Statutory review of the *Lobbying of Government Officials Act 2011*

June 2017

NSW GOVERNMENT Premier & Cabinet

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Executive summary

The *Lobbying of Government Officials Act 2011* (NSW) (the ***Lobbying Act***) regulates lobbying activity in New South Wales. It establishes the NSW Electoral Commission (the ***NSWEC***) as an independent regulator of lobbyists, and applies a set of ethical standards to all third-party lobbyists and other individuals and organisations that lobby government.

Under section 24 of the Lobbying Act, the Premier is required to conduct a review of the Act.

A review has been conducted by the Department of Premier and Cabinet (the ***Department***) on behalf of the Premier in consultation with key stakeholders, including the NSWEC. Submissions were invited from:

- the Independent Commission Against Corruption (the ***ICAC***),
- the author of each submission made in 2015 on the Regulatory Impact Statement (***RIS***) for the *Lobbying of Government Officials (Code of Conduct) Regulation 2014* (the ***Regulation***), and
- all registered lobbyists.

A Discussion Paper was released for public comment on the Department's website and the NSW Government "Have your say" website in January with a closing date for submissions of 24 February 2017. The Discussion Paper calling for submissions was also publicly advertised in early February. The Department received 12 submissions in response to the Discussion Paper.

The review also gave further consideration to the six submissions (mostly from the same stakeholders) received in 2015 during the RIS consultation.

The Department concludes that the Act's objectives remain valid and that the terms of the Act remain broadly appropriate for securing the Act's objectives. However, there is scope to improve the efficacy of lobbying regulation in NSW.

The key recommendations of the review are that the Lobbying Act and Regulation be amended to:

- clarify that the general objects of the Lobbying Act are to promote transparency, integrity and honesty by ensuring third-party lobbyists and other individuals and organisations who communicate with NSW Government officials for the purpose of representing the interests of others comply with ethical standards of conduct,
- clarify that the definition of 'third-party lobbyist' does not include professionals (such as doctors, lawyers or accountants) who as part of their day to day professional services to a client, represent that client's views to a Government official, in line with the NSWEC's current practice,
- formalise the NSWEC's current approach to applying the 'fit and proper purpose test' by providing that a third-party lobbyist will not be eligible to be registered if they have been sentenced to a term of imprisonment of 30 months or more, or if they have been convicted, as an adult, in the last ten years, of an offence, one element of which involves dishonesty or fraud,
- clarify that where a registered third-party lobbyist subsequently becomes ineligible for registration (for example by being convicted of a relevant offence or becoming an officer of a registered political party), the NSWEC may cancel or suspend their registration,
- prescribe that a director or secretary, or other person who holds an executive position (however designated) in a third-party lobbyist will be a person who has an interest in the third-party lobbyist for the purposes of the disclosure requirements in section 10(1)(c) of the Act,
- require registered lobbyists to nominate a Responsible Officer, who must complete online training annually, in a form approved by the NSWEC,
- expand the exemption from the restriction on lobbying during the cooling-off period in section 18(2) of the Act to include an ex-NSW Minister or Parliamentary Secretary who is lobbying the NSW Government in their role as a federal Government official or federal Member of Parliament, and

- require the Electoral Commissioner to give complainants, and the lobbyist whose conduct is the subject of a complaint, written notice of the Electoral Commissioner's decision and the reasons for the decision.

A list of the submissions received is set out in Appendix A. Copies of the submissions are available on the DPC website (http://www.dpc.nsw.gov.au/about/publications). The abbreviations used in this report to refer to a submission are set out in the Appendix.

This report on the outcome of the review will be tabled in each House of Parliament.

Statutory review of the Lobbying Act

Under section 24 of the Lobbying Act, the aim of the review is to determine whether the policy objectives of the Lobbying Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

The objectives of the Lobbying Act are not prescribed in the Act itself. Accordingly, based on the combined content of the Lobbying Act, the Regulation and the *NSW Lobbyists Code of Conduct* (the ***Lobbyists Code***), the Department considers that the policy objectives of the Act are to promote transparency, integrity and honesty by:

- providing a legislative basis for the regulation of lobbying,
- establishing a Lobbyists Code which sets out ethical standards and other requirements to be observed by lobbyists when lobbying NSW Government officials,
- establishing the NSWEC as an independent regulator of lobbyists,
- enabling the independent regulator to investigate alleged breaches of the Lobbyists Code and legislation and impose sanctions,
- banning lobbyist success fees (being a payment which is contingent on the outcome of the lobbying of a government official), and
- restricting lobbying by former Ministers and Parliamentary Secretaries.

