



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Mr Roy Waldon  
The Solicitor to the Commission  
Independent Commission Against Corruption  
GPO BOX 500  
SYDNEY NSW 2001

Dear Mr Waldon

**Lobbying in NSW: An Issues Paper on the Nature and Management of Lobbying in NSW**

The Law Society of New South Wales appreciates the opportunity to comment on the investigation being conducted by the Independent Commission Against Corruption (ICAC) into the nature and management of lobbying in New South Wales.

The Law Society is the peak industry body for solicitors in New South Wales.

A number of the Law Society's specialist Committees have considered the Issues Paper. These Committees include the Litigation Law & Practice Committee and Property Law Committee (collectively the Committees). The Committees' primary focus is on the role of lawyers in the context of this Issues Paper.

**Purpose of investigation**

The Issues Paper has been produced as part of ICAC's investigation of the relationship between lobbyists and public authorities and public officials "for the purpose of examining whether such relationships may allow, encourage or cause the occurrence of corrupt conduct" and to consider whether changes need to be made to the current regulatory system to reduce the likelihood of corrupt conduct.

**Current regulatory regime**

There is no specific legislation in NSW regulating the conduct of lobbyists or the conduct of public officials with whom they deal.

The New South Wales Government Lobbyist Code of Conduct was introduced in 2009. From 1 February 2009 lobbyists as defined in the Code, are required to be registered with the Department of Premier and Cabinet before they can lobby a "Government Representative" (as defined in the Code).





The preamble to the NSW Lobbyist Code of Conduct provides that the Code was established to ensure that contact between lobbyists and Government Representatives is conducted in accordance with public expectations of "transparency, integrity and honesty".

### **Definition of Lobbyist**

"Lobbyist" is defined in the NSW Government Lobbyist Code of Conduct as follows:

"Lobbyist" means a person, body corporate, unincorporated association, partnership or firm whose business includes being contracted or engaged to represent the interest of a third party to a Government Representative. "Lobbyist" does not include:

- (a) an association or organisation constituted to represent the interests of its members;
- (b) a religious or charitable organisation; or
- (c) an entity or person, whose business is a recognised technical or professional occupation which, as part of the services provided to third parties in the course of that occupation, represents the views of the third party who has engaged it to provide their technical or professional services."

The Law Society, as an "organisation constituted to represent the interests of its members" falls within the category of exclusion provided in paragraph (a) and lawyers in general into the exclusion currently provided in paragraph (c).

### **Chapter 9: What is the current NSW regulatory system?**

Issue for consideration 9.1 in the Issues Paper asks whether there are any other rules, guidelines or procedures that seek to regulate lobbying in NSW.

The Committees consider that the definitions of "lobbying" and "lobbyist" set out in Chapter 1 of the Issues Paper are so broad that they could include conduct and persons already regulated by other legislatively sanctioned processes. To take two examples:

1. Section 5 of the *Subordinate Legislation Act 1989* sets out a comprehensive and transparent regime for the preparation and publication of a Regulatory Impact Statement. The comments and submissions contemplated by section 5 would, it is suggested, be "lobbying" within the Chapter 1 definition.
2. Section 33(2) of the *Independent Commission Against Corruption Act 1989* requires the Commission to give a reasonable opportunity for a person giving evidence at the compulsory examination or public inquiry to be legally represented. It is suggested that a legal representative acting as an advocate at the Commission (or indeed at any Court or Tribunal) would be a "lobbyist" within the Chapter 1 definition.

If the exclusion in paragraph (a) of the definition of lobbyist is to be removed, then a definition of "lobbying activities" as in Section 42 of the Integrity Act (Qld) should be inserted. This definition excludes communications that are "in response to a call for submissions" or "responses to requests by government representatives for information" or statements in a public forum" all of which may apply to submissions made by the Law Society of NSW.



## **Chapter 10: What are the weaknesses of the current NSW regulatory system?**

Chapter 10 of the Issues Paper notes that the NSW Legislative Council General Purpose Standing Committee No. 4' "Report *Badgerys Creek Land Dealings and Planning Decisions*", made public in November 2009 made a number of critiques and recommendations in relation to the NSW Lobbyist Code.

A number of that Committee's recommendations are set out at page 16 of the Issues Paper.

In addition to the matters identified by the Committee, it is suggested that "there are other matters that may be considered as potential weaknesses in the current regulatory system applicable to lobbyists." These include the current exclusions for in-house lobbyists; lobbyists from peak bodies and some professions including lawyers.

