

The Regulation of Lobbying, Access and Influence in NSW ("Operation Eclipse")

NCOSS Submission

May 2019

Introduction

NCOSS is the peak body for the community sector in NSW. Our vision is for a NSW free from poverty and disadvantage.

As required by our constitution, we pursue this end via a range of activities which include: influencing social and economic policy; advocating for residents in NSW to have access to services and resources to mitigate the impacts of poverty; developing informed public opinion; representing the needs of disadvantaged and vulnerable individuals and groups to all levels of the government and non-government sector, the media and the general public; and representing the non-government sector to the government, businesses, philanthropic networks and the public.¹

This highlights the central role that advocacy and input to public policy and decision-making processes play in pursuit of the NCOSS mission.

The community sector in NSW (and elsewhere) is undergoing significant reform and upheaval as Government transitions from direct service provision to the purchasing of services from non-Government and community-based organisations (referred to as 'NGOs' in this submission). This change shifts greater responsibility and risk to the community sector. The move to consumer-driven care and individualised funding packages, data driven decision-making, and commissioning for outcomes are some of the changes that NGOs are grappling with in a constantly evolving and complex landscape.

In this environment, the importance of the sector in addressing complex social issues and meeting the needs of vulnerable and disadvantaged communities continues to grow. Along with this, the need for the sector (and NCOSS) to be able to advocate, influence policy processes, and bring its expertise and experience to bear on decision-making, is paramount.

NCOSS welcomes this opportunity to contribute to the work of ICAC to improve the transparency and fairness of lobbying activities and decision-making processes in NSW. The recognition that disadvantaged groups, as identified in the Discussion Paper, require support from Government in their lobbying efforts is particularly important. There is currently a disparity between the resources available for NGOs and community groups to dedicate to advocating and lobbying and those available to many industries and professional lobbyists. NCOSS supports an approach that ensures fairness, transparency and a level playing field for all who seek to influence government.

Over the last few years NCOSS has undertaken grassroots consultation in over 24 communities across metropolitan and regional NSW and regularly convened a range of expert advisory groups – including the Forum of Non-Government Agencies, Regional Forum, Health Equity Alliance and Children, Young People and Families Alliance. NCOSS also recently held a forum for our members to discuss Operation Eclipse and provide input into our submission.

This submission is therefore informed by the expertise and experiences of our members, expert advisory groups, the broader social services sector and their clients.

¹ NSW Council of Social Service 2017, Constitution of Council of Social Service of New South Wales, dated 9 November, available at: <https://www.ncoss.org.au/about/governance>

NGOs: Advocates or Lobbyists?

Many NGOs would not consider advocacy activities that seek to influence government decisions that benefit the people they deliver services to, as “lobbying”. In NCOSS consultations with NGOs there was concern expressed that failing to distinguish the activities of organisations acting in the public interest from lobbyists representing for-profit interest groups, misrepresents the intention that underpins advocacy activities of many NGOs. It also obscures the difference in power relations between for-profit lobbyists, who represent commercial interests and benefit from greater resources to dedicate to their activities, and groups that seek to represent the interests of poor and disadvantaged citizens.

NCOSS supports the development of an approach that improves the transparency, integrity and fairness of all lobbying activities while clearly distinguishing between lobbying by for-profit interest groups and advocacy activities conducted by NGOs.

Arguably, NGOs who engage in advocacy already fall within the definition of “lobbying” under the NSW Lobbyist Code of Conduct. Section 4(1)(a) states:

‘[L]obbying a NSW Government official means communicating with the official for the purpose of representing the interests of others in relation to ... legislation or proposed legislation or a government decision or policy or proposed government decision or policy...’

The definition of lobbying further extends to ‘any such communication for the purpose of representing community interests’.²

A key question is therefore whether and how NGOs – who advocate in the public interest and for public benefit, and in doing so enable a robust representative democracy – should be captured by lobbying laws that apply to for-profit, third party lobbyists.

What is advocacy?

Advocacy involves the development of public policy, the promotion of, or opposition to particular laws, policies, practices or decisions of governments and awareness- raising.³ Further, ‘Civil society advocacy is understood as key to supporting the “robust functioning of democracy”, both by cultivating democratic practices among members and participants, and, more importantly in our view, by ensuring that the most diverse range of views and voices is represented in policy debate.’⁴

Advocacy also plays a crucial role in improving service delivery. The community services sector is one where increased demand for services is not a positive thing – particularly when that demand cannot be met, as is so often the case. Advocacy is a key channel through which the underlying and systemic causes of demand of services can be highlighted. NGOs who are community service providers and their peak representatives therefore need the opportunities to share their expertise with decision makers.

Advocacy can take many forms, from undertaking research, to attending meetings with MPs and bureaucrats, participating on advisory groups and steering committees, to public campaigns and use of the media. It is important that these activities continue, so that the needs of marginalised and

² NSW Lobbyist Code of Conduct, section 2(c)

³ <https://www.acnc.gov.au/tools/guides/charities-elections-and-advocacy>

⁴ Carson, Dr. A. & Maddison, A/Prof. S. 2017, *Civil Voices: Researching Not-for-Profit Advocacy*, University of Melbourne, Victoria, pp15

disadvantaged groups, who are traditionally locked out of the policy process, are represented to decision makers.