Key references

The Lobbying Act and the Regulation can be viewed on the NSW legislation website at:

http://www.legislation.nsw.gov.au

The Lobbyist Register is available on the NSWEC website at:

http://www.lobbyists.elections.nsw.gov.au/whoisontheregister

Premier's Memoranda (including M2014-13 *NSW Lobbyist Code of Conduct* and M2015-05 *Publication of Ministerial Diaries and Release of Overseas Travel Information*) can be viewed on the Department's website at:

http://www.dpc.nsw.gov.au/announcements

The Discussion Paper for the review is available on the Department's website:

http://www.dpc.nsw.gov.au/announcements/review_of_the_lobbying_of_government_officials_act_2011

Copies of the submissions in response to the Discussion Paper are available on the DPC website:

http://www.dpc.nsw.gov.au/about/publications

Background – the regulation of lobbying in NSW

Lobbying was first regulated in NSW under the *Lobbyist Code of Conduct*, which was introduced by the former NSW Government in February 2009. The former Code was issued under a Premier's Memorandum and prohibited the lobbying of Ministers, Parliamentary Secretaries, Ministerial staff and persons working in public sector agencies by third-party lobbyists who were not registered on the Register of Lobbyists. Under the former Code, the Register of Lobbyists was administered by the Department of Premier and Cabinet.

On 10 November 2010, the ICAC released its final report on its investigation into the nature and management of lobbying in NSW (Operation Halifax - *Investigation in to corruption risks involved in lobbying*) (http://www.icac.nsw.gov.au/investigations/past-investigations/investigationdetail/169).

In response to this report, the Lobbying Act was passed by Parliament in 2011, which strengthened the regulation of lobbying by introducing legislation to ban success fees and restrict lobbying by former Ministers and Parliamentary Secretaries.

On 13 May 2014, the Premier announced a package of reforms to strengthen the regulation of lobbying activities and to ensure that contact between lobbyists and government officials is conducted in accordance with public expectations of transparency, integrity and honesty.

The package involved:

- establishing the NSWEC as an independent regulator of lobbyists,
- applying a set of ethical standards to all third-party lobbyists and other organisations that lobby government,
- empowering the independent regulator to investigate alleged breaches and impose sanctions, which could result in third-party lobbyists being removed from the Lobbyist Register and other organisations being placed on a Watch List and their access to government restricted,
- requiring Ministers to publish quarterly diary summaries of scheduled meetings with external organisations on portfolio-related activities, and
- making the NSW Ministerial Code of Conduct an applicable code under the *Independent Commission Against Corruption Act 1988* (NSW), giving the ICAC the power to investigate and make findings on a Minister's compliance with the Code.

The reform package addressed recommendations made by the ICAC in its November 2010 report titled *Investigation into corruption risks involved in lobbying*.

The Government chose to address some of the problems identified in the ICAC's Report, and create transparency around the lobbying of Ministers, through the publication of Ministerial diaries. In a recent submission, the ICAC observed that the Government's policy mandating the publication of Ministers' diaries is 'transformative, in that… [i]t addresses the intent of a number of Operation Halifax recommendations at once'.

Premier's Memorandum M2014-07 *Publication of Ministerial Diaries* mandated the publication of information from the diaries of Government Ministers. It commenced on 1 July 2014 and the first quarterly disclosures (for the period 1 July to 30 September 2014) were published on 31 October 2014. Following a 12-month review of the diary disclosures policy, a revised Premier's Memorandum was released that clarified aspects of the policy (see M2015-05 *Publication of Ministerial Diaries and Release of Overseas Travel Information*).

The legislative elements of the reform package were implemented through amendments to the Lobbying Act and the Regulation. These reforms took effect on 1 December 2014. The amendments imposed a duty on lobbyists to comply with the Lobbyists Code and established the NSWEC as the new regulator of lobbyists.

The Regulation took effect on 1 December 2014 to support the amendments to the Lobbying Act. Schedule 1 of the Regulation prescribes the Lobbyists Code. The Lobbyists Code is very closely based on the former Code. The key difference is that the Lobbyists Code imposes a set of ethical

obligations on all individuals and bodies that communicate with NSW Government officials for the purpose of representing the interests of others. The former Code only applied to 'third-party lobbyists', being those who carry on the business of lobbying NSW Government officials on behalf of other individuals or bodies.

Noting that the Lobbying Act and Regulation do not have a specific 'objects and purpose' provision, the Department considers that the objectives of the Lobbyists Code are to promote transparency, integrity and honesty by ensuring third-party lobbyists and other individuals and organisations who communicate with NSW Government officials for the purpose of representing the interests of others comply with ethical standards of conduct. The Lobbyists Code also imposes additional requirements on third-party lobbyists, such as the requirement to be registered and to disclose the name of the client who has retained them before meeting or communicating with a NSW Government official.

