-off period

b) the nature of any employment or engagement referred to in (a)

c) whether any employment or engagement undertaken in the cooling-off period has or does involve information obtained during his/her period as a public official

d) whether any employment or engagement undertaken in the cooling-off period involves or relates to any former portfolio functions or responsibilities pertaining to his/her former position as a public official.

Recommendation 15

That the LOGO Act be amended to restrict ministerial and parliamentary secretary advisers of sufficient seniority from engaging in any lobbying activity relating to any matter that they had official dealings with in their last 12 months in office, for a period of 12 months after leaving office, except with the approval of the lobbying regulator. Based on criteria published by the lobbying regulator, the restriction period could be removed, modified or made subject to conditions.

Recommendation 16

That the LOGO Act be amended to mirror the provisions of s 16 of the *Gaming and Liquor Administration Act 2007*. This would provide secretaries and agency heads with authority to designate high-risk roles and associated "key officials" where appropriate.

Officials in such roles would be subject to a six-month restriction on employment in certain areas related to their public duties. Based on criteria published by the lobbying regulator, the restriction period could be removed, modified or made subject to conditions.

Recommendation 17

That, in the absence of any other new measures to reduce the risks associated with lobbying by former public officials, the LOGO Act be amended to introduce a "Former Public Officials" list, to be managed by the lobbying regulator. For a period of four years after leaving office, all former public officials involved in lobbying activities would be required to ensure they are named on this list, including those working for third-party lobbyists.

Recommendation 18

That the NSW Government:

- creates a dedicated NSW lobbying commissioner whose primary purpose is to regulate the LOGO Act. The lobbying commissioner could head a standalone lobbying commission, or serve within an existing oversight agency
- provides the lobbying regulator with additional resources and powers to carry out the expanded functions set out in this report.

Recommendation 19

That the role of the lobbying regulator be clarified by creating clear legislative provisions that allow it to:

- oversee the conduct of both public officials and lobbyists under the "Lobbying Code of Conduct" and LOGO Act, including the criminal, administrative and ethical aspects of the regulation
- establish formal processes for accepting complaints and referrals in relation to lobbying matters
- have powers with respect to auditing compliance
- investigate suspected breaches (including of its own initiative) and make referrals for further investigation or sanction (if required)
- publish and disseminate any relevant findings
- have an advice-giving and standard-setting function.

Recommendation 20

That the LOGO Act be amended to give the lobbying regulator responsibility for setting the conditions of the Lobbyists Watch List.

Recommendation 21

That the requirement for ministers and parliamentary secretaries to publish summaries from their diaries should be set out in the regulation to the LOGO Act rather than a Premier's Memorandum. The lobbying regulator should be responsible for compliance.

Recommendation 22

That the NSW Government gives the lobbying regulator power to investigate and report on indirect lobbying that involves alleged unlawful and/or dishonest conduct.

Recommendation 23

That the NSW Parliament ensures that induction training for new members of Parliament is extended to existing members and addresses the administrative and ethical requirements of public officials in relation to lobbying. Such training should also be mandatory for parliamentary and ministerial staff.

Recommendation 24

That the Lobbyists Code of Conduct be amended to prohibit lobbyists (as defined in the LOGO Act) from offering, promising or giving gifts or other benefits to a public official who is, has been, or is likely to be lobbied.

Recommendation 25

That any fundraising event, where an attendee pays for any form of exclusive or private access to a minister, should be classified as a "scheduled meeting" for the purposes of Premier's Memorandum M2015-05 and consequently be disclosed in published summaries of ministerial diaries – along with the fact that it was paid access. This information should be published irrespective of whether any lobbying takes place.

Recommendation 26

That clause 13 of the Lobbyists Code of Conduct applies to all classes of lobbyist. However, this should not prevent members and supporters of a political party from lobbying in relation to policy issues.

Recommendation 27

That the prohibition on paid advocacy – as outlined in clause 2(a) of the Members' Code of Conduct (Legislative Assembly) and the Members' Code of Conduct (Legislative Council) – be extended beyond the promotion of matters in the NSW Parliament or its committees, to any communication with any other public officials, and that clause 7A of the Constitution (Disclosure by Members) Regulation 1983 (relating to disclosure) be amended accordingly.

Recommendation 28

That the NSW Government establishes a "Lobbying Reform Panel" comprising appropriately qualified persons to examine and formulate proposed legislative reforms. Appropriate secretariat services for the panel should be provided.

Recommendation 29

That, over a 12-month period, the "Lobbying Reform Panel" undertakes the required work under recommendation 28 and, by the end of the 12-month period, the panel provides a report setting out the provisions it recommends be incorporated into revised legislation.

These recommendations are made pursuant to s 13(3)(b) of the ICAC Act and as required by s 111E of the ICAC Act, will be furnished to the responsible minister or officer. The Commission will seek advice in relation to whether the recommendations will be implemented and if so, details of the proposed plan of action and progress reports. The Commission will publish the response to its recommendations, any plan of action and progress reports on its implementation on the Commission's website at www.icac.nsw.gov.au.

Recommendation this report be made public

Pursuant to s 78(2) of the ICAC Act, the Commission recommends that this report be made public forthwith. This recommendation allows either Presiding Officer of a House of Parliament to make the report public, whether or not Parliament is in session.

List of witnesses

Phase 1 — 5–7 August 2019	
Professor A J Brown	Professor of Public Policy and Law, Griffith University
Dr Simon Longstaff	Executive Director, The Ethics Centre
Kate Griffiths	Senior Associate, Grattan Institute
Annabelle Warren	Spokesperson, Public Relations Institute of Australia
Professor Mark Evans	Director of Democracy 2025, Museum of Australian Democracy
Dr Yee-Fui Ng	Senior Lecturer in Law, Monash University
Phase 2 — 21–22 October 2019	
Stephen Galilee	Chief Executive Officer, NSW Minerals Council
Georgina Woods	NSW Coordinator, Lock the Gate
Les Timar	Secretary, Australian Professional Government Relations Association
Joanna Quilty	Chief Executive Officer, NSW Council of Social Services
Professor Mary O'Kane	Chair, Independent Planning Commission
Matthew Hingerty	Executive Business Director, Barton Deakin
Phase 3 — 17–18 February 2020	
James Hebron	Chief Legal Counsel, NSW Department of Planning, Industry and Environment
Dr David Solomon	Former Queensland Integrity Commissioner
Greg Woodhams	Executive Director, City Planning, Greater Sydney Commission
George Rennie	Lecturer, School of Social and Political Sciences, Faculty of Arts, University of Melbourne

Chapter 1: Introduction

The regulation of lobbying in NSW

Lobbying plays an accepted role in influencing federal, state and local government decision-making. Over the last few decades, the complexity, scale and sophistication of lobbying activity has expanded around the world. In response, many countries and states, including NSW, have decided to regulate lobbying practices.

While lobbying is a central and legitimate activity for the functioning of a democratic system, in practice there are inherent corruption and other undesirable risks associated with it. As the OECD has noted:

> *Lobbying … has the potential to promote democratic participation and can provide decision makers with valuable insights and information, as well as facilitate stakeholder access to public policy development and implementation. Yet, lobbying is often perceived as an opaque activity of dubious integrity, which may result in undue influence, unfair competition and regulatory capture to the detriment of fair, impartial and effective policy making.*[2]

The expansion in lobbying activity may potentially exacerbate declining levels of public trust and a loss of confidence in democracy. Mark Evans, Director of Democracy 2025 at the Museum of Australian Democracy, told the Commission that:

> *…our data demonstrated that if current trends continue, no more than 10 per cent of Australians will trust their government and politicians. So by 2025 there is potentially a doomsday scenario … for Australian democracy.*

While there are many causes of the decline in trust in government and its institutions, the perception that an elite few are favoured with special access to decision-makers and who are able to influence government to make decisions that favour their interests has often been suggested to be one important factor.[3]

The overall objective of any lobbying regulation is the imposition of an appropriate level of transparency and accountability, in accordance with ethical standards with which lobbyists and public officials are expected to comply.[4] Transparency permits citizens and communities to know which private interests are seeking to influence public policy, or the favourable exercise of public power, and whether public officials have in fact acted in the public interest.

In 2019, NSW Premier the Hon Gladys Berejiklian MP said, "The NSW community has a right to know who their politicians are meeting with, and why".[5] Operation Eclipse was concerned with how the regulatory framework can be improved to ensure such an important right is satisfied. The investigation examined the statutory regime in NSW to determine whether:

- the NSW Lobbyists Register is adequate in terms of scope and transparency
- existing codes of conduct for lobbyists and public officials are satisfactory in promoting integrity and ethical behaviour in lobbying

[2] OECD, *Lobbyists, Government and Public Trust: Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying*, 2014, p. 3.

[3] In 2019, 56% of respondents agreed that government is run for a "few big interests" (up from 38% in 2007). I McAllister and S Cameron, *Trends in Australian Political Opinion: Results from the Australian Election Study 1987-2019*, Australian National University, December 2019, p. 100.

[4] OECD, *Lobbyists, Government and Public Trust: Volume 1: Increasing Transparency Through Legislation*, 2009 p. 4.

[5] Media release, "Tough new public sector integrity measures", NSW Premier, 2 February 2019.

- the of transparency of process to enable determinations to be made as to whether government officials have acted in the public interest when dealing with lobbyists is adequate
- access to government officials is fair and equitable
- notetaking and recordkeeping of communications with lobbyists satisfy transparency requirements in line with the *State Records Act 1998* and Open Government initiatives
- agencies adhere to policies and procedures when communicating with lobbyists
- the published summaries of ministerial diaries are sufficiently detailed and meaningful for the public to understand who is meeting with whom and about what
- the "revolving door" provisions, which stipulate when public officials can become lobbyists after leaving office, are fit-for-purpose
- lobbying laws are enforceable by an independent oversight body.

The Commission is mindful that the regulation of lobbying should be contextualised within the wider policy regime, in relation to matters such as Open Government, whistleblowing and ethical standards and obligations. Combined, these initiatives help play a role in strengthening transparency and accountability and preventing misconduct and corruption.

The Commission is also aware that the regulation of lobbying requires some investment of taxpayer money. It can be argued that areas with lower levels of corruption may need less robust regulation. Conversely, areas with medium to high risks of corruption require appropriate safeguards, including targeted regulation. Government commitment to an appropriate level of funding for the regulation of lobbying is essential in protecting the public interest. An appropriate level of funding will operate to strengthen trust and confidence in government and public administration.

Background to the investigation

In 2010, the Commission released its detailed and extensive review of lobbying activities, processes and issues in its report, *Investigation into corruption risks involved in lobbying*, known as Operation Halifax. At that time, the LOGO Act did not exist and there was no meaningful regulation of lobbying in NSW. The Commission released its report in November 2010 and made a series of recommendations for a regulatory scheme in NSW.

Operation Halifax 2010 – revisited

As part of Operation Eclipse, the Commission revisited the recommendations made in Operation Halifax and examined the impact of the LOGO Act.

Operation Halifax identified the key elements of an effective lobbying regulatory scheme. The Commission's recommendations were directed to a comprehensive integrated approach that appropriately brought into account accessibility to government and public officials and the essential measures that would ensure transparency and accountability in the exercise of public power.

The strength or effectiveness of the model proposed in the Operation Halifax report, however, was dissipated in the process of drafting the legislation that was necessary for translating the Commission's recommendations into law. For unexplained reasons, the approach taken in developing the LOGO Act was one confined to implementing some, but by no means all, of the Commission's 17 recommendations. This approach from the outset was destined to produce and did in fact result in a minimalist legislative approach, not the comprehensive and integrated approach that was recommended by the Commission in Operation Halifax.

Importantly, the matters in the list directly below were *not* incorporated into the LOGO Act as the Commission had recommended:

- Establishing a protocol that included "the minuting of meetings and relevant telephone calls" and for the retention of records of lobbying activity to the level referred to in the *State Records Act 1998* (see recommendations 2 and 3 and chapter 7 of the Operation Halifax report).
- Provisions to amend the GIPA Act with a view to including records of lobbying activity in the definition of "open access" information for which there is no overriding public interest against disclosure. Under the GIPA Act, open access information held by an agency must be made publicly available including on a website maintained by the agency (see recommendation 4 and chapter 7 of the Operation Halifax report).
- Expanding the class of lobbyists to be regulated to include *all* "third-party lobbyists" and "lobbying entities" as defined by the Commission (see chapter 9 of the Operation Halifax report, and the definition of "lobbying entities" below).
- A requirement for third-party lobbyists *and* in-house lobbyists to register before they can lobby a government representative (see recommendation 8 and chapter 9 of the Operation Halifax report).
- Establishing a two-panel lobbyists register – one for third-party lobbyists and one for other lobbying entities – requiring disclosure of the:
  - month and year in which they engaged in lobbying activity
  - identity of the government department, agency or ministry lobbied
  - name of any senior government representative lobbyist, and in the case of third-party lobbyists, the name of the client or clients to whom the lobbying occurred
  - name of any entity related to the client, the interests of which did derive or would have derived a benefit from a successful outcome of the lobbying.

  (see recommendation 8 and chapter 9 of the Operation Halifax report)

The proposed disclosure requirements for lobbying activity were not legislated in the LOGO Act. The Act requires third-party lobbyists to register their business and clients before lobbying on their client's behalf, but there is no further requirement to record each lobbying activity.

In the Operation Halifax report, the expression "lobbying entity" is defined as follows:

> *A body corporate, unincorporated association partnership, trust firm or religious or charitable organisation that engages in a Lobbying Activity on its own behalf.*

Importantly, this definition would extend regulation to, among others, in-house lobbyists.

The Commission proposed a system with extensive disclosure of information on lobbying activities, which would enable an interested person to obtain further information using the GIPA Act. As noted above, a lobbyist register for all "lobbying entities" was not established by the LOGO Act, nor was any requirement legislated for in-house lobbyists to register or create any record of their lobbying activities.

The complete omission or, in some instances, the partial omission from the LOGO Act of the recommendations on the matters referred to above resulted in a lobbying regulatory scheme:

- of very limited scope
- that lacked the essential transparency and accountability requirements recommended by the Commission in its Operation Halifax report.

Specific deficiencies in the LOGO Act include the following:

- other than third-party lobbyists, there is no requirement for other lobbyists (in particular in-house lobbyists) to register at all
- there is no legislative requirement for lobbyists to record lobbying activities or to document meetings or relevant telephone calls with public officials. Nor is there provision for public officials to document these lobbying interactions
- other than for third-party lobbyists, there is no requirement to follow a meeting request protocol
- other than for third-party lobbyists, the LOGO Act contains no provision or requirement on lobbyists or public officials to establish procedures or precautions to ensure transparency of dealings between public officials and lobbyists
- the LOGO Act fails to specify accountability measures or procedures in official decision-making that disclose the bases upon which lobbied proposals were accepted.

In the absence of legislation that directly and expressly addresses well-known corruption risks in the lobbying of public authorities and officials, it occasions no surprise

that a minimalist legislative response such as the LOGO Act lacks the controls required to eliminate or reduce corruption risks in relation to lobbying and thereby increase the public confidence in lobbying activities between government officials and special interests.

The prospect of commercial advantage obtained through lobbying conducted in secret and without transparency and accountability measures maximises the risk of partiality or improper dealings. It also fuels perceptions of corruption associated with lobbying.

In the publication, *Lobbyists, Governments and Public Trust* (2009), and as also set out in the Operation Halifax report, the OECD noted:

> *Effective standards and procedures that ensure transparency and accountability in decision making are essential to reinforce public trust. There is a growing recognition that regulations, policies and practices which require disclosure of information on key aspects of the communication between public officials and lobbyists have become vital aspects of transparency in 21st century democracies to empower citizens in exercising their right to public scrutiny. Measures promoting a culture of integrity are also an integral part of the "good governance" approach, particularly those that clarify expected standards of conduct in lobbying for both public officials and lobbyists*

What needs to be emphasised is that, properly constructed, statutory regulatory schemes do not operate to prevent or obstruct lobbying as a useful form of communication with government and government agencies or public officials. Statutory regulation proceeds on the basis that principles which already exist at common law (the public trust obligations that attach to public officials) continue to operate to ensure that public functions are exercised in the public interest and not for any extraneous purposes.

Legislation should include provisions that mirror the accepted legal standards of conduct of public officials. These would both inform public officials and lobbyists alike and safeguard the public trust by encoding such standards and reinforcing transparency and accountability in official decision-making.

Legislatively prescribed standards and principles operate to underpin the protocols and processes to be followed in practice. They do not prohibit or obstruct lobbying activity. Rather, in the public interest, they ensure that lobbying conduct meets minimum standards. Protocols can be constructed so as to afford protection for personal or commercially sensitive information. They may also, as appropriate and necessary, provide for private communications between lobbyists and public officials subject, of course, to the overriding principles of transparency and accountability.

Secrecy, absent accountability, will usually involve a tacit, if not an express, understanding between the lobbyist and the public authority or public official against any disclosure. As such, secrecy negates transparency. In its Operation Halifax report, the Commission observed:

> *In the present, non-transparent system of lobbying, where great weight is placed by many lobbyists on having a friendly, frank and working relationship with a Minister or department, a lobbied official may feel obliged to maintain confidence, even as to the fact of a meeting regardless of what is discussed during it. In this way, lobbying can have a covert component in which subtle, complex, all-party non-disclosure or secrecy can result to the detriment of the public interest. The privacy culture currently surrounding lobbying draws both non-government and government officers into a confidentiality of tactics that exceeds the need for legitimate protection. It contributes to a culture of non-disclosure even when public disclosure would be harmless.*

As discussed in chapter 4, secrecy and the discretionary exercise of official power that favours a lobbyist or the client of a lobbyist may combine in some cases to attract the Commission's corrupt conduct jurisdiction on the basis that the power was exercised improperly, partially or, dependent on the circumstances, dishonestly.

Aside from exceptional circumstances that justify secrecy and non-disclosure, public power and public office must be exercised in accordance with, and not in contravention of, the principles that inform their exercise. In the WA Inc Royal Commission into Commercial Activities of Government, the Royal Commission remarked on the processes of decision-making that were "often shrouded in secrecy", noting that, "Accurate records provide the first defence against concealment and deception".

The Royal Commission also observed:

> *Individually, the matters upon which we have reported reveal serious weaknesses in the present capacity of our institution of government, including this Parliament, to exact the degree of openness, accountability and integrity necessary to ensure that the Executive fulfils its basic responsibility to serve the public interest…*

In its Operation Halifax report, the Commission observed:

> *The corruption risk is exacerbated when secrecy of the lobbying activity itself is allied with secrecy surrounding the basis on which a decision has been made. When information on lobbying activity is not*

> *available to the public, those engaged in the lobbying activity can make representations that other interested parties are not in a position to address because they are not aware that they are being made. This can lead to false or misleading claims being made by a lobbyist that may adversely affect the exercise of official functions by the public official being lobbied. Private meetings that are kept from public disclosure also give rise to the perception, sometimes backed up by reality, that both parties have something to hide and that decisions are not being made in the public interest.*

Provisions of the LOGO Act were not drafted to comprehensively and effectively respond to the issue of secrecy in lobbying communications or in relation to the bases on which lobbied decisions are made. In addition, in-house lobbyists are not required to register with the lobbying regulator.

The enactment of legislation for the regulation of lobbying is necessary to make explicit to all (including to public officials) the fundamental principles and assumptions on which public office and public power are held and must proceed. The power associated with public office must be exercised on behalf of the people and not otherwise. That fact and the accountability of elected officials associated with it has been clearly enunciated by the High Court in *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45; (1992) 177 CLR 106 (30 September 1992).

The public trust principle that governs the exercise of public power and public office requires integrity *both* in the processes of government and in the conduct to be expected of public officials. The transparency of information is invariably the key to accountability.

In Operation Halifax, the Commission observed that any regulatory system for lobbying should address relevant corruption risks. Applying that proposition to the LOGO Act, it may be readily seen that that Act plainly does not address or respond to the critical corruption risks highlighted in the Operation Halifax report. In particular, the LOGO Act does not adequately address the risk of corruption by those who wish to influence government but who are not third-party lobbyists.

These shortcomings and deficiencies in the LOGO Act are largely attributable to the fact that, in its drafting, a number of key recommendations in the Operation Halifax report were not addressed and provided for in the legislation.

In summary, as noted in the Operation Halifax report:

> *In the Commission's experience, a lack of transparency in any process involving government decision-making can be conducive to corruption.*

Why the Commission conducted Operation Eclipse

The Commission revisited the recommendations made in Operation Halifax and their impact. During Operation Eclipse, differing views had emerged about whether further reform was required. There are some who believe the current regulatory framework in NSW is fit for purpose in achieving its intended objectives without unnecessary compliance burdens. Others believe that the LOGO Act does not go far enough. They point to the prevalence of unfair access and undue influence and, additionally, the need for more robust regulation and greater transparency.

Section 12 of the ICAC Act requires the Commission to have regard for the protection of the public interest and the prevention of breaches of public trust as its paramount concerns. Section 13(1)(a) provides for the Commission to investigate "conduct liable to allow, encourage or cause the occurrence of corrupt conduct" and "conduct connected with corrupt conduct". Section 20(1) makes provision for the Commission to commence investigations on its own initiative, which was the case with Operation Eclipse. Section 13(1)(e-j) of the ICAC Act makes provision for the Commission to promote the good repute of public administration.

Pursuant to those legislative provisions, the Commission determined that it was timely to revisit the existing regulatory regime. The following factors coalesced to inform the Commission's decision to conduct a further investigation into lobbying:

- as stated above, only certain of the Commission's recommendations in Operation Halifax were adopted
- survey evidence reveals reasonably widespread perceptions that public trust in aspects of government and government institutions is declining
- some lobbying practices are secretive; the public's perception of the legitimacy of lobbying depends on there being transparency in lobbying
- Open Government initiatives give effect to transparency laws aimed at improving public access to information and data held by government
- the existing regulatory regime under the LOGO Act addresses only a small proportion of all the lobbying that takes place
- only third-party lobbyists are required to appear on the Lobbyists Register

- a significant proportion of lobbyists are former public officials, contributing to concerns about the revolving door and undue influence
- lobbying regulation in NSW remains well below international best practice, and lessons can be drawn from a well-established regime (Canada), a well-regarded model (Ireland), and a recently enacted regime (Scotland).

Conduct of the investigation

The Commission commenced Operation Eclipse on its own initiative in February 2019.

The investigation required an examination of the following key variables that characterise lobbying regulation:

- the definition of "lobbyist" – who is to be regulated, and who is exempt
- registration disclosure requirements – the amount and accuracy of information that directly relates to a law's robustness
- public access to a registry of lobbyists – what information is made available to the public and the technology infrastructure that facilitates access
- reporting processes – how lobbying activities are recorded and by whom
- timeliness – the timeframes in which lobbying activity updates and other relevant information is expected to be reported
- the presence of codes of conduct – the expectations set out by any such codes, and which lobbyists and lobbied public officials to which they apply
- adequacy of accountability mechanisms – requiring public officials to show how they have used their discretion and to whose benefit
- revolving door provisions – who is regulated, for which activities, and for how long
- enforcement and compliance – the methods by which compliance is monitored, investigated and sanctioned, and the manner and extent to which relevant parties are educated on their obligations.

To begin the process of information gathering, in April 2019, the Commission released a discussion paper authored by academic experts in the field, titled *Enhancing the democratic role of direct lobbying in NSW*.[6]

A total of 43 formal submissions were received in response to the issues raised in the discussion paper, representing the interests of:

- not-for-profit and for-profit organisations
- peak bodies (including bodies representing professional lobbyists)
- local government representatives
- private citizens
- academics
- research bodies
- journalists
- elected officials
- third-party lobbyists
- elected officials from outside NSW.

In October 2019, the Commission consulted further with the release of *Operation Eclipse: lobbying, access and influence in NSW – an interim paper*,[7] in response to which it received 10 written submissions.

Chief Commissioner the Hon Peter Hall QC presided over a public inquiry in three phases held in August and October 2019 and February 2020. Sixteen witnesses from various sectors voluntarily gave evidence.

The Commission's SIRU undertook an analysis of data from the NSW Lobbyists Register (including data-matching of third-party lobbyist organisations, owners, employees and clients) and the Commission's complaints data to identify registered entities named in relation to alleged corrupt conduct. The data-matching exercise also made use of the NSW ministers' diary disclosures.

The Commission conducted research to draw lessons from models considered to have elements of best practice. Case studies of regulatory models in Australia, Canada, Ireland and Scotland were prepared, followed up by further insights in interviews with international regulators.

In addition, an analysis was conducted of all NSW Government departments that provided information on procedures and protocols in relation to their interactions with lobbyists. This included guidelines on how officials grant access to lobbyists and how those interactions are recorded and made transparent. The DPC also produced relevant government-wide guidelines and protocols.

[6] Yee-Fui Ng from Monash University and Joo-Cheong Tham from the University of Melbourne. Available from the Commission's website at www.icac.nsw.gov.au.

[7] Available from the Commission's website at www.icac.nsw.gov.au.

Similar information was requested from 14 NSW ministers. An analysis was made of their processes and practices around meetings with third-party lobbyists as well as industry associations, peak bodies, not-for-profit organisations and other relevant parties. In addition, four of the 14 ministers were asked to provide information specific to 10 meetings they had held with lobbyists, as reported in their published diary summaries.

The investigation included desktop research to identify, summarise and highlight existing knowledge on lobbying regulation, as well as to identify gaps and inconsistencies. Extensive qualitative research was undertaken, involving face-to-face interviews with experienced individuals and organisations that provided an insight into how lobbying regulation works at state and local government levels in NSW, throughout Australia and other jurisdictions. Academic experts in the field, elected officials, community members and lobbying practitioners were among the many who expressed their views on how regulation could be improved in NSW.

Principles underlying lobbying regulation in NSW

As part of the investigation, the Commission considered the OECD's 10 principles of transparency and integrity in lobbying. The first and key OECD principle states that:

> *Countries should provide a level playing field by granting all stakeholders fair and equitable access to the development and implementation of public policies.*[8]

The OECD recommends that lobbying regulation form part of broader legislation promoting public participation and transparency and for certain lobbying activities to be disclosed so as to be scrutinised by civil society and the media. The OECD principles place importance on public officials embracing a culture of integrity, transparency and accountability, which are fundamental to any system of regulating lobbying, and for lobbyists to abide by codes of conduct.

Integrity refers (but is not limited) to honesty, fairness and impartiality.

Transparency in public administration refers to the public, or at least organisations acting on behalf of the public, having access to timely and reliable information on decisions and performance in the public sector. Although not always explicitly defined, the need for transparency is implied; for example, in government recordkeeping.

Accountability in public administration refers to the obligation on public officials to document the basis for significant decisions and actions and report on how public resources are allocated, and be ultimately answerable to the public for the proper discharge of their functions. Where accountability is fragmented, there is a higher risk that corrupt conduct will go undetected.

