Health Coalition Aotearoa

MATHER Solutions

Māori Perspectives on Options for Lobbying Regulations

30 April 2024

LEVEL THE Lobbying PLAYING FIELD

Report note

Mather Solutions Limited (MSL) was contracted by Health Coalition Aotearoa (HCA) to undertake three online engagement sessions with Māori stakeholders to ensure Māori perspectives were considered and integrated into the HCA report on regulating lobbying in Aotearoa New Zealand.

This report summarises the key themes and feedback provided by the participants.

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Foreword

Unhealthy diets, obesity, tobacco, and alcohol contribute about one third of the overall preventable health loss in Aotearoa/New Zealand, with wide inequities by ethnicity and levels of disadvantage. The industries associated with these harms have tremendous wealth and power, and the ability to exert their influence on government through lobbying, while the communities that suffer the most health and social harm have inequitable and unequal access to shaping policy or influencing decision-making.

For many years Health Coalition Aotearoa (HCA) has advocated for policies that would limit health and social harms, only to see public health advice overrun by industry interests. On issues such as food labelling and the ineffective Health Star Rating System, alcohol reform and the repeal of the Smokefree Environments and Regulated Products (Smoked Tobacco) Amendment Act (SERPA), the voices advocating for the public good have repeatedly been drowned out by commercial interests.

Media scrutiny and public pressure in March 2023 led then-Prime Minister Chris Hipkins to announce changes aimed at improving transparency around lobbying. Hipkins also directed the Ministry of Justice to begin work on a voluntary code of conduct for third-party lobbyists and a review of policy options for regulating lobbying. At this time, having already initiated work on Integrity Protection in Public Policy-making, HCA released a set of urgent recommendations to regulate lobbying in Aotearoa, shaped by a panel of experts.

There are many details and perspectives to consider around the the regulation of lobbying, such as: the potential impact of lobbying regulation on the ability of iwi/hapū/hāpori Māori to engage with government in accordance with Te Tiriti o Waitangi/The Treaty of Waitangi, lobbying definitions and the specific application of international regulatory standards in the New Zealand context.

To assist HCA in developing a robust and informed position in order to advocate for change, we commissioned a report examining these issues by author and researcher, Max Rashbrooke, A Balance of Voices: options for the regulation of lobbying in New Zealand. We also consulted with Māori stakeholders and commissioned a report on Māori perspectives on options for lobbying regulations by Mather Solutions Limited. We recommend that this document should be read alongside *A Balance of Voices: options for the regulation of lobbying in New Zealand*.

These reports, public consultation and the ongoing work by a steering group of expert advisors has informed the creation of an action plan to create a level playing field for public decisionmaking by:

- regulating lobbying
- introducing a “cooling off’ period for former ministers and other officials
- creating a new code to manage conflicts of interests
- rewriting the Official Information Act to strengthen transparency legislation.

HCA wishes to thank Max Rashbrooke, Jim Mather and Moana Tuwhare, and HCA steering committee, expert panel members and staff (Andrew Ecclestone, Bryce Edwards, Faye Langdon, Lara Greaves, Grant Berghan, David Galler, Peter Adams, Tim Tenbensel, Danica Ludlow, Joany Grima, Anna Jackson, Kristin Gillies) for all their work, and all those who took the time to participate in our consultations.

We hope you will join us in taking action to **Level the Playing Field** to bring greater balance and accountability into public decision making.

Professor Boyd Swinburn

Associate Professor Lisa Te Morenga

Health Coalition Aotearoa

About Health Coalition Aotearoa

Health Coalition Aotearoa (HCA) is a Te Tiriti-led coalition of health NGOs, professionals and academics with an unwavering commitment to reduce harm from tobacco, alcohol, unhealthy food and advance public health equity.

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Treaty obligations need separate consideration

It has been highlighted in the report titled '*A Balance of Voices*' that in regulating lobbying, careful consideration must be given to obligations under Te Tiriti o Waitangi/The Treaty of Waitangi, and the need to ensure that regulations do not unreasonably limit opportunities available to Māori working in and around government. It may be necessary, for instance, to differentiate between Māori groups acting as Treaty partners and as lobbyists. Further research on these issues, as commissioned by HCA, may alter or refine the conclusions in this report.

Limited consultation has been undertaken to canvass Māori perspectives on the regulation of lobbying and in particular the matters set out in the draft of this report consulted on.

