Submission to the ACT Integrity Commission's Lobbying Consultation

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Thank you for the opportunity to provide a submission to this inquiry.

I am an Associate Professor at Monash University. I have co-written commissioned reports on the regulation of lobbying for the New South Wales Independent Commission Against Corruption (NSW ICAC) and New South Wales Electoral Commission,[1] and have appeared as an expert witness before NSW ICAC (Operation Eclipse) and the Victorian Independent Broad-based Anti-Corruption Commission (Operation Sandon) to provide expert advice and recommendations on lobbying regulation.

I have also published a journal article on the regulation of lobbying in the Australian federation in the *Adelaide Law Review*.[2]

PURPOSES OF REGULATING LOBBYING

Although lobbying is integral to democratic representation, there are concerns regarding the secrecy and unfair influence of professional lobbyists, which may ultimately lead to corrupt conduct by lobbyists and/or officials. As the OECD has observed:

> [l]obbying is often perceived negatively, as giving special advantages to "vocal vested interests" and with negotiations carried on behind closed doors, overriding the "wishes of the whole community" in public decision-making.[3]

The primary risks of lobbying to democracies include secrecy, unfair access and influence and corruption.[4]

[1] Yee-Fui Ng and Joo-Cheong Tham, *Enhancing the Democratic Role of Direct Lobbying in NSW: A Discussion Paper for the New South Wales Independent Commission Against Corruption* (2019); Joo-Cheong Tham and Yee-Fui Ng, *Regulating Direct Lobbying in New South Wales for Integrity and Fairness* (Report, August 2014).
[2] Yee-Fui Ng, 'Regulating the Influencers: The Evolution of Lobbying Regulation in Australia' (2020) 41(2) *Adelaide Law Review* 507.
[3] OECD, *Lobbyists, Governments and Public Trust: Volume 1* (OECD Publishing, 2009) 9.
[4] Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (UNSW Press, 2010) ch 9.

There are three main purposes in regulating lobbying.[5] The first is to prevent corrupt behaviour by lobbyists and public officials. The second purpose is a broader notion of political equality in ensuring the fairness of government policy-making and decision-making processes by increasing transparency in the disclosure of lobbying activities. This is aimed at reducing the incidence of secret lobbying by vested interests and reducing the risk of regulatory capture by government. This leads to the third main purpose of improving the quality of government decision-making and policy-making in ensuring that government decisions are made according to merit, rather than skewed towards narrow sectional interests.

KEY ELEMENTS OF AN EFFECTIVE LOBBYING REGULATORY SCHEME

There are several key elements of an effective lobbying regulatory scheme.

Firstly, ***adequate coverage of the lobbyist register***. The lobbyist register should cover both third party and in-house lobbyists, consistent with comparable jurisdictions such as Canada and the United States.

Second, ***adequate disclosure of lobbying activity***. To increase transparency, lobbyists should be required to disclose every lobbying contact. There should be an accompanying requirement for Ministers, ministerial advisers and senior public servants to proactively disclose their diaries. Disclosures should be sufficiently detailed, i.e. required to specify the subject matter, and whether it relates to any legislative bills (which should be specified), grants or contracts.

Third, **data should be integrated** from various sources and made publicly available. This data should include:

(i) political donations made by lobbyists

(ii) the register of lobbyists

(iii) ministerial diaries

(iv) where publicly available, details of investigations into misconduct or corruption

(v) list of holders of parliamentary access passes

(vi) gifts given by lobbyists to government officials, and

(vii) details of each lobbying contact (if reform occurred).

Fourth, the ***independence of the regulator*** is essential, and it is best if the scheme is administered by an independent statutory authority, rather than a department within the executive.

Fifth, ***adequate enforcement by regulators*** is a major issue, as there are some rules in certain jurisdictions, e.g. post-separation employment provisions, which are not enforced despite many breaches.