Public interest

The primary difference between NGOs engaged in advocacy and for-profit lobbyists is that most NGOs' advocacy is aimed to influence government to act in the *public interest*. Unlike for-profit lobbyists, NGOs act as a conduit for information and voices from the *public* that often go unheard. It should be noted that NGO advocacy is also often informed by the expertise of service providers, research and evidence and expert opinion.

Although the 'public interest' is a central concept to our democratic system, it has no clear definition. The public interest has been described as '...a convenient and useful concept for aggregating any number of interests that may bear upon a disputed question that is of general – as opposed to merely private – concern'.⁵ Most attempts to describe the public interest refer to the community as a whole, the 'common good' or 'society'. However these definitions ultimately fail to identify the interest of groups, or sections of the population that do not fall into the category of the majority, for example, people living with disability or people experiencing poverty and disadvantage.

It is arguably easier to understand the concept of the public interest by looking at what it is *not*; it is not a private interest, personal interest or "'other motivation' type issues that focus on the private, personal or partisan interests of the decision-maker".⁶ Guidance can also be drawn from the definition of *public benefit* under the *Charities Act 2013* (Cth) (the Charities Act) which replaced the common law definition of charity as 'an entity that is a not-for-profit and the purposes of which are charitable and for the public benefit.'⁷ The Charities Act contains a list of certain purposes presumed to be for the public benefit which include preventing and relieving sickness, disease or human suffering, advancing education and relieving poverty.⁸

Public interest or benefit is enshrined in many NGOs' Constitutions. For example, NCOSS's Constitution states that our purpose is to:

1. Advance social or public welfare; and
2. Other purposes beneficial to the general public;

by undertaking activities including: working towards eliminating poverty in NSW by influencing social and economic policy; and advocating for all NSW residents to have access to services and resources that mitigate the effects of poverty.

NCOSS's Constitution also stipulates that it must pursue charitable purposes only and apply its income in promoting those purposes.⁹

Not all NGOs are the same

NCOSS recognises that that not all NGOs are the same. Some exist solely for advocacy purposes, others have a dual role of providing direct service delivery alongside an advocacy function and some

⁵ Commonwealth Freedom of Information Bill, the Australian Senate Committee on Constitutional and Legal Affairs (1979).

⁶ Wheeler, C. 2006, 'The Private Interest: We know it's important, but do we know what it means?', *AIAL Forum*, No. 48, available at: <http://www.austlii.edu.au/au/journals/AIALAdminLawF/2006/2.html>

⁷ *Charity Act (Cth) 2013*, s 5.

⁸ *Charity Act (Cth) 2013*, s 7.

⁹ NSW Council of Social Service 2017, Constitution of Council of Social Service of New South Wales, dated 9 November, available at: <https://www.ncoss.org.au/about/governance>

organisations exist solely to deliver services.

All NGOs have an important role to play to ensure diverse views are represented in policy debate. For example, direct service delivery organisations may not have a core advocacy function, but often provide input into policy development through submissions, participation on steering groups and working parties, campaigns and activities designed to raise public awareness of issues.

Some NGOs are also much larger and well-resourced than most others. Some NGOs, for example, own large property holdings and may engage with decision-makers on matters related to their own land and property development, which arguably cannot be seen as advocating in the public interest.

Measures to improve transparency

Register of Third-party Lobbyists

1. Are there any examples of lobbying laws/ practices in other jurisdictions (interstate or overseas) that seem to work well?
2. Who should be required to register on the Register of Third-party Lobbyists?
3. Should there be a distinction between lobbyists on the register and lobbyists bound by the code of conduct?

Lessons from Scotland and Ireland

NCOSS strongly supports a more robust lobbying framework and considers the Scottish laws a strong model in which to seek guidance. However, careful consideration needs to be taken about where NGOs sit within this framework. Disappointingly, Scotland and Ireland's sophisticated lobbying frameworks have not been successful in distinguishing for-profit lobbying from NGO advocacy.

Ireland's *Regulation of Lobbying Act 2015* requires third party lobbyists, in-house lobbyists, representative bodies, advocacy bodies as well as any person communicating about the development or zoning of land to register as a lobbyist if they engage in relevant communication about a relevant matter. Similarly, Scotland requires anyone who has engaged in 'regulated lobbying' to be included on the lobbying register.¹⁰ A person engages in regulated lobbying if a person makes a communication that is in relation to Government or parliamentary functions, and is not a communication of a kind mentioned in the schedule.¹¹

Scotland attempts to limit types of communications that are regarded as 'regulated lobbying' in the schedule of exemptions. Section 5 exempts 'a communication made by an individual who is not making it in return for payment.'¹² This exemption would only capture volunteer-based organisations, and not paid employees working in NGO advocacy – guidance notes for the legislation make it clear that the exemption does not cover an employee making a communication in return for payment of any kind. Therefore, a similar exemption in NSW lobbying laws would need to be expanded to properly protect NGO advocacy conducted in the public interest, for public benefit.