This section includes that feedback, however it is qualified by a number of factors and should not be taken as a thorough or final reflection of Māori perspectives on appropriate regulation of lobbying. These factors include:

a. The consultation and feedback although of high quality was limited by the small number of participants (6) who attended the online consultation hui;

b. The consultation process was carried out in a condensed timeframe over a two week period;

c. Māori in general are dealing with a large number of very important issues including but not limited to the Fasttrack Bill; the Treaty Principles Bill; the disestablishment of Te Aka Whai Ora (the Māori Health Authority) and cuts in the public service and media sectors. Alongside the ongoing social and economic as well as Iwi, hapu and whānau issues, it was conveyed that lobbying regulation is eclipsed by what are considered to be more important priorities at this time; and

d. There is a view that constitutional transformation is required to reset the government Māori relationship on a clearer Te Tiriti based foundation and lobbying regulation is but a small component of the constitutional reset that many participants regarded as the wider strategic challenge.

Alignment of values and a values-based approach to reform

In considering the broader cultural context of Maori, and Māori perspectives and values when assessing appropriate lobbying processes and regulation, it was emphasised that values and principles such as transparency, accountability, fairness, and equity are at least as important in Māori society as they are in general New Zealand society. In this regard the purpose for regulating lobbying in New Zealand is generally aligned with Māori cultural expectations. It was suggested that a values based approach to regulating lobbying in New Zealand would help to emphasise the shared values and integrity in government.

This may differentiate between lobbying for the purpose of private commercial and financial gain and lobbying for the purpose of community, and social justice outcomes. It was noted that iwi, hapū and Māori organisations almost always access government officials and ministers for the reasons underpinned by the latter. This might also include not for profit-driven lobbying generally. Commercial purposes should at least be subject to a higher degree of scrutiny.

It was also emphasised that there is a need to ensure Māori relational ways of working are not captured by lobbying regulations as, Treaty based recognition aside, Māori values-based engagement with the government prioritises collective benefit over individual gain and emphasises whanaungatanga and importance of developing and maintaining good relationships for collective and mutual benefit.

Te Tiriti o Waitangi and the Crown-Māori Relationship

Te Tiriti o Waitangi/The Treaty of Waitangi, and the Treaty relationship between Crown and Māori is a fundamentally important context in any public law and policy reform in New Zealand. The Crown is obliged as a party to the Treaty to fulfil its role in the exercise of its power in a manner that is consistent with the principles of the Treaty.

As noted in the cabinet manual, "*the Treaty is referred to in many statutes, deployed by the courts as an aid to statutory interpretation and is a relevant consideration in decision-making, which can be measured against the principles of the Treaty by the Waitangi Tribunal. Treaty principles are primarily concerned with the way in which the Crown and Māori behave in their interactions with one another. The courts and the Waitangi Tribunal have emphasised the need for recognition and respect in the Treaty partnership and stress the parties' shared obligation to act reasonably, honourably, and in good faith towards each other. The role of the public service includes supporting the Crown in its relationships with Māori under the Treaty (see section 14 of the Public Service Act 2020).*"[1]

There are aspects of Treaty principles which inform the relationship dynamic not mentioned in the cabinet manual but emphasised by some participants. One participant emphasised the Crown's responsibility (rather than obligation) to uphold the Te Tiriti and that this should be reflected as part of its role and not as something that the government is obliged to do reluctantly. This is an important emphasis in public messaging.

Other participants emphasised that if the status of Iwi Māori as independent polities, or sovereign peoples in the expression of tino rangatiratanga guaranteed by article two of the Treaty is to be upheld, the relationship can either be categorised as a diplomatic relationship between Iwi and the Crown (where the issue falls into the Māori sphere) and/or joint decision maker/co-governor (where the two spheres overlap and impact Māori) as opposed to one of a lobbyer and a recipient of lobbying activities.

Some of the Waitangi Tribunal's articulation of relevant principles for the relationship are included[2] to inform and guide the conceptual framework on what may be appropriate in the lobbying reform context such as te mātāpono o te tino rangatiratanga or the principle of tino rangatiratanga and te mātāpono o te kāwanatanga or the principle of kāwanatanga. These principles outline that, where Government decisions or policies, place unreasonable limitations on tribal or hapū exercise of tino rangatiratanga, they are not in accordance with the agreement reached with Māori in February 1840 as to the respective spheres and responsibilities of kāwanatanga and rangatiratanga.