[8] Op cit, OECD, *Lobbyists, Government and Public Trust: Volume 3*, p. 3.

Chapter 2: The legislative and regulatory framework in NSW

This chapter sets out the regulatory elements and key definitions in the LOGO Act. These include the Lobbyists Register, the Lobbyists Code and the NSWEC which oversees compliance with legislative requirements. The publication of summaries from ministerial diaries, although not provided for in the LOGO Act, is intended to promote transparency and public trust in the political process.

The LOGO Act

The LOGO Act provides for:

- the establishment and maintenance of a publicly accessible Lobbyists Register and a Lobbyists Watch List
- obligations on third-party lobbyists to register and provide regular information about their corporate details, staff and the clients they represent
- a code of conduct for all lobbyists
- a ban on success fees for third-party lobbyists
- an 18-month cooling-off period during which former ministers and parliamentary secretaries may not engage in lobbying activities associated with their former portfolio responsibilities
- appointment of the NSWEC as the independent regulator of the LOGO Act
- sanctions for non-compliance with registration requirements and the code of conduct.

In addition, Premier's Memorandum M2015-05 "Publication of Ministerial Diaries and Release of Overseas Travel Information" requires the disclosure of relevant information from ministerial diaries.

The LOGO Act – definitions of lobbying, lobbyist and lobbied

Section 4 of the LOGO Act defines lobbying as follows:

1) *For the purposes of this Act, lobbying a Government official means communicating with the official for the purpose of representing the interests of others in relation to any of the following:*

   (a) legislation or proposed legislation or a government decision or policy or proposed government decision or policy

   (b) a planning application

   (c) the exercise by the official of his or her official functions.

2) *Lobbying extends to:*

   (a) any such communication whether or not in the course of carrying on the business of lobbying Government officials, and

   (b) any such communication by a person who works for an organisation for the purpose of representing the interests of the organisation or its members, and

   (c) any such communication for the purpose of representing community interests, and

   (d) any communication included in this definition by the regulations.

A lobbyist is an individual or body that lobbies government officials. However, a distinction is drawn between third-party lobbyists and other types of lobbyist.

The "lobbied" are government officials. In the LOGO Act, the expression "government official" is broadly defined and includes, among others, ministers and

parliamentary secretaries, their staff, agency heads, public servants and members of a statutory body. Members of Parliament, who are not ministers or parliamentary secretaries, are not government officials. Nor are local government officials (except for the purposes of Part 5 and Part 6 of the LOGO Act).

The Lobbyists Register

Under the LOGO Act, the NSWEC must maintain a register of lobbyists. However, only third-party lobbyists are required to register. The rationale for this was explained in 2014 by then-NSW premier Mike Baird:

> *…it is not necessary to place in-house lobbyists or peak industry bodies lobbyists on the Register, as its purpose is to primarily disclose to government officials whom lobbyists are acting on behalf of. There are no transparency issues for in-house lobbyists, as it is self-evident who they represent.*[9]

Under s 10 of the LOGO Act, third-party lobbyists must provide the following information, which appears in the register:

- name and business contact details
- the names of individuals engaged by the lobbyist who lobby government officials on behalf of clients
- the names of individuals who have a management, financial or other interest in the lobbyist
- the names of clients who have retained the lobbyist to provide, or for whom the lobbyist has provided, lobbying services (whether paid or unpaid), including information about those clients who are foreign principals.

The Commission's position is that the scope of who must register must be expanded, and for the register to contain more detailed information. The Commission's analysis is set out in chapter 6.

The Lobbyists Code

In Operation Halifax, the Commission recommended that:

> *…the NSW Government develops a new code of conduct for lobbyists, which sets out mandatory standards of conduct and procedures to be observed when contacting a Government Representative.*

This recommendation was adopted. The Lobbyists Code was brought into effect via the Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014 and applies to all lobbyists, not just third-party lobbyists. The Lobbyists Code imposes ethical and other standards on lobbyists but not public officials. In addition, the code states that a third-party lobbyist is not permitted to meet or communicate with government officials for the purpose of lobbying if it has not complied with the requirements of the register.

In accordance with the Lobbyists Code, before meeting with a public official, a lobbyist must disclose the nature of the matter to be discussed and any financial or other interests they have. Lobbyists are also required to refrain from "misleading, dishonest, corrupt or other unlawful conduct" and "must use all reasonable endeavours to satisfy themselves of the truth and accuracy of all material information that they provide".

Third-party lobbyists are subject to some additional disclosure requirements and ethical obligations. For example, they may not misrepresent their level of access to political parties or government and may not accept success fees.

Premier's Memorandum M2019-02 "Lobbyists Code of Conduct", which replaced Premier's Memorandum M2014-13, was issued by the premier and required all government officials covered by the LOGO Act to:

- not have lobbying contact with unregistered third-party lobbyists
- observe special precautions when meeting with any lobbyist who has been placed on the Lobbyists Watch List.

Chapter 4 of this report discusses a Code of Conduct for lobbyists and government officials in more detail.

NSW ministerial diaries

On 1 July 2014, NSW became the second state (after Queensland) to require the release of information from ministerial diaries as part of a move to reform the influence of lobbyists and bring greater transparency to government. Premier's Memorandum M2015-05 "Publication of Ministerial Diaries and Release of Overseas Travel Information", which replaced Premier's Memorandum M2014-07, requires all ministers to publish:

[9] M Baird, "Transforming politics: tough new rules for lobbyists", media release, 13 May 2014, quoted in D McKeown, *Who pays the piper? Rules for lobbying governments in Australia, Canada, UK and USA*, Parliament of Australia, Parliamentary Library Research Paper, 1 August 2014, p. 12.

> *…extracts from their diaries detailing scheduled meetings held with stakeholders, external organisations, third-party lobbyists and individuals.*

The extracts are made public quarterly, within one month of the end of each quarter.

At the time the original memorandum was introduced, then-NSW premier Mike Baird said the publication of ministerial diaries would "help restore the public's trust in our political system and the MPs that represent them", also noting that, "[t]here needs to be better transparency and accountability in the way ministers deal with business".[10] Chapter 7 of this report discusses ministerial diary disclosures in more detail.

Post-separation employment and the revolving door

Section 18 of the LOGO Act imposes an 18-month "cooling-off period" after leaving office for ministers and parliamentary secretaries relating to:

> *lobbying of a Government official in relation to an official matter that was dealt with by the former Minister or Parliamentary Secretary in the course of carrying out portfolio responsibilities.*

The maximum penalty for non-compliance is 200 penalty units (currently $22,000).

Additionally, under clauses 24-25 of the NSW Ministerial Code of Conduct, ministers and parliamentary secretaries must, while in office, and for 18 months after leaving office, first obtain advice from the parliamentary ethics adviser if any proposed employment relates to any of the portfolio responsibilities they held in the two years prior to leaving office.

The parliamentary ethics adviser may advise against the acceptance of an offer of post-separation employment, either generally or unless certain conditions are met and a minister must not, while in office, accept any offer of post-separation employment if the parliamentary ethics adviser has advised against it. Additionally, clause 10 of the Lobbyists Code prevents ministers and former ministers from using information acquired during their official functions for the private benefit of themselves or any other person. Chapter 8 of this report examines issues of integrity including the "revolving door" of public officials moving into, and out of, lobbying roles.

[10] S Nicholls, "Mike Baird to make ministerial diaries public after lobbying allegations", *Sydney Morning Herald*, 12 May 2014.

The NSWEC

In Operation Halifax, the Commission recommended that:

> *…an independent government entity, maintains and monitors the Lobbyists Register, and that sanctions be imposed on Third-party lobbyists and Lobbying Entities for failure to comply with registration requirements.*

This recommendation was adopted, and Part 7 of the LOGO Act makes provision for the NSWEC to oversee lobbying regulation. The NSWEC has the capacity to cancel or suspend a third-party lobbyist's registration for certain reasons, which include contraventions of the Lobbyists Code and a failure to update the register when required. Third-party lobbyists or other lobbyists who have contravened the Lobbyists Code or the LOGO Act may be placed on a Lobbyists Watch List maintained by the NSWEC and published on its website. The Commission called for views on whether the current mechanism of lobbying oversight was sufficient.

Chapter 9 of this report canvasses oversight issues, including whether a dedicated lobbying commissioner (similar to models in other jurisdictions) should be considered as an alternative regulator to the NSWEC. Consequently, where relevant, this report refers to the "lobbying regulator", which may be read as a reference to the NSWEC, to the position of a lobbying commissioner (if appointed, as recommended in chapter 9) or other regulator of the LOGO Act.

Some key facts about third-party lobbyists in NSW

The Commission's SIRU undertook a detailed analysis of the information contained in the Lobbyists Register. Table 1 gives a breakdown of their status. Some are captured more than once due to duplications within the register.

Table 1: The NSW Lobbyists Register, March 2021

Status	Number
Active	150
Inactive	111
Suspended	2
Cancelled	45
Ineligible	0
Watch List	0

Based on some earlier analyses conducted by SIRU, as at January 2020, 41% of third-party lobbyists had been listed since the Lobbyists Register commenced on 1 December 2014.

Three third-party lobbyists were suspended at the time: two for "Failure to Update Details" and a third for "Contravention of the Code/Act" (related to failure to ensure the responsible officer had completed annual online training). Similarly, the majority (75%) of cancellations was because of "Failure to Update Details".

No third-party lobbyists were listed on the Lobbyists Watch List at the time of writing.

There were 832 owners and 910 employees listed on the Lobbyists Register, of which 200 owners and 338 employees were listed as active.

At least one-fifth of active employees of third-party lobbyists were former government representatives. While the Lobbyists Register does not record this information, a comparison with those also listed on the Australian Government Register of Lobbyists (which does) reveals 69 individuals employed by 50 NSW registered third-party lobbyists were former government representatives. Many of these individuals were also listed as owners.

A number of separately registered third-party lobbyists were related entities. While these relationships were not detailed on the register, links between at least 13 active third-party lobbyists could be identified through common ownership, Australian Business Numbers and employees. Open source information confirmed some third-party lobbyists shared a common ultimate parent company or operated under different names/brands.

Notably, organisations appearing on the register tended not to use the word "lobbyist" to describe themselves. Terms like "consulting", "advisory", "public affairs", "strategic" and "communication" featured regularly in organisation names and were similarly reflected in listed employee titles (for example, "consultant", "advisor", "analyst" and "government relations"). Only three employees (all inactive) had the position title of "lobbyist" listed.

A total of 2,731 clients of third-party lobbyists was listed on the Lobbyists Register, of which 929 were active clients of active third-party lobbyists. Client details appeared to have only been listed on the register since September 2016. One-fifth of currently active clients were registered at that time. Client registrations averaged just over 300 in both 2017 and 2018, and increased in 2019 with 421 registrations.

A small number of active third-party lobbyists represented the majority of active clients. Twenty-five (19.5%) active lobbyists had 10 or more active clients, and these lobbyists organisations represented 661 (71.2%) of all active clients. In contrast, nearly one-third of active third-party lobbyists listed only one active client, while a further 10 active third-party lobbyists listed no active clients.

Most clients were organisations registered in Australia; although many were global brands. Some of the most common industry types[11] included financial asset investing, local government, medical, pharmaceuticals and scientific research, computer design, real estate, construction, property operation and land development, and social assistance services. Notably, over 10% of active clients were classified as providing management advice, consulting, professional or other interest group services, which were themselves often set up to lobby government. A handful of active clients were unregistered community groups.

Of the overseas client organisations, 16 active clients were listed as foreign principals.[12] One third-party lobbyist represented three of these foreign principals.

Most third-party lobbyists with multiple clients represented a range of clients; although several appeared to cater to certain industry types. For example, one third-party lobbyist had seven local councils as active clients, while another had 11 active clients from the pharmaceutical, toiletry and cosmetics industries.

Sixty-five clients were listed as active for more than one third-party lobbyist, which suggested simultaneous representation. Most (58.5%) of these clients were active across two third-party lobbyists that appeared to be related corporate entities.

At least three third-party lobbyists were listed as active clients of other active third-party lobbyists. A further seven third-party lobbyists had been listed as clients of other third-party lobbyists at some stage. While it is likely this was related to common ownership structures, it raises the question as to whether this arrangement extends to

[11] This is based on the Australian and New Zealand Standard Industrial Classification (ANZSIC) description listed for the organisation on the Australia Business Register. It should be noted that a number of clients had recorded ANZSIC descriptions that did not accurately describe their core business.

[12] The category of "foreign principal" has only been listed on the register since mid-2019. It includes but is not limited to a foreign:

a) government

b) political organisation

c) government-related entity

d) government-related individual.

clients of the client third-party lobbyist and thus has the potential to obfuscate the true client.

Chapter 3: Risks in lobbying activities, access and influence

This chapter provides an overview of the role of lobbying and the circumstances that create or contribute to the risk of improper conduct in the course of lobbying activities. In general terms, as mentioned in chapter 1, it is well recognised that lobbying activities, when properly regulated, play a constructive role.

Lobbying can enhance the public interest in a number of ways, as follows.

- An experienced lobbyist can assist a client or employer to frame its representations in a way that is realistic and cogent. An experienced lobbyist can counsel against techniques that are unethical (for example, a client who does not understand public sector conventions might think that offering gifts or hospitality is an acceptable way to persuade a public official).
- Lobbyists can assist a client or employer to understand how government, public policy-making and the LOGO Act work.
- Peak bodies that are representative of the views of a significant membership base can add to the efficiency of decision-making. Dealing with a single, well-organised and resourced peak body may reduce the cost and effort of liaising with its individual members. Moreover, a peak body may make representations to government that its individual members might not be resourced to submit. In Operation Eclipse, the Commission received submissions from peak bodies including the Australian Professional Government Relations Association, the Public Relations Institute of Australia, the NSW Minerals Council and the NSW Council of Social Service. Well-run peak bodies often have industry codes of conduct and governance arrangements that discourage dishonest practices.
- Even if they are advancing the narrow interests of a client or employer, lobbyists can contribute to the refinement of existing government priorities and policy settings. This is because it is generally accepted that deliberating and listening to a range of potentially divergent views assists public officials to make balanced, informed decisions. Some lobbying is undertaken by think tanks and large peak bodies that speak for broad constituencies.

It is equally accepted that unregulated lobbying conducted in secret and without appropriate accountability generates the perception and risk of corruption and other forms of unethical conduct.

What does undue influence look like?

While the nature of conduct that may constitute corrupt conduct under the ICAC Act is broad, the following activities may qualify as "corrupt":

- payments/gifts or the offer of other benefits including non-financial benefits made as an improper inducement for a favourable exercise of official functions
- a serious undisclosed conflict of interest
- a serious and dishonest misuse of information in relation to a lobbying proposal
- dishonest conduct including the creation of false documents and the making of dishonest representations.

Lobbying that involves corrupt conduct can include the conduct of any person that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official or any public authority. It may also involve, in certain

circumstances, conduct that impairs or could impair public confidence in public administration.

The Commission has made many findings in relation to several areas involving government and public administration concerning individuals who have influenced, or sought to influence, public officials in a range of factual circumstances using corrupt or other unethical means. However, the Commission has, to date, not had cause to consider alleged corrupt conduct by registered third-party lobbyists. Nor has it ever been called to consider corrupt conduct allegations against an individual lobbying for a legitimate peak body. Almost without exception, the Commission's relevant corruption findings concern persons "lobbying" government on their own behalf. In practice, this typically involves business owners, or their employees, who often are not considered to be professional lobbyists, seeking favourable decisions from government.

The principal functions of the Commission that are set out in s 13 of the ICAC Act require, among other matters, the Commission to investigate any circumstances, which, in the Commission's opinion, imply that:

> *(i) corrupt conduct, or*
>
> *(ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or*
>
> *(iii) conduct connected with corrupt conduct may have occurred, may be occurring or may be about to occur.*

Plainly, conduct liable to encourage the occurrence of corrupt conduct may arise in a broad number of circumstances, including circumstances where:

- a decision-maker is persuaded by irrelevant or overstated arguments advanced by a lobbyist and is unmoved by cogent information, opinions or submissions that contradict, refute or dispute the claimed merit of a lobbying proposal
- the representations of well-funded, better-organised lobbyists prevail despite the more meritorious arguments of other affected parties
- a regulatory body (or other decision maker) is captured by, or over-identifies with, a particular interest group
- a government official meets with one relevant party that wants to influence a decision but not with others (such preferential access could be on the basis of a personal relationship)
- a lobbyist conceals who they are acting for or through (for instance, an astroturfing[13] campaign)
- affected parties, that is, those whose interest will be affected by a lobbying proposal, are never informed that a decision relevant to their interests arising from a lobbying proposal is pending
- a government agency, having received a lobbying proposal, reverses an existing policy position without full and proper consideration and without providing an explanation and/or justification, or where it relies on an unsatisfactory and unconvincing explanation, which might generate perceptions that special interests have prevailed
- a government agency establishes an enquiry or a review of, or seeks independent advice about, an issue but, as a result of the approach taken, the public perceives there is a pre-ordained outcome (for example, an in-house inquiry or review that lacks required independence)
- a lobbyist has "special" or "unparalleled" access to ministers (in some cases, based on past relationships or associations such as personal, social or political connections)

[13] Used to describe a fake grassroots campaign or lobbying proposal that gives the false impression of having significant community or public support.

- an application for information about a lobbying proposal under the GIPA Act is refused without a valid reason
- a lobbyist has paid substantial amounts of money (for example, the purchase of a lunch or dinner) to obtain access to, or meet with, a minister or parliamentarian as part of a political fundraising event.

There are well-recognised circumstances in and around lobbying activities that are conducive to corrupt conduct. A number of circumstances (such as those examples referred to in the list above) can be associated with conduct that is liable to allow, encourage or cause the occurrence of corrupt conduct. Proper regulation of lobbying serves to prevent such circumstances through transparency and accountability mechanisms.

As discussed in chapters 1 and 2, the LOGO Act was drafted in terms that exempt all but third-party lobbyists from registration. Professional in-house employees who routinely lobby government do not face the same registration obligations as third-party lobbyists. There is no principled basis for their exclusion from this obligation.

The circumstances that are conducive to corrupt conduct in lobbying by in-house lobbyists pose an enhanced risk of corrupt conduct in public office.

Favoured access and undue influence

It is not practical to identify all complaints made to the Commission that relate to lobbying. The Commission does not specifically categorise complaints as being related to "lobbying" or "undue influence", nor are lobbyists (third-party lobbyists or otherwise) set up as a class of entity in the Commission's data holdings. Furthermore, certain complaints or allegations made to the Commission state or imply some sort of corrupt relationship between a public official and a person or organisation that wants a favourable decision, without using words such as "lobbying" or "lobbyist".

In January 2020, SIRU undertook an analysis of the Commission's complaints data, utilising keywords and phrases pertaining to lobbying and undue influence, as well as allegations involving third-party lobbyists and/or their clients. The summary of results obtained is as follows.

Third-party lobbyists

No corrupt conduct findings have been made about a third-party lobbyist or any of its staff.

Only a relatively small number of third-party lobbyists have been listed as the subject of a complaint made to the Commission. Between 2003 and 2019, nine third-party lobbyists, six of which are currently active, had been named in 17 complaints made to the Commission. Seven reports involving seven third-party lobbyists were made since the Lobbyists Register commenced in 2014.

The Commission undertook investigative enquiries regarding four matters, with two proceeding to full investigation, both of which involved the same third-party lobbyist as subject (now listed as cancelled on the Lobbists Register). Both investigations were closed due to insufficient evidence of serious corrupt conduct.

A larger proportion of owners, employees and clients of third-party lobbyists has been the subject of complaints; although, only a small fraction of these reports refer in terms to lobbying or undue influence.

Three organisations and 43 individuals were listed as owners of third-party lobbyists, and at least 18 employees and 91 clients[14] were named as the subject of allegations made to the Commission.

Most individuals (both owners and employees) were named in relation to other roles they have held/hold and not regarding their activities as owners of third-party lobbyists. At least one-third of owners and half of employees are identified in Commission data as being current or former NSW public officials.

Of the 765 complaints involving third-party lobbyists' clients, over 65% pertain to 21 local councils. Other clients named in multiple complaints include energy and telecommunications providers, universities, legal services, banks and insurance companies, racing and gaming entities and property developers.

Only 15 of the complaints (1.8%) explicitly referred to "lobbying". These complaints involved 12 clients; seven of which were local councils.

Some examples follow of the type of *allegations*[15] involving third-party lobbyists and alleged undue influence.

- An MP, who was a close friend of the owner of a third-party lobbyist organisation, referred community groups and other organisations that were seeking funding for projects to the third-party lobbyist. In return, the third-party lobbyist made donations to the MP.

[14] Due to the large number of entities listed in Commission complaints data, the search for employees and clients of third-party lobbyists was limited to complaints made since December 2014, when the register commenced.

[15] It should be noted that these allegations did not proceed to full investigation.

- A ministerial staffer and a senior employee of a third-party lobbyist were in a relationship. The staffer facilitated access for several clients of the third-party lobbyist to the minister. With this special access, and lobbying by the third-party lobbyist, ministerial policy was developed that saw financial benefit for the third-party lobbyist's clients and a success fee paid to the third-party lobbyist, which indirectly benefitted the staffer.
- A family member of a minister was an employee of a company (third-party lobbyist's client) and lobbied government on behalf of the company.

Other lobbying entities

Results for a search of lobbying and influence keywords across the Commission's complaints data showed that the local government sector makes up over half (58%) of all reports where a NSW public authority is listed as the subject of allegations. The most common function type listed for keyword complaints was "development applications and land zoning" (39.5%).

Over 200 organisations that are not NSW public authorities were listed as the subject of these allegations. The industries more frequently named in allegations include construction, interest group and social assistance services, finance and investment, real estate, land and property development, mining, gambling and racing, insurance, and labour association services.

Over 670 NSW public officials were listed as the "affected person" in complaints containing lobbying and influence keywords. A further 396 non-public officials were listed, many of whom are former NSW public officials.

Besides development application and land zoning, lobbying and undue influence complaints most often related to electoral and political activities (13.5%) and procurement (10.6%). Unsurprisingly, they frequently involved alleged partiality (28.7%) and personal interests (17.8%) and tended to encompass the improper use of information (11.6%) or bribery, secret commissions and gifts (9.0%).

Some examples follow of the nature of *alleged* complaints.

- Bribes were paid to council officials for development approvals and concessions. At the more serious end of the scale, some complaints alleged "facilitators" for developers, and even some councillors, had used threats and intimidation against council officials to influence the development approval process. Motivation ranged from political party power and donations, to undisclosed pecuniary interests in properties and companies, or personal relationships with developers.
- Relationships between developers and representatives on planning panels. In some cases, it was alleged certain councils had moved to have development applications referred to panels in order to facilitate decision-making by partial panel members.
- A minister failed to disclose a meeting with a "lobby" group (not a registered third-party lobbyist or client).
- Councils and/or ministers refused to meet with local environmental community groups.
- A minister permitted certain access and activities that were in conflict with existing policy in order to benefit a company that had made substantial contributions to their election campaign.
- A company, whose executive team consisted of local council staff, were "wined and dined" and then "lobbied" their councils to utilise the services of the company.
- The CEO of a company improperly lobbied a minister via letter in relation to a tender for a multi-million-dollar contract.
- An individual misused public sector finances and official sensitive information to "lobby" his own agenda and benefit a secondary employer.

From 2008, there was a notable rise in complaints alleging lobbying activity. This corresponds with a raft of codes and registers developed across Australia at the time, including the Lobbyists Code, and likely reflects, in part, an increase in awareness of lobbying activity and the use of this terminology in reports to the Commission. Reports alleging "lobbying" spiked in 2018 and 2019.

The majority of complaints received by the Commission (82.3%), which contained lobbying and undue influence keywords, were made by members of the public. This is consistent with a heightened public perception of lobbying and undue influence and disparity in the ability to access public officials in the general community, and/or possible under-reporting by the public officials who are obliged to report suspected corrupt conduct of this kind to the Commission.

Some of the more specific areas of risk that contribute to improper lobbying are set out below.

Privileged and restricted access to government decision-makers

The OECD has stated:

> *When concern is related to accessibility to decision makers, measures to provide a level playing field*

> *for all stakeholders interested in participating in the development of public policies is indispensable – for instance to ensure that not only the "privileged", but also the "public" has a voice.*[16]

A well-functioning democracy, which goes beyond mere majority rule, seeks to implement participatory and deliberative ideals with the aim that "greater public deliberation may also lead to more justifiable public policies".[17]

Privileged access

The Commission's Operation Halifax did not directly address the issue of privileged access. However, a decade later, the perception, as reflected in submissions to the Commission, that only a select few can obtain the ear of government, has contributed to the downward trend concerning trust and confidence in government.

Numerous submissions made to the Commission asserted that this privileged access is crowding out the views of community interests and smaller, under-resourced organisations. The increasing gap between those referred to as "insiders" and "outsiders" is evidenced by a number of academic studies, surveys and reports undertaken in this field. Kate Griffiths, Senior Associate at the Grattan Institute, referred to findings of an Australian Election Study (running since 1966) that were published in the institute's 2018 report, *Who's in the Room? Access and Influence in Australian Politics*:

> *The people surveyed think that people in government look after themselves, that's the highest it's ever been on record, and survey results also have shown that people think government acts in the interests of, or for a few big interests, rather than for the public interest, that's the highest on record as well.*

In situations where a lobbyist's "insider" status is based on a personal, social or political relationship, the prospect of conflicts of interest is a matter of significant concern.

Do third-party lobbyists get privileged access to ministers?

The Commission undertook a comparison of summaries of ministerial diaries and information about third-party lobbyists from the Lobbyists Register. As shown in table 2, the data suggests that third-party lobbyists do not dominate access to ministers. Over the same period, over 17,000 meetings were reported in the summaries of ministerial diaries, which means that a third-party lobbyist was present in less than 1% of reported meetings.

Table 2: Recorded meetings between minister and third-party lobbyists

Year	Number of meetings with a minister where a third-party lobbyist was present
2014*	1
2015	15
2016	23
2017	30
2018	19
2019**	34

* July to year end

** calendar year to September

There are a number of factors that can affect the extent to which citizens and interest groups can obtain access to official decision-makers. These may include financial and other resources, geographical disadvantage, or the power imbalance between sophisticated corporate entities and less well-organised persons or groups.

However, the evidence referred to below does indicate some factors that tend to reflect an imbalance. That said, the evidence does not permit precise findings to be made of the extent of such an imbalance and casual factors related to it.

Restricted access

Academic George Rennie told the Commission:

> *It's a good thing that lobbying occurs. It allows people to make representations to government. It is again, those questions of undue influence and undue bias and the issue of access. That's the greatest concern. There are organisations that have, that represent millions of Australians who, who would, would love to have even a tenth of the access of say our biggest companies. That's a problem in a democracy.*

As indicated by Mr Rennie, Operation Eclipse considered the issue as to who could not get access to a key decision-maker. Some witnesses spoke about this issue. Georgina Woods, NSW Coordinator of Lock the Gate, observed:

[16] Op cit, OECD, *Lobbyists, Government and Public Trust: Volume 1*, p. 22.