¹⁰ *Lobbying (Scotland) Act 2016* (Scot).

¹¹ *Lobbying (Scotland) Act 2016, s 1(a)* (Scot).

¹² *Lobbying (Scotland) Act 2016, sch 5* (Scot).

The challenge for NSW

NCOSS does not want to see extra burden placed on the NGO sector. Any consideration of defining NGO advocates as ‘lobbyists’ and requiring them to be listed on the register, must also factor in the impact this could have on the NGO sector and the consequences of a weakened civil society voice. NGOs already operate in an uncertain funding environment which can give rise to a culture of self-silencing, as discussed later in this submission. In light of this, any extra barrier between NGOs and government decision-making would not be sustainable for the sector.

In contrast to a large part of the NGO sector, for-profit lobby groups have had an inequitable level of access to government decision-making. Not all for-profit lobbying is the same – there are many legitimate for-profit lobbying activities that occur – however there are also powerful big business and industry lobbyists that have an unfair advantage through their access to resources and influence, and have a history of acting in bad faith. For example, the tobacco industry has a history of influencing government policies and discrediting scientific research and evidence-based tobacco control measures.^{13,14}

Based on the above considerations, NCOSS supports a distinction between lobbyists on the register and lobbyists bound by the *NSW Lobbying Code of Conduct* (“code of conduct”). NCOSS would also support requiring all communications by for-profit entities to be registered on the Register, not just communications by Third-Party Lobbyists. Those NGOs advocating in the public interest could remain bound by the code of conduct but exempt from the Register on the basis that their work is in the ‘public interest without regard to personal, party political or other immaterial considerations.’¹⁵ This would also need to take into consideration the fact that some large, well-resourced NGOs may at times engage with decision-makers on matter of self-interest, as previously discussed.

Disclosure of lobbying activity

6. What information should lobbyists be required to provide when they register?
7. Should lobbyists be required to provide, or at least record, details of each lobbying contract they have, as well as specify the legislation/grant/contract they are seeking to influence? Should this information be provided only to regulatory agencies or be publically available?
8. How should lobbying interactions with ministerial advisers, public servants, and members of Parliament be recorded and disclosed?
9. What information should ministers be required to disclose from their diaries and when?

There are many different disclosure models that the Commission can draw and improve upon from overseas and within Australia. A disclosure framework should aim to place as much information as is practically possible in the public domain, while balancing the administrative burden between lobbyists and government and allowing for systematic comparison of lobbying activity reported by lobbyists against ministerial diaries and other sources.¹⁶

Disclosure by lobbyists

The *Lobbying (Scotland) Act 2016* provides a good example of what a lobbyist must disclose on the

¹³ World Health Organization 2008, *Tobacco industry interference with tobacco control*, Geneva

¹⁴ Chapman, S. & Freeman, B. 2014, *Removing the emperor's clothes: Australia and tobacco plain packaging*, Sydney University Press, Australia

¹⁵ Ng & Tham, above n 1, 10.

¹⁶ Ng & Tham, above n 1, 21.

lobbying Register:

- the name of the person lobbied,
- the date on which the person was lobbied,
- the location at which the person was lobbied,
- a description of the meeting, event or other circumstances in which the lobbying occurred,
- either—
 - a statement that the lobbying was undertaken on the registrant's own behalf, or
 - the name of the person on whose behalf the lobbying was undertaken, and
- the purpose of the lobbying.¹⁷

NCOSS supports a similar disclosure requirement for lobbyists as that adopted in Scotland, with the additional requirement to disclose the legislation/grant/contract they are seeking to influence.

NCOSS also supports the additional disclosure requirements outlined by Transparency International's International Standards for Lobbying Regulation:

- the ultimate beneficiary of lobbying activities; and
- any supporting documentation shared with the public officials.¹⁸

A new mechanism for lobbyists to declare this information may not be required. NCOSS strongly supports the proposal in the Discussion Paper to enhance the effectiveness of disclosure by integrating information on political donations made by lobbyists, the register of lobbyists, ministerial diaries, details of investigations by ICAC and the list of holders of parliamentary access passes into one database (subject to our position on parliamentary access passes discussed later in this submission). Viewing this information side by side also promotes systematic comparison of lobbying activity reported by both lobbyists and government.

Disclosure by the lobbied

Currently in NSW, the main source of information on the extent of lobbying occurs through the disclosure of ministerial diaries. In principle, NCOSS supports the current obligation on ministers to disclose their ministerial diaries. It is noted however that often scant information is recorded on the purpose and outcomes of meetings. The practice of simply listing the date, subject and meeting attendees does not provide the public with information on what transpired at the meeting. For example, the disclosure summary for the Minister for Planning, Minister for Housing and Special Minister of State for the period of 1 January to 31 March 2019 only includes the following information:

20/01/2019	Meriton Properties Ltd	Discuss planning and education issues
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To improve transparency and accountability of current obligations for diary disclosure, consideration should be given to the publication of more detailed information such as meeting agendas and summary of discussions.