The Lobbyists Code sits within a broader accountability framework designed to protect the integrity of government decision-making and prevent corruption. The *Government Sector Employment Act 2013* (NSW) (the ***GSE Act***) provides an ethical framework for the government sector, which recognises the role of the government sector in preserving the public interest, defending public values and implementing the commitments of the Government of the day. The GSE Act also sets out the government sector core values of integrity, trust, service and accountability. In addition, statutory and common law rules apply to criminal corrupt conduct. The integrity arm of government includes bodies such as the ICAC, the NSWEC, the NSW Ombudsman, the Police Integrity Commission and the Auditor-General.

The Lobbying Act and the Regulation are also supplemented by administrative measures introduced from 1 July 2014 that require:

- all NSW Government officials not to have lobbying contact with unregistered third-party lobbyists, and to observe special precautions when meeting with any lobbyist who has been placed on the Lobbyists Watch List (see M2014-13 *NSW Lobbyist Code of Conduct*), and
- the publication of details of scheduled meetings with Ministers (see M2015-05 *Publication of Ministerial Diaries and Release of Overseas Travel Information*).

These administrative measures do not fall within the scope of this review. It is noted that M2014-07 – *Publication of Ministerial Diaries* was reviewed by the Department after 12 months of its operation (see http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0009/174645/Report_-_Publication_of_Ministerial_Diaries_-_12_month_review.pdf).

In addition, agencies have supplemented these administrative measures with their own internal protocols. For instance, the Department of Planning and Environment has developed a Registered Lobbyists Protocol and a Business Contact Protocol to ensure that planning and development decisions are made in an open and transparent manner. Consideration of such internal measures does not fall within the scope of the Department's statutory review.

Issues arising from the consultation

Objects and purposes

Part 1 does not contain an 'objects and purpose' provision that sets out the objectives of the Lobbying Act.

The Department considers that the objectives of the Lobbying Act and the Lobbyists Code are to promote transparency, integrity and honesty by ensuring third-party lobbyists and other individuals and organisations who communicate with NSW Government officials for the purpose of representing the interests of others comply with ethical standards of conduct.

Three submissions (Baume, ICAC and NSWEC) supported the inclusion of an objects clause in the Lobbying Act, and one (AGPRA) considered that, as the objects are clear, there was no need to amend the legislation to include such a clause.

Five submissions agreed that the objects identified by the Department were clear and correct (AGPRA, Baume, ICAC, NSWEC and PRIA). The ICAC submission suggested that these objects could be expanded to include the following:

- to ensure lobbyists and public officials are accountable (responsible and answerable) for their actions, and
- to ensure fairness in terms of access to government representatives and attempts to influence government decisions.

While ensuring equity of access to government decision-makers and representatives is generally a desirable goal, the Department has concerns about prescribing this as an object insofar as it could imply that the Lobbying Act imposes a positive obligation on Government officials to meet with particular third-party lobbyists or other individuals and organisations to ensure fairness of access.

Given that there otherwise appears to be significant consensus about the objects of the Act, it is proposed to amend the Lobbying Act to clarify that its objects are to promote transparency, integrity and honesty by ensuring third-party lobbyists and other individuals and organisations who communicate with NSW Government officials for the purpose of representing the interests of others comply with ethical standards of conduct.

Key definitions

Part 1 of the Lobbying Act contains key definitions, including the definitions of 'lobbyist', 'lobbying' and 'Government official', which define the scope of the Act.

The purpose of Part 1 is to make clear to whom these ethical obligations apply. This includes not only third-party lobbyists, but all other individuals and bodies that lobby NSW Government officials including for example:

- individuals making representations to Government on behalf of their relatives or friends about their personal affairs, and
- organisations constituted to represent the interests of their members (such as professional organisations, peak industry bodies and trade unions).

Two areas of concern with the scope of key definitions were raised in submissions by more than one respondent:

- the definition of 'Government official' should include local government officials, so that the regulation of lobbyists also applies to lobbying at the local government level (Quinn, NSROC and SHHMC), and
- the definition of 'officer of a political party' should be amended to include members of a political party's State Council (the NSW Liberal Party's governing body) and proxies for a member of the State Executive (or alternatively, expanding the ban on officers of political parties from

being registered as third-party lobbyists under section 9 of the Lobbying Act to include any person affiliated with any political party) (Baume and Cronin).

The ICAC suggests that the definition of lobbying, as well as making specific reference to 'planning applications', should also highlight two other areas that are particularly vulnerable to corruption:

- the awarding of government contracts (particularly given the growing trend to outsource the provision of government services), and
- the allocation of funding and grants.

Local government

The ICAC's 2010 Report outlined in Chapter 11 the reasons why the ICAC did not consider that lobbying at the local government level should be subject to the same regulatory regime as lobbying at State level.

The report found that the corruption risks at local government level arise at the point of contact between the applicant and the council officer (rather than the lack of transparency that it saw as the root of the problem at the State level). It found that transparency of ordinary process is higher in local government than in most areas of public administration – files are available, proposals are advertised, decisions are made in public, or are otherwise visible to the local community. Obtaining access to a decision-maker or to information is not the problem.

