



Professor Emerita Anne Twomey

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Senator the Hon Richard Colbeck,
Chair
Senate Finance and Public Administration References Committee
Parliament House
Canberra, ACT 2600

Dear Senator Colbeck,

Please accept this submission on your inquiry into the adequacy of the current transparency arrangements relating to the lobbyist register and the sponsored pass system for lobbyist access to Parliament House.

Lobbying can be an important means of informing Ministers and other parliamentarians about issues and the perspectives of particular groups in the community. It involves political communication which is, to a degree, protected by the Constitution. Lobbying can also, however, involve the exercise of undue influence and lead to corruption. For this reason, it is important that there are appropriate measures in place to protect governmental integrity and public trust in the system of government.

Transparency of arrangements relating to the lobbyist register

The current Lobbyist Register only applies to those who engage in lobbying on behalf of third party clients – not in-house lobbyists for corporations or peak bodies. This has a flow-on effect to the ‘Lobbying Code of Conduct’, which only applies to lobbyists for third parties and therefore does not extend to most lobbyists. Clause 4(4) of the Code states that ‘this Code does not apply to any person, company or organisation, or the employees of such a person, company or organisation, engaging in lobbying activities on their own behalf rather than for a third party client’.

Yet the preamble to the Code refers to the ‘public expectation that lobbying activities will be carried out ethically and transparently’ and states that the Code is ‘intended to promote trust in the integrity of government processes and ensure that contact between lobbyists and Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty’. It is unclear to me why such a public expectation does not extend to lobbying by in-house lobbyists and why their behaviour should not also be the subject of a Code requiring ethical behaviour and transparency.

The Lobbying Code of Conduct also provides in clause 12 that the lobbyist ‘must not engage in any conduct that is corrupt, dishonest or illegal, or unlawfully cause or threaten any detriment to a person’. The lobbyist ‘must use all reasonable endeavours to satisfy themselves of the truth and accuracy of all statements and information’ they provide to Government representatives. When making initial contact with a

Government representative with the intention of conducting lobbying, the lobbyist must inform the Government representative whether they are on the Register of Lobbyists and for whom they are conducting the lobbying activities. It is unclear why these requirements do not extend to in-house lobbyists, who surely should also be subject to requirements of both ethical behaviour and transparency.

As a matter of transparency, the Register and the Code should be extended to include those who are paid to lobby governments on behalf of their employer. This is of particular importance if the current system of providing sponsored passes to in-house lobbyists continues so that such persons can have informal interaction and lobbying opportunities with Members of Parliament without the name or business of their employer necessarily being known.

The sponsored pass system for lobbyists to access Parliament House

According to recent press reporting, at least 1791 orange sponsored passes have been issued which allow the holder full access to the non-public areas of Parliament House. While some of these are issued to family members of parliamentarians, the vast majority are issued to registered lobbyists and others such as representatives of businesses, peak bodies, charities, non-profit organisations, universities, and religious groups, who seek to influence Members and Senators – i.e. to lobby them.

This gives them a greater advantage over other organisations or members of the public who may want to influence Members and Senators, because the holders of the orange pass have much greater access and can ‘drop-in’ to a parliamentarian’s office without an appointment or casually run-in to them at Aussies when drinking coffee, or catch them as they return from a division in the chamber. It allows lobbying to occur in an informal and undocumented way, without a formal appointment recorded in a diary and without the attendance or knowledge of a staffer or official. In short, it opens the door to undue influence and potentially corrupt behaviour. Facilitating such opportunities is both unwise and inappropriate.

Access, undue influence and the Constitution

The relationship between preferential access to politicians, undue influence and corruption was considered by the High Court in the case of *McCloy v New South Wales* (2015) 257 CLR 178. It arose in the context of political donations being paid as a means of acquiring access to Ministers to seek to influence them. An orange pass is a less expensive manner of achieving similar access.

The judgments referred to the great underlying principle of the Constitution that the rights of individuals are secured by ‘ensuring each an equal share in political power’. French CJ, Kiefel, Bell and Keane JJ noted at [34] that a parliamentary committee report had acknowledged that ‘the purchase of access to politicians through large donations, which is not available to ordinary citizens, can result in “actual or the perception of undue influence”’ and that reform was needed to ‘restore public confidence in the integrity of the system’. Their Honours concluded at [45]:

Equality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our *Constitution*. In *ACTV*, the law which was struck down was inimical to equal participation by all the people in the political process and this was fatal to its validity. The risk to equal participation posed by the uncontrolled use of wealth may warrant legislative action to ensure, or even enhance, the practical enjoyment of popular sovereignty.

Justice Gageler noted at [172] that the ‘influence which comes with the preferential access to government resulting from the making of political donations does not necessarily equate to corruption’, but he thought the line was ‘not always easy to discern’. He concluded at [184] that the elimination of preferential access to government is a compelling legislative objective.

None of this is to say that Parliament is constitutionally required to remove unequal access to politicians. But it does illustrate the legitimate, indeed compelling, concern that granting some people favoured access to government decision-makers, by giving them unfettered access to Parliament House, when others do not have such access or opportunities to influence, is inconsistent with a fundamental constitutional principle of equal sharing in political power.

Accordingly, there are good grounds to eliminate this unfair level of access altogether, so that lobbyists have to make formal appointments to see Ministers and other parliamentarians, and are treated as visitors, obtaining a temporary escorted visitor pass, like everyone else. This would improve equity of access and eliminate the undue influence that might be exercised through informal contact within the parliamentary precincts that is facilitated by the orange pass. This should be combined with the publication of ministerial diaries, so that there is greater transparency about meetings involving lobbyists, as has occurred in New South Wales.

If, however, the lobbyists are so effective in their lobbying that they persuade parliamentarians to maintain their access to an orange pass, at the very least access to an orange pass should be limited to those lobbyists who are registered (with an expanded obligation to register, as discussed above) and the Register should also record which lobbyists have such a pass and who sponsored it.

Risks

I note that in the past, the excuse for denying such transparency has been that such a record could amount to a security risk. However, anyone with malicious intent who wished to steal or duplicate a parliamentary pass could surely do so from the large number of others who hold such passes, including parliamentary staff (white passes), ministerial staff (blue passes), public servants (green passes) and press gallery journalists (yellow passes), most of whose identity is public known or easily found out. There would be no need to publish the names of other orange pass holders, such as family members, or alternatively they could be provided with a different coloured pass.

The other reason that has previously been given for not publicly revealing who holds an orange pass – that it would potentially impede access by parliamentarians to information provided by lobbyists – is nonsense. Lobbyists are paid to influence parliamentarians, and will seek to do so regardless of whether or not it is revealed publicly that they hold an orange pass. If they do not want to be publicly known to hold such a pass, then they can choose not to hold one and instead make an appointment to see the relevant parliamentarian and be treated as an escorted visitor.

Please let me know if you need further information.

Yours sincerely,

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* This submission is a personal view. It does not constitute legal advice and does not represent the views of the University or Gilbert + Tobin Lawyers).