As noted in the Discussion Paper, ministerial diaries 'do not cover official events, town hall meetings, and community functions, where lobbying frequently happens'.¹⁹ There is also inadequate transparency around meetings between Ministers and Parliamentarians which is of particular

¹⁷ *Lobbying (Scotland) Act 2016 s 6 (Scot)*.

¹⁸ Transparency International 2015, *International Standards for Lobbying Regulation*, Standard 3: Lobbying Register, available at: <http://lobbyingtransparency.net/standards/transparency/>

¹⁹ Ng & Tham, above n 1, 20.

concern because Parliamentarians are permitted to undertake secondary employment or engagements, including paid lobbying activity, provided they disclose the employment and the income derived from it.²⁰

There is further concern that disclosing the diaries of ministers does not adequately capture all lobbying activity that government are subject to, as meetings with lobbyists also commonly occur with senior government officials that are logical targets because of their power and influence in decision-making.

NCOSS supports the suggestion in the Discussion Paper that all the diaries of Chiefs of Staff, senior departmental staff and Members of the New South Wales Parliament are disclosed. It is important that disclosures are timely in order to be most effective in holding government to account for their decisions. NCOSS also supports monthly publication of ministerial diaries, as is currently the practice in Queensland.²¹

Promoting accessibility and effectiveness

11. How can disclosures of lobbying regulation best be presented and formatted to better enable civil society organizations to evaluate the disclosure of lobbying activities?

12. Should there be greater integration of lobbying related data? For example, should there be integration of:

- (i) Information on political donations made by lobbyists
- (ii) The register of lobbyists
- (iii) Ministerial diaries
- (iv) Details of investigations by the Commission
- (v) List of holders of parliamentary access passes
- (vi) Details of each lobbying contact (if reform occurred)?

13. Should the NSW Electoral Commission be required to present an annual analysis of lobbying trends and compliance to the NSW Parliament?

Accessibility of disclosure information is crucial for civil society organisations, the media and others to hold ministers to public account and to provide transparency. Currently, the NSW Electoral Commission website is not intuitive or easy to navigate. In contrast, the Scottish [Lobbying Register](#) is easy to use with the lobbyist search box right at the top of the page. It has good functionality as it enables searching by individual name or broadly by title, the date the meeting occurred or by the lobbying activity.

The Guardian's [Transparency Project](#) is also user friendly as it is visual which allows multiple sources of information to be displayed without seeming text heavy and therefore user friendly. NCOSS recommends that a transparency platform is created which combines both the Scottish lobbying register functionality with the visual platform similar to *the Guardian's* Transparency Project.

As discussed above, NCOSS supports the integration of other lobbying related data to give the public a clear picture of how decisions are made without placing unreasonable administrative burden on both lobbyist and government. NCOSS agrees that the list of transparency related data noted in question 12 should be integrated into the same platform.

²⁰ NSW Code of Conduct for Members (adopted May 2015, Votes and Proceedings, pp 53-5), cl 2 (under review); Proposed Revised Code cl 2.

²¹ Queensland Cabinet and Ministerial Directory 2019, Ministerial Diaries, Queensland Government, available at: <https://www.cabinet.qld.gov.au/ministers/diaries.aspx>

NCOSS also supports the Commission’s proposal for the NSW Electoral Commission to be required to present an annual analysis of lobbying trends and compliance to the NSW Parliament. However, there is a preference that other substantial reform that is outlined in our submission be prioritised above and over this proposal. Whilst important, NCOSS considers access to essential information on lobbying practices – how our representatives make decisions – most important. It is essential that the public, civil society and the media have access to a user friendly platform that contains detailed information on lobbying practices in NSW.

Measures to improve integrity

Regulation of the lobbyists

14. What duties should apply to lobbyists in undertaking lobbying activities?
15. Should NSW members of Parliament be allowed to undertake paid lobbying activities?
16. Should lobbyists be prohibited from giving gifts to government officials?

NCOSS supports previous recommendations from the Commission that the lobbyist code of conduct should include requirements for lobbyists to:

- Inform their clients and employees who engage in lobbying about their obligations under the code of conduct;
- Comply with the meeting procedures required by Government Representatives with whom they meet, and not attempt to undermine these or other government procedures or encourage Government Representatives to act in breach of them;
- Not place Government Representatives in the position of having a conflict of interest;
- Not propose or undertake any action that would constitute an improper influence on a Government Representative, such as offering gifts or benefits.²²

Further to the above, NCOSS supports prohibiting lobbyists from giving gifts to government officials. This constitutes an improper influence and undermines the trust in government officials acting in the public interest.

NCOSS proposes abolishing the one-year ‘Authorised Visitor’ category passes for lobbyists to the NSW Parliament. It is unnecessary for lobbyists to have unfettered, frequent access to decision-makers that is not available to other stakeholders.