The Government accepted this distinction when it legislated to exclude local government officials from the Lobbying Act.

The Office of Local Government has advised that it took the ICAC's recommendations into consideration when conducting its review of the *Model Code of Conduct for Local Councils In NSW* in 2011. Issues relating to lobbying at the local government level will also be the subject of the Office of Local Government's 2017 review of the Model Code. A revised draft of the Model Code will be released for public comment later in the year.

Officer of a political party

Section 9(3) of the Lobbying Act provides that a third-party lobbyist (or any individual so engaged) is not eligible to be registered if the person is an officer of a registered political party. Section 3 defines 'officer of a registered political party' to mean a person who is occupying or acting in an office or position concerned with the management of a party registered under Part 4A of the *Parliamentary Electorates and Elections Act 1912* (NSW).

The restriction on third-party lobbyists acting in or occupying an office or position concerned with the management of a registered political party was first introduced to the Lobbyists Code in 2013.

Because NSW political parties have very diverse management structures, it was necessary to keep the wording of the restriction broad and general, and the wording in the electoral legislation was adopted. The Department wrote to all registered parties advising them of the new restriction and asking them to assist in the administration of the Register by providing a list of all the offices or positions concerned in the management of their party.

At that time, the NSW Liberal Party, NSW Nationals and NSW Labor variously nominated members of their State Executive/Administrative Committee and Party Officers/senior managers/senior staff as having a role in the management of the party. However, in August 2016, the NSW Liberal Party also asked lobbyists to resign from its State Council.

The current test is broad and accommodates the diversity of party structures in NSW by focussing on the relevant function or purpose of a person's role within a party that is considered to give rise to a potential conflict. Any attempt to legislate with reference to the particular current constitutional structures of registered parties would risk narrowing the provision, leading to some party structures avoiding the relevant provisions of the Lobbying Act.

Definition of 'lobbying'

Under the Lobbyist Code, 'lobbying' a NSW Government official includes communicating with the official for the purpose of representing the interests of others in relation to 'a government decision … or proposed government decision'. Planning applications are specifically and separately nominated because of the significant history of particular corruption risks associated with them. This inclusion in clause 4(1)(b) of the Lobbyists Code broadens the definition from 'communicating in relation to a government decision or proposed government decision' (on the application) to also capture communicating in relation to the application itself (and not just the decision).

While it is acknowledged that there are some areas of government activity that may present greater corruption risks than others, it is clear that communications about awarding a contract or allocating funding or grants are adequately captured by the current wording of clause 4(1) that refers to communicating in relation to government decisions, proposed government decisions and the exercise by the official of his or her official functions.

Definition of 'third-party lobbyist'

Under section 3 of the Lobbying Act, a 'third-party lobbyist' means an individual or body carrying on the business (generally for money or other valuable consideration) of lobbying Government officials on behalf of another individual or body. Section 3 provides that the definition of 'third-party lobbyist' does not include any individual or body that is excluded from the definition under the Regulation.

Third-party lobbyists must be registered in order to legally lobby Government officials.

Guidance provided by the NSWEC on its website[1] provides that generally, professionals (such as doctors, lawyers or accountants) who as part of their day-to-day professional services to a client, represent that client's views to a Government official, are not 'third-party lobbyists' for the purposes of section 3 of the Lobbying Act.

Further practical guidance on whether a person or entity needs to register before making contact with a Government official is also provided in the form of examples:

> *A lawyer has a practice that specialises in workers' compensation cases in the course of which she communicates with WorkCover on behalf of her clients.*
>
> In these circumstances, the lawyer does not need to be registered because the lawyer is engaged in a recognised professional occupation and communicates with WorkCover as part of the legal services that she provides to her clients.

The Department considers that, in the interests of regulatory certainty, there would be merit in amending the Regulation to clarify that professionals such as doctors, lawyers and accountants who as part of their day-to-day professional services to a client, represent that client's views to a Government official, are excluded from the definition of 'third-party lobbyist' under section 3 of the Lobbying Act and are therefore not subject to additional registration and information disclosure requirements. This is consistent with the current approach taken by the NSWEC and with the approach taken in:

- Queensland (where entities that carry out incidental lobbying activities such as legal practitioners and accountants are excluded from the definition of 'lobbyist' under section 41 of the *Integrity Act 2009*),
- South Australia (where legal practitioners, accountants and financial advisors are excluded from the definition of 'lobbying' under section 4 of the *Lobbyists Act 2015*), and

[1] See http://www.lobbyists.elections.nsw.gov.au/whoneedstoregister.

- Western Australia (where those who are engaged in a technical or professional occupation such as engineering, accountancy, town planning, medicine or law and only occasionally engage in lobbying when providing technical or professional services are exempt from the requirement to register as an accredited lobbyist under section 9 of the *Integrity (Lobbyists) Act 2016*).