Te mātāpono o te houruatanga or the principle of partnership guides the interface between the two spheres of influence. The kāwanatanga space is not seen as a superior authority.[3] It is often emphasised that the Treaty partnership required the cooperation of both parties to agree their respective areas of

1. Cabinet Manual 2023 p. 155

2. We have not emphasised the principles of active protection, equity, good government, good faith, mutual benefit, options, reciprocity, autonomy, or the right of development not because they aren't relevant but to emphasise that if the relationship is conceptualised in a treaty compliant manner in the first instance the other principles are more readily supported. It should be noted that a Constitutional Inquiry is currently underway and will result in more directly applicable articulation of the principles and how they apply to NZ's consitutional and public law and policy arrangements.

3. The Tribunal has departed from the original framing of the principle of partnership outlined in earlier tribunal reports for other inquiry districts, on which the cabinet manual version of partnership appears to be based.

authority and influence, and both parties were required to act honourably and in good faith. The Crown could not unilaterally decide what Māori interests were or what the sphere of tino rangatiratanga encompassed. The shared sphere of authority, must be agreed upon by both parties. The Crown was obliged, for example, to acknowledge rangatiratanga by recognising the need to engage with hapū and include them in decision-making about whether, or how law is to operate in Māori communities. Furthermore, ensuring that policies were transparent; that Māori leaders were involved in their design and in decision-making.

Consistent with the Treaty, the relationship of the Crown with Māori should always have been based on dialogue and shared decision-making, as well as independent decision-making by either party where appropriate and where both parties agreed to this. Where unilateral Crown consultation has left hapū and iwi feeling disempowered, but trapped in processes that seem to them to offer the shadow of participation rather than the substance, it has not met the test of partnership in accordance with the principle of partnership, the Crown's duty was always to engage with Māori leadership actively (rather than merely consulting), and to ensure their role in shaping policy.

It was a consistent view of participants that lobbying regulation falls into a category of being a managerial tool of the kāwanatanga sphere that could intentionally or unintentionally capture and limit the Crown-Māori relationship.

A key theme from participants was that the process by which any lobbying reform is fashioned and implemented must ensure that it does not unilaterally place additional burden on Māori and further strain the Government-Māori relationship. Accordingly, a much wider Māori engagement program and Māori consent to the ways in which the reform affects the relationship would be necessary.

It has been noted by participants that the imbalance in the Treaty dynamic often (arguably always) gives rise to Treaty derived duties to ensure the partnership between the Crown and Māori can be readily supported and fulfilled. This requires a level of access to government and influence that falls outside of lobbying per se but may not fall outside of public power mechanisms requiring higher levels of accountability and transparency. Today, this sometimes gives rise to focussed consultation and engagement with Māori in policy development for example.

Relationship mechanisms because of Treaty settlement agreements are also a distinct category of access that warrant an exception in definitions of lobbying that could potentially be captured. As noted above, a Treaty compliant approach would be for respective Iwi with those agreements in place giving informed consent to being captured by some or all parts of the reform or not.

Moreover, Treaty settlement negotiations are by and large conducted confidentially. Where deemed appropriate, information shared in negotiations will often be substantially redacted in Official Information Act requests. Therefore, Treaty negotiations will also likely need to form a distinct category or be excluded from the regulations, but certainly require more focussed consideration.

In any event there is a need for clear articulation about how Te Tiriti o Waitangi/ The Treaty of Waitangi is reflected in any regulation of lobbying law and policy including what the intended outcomes are. How this is communicated to the general public also requires serious consideration and planning, given the current tendency for it to be misinterpreted as special treatment and Māori elitism.