Finally, NCOSS does not support NSW Members of Parliament undertaking paid lobbying as secondary employment while they are an elected representative. This is clearly a conflict of interest. NSW Members of Parliament should also be subject to a post-separation employment ban (discussed later in this submission in response to questions 21 and 23).

Regulation of the lobbied

17. Should the definition of “government official” be expanded to include members of Parliament?
18. What obligations should apply to government officials in relation to lobbying activities?
20. Should government officials be required to comply with certain meeting procedures when interacting with lobbyists? If so, what procedures are appropriate?

²² Ng & Tham, above n 1.

NCOSS supports expanding the definition of 'government official' under the lobbyist register to include local government officials and members of Parliament, as they are important players in the political process. Members of Parliament should also be required to comply with the lobbyist legislation under their Code of Conduct, similar to Ministers.

Government officials should be subject to the expanded disclosure requirements discussed earlier in this submission, in response to questions 9 and 10. NCOSS also supports the Commission's previous recommendations that government officials comply with meeting protocols including:

- A Third Party Lobbyist and anyone lobbying on behalf of a Lobbying Entity to make a written request to a Government Representative for any meeting, stating the purpose of the meeting, whose interests are being represented, and whether the lobbyist is registered as a Third Party Lobbyist or engaged by a Lobbying Entity;
- The Government Representative to verify the registered status of the Third Party Lobbyist or Lobbying Entity before permitting any lobbying;
- Meetings to be conducted on government premises or clearly set out criteria for conducting meetings elsewhere;
- The minimum number and designation of Government Representatives who should attend such meetings;
- A written record of the meeting, including the date, duration, venue, names of attendees, subject matter and meeting outcome;
- Written records of telephone conversations with a Third Party Lobbyist or a representative of a Lobbying Entity.²³

Regulation of post-separation employment

21. Should there be a cooling-off period for former ministers, members of Parliament, parliamentary secretaries, ministerial advisers, and senior public servants from engaging in any lobbying activity relating to any matter that they have had official dealings in? If so, what length should this period be?

23. Should lobbyists covered by the NSW Register of Lobbyists be required to disclose whether they are a former minister, ministerial adviser, member of Parliament or senior government official and, if so, when they left their public office?

NCOSS supports a cooling-off period for former ministers, members of Parliament, parliamentary secretaries, ministerial advisers and senior public servants from engaging in any paid lobbying in the portfolio area they worked. This cooling-off period should be 3-5 years, consistent with Transparency International Australia's recommendations.²⁴

The NSW Register of Lobbyists should also require lobbyists to disclose whether they are a former minister, ministerial adviser, Member of Parliament or senior government official and when they left their public office, consistent with the Commonwealth register.

²³ Ng & Tham, above n 1.

²⁴ 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, available at: https://www.griffith.edu.au/__data/assets/pdf_file/0028/726247/Governing-for-Integrity-Australia-2nd-NIS-Assessment-DRAFT-REPORT-April2019.pdf

Measures to improve fairness

Fair consultation processes

26. Should there be NSW Government guidelines on fair consultation processes?
27. If so, what should be provided under these guidelines in terms of these processes being inclusive, allowing for meaningful participation by stakeholders and promoting adequate responsiveness on the part of government officials?

NCOSS supports establishing NSW Government guidelines on fair consultation processes. These guidelines should be co-designed with stakeholders, including the community sector. They should also incorporate the principles of co-design themselves to ensure all critical stakeholders – from professional and lived experience experts, to service providers, to end users – are supported to participate in consultation processes and are respected as equal partners sharing expertise in the design of policy and service system reform.²⁵ This includes ensuring consultation processes are:

- Inclusive
- Respectful
- Participative
- Iterative
- Outcomes-focused

The guidelines should also include, but not be limited to, specific guidance around:

Access, inclusion and representation

- Consultation processes should take into account the specific needs of population groups, including those experiencing disadvantage. Consultation methods should therefore be adapted and tailored to support engagement with stakeholders who may not respond to traditional methods, or require assistance to understand policy issues and contribute meaningfully.
- Where possible, NSW Government agencies should partner with NGOs who have established relationships with members of the community who may be ‘hard to reach’ for consultation. They should also recognise that direct consultation with target groups is as important and necessary as consulting with representative bodies.
- NCOSS agrees with the Commission’s suggestion that there should be an obligation to ‘actively seek out a range of voices’ and further suggests that the guidelines could be accompanied by examples of best practice in other jurisdictions. For example, the [Parker Police Department](#) in Colorado is a strong example of community engagement using a range of methods and touchpoints to reach diverse groups within the community.²⁶ Their approach incorporates a mix of face-to-face engagement and community programs – for example through their ‘Cram the Cruiser’ program which supports a local food bank and identifies community needs – and online tools, such as their online engagement platform that allows police and residents to explore issues and solve problems together.

²⁵ NSW Council of Social Service 2017, *Principles of Co-design*, available at: <https://www.ncoss.org.au/capacity-building/sector-support/templates-and-resources/principles-of-co-design>.