It is noted that these professionals will, like all persons that engage in lobbying in NSW, continue to be required to comply with the ethical standards set out in the Lobbyists Code.

Lobbyists Code of Conduct

Part 2 of the Lobbying Act provides that the Lobbyists Code is prescribed by the Lobbying Regulation (section 5). It provides that the Lobbyists Code is to set out the ethical standards of conduct to be observed by lobbyists in connection with the lobbying of Government officials so as to promote transparency, integrity and honesty (section 6).

Most importantly, it imposes a statutory duty on all lobbyists to comply with the Lobbyists Code in connection with the lobbying of Government officials (section 7).

Two submissions made suggestions for the expansion of obligations under the Lobbyists Code.

Mr Baume suggested clause 13 of the Lobbyists Code should be put into the legislation and its meaning clearly stated for regulatory purposes. It was also submitted that the Lobbyists Code should contain clear prohibitions on:

- third-party lobbyists having any involvement in the creation or exercise of political party policy that may relate to the interests of any current or potential clients, and
- third-party lobbyists participating in or influencing selection processes for candidates for political office where that candidate, if elected, would be capable of being solicited by the lobbyist on behalf of clients. (This would not be applicable if the party allows open plebiscites of their members in selecting candidates.)

The ICAC submission notes that the 2009 ICAC Report also recommended the Lobbyist Code:

- prohibit a lobbyist or a lobbyist's client offering gifts or benefits to a government official who is being lobbied, has been lobbied, or is likely to be lobbied by the lobbyist,
- include specific duties on lobbyists to comply with meeting procedures, and
- include specific duties not to place government representatives in the position of having a conflict of interest.

Role of lobbyists in political parties

Clause 13 of the Lobbyists Code makes clear that 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.

As discussed above, section 9(3) of the Lobbying Act provides that a third-party lobbyist (or any individual so engaged) is not eligible to be registered if the person is an officer of a registered political party.

Except to the limited extent that parties are regulated by electoral legislation (in relation to registration and funding), regulating the internal conduct, management and decision-making of political parties is not properly a matter for government regulation. Parties are free to organise themselves, develop their policies and select their candidates in any manner they see fit. The prohibitions suggested by Mr Baume are more appropriately a matter for individual parties to consider, for example, if they feel that their processes for selecting candidates may give rise to a conflict of interest for those candidates, and parties should be judged by the electorate accordingly.

Gifts from lobbyists and conflicts of interest

The receipt of gifts by Ministers and Government officials and rules for managing conflicts of interest is already governed by relevant codes of conduct and legislation, including:

- the *NSW Ministerial Code of Conduct* (which is an applicable code under the *Independent Commission Against Corruption Act 1988* (NSW), giving the ICAC the power to investigate and make findings on a Minister's compliance),
- the *Code of Ethics and Conduct for NSW government sector employees* (in particular, the Mandatory Conduct part of that Code on conflicts of interest),
- the Public Service Commission's Ethical Framework (in particular, Part 2.1 on Managing Gifts and Benefits), and
- existing laws governing corrupt conduct, including the criminal law and the *Independent Commission Against Corruption Act 1988* (NSW).

Given the very broad definition now in place for lobbyists and lobbying in sections 3 and 4 of the Lobbying Act, the ICAC's proposed complete prohibition on gifts would have a very broad reach.

The codes and guidelines above highlight the ethical and corruption risks associated with relationships and influence, and provide guidance on managing those risks in a way that is more effective than a simple prohibition on giving or accepting a gift or benefit.

Meeting procedures

Special procedures for meetings with lobbyists are set by the Premier and/or individual Departments (e.g. the Department of Planning and Environment) tailored to particular circumstances, to address particular risks.

For example, M2014-13 *NSW Lobbyist Code of Conduct* directs that a NSW Government Official must not permit lobbying by a lobbyist whose name has been placed on the Lobbyists Watch List, unless:

- 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
- 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.

The Department received no evidence during the consultation phase of its review to suggest that the relevant meeting procedures are not being complied with.

Register of third-party lobbyists

Part 3 of the Lobbying Act provides that the NSWEC is to establish and publish a Register of Third-Party Lobbyists (the ***Lobbyists Register***) that includes specified information. It sets out the procedure for registration, including circumstances where the NSWEC must register a third-party lobbyist and where it may cancel or suspend registration.

The Lobbyists Register established by Part 3 informs the community about registered third-party lobbyists in NSW and the interests that are being represented in the lobbying of Government officials, which is central to the transparency aims of the Lobbying Act.

Scope

Two submissions (ADJ and ICAC) proposed that the requirement to register should be expanded to all lobbyists, including churches, charities, NGOs and companies, not just third-party lobbyists. It was proposed that private individuals, being natural persons seeking assistance with constituency matters, should be excluded from the registration requirements (ADJ).

