



information
and privacy
commission
new south wales

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Dear Chief Commissioner,

THE REGULATION OF LOBBYING, ACCESS AND INFLUENCE IN NSW: A CHANCE TO HAVE YOUR SAY

The purpose of this correspondence is to provide a submission to the NSW Independent Commission Against Corruption (ICAC) in response to its Discussion Paper on the regulation of lobbying, access and influence in NSW. The following comments are provided for consideration. These comments are made in relation to the issues discussed in the paper as a whole.

Democracy and lobbying

The Discussion Paper notes the democratic role of direct lobbying and says that '[d]irect lobbying is essential to the proper workings of democracies.'¹ In writing of the crises that face democracy, Professor AC Grayling has noted that the principle that underlies democracy 'is that it gives the enfranchised an important say in the running of their society, through mechanisms which allow for peaceful changes of government.'² Key to giving citizens a voice and safeguarding democracy is ensuring that we all are fully informed. This can be achieved by promoting principles of transparency, accountability, integrity, fairness and public interest.

The issue of lobbying was considered by the ICAC in 2010 and since that time significant developments have occurred that present new risks to democracy and importantly highlight a recognised need to actively advance the principles of Open Government.

The Transparency International Corruption Perceptions Index shows that Australia has gradually declined in the score that it receives and in its position on the Index. When the Index was first launched in 1995, Australia ranked at 7, and now ranks at number 13. In the face of a decline in trust, it is essential to bolster access to information, transparency and accountability by public institutions and public office holders. This in turn will promote integrity and the public trust.

¹ Dr Yee-Fui Ng and Professor Joo-Cheong Tham, *Enhancing the Democratic Role of Direct Lobbying in New South Wales: A Discussion Paper Prepared for the New South Wales Independent Commission Against Corruption* (2019) 6.

² Grayling, AC, *Democracy and its Crisis* (Oneworld Publications, 2017) 9.

The Government Information (Public Access) Act 2009

NSW governments have recognised that many agencies, statutes and soft law contribute to an effective integrity regime. The structural independence of these agencies, accountability to Parliament and the exercise of independent discretion provide a clear and consistent configuration that supports integrity.

Each agency plays a vital role in upholding integrity and within NSW there is an effective ongoing partnership established through legislated mechanisms including referral powers and through informal mechanisms such as the Integrity Agencies Collaboration Group.

The *Government Information (Public Access) Act 2009* (NSW) (GIPA Act) establishes a proactive, open approach to providing access to government information in NSW. Section 3 of the GIPA Act details the object of the GIPA Act, which is to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective.

The GIPA Act:

- authorises and encourages the proactive release of information by NSW public sector agencies
- establishes that members of the public have a legally enforceable right to access government information
- ensures that access to government information is restricted only when there is an overriding public interest against releasing that information.

The GIPA Act applies to all NSW government agencies, Ministers and their staff. It also extends to local councils, state-owned corporations, courts in their non-judicial functions, and to certain public authorities such as universities.

Under section 18 of the GIPA Act it is mandatory for agencies to proactively release information about their structure, functions and policies. This information is required to be made publicly available free of charge on the agency's website, and is known as 'open access information'. Agencies are encouraged to proactively and informally release as much other information as possible. An access application (also known as a formal application) should only need to be made as a last resort. Where access applications are needed, the GIPA Act outlines the process that applicants and agencies should follow, as well as the options for reviewing decisions about an access application.

Transparency – Open Government

The guiding principle of the GIPA Act is to make information more accessible to the public. The GIPA Act embodies the general presumption that the disclosure of information is in the public interest unless there is a strong case to the contrary.³

³ Information and Privacy Commission NSW, *Report on the Operation of the Government Information (Public Access) Act 2009 : 2010-2013* (2013) 6.

This places the GIPA Act at the centre of the endeavour to achieve transparency and integrity in government. This was first outlined in the then Premier's Agreement in Principle speech when introducing the GIPA Bill to Parliament, when he said that the GIPA Act would 'vastly improve the transparency and integrity of Government in New South Wales.' The then Premier also said that the Information Commissioner would be an independent champion of Open Government and that the 'culture of Government secrecy has to end and that the public's right to know should be respected.'⁴

The right to access information and independent oversight of that right is recognised as a core feature of a healthy pro-integrity system.⁵ Within NSW the GIPA Act and the *Government Information (Information Commissioner) Act 2009* (GIIC) play an important role in corruption prevention and operate to achieve pro-integrity outcomes through both *ex ante* and *ex post* disclosure mechanisms including:

- Mandating proactive disclosure of government information such as returns of interest of councillors, designated persons and delegates and government contracts (Part 3 Open access information)
- Providing avenues for redress including investigation of complaints regarding the exercise of information access functions and review rights in respect of information access decisions.