[17] A Gutmann, "Democracy", in R Goodin et al, *A Companion to contemporary political philosophy, Volume 2*, (2nd edition), Wiley-Blackwell, 2012, p. 530.

…access is partly influenced by geography because the decisions that are made about the mining projects and policies that affect the communities that we work with – in the Hunter Valley and the north-west of New South Wales particularly – are predominantly or even in some cases are entirely made by people in Sydney, and that includes ministers.

NSW Council of Social Service (NCOSS) CEO Joanna Quilty stated that resources are a barrier for many of their members:

I think that our members and NCOSS itself does not necessarily have access to the same level of resources that some private firms or interests may have and that they may be able to use those resources to use their lobbying efforts to gain better access and to have further or more input into decision-making processes.

In his submission to the Commission, former Western Australian premier, Geoff Gallop, offered insight to the reasons for the inequalities of access and capacity to be heard:

…there is pre-existing bias such that ministers et al will want to hear from those who support their values and who provide evidence and arguments that may assist in the political battle. It's a case study in what the psychologists call "confirmation bias" or "the tendency to search for, interpret, favour, and recall information in a way that confirms one's pre-existing beliefs".

During the inquiry, lobbyists spoke about their experiences of influencing policy and/or legislation. NSW Minerals Council CEO Stephen Galilee estimated that:

In the past four years, we've probably made in the, in the area of around 150 different public submissions in response to government proposals for changes to legislation, policy, or regulation. Those can range from, in length and detail, from being a very short letter stating the industry's position to very detailed submissions, potentially 100 pages or more.

Matthew Hingerty, former chief executive officer of third-party lobbyist Barton Deakin, told the Commission:

Yes, there can be difficulty [in obtaining access] *but for, for reasons of the minister may not want to meet, they may not have the time, they may refer our client to a, to a different process, talking to a, to a public servant, for instance. So I wouldn't say difficulty. If, if it's just the process of making sure our client speaks to the person that they need to speak to, and invariably it's not the minister, it can be someone in the department.*

Lobbying in support of commercial interests

Some submissions made to the Commission during Operation Eclipse supported the need for a distinction to be made between (1) narrow commercial interests and (2) broader, non-commercial interests. The general thrust of such views is that lobbying in the first category (for example, a lobbyist seeking approval of a development application) carries a higher risk than lobbying in the second (for example, a not-for-profit think tank advocating for a change in legislation).

Some community advocacy organisations questioned the desirability of being subject to the same regulatory regime as a "commercial" lobbyist. In part, this is based on the proposition that non-commercial lobbying is perceived as being relatively benign and much less likely to involve corrupt or deceptive behaviours aimed at securing windfall gains or benefits from government. In addition, however, the Commission was told that many community organisations combine their lobbying activity with delivery of government-funded services. It was submitted that the regulation of lobbying should not inhibit the efficient delivery of these services. In its submission, the Public Interest Advocacy Centre proposed:

On a practical level, this diversity of voices can be assisted by ensuring that government funding agreements do not prohibit the use of that money for advocacy activity where it is directly related to the aims and objectives of the organisation, and do not include even broader limitations on organisations that receive government funding from engaging in any advocacy activity altogether (whether imposed via contract or because of legitimate fears of defunding).

Circumstances that have a higher risk of improper lobbying

It is obvious to observe that there is a degree of connection between the incidence of lobbying and the enterprises that have the most to gain or lose from government decisions. Based on the findings and conclusions from the Operation Halifax report, and the evidence before the Commission in Operation Eclipse, there is a sound basis for concluding that there is heightened risk of improper lobbying where:

- entities operate in areas that are heavily regulated and where a government licence or authorisation is required to commence and operate a business
- entities rely on government patronage (for example, defence contractors and firms that specialise in building public infrastructure)

- operations in a particular area are mainly conducted by large, well-resourced firms that are better funded and organised than their customers or other affected parties
- public officials exercise a significant degree of discretionary power; for example, despite the many rules and the case law that embody the planning system, individual consent authorities still exercise wide discretion over development outcomes
- significant windfall gains or losses flow from a single decision; for example, a decision to rezone a parcel of land
- a lobbying entity has made donations to a particular political party
- there is a personal or other relationship between persons associated with an entity pursuing a lobbying proposal and public officials in a position to influence the outcome.

Lobbying outside a formalised process

Many interactions between lobbyists and government officials are already subject to formal, structured processes that are designed to regulate communications. For example, a significant tender is usually accompanied by pre-determined selection criteria, a formal evaluation methodology and protocols for communicating with tenderers. In addition, under the GIPA Act, there is a standardised process for publishing the outcome of tenders.

Many other government processes operate along similar lines, such as development and mining exploration applications and grant applications. In NSW, a formal process is also in place for managing unsolicited proposals.

Another example involves lobbying in relation to the appointment (and, on occasion, the dismissal) of a public official, which is normally subject to a formal, merit-based process. The Commission has encountered instances where decision-makers have been lobbied to consider factors other than merit.

A further example is lobbying in relation to the exercise of statutory discretion, such as the decision to take enforcement action. Such decisions are also subject to pre-determined decision-making criteria. The NSW Ombudsman has described the problem in these terms:

> *…when a person has a statutory discretion, they must not be hindered by a superior authority from independently exercising that discretion … Interfering in a delegated officer's discretion to make a decision is unlawful.*[18]

When lobbying threatens to deflect a public official from their statutory duties, it is potentially improper.

Policy formation and certain areas involving discretionary decision-making are not so tightly regulated and can be open to abuse:

> *…a system will be rendered vulnerable to corruption where there is an unreviewable discretionary ability to bypass significant aspects of the process and criteria. A discretionary exception, unless plainly regulated and prescribed, provides the opportunity for the potentially corrupt to bypass an otherwise proper process. Such discretions are, of course, important to enable flexible and effective management, and thus a balance needs to be struck with care.*[19]

Of course, having a formal process does not remove all risk of improper lobbying. The Commission has exposed many examples of corrupt conduct in public administration where individuals with vested interests have exerted improper influence outside the formal decision-making process. However, in situations where there is no existing, robust process under which lobbying interactions (or communications more generally) occur, the risk of improper conduct is greater.

The influence of political donations

It is now widely acknowledged that political donations have the potential to exert improper influence or to facilitate improper access. In NSW, political donations are capped and donations from the property development, tobacco, liquor and gambling industries are prohibited.

The Commission has not placed political donations at the centre of its analysis in Operation Eclipse, given that it is conducting a separate investigation into alleged breaches of electoral funding laws (known as Operation Aero). Recommendations addressing the risks of political donations to improperly influence will be addressed in the Operation Aero investigation report in due course. Despite this, numerous submissions made to the Commission generally reflected the wider

[18] NSW Ombudsman, *Water: compliance and enforcement – A Special Report to Parliament under section 31 of the* Ombudsman Act 1974, August 2018, p. P.

[19] Independent Commission Against Corruption, the Hon I Temby QC, Commissioner, *Integrity in Public Sector Recruitment*, March 1993, p. 6.

public perception of the link between political donations, corruption and undue influence.

Under clause 13 of the Lobbyists Code, third-party lobbyists "must keep separate from their lobbying activities any personal activity or involvement on behalf of a political party". Chapter 11 of this report sets out some findings and recommendations as to how this requirement can be strengthened.

Foreign influence

During the Commission's work on Operation Eclipse, reforms were introduced via the *Foreign Influence Transparency Scheme Act 2018* at the Commonwealth level and the Lobbying of Government Officials (Lobbyists Code of Conduct) Amendment Regulation 2019 in NSW. These amendments were preceded by a debate about improper lobbying and influence peddling by foreign interests. In NSW, third-party lobbyists must now disclose if their client is a foreign principal and if so, the country they are from.

Given the timing and nature of these developments, the Commission's investigation did not seek to reach a conclusive view about the threat posed by foreign influence. However, it is acknowledged that foreign influence is a potential source of risk that warrants a regulatory response.

Indirect lobbying

Operation Eclipse was primarily occupied with direct lobbying; that is, communications between lobbyists and the lobbied. However, some submissions made to the Commission pointed to risks associated with indirect lobbying, which is not covered by the LOGO Act. Typically, this includes lobbying that takes place in both the traditional media and social media, aimed at persuading decision-makers and/or shaping public opinion. Indirect lobbying techniques can be used to:

- encourage members of an organised interest group to communicate directly with policymakers and pressure them to endorse an opinion
- expand outreach through social media, including in some cases the use of so-called "fake news" to encourage action
- stage media events, issue media releases and mount advertising campaigns.

The Commission has made several observations in relation to indirect lobbying in chapter 9 of the report.

Chapter 4: Obligations on public officials – a lobbying code of conduct

A key finding from the investigation is that the current regulatory system does not address or prescribe the obligations of public officials that arise or operate in the conduct and disposition of lobbying proposals. The Commission contends that a robust lobbying regime must address the responsibilities and the conduct of both lobbyists and the public officials, who, as part of their duties, consider and determine the outcomes of lobbying proposals.

Given the conferral of public power on public officials and the obligation to exercise it for a legitimate public purpose, not for extraneous purposes, any regulatory scheme in relation to lobbying activities must expressly address the legal and ethical standards and obligations of public officials. In his opening address to this inquiry, Counsel Assisting the Commission noted that existing ethical conduct obligations on public officials specific to lobbying can only be determined with regard to the legal framework relating to the exercise of public power more generally.

This chapter identifies the underlying legal principles relating to the exercise of public power by public officials and the extent to which they should specifically apply under a regulatory system that applies to public officials when dealing with lobbyists, and whether any reform is required.

The codification of principles as a starting point for reform

In determining the appropriate approach to reform, the starting point involves the identification of the principles that inform whether a need for reform exists. The approach that begins with a discourse on matters of principle is consistent with evidence before the Commission.

Dr Simon Longstaff, Executive Director of the Ethics Centre, addressed the utility of identifying and documenting those principles that are fundamental to a well-functioning democracy. He added that consideration ought then to be given to how those fundamental principles might be applied in practice with respect to lobbying. Dr Longstaff's evidence was that there would be merit to, and real advantage in, an attempt to rebuild the ethical infrastructure for lobbying in NSW, which would necessarily be linked to protecting and serving the public interest.

The matters discussed in this chapter suggest that effective reform of the current regulatory system for lobbying would include, as a starting point, the codification, in a single document, of the principles that apply to public officials who engage in lobbying activities. The Commission contends this would:

- ensure the principles are known to, and understood by, public officials, lobbyists and the public, thereby enhancing compliance
- provide a frame of reference by which improper conduct in lobbying activities can be more readily identified
- educate those entrusted with public power to act with integrity in accordance with the standards of conduct expected
- help promote and develop a culture of ethical behaviour for those holding public office
- ensure consistency of expectations when lobbyists interact with any public official, be they a minister, a member of that minister's staff, or any other public official
- improve public trust and confidence in the standards by which consideration of lobbying proposals is undertaken.

A principle-based approach constitutes the basis for determining practices that ensure that the public interest remains well in focus throughout the lobbying process.

The legal framework

Over centuries, the common law developed and refined the integrity principles that bind the holders of public office in the exercise of their official functions. As discussed in this chapter, although these principles may be regarded as well-settled there has until now been limited consideration as to how they apply in the lobbying context and whether dishonest or improper conduct of public officials in the course of determining or deciding a lobbying proposal could constitute corrupt conduct within the meaning of that concept under the ICAC Act. If so, then clearly it is important to examine the circumstances in which such conduct could arise.

Many public officials, possibly including some members of Parliament, have a limited understanding of the relevant principles and the obligations they impose and/or in the determination of circumstances that may constitute corrupt conduct of a public official in supporting a lobbying proposal. That is not intended as a criticism; for the principles, outside the practice of law, are not always readily available to, or understood by, non-lawyers. At a minimum, any interaction between public officials and lobbyists should be guided by such principles. They are not limited in their application to a closed category of official or public functions. They form the legal foundation for official conduct in public office and apply as much to official involvement in lobbying as they do in other areas of government and public administration.

In the discussion that follows, attention will be focused on the following matters:

- the common law offence of misconduct in public office
- fiduciary-like and other ethical obligations that apply to public officials (elected and appointed) despite not being legislatively codified, and notwithstanding the absence of enforcement methods to ensure compliance
- the codes of conduct that guide behaviour for a particular class of public official, breaches of which may be a disciplinary offence or provide a reasonable ground for dismissal or termination.

Common law and a public official's fiduciary-like obligations

The common law offence of misconduct in public office provides the standard of conduct applicable to public officials whether appointed or elected. Its object is to prevent public officials from exercising their power in a corrupt and partial manner (*Maitland v R; Macdonald v R* (2019) 99 NSWLR 376 at 391). In essence, the offence is concerned with the public trust concept attached to public office-holding, and its abuse by a public official who has been entrusted with powers and duties for the benefit of the public.[20] As was observed by the *Supreme Court of Canada in Boulanger v The Queen*:[21]

> *The purpose of the offence of misfeasance in public office … can be traced back to the early authorities that recognize that public officers are entrusted with powers and duties for the public benefit. The public is entitled to expect that public officials entrusted with these powers and responsibilities exercise them for the public benefit. Public officials are therefore made answerable to the public in a way that private actors may not be…*

[20] In his evidence before the Commission, AJ Brown, Professor of Public Policy and Law at Griffith University, noted that the offence of misconduct in public office is "synonymous with breach of trust".

[21] [2006] 2 SCR 49 at [52].

To conceive of public office as a public trust is to recognise that the power exercised by public officials is not their own but is one to be exercised by them for an authorised purpose in the public interest. Public power is bestowed on them by, and held in trust for, the people because "the powers of government belong to, and are derived from, the governed, that is to say, the people of the Commonwealth".[22] As Mason CJ observed in *Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2)*:

> *…the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives* ***of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act***[23] (emphasis added).

These observations made in a case concerning elected federal officials apply equally to state public officials. It is this concept of public trust that operates as the principal constraint on the exercise of a public official's authority or powers. If it is accepted that a public official holds power on trust for the people, then it follows that the public official is duty-bound to exercise that power only in furtherance of the public interest. The relationship between our public officials and the public in this respect may be considered in the public law context as fiduciary in nature, with the exercise of public power being governed by certain fiduciary-like obligations.[24] To be clear, it is not suggested that public officials are fiduciaries in the strict private law sense, but rather that the relationship between public officials and the public is analogous to a fiduciary relationship;[25] any exercise of power or discretion being constrained by the purpose for which it was conferred, and fiduciary standards of behaviour that apply.[26]

As the High Court recognised in its decision in *Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2)*, accountability to the public is the burden or obligation imposed on all who hold office or employment in our system of government, as a result of having been entrusted with public power that applies as much to the disposition of a lobbying proposal as it does to most official decision-making.[27]

Section 8(1) of the ICAC Act defines corrupt conduct as including:

> *(a) any conduct of a public official or former public official that constitutes or involves a breach of public trust.*

Section 12 of the ICAC Act, entitled "12. Public Interest to be paramount", provides:

> *In exercising its functions, the Commission shall regard the protection of the public interest and the prevention of breaches of public trust as its paramount concerns.*

In addition to the principle of accountability other fiduciary-like obligations inform the exercise of public power. Chief among these obligations is the duty of loyalty owed to the public. The duty of loyalty has been described as "the very essence" of the trust or fiduciary idea.[28] It requires that public officials exercise their powers honestly, impartially and disinterestedly.[29] Further, it requires that public power be exercised in a manner unfettered by considerations of personal gain or profit, as Rich J identified in *Horne v Barber*:[30]

[22] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 72 per Deane and Toohey JJ.

[23] *Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2)* (1992) 177 CLR 106 at 138.

[24] See P Finn, "The Abuse of Public Power in Australia: Making our Governors Our Servants", *Public Law Review*, 1994, 5, 43-57, at 45, and P Finn, "Public Trusts, Public Fiduciaries", *Federal Law Review*, 2010, 38, pp. 335-351.

[25] As the former Chief Justice of Australia French CJ has observed: "The application of the concept of trusteeship to the exercise of public power is longstanding and persistent … [T]he trusteeship analogy is consistent with a characterisation of public power as fiduciary in nature". Chief Justice Robert French AC, "The Interface between Equitable Principles and Public Law", presented at the Society of Trust and Estate Practitioners, Sydney, 29 October 2010.

[26] P Finn, "Public Trusts, Public Fiduciaries", *Federal Law Review*, 2010, 38, pp. 335-351, at 340, who cites Sir William Wade and Cristopher Forsyth, in their text *Administrative Law* (9th ed, 2004) at pp. 354-355: "Statutory power conferred for public purposes is conferred *as it were* upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended" (emphasis added).

[27] P Finn, "Public Trust and Public Accountability", *Griffith Law Review*, 1994, Volume 3, No. 2, pp. 233-234.

[28] P Finn, "Integrity in Government", *Public Law Review*, 1992, 3, p. 244.

[29] P Finn, "The Abuse of Public Power in Australia: Making our Governors Our Servants", *Public Law Review*,1994, 5, p. 55.

[30] *Horne v Barber* (1920) 27 CLR 494 at 501, per Rich J.

Members of the Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interest of the public unfettered by considerations of personal gain or profit. So much is required by the policy of the law. Any transaction which has a tendency to injure this trust, a tendency to interfere with this duty, is invalid…

Codes of conduct

Alongside the standards of conduct imposed by the common law and the fiduciary-like obligations that apply to the exercise of power by public officials, codes of conduct also contribute to the legal framework under the ICAC Act, in that they prescribe standards of ethical behaviour for public officials.

The code of conduct for both the Legislative Assembly[31] and the Legislative Council[32] (referred to collectively in this report as "the members' codes of conduct") refer to the responsibility owed by members of Parliament to "maintain the public trust that has been placed in them", and requires that a member not knowingly and improperly use his/her influence for private gain (clause 2), that conflicts of interest are to be avoided, resolved or disclosed (clause 7) and that the acceptance of gifts that may pose a conflict of interest or give the appearance of an attempt to improperly influence the member in the exercise of his or her duties (clause 8) is prohibited.

The NSW Ministerial Code of Conduct also refers to the responsibility of ministers to maintain the public trust that has been placed in them, to advance the common good of the people of NSW, and to pursue the best interests of the people of NSW to the exclusion of any other interest. Ministers are prohibited from soliciting, accepting, or agreeing to solicit or accept any private benefit by way of an inducement or reward for doing or not doing something in the exercise of his or her official functions (clause 8). Part 3 of the Schedule to the Ministerial Code of Conduct deals with the mandatory disclosure and management of conflicts of interest.

Other classes of public officials who are involved in lobbying activities are similarly bound by codes of conduct. Public service employees must adhere to the "Code of Ethics and Conduct for NSW Government Sector Employees", which obliges them, among other things, to place the public interest over personal interest and to appropriately manage conflicts of interest. Such officials may also be bound by their agency's own code of conduct, which might, either generally or specifically, refer to ethical standards expected of them when being lobbied.

The NSW Office Holder's Staff Code of Conduct applies to staff employed in members' offices, including ministerial staff and requires them to, for example, not make improper use of their position for private gain and to avoid or disclose conflicts of interest. Both these codes refer to officials' obligations with respect to lobbying under Premier's Memorandum M2019-02 "Lobbyists Code of Conduct" (see below).

Breaches of any of these codes may constitute a disciplinary offence and as such may ground a finding of corrupt conduct under the ICAC Act. The members' codes of conduct are an "applicable code of conduct", as that term is defined by s 9 of the ICAC Act, with the result that a suspected breach of those codes by a minister or member of Parliament respectively may be investigated by the Commission and "a substantial breach" may give rise to a finding of corrupt conduct.

The aforementioned codes reflect a *degree* of recognition of the standards that apply to public officials by operation of the common law, and of some of the fiduciary-like obligations that apply under the current legal framework. However, while the codes touch on matters that will guide the ethics of a public official's interaction with lobbyists, *none do so expressly* . None of the codes directly attempt to regulate or impose specific obligations on the conduct of public officials with respect to lobbyists or lobbying proposals.

The Commission sees this as a gap in the existing regulatory approach. The principles that apply to public officials referred to above should be formulated in terms that prescribe the standard of conduct expected of public officials engaged in lobbying activities. The purpose and benefit of doing so would be to:

- re-enforce the application of the public trust principles that exist under the common law and related legislation
- in particular, focus attention on the need for accountability and transparency protocols that apply to:
  - communications concerning and information supplied in support and obtained in relation to lobbying proposals
  - the decision-making processes employed in the assessment and determination of such proposals.

The express purpose of the Lobbyists Code is to set out the ethical standards of conduct, and other requirements,

[31] Code of Conduct for Members (5 March 2020).

[32] Members' Code of Conduct (24 March 2020).

"to be observed by lobbyists", but not public officials. However, Premier's Memorandum M2019-02 "Lobbyists Code of Conduct"[33] does impose some quite limited obligations on public officials in relation to this code. It prohibits lobbying by unregistered third-party lobbyists and requires public officials to observe special precautions when meeting with any lobbyist who has been placed on the Lobbyists Watch List. However, the Lobbyists Code is clearly not directed to public officials being lobbied and does not provide guidance on behaviour of an ethical nature.

Integrity in lobbying: the obligations of lobbyists and government officials

Community trust and confidence in government and public administration is, of course, directly related to both the actuality and the perception of integrity in process and in the character of those who hold public office. Lobbying involves communications and dealings between those representing business, community or other interest groups (the lobbyists) and government officials (the lobbied). Such communications and dealings should be undertaken in accordance with integrity principles through systems or processes designed to ensure transparency and accountability.

Existing obligations for lobbyists under the current Lobbyists Code in NSW

The Lobbyists Code states that all lobbyists "must not engage in any misleading, dishonest, corrupt or other unlawful conduct" (clause 7) and "must use all reasonable endeavours to satisfy themselves of the truth and accuracy of all material information that they provide" (clause 8).

In some submissions to the Commission, it was contended that the obligations of public officials who engage in lobbying activities in fact outweigh those of lobbyists. There is substance to those submissions. The public official carries that responsibility of ensuring that approval of lobbying proposals is in the public interest and requires an independent and objective assessment before any exercise of public function (for example, the grant of a licence, an approval, a policy change or a change in the law).

Responsibility, obligations and performance standards that attach to public office and to public officials, both appointed and elected, are bound by obligations of honesty and fidelity that exist to protect and advance the interests of the public.[34]

In summary, in lobbying, as in other areas of public service, public officials must act with integrity and openness and be accountable for their stewardship. In relation to official action:

- integrity must exist in the processes of government as well as in the conduct expected of government officials
- subject to prescribed exceptions, government should be conducted openly[35]
- public officials and agencies are accountable for their actions.[36]

As discussed in this report, lobbying is directed at seeking government support, usually in relation to the exercise of official power or discretion on a potentially wide range of matters, such as, among others:

- new legislation or a change to existing legislation
- the adoption of new policies or a change in existing policies
- required approvals
- licences
- awarding of contracts
- inclusion in a government panel of preferred contractors.

Matters such as these potentially have community or other public interest impacts or consequences, should a lobbied proposal win the support of a premier, a responsible minister, the management of a public sector department or agency or an individual public official, who is involved in or who is in a position to influence the exercise of public functions.

[33] The memorandum applies to all NSW Government officials, including:

- NSW ministers and parliamentary secretaries and their staff
- heads of NSW Public Service agencies
- employees of (and contractors with) the NSW Public Service, NSW Transport Service and any other service of the Crown
- members of NSW statutory bodies.

It does not include a local government official. It mirrors the definition of "NSW Government Official" provided by clause 15 of the Lobbyists Code and the definition of "Government official" in s 3 of the LOGO Act.

[34] *R v Bembridge* (1783), 3 Doug 327, 99 ER 679.

[35] *Report of the Royal Commission into Commercial Activities of Government and Other Matters*, 1992, Part II, chapter 1, paragraph 1.2.8.

[36] As to these propositions, see the Hon P Hall QC, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures*, 2019, 2nd edition, p. 11.

The exercise of public functions can significantly impact the community and/or otherwise carry consequences for the relevant sector of society. A number of submissions made to the Commission raised the need for official processes to warn, detect and determine third-party impacts and for the need to provide appropriate notice of the lobbying proposal. In turn, this would afford an opportunity for a party likely to be affected by a lobbied proposal to be heard and contribute to the process before a decision is reached. There is much to support those submissions.

The principles of integrity and impartiality in the process of official evaluation of lobbying proposals provide safeguards against improper preferencing of lobbyists, or in the case of professional lobbyists, their clients, in two respects. First in the procedural processes employed in their assessment. Secondly, in the actual decision-making process for assessing the merits and possible risks and/or the disadvantages that need to be considered and the accountability in the actual decision made.

Corrupt conduct and lobbying activities

When considering the field of possible interactions between a public official and a lobbyist, it is important to note that "corrupt conduct", as that phrase is defined by s 8 and s 9 of the ICAC Act, is not limited to the *dishonest* exercise of public or official functions, but extends to an exercise of those functions that are partial, or that amount to a breach of public trust (s 8(1)(a), s 8(1)(b) and s 8(1)(c) of the ICAC Act).

The concepts of "partiality" and "impartiality" are not defined in the ICAC Act. However, in *Greiner v ICAC*,[37] the partial exercise of official functions was said by Mahoney JA to involve "the advantaging of a person for an unacceptable reason".[38] As his Honour observed in that case, the misuse of public power, to which the proscription of partiality in the ICAC Act is directed, is not limited to the misuse of public power that involves a criminal act (for example, the offence of bribery).[39] Rather, it seeks to prohibit more subtle manifestations of misuse of power; that is, where power has been used for a purpose other than for which it was bestowed:

> *Power may be misused even though no illegality is involved or, at least, directly involved. It may be used to influence improperly t**he way in which public power is exercised**, for example, how the power to appoint to the civil service is exercised; or it may be used **to procure, by the apparently legal exercise of a public power, the achievement of a purpose which it was not the purpose of the power to achieve.** This apparently legal but improper use of public power is objectionable not merely because it is difficult to prove but because it strikes at the integrity of public life: it corrupts. It is to this that "partial" and similar terms in the Act are essentially directed.* [40] (emphasis added)

The element of partiality, as it is used in s 8 of the ICAC Act, will differ according to the context in which it arises. It will often involve at least five elements:

> *First, it is used in a context in which two or more persons or interests are in contest, in the sense of having competing claims ... Secondly, it indicates that a preference or advantage has been given to one of those persons or interests which has not been given to another. Thirdly, for the term to be applicable, the advantage must be given in circumstances where there was a duty or at least an expectation that no one would be advantaged in the particular way over the others but, in the relevant sense, all would be treated equally. Fourthly, what was done in preferring one over the other was done for that purpose, that is, the purpose of giving a preference or advantage to that one. And, finally, the preference was given not for a purpose for which, in the exercise of the power in question, it was required, allowed or expected that preference could be given, but for a purpose which was, in the sense to which I have referred, extraneous to that power.*[41]

While this analysis in *Greiner vs ICAC* was not given in the context of the exercise of governmental power in relation to lobbying activity, it is equally instructive in relation to circumstances in which a person or entity seeks, by the exercise of persuasion or influence on public officials, to obtain a benefit or advantage. Preferential treatment of the person or entity advocating for such an outcome may be appropriate where, for example, other things being equal, that person or entity has a proven capacity to deliver a specialist service or other outcome. Of course, merely acting in support of a particular proposal that may

[37] (1992) 28 NSWLR 125.