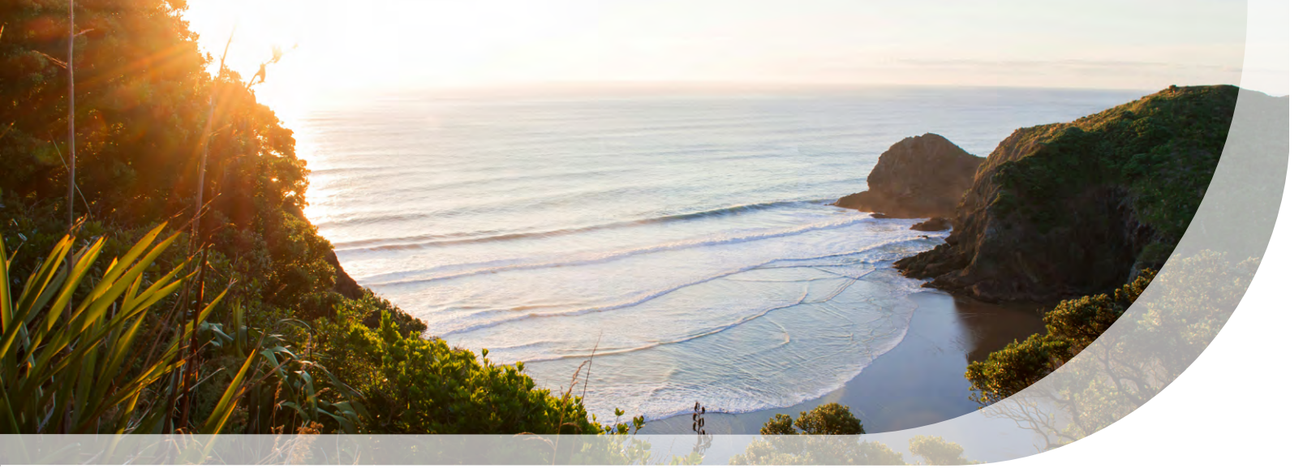
Māori and lobbying in New Zealand

All participants recognised that there is a need to reconcile the dual categories of Māori as citizens and as 'sovereigns' in Aotearoa. It was considered important that any definition of a 'lobbyist' differentiates between Māori groups acting as Treaty partners and individuals acting as lobbyists.[4]

However, it was also stated that there is a need to ensure that any new system does not unfairly impact some Māori groups. It was noted in the feedback that some Iwi entities, particularly those who have a Treaty settlement in place, benefit from current processes which support access to government and as settled Iwi, are generally better resourced, while Iwi with relatively little resource and capacity do not have equitable access.

Inequities as between Iwi are a live issue which gives rise to a need for improved access for Māori, where there are existing imbalances in financial resources, capacity and/or knowledge. A regime that evens the playing field is required. It was also agreed that equitable outcomes as a Treaty-based guarantee, should support the ongoing ability of companies that are deriving profit on behalf of iwi (who are ultimately in the business of generating wealth to support wider social outcomes) should not be captured.

[4] It was suggested that separate research on these issues, commissioned by HCA should be considered.



Impact of unregulated lobbying on Māori

It was highlighted that there is a disproportionate impact of unregulated lobbying on marginalised groups, particularly Māori who already face considerable inequities, and may be more susceptible to manipulative public health messaging for example.

Other General Points

Participants made a number of general points, not specifically related to Māori including those set out below.

Lobbyists vs lobbying

Participants noted it is important to define lobbying functions or purpose, versus labels, with a focus on intention of the interaction, for example is it for finance, favour, information, etc. The intent or function is important. Therefore a definition which was too narrow and focussed on professional lobbyists would not address the problem.

Lobbying standards and ethics

All agreed greater transparency and ethical standards in lobbying would be a positive development. It was suggested that defining unethical lobbying as opposed to legal and illegal lobbying practices would capture the intent of the reforms better. Looking at it as legal vs. illegal will not capture ethical vs. unethical.

Ethics and evidence in decision-making

As a general point government should be basing decisions on best available and verifiable evidence, rather than lobbying, noting that often evidence used in lobbying is incomplete and cherry picked, or an interpretation of evidence is emphasised to suit a particular outcome. There is a need to be aware that in the face of incomplete evidence, or evidence that evolves and/or is updated, that there should be a real commitment by the government to stay up to date with the best available evidence. If evidence is unclear, decision makers should be required to consider values, ethics, and what is best for the population needs when making decisions.

Influence, bias, and disclosure

Concern was expressed about for-profit companies influencing decisions through paid lobbyists and the potential for indirect commercial influence such as with patient advocacy groups. Requiring disclosure would help to safeguard against decisions being based on biased, selective or ‘cherry-picked’ research and information.

Regulating conflicts of interest in decision-making processes, with emphasis on the importance of disclosure and peer/government oversight to mitigate biases is also important. There is a need for transparency in lobbyists’ financial and commercial ties to ensure transparency and fairness in decision-making.

