

ICAC Submission on Regulatory Impact Statement – Lobbying Government Officials (Lobbyists Code of Conduct) Regulation 2014

The Independent Commission Against Corruption (ICAC) provides the following written comments on the *Lobbying Government Officials (Lobbyists Code of Conduct) Regulation 2014* and the Regulatory Impact Statement.

The *Lobbying Government Officials (Lobbyists Code of Conduct) Regulation 2014* (“the Regulation”) requires all lobbyists, whether third-party lobbyists or any other individual or body (including an individual engaged to undertake lobbying for a third-party lobbyist), that lobby government officials to comply with the requirements of the *Lobbyists Code of Conduct*.

Only third-party lobbyists, however, are required to be registered and to provide accessible and up-to-date information for publication on the Register of Third-Party Lobbyists.

In December 2009, the Independent Commission Against Corruption (“the Commission”) commenced an investigation into corruption risks in the lobbying of public officials and public authorities in NSW (Operation Halifax). The Commission published its report on Operation Halifax in November 2010.

The report found that lobbying had attracted widespread community perceptions of corruption, and involved a number of corruption risks. It also commented that there was much evidence which demonstrated that, in general, professional lobbyists act ethically and that lobbying, when done well, can enhance rather than detract from good decision-making by public officials.

The report set out the then regulatory system in NSW to identify corruption risks that might allow, encourage or cause corrupt conduct, or conduct connected with corrupt conduct, and identified necessary changes to address these risks and thereby reduce the likelihood of corrupt conduct from occurring.

The main contributing risks identified were:

- lack of transparency
- inadequate recordkeeping
- involvement in political fundraising
- gifts and benefits
- difficulty of access
- former public officials acting as lobbyists
- exploitation of privileged access
- payment of success fees.

Seventeen recommendations were made to address these risks; 14 were relevant to state agencies.

To assess the effectiveness of the Regulation, the Commission examined its contribution to the overall effectiveness of the lobbying corruption control environment.

The Commission has mapped current arrangements for the control of corruption risk in lobbying (which include the Lobbying Government Officials (Lobbyists Code of Conduct) Regulation 2014) against the Operation Halifax report recommendations.

The Operation Halifax recommendations to limit the risk of corruption in lobbying can be summarised as:

- enacting legislation to regulate lobbying, including the need for all third-party lobbyists and lobbying entities to be registered in order to be permitted to lobby
- establishing an independent entity to monitor legislation and impose sanctions on lobbyists
- developing separate enforceable codes of conduct for lobbyists and government officials
- creating public registers of third-party and other lobbyists that also describe their lobbying activities
- providing public access to information on lobbying activities (via proper recordkeeping and amendment of the *Government Information (Public Access) Act 2009*)
- placing restrictions on former ministers and government officials from acting as lobbyists
- placing a ban on success fees.

While some of the Operation Halifax recommendations have been implemented as recommended, others have been implemented in alternate ways and some aspects of the recommendations have not been implemented at all.

Under the current arrangements, elements of the Operation Halifax report controls, or in other instances their intent, have been reconfigured within a cohesive model that is implemented through the designed interplay of a number of instruments (*Lobbying of Government Officials Act 2011* and the *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014*, including the *Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014*, Premier's Memorandum 2014-07 – Publication of Ministerial Diaries, Premier's Memorandum 2014-13 – NSW Lobbyists Code of Conduct, and Premier's Memorandum 2014-09 – Code of Conduct for Ministers of the Crown).

These instruments, which include the Regulatory Impact Statement Option 3 version of the Regulation, have the following effect:

- lobbying is regulated, registration of third-party lobbyists is mandated, and offence provisions apply to breaching the ban on success fees
- all lobbyist conduct is controlled by an enforceable code (before a meeting, lobbyists must disclose to government officials the nature of the matter to be discussed, as well as any financial or other interest they have in the matter; must not engage in misleading, dishonest, corrupt or other unlawful conduct in connection with the meeting; and must satisfy themselves of the truth and accuracy of material information provided in connection with the meeting or other communication for the purposes of lobbying government officials)
- the NSW Electoral Commission provides oversight and enables registration of third-party lobbyists, provides public access to the register, and provides enforcement through placing lobbyists on the “watch list” or by deregistration
- ministers are required to publish extracts of their dairies. The extracts are to detail scheduled meetings held with stakeholders, external organisations and individuals one month after the end of each quarter. The summary is to disclose the organisation or individual with which or whom the meeting occurred, details of any registered lobbyists present, and the purpose of the meeting
- the conduct of ministers is subject to a code of conduct which is an applicable code of conduct under the Independent Commission Against Corruption Act 1988. The code restrains accepting an offer of post-separation employment if it relates to any of the minister’s portfolio responsibilities held during the last two years of ministerial office
- the conduct of public officials is subject to a premiers memorandum and NSW Electoral Commission guidelines that require ministers and other NSW government officials not to permit lobbying by third-party lobbyists who are not registered on the Register of Third-Party Lobbyists.

The mandated publication of ministers’ dairies was not contemplated in the Commission’s recommendations. Its addition is transformative in that, in relation to ministers. It addresses the intent of a number of Operation Halifax recommendations at once. In relation to the Lobbying Government Officials (Lobbyists Code of Conduct) Regulation 2014, the Commission notes the recommended option - Option 3. The current corruption control arrangements in relation to ministers are pragmatic, streamlined, easy to follow and understand, and emphasise integrity and honesty. Enforceable conduct standards, together with independent oversight, provide mechanisms for removing the non compliant from the system.

Operation Halifax, however, identified that lobbying tactics and therefore the associated risks, frequently did not involve the Minister. Evidence indicated that lobbying can be more effective if directed at Ministerial staff or employees of public agencies, whether public officials or contractors. While Ministers are now required to disclose the purpose

of the meeting and the details of any registered lobbyists present, the public is not informed about associated lobbying activity that may involve a parliamentary secretary, ministerial staff member or person employed, contracted or engaged in a public sector agency. The Commission recommends that action be taken to address this broader set of risks.

Recommendation 8 of the Operation Halifax report envisaged a register for all third-party lobbyists and lobbying entities comprising two panels; one for third-party lobbyists and one for lobbying entities. (The Commission notes that Option 2 of the regulatory impact statement incorrectly asserts that the Commission recommended that all lobbyists be registered.)

Recommendation 8 further specified that third-party lobbyists and lobbying entities disclose their lobbying activity on the register, including: the identity of the government department, agency or ministry lobbied; the name of any senior government representative lobbied; and, in the case of third-party lobbyists, the name of the client or clients for whom the lobbying occurred.

The two parts (registration and reporting of activity) create transparency around lobbying activities across government in a way that it not achieved by Option 3. The Commission does not accept that implementation of these recommendations made in the Operation Halifax report would impose an unreasonable regulatory burden, or that the register would become unwieldy.

The Commission also maintains that the policy and procedure for departments, agencies and ministerial offices concerning the conduct of meetings with lobbyists be expanded to include the proactive release of lobbying activity information, for which there is no overriding public interest against disclosure, by publishing that information on their websites. If this were implemented, Electoral Commission enforcement of the Lobbyists Code of Conduct would be assisted by the disclosure of such information.

The Commission's preferred position remains that Halifax Report recommendation 8, which requires the registration of all third party lobbyists and lobbying entities before they can lobby a Government representative, and the publication of information about lobbying activities, be implemented; and that the policy and procedure for departments, agencies and ministerial offices concerning the conduct of meetings with lobbyists be revised to incorporate the intent of the Halifax Report recommendations.