[38] (1992) 28 NSWLR 125 at 162. Although his Honour was in dissent on the appeal, his exposition of relevant legal principles was unaffected by the ultimate disposition of the appeal.

[39] (1992) 28 NSWLR 125 at 160.

[40] *Greiner v ICAC* (1992) 28 NSWLR 125 at 160.

[41] Per Mahoney JA in *Greiner.* Although dissenting, the extracted passage is unaffected by the reasoning in the judgment of the Court in *Greiner.*

confer a benefit or advantage to certain groups is not improper or corrupt.

However, in cases where a lobbyist seeking a benefit or advantage has been a political donor to the incumbent government, preferential treatment of a lobbying entity may be improper or corrupt where a favourable outcome can be shown to be the exercise of an official function by a public official for an extraneous reason (that is, extraneous to the purpose for which an official function has been created and conferred).

It is clear that "advantaging" a person for an unacceptable reason may occur in relation to a lobbying proposal, as, for example, when a public official makes a decision, involving the award of a contract to a particular entity, the grant of a licence or approval of a project that requires the exercise of governmental (including regulatory) authorisation of a particular proposal. As has been noted above, such conduct can also arise before a decision is made "in the process leading to the exercise of a power or the grant of a benefit" or by a person being preferred:

> *…by being put in a position of advantage in the process leading to the decision … or, indeed, by the mere fact of being brought into the contest as one of the contending parties.*[42]

In light of the above, it is possible to conceive of circumstances whereby a public official's improper interactions with a lobbyist could attract the corrupt conduct jurisdiction of the Commission. Either during the process preceding a decision or determination or in the making of the decision or determination itself, the *improper conduct* by a public official in the exercise of official functions may constitute a breach of the fiduciary-like obligations and the standards imposed by the common law.

In relation to ministers and other elected officials, improper conduct in lobbying may constitute or involve a substantial breach of an applicable code of conduct.

As with the concept of partiality in s 8(1) of the ICAC Act, the phrase "public trust" is not specifically defined in the ICAC Act. However, the concept as it is used within s 8(1)(c) of the ICAC Act has been said to require an inquiry into whether the conduct was a "use of the trust confided in [the public official] for a purpose for which it was not given".[43] Further, the NSW Court of Appeal has observed that the concept is reflective of the notion of improper purpose in administrative law, which extends beyond the principles of honesty and impartiality.[44] An exercise of power in bad faith would constitute a breach of public trust.

Importantly, while abuse of public trust is at the core of the offence of misconduct in public office, a breach of public trust referred to in the ICAC Act is not confined to conduct that constitutes a criminal offence.[45] The factors that might feature in a decision held to be made in bad faith could include the exercise of a power of official function for an extraneous or ulterior purpose. In the context of lobbying, if a public official improperly exercised his or her discretion with respect to a particular lobbyist's proposal predominantly for the public official's own benefit or for the purpose of improperly benefitting the lobbyist or the entity on behalf of which the lobbyist is acting or both, such an exercise of power could constitute a breach of public trust and thereby amount to corrupt conduct. This is especially so in circumstances where the conduct is calculated to injure the public interest while improperly benefitting a party or person seeking a favourable outcome.

The standards for integrity in lobbying are not to be taken as satisfied by what may be considered to be the minimum standards for disclosure. A lobbyist's proposal may be expected to draw attention to or highlight the possible or likely benefits of the project or action for which governmental support or approval is sought. However, full and frank disclosure of possible known shortcomings, deficiencies or adverse effects should be disclosed by the lobbyist. The public interest requires nothing less. The public interest requires both lobbyists and public officials to act according to the highest not the lowest standards. Advocacy and scrutiny in the course of lobbying activities must both proceed accordingly.

Summary

The matters that are required to be addressed in the interest of effective regulation concern the responsibilities of both lobbyists and public officials, as the OECD has observed:

> *… Since it takes two to lobby, both governments and lobbyists need to take their share of responsibility. In the case of governments, it is crucial to strengthen the implementation of the wider integrity framework and to adapt it to evolving and emerging risks.…*[46]

[42] *Greiner v ICAC* (1992) 28 NSWLR 125, at 162.

[43] *Greiner v ICAC* (1992) 28 NSWLR 125, at 165.

[44] *Cunneen v ICAC* [2014] NSWCA 421 at [78].

[45] See Independent Commission Against Corruption, *Report on Investigation into the Conduct of the Hon. J. Richard Face*, 2004, where it was noted that there is no reason to construe s 8(1) generally, or s 8(1)(c) in particular, as being confined to conduct which constitutes a criminal offence.

[46] Op cit, *Lobbyists, Government and Public Trust*: Volume 3, p. 1.

Responding appropriately to concerns in relation to lobbying practices and undue influence in the decision-making process is a key to restoring trust in government. Based on a survey of stakeholders, the OECD observed,:

> *…The scale of opinion suggests that addressing concerns over opaque lobbying practices (such as deals behind closed doors) is a key policy lever in governments' efforts to restore trust of the people.*

There is a cogent basis for regulating the lobbied (the public official) by encoding standards of conduct based on the public trust principle that find support in the common law. Non-compliance with such principles should, in the public interest, be the subject of appropriate sanction.

Regulations or codes of conduct that apply generally to public officials in the exercise of public functions are often insufficient. There is a need for a code of conduct that specifically addresses malpractice and corruption in lobbying. As observed by the OECD:

> *Governments have … Responsibility for setting out clear standards of conduct for public officials who may be lobbied….*[47]

The OECD further stated:

> *…The ultimate responsibility for safeguarding the public interest and rejecting undue influence lies with those who are lobbied, and more attention is needed on this*

…

> *There is an emerging sense that there should be greater focus on the responsibility of those who are lobbied, namely public officials. They are the guardians of the public interest, and although it takes two to lobby, the ultimate responsibility for safeguarding the public interest and rejecting undue influence lies with them.*[48]

Effective regulation of public officials in relation to lobbying requires the incorporation of a code of conduct that has legislative force and sanctions. The lobbying code of conduct for public officials must specify the principles and the standards that apply in dealing with lobbying proposals and in the conduct of lobbying activities. They include the obligation to ensure:

- any lobbied proposal, if granted, would not injure or adversely impact the public interest
- full transparency in all lobbying process, save only those whose exceptional circumstances justify confidentiality being maintained on public policy grounds
- accountability with respect to any decision made to grant or refuse a lobbied proposal.

Specific standards apply to lobbying activities, as follows:

- lobbying should not be conducted in secret
- meetings/communication with lobbyists should be subject to proper disclosure requirements
- principles of transparency and accountability (including, in particular, contemporaneous recordkeeping) apply to the process of:
  - communicating
  - information collection
  - analysis
  - decision-making
- common law obligations that attach to public office-holding and the exercise of public power including discretionary decision-making discussed in this chapter also apply.

As noted in chapter 2, the current Lobbyists Code is overseen by the NSWEC. The Commission acknowledges giving the NSWEC additional responsibility for enforcing the conduct of the broad range of public officials who deal with lobbyists would entail a significant expansion of its responsibilities. Chapter 9 makes recommendations in this regard.

Recommendation 1

That the Lobbyists Code of Conduct be renamed the "Lobbying Code of Conduct" and imposes standards and obligations on public officials with regard to how lobbying proposals are received, considered and determined.

These standards and obligations will be consistent with the obligations at law that apply to the discharge of public functions and the exercise of public powers.

Recommendation 2

That the "Lobbying Code of Conduct" includes general principles that a public official must adhere to when receiving, considering and determining a lobbying proposal, including the obligations:

- **to act honestly, impartially and disinterestedly**

[47] Ibid, p. 66.

[48] Ibid, p. 68.

- to act in the public interest and not for any extraneous purpose
- not to act improperly, including by improper preferencing or favouritism.

Recommendation 3

That the "Lobbying Code of Conduct" also set out some detailed standards and obligations including:

a) a prohibition on undocumented or secret meetings and communications with lobbyists, which entail obligations to:

   i. document all communications with lobbyists, including those held away from government premises, apart from immaterial or ephemeral communications

   ii. avoid discussing substantive matters with lobbyists in social settings

b) an expectation that a public official makes all reasonable efforts to seek the views of all parties whose interests are likely to be affected by the adoption of a lobbying proposal

c) a prohibition on improper preferential treatment of a lobbyist on the basis of any existing or former relationship (for example, a conflict of interest situation)

d) that a public official should discourage lobbying representations relating to proposals in situations where there are formal assessment procedures in place for determining the merits of the proposal, and that these procedures (for example, those relating to development applications, tenders, grants and unsolicited proposals) offer a more suitable channel through which representations can be made

e) that a public official must not divulge information to lobbyists that would provide them with an unfair advantage over other interested parties, including other lobbyists

f) a requirement to report any reasonably suspected breach of the "Lobbying Code of Conduct" to the lobbying regulator.

Conduct of self-represented "lobbyists"

As noted in chapter 3, the Commission's experience is that corrupt "lobbying" activity is most likely to involve persons acting in their own interests. Because the LOGO Act excludes the self-represented from the definition of "lobbying",[49] the individuals who are most likely to be engaged in corrupt conduct, fall outside the current regulatory scheme.

The Commission has concluded that it would not be practical to bring all self-represented persons within the meaning of "lobbying" under the LOGO Act. However, public officials should be subject to the standards and obligations of the proposed "Lobbying Code of Conduct" when any person or organisation is making representations, irrespective of whether that party falls into the definition of lobbyist in the LOGO Act. This is consistent with Premier's Memorandum M2015-05, which requires ministers to publish information about meetings with *any* group or individual involving the discussion of a matter that may be considered by a minister.

Recommendation 4

That, with respect to the proposed "Lobbying Code of Conduct", the obligations on, and oversight of, government officials, should extend to circumstances where an official is "lobbied" by a person or entity acting in their/its own interests; that is, not "representing the interests *of others* ".

[49] Section 4 of the LOGO Act defines "lobbying" in terms of communications "for the purpose of representing the interests **of others**…" (emphasis added).

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Chapter 5: Keeping and publishing records of lobbying communications

There is a distinction between "secret" and "private" communications with lobbyists. A communication is secret where it is known only to the parties, if there is no record of it having taken place, no record of the participants, and no record of the decision-making process. In effect, a secret communication is a clandestine, non-transparent event.[50] Private communications, where justified, on the other hand, occur behind closed doors but a written, accurate record is made of the particulars and subsequent actions. Such a record could potentially be made available under a GIPA Act request or provided to agency management, a relevant regulator or watchdog body.

Accordingly, provided that lobbying adheres to necessary recordkeeping standards, it may be acceptable for private meetings to occur. However, as discussed elsewhere, secret meetings can be conducive to corrupt conduct.

This chapter examines accountability mechanisms associated with good recordkeeping and the disclosure of information arising in the course of interactions with lobbyists.

Appropriate scrutiny cannot take place if communications with lobbyists are not documented or are concealed from the public, media and relevant authorities. Ideally, records should reflect the entire lobbying "footprint", which would reveal a lobbyist's:

- input (representations made to decision-makers)
- throughput (the policy process whereby various options are considered)
- output (government's final decision and reasoning for it).

This level of transparency would permit an understanding of both the representations and relevant steps in the process leading to an outcome.

In this regard, there are two important pieces of legislation in NSW: the *State Records Act 1998* and the GIPA Act. Numerous other Acts, regulations and procedures require public officials to validate or give an account of their decisions and/or record information. An example is Standing Order 52 of the Legislative Council, which is used to require the production of documents, usually about a particular decision of government that has become a matter of broad public interest.[51] In recent years, open government initiatives have promoted the publication of a wider range of information held by government.[52]

State Records Act 1998 and the GIPA Act

The *State Records Act 1998* imposes obligations on each public office, including local councils, "to make and keep full and accurate records of the activities of the office" (s 12(1)) and "ensure the safe custody and proper preservation of the State records that it has control of" (s 11(1)).

Section 15 of the Act gives the State Archives and Records Authority power to access records held by agencies for the purpose of monitoring compliance.

Schedule 2 of the State Records Regulation 2015 provides "Guidelines on what constitutes normal administrative

[50] Self-deleting electronic messages and use of private email can be the basis for secret communications.

[51] Standing rules and orders adopted by the Legislative Council of NSW on 5 May 2004.

[52] See, for instance, information about Australia's Open Government National Action Plan at https://ogpau.pmc.gov.au/national-action-plans/australias-third-open-government-national-action-plan-2020-22. Accessed on 24 August 2020.

practice", which agencies are expected to follow. These guidelines include a requirement to retain drafts and working papers that:

> *…document significant decisions, discussions, reasons and actions or contain significant information that is not contained in the final version of the record.*

Accordingly, good recordkeeping, including documenting communications with lobbyists, is already the law in the NSW public sector.

The GIPA Act authorises and encourages the proactive release of government information by agencies, and provides an enforceable right of access to government information, restricted only when the application for access is not valid or there is an overriding public interest against disclosure. When determining whether to release a document in response to a valid GIPA Act application, agencies are required to consider information that is personal or "concerns the person's business, commercial, professional or financial interests" (s 54). Agencies also have scope to delete information from documents made available in response to a GIPA Act application (s 74) or defer access (s 78).

Strengthening accountability mechanisms for keeping and publishing lobbying communications – the case made in submissions

Most submissions made to the Commission supported the need for the "lobbied" public official (and not just the "lobbyist") to make and keep records of significant interactions with lobbyists and others making representations to government. As stated above, this is already required under NSW law and is uncontroversial. A failure to make or maintain records may not only constitute a breach of a statutory requirement to do so, it may also support an inference as to the existence of a deliberate intention to suppress information in order to disguise improper or corrupt conduct.

The following views were expressed in submissions to the Commission:

- officials may avoid creating records (including email communications) out of fear that they will be made public via a GIPA Act application
- agencies may unreasonably seek to refuse GIPA Act applications requesting information about lobbying communications under the personal and business information exemptions (Cabinet-in-confidence protections, of course, must be carefully considered)
- requests for information via the GIPA Act or Standing Order 52 of the Legislative Council can take time to be actioned and often result in large volumes of documentation that need to be analysed
- the State Archives and Records Authority has limited scope to audit, monitor and enforce compliance with the *State Records Act 1998*
- the penalties for breaches of statutory recordkeeping requirements are not practically enforceable.

Imposing additional accountability mechanisms for keeping and publishing lobbying communications – concerns raised in submissions

Some submissions made to the Commission expressed concern that introducing further recordkeeping measures could be administratively burdensome. In summary, the key concerns were that:

- there is an inherent problem in trying to make a fundamentally dishonest person, or a person who is in the process of engaging in misconduct, keep good records
- provisions requiring the disclosure of file notes (or the keeping of file notes) can be onerous and costly
- the practical realities of documenting all meetings can make public policy debates more difficult and dampen frank discussions
- the possibility of records being subject to a GIPA Act application can colour their content
- strict requirements to keep and publish records encourage individuals to keep unofficial or "shadow records" instead.

NSW Government agencies – policies, guidelines, protocols, and processes for communicating with lobbyists and other entities

Public officials and public authorities may frequently have contact with lobbyists and "business contacts". They include professional lobbyists and representatives of industry bodies, peak bodies and other in-house or vested interest groups who seek to advocate or represent those for whom they act or represent.

In this section, the discussion focuses on the processes and procedures that have been adopted by specific agencies. They are instructive in that they demonstrate the elements of models that have created accountability systems that may be readily adopted as standard practice in most areas in government and public administration.

According to a submission received by the Commission from the DPC:

> *To manage corruption risks, the focus is and should be on prevention through quality processes, people and cultures that ensure routine accountability. Imposing additional transparency and accountability measures should be by exception, where there is evidence (from internal or external audits, or other investigations) that standard management processes, properly followed, are insufficient to meet the risk level in a particular environment.*

To assess whether "routine accountability" exists across the public sector, the secretaries of NSW departments were asked to provide to the Commission policies, guidelines, protocols and processes relating to:

- meetings with external stakeholders, including meeting requests
- recordkeeping of meetings involving external stakeholders, including recordkeeping of telephone conversations.

A wide range of documentation was received in response. Included were codes of conduct and policies relating to gifts and benefits, stakeholder engagement, recruitment and records management. However, it was evident that few departments have policies and procedures that relate specifically to lobbyists and lobbying activities. Two exceptions were the former Department of Planning and Environment (now the DPIE) and a related entity, the Greater Sydney Commission. Representatives from these organisations volunteered to give evidence at the public inquiry.

The DPIE policy and procedure, which is under review following the machinery of government changes, includes the following:

- Lobbyist/Business Contact Meeting Request Form
- Engaging with Lobbyists and Business Contacts Policy
- Engaging with Lobbyists and Business Contacts Procedure.

DPIE Chief Legal Counsel James Hebron gave evidence about the similarities and differences in the approach to communications with third-party lobbyists (in accordance with the LOGO Act), "other lobbyists" (which refers to industry bodies, peak bodies, interest groups but also includes professionals such as planning consultants, professional consultants, lawyers, and so forth) and "business contacts", as follows:

- a "business contact" is a person making representations to the DPIE but who is not classed as a third-party lobbyist or another lobbyist
- third-party lobbyists are required to submit a meeting request form stating the purpose of the meeting (this is not required for "other lobbyists" and "business contacts"), however, as part

of its review, the DPIE is considering aligning procedures for all types of meeting request

- a senior member of staff must approve whether a meeting with a third-party lobbyist can take place and where it can be held, and that at least two departmental officers must be in attendance and more senior officers must sign-off the meeting record, which is then uploaded onto the DPIE's website
- the DPIE policy targets a relatively small number of lobbying contacts (the Commission heard that, from about August 2017 to October 2019, there were 23 entries on the lobbying contact register)
- records of meetings with "other lobbyists" and "business contacts" are kept in accordance with the *State Records Act 1998*; however, there is no obligation for the records of those meetings to be disclosed on the DPIE website
- in relation to "other lobbyists", Mr Hebron is of the view that:

  > *…there would clearly be an increase in transparency if records of those meetings were published, and one of the questions that we need to look at is, well, what would be the cost impact of doing that, and versus, and does that, does the benefit of the additional transparency justify that cost.*

- in relation to "business contacts", Mr Hebron stated:

  > *The keeping of business records, business contact records, applies to any meeting with virtually any, well, with any other agency. So rather than meetings which are held for the purpose of trying to influence legislation or in relation to a planning application, we're talking about I'd say tens but I think I can say hundreds of thousands of records, perhaps annually but certainly over a period of years, that record the Department's ordinary operations. So, whether it's planning, whether it's national parks, whether it's energy, whatever it is, business contact records are just kept as a matter of course. So, I think they are necessarily in a different category to meetings which are held for the purpose of influencing the future development of policy or legislation.*

Mr Hebron advised that the DPIE's decision-making in relation to state-significant development matters involves numerous steps that are made subject to safeguards. Each step in the process is published and open to public scrutiny. For example, the assessment report setting out the decision in relation to an application, includes the meetings and interactions with stakeholders. A further safeguard involves separating the decision-making process from the assessment process in relation to controversial matters. This involves local councils and planning panels, at the local level, and the DPIE and the Independent Planning Commission, at the state-significant level.

The Greater Sydney Commission has a more comprehensive set of policies and procedures. Its "Engaging with Lobbyists and Business Contacts" policy and procedure was introduced in 2019 to comply with the Premier's Memorandum M2019-02 "Lobbyists Code of Conduct" and the LOGO Act, and that these meet the need for greater openness and transparency in decision-making.

Like the DPIE, the Greater Sydney Commission classifies three types of lobbyist: "third-party lobbyists", "other lobbyists" and "business contacts". Of the total volume of meetings, no more than 5% are with third-party lobbyists, 50-60% are with "other lobbyists", and 30-40% are with "business contacts".

In advance of a meeting, third-party lobbyists and "other lobbyists" are required to complete a meeting request form and identify the purpose of the meeting, as well as any financial or other interests.

Although not compelled to, "business contacts" and "community groups" also complete a meeting request form. There is an additional requirement for third-party lobbyists to confirm that they are complying with the ethical standards under the LOGO Act and the Lobbyists Code.

Before a meeting can take place with third-party lobbyists and "other lobbyists" (but not "business contacts"), approval must be obtained by a senior executive manager. Additional checks are undertaken to verify that third-party lobbyists are on the Lobbyists Register (and not on the Lobbyists Watch List).

A senior executive member, one other staff member and a probity staff member must attend meetings with third-party lobbyists and "other lobbyists". As a matter of good practice, a probity officer also attends most meetings with "business contacts".

Greg Woodhams, Executive Director of City Planning Projects at the Greater Sydney Commission, told the Commission that recordkeeping requirements for third-party lobbyists "other lobbyists" and "business contacts" differ slightly. For third-party lobbyists, in addition to file notes, telecommunications as well as face to face meetings are documented. They include the items of discussion, any substantive issues raised, key decisions, advice, actions or outcomes, and who is responsible for

any actions arising. These records are maintained in the Greater Sydney Commission corporate software system and the Registered Lobbyists Contact Register.

Although the same recordkeeping procedure applies to "other lobbyists" and "business contacts", they are not recorded in a register. The Greater Sydney Commission corporate software records a trail of "action" and "follow-up action". As part of his duties, Mr Woodhams assesses what, if any, action is outstanding and then ensures that it is followed through. Any member of the public may request access to the meeting record and review it. Third-party lobbyists are made aware that details of their contact will be published on the website within 10 days. To date, no third-party lobbyist has raised an issue of commercial-in-confidence that would restrain details of the meeting being placed on the register.

The Greater Sydney Commission has considered extending the reach of its register beyond third-party lobbyists to other lobbyists and business contacts. A key concern was not to deter business contacts and other lobbyists from making contact; however, from an administrative perspective, Mr Woodhams noted that "it would just be an additional task" to extend the register to the other classes of lobbyists.

The Commission also heard from NSW Independent Planning Commission (IPC) Chair Professor Mary O'Kane. The IPC was established in 2018 as a standalone agency under Part 2, Division 2.3 of the *Environmental Planning and Assessment Act 1979*. Its key function includes determining state-significant development applications where there is significant opposition from the community. It also conducts public hearings for development applications and other planning and development matters. It provides independent expert advice in relation to planning matters when requested by the minister for planning and public places or the DPIE secretary.

Professor O'Kane detailed the high level of scrutiny that her agency faces. To manage the risk of actual or perceived risks of bias and misjudgment, the IPC operates with a high level of transparency. Professor O'Kane told the Commission that the IPC:

- has chosen to record and publish transcripts of private meetings (which might be held with applicants), as well as public hearings, and that any commercial-in-confidence material that appears in a transcript can potentially be redacted
- requires written notes to be taken in relation to any site meetings
- provides formal reasons for decisions, using a standardised template
- has processes that allow all relevant parties to comment on new information.

Summarising her approach, Professor O'Kane said:

> *I think the default should always be open, an open approach to meetings and transparency, and if there are exceptions then they should be treated on their merits and appropriately noted and recorded. I think the other thing that is really important is the protection of public officials, including ministers. I think there is a great deal of protection in an open process in that even if nothing untoward happened, if it's open, no one can accuse somebody of something untoward happening, and I think levels of public trust in government tend to go up if the process is, by default, open.*

Codes of conduct

Most government agencies have created relevant codes of ethics and conduct, and subscribe to the general requirement to create and maintain full, accurate and honest records of activities, decisions, and other business transactions. For example, the Transport for NSW code of conduct makes specific reference to the need for decisions to withstand external scrutiny, including holding and maintaining adequate records of decisions and actions, including the reasons for those decisions.

The former Department of Finance's code of conduct (also used by the Department of Customer Service) includes the requirement for staff to check that third-party lobbyists are registered and to report any attempt by a former employee to influence or lobby them about departmental activities.

The code of ethical conduct of the Department of Families, Community Services and Justice (as it was then called) goes beyond simply requiring that employees abide by the relevant Premier's Memorandum provisions by restating in its code that lobbying is not permitted by:

- a third-party lobbyist who is not on the register
- an individual engaged to undertake lobbying for a third-party lobbyist who is not registered
- any lobbyist who has failed to make disclosures to the government official required under the LOGO Act or the Lobbyists Code
- a lobbyist whose name has been placed on the Lobbyists Watch List, unless the provisions of the memorandum are adhered to.

Public sector guidance in relation to the conduct of lobbying is commonly addressed in general rather than specific terms. As discussed in this chapter, some agencies, like the DPIE, Greater Sydney Commission and the Independent Planning Commission, have designed

internal policies and procedures that address the specific lobbying-related risks each potentially faces. Others rely on the more general provisions of their codes of conduct or, in the case of elected public officials, on the need for compliance with existing Premier's Memorandum M2019-02 "Lobbyists Code of Conduct".

The evidence before the Commission is that compliance with a more prescriptive approach, as occurs with the agencies such as the DPIE and Greater Sydney Commission, is neither unduly complicated nor burdensome. Generally, other NSW agencies, most of which face lesser lobbying-related risks, are capable of designing enhanced controls that address risk in a proportionate manner.

Summary

Communications that are formal and informal, verbal or in writing, between lobbyists and public officials are, of course, the medium by which lobbying is transacted. While that is an obvious fact, it focuses attention on (a) the process through which communications are or should be affected and (b) the procedures by which a lobbied proposal is considered evaluated and determined.

Aside from exceptional cases where there is a need for confidentiality or secrecy, all such processes and procedures must be transparent. To this end:

1. lobbyists must be required to disclose on a register basic and essential facts, including the:
    - identity of the lobbyist and/or the identity of the lobbyist's client
    - nature or subject matter of the lobbied proposal
    - purpose of any meeting sought with a public official
2. those who are lobbied, must also be required to disclose communications, including meetings with lobbyists and/or their representatives, and create records of the lobbying activity, with such records to be made accessible through a process provided for in the GIPA Act.

There is clearly a need for standard protocols to be designed and encoded by regulation so as to ensure that the transparency measures referred to in (1) and (2) are made subject to strict compliance obligations.

It must be understood that the development of standards such as these are derived and based on principles associated with public office and the exercise of public power. Such principles inform the accepted standards of propriety for public officials. The overarching principle that attaches to public office-holding and from which other principles are derived, *the public trust principle*, expresses the values as well as the conditions on which power is held by institutions of government and by individual public officials, elected and appointed alike. As has been observed:

> *…the institutions of government and the officials and agencies of government exist to serve the interests of the people.*[53]

In lobbying, as in other areas of government, public officials are responsible in the exercise of their trusteeship. Public officials, by reason of statute and/or by virtue of the public office held, are required to exercise the powers and discretions vested in them concerning a lobbied proposal not arbitrarily but reasonably and in their exercise to display good faith, honesty and integrity.