²⁶ Cantrell, J. & Nagl, A. 2018, ‘Parker Police are on the Map for Community Policing and Engagement’, Community Engagement Blog, *Bang The Table*, 30 May, available at: <https://www.bangthetable.com/blog/parker-police-map-community-policing-engagement/>

- Many NGOs may be hesitant to participate in consultation processes for a range of reasons discussed later in this submission. The guidelines should therefore include a commitment to the principle that all stakeholders have equal right to be heard during consultation without fear of reprisal, financial or otherwise.

Transparency and responsiveness

- There should be a commitment to transparency throughout public consultation processes. The Independent Review of Out of Home Care in NSW (the 'Tune Review') is a recent example of poor practice where the Review's report filed in 2016 was kept from the public for two years, until mounting pressure from community sector organisations and NSW Parliament moved the NSW Government to release it in June 2018. Timely release of information that informs policy change and reform is in the public interest and crucial to a strong democracy. Lack of transparency compounds information asymmetry and limits the capacity of stakeholders to analyse, develop and provide thoroughly informed, evidence-based policy advice. Some NGOs are funded to do this and require access to timely information to meet deliverables.
- Timeframes and stages of the consultation process – including how and when the government agency will respond to stakeholders and publish consultation outcomes – should be clearly articulated and published at the commencement of consultation processes. This should be accompanied by a statement explaining how the consultation process has adhered to the guidelines.
- It is not uncommon for NGOs invited to represent the community sector on an advisory committee or working group convened by Government to be required to sign a confidentiality agreement. In many instances this feels like a blunt and unnecessary legal instrument that prohibits proper consultation, sharing of views and consideration of relevant issues.

Timing considerations

- There should be minimum timeframes for seeking input, such as six weeks. Some consultations have in the past only allowed stakeholders two weeks to lodge a written submission, which is insufficient time for many organisations or individuals with limited resources. The OECD Draft Best Practice Principles on Stakeholder Engagement in Regulatory Policy point to many OECD countries requiring or recommending minimum periods of 30 or 60 days for public comment.²⁷
- Consultations over the Christmas and New Year shutdown period should be avoided. Organisations are often short-staffed during this time and less able to contribute meaningfully.
- There needs to be an awareness and coordination of concurrent consultations on similar or related policy matters, impacting the capacity of stakeholders who are likely to contribute to both. For example, recently submissions to the Their Futures Matter discussion paper (on access to the child protection system) were due on the same date as submissions to the Regulating Child Safe Organisations discussion paper, making it logistically difficult for stakeholders in the child protection space to provide meaningful input to both.

²⁷ OECD 2017, Best Practice Principles on Stakeholder Engagement in Regulatory Policy: Draft for Public Consultation, available at: <http://www.oecd.org/governance/regulatory-policy/public-consultation-best-practice-principles-on-stakeholder-engagement.htm>

NCOSS further supports the Commission's suggestions that there be consultation to establish the need for public policy reform and separate consultation on the implementation measures. According to a 2017 University of Melbourne survey of over 1,400 NGOs conducted in partnership with Pro Bono Australia and the Human Rights Law Centre, government consultation with most NGOs only commences in the middle of the policy cycle, when policies have already been determined.²⁸ This is consistent with the experience of the NSW community sector in recent years and demonstrates a clear need for NGOs to be consulted earlier on and throughout the policy cycle to ensure the policy rationale is sound.

Resourcing disadvantaged groups

29. How can disadvantaged groups be supported by the NSW Government in their lobbying efforts (for example, ongoing funding of organisations, and public service dedicated to supporting community advocacy) to promote openness in the political process and to promote advocacy independent of government?

NGOs serve to amplify the voices of those who would otherwise go unheard – people living with multiple and intersecting forms of disadvantage, who already struggle to access basic supports and services on an everyday basis, let alone key policy and system reform processes that have profound impacts on their lives.

NGOs in the community sector are now operating in an increasingly complex and uncertain funding environment impacted by the rollout of the NDIS, competition, commissioning and contestability, and the interaction between state and federal government funding. This continues to put significant pressure on NGOs' capacity to respond to the growing and diverse needs of the broader community, let alone remain sustainable and engage meaningfully in advocacy. According to the 2017 University of Melbourne survey, commonly cited barriers to NGOs having a voice include cuts to funding and fewer resources for advocacy.²⁹ This is consistent with advice received by NCOSS.

For communities to rebuild trust in their governments, they need to feel that the local supports and services they rely on are stable and accessible. In the context of advocacy and representation, the consequence of uncertain and unstable funding is significant. When community-based organisations lose funding, particularly those that are smaller and more localised, governments lose a direct, trusted and much-needed connection and insight into grassroots communities and marginalised groups. This makes it all the more challenging for policy processes to be robust and informed by a range of civil voices.

Adding further complexity to this is the fact that many NGOs are already 'self-silencing' out of fear of losing their government funding, or in other cases have restrictions on advocacy built into their Commonwealth funding agreements. These restrictions impact over 1 in 5 NGOs across Australia in their ability to be heard.³⁰ Similar restrictions previously existed in some NSW funding agreements in 2013,³¹ however it is important to note that many, such as those for peak NGO bodies, now include deliverables specifically for advocacy and policy development.