Two submissions proposed that the requirement to register should be expanded to include professional services firms that advocate on behalf of their clients, including accounting, town planning and licensing consultants (APGRA). It was submitted that the Lobbyist Register is not capturing the many accountants, lawyers, management consultants and financial advisors who lobby government on behalf of their clients (PRIA).

Four submissions received during the RIS consultation also supported broader registration requirements, including for:

- all 'lobbying entities' (ICAC) (this term is defined in the ICAC's 2010 report to mean a body corporate, unincorporated association, partnership, trust, firm or religious or charitable organisation that engages in a lobbying activity on its own behalf),
- all lobbying organisations (stakeholders, action groups, churches, charities, NGOs) (ADJ),
- professional services firms that do not market or brand themselves as professional government relations practitioners but nonetheless advise and advocate to government on behalf of their client (AGPRA), and
- industry associations and trade unions (1st State).

While the ethical obligations set out in the Lobbyists Code currently apply to all lobbyists, the registration requirements only apply to third-party lobbyists. The aim of the registration and disclosure requirements is to improve transparency by ensuring that the public is aware of whose interests are being represented when third-party lobbyists communicate with government. The same transparency issues do not arise in relation to other lobbyists, as it is clear whose interests are being represented when a person or organisation is communicating with government on its own behalf. Accordingly, extending the registration requirements to all lobbyists would involve a significant increase in regulatory burden with little benefit in terms of transparency.

Information about lobbying activities

The ICAC also submitted that the Lobbyists Register should include more comprehensive information about specific lobbying activities. Lobbyists should post (in an online, self-managed public register) the following details:

- The month and year in which the lobbying activity occurred.
- The identity of the agency or ministry lobbied.
- The name of the senior government official lobbied.
- In the case of third-party lobbyists, the name of the clients for whom the lobbying occurred, and any related entities that would benefit.

Other submissions suggested that the Lobbyists Register should include disclosures of all lobbyists interests (Fuller), and a description of what is sought by the lobbyist and its potential monetary value (ADJ), and that legal professional privilege or commercial-in-confidence claims should not be available to defeat a disclosure (ADJ).

Submissions from peak lobbyist bodies (PRIA and APGRA) support the Lobbyists Register as currently operated. They consider that it delivers the intended transparency of client representation by third-party lobbyists, is not overly burdensome or expensive, and is operated effectively and efficiently by the NSWEC.

The ICAC's concerns about the transparency of lobbying activity are largely addressed through M2015-05 *Publication of Ministerial Diaries and Release of Overseas Travel Information*. This policy requires Ministers to regularly publish extracts from their diaries detailing scheduled meetings held with stakeholders, external organisations, third-party lobbyists and individuals, including the purpose of the meetings.

There is currently no exemption from the third-party lobbyist registration requirement for professional services firms that do not market or brand themselves as professional government relations practitioners but advise and advocate to government on behalf of their clients. Such firms may well fall within the definition of third-party lobbyist, being an individual or body carrying on the business (generally for money or other valuable consideration) of lobbying NSW Government officials on behalf of another individual or body. If such firms are being paid for lobbying on behalf of their clients, they will be subject to the legislative requirement to register and the additional obligations in the Lobbyists Code that apply to third-party lobbyists.

Ministerial diaries

The submissions from PRIA supported the transparency provided by the quarterly publication of Ministerial diaries, noting that diary information relates to meetings with third-party lobbyists as well as other lobbyists. Two submissions suggested improvements to this process, including that:

- Ministers should be required to reveal meetings with other Ministers and Members of Parliament, if lobbying for a particular outcome (Fuller).
- In addition to the current requirement to identify the purpose of the meeting, any vested interests should be disclosed (Fuller).
- The requirement should be extended to all meetings by all Members of Parliament with people seeking to influence government decisions (PRIA).

Submissions to the RIS consultation supported the provision of more information about lobbying activities by expanding the requirement to publish meeting information to Departments and agencies (ICAC, ADJ) and also all Members of Parliament (PRIA). Two submissions suggested the information about lobbying activities should be released at least monthly (ADJ, PRIA).

Submissions for the expansion of the scheme were carefully considered by the Department during the July 2015 review of M2014-07 *Publication of Ministerial Diaries*. It was recommended that:

> *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 (e.g. as now occurs in relation to planning decision-making within the Department of Planning).*[2]

Eligibility to be registered – the 'fit and proper person' test

The NSWEC, in its 2015 submission to the RIS consultation and its submission to the Discussion Paper, suggested that the Regulation be amended to more explicitly detail the fit and proper person test for applicants.

Part 3 (section 9) provides that a third-party lobbyist is not eligible to be registered if the person is:

- an officer of a registered political party,

[2] Department of Premier and Cabinet, *Publication of Ministerial Diaries – 12 Month Review* (July 2015), page 10.