[5] Yee-Fui Ng, 'Regulating the Influencers: The Evolution of Lobbying Regulation in Australia' (2020) 41(2) *Adelaide Law Review* 507.

OTHER COMPARATOR JURISDICTIONS

Canada and the United States have well-established lobbying laws, which may be models that could be considered for the Australian context.

The coverage of lobbyists on the register of Canada and the United States is broader than Australian jurisdictions. For instance, the Canadian lobbyists register requires the registration of professional lobbyists or any individual who, in the course of his or her work for a client, communicates with or arranges meetings with a public office holder.[6] This includes third party lobbyists, in-house lobbyists for corporations, and in-house lobbyists for not-for-profit organisations.[7]

The United States covers lobbyists based on financial thresholds. Lobbyists are required to be registered if they are:

- Persons who receive financial or other compensation for lobbying in excess of $2,500 per three month period, make more than one lobbying contact and spends 20% or more of their time over a three month period on lobbying activities on behalf of an employer or individual client. This covers both third party lobbyists and in-house lobbyists.
- An organisation is required to register if it plans to engage in lobbying activities during any three-month period and during that period incurs at least $12,500 in lobbying expenses for organisations that employ in-house lobbyists and $3,000 for lobbying firms.[8]

The United States and Canada are also broader in terms coverage of government officials, as both legislative and executive branch officials are covered by the lobbying provisions.[9]

The disclosures of lobbying activities are also more extensive in the United States and Canada (compared with South Australia); both require disclosure of each lobbying contact, and additionally the United States requires lobbyists to disclose their expenditure as well. Registered lobbyists are required to file quarterly activity reports with the Clerk of the US House of Representatives and the Secretary of the US Senate.[10] Lobbyists must also file semi-annual reports of campaign contributions to federal candidates and events that honour federal officeholders.[11] The semi-annual report must contain information about the

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[6] *Lobbying Act,* RSC 1985 (4th Supp), c 44 ss 5-7.

[7] Ibid ss 5-7.

[8] *Lobbying Disclosure Act of 1995*, 2 USC § 1601-3(10).

[9] Covered executive branch official, i.e. the President, the Vice President, any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President, any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order, any member of the uniformed services whose pay grade is at or above O–7 under section 201 of title 37, United States Code; and any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2)(B) of title 5, United States Code: *Lobbying Disclosure Act of 1995*, 2 USC § 1601-3.
Covered legislative branch official, i.e. a Member of Congress, an elected officer of either House of Congress, any employee of, or any other individual functioning in the capacity of an employee of a Member of Congress, a committee of either House of Congress, the leadership staff of the House of Representatives or the leadership staff of the Senate, a joint committee of Congress, and a working group or caucus organised to provide legislative services or other assistance to Members of Congress; and any other legislative branch employee serving in a position described under section 109(13) *Ethics in Government Act 1978* (5 USC App). *Lobbying Act* (Can), section 2.

[10] Ibid § 1601-5.

[11] Office of the Clerk, *Guide to the Lobbying Disclosure Act* (17 June 2014) US House of Representatives <http://lobbyingdisclosure.house.gov/amended_lda_guide.html>.

lobbying clients, issues, including bill numbers and executive branch actions, and total income and expenses received from the client.

Canadian lobbyists have an obligation to file a monthly return to the Commissioner of Lobbying, no later than 15 days after the end of every month, setting out the details of the lobbying clients, name of the public office holder, subject matter and date of communication.[12]

In Canada, lobbyists' donations to political parties are capped at $1,000,[13] although there is a loophole within the system that allows lobby groups to provide 'consultancy services' to political parties for free during election times and many lobbyists do so.[14]

These regulatory systems have broader coverage of both lobbyists and government officials. They also involve far more extensive disclosure requirements (including disclosures of each lobbying contact, income and expenditure by lobbyists). Alongside the regulation of political donations by lobbyists (through either caps or disclosures) these models contain measures that could be considered as possible reform options.