The trust principle on which public power is held in relation to lobbying, as in other fields, cannot be left unguarded; it must, in the public interest, be protected by appropriate accountability measures. These include, of course, the adoption of procedures that require the proper recording of decisions by public officials and/or government agencies.

It is a basic principle of government accountability and a requirement under the *State Records Act 1998* for public officials in all fields of public service to make and keep full and accurate records of their official activities. The benefits of proper recordkeeping include:

- the establishment of a lasting record in relation to important official decisions
- ensuring compliance with legislative and regulatory obligations
- protection in the event of a dispute, misunderstanding or enquiry into official action.

Recordkeeping – the essential element in lobbying regulation

Detailed recordkeeping is essential in most, if not all, areas of government decision-making for the reasons referred to directly above. It is an essential element in lobbying regulatory schemes. Generally speaking, records of lobbying activities would, at least, be expected to be created at the following points:

1. the request by a lobbyist for a meeting in relation to a lobbying proposal
2. the subsequent receipt of submissions (including verbal submissions) and supporting materials by the lobbyist

[53] Report of the Royal Commission into Commercial Activities of Government and Other Matters, Part II, chapter I, 1992, paragraph 1.2.5.

3. the assessment stage, including consideration, analysis, testing and validating the case put by the lobbyist and the possible or likely benefit or detriment to the public interest

4. the deliberative or decision-making stage leading to the decision to accept or reject a lobbying proposal.

Accountability requires record-making, and the preservation of records to a greater or lesser degree depending on the nature and significance of the lobbying proposal at each of the above stages.

On the basis of the material obtained in Operation Halifax and in the present investigation, such a regulatory requirement in relation to lobbying is unlikely to add – in any significant or burdensome way – to what is essentially common practice.

In relation to points 1 and 2 directly above, it would include written details of the subject matter set out in a request of a meeting, the persons present, minutes of meetings, telephone communications, and written and electronic correspondence.

Point 2 also includes discussion pertaining to the business case advanced in support of a proposal, properly supported.

Point 3 requires the relevant public official(s) to document the approach adopted during the analysis and assessment process and the matters taken into account.

Point 4 places the relevant public official(s) under an obligation to document the basis or bases for a decision made.

Record-making and recordkeeping at each stage need not necessarily be voluminous. However, that said, the assessment and decision-making stages must meet acceptable transparency and accountability standards.

The provisions of the *State Records Act 1998* imposes an obligation on public offices to "make and keep full and accurate records of the activities of the office" (s 12(1)).

The obligation is broad enough to cover records pertaining to lobbying activity. The expression "public office" is broadly defined and includes (s 3(k)) "the holder of any office under the Crown".

Recommendation 5

That the lobbying regulator be empowered and resourced to:

- **develop minimum standards and a model policy relating to interactions with lobbyists and others making representations to government, which should:**
  - **address recordkeeping, disclosure of records and protocols for organising and conducting meetings**
  - **prohibit undocumented or secret interactions with lobbyists or other persons making representations to government**
- **assess and report on agencies' compliance with minimum standards**
- **give advice to agencies and individual government officials about compliance with minimum requirements and better practice**
- **liaise with organisations such as the State Archives and Records Authority and the Information and Privacy Commission**
- **direct an agency or public official to provide any lobbying-related documents or records. Such a direction would operate in a manner similar to the power in s 15 of the *State Records Act 1998*. In addition, the lobbying regulator should, subject to a public interest test, have the power to direct an agency to make public any document or record concerning lobbying communications.**

Recommendation 6

That all public sector agencies subject to the LOGO Act be required to adopt policies and procedures that conform to minimum established standards issued by the lobbying regulator.

Ministerial recordkeeping processes: what happens in practice?

The Commission issued notices to 14 NSW ministers requesting recordkeeping information about meetings with third-party lobbyists as well as industry associations, peak bodies and voluntary, not-for-profit organisations. Of the 14 ministers, four were asked to provide detailed information about 10 specific meetings (randomly selected by the Commission) held during the second quarter of 2019.

An analysis was then conducted on the extent to which a selected group of ministers' offices consistently applied recordkeeping policies and protocols in their communications with lobbyists.

From the responses received, the Commission found that there is no consistent practice for notetaking of meetings with lobbyists. Only one minister advised of a practice for

staff to take written notes during meetings with lobbyists. Others advised that, if a departmental official attended a meeting, it was their expectation that the public official would take notes of the discussions on behalf of the office. One minister advised that only in circumstances where further action is required, such as a request for additional information from the department, is there a standard practice as to taking notes of the discussion.

The following records are typically created that form the basis for a minister's diary disclosure:

- meeting request "cover sheet" (effectively, a checklist of requirements to be met in advance of the meeting taking place)
- initial documentation from a lobbyist requesting a meeting
- communication and correspondence between the minister's office and the person making the request for a meeting, the minister's internal office, and between the minister's office and a department, including internal or departmental briefs prepared for the meeting
- a completed meeting disclosure form and any other documentation provided by the person requesting a meeting
- diary entries (electronic or hardcopy).

Records are retained either in the minister's Microsoft Outlook folder, in a shared drive, document storage system or other software system designed to manage meetings.

One minister advised that a "Ministerial Office" is defined as an agency for the purpose of the *State Records Act 1998* and, as such, is obliged to keep full and accurate records of all activities and decisions. All ministers advised that records relating to meeting with lobbyists are conducted in line with the *State Records Act 1998*, and the Ministers Office Records General Retention and Disposal Authority 13 ("GDA 13"), which specifically relates to the records of ministers' offices. GDA 13 does not set out specific requirements relating to lobbying-related records but it does require the following to be kept as state archives:

> *Correspondence from members of the public or organisations concerning matters relating to the portfolio responsibilities of the Minister and receiving further action.*

In 10 of the 40 meetings examined by the Commission, the copies of notes taken by ministerial office staff present at meetings were consistent with other records provided to the Commission in relation to the meeting, its purpose and outcome. With regard to the remaining 30 meetings examined, the information available to the Commission indicates that no notes were taken, nor records kept.

The use of ministerial diaries is discussed in more detail in chapter 7 of this report.

Chapter 6: Who and what goes on the Lobbyists Register?

The Lobbyists Register in NSW includes the disclosure of certain identifying information about third-party lobbyists and their clients. Importantly, in-house lobbyists employed by corporations and industry groups, as already noted, are excluded. This chapter discusses the type, amount and timeliness of information required to be entered into the Lobbyists Register for the general public to better understand who is meeting whom and why.

Registration as a transparency mechanism

Information in the NSW Lobbyists Register and published summaries from ministerial diaries (discussed in chapter 7) are the two key mechanisms through which some elements of lobbying activity are made transparent. There are others, such as the GIPA Act and the Legislative Council's ability to "call for papers" under its Standing Order 52.

Given that the Lobbyists Register is an important transparency mechanism, the Commission considered whether it is adequate in its present form or whether it should contain more detail about lobbying activities and cover categories of lobbyist other than third-party lobbyists.

In its Operation Halifax report, the Commission recommended that third-party lobbyists *and in-house lobbyists* be required to register before they can lobby a government representative. As noted earlier, the LOGO Act requires third-party lobbyists to register but not in-house lobbyists. In Operation Halifax, the Commission's intent was for all lobbyists to disclose details about their lobbying activities including the date, the government official being lobbied and in the case of third-party lobbyists, the name of their client and any associated interests that would derive a benefit from a successful lobbying outcome.

The case for strengthening lobbying regulation

In recent years, governments around the world have acknowledged that lobbying – if left unregulated and conducted in a hidden manner – creates opportunities for organisations or special interest groups to obtain unfair advantages and disproportionate access to, and influence over, official decision-making. Without a requirement for any form of record or disclosure by the lobbyist, and/or the lobbied, it is not clear to the general public whether lobbying is being conducted in secret, private or "off the record" briefings. Secrecy in lobbying breeds perceptions of undue influence and diminishes trust in government decision-making, both of which enhance the risk of corruption. As one witness said of the lobbying regime in NSW:

> *In our current system there is a secrecy and lack of transparency about who is lobbying government and what polices and positions they are seeking to influence.*

The Commission heard that third-party lobbyists represent a minority of all professional lobbyists. Les Timar from the Australian Professional Government Relations Association estimated a 25:75 split between third-party lobbyists and in-house lobbyists. Former Queensland integrity commissioner David Solomon reiterated this, stating that third-party lobbyists represent "about one-fifth or one-sixth of the total number of people who were involved in lobbying". He went on to recommend that, "If we're going to regulate lobbying, we regulate all of lobbying".

The estimates validate the Commission recommendation made in Operation Halifax for the need for accountability in respect of in-house lobbyists as well as third-party lobbyists.

The risks associated with lobbying, as disclosed in the present investigation, must be met and dealt with through regulatory reform. Particular matters of note include:

- the existing register for third-party lobbyists is of limited value and should be expanded in scope to include in-house organisations, among others, with limited exemptions
- the information contained in the Lobbyists Register should be readily capable of being reconciled with disclosures from ministerial diaries
- the Lobbyists Register should be redeveloped using technological innovation that enables a wider range of lobbying activity to be captured and displayed online, in a user-friendly manner and updated regularly, without imposing significant compliance burdens.

The case against regulatory reform

In some submissions and evidence presented by witnesses, the argument was made against expanding the Lobbyists Register.

First, if the sole purpose of the Lobbyists Register is to provide information about whose interests are being represented, there is an argument that only third-party lobbyists need to be included. This is because it is self-evident who an in-house lobbyist represents.

Secondly, some lobbying interactions involve information that is private, commercial-in-confidence or subject to legal professional privilege. The Commission agrees that, while some aspects of lobbying may involve confidential information, the protection of that information does not prevent an acceptable level of transparency in the public interest.

Thirdly, increased regulation would create an unnecessary administrative burden if lobbyists were asked to document each exchange of communication with government officials.

Mr Timar advised:

> *…the caution that we sound, Commissioner, is that where measures are being proposed to substantially expand that regulatory framework, and we do recognise that it's a balancing act here, but that the caution relates to the benefit cost equation and I do accept that those things are potentially difficult to measure, but we do need to, we believe, be very mindful of what those consequences could be, because the potential cost is significant.*

There is also a risk that lobbying will be pushed underground if compliance with any regulatory system is perceived to be costly and easy to circumvent.

The issue of regulatory burden has been closely examined. Any obligation to disclose information over and above current requirements may be perceived by some as a burden. The critical issue is the extent to which regulation may unduly burden lobbyists against the benefits and safeguards provided by it, in particular, in terms of accountability and transparency in the public interest. A further argument was made that, if only repeat or professional lobbyists (third-party lobbyists and in-house lobbyists) had to register (and not ad hoc lobbyists), the compliance burden would be more appropriately distributed. Ultimately, the Commission agrees with the view of Dr Longstaff, who argued that some additional compliance burden in the interests of transparency is "a price worth paying".

In considering arguments that involve or that attempt to involve evaluating "cost" against principle (such as the principle of accountability in lobbying), those that attempt to argue the former against the latter clearly face

a formidable task. Before any added cost of compliance could trump the public interest in transparency and accountability in lobbying, there would need to be, at the least, a sound evidentiary basis as to what this claimed added cost of compliance would be. The submissions received by the Commission made general points about the need to control administrative costs but did not specify the likely costs under various regulatory models.

Having said that, the Commission accepts that any regulatory and compliance burden should not result in any unnecessary, purely administrative burden on lobbyists. Some third-party lobbyists, who work across multiple Australian jurisdictions, have noted the repetitious administrative burden of complying with the specific requirements of each jurisdiction, including at the federal level.

To ease administrative burden on registered lobbyists as far as possible, the Commission recommends that, where requirements are similar between jurisdictions, the NSW lobbying regulator be permitted to accept relevant documentation filed elsewhere. For example, in Victoria, with respect to "fit and proper person" provisions, the Victorian Government Professional Lobbyist Code of Conduct deems "a certified copy of a statutory declaration sworn for the purposes of annual confirmation of details for the Commonwealth Government Lobbyist Register"[54] as sufficient to meet the fit and proper person requirements of the Victorian scheme.

The Commission agrees that the registration of lobbyists and lobbying activities should not unreasonably impede the opportunity an individual or organisation has to make representations to government. In this respect, the voices of small charitable and voluntary organisations, or ordinary citizens, who wish to talk to their local member of Parliament, should not be made subject to excessive disclosure requirements, as a denial of access under any regulatory regime could produce a so-called "democratic chill". They are to be distinguished, for example, from corporations and other organisations that seek to influence government in advancing their commercial interests.

Key characteristics of lobbying regulation

All jurisdictions in Australia, except the Northern Territory, have a lobbyist register. In South Australia and Queensland, lobbyists are required to publish details about the ministers and shadow ministers with whom they meet. Most evidence gathered by the Commission indicated a need for change in the way that the Lobbyists Register in NSW operates. A number of witnesses who gave evidence during the public inquiry were generally familiar and supportive of robust registration models such as the well-established model in Canada, and the more recently enacted legislation in Scotland and Ireland.

In considering practical options for reform, the Commission looked to other regulatory regimes to identify best practice. In a recent book comparing various international models of regulation, it was found that:

> *A fundamental dimension of lobbying rules is that lobbyists must register with the state, usually an independent regulator, before contact is made with the elected officials and high-level civil servants that are the target of lobbying.*[55]

The Commission analysed the following statutory schemes that impose higher levels of transparency over lobbying registration:

- Ireland – *Regulation of Lobbying Act 2015*
- Scotland – *Lobbying (Scotland) Act 2016*
- Canada – *Lobbyists Registration Act* renamed *The Lobbying Act*.

These jurisdictions place the primary obligation on lobbyists to file regular information about their lobbying activities in a register that is then publicly available. The operational aspects of each of the statutory schemes in Ireland, Scotland and Canada were examined during the inquiry. The key elements of best practice that helped shape the Commission's recommendations are set out below.

Ireland: *Regulation of Lobbying Act 2015*

The regulatory model in Ireland is robust, with a successful level of compliance. Particular observations arise under relevant legislative provisions. They include the following:

- Importantly, a broad range of lobbyists are required to register including third-party consultant lobbyists, in-house lobbyists, for-profit firms and in-house lobbyists for non-profit organisations.
- Part 2 of the Act requires all communications (oral and written) to be registered, including planning matters (for example, appealing decisions in development or re-zoning of land). However, no financial disclosures are required to be made.

[54] See https://www.lobbyistsregister.vic.gov.au/lobbyistsregister/documents/Vic_Gov_Professional_Lobbyist_Code_of_Conduct_Sept_2009.PDF. Accessed 15 December 2020.

[55] R Chari, et al, *Regulating lobbying: a global comparison, 2nd* edition, 2019, p. 162.

- Anyone who is lobbying (as defined in the Act) must register and submit returns every four months indicating:
  - the "designated public official" being lobbied
  - the subject matter of the lobbying activity and the intended results the person was seeking to secure
  - the type and extent of activity
  - the name of any person in the lobbying organisation who is or was a designated public official and who carried out lobbying activity
  - if relevant, information about any client on whose behalf they are lobbying.
- Exemptions (communications that are not considered relevant for the purposes of registration where transparency arrangements are already in place) include:
  - private affairs – relating to, or on behalf of, an individual's private affairs unless they relate to the development or zoning of any land
  - diplomatic relations
  - factual information – in response to a request for information from a public servant, or provided to a government department in response to a request
  - published submissions – such as those that form part of government consultation processes
  - trade union negotiations
  - safety and security – communications that could pose a threat to an individual or the state
  - parliamentary committees – applies to formal proceedings of committee which are generally recorded or minuted
  - communications by designated public officials or public servants in the course of their work capacity
  - governance of commercial state bodies
  - policy working groups – this includes advisory groups, expert groups, working groups, review groups or commissions.

The intent of the register in Ireland is for disclosure requirements to be proportionate and informative so as not to generate an excessive volume of information that would overwhelm the regulatory system.

The online register has a suite of information tools designed to help lobbyists, "designated public officials", and the public to fully understand the Act and its obligations. Furthermore, the information on the website is ordered in such a way to facilitate a search by the:

- name and details of the lobbying organisation
- number of entries listed by "relevant matter": legislation/public policy or program/matters involving public funds/zoning or development
- number of entries categorised by public policy area, for example: health/economic development and industry/agriculture/justice and equality/housing
- public body being lobbied: by department name
- individual(s) being lobbied: ministers, members of parliament, members of local authorities (chief executive officers and directors of services), special advisers to ministers and public servants (at secretary general, assistant secretary, director and equivalent grades)
- lobbying activity linked to a grassroots campaign.

In addition, officials who are lobbied are encouraged to check the register on a periodic basis to ensure their name is associated with the correct lobbying activities and the information is factually correct. Persons have a right to seek correction where information is inaccurate. These corrections can also be found by searching the register.

While there were some initial concerns among the voluntary, not-for-profit sector in Ireland about the introduction of the lobbying register – in particular, that registration would inhibit lobbying – these fears have not materialised and there has been no suppressive effect, according to subsequent reviews of the Act.[56] While there has been an increased administrative burden for some organisations, there are also reported benefits to registration, including raising awareness of all the advocacy work performed by small organisations.

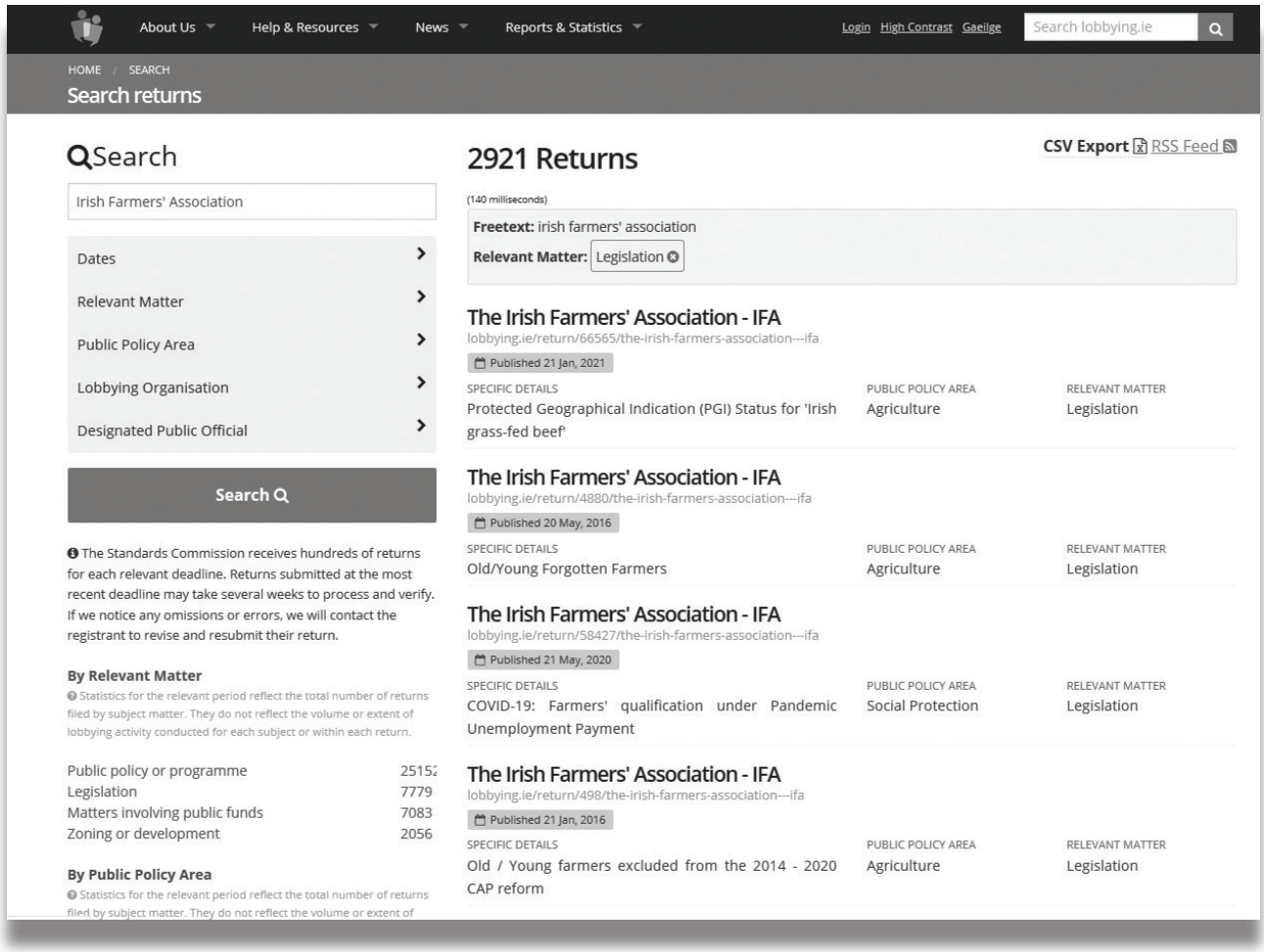
In 2018, Sherry Perreault, Head of Ethics and Lobbying Regulation, Standards in Public Office Commission, reported:

> *With experience, registrants have honed their skills, and combined with tailored feedback, the quality of returns has improved from one deadline to the next.*[57]

[56] Department of Public Expenditure and Reform, *Second Statutory Review of the Regulation of Lobbying Act 2015*, 25 February 2020. See op cit, R Chari, Regulating lobbying: a global comparison.

[57] Standards in Public Office Commission, "Standards in Public Office Commission publishes its Annual Report under the Regulation of Lobbying Act", media release, 28 June 2018.

Figure 1: *Regulation of Lobbying Act 2015* – Sample from the Register of Lobbying in Ireland



Scotland: *Lobbying (Scotland) Act 2016*

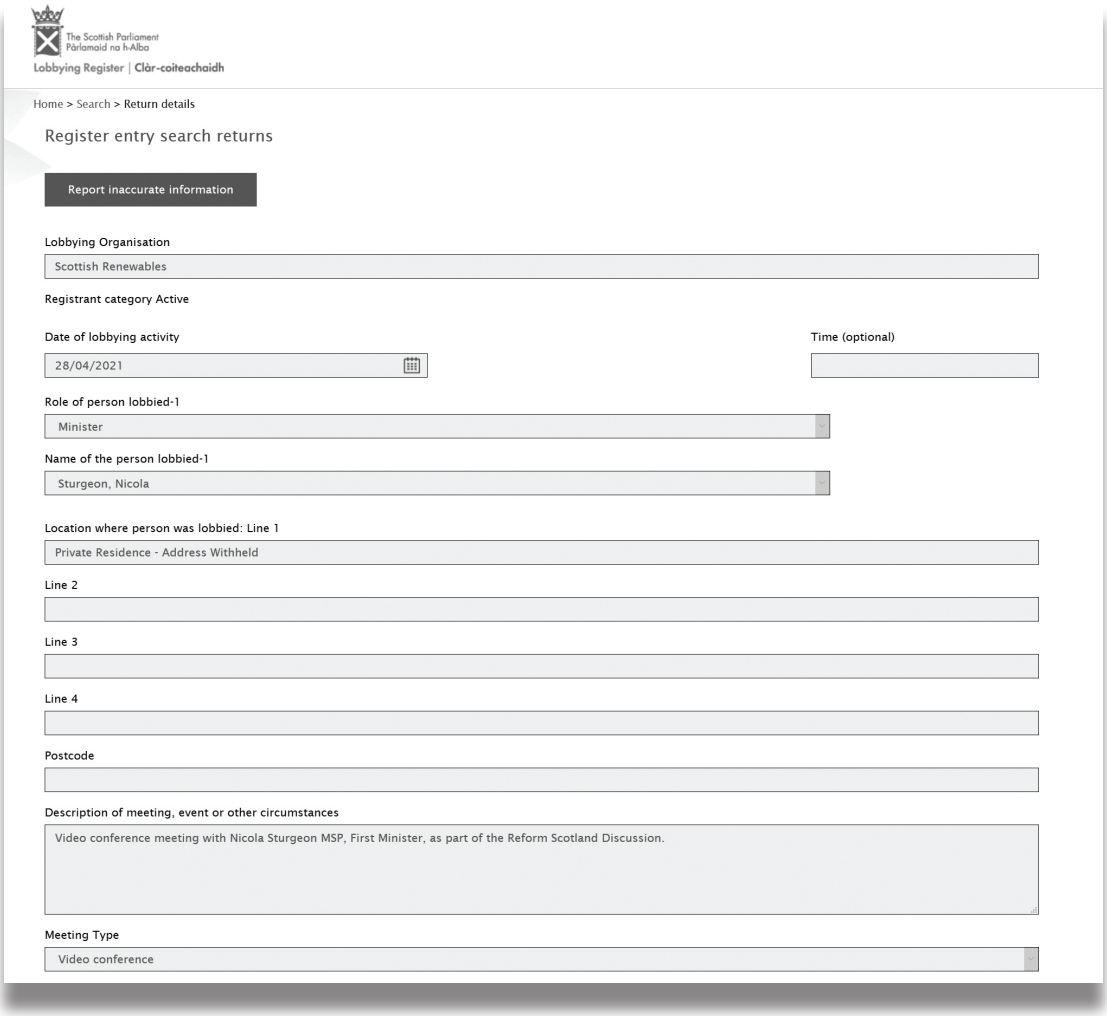
The design of the regulatory model in Scotland is based in part on the Irish model but with notable differences. The scope of regulation encompasses *paid* lobbying consultants, including, importantly, in-house lobbyists. Notably, it is only face-to-face communications (not written) with government officials that must be entered into the register. Under the *Lobbying (Scotland) Act 2016*, regulated lobbying includes activities carried out by:

- paid consultants acting on behalf of other parties
- organisations using in-house lobbyists such as employees, directors, office-holders, partners or other members of an organisation (for the purposes of the Act, it is the organisation rather than the individual performing the in-house function that is engaged in regulated lobbying).

Importantly, as with Ireland's, the Scottish register contains specified "entries" rather than just information about regulated "entities". The information that regulated lobbyists are obliged to enter into the register includes:

- the registrant's identity (name of organisation)
- the registrant's active or inactive status
- the date of lobbying activity (time is optional) and location of meeting
- the name and role of the person lobbied
- information about the lobbying activity
- confirmation of meeting type (face-to-face)
- the purpose of the lobbying
- the name of the individual who carried out the communication
- on whose behalf the communication has been made.