- not a fit and proper person to be registered, or
- is otherwise ineligible under the regulations to be registered.

The elements of the 'fit and proper person' test are not currently prescribed in the Lobbying Act. The NSWEC's current practice is that a person will not be deemed 'fit and proper' if:

- they have been sentenced to a term of imprisonment of 30 months or more, or
- they have been convicted, as an adult, in the last ten years, of an offence, one element of which involves dishonesty, such as theft or fraud.

The NSWEC considers that these matters are relevant to the question of fitness and propriety in the context of the legislation. Three submissions to this review supported formalising this test in the regulation (Baume, ICAC and NSWEC). This test was originally set out in the precursor to the Lobbying Act, the *NSW Government Lobbyists Code of Conduct 2009* (at clause 8.1)

In the interests of greater transparency and clarity, it is recommended that the Regulation be amended to set out the elements of the 'fit and proper person' test.

Cancellation or suspension of registration if lobbyist becomes ineligible

Section 9(3) of the Lobbying Act provides that a third-party lobbyist (or any individual so engaged) is not eligible to be registered if the person is an officer of a registered political party, is not a fit and proper person to be registered, or is otherwise ineligible under the Regulation to be registered.

Section 9(7) of the Lobbying Act lists the grounds on which the NSWEC may cancel or suspend the registration of a third-party lobbyist (or individual so engaged), but does not expressly authorise the NSWEC to cancel or suspend registration where a third-party lobbyist ceases to meet the eligibility criteria for registration.

The submission from the NSWEC proposes that this matter should be clarified by an amendment to the Regulation. It is recommended that the Regulation be amended to provide that, where a registered third-party lobbyist subsequently becomes ineligible (for example, by being convicted of a relevant offence or becoming an officer of a registered political party), the NSWEC may cancel or suspend their registration.

Disclosure of interest in a third-party lobbyist

Section 10(1) of the Lobbying Act sets out the information required to be included in the Lobbyists Register for each third-party lobbyist. It includes the names of persons having a management, financial or other interest in the lobbyist of a kind prescribed by the regulations.

In the interests of greater transparency, the NSWEC has requested that the Regulations prescribe that persons who hold the position of Director or Secretary of a third-party lobbyist, or any other executive position (however designated), have a relevant interest for the purposes of section 10 of the Lobbying Act. It is recommended that such a provision be inserted into Regulations.

Updating information on the Register

Clause 5(1) of the Lobbying Regulation requires third-party lobbyists to update information in the Lobbyists Register within 10 business days after a change occurs to that information. In addition, clause 5(2) requires third-party lobbyists to confirm their details three times a year.

The ICAC submission opposed any change to the frequency with which the information on the Lobbyists Register is required to be confirmed by registered lobbyists, in the interests of ensuring the accuracy and currency of the information on the Register.

However, both the regulator (NSWEC) and two lobbyist organisations (PRIA and APGRA) supported the proposal to move to annual confirmations of information. They consider that the ongoing obligation to update information within 10 days of a change occurring is well understood

and observed by most registered lobbyists, and that the change would significantly reduce the compliance burden for lobbyists.

The Government considers that the confirmation process plays a role in ensuring the accuracy and currency of the information on the Register and does not propose to reduce the frequency of this obligation at this time.

Responsible Officers

The NSWEC also proposes that the role of 'responsible officer' be introduced into the legislation, and that there be a compulsory annual requirement that a lobbyist's responsible officer completes the Lobbyist Register e-learning module. This would ensure awareness of the ongoing obligation to update information within 10 days of a change occurring.

The Lobbying Act does not currently require third-party lobbyists to undertake any training or to nominate a responsible officer for compliance purposes. Online training is publicly available on the NSWEC's website and the NSWEC strongly encourages responsible officers and government officials to complete the module.

The ICAC submission supported the NSWEC's suggestion that there should be legislative provision for the nomination of responsible officers.

The APGRA submission argues that there is no compelling case for this change as the current process (whereby third-party lobbyists informally designate a responsible officer) works well in practice.

The AGPRA submission supports the provision by the regulator of online training on the Lobbyists Register, but prefers that it be undertaken by responsible officers and other lobbyists on a voluntary basis.

It is recommended that the role of responsible officer be given a legislative basis, and that responsible officers be required to complete online training annually to ensure that they are familiar with their ongoing obligations. The formalisation of the role of responsible officer will assist the NSWEC to enforce the Lobbying Act and the Regulation by ensuring that a current and informed contact officer for each registered lobbyist is available to discuss any compliance issues.

Restrictions on former Ministers and Parliamentary Secretaries

Part 6 of the Lobbying Act sets a cooling-off period for Ministers and Parliamentary Secretaries of 18 months immediately after the Minister or Parliamentary Secretary ceases to hold office. During that time, an ex-Minister or Parliamentary Secretary must not lobby a government official in relation to any official matter with which they dealt in the period of 18 months before they ceased to hold office. The maximum penalty for a breach of this provision is 200 penalty units ($22,000).