Lobbying strategies

It was noted that key influencers often find informal contacts more effective than premeditated lobbying efforts. Therefore, it may be more effective to focus on decision makers in the regulations, as they hold ultimate power. Decision makers should be required to be transparent about what information they have relied upon to make any given decision and the source of that information, including informal sources and any ties which connect sources to any interested commercial entities, should be publicly available information.[5]

Some participants thought lobbying regulations should be expanded to include officials and Ministers’ offices.

Industry Standards

A participant was of the view that the lobbyists ought to be regulating themselves and holding their profession to a high standard. It was noted that there are very few (200 or so) professional lobbyists in the country.

[5] It has been a recognised strategy of drug lobbyists to influence doctors, including building relationships with receptionists and nurses for example

Lobbying laws

One participant held the view that, Ireland's lobbying laws which capture indirect conversations and movements, was better. It was suggested that we should also couple the regulations with annual reviews of the regulations to ensure it is effective and capturing and achieving what it is intended to.

Another participant cautioned against unintended consequences of limiting legitimate advocacy work of Māori and the potential to hinder constructive dialogue.

Challenges in Policy Advisory Systems

A participant with very significant public sector experience emphasised that there is a breakdown in the policy advisory system, in part due to the impact of the MMP system on governance and decision-making, noting that we are no longer working in a traditional Westminster system. In pointing out the 5 tenets of the Westminster system and how they have been altered in recent decades, it was highlighted that a separation within the civil service exists from those who advise to those who actually deliver. This led to an opening up of the advisory system to compensate, and those who it mostly opened up to are elites.

Through consultants, commissions of inquiry, advisory boards, working groups and royal commissions, the advisory function now belongs mostly in the non-government sector, thus it should be noted that most of the advice that Ministers get they do not receive from the public service anymore.

It was highlighted that the government often outsources its policy work to consultants and the conversations those policy writers/developers were having would potentially fall outside of regulations. This includes a substantial number of Māori consultants who are often engaged in providing policy advice in relation to Māori issues and impacts. Therefore, the real emphasis should be on the need for a new, more inclusive, competent, and contemporary advisory framework which provides for greater iwi and hapū rangatiratanga in the policy advisory system and a view that this warranted greater consideration than regulating lobbying.

Revolving Doors

The issue of 'revolving doors' was also regarded as significant. Policy developers moving from industry into government and back to industry and the outsourcing of decision making was having a greater impact and influence than lobbying. This includes the easy movement of journalists into press secretary roles for example.

It was also noted that this would also create a significant burden for Māori who do work for government and then progress other work and/or advocate for their Iwi in their "downtime".

Also highlighted was the support Māori have received from ex Ministers or ex Members of Parliament once they have left parliament, noting that restricting this involvement, advice, support and movement would create a real burden for Māori in particular, if stand down periods or other restrictions precluded this work or placed an undue emphasis on this being 'unethical' influence.

Focus on Constitutional Reform

Participants raised the idea of constitutional reform. The shift towards broader discussions on constitutional reform with a prioritisation of systemic changes over specific regulatory measures to address governance, representation, and decision-making comprehensively and provide recognition of Te Tiriti as a central framework for addressing constitutional questions was seen as more important and more effective. Overall, the question for Māori is a different one to the focus of this reform work. The managerialist approach of being focused on just lobbying reform was seen as inadequate and concern was expressed about additional complexity in governance whilst not resolving the ultimate problem.

It was highlighted that because there are much higher priorities for Māori than lobbying reform, the creation of a Treaty based exception battleground, for a battle Māori are unlikely to prioritise, particularly with the current government, may not be strategic or a wise use of Māori resources.

The regulation of lobbying being relatively low on the list of priorities for Māori was a generally held understanding of Māori participants. This is supported by National Māori hui held since the formation of the new National, Act, NZ First coalition government where the focus has been on what Māori can do for ourselves, independent of the government. It was further recognised that in all areas where government is failing to support Māori, constitutional transformation which embeds the treaty relationship and updates the policy system, is a very live topic in te ao Māori.

Final Comment

As a final comment all those who contributed their time, knowledge, and experience to provide feedback on the key tenets of the report agreed that there is a need to ensure that regulations do not unreasonably limit opportunities available to Māori working in and around government.

Health Coalition Aotearoa

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