### **Proposal to amend the definition of lobbyist**

The Committees strongly disagree that the current exclusions from the definition of lobbyist identified above constitute a weakness in the regulatory system requiring rectification.

The Issues Paper notes that "In determining the extent to which any lobbying activity should be regulated it is appropriate to distinguish between those activities which have a low corruption risk and those that, potentially at least, have a higher corruption risk..... To impose controls such as registration, codes of conduct and disclosure requirements across the board may unduly interfere with access to government and government agencies". The Committees agree that the very broad definition of lobbyist can be criticised as an excessive intrusion into the democratic process.

The first issue for consideration in the Issues Paper relates to the definition of "lobbyist". Those commenting are asked whether the definition outlined in that section covers "the type of lobbyist whose conduct or involvement is most likely to affect public perceptions as to transparency, accountability and fairness of decision- making."

It is not clear what objective would be achieved by removing these exclusions from the definition of 'lobbyist'. So far as addressing the risk of corruption, the Committees suggest that in the case of an industry association, such as the Law Society, such risks are extremely low. Member organisations, of their very nature, represent members with numerous, often competing or conflicting, interests. Such organisations have nothing to gain in advancing the commercial interests of individual members or sectional interests and are accountable to their members in relation to lobbying that they carry out.

Any lobbying, however defined, carried out by the Law Society, on behalf of its members, demonstrates the qualities required to meet public expectations of "transparency, integrity and honesty". The existing disclosure regime adopted in relation to Law Society lobbying activity ensures transparency. Disclosure of the content of Law Society submissions is made by the Law Society in its annual report to the Attorney General, as part of the Law Society's own annual report, by publication of submissions in a publicly accessible section of the Law Society's website and by reporting on lobbying activity in a dedicated column in the Law Society's monthly journal circulated to over 20,000 of its members.



Lawyers are engaged by clients to offer legal advice and to represent the client's interest in proceedings or transactions. Given the lawyer's role as advocate and advisor to his or her client, a lawyer's conduct in providing such professional services is unlikely to offend public perceptions of transparency, accountability and fairness of decision-making.

Lawyers individually are subject to a very prescriptive regulatory regime. It is very difficult to see how imposing another regulatory regime, such as the Code, would make an individual any more accountable for any corrupt conduct. Existing penalties with far reaching consequences for a professional's ability to practice their profession already exist which address professional misconduct issues such as corrupt conduct.

The Committees consider that a case has not been established demonstrating the need to expand the definition of "lobbyist" to include groups representing the interests of its members, such as the Law Society, or professionals representing the interests of third parties as part of the professional services they provide, such as lawyers, as a strategy to address a risk of corrupt behaviour.

### **Chapter 19: Should lobbyists be prohibited from serving on government committees or boards?**

Solicitors from time to time apply (or are invited) to serve on government committees or boards. Such committees, often styled "advisory councils" or "liaison committees", include some specifically mentioned in legislation (to take one example, the various advisory committees referred to in Part 2 Divisions 4 to 9 of the *Fair Trading Act 1989*). The Committees consider that a definition of "lobbyist" which included solicitors, coupled with a prohibition of lobbyists serving on government boards or committees, would deprive those boards or committees of expertise and input which has proved valuable in the deliberations of, and outcomes achieved by, those committees or boards.

#### **General comments**

The Litigation Law and Practice Committee (Committee) also considered the wider issue of regulation and found aspects of the proposed regime to be unduly prescriptive, such as the requirement that a lobbyist disclose the matter, timing and intended recipient of lobbying activities, as well as the lobbyist's financial information. Similarly, it is not always appropriate that the Premier's report include such detail as the names of the lobbyists, the date of contact, meeting attendees and the issues discussed. Similarly, the prohibition on lobbyists serving on government committees or boards, or holding government-funded position is considered to be overly restrictive. The issues are further complicated by the attempt to define 'lobbyist' or to distinguish between a lobbyist and a consultant.

The Committee is of the view that particular aspects of the Code should remain, specifically that there be no requirements that records of lobbying activity be published or that lobbyists disclose income from lobbying. Notably the Code is silent on the issue of payment of success fees to lobbyists, and the Committee submits that there is no justification for a lobbyist to charge such a fee. The only requirement should be that gifts are disclosed.

**Conclusion**

Thank you once again for the opportunity to comment on the Issues Paper. I am happy to discuss the Committees' comments further at your convenience.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Mary Macken', written over a horizontal line.

*pm*  
**Mary Macken  
President**