To promote openness and democracy in the political process, the NSW Government needs to

²⁸ Carson, Dr. A. & Maddison, A/Prof. S. 2017, *Civil Voices: Researching Not-for-Profit Advocacy*, University of Melbourne, Victoria.

²⁹ Carson & Maddison, above n 6.

³⁰ Ibid.

³¹ <https://probonoaustralia.com.au/news/2013/05/state-nfp-gag-clauses-outrageous-feds/>

continue to support NGOs to advocate freely without restriction or fear of reprisal, and to be sustainable so they can continue to service and be a voice for the community.

Restrictions on advocacy

The *Not-for-profit Sector Freedom to Advocate Act 2013* (Cth) (the Freedom to Advocate Act) made it unlawful for federal funding agreements to contain clauses restricting or preventing not-for-profit entities from ‘commenting on, advocating support for or opposing a change to any matter established by law, policy or practice of the Commonwealth’.³² No such legislation exists in NSW.

Restrictive funding agreements regarding advocacy generally appear to be a more of a barrier in state rather than federal funding – the 2017 University of Melbourne survey found 65% of state-based NGOs felt restricted by their funding agreements as opposed to 42% of national NGOs.³³

In NSW, the new standard Human Services Agreement (the HSA) for NGO services procured by NSW government agencies includes a term stating that nothing restricts the ability of the contracted NGO from entering into public debate or advocacy activities, subject to compliance with ‘obligations relating to confidentiality, privacy and Conflict of Interest’.³⁴ However, the HSA definition of ‘Conflict of Interest’ refers to having an interest that conflicts, or may be reasonably perceived as conflicting, with the contracted NGO’s ability to ‘fairly, objectively and independently perform [their] obligations under the Agreement’.³⁵ It is therefore arguable whether NGOs under the HSA would be able to reasonably conduct advocacy on matters relevant to their service and clients without breaching their Conflict of Interest obligations.

Establishing a NSW Freedom to Advocate Act would go some way to addressing potential restrictions around advocacy. However, since the Commonwealth Act commenced, there have been a range of government policies and practices designed to limit advocacy by NGOs. Some of these have been direct, including for example cutting funding to peak bodies. Other measures have been more indirect with a chilling effect that has resulted in ‘self-silencing’ by these groups, or careful use of non-government funding sources to support advocacy work. An example is the current restriction under the National Partnership Agreement on Legal Assistance Services which prevents community legal centres from using Commonwealth funding to lobby governments or engage in public campaigns.³⁶

Uncertainty about whether NGO advocacy is captured by legislation such as the *Electoral Funding Act 2018* (NSW) (the Electoral Funding Act) is also an issue. The Electoral Funding Act imposes registration and disclosure requirements on ‘Third Party Campaigners’ on expenditure used for the purpose of influencing voting at an election.³⁷ Similar to the discussion earlier in this submission on the nature of NGO advocacy, it is arguable whether NGOs are Third Party Campaigners as they seek to influence party policy for the public benefit – as opposed to voting intentions – but this

³² *Not-for-profit Sector Freedom to Advocate Act 2013* (Cth) s 5(1).

³³ Carson & Maddison, above n 6.

³⁴ *Human Services Agreement for Funding of Services – Standard Terms 2017*, clause 21.2, NSW Government, available at: <https://www.facs.nsw.gov.au/download?file=534254>

³⁵ *Ibid.*

³⁶ Goldie, C. & Hunyor, J. 2019, ‘Who’s afraid of advocacy?’, media release, Australian Council of Social Service, para.4, available at: https://www.acoss.org.au/media_release/whos-afraid-of-advocacy/

³⁷ Section 29(10) of the *Electoral Funding Act* also imposes a cap on this expenditure, however the High Court decision of *Unions NSW v New South Wales* [2019] HCA 1 invalidated this provision.

uncertainty and the potential administrative burden poses another challenge to NGOs who are already under-resourced in advocating in the public interest.

Ultimately, advocacy needs to be recognised and valued as a core and legitimate function of NGOs conducted on behalf of communities, and any potential barriers to advocacy should be minimised.

Dependence on government funding and self-silencing

For NGOs dependent on government funding – of which there are over 2,900 involved in human services in NSW³⁸ – there can be a culture of fear and ‘self-silencing’ when it comes to advocacy, even for those who do not have restrictions built into their funding agreements.³⁹ This is particularly the case for smaller to medium-sized organisations who have limited resources, shorter term contracts, are more reliant on government as a single source of funding and are constantly competing with larger, more well-resourced organisations for the same pool of funding.

This is where peak representative bodies like NCOSS have an important role to play – advocating on behalf of those who are not resourced or do not feel secure to do so. However, while peak advocacy is powerful and informed by a strong alliance of sector organisations, it cannot and should not completely replace the views of other stakeholders whose voices should be sought and heard.