The cooling-off period is meant to ensure that there is a sufficient period of time between the performance of the Minister's or Parliamentary Secretary's public role and their private role as a lobbyist. This enhances public confidence that Ministerial decisions are made on their merits and are not compromised by extraneous considerations or personal interests such as plans for, or offers of, future employment. It also reduces the perception that ex-Minsters and Parliamentary Secretaries could influence former government colleagues to make decisions that favour their new employment or private business, or to provide them with confidential information or favourable treatment. In this way, Part 6 of the Lobbying Act reinforces the general policy objectives of honesty, transparency and integrity. It is complimented by the ethical obligations that apply to Ministers under the *NSW Ministerial Code of Conduct*, which provides that a Minister who is aware that a particular decision or other action could reasonably be expected to confer a private benefit on another Member of Parliament belonging to the same political party (or any of their family members) must give notice to the Premier of the matter before making the decision or taking the action (Sch 1, clause 16).Two submissions (Cronin and Fuller) felt that there should be a complete ban on former Members of Parliament ever becoming lobbyists.

Exemption for lobbying by Commonwealth members of Parliament and Commonwealth public officials

Under section 18(2) of the Lobbying Act, the restriction does not apply to the lobbying of a Government official by a former Minister or Parliamentary Secretary who is lobbying as a Government official or as a Member of Parliament.

Under sections 12, 13 and 15 of the *Interpretation Act 1987* (NSW), 'Government official or member of Parliament' means a NSW Government official or member of Parliament.

As some State members of Parliament have continued their careers by being elected to the Commonwealth Parliament, it is therefore recommended that the section 18(2) exemption be amended to include a former NSW Minister or Parliamentary Secretary who is now lobbying the NSW Government in their role as a Commonwealth Government official or Commonwealth member of Parliament.

Other issues

Giving reasons

The submission from Mr Baume proposes that reasons should be provided by the NSWEC in relation to all determinations made on complaints of alleged breaches, and an appeals process should be instituted.

The review agrees that the NSWEC should give complainants, and the lobbyist whose conduct is the subject of a complaint, written notice of the Electoral Commissioner's decision and the reasons for the decision. It is recommended that the Lobbying Act be amended to make this clear.

It is not considered that special avenues for appeals need to be instituted. The normal administrative law framework for review applies to the NSWEC's decisions on lobbying.

National harmonisation

The two submissions from lobbyist groups PRIA and AGPRA raised the issue of national harmonisation. There are currently eight State, Territory and Federal third-party lobbyist registers.

The submission from PRIA argued that harmonising national regulatory regimes and reciprocal recognition of registration for third-party lobbyists, or a central register would relieve a huge administrative burden and make compliance much simpler and more likely.

PRIA also supported the ban on success fees being adopted by all other Australian jurisdictions.

In its submission, AGPRA advocates adopting a single national register of lobbyist firms, practitioners and clients which it believes would present significant benefits to regulators and regulated lobbyists, eliminating duplication. Under the single national register model, individual jurisdictions could still modify the obligations imposed on the registered lobbyists in their jurisdiction.

Lobbyist regulators around Australia meet informally once a year, and last met in September 2016. The national regulators are not a decision-making body. Rather, they meet to share and learn from each other's experiences, and to identify opportunities for administrative harmonisation within the constraints of the different regulatory frameworks governing each of them. The AGPRA proposal was discussed at that meeting and the extent of the existing divergence in regulatory approach was considered to be an obstacle to significant harmonisation, in light of the other current issues competing for attention on the Council of Australian Government's agenda.

Appendix A – Submissions

List of submissions – Statutory Review

- Australian Professional Government Relations Association (Les Timar) (***APGRA***)
- ADJ Consultancy Services (Adam Johnston) (***ADJ***)
- Michael Baume AO
- George Cronin
- Louise Fuller
- Independent Commission Against Corruption (The Hon Reginald Blanch AM QC) (***ICAC***)
- NSW NSWEC (***NSWEC***)
- Northern Sydney Regional Organisation of Councils (Andrew Roach) (***NSROC***)
- Public Relations Institute of Australia (Jennifer Muir) (***PRIA***)
- Richard Quinn, Mayor of the Municipality of Hunters Hill
- Jukka Rannila
- Save Hunters Hill Municipality Coalition (Ross Williams) (***SHHMC***)

List of submissions – Regulatory Impact Statement

- ADJ Consultancy Services (Adam Johnston)
- Australian Professional Government Relations Association
- 1st State Government and Corporate Relations (1st State)
- Independent Commission Against Corruption
- NSW NSWEC
- Public Relations Institute of Australia