The combined effect of these provisions ensures that the Information and Privacy Commission is well placed to act responsively and, informed by data, act proactively to address compliance breaches, cultural impediments and emerging threats to the right to access information.

Oversight agencies are, like service delivery and other agencies increasingly challenged by resource constraints. However in the context of integrity promotion and oversight agencies technology has not of itself offered a solution to investigatory processes. Rather technology has offered opportunities to better identify risk or patterns that detect emerging risk. It is this technology that is particularly useful to oversight agencies in fulfilment of their responsibilities. However these technologies are largely dependent upon data. Accordingly, transparency measures including reports, registers and declarations provide the foundation of evidence and importantly data from which risk identification and mitigation can develop and ultimately safe guard against corruption.

Lobbying

In NSW a third-party lobbyist is not eligible to be registered if they have been convicted (within the previous ten years) of an offence involving fraud or dishonesty.⁶

In the United States, a scandal involving fraud perpetrated by lobbyists has brought issues of integrity and transparency in lobbying to the public's attention.⁷

⁴ Agreement in Principle speech, Premier and Minister for the Arts, 17 June 2009.

⁵ AJ Brown, 'The Fourth Integrity Branch of Government: Resolving a Contested Idea' Presidential Address (Speech delivered at Australian Political Studies Association 2018 Conference and International Political Science Association World Congress of Political Science, Brisbane, 24 July 2018).

⁶ *Lobbying of Government Officials Act 2011* (NSW) section 9(9).

The re-registering of a lobbyist convicted of offences relating to fraud and bribery of public officials recently led the United States to pass the Justice Against Corruption on K Street Act of 2018 (JACK Act). It requires disclosure by lobbyists of convictions for bribery, extortion, embezzlement, illegal kickbacks, tax evasion, fraud, conflicts of interest, making false statements, perjury, or money laundering. In introducing the Bill, Senator Kennedy said that "Political leaders and businesses need to know the backgrounds of those who are trying to influence public policy."⁸

Moreover, transparency, integrity and trust are enhanced when *citizens* know the backgrounds of those who are trying to influence, or are shaping, public policy and on whose interest and behalf they act.

In April 2019, Transparency International and Griffith University released their draft report: *Governing for Integrity: a blueprint for reform*.⁹ This draft report presents draft recommendations in relation to upholding public integrity and controlling corruption.

Relevantly, Recommendation 10 of the report relates to *lobbying and access*. It recommends:

That the Commonwealth, States and Territory parliaments each legislate to **eliminate undue influence by vested interests in parliamentary and ministerial decision making**, through provisions including:

- Stronger, more enforceable, independently administered registration and code of conduct requirements for lobbying activities (including in-house personnel)
- Real-time publication of records of lobbying activities, including diaries of ministers, ministerial staff and designated officials
- Information, training and support for community organisations with limited skills or resources necessary to lobby in the public interest
- Prohibition on the purchase of ministerial access or use of government resources as part of political party fundraising or electoral campaigns
- Express requirements for compliance with lobbying rules in parliamentary and ministerial codes of conduct, including published records and statements of reasons for all significant ministerial decisions

⁷ See, for example PBS Newshour, *Rise and Fall of Jack Abramoff* <<https://www.pbs.org/newshour/show/rise-and-fall-of-jack-abramoff>> and The University of Texas at Austin, *Abramoff: Lobbying Congress*, Ethics Unwrapped <<https://ethicsunwrapped.utexas.edu/case-study/abramoff-lobbying-congress>>.

⁸ See <<https://www.kennedy.senate.gov/public/press-releases?ID=7E18D57F-FED1-4605-A7AB-099AE44AA3AE>>.

⁹ Brown, A J et al (2019) *Governing for Integrity: a blueprint for reform*. Draft report of Australia's Second National Integrity System Assessment. Griffith University & Transparency International Australia.

- A quarantine period of 3-5 years after serving in executive office, during which a former minister may not accept any substantial benefit from any entity or related entity with which they dealt in their portfolio.