To this end, NCOSS seeks to support and empower its members to conduct their own advocacy, for example by approaching their local Member of Parliament on matters important to their community. This can prove challenging; most recently, in the lead-up to the NSW Election NCOSS was told by a number of local service providers that while they felt they could provide their local candidate with a useful community perspective, they did not want to appear partisan or political, or risk ‘getting the funder offside’. No member of the NSW community, whether acting privately or on behalf of a service or organisation, should feel unable to approach their local Member of Parliament or candidate for fear of jeopardising their funding.

In another example, NCOSS heard that a representative from the local office of a NSW Government agency had been present at a 2017 regional community consultation convened by NCOSS to inform NCOSS’s advocacy priorities (at which Chatham House Rules applied and were explained at the start of the consultation). Following the consultation, the government representative identified and reported back to their office views expressed by a local service provider during the consultation. This resulted in backlash for the service provider and damage to the professional relationship.

These examples illustrate the tension NGOs can experience in not wanting to appear adversarial with government – for NGOs, the threat to both funding and professional relationships posed by speaking out is a very real risk to their sustainability and ability to keep serving the community.

The importance of peak advocacy

Some peak bodies, including NCOSS, have deliverables around advocacy and collaboration with the NSW Government on policy development built into their core funding. This demonstrates that NSW Government funding agencies understand and value the important role peaks play in advocating around systemic issues on behalf of those who cannot.

³⁸ NSW Department of Finance, Services and Innovation 2016, *Human Services Data Hub NGO Providers*, Data NSW, available at: <https://data.nsw.gov.au/data/dataset/0d915408-0026-44f7-a477-5f29ad7708ea>

³⁹ Carson & Maddison, above n 6.

Peak bodies also have strong connections to community through their membership. NCOSS represents a diverse membership of community sector organisations, ranging from other peak bodies and regional peaks, through to smaller, local service providers right across the state from metropolitan NSW to areas as remote as Wilcannia.

Particularly as the NSW Government seeks to streamline and consolidate its agencies and portfolios over the coming term, the role of peaks and the robust policy work we do will become all the more important. Unlike for-profit lobbyists, peak bodies like NCOSS have a long history of conducting strong, transparent, research-based, community-informed policy development that adds value and diverse voices to the work of Government. The NSW Government should continue to support and resource NGO policy and advocacy as a key input to inclusive policy and decision-making processes.

The ongoing need for individual advocacy funding and support

Advocacy is not just about systemic change, but also about individualised and tailored support for our most vulnerable to navigate the systems and policies in place. It is therefore disappointing and concerning that many NGOs, whose primary function is advocating on behalf of individuals and families experiencing disadvantage, are having their support and resources taken away.

A live example of this is the experience of disability advocacy organisations across NSW. Under the transition to the NDIS, disability advocacy organisations were initially faced with defunding in June 2018. Under mounting pressure from NGOs and the Stand By Me campaign,⁴⁰ the NSW Government announced funding would be extended to June 2020, which has provided some breathing space but still means that many people with a disability will lose advocacy support post-June 2020, and the organisations providing this support will no longer be viable.

While NCOSS supports the Commission's suggestion that there could be a general scheme providing ongoing support for community advocacy, any support should be provided in partnership with the community sector to ensure it is responsive and appropriate to the community's needs. Resources should also be directed to those advocacy services that already have a long track record of supporting vulnerable groups in the community and established, trusting relationships.

Supporting marginalised and disadvantaged groups to have voices heard and interests represented requires secure, long-term funding for advocacy; not just for peak bodies, but also for organisations focused on advocacy support for individuals.

Conclusion

This ICAC investigation comes at a time when a new term of NSW Government provides new opportunities for communities and their representatives to engage with decision-makers on the issues that matter to them most.

It also comes at a time when public trust in governments is decreasing and there is a renewed push for transparency, integrity and fairness in political decision-making and democratic processes. This is where it is all the more important to recognise the difference between the contributions of NGO advocacy and for-profit lobbying to democracy, and the context in which NGOs operate to understand the regulatory and administrative burden they can and cannot bear.

⁴⁰NSW Disability Advocacy Alliance, *Stand by Me* (20 May 2019) Stand by Me <<https://standbyme.org.au/>>

In strengthening lobbying laws, it is also important to recognise that it is not about barring self-interest or for-profit lobbying in itself, but ensuring it is done in a way that does not disadvantage other groups in society who should have equal say, influence and access.

Finally, for a truly robust democracy and fair policy processes, measures around equity and fairness must be improved to ensure NGOs are supported to advocate for the most disadvantaged citizens in NSW. Resourcing and supporting this must be seen as a NSW Government responsibility, along with the commitment to an environment where NGOs are able to advocate freely, without fear of reprisal, and ultimately give a voice to those who are never heard.

Thank you for the opportunity to contribute to this investigation. We would very much welcome the opportunity to discuss this submission with you in greater depth. Should you have any questions in relation to this matter, please do not hesitate to contact NCOSS Director of Policy & Research, Anna Bacik (02) 8960 7916 or via email at: anna@ncoss.org.au.

A handwritten signature in grey ink that reads "Joanna Quilty". The signature is written in a cursive, flowing style.

Joanna Quilty
CEO, NCOSS