Figure 2: The *Lobbying (Scotland) Act 2016* – Sample from the Lobbying Register



Lobbying activities that are not regulated (and are therefore exempt from registration) include communications that are not made in return for payment, as well as communications that are made:

- by individuals raising issues on their own behalf made during discussions with (most) local members of the Scottish Parliament
- by those who are unpaid (directly, or indirectly)
- by those representing some small organisations (with fewer than 10 full-time equivalent employees)
- during formal parliamentary proceedings of the Scottish Parliament (for example, a meeting of a parliamentary committee) or as communication required by statute or another rule of law
- in response to requests for factual information or views on a topic (from a member of the Scottish Parliament, minister, law officer, and so forth)
- during quorate meetings of cross-party groups of the Scottish Parliament
- for the purposes of journalism
- during negotiations about terms and conditions of employment
- by political parties and some public figures, bodies and professions
- because of a person's public role or the public role/functions of an organisation listed in the Act as being exempt.[58]

To be seen in context, lobbying obligations under the relevant Acts in Ireland and Scotland are not only imposed on the lobbyist. The operational aspects of the registers in both countries are designed to inform the lobbied official that he or she has obligations, particularly

[58] The Scottish Parliament, Lobbying Register, *Lobbying (Scotland) Act 2016*, 1st edition, January 2018.

in relation to what is disclosed. That is, there is a facility (an embedded link) in the online register templates that can be activated if the information is thought to be inaccurate. In Scotland, when information is put on the register, a link to that information is sent for cross-checking purposes to the public officials in question. The accuracy of the information can then be challenged and, if necessary, corrected.

From a transparency perspective, any member of the public may navigate the online register to know who is meeting whom, about what, and when. At any given point in time, it is possible to track the development and level of interest in a policy area, legislative proposal, or particular organisation, and the frequency of meetings between any designated public official and a regulated lobbyist, over time. A "designated public official", as provided for in the *Lobbying (Scotland) Act 2016* includes:

- a member of the Scottish Parliament
- a member of the Scottish Government (cabinet secretaries and Scottish law officers)
- a junior Scottish minister
- a Scottish Government special adviser
- the Scottish Government's permanent secretary (aside from special advisers, the only civil servant covered by regulated lobbying within the Act).

Canada: *The Lobbying Act*

In Canada, the incidence of lobbying significantly increased in the period between 2009–10 and 2015–16. During this time, the number of registered lobbyists increased at the federal level by well over 20%. Of the circa 8,000 lobbyists, some 12% are consultant lobbyists (third-party lobbyists).[59] The federal *The Lobbying Act*, which came into force in July 2008, has received worldwide attention, and numerous jurisdictions looked to Canada when devising lobbying regulation. Canada does not impose an obligation for lobbyists to disclose lobbying income and expenditure information.

The Canadian legislation has been strengthened over time; from regulating communication "in an attempt to influence" to any communication made "in respect of" government decisions (a term that encompasses any legislative proposal, bill or resolution, amendment to any government program or regulation, and awarding of grants and contracts). This has the effect of capturing all oral or written forms of communication, whether the intent was to influence or not. Section 7 of *The Lobbying Act* states that in-house lobbyists need only register if lobbying activities:

> *…constitute a significant part of the duties of one employee or would constitute a significant part of the duties of one employee if they were performed by only one employee.*

In practice, a 20% rule-of-thumb has developed; meaning that, if more than 20% of a full-time equivalent employee is devoted to lobbying, the organisation is required to register.

Not unexpectedly, the "significant part of the duties" threshold is open to some interpretation. Canadian Lobbying Commissioner Nancy Bélanger advised the Commission that, although levels of compliance are quite high in Canada, her office spends time monitoring and educating organisations that are close to the threshold. It should be noted, this is a problem that already affects the regulatory system in NSW because certain professionals, such as lawyers, accountants and doctors, are not classified as third-party lobbyists if their "lobbying" is incidental to the provision of other professional services.

Summary

The Commission's key objective in Operation Eclipse is to ensure that a registration scheme in NSW captures an informative picture of lobbying activities. Disclosure requirements should be proportionate and informative without generating an excessive volume of information, which would overwhelm the regulatory system or create unnecessary administrative burdens.

In formulating recommendations, the Commission examined:

- the definition of "lobbyist" – who should register (including both repeat in-house lobbyists and third-party lobbyists) and who is exempt
- the definition of "government official" – with whom the lobbying contact is made
- disclosure requirements – what lobbying activity and other details should be disclosed and by whom
- access and usability – how lobbying information should be disclosed
- process and timeliness of reporting – the timeframes in which lobbying activities and other relevant information should be disclosed.

[59] Op cit, R Chari, *Regulating lobbying: a global comparison*, pp. 40-41.

The Commission also notes that adopting a register based on the Canadian, Irish and Scottish models is an essential reform but will require some effort to implement. Broadening the registration and reporting obligations to a wider class of lobbyists will require a wide-ranging awareness-raising campaign.

Recommendation 7

That all professional lobbyists (third-party lobbyists and in-house lobbyists) be required to register with the lobbying regulator and make entries into the NSW Lobbyists Register. Exemptions for organisations that are small or lobby infrequently should apply (based on the Scottish or Canadian systems). As is currently the case with third-party lobbyists, all lobbyists should:

- provide relevant details about their organisation and staff that engage in lobbying activities
- complete mandatory training
- disclose if they represent a foreign principal
- file statutory declarations with the lobbying regulator.

Recommendation 8

That all regulated lobbyists on the Lobbyists Register should disclose:

- date and location where face-to-face lobbying communications took place
- the name and role of the government official(s) being lobbied
- a description of their lobbying communications
- a description of the purpose and intended outcome of their lobbying communications
- whether lobbying was undertaken on behalf of another party.

Exemptions, similar to those in Scotland and Ireland, should be introduced.

The Commission does not recommend that communications with all government officials would need to appear on the register. The requirement could be limited to "designated officials" such as ministers and the senior executive service (or equivalent senior managers).

Recommendation 9

That lobbyists should file information electronically that is then automatically published on the Lobbyists Register. The register should allow any person to alert the lobbying regulator of any information that is considered missing or inaccurate.

Recommendation 10

That the lobbying regulator should have powers to determine whether a person or entity is required to register and whether the information required for the Lobbyists Register is accurate and up-to-date. This could include issuing information notices and making use of the Lobbyists Watch List. Failure to register may require the lobbying regulator to provide an adequate opportunity to comply, as there is with third-party lobbyists.

Recommendation 11

That, in order to reduce the administrative burden, lobbyists required to be registered in NSW should be permitted to provide or rely on registration documentation filed with other jurisdictions, such as a jurisdiction under the Commonwealth. This could include relevant statutory declarations made in order to satisfy fit and proper person requirements.

Chapter 7: Disclosure of ministerial diary information

As discussed in chapters 5 and 6, the timing and nature of many communications between government officials and lobbyists are not routinely disclosed. However, since 2014, NSW ministers have been required to publish extracts from their diaries showing meetings with parties including lobbyists. This chapter focuses on whether the published diary information is sufficiently transparent and informative for the public to understand, who is meeting whom and why. Consideration is also given to whether the requirement for diary disclosures should be extended beyond ministers.

Premier's Memorandum M2014-07 mandated the publication of summary information from the diaries of ministers. This commenced on 1 July 2014. Premier's Memorandum M2014-07 was replaced by Premier's Memorandum M2015-05 "Publication of Ministerial Diaries and Release of Overseas Travel Information" in September 2015.

The diary summaries made public via the DPC website list the:

> *…scheduled meetings held with stakeholders, external organisations, third-party lobbyists and individuals. Scheduled meetings include meetings scheduled to take place in person or by videoconference, teleconference or telephone call.*

The summaries are published quarterly, which in practice may mean that details of a meeting are not disclosed until up to four months after it occurred. M2015-05 also requires ministers to disclose:

- the date and purpose of meetings
- the organisation(s) or individual(s) in attendance, including details of any third-party lobbyists. Where a third-party lobbyist is present, the name of the third-party lobbyist firm, any of their personnel present and the name of the client on whose behalf the third-party lobbyist is lobbying should be disclosed.

Ministers are not required to disclose:

- internal meetings (with ministerial staff or government officials)
- personal, electorate or party-political meetings
- meetings with other parliamentarians
- attendance at public social functions or events (however, if a "non-public substantive discussion of issues" occurs at a function or event, the meeting should be disclosed)
- meetings where there is an overriding public interest against disclosure.

The DPC provided the Commission with its "Guidance Notes 1 and 2: M2015-05 – Publication of Ministerial Diaries and Release of Overseas Travel Information". Guidance Note 1 is consistent with Premier's Memorandum M2015-05 and, among other things, states that:

- the rule of thumb for disclosure is:

  > *…any meeting in which an individual or an organisation seeks to influence government policy or decision-making, or in which the Minister is discussing policy or decision making (other than internal Government meetings or intergovernmental meetings)*

- persons wishing to meet with ministers have no entitlement to meet in secret and should generally expect that details of the meeting will be made public

- omitting details from the published version of ministerial diaries should only be done in exceptional circumstances and might be necessary in rare cases only[60]
- ministers and/or their staff are advised to err on the side of caution and may seek the advice of the DPC secretary. Only the public interest considerations against disclosure set out in the table to s 14 of the GIPA Act may be considered. In addition, consideration of the public interest must not take into account possible embarrassment or loss of confidence in government, or the fact that information might be misinterpreted or misunderstood.

In 2015, the DPC undertook a review of Premier's Memorandum M2014-07, which addressed whether it was meeting its policy objective of providing transparency in relation to lobbying of ministers, in light of users' experience in the first 12 months of operation. The review recommended:

> *There should be no extension of the mandatory proactive disclosure of diaries beyond Ministers given the high administrative costs that would be associated with implementing such an expansion and the fact that a regime for public access to government information already exists under the GIPA Act.*
>
> *The Government should, however, continue to monitor the need to implement special record-keeping and disclosure policies in policy areas that involve particular corruption risks (as now occurs in relation to planning decision-making within the Department of Planning).*
>
> …
>
> *The current requirement for at least quarterly disclosures of diary information should be maintained.*[61]

The Commission notes that the disclosure of information from ministerial diaries in NSW is similar in some respects to the requirement in many other jurisdictions, including the United States, Canada, Scotland and Ireland. Among Australian jurisdictions, only NSW, Queensland and the Australian Capital Territory require the publication of diary information. There are, however, differences in the frequency and format of disclosure, as well as the disclosure requirement being extended beyond ministers.

For example, New Zealand ministers publish summaries of internal and external meetings on a monthly basis (within 15 business days following the end of each month) showing the date, time (start and finish), brief description, location, who the meeting was with, and the portfolio.

In the United Kingdom, a requirement is placed on individual government departments to disclose quarterly lists of the external groups that met with the minister or permanent secretary. Although minutes of meetings are generally kept (audio-recorded and frequently transcribed), they are considered too costly and time-consuming to publish. Instead, each department uploads its own lists in its own format.

Queensland, in common with Scotland and Ireland, discloses summaries from ministerial diaries on a monthly basis. To varying degrees, the disclosures in these jurisdictions are made alongside other "transparency data", such as hospitality and gifts, overseas travel and guest lists.

[60] For example, omissions may apply where the release of information could place the state at a competitive disadvantage or cause commercial damage to contacts. In such cases, those persons meeting the minister should be notified of disclosure and given the opportunity to proceed or not.

[61] DPC Publication of Ministerial Diaries – 12-month Review, July 2015, p. 4.

In some jurisdictions, the type of meeting is disclosed. For example, in the Australian Capital Territory, diary information is classified by "briefings", "events" and "meetings", providing readers with a more complete picture of each minister's activities.

In other jurisdictions, the diaries of ministers are only made available in response to right-of-information applications.

In short, the published records of ministerial meetings are disclosed in different formats and frequency, with varying ease of accessibility. In those jurisdictions that publish diary information, the Commission has not identified any that provide detailed descriptions of the purpose of the meeting. Rather, the information disclosed in these jurisdictions (including NSW) about the purpose of a meeting is vague and falls short of explaining why the meeting took place. As noted in chapter 1, NSW Premier the Hon Gladys Berejiklian MP has stated that the NSW community has a "right" to know who their politicians are meeting with – and why.

As part of Operation Eclipse, the Commission sought views on the utility of diary disclosures. During the public inquiry, the Commission, and witnesses appearing before it, were shown diary extracts from a sample of NSW ministers. The one shown below is an example of diary records that not only lack pertinent detail as to purpose or matter discussed but employed opaque expressions such as "discuss planning issues", which disguises rather than enlightens the reader as to what the planning issue was.

Figure 3: Sample of information disclosed from a ministerial diary

NSW GOVERNMENT

Disclosure Summary

Minister for Planning and Public Spaces

For the period of 1 April 2019 to 30 June 2019

Date	Organisation/Individual[2]	Purpose of Meeting
03/04/2019	Northern Beaches Council	Discuss planning issues
04/04/2019	Chief Planner Toronto, Canada Ethos Urban	Discuss planning issues
10/04/2019	Scott Hamilton	Discuss planning issues
15/04/2019	Dave Sharma	Discuss planning issues
24/04/2019	Global Access Partners	Discuss planning issues
30/04/2019	Charles Curran	Discuss planning issues
30/04/2019	Paul Keating Treasurer Perrottet	Discuss planning issues
01/05/2019	Committee for Sydney	Discuss planning issues
01/05/2019	Mirvac	Discuss planning issues
01/05/2019	Eastern Economic Corridor Group	Discuss planning issues
01/05/2019	The Hills Shire Council David Elliott MP	Discuss planning Issues
09/05/2019	The Right Pitch Advisory	Discuss planning issues
10/05/2019	Nature Walks	Discuss planning issues
10/05/2019	Headland Preservation Group	Discuss planning issues
14/05/2019	Silvana Nile The Hon Rev Nile MLC	Discuss planning issues
14/05/2019	Urban Development Institute of Australia	Discuss planning issues
14/05/2019	Centre for London Committee for Sydney	Discuss planning issues
15/05/2019	Professor Les Stein	Discuss planning issues

Notes: [1]This table shows scheduled meetings (including a scheduled meeting that takes place in person, or by teleconference or telephone call) held by the Minister with external persons who seek to influence government policy or decisions. It does not include internal meetings held by Ministers with other Ministers, ministerial staff, Parliamentarians or government officials (whether from NSW, or other Australian jurisdictions, or foreign governments), or strictly personal, electorate or party political meetings. It does not include attendance at public or social functions or events. Information (such as that above) will not be disclosed about meetings where there is an overriding public interest against disclosure under the *Government Information (Public Access) Act 2009* (for example, where the information is market sensitive or commercial-in-confidence).

[2] This column records organisation names unless an individual attends a meeting in a personal capacity and does not represent any organisation, in which case the individual's name should be recorded. Where a third-party lobbyist is present at a scheduled meeting, this column includes the name of the third-party lobbying firm, any of their personnel present at the meeting and the name of the client on whose behalf the third-party lobbyist is lobbying.

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Criticisms of existing arrangements and potential enhancements

The Commission identified a number of key criticisms of the existing diary arrangements.

As noted above, witnesses pointed to the meeting descriptions being too short and too vague or generally uninformative in explaining what a particular meeting was about. In evidence, Dr Ng stated:

> *So, what we've seen in New South Wales is sometimes very short sentences or a couple of words about what they are meeting for and that might not provide the quality of information that we might like.*

As can be seen from figure 3, the stated purpose of all the meetings attended by the minister for planning and public spaces, was to "Discuss planning issues". Disclosures made by many other ministers tend to follow this same practice of providing relatively little useful information about the subject matter of the meeting.

The practice of providing words or phrases in meeting disclosures by ministers that are uninformative immediately raises questions as to why such "disclosures" are written in terms that do not actually disclose the actual, true or specific purpose of meeting with a minister. Such practices defeat the objective of open and accountable government and at least potentially, or actually, tend to raise suspicions as to what information may deliberately be suppressed under practices that exhibit at least a pattern or tendency for non-disclosure or inadequate disclosure.

The Commission sees merit in an arrangement that requires the relevant minister or his or her administrative staff to identify the actual meeting purpose from a pre-set menu of options. For example, in NSW, this could entail requiring the diary summaries to indicate which of the categories of lobbying (set out in s 4(1) of the LOGO Act) pertain to the meeting. The categories are:

- legislation or proposed legislation or a government decision
- policy or proposed government decision or policy
- a planning application
- the exercise by the official of his or her official functions.

The particular minister, however, should carry the personal responsibility to ensure that pre-set menu options are supplemented with a brief written note or statement that meaningfully discloses the purpose of the meeting.

An equally important matter to proper disclosure concerns accessibility. In its current format, diary data is not easily accessible or searchable. This further reduces the utility of disclosures and makes analysis more difficult. Specifically, the summaries:

- are listed in Adobe PDF format
- are published separately (and are therefore not searchable as a single file or database)
- are disclosed by portfolio name, without being linked to the name of the minister (which makes comparative research over a lengthy period difficult, given that portfolio duties change from time-to-time)
- do not link to the Lobbyists Register
- are published quarterly
- do not seem to follow consistent naming conventions.

Ministers can avoid disclosure by arranging for a lobbyist to meet with a staffer. Professor AJ Brown, of Griffith University, put it this way:

> *Commissioner, if there is a meeting that takes place not with a minister but, say, ministerial advisors, then the relevant minister has no requirement to disclose the occurrence of that meeting. It is not readily apparent why, if the lobbying occurs through a senior staff member, a corresponding obligation to disclose that meeting does not still arise. But the fact is, under current guidelines, no such requirement arises.*

Dr Yee-Fui Ng, of Monash University, spoke of her experience:

> *So we are getting information about who the ministers are meeting with but not ministerial advisers and chiefs of staff. In terms of diaries of chiefs of staff, there is a case called the* Office of the Premier v Herald and Weekly Times *which state that diaries of chiefs of staff are accessible via freedom of information but, but that took a couple of appeals until the Court of Appeal said yes, this is an official document of the minister and therefore it should be released on FOI. So there's a possibility of getting diaries of senior ministerial staff, such as chief of staff's, by FOI but that involves fighting with the Department. They'll fight you tooth and nail. They'll, you know, they will try to exclude certain things.*

The Commission's view is that ministerial staff should keep accurate records of meetings they attend, including any held with lobbyists. In its December 2010 *Report on an Investigation into the Alleged Misuse of Public Monies*,

and a Former Ministerial Adviser, Queensland's Crime and Misconduct Commission[62] referred to:

> *…the development of 'back-door' cultures where the practitioners and the public seek to find ways – usually based on contacts, 'mates', and reciprocal favours – of circumventing the accountabilities of the system.*

However, there is not currently a strong argument for extending the requirement to publish diary information to ministerial staff because:

- there are many more ministerial staff than ministers
- ministerial staff are not formal decision-makers
- ministers should, to an extent, be accountable for the conduct of their staff and the management of their office.

On 2 February 2019, NSW Premier the Hon Gladys Berejiklian MP announced that, if re-elected, the government would "Extend the requirements for the publication of diary and overseas travel information to all Members of Parliament"[63]. To date, this has not transpired. However, correspondence from the DPC indicated that this requirement could be imposed by a resolution of both Houses of Parliament.

While the Houses of Parliament might resolve to publish the diary information of all members (or a decision by any individual parliamentarian to publish information from their diary), there are some practical barriers to the success of such a reform. Individual parliamentarians who are not ministers are not subject to the relevant sections of the *State Records Act 1998* or the GIPA Act. In addition, any requirement for parliamentarians to publish diary information may be opposed on the basis that it interferes with parliamentary privilege.

In any case, non-government parliamentarians communicate with external parties about political, parliamentary and media tactics and the shaping of potential election policies. It is likely that disclosure of information about such meetings would be resisted and any non-compliance would be difficult to enforce.

For these reasons, the Commission has not recommended that all members of Parliament be required to publish summaries of their diaries.

The number of parliamentary secretaries assisting ministers in their duties has increased significantly since the *Constitution (Parliamentary Secretaries) Amendment Act 1988*. This Act allowed members to be appointed from both Houses. At the time of writing, there are 18 parliamentary secretaries, all of whom may be lobbied. Consequently, there is an argument for requiring parliamentary secretaries to also disclose relevant diary summaries.

A practical issue relates to oversight and compliance. The DPC currently administers the publication of ministerial diary information, pursuant to M2015-05. However, the LOGO Act, including the Lobbyists Register and the Lobbyists Code, is administered by the NSWEC. There is a strong argument for combining these administrative processes under the responsibility of a single lobbying regulator. An agency that is at arm's length from the officers and functions it regulates (including ministers) clearly provides a basis for enhancing public trust and confidence. Chapter 9 deals with this issue in more detail and recommends that the lobbying regulator has oversight of the publication of diary information.

There is some evidence to suggest that ministers avoid meeting with third-party lobbyists because they are concerned about disclosing such meetings. During the inquiry, Annabelle Warren of the Public Relations Institute of Australia advised:

> *…there are certainly one or two ministers who refuse to meet with properly-registered lobbyists, this has always concerned us as it shows a preference to meet with people who aren't registered and perhaps not recorded.*

Les Timar of the Australian Professional Government Relations Association told the Commission that the practice of excluding third-party lobbyists is not widespread but does occur. He noted that it was strange:

> *…that the only people who have, who fall within the regulatory framework are the very ones who appear to be the subject of an exclusion.*

Finally, self-evidently, published diary information does not show who sought a meeting with a minister but was refused, or referred instead to a parliamentary secretary, staff member or other public official. Of course, ministers cannot meet with everyone who requests their time. While the Commission sees no need to publish information about these "refused" meetings, the issue of fair access is discussed in chapter 3 and oversight arrangements in chapter 9.

[62] Now the Crime and Corruption Commission, *Report on an Investigation into the Alleged Misuse of Public Monies, and a Former Ministerial Adviser*, 2010, p. 51.

[63] "Tough new public sector integrity measures", media release, NSW Premier, 2 February 2019.

Recommendation 12

That the diary and overseas travel information of ministers and parliamentary secretaries should be published:

- monthly, not quarterly
- in a single, searchable document or database formatted for easy access to enable public scrutiny
- displaying each minister's name against his/her portfolio.

Recommendation 13

That the NSW Government creates a pre-set menu of options that must be used to indicate the purpose of each meeting disclosed in the diary summaries of ministers. These options could be based on the categories of lobbying set out in s 4(1) of the LOGO Act or another classification that adequately covers the types of disclosable meetings held by ministers. The individual ministers ultimately should be responsible for supplementing the indicated entry by adding a clear description of the specific purpose of the meeting.

Chapter 8: The revolving door

For decades, governments across Australia and overseas have attempted to manage the risks associated with personnel switching employment between the government sector and lobbying roles in the private sector (the "revolving door"). A key finding of the Commission in this investigation is that there remains an unmanaged risk of undue influence in NSW from former officials who undertake lobbying. Recommendations are made to reduce this risk by expanding existing regulation and improving enforcement and oversight.

Risks that arise when former public officials engage in lobbying

At the public inquiry, Kate Griffiths from the Grattan Institute addressed some of the key risks associated with the revolving door, as follows:

> *…there's also risk factors related to relationships, so whether there's sort of, whether it's possible for a sort of cosiness to develop, and we can see that with things like the revolving door where people move from political offices into lobbying offices and back again. Relationships are cultivated through those sorts of processes, they're also cultivated through ongoing lobbying interactions. So that's definitely a risk factor that's present in the Australian system.*

In Operation Halifax, the Commission identified two specific risks arising when former NSW public officials become lobbyists:

- relationships they developed with other public officials may be used to gain an improper or corrupt advantage including preferential access
- confidential information, to which they had access while public officials, may also be used to gain such an advantage.

There are many former public officials involved in lobbying in NSW.[64] Research by the Grattan Institute shows that former public officials make up a large and growing share of commercial lobbyists at the federal level.[65] In his submission to the Commission, Darren Halpin of the Australian National University referred to his earlier research showing that up to 30% of those on the Commonwealth lobbying register were former government officials. However, more recent work puts the figure at 56%. Professor Halpin noted:

> *…the direct movement from senior levels of government to the lobbying industry – especially where the individual possesses contacts and knowledge of key processes and issues – does create an impression that the insights of public/government service have been opportunistically monetised.*

There is some evidence that "who you know" and "what you know" can enhance a person's value as a lobbyist.[66] This suggests that there is a risk that any relevant knowledge gained, or any relationships developed with current public officials while in office, could potentially be used to leverage an improper advantage. The Commission notes a further risk arising when a serving public official has been involved in lobbying prior to taking office; that is, the other side of the revolving door. The risk is that

[64] While the NSW Lobbyists Register does not record information relating to former positions, a comparison of NSW third-party lobbyists also listed on the Australian Government Register of Lobbyists (which does record former positions) reveals that, as at 20 January 2020, 69 individuals employed across 50 NSW registered third-party lobbyists on the NSW Lobbyists Register are former public officials.

[65] D Wood and K Griffiths, *Who's in the room? Access and influence in Australian politics*, Grattan Institute, September 2018, p. 20.

[66] J Figueiredo and B Richter, "Advancing the Empirical Research on Lobbying" *Annual Review of Political Science*, 2014, 17, pp. 163-183.

lobbyists-turned-public-officials may give improper or corrupt advantage or access to former associates or over-identify with the viewpoints of the industry in which they were a lobbyist.

There is at least a theoretical risk that some serving public officials (no doubt a minority) could favour an organisation while in office with the intention of improving their post-separation employment prospects.

In its March 2018 report, *A Crisis of Trust*, the Grattan Institute observed that:

> *…the more rapidly-revolving door between political office and lobbying positions increases* [public] *concerns about both self-interested behaviour and the power of vested interests.*[67]

Along similar lines, one non-government advocacy group noted in its submission to this investigation that "relationships do not need to be 'corrupt' to have a corrosive effect on democracy". Other witnesses, including George Rennie from the University of Melbourne, referred to the phenomenon of "grey corruption"; namely, that which involves the subtle exchange of favours that do not involve an explicit quid pro quo or corrupt agreement. There are a number of media reports relating to the movement of personnel, including at the federal level and in other jurisdictions,[68] which can add to public concern or distrust without necessarily exposing behaviour that amounts to corrupt practice.

The Commission concludes that, in order to enhance public trust and confidence in the integrity of lobbying activity involving former public officials, the regulatory scheme should be designed to both prevent corruption and address any perceptions of improper advantage.

It is noted that, since 2007, NSW parliamentarians have not been entitled to a pension.[69] This may have increased the number of former parliamentarians seeking paid employment soon after leaving office, which might include a career in lobbying or government relations in policy areas in which they have developed an interest or expertise. Regulation should not, of course, unnecessarily deter a citizen from choosing political or public sector roles and there are, of course, positive benefits of "additional capabilities, new perspectives and broader experience" being shared between the government and private sectors.[70]

The current approach to regulating risk

Section 18 of the LOGO Act states:

> *(1) A Minister or Parliamentary Secretary who ceases to hold office as a Minister or Parliamentary Secretary must not, during the cooling-off period, engage in the lobbying of a Government official in relation to an official matter that was dealt with by the former Minister or Parliamentary Secretary in the course of carrying out portfolio responsibilities in the period of 18 months immediately before ceasing to hold office as a Minister or Parliamentary Secretary.*

[67] D Wood and J Daley, *A Crisis of Trust: The rise of protest politics in Australia*, Grattan Institute, March 2018, p. 76.