The draft report also includes a copy of a ten-point plan for democratic regulation of funding of political lobbying.¹⁰ The ten points cover:

- Register of Lobbyists
- Disclosure of lobbying activity
- Improved accessibility and effectiveness of disclosure
- Code of conduct or lobbyists
- Stricter regulation of post-separation employment
- Statement of reasons and processes
- Fair consultation processes
- Resourcing disadvantaged groups
- An effective compliance and enforcement regime
- A vigilant civil society.

Any view to further regulating lobbying might consider the draft report in its application to lobbying and the objective of achieving maximum integrity decision making by public officials.

Lobbying and the GIPA Act

The Discussion Paper notes the recommendations of the 2010 ICAC Lobbying Report¹¹ (the Lobbying Report), including Recommendation 4, which the Paper notes has not been implemented.

Recommendation 4

The Discussion Paper recognises that Ministers fall within the definition of agency under the GIPA Act.¹² Recommendation 4 is that the NSW Government amend the definition of “open access information” in the GIPA Act to include records of Lobbying Activities for which there is no overriding public interest against disclosure.

Examination of the regime through which proactive disclosure by agencies is enlivened under the GIPA Act is best satisfied through the following provisions:

- Section 6 – mandates public release of open access information (unless there is an overriding public interest against disclosure) to be provided on a **website**

¹⁰ Joo-Cheong Tham, 'Democracy before dollars: The problems with money in Australian politics and how to fix them', *Australian Quarterly* Vol 90, Issue 2 (Apr-June 2019) 20 in Brown, A J et al (2019) *Governing for Integrity: a blueprint for reform*. Draft report of Australia's Second National Integrity System Assessment. Griffith University & Transparency International Australia, 22.

¹¹ NSW Independent Commission Against Corruption (2010) *Investigation into corruption risks involved in lobbying*.

¹² GIPA Act section 4.

maintained by the agency (unless to do so would impose unreasonable additional costs on the agency)

- Section 18 – provides an exhaustive list of information that constitutes *open access* information
- Part 3 GIPA Regulations – provides additional open access information relevant to Ministers, in particular media releases and details of overseas travel undertaken by a Minister.

In practice NSW Ministers do not maintain websites relevant to their Ministerial offices. Rather the NSW Parliamentary website operates as the vehicle through which contact with a Minister's office can be achieved.

Accordingly, in the absence of an 'agency website' the prescribed open access information for Ministers may be located the relevant Department's website (media releases) or, as is the case with Ministerial overseas travel on NSW Department of Premier and Cabinet website.

Any recommendation relevant to open access requirements should be informed by the operation of these provisions and the practice adopted to satisfy these requirements of open access provisions.

Recommendation 5

The Paper further notes that Recommendation 5 of the Lobbying Report has been implemented with respect to the public release of Ministerial diaries. That recommendation is that all agencies subject to the operation of the GIPA Act proactively release lobbying information for which there is no overriding public interest against disclosure, including by publishing that information on their websites. A review of the Department of Premier and Cabinet website indicates that Ministerial diaries are being published on a quarterly basis.¹³

The Discussion Paper notes the option of requiring those who are lobbied to create records of the lobbying activity, and for those records to be accessible to the public through the operation of the GIPA Act. While the media, other parliamentarians and some members of the public may have the knowledge to make a GIPA access application, full transparency is only achieved when the largest number possible of members of the public are given the opportunity to gain awareness and insight. The Report and Discussion Paper envisage this to be accomplished by requiring the lobbied to publish detailed records on their website, as open access information. Implementation of this option would align with the object of the GIPA Act.

The Discussion Paper notes that NSW Members of Parliament may undertake secondary employment, including as a paid lobbyist, provided that the employment and income derived from it are declared.

¹³ Premier & Cabinet, *Ministers' Diary Disclosures*

<<https://www.dpc.nsw.gov.au/publications/ministers-diary-disclosures/>>.

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Proactively including such declarations as part of mandatory open access has the benefit of promoting transparency, openness and trust in government, consistent with the broader objectives of the GIPA Act. Active publication of lobbying activity is essential to transparency. Provision of this information facilitates active citizen engagement with policy and decision-making, and facilitates a more informed participatory democracy.

Declarations and other pro-integrity measures have been implemented in respect of Local Councillors under the *Model Code of Conduct for Local Councils in NSW 2018*. Councils have six months from the date of prescription, (14 December 2018 – 14 June 2019) to adopt a code of conduct and procedures based on the prescribed Model Code of Conduct and Procedures. The Code in part, applies to advisers (see clause 4.16-4.17).