In terms of disclosures provided on the lobbyist register, an excellent example can be seen in Scotland, where the lobbying register has a searchable database that includes detailed information about each lobbying contact with government officials, including precisely who they met, the subject matter discussed, which legislation they are lobbying in relation to, and what they were hoping to achieve with the meeting.[15]

OTHER CONTROLS TO MITIGATE RISKS OF CORRUPTION ASSOCIATED WITH LOBBYING ACTIVITIES

To mitigate the risk of corruption associated with lobbying activities, there could be further measures instituted such as:

- Bans on the ability of lobbyists to receive success fees, as fees contingent on success give the lobbyist an incentive to engage in potentially unethical or corrupt behaviour in order to secure their remuneration. These exist in certain Australian jurisdictions, including South Australia.[16]
- Bans on MPs receiving remuneration from any third parties including lobbyists for parliamentary speeches, questions, motions, introduction of a bill, or amendment to a motion or bill, as this enables interest groups to utilise money to monopolise a scarce parliamentary resource; consequently it may lead to a conflict of interest between the MP's personal financial advancement and the public interest.

[12] *Lobbying Act,* RSC 1985 (4th Supp), c 44 ss 5-7.
[13] *Canada Elections Act*, SC 2000, c 9 s 405.
[14] Raj Chari, John Hogan and Gary Murphy, *Regulating Lobbying: a Global Comparison* (Manchester University Press, 2010) 42.
[15] See The Scottish Parliament, *Lobbying Register* <https://www.lobbying.scot/>.
[16] E.g. *Lobbying of Government Officials Act 2011* (NSW) ss 14-6; *Lobbyists Act 2015* (SA), s 14; *Integrity (Lobbyists) Act 2016* (WA), ss 20-2.

- Bans on lobbyists giving gifts to government officials, as this is seen to unduly sway public officials to be more receptive to the entreaties of lobbyists.[17]
- Bans on post-separation employment for government officials both in Australia and overseas, where certain government officials, such as Ministers, their advisers, and senior public servants, are prohibited from working for lobbyists in their portfolio area for a certain period.[18] These bans are not well-enforced in Australia.[19]

To increase transparency, Ministers, ministerial advisers and senior public servants should be statutorily obliged to proactively disclose their diaries. There should be an accompanying requirement for lobbyists to disclose each contact. Disclosures should be sufficiently detailed, i.e. required to specify the subject matter, and whether it relates to any legislative bills (which should be specified), grants or contracts.

FINAL REMARKS

It is commendable that the ACT Integrity Commission is considering holistic reform to lobbying regulation.

I am happy to provide further details or evidence on any of the points made.

EXPERTISE:

The author is an Associate Professor at Monash University Faculty of Law.

She has published the following articles relevant to the consultation paper:

Yee-Fui Ng, 'Regulating the Influencers: The Evolution of Lobbying Regulation in Australia' (2020) 41(2) *Adelaide Law Review* 507.

[17] Canada, *The Lobbyists' Code of Conduct* (2012), cl 10 <http://www.ocl-cal.gc.ca/eic/site/012.nsf/eng/h_00014.html>.

[18] E.g. the 'cooling off period' at the Commonwealth level is18 months for Ministers taking up lobbying positions in their former portfolio area and 12 months for ministerial advisers and senior public servants. Australian Government, Lobbying Code of Conduct <https://lobbyists.pmc.gov.au/conduct_code.cfm>; Department of the Prime Minister and Cabinet, *Statement of Ministerial Standards* <https://www.pmc.gov.au/resource-centre/government/statement-ministerial-standards>. Canada has a five year post-separation ban for Ministers, MPs, ministerial advisers, and senior public servants from being third party or in-house lobbyists. *Lobbying Act,* RSC1985 (4th Supp), s 10.11.

[19] Yee-Fui Ng and Joo-Cheong Tham, *Enhancing the Democratic Role of Direct Lobbying in NSW: A Discussion Paper for the New South Wales Independent Commission Against Corruption* (2019).