[68] C Knaus, "Christopher Pyne and the revolving door of MPs turned lobbyists", *The Guardian*, 28 June 2019. E Han, "Smacks of revolving door: treasury official nabbed top job at LPI", *Sydney Morning Herald*, 20 March 2019. A Lucas, "Revealed: the extent of job-swapping between public servants and fossil fuel lobbyists", *The Conversation*, 5 March 2018.

[69] See s 4A of the *Parliamentary Contributory Superannuation Act 1971*.

[70] Submission of the Australian Professional Government Relations Association, May 2019.

Maximum penalty: 200 penalty units.

(2) This section does not apply to the lobbying of a Government official by a former Minister or Parliamentary Secretary who is lobbying as:

(a) a member of Parliament, or

(b) a member of the Parliament of the Commonwealth, or

(c) a Government official, or

(d) a Commonwealth public official.

(3) In this section, the cooling-off period for a Minister or Parliamentary Secretary who ceases to hold office is the period of 18 months immediately after the Minister or Parliamentary Secretary ceases to hold office as a Minister or Parliamentary Secretary.

The Commission acknowledges the risks and perceptions of risk associated with ministers and parliamentary secretaries undertaking lobbying activities immediately after leaving office and supports these cooling-off arrangements. However, evidence before the Commission suggests that there is potential to expand on, and improve, these provisions, particularly with regard to enforcement, oversight and scope.

Reforms to the enforcement and oversight of regulations

Witnesses to the inquiry noted the general difficulties with enforcing cooling-off periods, and the perceived lack of enforcement action in Australia. One witness, Dr Yee-Fui Ng from Monash University, observed that "across Australia the enforcement of post-separation bans has been dismal". In contrast, there are examples of meaningful enforcement overseas – the Canadian lobbying commissioner has referred cases to the courts leading to a small number of successful prosecutions.[71]

The Commission notes that, to date, the NSWEC has not found any minister or parliamentary secretary to be in breach of existing post-separation employment provisions. This may indicate that the provisions are acting as an effective deterrent. However, while the NSWEC has a clear role and investigative powers under s 19 of the LOGO Act, it is not clear to the Commission how the NSWEC monitors compliance by way of following the careers of ministers and parliamentary secretaries upon leaving office. In a letter to the Commission, Electoral Commissioner John Schmidt acknowledged the NSWEC's power to investigate contraventions of the LOGO Act that are criminal offences, including breach of the post-separation employment provisions. That said, there is limited transparency around any investigations undertaken by the NSWEC to date.

Further, it is the case that former public officials could provide an undue advantage to their new employer or clients, even if they do not personally participate in lobbying activities. For example, they could share confidential information gained in office with colleagues or clients. Cooling-off periods do not apply to such persons if they are not "lobbying", as defined in the LOGO Act.

The Commission argues that, to minimise risk of undue influence, the lobbying regulator should have the necessary powers to verify whether former public officials are engaged in lobbying activities or are in compliance with relevant codes (including, for example, clause 10 of the NSW Ministerial Code of Conduct, which prohibits ministers from using information acquired in office for personal benefit, including after leaving office). Among other things, this might involve a power to seek annual or ad hoc attestations from former public officials.

Recommendation 14

That the LOGO Act be amended to improve oversight of post-separation employment provisions by providing that the lobbying regulator may require any relevant former public official during the cooling-off period, who has a role in an organisation that employs lobbyists (whether or not a lobbyist themselves), to provide it with information concerning:

a) the terms and conditions of any employment or engagements undertaken by former public officials in the cooling-off period

b) the nature of any employment or engagement referred to in (a)

c) whether any employment or engagement undertaken in the cooling-off period has or does involve information obtained during his/her period as a public official

d) whether any employment or engagement undertaken in the cooling-off period involves or relates to any former portfolio functions or responsibilities pertaining to his/her former position as a public official.

[71] See https://lobbycanada.gc.ca/en/investigations/prohibition-on-lobbying-for-lobbyists-convicted-of-an-offence/. Accessed 18 August 2020.

Reforms to the scope of regulation

Ministerial advisers

In its Operation Halifax report, the Commission observed that restricting the cooling-off period to ministers and parliamentary secretaries ignores the corruption risks that extend to their advisers. There is evidence in the present inquiry supporting that observation.

Research suggests that ministerial advisers play an important role in government decision-making and policy-making.[72] These roles offer similar access to personal networks, government strategy and confidential information (including commercial knowledge) to that which is available to ministers and parliamentary secretaries.

The Commission recommends that a cooling-off period of 12 months is introduced for ministerial and other advisers working in the office of a NSW minister or parliamentary secretary. This is equivalent to restrictions placed on advisers to federal ministers and parliamentary secretaries by the Australian Government Lobbying Code of Conduct and to ministerial officers in Victoria under the Victorian Government Professional Lobbyist Code of Conduct.

The recommendation will be directed at ensuring any restriction on a former adviser's subsequent employment is commensurate to the risks posed, given that such persons receive less remuneration than ministers, may be relatively junior and may have spent only a short period of time in a particular portfolio.

Section 10.11.(3) and s 10.12.(2) of *The Lobbying Act* (Canada) provide examples and allow the Canadian lobbying commissioner to consider, among other things:

- the degree to which the person's new employer might gain unfair commercial advantage by hiring the person
- the significance of the information the person may have gained in office
- the authority and influence the person possessed while in office
- length of tenure and duties undertaken.

Recommendation 15

That the LOGO Act be amended to restrict ministerial and parliamentary secretary advisers of sufficient seniority from engaging in any lobbying activity relating to any matter that they had official dealings with in their last 12 months in office, for a period of 12 months after leaving office, except with the approval of the lobbying regulator. Based on criteria published by the lobbying regulator, the restriction period could be removed, modified or made subject to conditions.

Senior government representatives

Several witnesses also noted the risks associated with senior, unelected government officials moving directly to lobbying roles. There are several thousand senior government officials who, like ministers and their senior advisors, can be privy to confidential and other information and develop professional relationships in office that pose corruption risks if they are involved in lobbying upon leaving office.

However, the Commission does not support enforcing a cooling-off period for all such persons. The Commission notes the DPC submission, which states that "the risk profiles of various government departments vary with the nature of their functions and activities". As above, there are a greater number of senior government officials and the Commission agrees that a blanket cooling-off period would be disproportionate to the risks posed for many individuals.

That said, it would be advantageous to be able to regulate the movement of individuals in high-risk roles to the lobbying sector when appropriate. Restrictions should apply, for example, to officials who have a degree of influence and control over outcomes for industry, or where movement directly from a departmental role to a lobbying role in the industry might be perceived by the general public as carrying a high risk of undue influence.

As discussed below, to effect this, consideration could be given to extending the post-separation employment prohibitions that currently apply to "key officials" in liquor and gaming-related agencies to other officials employed in industries at high risk of corrupt conduct in relation to lobbying involving former public officials.

Under s 16 of the *Gaming and Liquor Administration Act 2007*, public officials employed at gaming and liquor agencies or authorities who are designated as "key officials" cannot, without permission, for a period of six months after leaving the designated role, be an employee of a gaming or liquor licensee, casino contractor or relevant peak body. Prohibitions on other financial interests are also in place.

The Commission submits that, because there are similarly high-risk roles outside liquor and gaming, similar arrangements could be put in place across the public service. Cluster secretaries or agency heads could be provided with the authority to designate high-risk roles within their own agencies or authorities. Persons in these roles would then be subject to restrictions

[72] Dr Y-F Ng, *The Rise of Political Advisors in the Westminster System*, Routledge, 2018.

akin to those in place for liquor and gaming officials. Procedures would mirror those already in place in the area of liquor and gaming and the lobbying regulator should prepare guidance to assist secretaries and agency heads. In addition, because many secretaries and agency heads might themselves be in high-risk roles, relevant ministers, advised by the lobbying regulator, could have power to designate key officials.

Recommendation 16

That the LOGO Act be amended to mirror the provisions of s 16 of the *Gaming and Liquor Administration Act 2007*. This would provide secretaries and agency heads with authority to designate high-risk roles and associated "key officials" where appropriate.

Officials in such roles would be subject to a six-month restriction on employment in certain areas related to their public duties. Based on criteria published by the lobbying regulator, the restriction period could be removed, modified or made subject to conditions.

Reforms to the duration of lobbying bans

A number of submissions to the Commission supported extending the existing cooling-off period beyond 18 months; some suggesting such bans should be in the order of three to five years, or one term of government. With regard to Australian jurisdictions, the longest ministerial cooling-off period is two years. The applies in Queensland under s 70 of the *Integrity Act 2009*. The Commission received evidence from a former senior NSW public official that his influence and access extended across several years.

In his evidence to the Commission, George Rennie, of the University of Melbourne, said:

> *So a study in the US found for instance that essentially the efficacy of lobbyists dropped off substantially around the five-year mark, in large part because the contacts that those lobbyists had tend to move on or change their roles at around five years.*

The Commission notes the difficulty in determining when risk in a particular circumstance (or in all circumstances) has reached a tolerable level. There are also external factors, such as a change in government, that might considerably reduce the relevant risks in a very short period.

With this in mind, the Commission contends there is no compelling reason to increase the length of the existing cooling-off period, particularly if the aforementioned improvements are made to existing provisions.

Reforms with reference to lobbied parties

Cooling-off periods help to manage the risks of lobbying interactions between serving and former public officials by prohibiting lobbying activity. For all other such interactions (for example, those that occur with former public officials not subject to cooling-off periods or for where the period has lapsed) the onus for ensuring the integrity of the interaction rests with the serving public official.

Where a public official has a personal relationship with a lobbyist, there are already requirements relating to declarations of conflicts of interest under relevant codes of conduct. Further, if the recommendations set out in chapter 4 are implemented, public officials will be in breach of the proposed "Lobbying Code of Conduct" if they offer preferential access to or treatment of a lobbyist based on existing or former relationships and the lobbying regulator would have power to investigate alleged breaches. This would help further reduce the risks associated with the revolving door.

Alternative restrictions on former public officials

Should any of the aforementioned recommendations not be implemented, the government should consider establishing a register of former public officials based on arrangements currently in place in Victoria,[73] as suggested by Matthew Hingerty from Barton Deakin in his submission to the Commission:

> *We do feel there is a benefit from a secondary list or register for former officials, political staff or MPs who are employed or engaged to lobby by a business, industry association or other charitable or interest group–even if unpaid. This can be similar to the Victorian model and disclose the time of separation from government employment.*

Mr Hingerty discussed this point further at the public inquiry:

> *[Counsel Assisting]: And so the point of it would be simply that those people, a list of those people would be available so that anyone dealing with them would know their former role.*
>
> *[Mr Hingerty]: Yes*
>
> *…*

[73] *Victorian Government Professional Lobbyist Code of Conduct*, 1 November 2013.

It's simply transparency, to allow people to know that a previous parliamentarian or previous minister has been involved with that government.

The lobbying regulator would manage the list and any lobbyists (as defined under the LOGO Act), who are former public officials, would have to declare their status as a former public official and ensure they are named on the list for a period of four years after leaving office.

In the absence of other measures, this will ensure improved transparency of former public officials who are currently involved in lobbying government.

Recommendation 17

That, in the absence of any other new measures to reduce the risks associated with lobbying by former public officials, the LOGO Act be amended to introduce a "Former Public Officials" list, to be managed by the lobbying regulator. For a period of four years after leaving office, all former public officials involved in lobbying activities would be required to ensure they are named on this list, including those working for third-party lobbyists.

Chapter 9: Oversight and the case for a NSW lobbying commissioner

A key finding of the investigation is that oversight of lobbying in NSW needs to be improved by means that will provide a more specific focus on enforcing lobbying regulation and on detecting and sanctioning improper lobbying and improper influence. The Commission recommends that a dedicated commissioner focused on regulating lobbying activity be established to take on the new and expanded functions recommended elsewhere in this report.

Current oversight arrangements

What is now the Lobbyists Code was introduced in 2009, overseen at that time by the DPC. The LOGO Act commenced in 2011 but it was not until amendments to the Act were introduced in 2014 that the newly reformed NSWEC was given the function of enforcing compliance with the Lobbyists Code and the provisions of the amended LOGO Act. According to then-NSW premier Mike Baird, the amendments were aimed at enhancing the regulation of lobbying by, among other things, establishing the NSWEC as "an independent regulator of lobbyists".[74] This was intended as a response to one of the key recommendations in the Commission's Operation Halifax. However, because the LOGO Act mainly focuses on third-party lobbyists, the jurisdiction of the regulator was narrowly prescribed.

Under the LOGO Act, the NSWEC's compliance objectives as the lobbying regulator are set by way of a cross-reference to its existing powers under the *Electoral Funding Act 2018*, meaning there are no specific compliance powers under the LOGO Act intended solely for lobbying oversight. It is also noted there are two statutory entities governing the activities of the NSWEC – the Electoral Commissioner (who is responsible for registering political parties and delivering elections) and the members of the NSW Electoral Commission (who are responsible for the enforcement of electoral and lobbying laws, for assessing claims for public funding or for conducting educational and public awareness activities in relation to elections).

Under the LOGO Act, the NSWEC is responsible for maintaining the Lobbyists Register. Additionally, s 2A confers on the NSWEC the function of enforcing compliance with the Act, including the Lobbyists Code. As above, s 19 provides that the NSWEC can use any relevant powers conferred by the *Electoral Funding Act 2018* for the purpose of enforcing compliance with the Lobbyists Code and the LOGO Act itself.

The LOGO Act criminalises the giving and receiving of success fees (s 15) and breaches of cooling-off periods (s 18). Breaches of the Lobbyist Code carry administrative penalties. Section 12 requires the NSWEC to maintain a Lobbyists Watch List, which can contain the names and details of lobbyists that have contravened the code or the LOGO Act. Additionally, the NSWEC can cancel or suspend the registration of a third-party lobbyist for relevant breaches. While the Lobbyists Watch List is created by the LOGO Act, it is Premier's Memorandum M2019-02 "Lobbyists Code of Conduct" that sets out whether and how public officials should deal with lobbyists on the Watch List.

As the statutory regulator, the NSWEC provides independence from government. The NSWEC reports to a bi-partisan joint standing committee of Parliament. The chair of the NSWEC can, and does, issue statements on matters or decisions of public interest from time-to-time. However, it is important to observe that overseeing lobbying is not the primary function of the NSWEC, which is predominantly charged with managing state and local government elections and by-elections, with additional legislative responsibilities in relation to political donation/expenditure disclosures and assisting political participants.

[74] Electoral and Lobbying Legislation Amendment (Electoral Commission) Bill 2014, Second Reading Speech, 17 June 2014.

The case for a lobbying commissioner

Evidence obtained by the Commission points to alternative oversight models that ought to be considered. Some jurisdictions appoint a dedicated lobbying commissioner to act as the watchdog over lobbying laws. The relevant considerations are set out below.

The regulator should have a focus on lobbying

According to its 2018–19 annual report, the NSWEC is responsible for:

- running independent, fair and accessible elections
- providing transparent processes and guidance to assist political participants (including candidates, parties, elected members, donors, third-party campaigners and lobbyists) to comply with their legal obligations
- publishing political donation and expenditure disclosures and registers of political parties, candidates' agents, third-party campaigners and political lobbyists
- engaging with the public to make it easier for people to understand and participate in the democratic process
- investigating possible offences and enforcing breaches of electoral, funding and disclosure and lobbying laws.

The Commission notes differing approaches in other jurisdictions with regard to lobbying oversight. At the public inquiry, Dr Yee-Fui Ng of Monash University noted the approach taken in Canada, where there is a regulator with a single focus on lobbying related matters:

> *What we see in Canada is a stronger regime because the regulator there is the Commissioner of Lobbying, a body specifically set up to regulate lobbying, and they take a more serious view to the regulatory scheme and they have their independence because they are an officer of parliament so they report to parliament not the executive.*

Other models include the Standards in Public Office Commission in Ireland, which oversees both lobbying legislation and legislation relating to the *integrity* (not the day-to-day management) of elections such as political donations, as well as having powers to investigate potential breaches of codes of conduct for elected and non-elected public officials.[75] In Scotland, the lobbying regulator does not have responsibility for conducting elections.

In Queensland, lobbying is overseen by the integrity commissioner whose additional responsibilities include:

- providing confidential advice on ethics and integrity matters to ministers, members of the Legislative Assembly, ministerial staff, senior public servants, and other persons or classes of persons nominated by a minister
- raising public awareness of ethics and integrity matters
- standard setting on ethics and integrity matters at the request of the premier.[76]

The Commission submits the proposed new functions set out elsewhere in this report, combined with existing functions, may not be compatible with the NSWEC's primary area of specialisation – running elections.

[75] See https://www.sipo.ie/. Accessed 28 August 2020.

[76] See https://www.integrity.qld.gov.au/about-us/what-we-do.aspx. Accessed 28 August 2020.

A suitable alternative would be to create a dedicated lobbying commissioner, in the style of the Canadian model.

Alternatively, there may be existing authorities in NSW that could assume responsibility for lobbying regulation. One of the key new functions for the lobbying regulator would be oversight of an amended "Lobbying Code of Conduct" and the conduct of public officials in this regard. The Commission notes that the NSWEC does not currently regulate the conduct of public officials (just political candidates). For this reason, an agency whose functions include oversight of public officials might be better placed to take on additional functions as lobbying regulator.

The regulator should have specific powers to oversee lobbying

In 2018–19, the NSWEC investigated 207 matters of non-compliance with electoral-related legislation and only one matter under the LOGO Act.[77] While the NSWEC reviews all allegations (whether related to lobbying or elections) and can use relevant powers when a reasonable breach of lobbying laws is suspected, the LOGO Act in its current form limits the regulator's compliance oversight. In correspondence to the Commission, the NSWEC notes that it does not, for example, have a compliance audit function on lobbying matters and has limited power to initiate its own investigations. Therefore, its response is constrained to the investigation of allegations, which are few in number.

In terms of the NSWEC's capacity to report on investigations it does undertake, in a letter to the Commission received in 2019, Electoral Commissioner John Schmidt notes that:

> *The NSWEC considers, however, that it is presently limited by the LOGO Act from disclosing the outcome of an investigation unless the outcome involves de-registration, suspension or placement of a lobbyist on the watch list, even when it considers it would be in the public interest to do so.*

Lobbying oversight could be improved by providing the NSWEC with more specific powers and additional compliance tools.

The regulator should have a broader focus than just administrative compliance

The regulation of lobbying, while primarily concerned with protecting the public interest against undue influence, also necessarily involves administrative work related to ensuring lobbying information is transparent and lobbyists and public officials are complying with relevant rules. The Commission's position is that, while administrative compliance is necessary, any regulatory framework should focus on the real value that a regulator can add; that is, preventing and detecting corrupt, dishonest or unethical lobbying and undue influence.

Under the current framework, the NSWEC's compliance work is mainly administrative in nature, focused on monitoring and sanctioning administrative breaches, primarily with regard to third-party lobbyists whose registration requirements are out-of-date .[78]

The Commission understands that the NSWEC has never placed a lobbyist (third party or other) on the Lobbyists Watch List for any conduct-related reason. This should be interpreted as a sign that most lobbying is conducted in a proper manner. However, given the range of risks described in this report and the volume of lobbying activity in NSW, the Commission's position is that, under the existing oversight arrangements, some improper or dishonest lobbying likely goes undetected and unsanctioned.

The regulator should have a lobbying advisory function

In his submission to the inquiry, Matthew Hingerty of Barton Deakin suggested there may be benefit in having an independent office that is equipped to:

> *…provide advice to parliamentary staff and departmental officers who wish to discuss specific lobbying activity and, if they feel the need, formally register an issue for investigation.*[79]

The Commission agrees with Mr Hingerty's point. Like other agencies that have regulatory or watchdog powers, it would be feasible and desirable for the lobbying regulator to provide advice to lobbyists and government officials.

As part of its advice-giving role, the lobbying regulator could counsel government officials on how to best manage the risks associated with lobbying activity where the lobbyist has or does make political donations. While the issue of political donations has not been a key focus of this investigation, there is a heightened risk of undue influence and the perception of undue influence in these scenarios.

The advice-giving function for the lobbying regulator would sit alongside other new functions being proposed by

[77] NSWEC, *Annual Report 2018–19*, pp. 77-78.

[78] A total of 128 warnings, 12 suspensions and five cancellations were issued in relation to failures to update the register. NSWEC, *Annual Report 2018–19*, p 78.

[79] It is noted, however, that the Parliamentary Ethics Adviser does have an advisory role, which is limited to the Parliament.

the Commission in recommendation 5, which include the lobbying regulator having a role in advising public officials on standards and best practice in recordkeeping.

Recommendation 18

That the NSW Government:

- creates a dedicated NSW lobbying commissioner whose primary purpose is to regulate the LOGO Act. The lobbying commissioner could head a standalone lobbying commission, or serve within an existing oversight agency
- provides the lobbying regulator with additional resources and powers to carry out the expanded functions set out in this report.

Recommendation 19

That the role of the lobbying regulator be clarified by creating clear legislative provisions that allow it to:

- oversee the conduct of both public officials and lobbyists under the "Lobbying Code of Conduct" and LOGO Act, including the criminal, administrative and ethical aspects of the regulation
- establish formal processes for accepting complaints and referrals in relation to lobbying matters
- have powers with respect to auditing compliance
- investigate suspected breaches (including of its own initiative) and make referrals for further investigation or sanction (if required)
- publish and disseminate any relevant findings
- have an advice-giving and standard-setting function.

In making this recommendation, the Commission notes that the compliance role of the lobbying regulator with respect to public officials could overlap with the routine management obligations of agencies. Consequently, while the lobbying regulator should be able to make fact-findings and recommendations – if necessary, in public – about the conduct of public officials, the Commission does not recommend that its role extend to applying sanctions. The lobbying regulator could, instead, assess or investigate allegations itself and make referrals to public agencies or other relevant bodies for formal sanction where appropriate.

Use of Lobbyists Watch List provisions

The provision in the LOGO Act for a Lobbyists Watch List is a practical and sensible tool for managing improper lobbying. The concept of a watch list is especially attractive because it can be used to address the risk of undue influence without stripping a person or organisation of the right to lobby government. However, three observations are made.

First, as noted above, although the NSWEC has undertaken some investigations, the Watch List has not been used to any great extent as a mechanism for dealing with conduct-related breaches. Since July 2018, the NSWEC has published reasons on its website relating to why it has placed a lobbyist on the Watch List, as well as why registrations have been suspended, cancelled or refused.[80] The material published as at 1 July 2020 (which dates back to 1 July 2018) indicates that in fact no lobbyists have been placed on the Watch List in that time. Reasons why third-party lobbyists had their registration cancelled during the period were administrative – failure to update details (sometimes together with failure to complete mandatory training) or no longer carrying on the business of lobbying.

Secondly, although the Lobbyists Code applies to all classes of lobbyists, the NSWEC is mainly focused on third-party lobbyists because they are the only class of lobbyist that is required to register. Combined with the NSWEC's limited resources focused on compliance with the non-administrative aspects of lobbying regulation and the absence of clear channels for reporting improper lobbying, the Commission contends there is limited prospect of a lobbyist other than a third-party lobbyist being placed on the Watch List.

Thirdly, although the Watch List is created by the LOGO Act, which is administered by the NSWEC, it is Premier's Memorandum M2019-02 "Lobbyists Code of Conduct" that sets out how public officials should interact with a lobbyist that is placed on the Watch List. M2019-02 states that, when dealing with a lobbyists on the Watch List:

> *(i) at least two NSW Government Officials who are not a NSW Minister or Parliamentary Secretary or a staff member of a NSW Minister or Parliamentary Secretary are present during any communication with the lobbyist; and*
>
> *(ii) one of those NSW Government Officials takes notes of the communications with the lobbyist, and provides a copy of those notes to the head of the relevant NSW Public Service Agency.*

[80] See https://www.elections.nsw.gov.au/Political-participants/Third-party-lobbyists/Reasons-for-decisions. Accessed on 1 July 2020.

The Commission believes that setting and enforcing the conditions of the Watch List should be a role for the lobbying regulator. In addition, the lobbying regulator should have discretion to modify those conditions from time-to-time or even tailor them to particular agencies or classes of public official or lobbyists. The lobbying regulator could also have discretion to make factual findings about the conduct of a lobbyist, or provide agencies with relevant advice, in lieu of placing the lobbyist on the Watch list.

Recommendation 20

That the LOGO Act be amended to give the lobbying regulator responsibility for setting the conditions of the Lobbyists Watch List.

Lobbying of NSW parliamentarians

Parliamentarians, who are not ministers or parliamentary secretaries, do not currently fall within the definition of "government official" under the LOGO Act and as such the lobbying of backbench, opposition and cross-bench parliamentarians currently falls outside the remit of the lobbying regulator. The Commission considered whether there would be benefit in terms of the transparency and accountability in expanding the LOGO Act to include regulation of the lobbying of these non-executive members of Parliament.

There would be value in ensuring lobbyists adhere to the Lobbyists Code and other rules set out in the LOGO Act when lobbying non-executive parliamentarians. However, expanding the LOGO Act in this way could provide the lobbying regulator with de facto oversight of the conduct of parliamentarians who are lobbied. Communications between a non-executive parliamentarian and a lobbyist may be subject to parliamentary privilege. In addition, any regulation with the potential to inhibit communications between citizens and parliamentarians might have a deleterious impact on democratic processes.

On balance, the Commission has decided not to recommend the expansion of the LOGO Act to cover non-executive parliamentarians. The additional oversight is not considered necessary at this time. These parliamentarians, while subject to lobbying, do not have the executive power bestowed on ministers to make and implement decisions and hence the scope for improper conduct with respect to lobbying approaches is greatly reduced.

Parliamentarians are already subject to similar obligations to representatives of executive government in terms of acting in the public interest. Furthermore, the codes of conduct applying to members of the Legislative Assembly and Legislative Council, as adopted in March 2020, contain clauses prohibiting various forms of improper influence. Additionally, the views of non-government members of Parliament on government policy, as voiced in Parliament, are a matter of public record.

Ministers and parliamentary secretaries

Premier's Memorandum M2015-05 "Publication of Ministerial Diaries and Release of Overseas Travel Information" is set and overseen by the DPC, not the lobbying regulator. This creates a dual set of oversight arrangements and in practice means that published information about lobbying activities is in different places (that is, the Lobbyist Register on the NSWEC website and ministerial diary disclosures on the DPC website).

It is the Commission's view that there is no compelling reason why the requirement to publish diary information should not be overseen by the agency with responsibility for the LOGO Act.

Recommendation 21

That the requirement for ministers and parliamentary secretaries to publish summaries from their diaries should be set out in the regulation to the LOGO Act rather than a Premier's Memorandum. The lobbying regulator should be responsible for compliance.