Whilst the Code does not deal specifically with lobbying, its requirements include declarations of non-pecuniary interests and political donations. It also provides a range of mechanisms to address the potential adverse impacts of lobbying, for example under clause 3.14, which states:

In exercising land use planning, development assessment and other regulatory functions, you must ensure that no action, statement or communication between yourself and others conveys any suggestion of willingness to improperly provide concessions or preferential or unduly unfavourable treatment.

Public interest

Under the GIPA Act, all government agencies must disclose or release information unless there is an overriding public interest against disclosure.

The NSW Deputy Ombudsman, Chris Wheeler, has written that '[a]lthough the term ["public interest"] is a central concept to a democratic system of government, it has never been definitively defined either in legislation or by the courts.'¹⁴ The High Court has noted that '[w]hen used in statute, the term ["public interest"] derives its content from the "subject matter and the scope and purpose" of the enactment in which it appears.'¹⁵

While 'public interest' is rarely defined, attempts have at times been made to provide a list of public interest matters. In the GIPA Act, section 12 states that there is a general public interest in favour of the disclosure of government information. The note to section 12(2) provides a list of examples of public interest considerations in favour of disclosure of information.

Fundamental to the obligation to release information is the overarching presumption in favour of disclosure of information (GIPA Act section 5). This is the starting point for all decisions regarding information access by: mandatory proactive disclosure; authorised proactive release; information release; and in response to access applications.¹⁶

¹⁴ Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 *Australian Institute of Administrative Law Forum* 12, 14.

¹⁵ *Hogan v Hinch* [2011] HCA 4 (10 March 2011).

¹⁶ GIPA Act Part 2 Division 1.

Accordingly, when deciding whether to release information, decision makers must commence the public interest test from the position of acknowledging the presumption in favour of disclosure of information. For example, section 9(1) of the GIPA Act provides that a person who makes an access application for government information has a legally enforceable right to be provided with access to the information in accordance with Part 4 of the Act unless there is an overriding public interest against disclosure of the information.

A determination as to whether there is an overriding public interest against disclosure is to be made in accordance with principles set out in section 15 of the GIPA Act. Those principles ensure that decisions are free from political or other interference thereby preserving the duty of decision makers to uphold the public interest.

The GIPA Act also provides mechanisms to preserve sometimes competing legislated rights and still achieve the ultimate purpose of releasing information in the public interest. These mechanisms include the ability to redact information to preserve commercially sensitive information or maintain personal privacy. The GIPA Act also encourages the creation of a new record or data set to facilitate the release of information.

Importantly the public interest test as it applies to access to government held information is oversighted and reviewed independently of government. The Information Commissioner is appointed by the Governor and reports to a Joint Parliamentary Committee.

Collectively these features help build institutional integrity, which is secured by accountability, transparency and access to information.

Methodology for risk assessment

The Discussion Paper notes the principle of fairness and recognises that direct lobbying is essential to the proper workings of democracies. To achieve fairness in the context of access to public officials, a blanket framework may be unsuitable. Rather, in promoting the integrity of direct lobbying it may be necessary to develop a methodology for risk assessment. This could involve a framework that would be constructed to focus treatment in a risk orientated and proportionate manner so as to minimise harm. That approach may serve to inform recommendations that respond to the context and thereby operate where applicable to minimise potential harms and whilst also ensuring that the benefits of direct lobbying are realised.

Factors that may be relevant to consider in identifying risk and responsive treatments could include:

- The principle to be promoted. For example, transparency, accountability, fairness, responsiveness, integrity, upholding individual or collective rights.
- The subject matter of the lobbying activity. For example, a publically identified government priority, a significant public asset, a development application, an unsolicited proposal.

- The lobbying entity. For example a former Minister, a lobbying firm, an industry representative.
- The lobbied individual. For example the responsible Minister, another Member of Parliament, a Ministerial advisor.
- The form of regulation. For example internal, external or both.

Such a framework may help to direct the conversation to consider the types of lobbying that are desirable for a democracy, and the types that are to be confronted and resisted.

Further comments

To address the decline in trust in public officials, citizens need to be fully informed. Principles of transparency, accountability, fairness, responsiveness, integrity and rights can be best realised when citizens are empowered, and this is achieved through transparency.

Making government open, accessible, fair and transparent can increase citizen engagement. With citizen input to government policy and service delivery, a more effective democracy ensues.

Contact details

I hope these comments will be of assistance. If you have any questions regarding these comments, please contact Sonia Minutillo, Director Investigation and Reporting on 1800 472 679 or by email at [REDACTED]

Yours sincerely

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Elizabeth Tydd
IPC CEO, Information Commissioner
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