Additional functions

The Commission's discussion paper posed two questions related to lobbying data:

> *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)?*
>
> *Should the NSW Electoral Commission be required to present an annual analysis of lobbying trends and compliance to the NSW Parliament?*

Most submissions that addressed these questions agreed that the compilation of such data would be useful. The NSWEC already publishes some information in its annual report relating to compliance and investigative activity under the LOGO Act.

The Commission contends that the lobbying regulator should be given a mandate to publish additional annual data on lobbying trends and compliance, noting that the

compilation of such information should relate to both third-party lobbyists and in-house lobbyists. This would be compatible with an advice-giving role for the lobbying regulator set out in recommendations 5 and 19.

Indirect lobbying

As mentioned briefly in chapter 3, Operation Eclipse was primarily concerned with direct lobbying of government officials. However, indirect lobbying – which typically involves using media and social media to influence opinion and decision-making –also warrants scrutiny. Clauses 7 and 8 of the Lobbyists Code state:

> *Lobbyists must not engage in any misleading, dishonest, corrupt or other unlawful conduct in connection with a meeting or other communication for the purpose of lobbying NSW Government officials.*
>
> *Lobbyists must use all reasonable endeavours to satisfy themselves of the truth and accuracy of all material information that they provide in connection with a meeting or other communication for the purpose of lobbying NSW Government officials.*

These requirements indicate that dishonest or unlawful behaviour unconnected with the direct lobbying of a public official is not covered by the code. In addition, representatives of third-party lobbyists are required to file statutory declarations with the NSWEC affirming that they have not been sentenced to a term of imprisonment of 30 months or more and have not been convicted of an offence involving dishonesty in the last 10 years.

These declarations provide the NSWEC with some ability to prevent individuals from lobbying if they have engaged in extreme forms of misconduct. But practices such as astroturfing, defamatory behaviour or deliberate, serious misrepresentations made in public, might justify a fact-finding exercise (and potential referral to relevant bodies if criminal or corrupt behaviour is suspected) or placing a lobbyist on the Lobbyists Watch List to ensure additional oversight of any future direct lobbying activity.

Of course, there is a danger in setting up a lobbying regulator with powers that could be used to unreasonably impede free speech and robust public debate. Many citizens and groups advocate policy positions that might be objectively wrong or widely regarded as distasteful. The Commission does not see a role for the lobbying regulator in regulating communications that fall into these categories. Rather, any regulation of indirect lobbying should be confined to conduct that is unlawful or dishonest. The Commission believes this could be achieved without having to redefine "lobbying" in the LOGO Act to include indirect lobbying (for instance, by amending clauses 7 and 8 of the code).

Recommendation 22

That the NSW Government gives the lobbying regulator power to investigate and report on indirect lobbying that involves alleged unlawful and/or dishonest conduct.

Education and training

The Lobbyists Code requires a responsible person from each third-party lobbyist to complete any online training approved by the NSWEC. The training is available via the NSWEC website. Third-party lobbyists must complete the training by logging into a portal (so their completion can be tracked) but any other person, including public officials, can complete the training without logging in. The training primarily addresses the requirements set out in the LOGO Act and the Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014, and contains a number of quiz questions that test the user's knowledge of the regulatory framework.

As an adjunct to legislative compliance, there is a case for education that touches on the ethical dimensions of lobbying. Dr Simon Longstaff from the Ethics Centre told the Commission:

> *But I mean clearly it's in everybody's interests if we had a solid and shared understanding about, you know, not just the compliance obligations but the ethical obligations and the democratic polity which is shared by politicians and public servants and that it was possible for all to be held accountable to those, so it's to do with the quality of reasoning just rather than the position one holds.*
>
> …
>
> *So you would hope that they* [lobbyists] *would want to commit themselves also to being, you know, as well informed as they can about the ethical foundations of the system and their role within it, and that they would aspire to the highest standards because, if anything, then it starts to advance the work that they do. Yes, there may be some burden to it, but the quality of their engagement as citizens with this common interest would be enhanced.*

Training in both the practical and ethical aspects of lobbying would ideally be ongoing, rather than ad hoc or reserved for an induction process. As noted by Annabelle Warren of the Public Relations Institute of Australia:

> *So I think a lot of work needs to be done in education and also for the ministers and for staff because there is also a very high churn of ministers and staff, so you can't do a one-off education when ministers and their staff are changing every one or two years or sometimes every three to six months.*

Submissions to this inquiry noted a range of organisations that could potentially provide training in the areas of lobbying and ethics, including the Ethics Centre, the Public Service Commission and the Institute of Public Administration Australia. The Public Relations Institute of Australia, the Australian Professional Government Relations Association and Barton Deakin also offered assistance.

The Commission has not made a separate recommendation here but notes that, if other recommendations made in this report are implemented, the education and training responsibilities of the lobbying regulator would need to be augmented accordingly. Substantial reforms such as those recommended in chapters 4, 5 and 6 will need to be supported by awareness-raising initiatives if they are to be successful.

For example, the introduction of the "Lobbying Code of Conduct" would require education on ethical lobbying across all classes of public officials covered by the new code. This was the case in Ireland and Scotland, where new statutory models were introduced in recent years. Among other things, these additional education requirements support the case for creating a lobbying commission or for moving responsibility for regulating lobbying to a different agency.

Education of parliamentarians

The Commission was advised that newly appointed parliamentarians receive induction training from Parliamentary Services. The training appears to cover important topics such as the code of conduct, conflicts of interest, gifts, bribery and the role of the parliamentary ethics advisor.

In September 2019, Jonathan O'Dea, Speaker of the Legislative Assembly, and Presiding Officer, Legislative Assembly, announced his intention to offer "corporate-style" training for members of Parliament with both online and face-to-face coaching in ethics, donation laws and rules of conduct. Mr O'Dea suggested the ethics component of the training would be compulsory for every member of Parliament. He said:

> *In parliament we talk a lot about spending on physical infrastructure, but it's time we start investing more in ethical infrastructure.*[81]

The Commission supports Mr O'Dea's ambitions.

Recommendation 23

That the NSW Parliament ensures that induction training for new members of Parliament is extended to existing members and addresses the administrative and ethical requirements of public officials in relation to lobbying. Such training should also be mandatory for parliamentary and ministerial staff.

[81] J O'Dea, "MPs need to go back to class and relearn ethics," *Daily Telegraph*, 5 September 2019, p. 13.

Chapter 10: Local government

Section 3 of the LOGO Act excludes local government officials from the definition of a "government official".[82] Consequently, the key provisions of the LOGO Act do not apply to local government. In Operation Halifax, the Commission concluded that it:

> *…does not consider that lobbying at local government level should be subject to the same regulatory regime as lobbying at NSW State Government level … A lobbying problem exists at the local government level but differs from the problem at state level.*

While the Commission still sees some material differences between local and state government, the appropriate regulatory regime for local government was reviewed. In particular, the Commission examined whether the key provisions of the LOGO Act ought to apply to local government.

Arguments against extending the LOGO Act to local government

The Commission's investigation identified a number of arguments against extending the LOGO Act to local government.

Some local government sector representatives suggested that the sector was already over-regulated. In particular, while the *Model Code of Conduct for Local Councils in NSW* does not explicitly refer to lobbying, it does contain general obligations in relation to ethical and honest conduct, as well as more detailed material covering:

- improper and undue influence
- inappropriate interactions
- use and security of confidential information
- recordkeeping (including a reminder that local council offices are required to comply with the *State Records Act 1998*).

While these codified duties are necessary, the Commission notes that they fall short of the obligations envisaged in chapter 4.

Local councillors are quite different from other types of public officials, including parliamentarians. With the exception of some mayors, local councillors serve in part-time roles and receive little remuneration. Because of this, many councillors have other employment or run their own businesses. In fact, many councillors would regard their council position as their "secondary" role. Unlike parliamentarians, local councillors do not have their own staff, offices or budget (again, with the exception of some mayors) and it is common for councillors to be approached by interested parties (including lobbyists) in unofficial settings.

Furthermore, while local councils have staff that assist in the preparation and conduct of council meetings, council decision-making lacks the scrutiny and support that comes with a Cabinet secretariat, parliamentary counsel's office and the Parliament itself. In regional and remote areas, there can be considerable distance between councillors' residences or places of work and the council chambers. For all of these reasons, it may not be practical to require all councillors to:

- hold meetings with lobbyists and community members on council premises
- hold meetings with another officer present
- maintain comprehensive written records of all communications with lobbyists
- maintain and publish an accurate diary of meetings.

[82] The exception to this is the prohibition on success fees and the cooling-off periods for former ministers and parliamentary secretaries.

Since local councillors are part-time and receive little remuneration, the Commission accepts that it would not be fair to impose cooling-off periods on any councillor who becomes a lobbyist shortly after leaving office. This is why recommendations in this report aimed at improving the conduct of government officials (chapter 4) and agency procedures (chapter 5) are important.

Most lobbying-related complaints and corruption findings in local government concern planning and large procurement exercises. At least in metropolitan areas, development applications are now determined by independent planning panels regulated by relatively strict communication protocols. While these arrangements are by no means impervious to corruption and improper influence peddling, they establish a level of formality around lobbying activities. The Commission also notes that, since October 2012, the power to make local environmental plans has been handed to local councils in many cases, reducing the oversight role of the NSW Government. This change has the potential to increase lobbying activities in local government.

Finally, because local councils provide many services that community members use on a regular basis, they tend to receive a large number of representations from individuals, businesses, community groups, progress associations, and so on. In the broadest sense, these representations involve lobbying but the Commission sees an unnecessary administrative burden if all such communications have to appear on a register. The circumstances of local government would therefore need to be considered when designing any new register (a matter addressed in chapter 6).

Arguments for extending the LOGO Act to local government

The Commission analysed its complaints data since 2008 using various keywords relating to lobbying. The analysis found that the local government sector makes up more than half (58%) of all reports where a NSW public authority is listed as the subject organisation in a lobbying-related complaint. There were 113 current and former councils named in these complaints. These figures certainly understate the volume of complaints that involve allegations of undue influence because many complaints make out a lobbying-related complaint without using the Commission's chosen keywords.

Section 4(1)(b) of the LOGO Act specifically incorporates communications about planning applications into the definition of "lobbying". In addition, property developers are among a small class of people/organisations that are banned from making political donations. Standing out property development from other activities clearly suggests that this sector carries more risk.

This was demonstrated in the Commission's March 2021 report, *Investigation into the conduct of councillors of the former Canterbury City Council and others*, which stated:

> *The Commission is satisfied that there were examples of lobbying occurring at the Council during the period of its investigation, and that close relationships had developed between public officials and people who were engaged in lobbying activities*
>
> …
>
> *The conduct exposed by this investigation demonstrates that there is a need to enhance transparency and promote honesty around the lobbying of councillors, particularly when it involves people with planning applications before the Council.*

The report also contained a recommendation that all provisions of the LOGO Act apply to local government. Consequently, the same recommendation is not repeated here.

In terms of interstate investigations, over the last few years, Queensland's Crime and Corruption Commission has made a number of adverse findings about interactions between local councils and property developers.[83] At the time of writing, Victoria's Independent Broad-based Anti-corruption Commission is investigating lobbying activities as part of its Operation Sandon. This includes:

> *whether public officers involved in planning and property development decision making have been improperly influenced through donations, gifts, pro bono services or other hospitality*
>
> …
>
> *whether the use of professional lobbyists or planning consultants to lobby State and local government has resulted in undue influence over planning and property development decision making within Victoria.*[84]

Most state and Commonwealth government initiatives that involve building new infrastructure or assets, changing the use of land or impacts on the environment or community amenities, will involve relevant local councils. In some cases, the local council will be a proponent,

[83] See, for example, *An investigation into allegations relating to the Gold Coast City Council* (Operation Yabber, January 2020), *Culture and corruption risks in local government: Lessons from an investigation into Ipswich City Council* (Operation Windage, August 2018) and *Operation Belcarra: A blueprint for integrity and addressing corruption risk in local government* (October 2017).

[84] IBAC Operation Sandon webpage, https://www.ibac.vic.gov.au/investigating-corruption/IBAC-examinations/operation-sandon. Accessed on 21 August 2020.

decision-maker or co-funder of these initiatives. Changing the use of land can bring substantial financial benefits to those owning the land. Inevitably, this attracts lobbying activities aimed at local councils. This can also encompass indirect lobbying campaigns aimed at securing community support for or against an initiative.

Extending the LOGO Act to local government would also allow the lobbying regulator to provide guidance about the appropriate policies and procedures that would best suit the circumstances of local councils.

Chapter 11: Gifts and secondary employment

When a public official is considering a lobbying proposal, certain situations heighten the risk of actual or perceived undue influence. These include the circumstances in which the lobbyist in question has conferred gifts, benefits or hospitality and where a public official acts as a lobbyist alongside their government role or is involved in political activity.

The investigation conducted by the Commission has found that the risk of undue influence on public officials in NSW should be better managed, and the Commission has made recommendations to more closely regulate high-risk circumstances.

Gifts, benefits and hospitality

In Operation Halifax, the Commission recommended that:

> *The new code of conduct for lobbyists contains a clear statement prohibiting a lobbyist or a lobbyist's client from offering, promising or giving any gift or other benefit to a Government Representative, who is being lobbied by the lobbyist, has been lobbied by the lobbyist or is likely to be lobbied by the lobbyist* [recommendation 10].

Currently, the LOGO Act and Lobbyists Code do not place any specific obligations or restrictions on lobbyists in relation to gift-giving.

The Commission notes that giving and receiving gifts is a significant corruption risk where it is intended to influence the relationship between the two parties, either at that time or in the future. Gift-giving in the form of hospitality can also provide opportunities for lobbying in an informal setting, which creates risk of improper influence, or at least the perception of such.

As noted by the NSW Public Service Commission:

> *…even gifts and benefits of modest value can be used to cultivate, over time, a relationship where a government employee feels an obligation or loyalty to the giver.*[85]

Evidence before the Commission from the healthcare sector is that even a single sponsored meal from a pharmaceutical company has been associated with increased prescribing of particular medication by medical professionals in receipt of the meal.[86] Some Commission investigations have involved the grooming of public officials with gifts, favours and hospitality.

All public officials are subject to codes and policies that prohibit or regulate the receipt of gifts. For example, the Ministerial Code of Conduct, the members codes of conduct, and the Gifts, Hospitality and Benefits Policy for Office Holder Staff, among others, all specifically prohibit the relevant public official from receiving a gift or benefit that would give rise to a conflict of interest or the perception of such. These instruments also contain rules around disclosure of gifts received in the course of official duties.

In addition, agencies are expected to have a centralised register where employees are obliged to record certain gifts and benefits received in the course of their duties.[87]

While breaches do occur, these codes and policies have played a constructive role in minimising inappropriate gift-giving practices. However, the Commission maintains

[85] Section 2.1 of *Behaving Ethically: A guide for NSW government sector employees*, October 2014.

[86] Submission to Operation Eclipse from Lisa Bero, Barbara Mintzes, Emily Karanges, Kellia Chiu and Alice Fabbri, University of Sydney, May 2019.

[87] Op cit, *Behaving Ethically: A guide for NSW government sector employees*.

that their overall effect would be enhanced if a prohibition of gift-giving was imposed on lobbyists.

Some submissions supported a legislated ban on lobbyists giving gifts to public officials and some called for greater and more easily accessible information in relation to gifts accepted.

A proposed ban of gift-giving would need to extend to all classes of lobbyist and clients of third-party lobbyists (noting that the third-party lobbyist may or may not be involved in the gift given by its client).

The Commission sees the prohibition on lobbyists giving gifts and hospitality as an uncontroversial but valuable step forward in reducing the opportunities for improper influence and to maintain public trust in the lobbying process.

Recommendation 24

That the Lobbyists Code of Conduct be amended to prohibit lobbyists (as defined in the LOGO Act) from offering, promising or giving gifts or other benefits to a public official who is, has been, or is likely to be lobbied.

Access at fundraising events

The Commission's investigation identified some objections to "pay-per-view" or "cash-for-access" fundraising events, where ministers or other senior government officials may speak publicly and/or socialise and share a meal with paid attendees, including lobbyists. Tickets are typically priced above the cost of the meal and entertainment offered.

Some of these fundraising events are open to a large number of potential attendees and involve a relatively benign event, such as a speech by a minister, shadow minister or other key politician. This type of event does not create a significant risk of improper lobbying or cultivation of an inappropriate relationship, especially in NSW where donation caps are in place.

However, political fundraisers that involve the following characteristics may raise at least the perception of favouritism:

- attendance is limited to a select group, who might have paid a fee in return for selective opportunities to network with politicians
- the event promises a degree of private or exclusive access to a politician
- the event promises exclusive insights into a yet-to-be announced policy
- it is possible to purchase time with a particular politician (possibly by winning an auction or prize).

Events with these characteristics provide attendees with opportunities to lobby politicians, exclude those without the funds to purchase tickets, and invite criticisms of unequal access. In addition, discussion between a lobbyist and a politician at an exclusive fundraising event might not be properly recorded or disclosed in any required diary disclosure.

Senior figures in other Australian jurisdictions have tried to address such concerns in the past, such as in 2009, when Queensland's then-premier Anna Bligh banned members of Parliament from her party from attending these types of events:

> *I have instructed all members of my parliament that they are no longer allowed to attend any fundraising dinners, lunches or breakfasts with businesses … They can work with the business community but these sort of fundraisers have had their day.*[88]

[88] "Bligh slaps ban on fundraising functions," *Brisbane Times*, 2 August 2009.

However, the Commission is not aware of any ongoing restrictions being enforced by the current Queensland premier.

In 2011, Victoria's then-premier Ted Baillieu introduced a Fundraising Code, which, among other things, stated that corporate fundraising events could not promote privileged access to decision-makers or ministers. The Commission notes that, while adherence to this code is currently required under clause 6.1 of the "Victorian Code of Conduct for Ministers and Parliamentary Secretaries", the Victorian Department of Premier and Cabinet has advised the Commission that the code is no longer in force.

While fundraising activities that entail payment-for-access or exclusive policy briefings might be seen as opportunities for undue influence, the existing donation caps and disclosure rules in NSW address part of the risk. If any lobbying (as defined by the LOGO Act) occurred at these events, the proposed amendments to the "Lobbying Code of Conduct" (recommended in chapter 4) could apply and breaches would be subject to oversight by the lobbying regulator. Consequently, the Commission does not propose that the fundraising events described above be prohibited. However, it has made one recommendation aimed at improving the level of oversight of such events.

Recommendation 25

That any fundraising event, where an attendee pays for any form of exclusive or private access to a minister, should be classified as a "scheduled meeting" for the purposes of Premier's Memorandum M2015-05 and consequently be disclosed in published summaries of ministerial diaries – along with the fact that it was paid access. This information should be published irrespective of whether any lobbying takes place.

Personal involvement in political activity

Clause 13 of the Lobbyists Code states:

> *Third-party lobbyists (and the individuals they engage to undertake the lobbying for them) must keep separate from their lobbying activities any personal activity or involvement on behalf of a political party.*

This requirement only applies to third-party lobbyists but the Commission sees an argument for extending it to all classes of lobbyist, at least in relation to certain types of government decision.

Again, the recommendations made in chapter 4 are intended to ensure lobbied public officials will be subject to clear obligations to avoid improper preferential access and treatment on the basis of personal associations. This could, for example, address relationships where a lobbyist is also a member or official in a political party.

Stricter measures apply in Canada, where the Lobbyists' Code of Conduct states:

> *When a lobbyist undertakes political activities on behalf of a person which could reasonably be seen to create a sense of obligation, they may not lobby that person for a specified period if that person is or becomes a public office holder. If that person is an elected official, the lobbyist shall also not lobby staff in their office(s).*

In plain terms, this means a person cannot a lobby a politician they helped get elected.

Clearly, a significant degree of intra-party lobbying should, and does, occur at policy level. Most political parties have members, core supporters and constituencies that should be able to influence the policies of the party to which they are aligned. To give an obvious example, trade unions should be able to influence the policies of the Australian Labor Party. Consequently, lobbying at the policy level should *not* be separated from a person's involvement in a political party. However, a lobbyist's political affiliation should not facilitate preferential treatment in areas such as regulatory decision-making under statute, tendering/procurement and making grants. These are matters that should be apolitical.

Recommendation 26

That clause 13 of the Lobbyists Code of Conduct applies to all classes of lobbyist. However, this should not prevent members and supporters of a political party from lobbying in relation to policy issues.

Secondary employment as a lobbyist

The Commission's discussion paper to the inquiry posed the question: "Should NSW members of Parliament be allowed to undertake paid lobbying activities?". Most submissions that addressed this question were in favour of banning MPs from these activities.

The Commission has previously recommended that paid advocacy be prohibited by members of the NSW Legislative Assembly.[89]

[89] Independent Commission Against Corruption, *Regulation of secondary employment for Members of the NSW Legislative Assembly*, Report to the Speaker of the Legislative Assembly, September 2003.

As far as the Commission is aware, there is currently no absolute prohibition on any class of public official from undertaking paid lobbying alongside, or in conflict with, their government role. In practice, there are very few situations where a public official would be permitted to simultaneously work as a lobbyist. Possible examples might include a:

- person whose public sector role is part-time or voluntary and their "main" job involves lobbying government
- person who is invited to join a government board or committee for the express purpose of representing a known interest
- public official who volunteers for a community organisation that lobbies government as part of its activities
- politician or unelected official who serves as a patron of a charity or community group that lobbies government.

Of course, the Commission has investigated some matters where a public official has concealed a conflict of interest such as secondary employment or business interests and misused their office to influence other officials. Intentional conduct of that kind is corrupt and may also involve criminal conduct.

Under the Ministerial Code of Conduct, ministers can only undertake secondary employment if it is the employment or management of a business where:

(a) the participation relates to a personal or family business of the Minister (such as a family farm or a self-managed superannuation fund …) and

(b) the participation is not likely to give rise to a conflict of interest, and

(c) the Premier gives a ruling that the Premier approves the participation (including the nature and extent of participation).

Even if points (a) and (b) were met, it is difficult to imagine a situation where a premier would ever permit a minister to take on a role as a paid lobbyist. So, in practical terms, paid lobbying by a minister will not be permitted.

Individual government agencies can enforce their own rules, which might include a ban on secondary employment for particular roles or require an employee to seek approval of the agency head or senior manager for any secondary role. Ministerial staff employed under the *Members of Parliament Staff Act 2013* are required to seek the written approval of their employer before commencing any paid secondary employment.

Under the members' codes of conduct (as revised in 2020), members are prohibited from acting as a paid advocate "in any proceeding of the House or its committees". However, there is no prohibition on paid advocacy/lobbying outside these proceedings. Part 3 of the Constitution (Disclosure by Members) Regulation 1983 requires disclosure of an MP's sources of income including any derived from "lobbying the Government or other Members on a matter of concern to the person to whom the service is provided" (clause 7A). On its face, the regulation still permits members of Parliament to be paid lobbyists, as long as the necessary details are disclosed, while the current members codes of conduct prohibit it in limited circumstances.

This is despite at least one common law example [*R v Boston* (1923) 33 CLR 386] where, under an agreement for payment, a parliamentarian agreed to use their position to influence an officer of the Crown on proceedings outside the parliament was determined to "tend to produce a public mischief" and amount to a criminal offence. Knox CJ observed:

> *Payment of money to a member of Parliament to induce him to persuade or influence or put pressure on the Minister to carry out a particular transaction tends to the public mischief in many ways, irrespective of whether the pressure is to be exercised by conduct inside or outside Parliament. It operates as an incentive to the recipient to serve the interest of his paymaster regardless of the public interest, and to use his right to sit and vote in Parliament as a means to bring about the result which he is paid to achieve. It impairs his capacity to exercise a disinterested judgement on the merits of the transaction from the point of view of the public interest, and makes him a servant of the person who pays him instead of a representative of the people.*[90]

The core duty of a member of Parliament is to represent the interests of the people of NSW, and all are paid a substantial salary to perform this role. Accepting any further payment to perform lobbying activities is completely incompatible with this role, amounts to a substantial conflict of interest, and should be prohibited.

Clause 7A also refers to paid services, such as providing public policy advice and the development of strategies, and advice on the conduct of relations with the NSW Government or members. These activities are also likely to conflict with the core duties of members of Parliament

[90] P Hall QC *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures*, 2nd edition, 2019, p. 755. See also the commentary on *Wilkinson v Osborne* (1915) 21 CLR 89 and *Horne v Barber* (1920) 27 CLR 494 at pp. 752-754.

and, while out of the scope of this inquiry, the Commission believes they should also be prohibited.

Recommendation 27

That the prohibition on paid advocacy – as outlined in clause 2(a) of the Members' Code of Conduct (Legislative Assembly) and the Members' Code of Conduct (Legislative Council) – be extended beyond the promotion of matters in the NSW Parliament or its committees, to any communication with any other public officials, and that clause 7A of the Constitution (Disclosure by Members) Regulation 1983 (relating to disclosure) be amended accordingly.

Chapter 12: Next steps

Operation Eclipse is founded on the premise that lobbying plays an essential role in informing and influencing public officials. Lobbying can come in many forms and from a range of individuals and organisations such as interest groups, representative bodies, industry, non-government organisations, charities and third-party lobbyists.

The Commission's 29 recommendations made in this report are intended to make lobbying activities and related government decision-making processes more transparent and accountable. That is, new legislative and regulatory controls (including sanctions available to the lobbying regulator) are a necessary safeguard against improper lobbying, privileged access and undue influence.

The recommendations are intended to be embedded within the appropriate administrative, policy and legislative arrangements in NSW. While the recommendations each have their own rationale, many are mutually reinforcing and successful implementation is dependent on their consideration as an interrelated package of reforms.

Translating the Commission's recommendations into these revised arrangements could be best progressed by forming a "Lobbying Reform Panel", comprised of a small number of subject-matter experts. These experts could be drawn from academia, the current regulator, lobbyists, members of the legal profession with public law expertise, and public officials who regularly deal with lobbyists.

A key role for the "Lobbying Reform Panel" would be to provide information and assistance to the NSW Government and NSW Parliament in drafting legislative amendments that incorporate the key measures of reform contained in this report. That is, the panel should steer the development of specific legislative initiatives consistent with the principles of integrity, transparency and accountability around lobbying regulation and government decision-making.

During its deliberations, the "Lobbying Reform Panel" should, where appropriate, seek the views of representatives from relevant agencies and different sectors impacted by updated lobbying legislation and related policy changes.

Recommendation 28

That the NSW Government establishes a "Lobbying Reform Panel" comprising appropriately qualified persons to examine and formulate proposed legislative reforms. Appropriate secretariat services for the panel should be provided.

Recommendation 29

That, over a 12-month period, the "Lobbying Reform Panel" undertakes the required work under recommendation 28 and, by the end of the 12-month period, the panel provides a report setting out the provisions it recommends be incorporated into revised legislation.

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