Health Coalition Aotearoa

A Balance of Voices: Options for the regulation of lobbying in New Zealand

Final Report

March 2024

LEVEL THE Lobbying PLAYING FIELD

Report note

This report was prepared for Health Coalition Aotearoa (HCA). It forms part of HCA's Integrity Protection in Public Policy-making project, and assists civil society's contribution to the Ministry of Justice's review of lobbying laws. It represents, however, the opinion of the author rather than HCA per se. It also needs to be considered in light of separate processes to establish te ao Māori viewpoints on lobbying. The report is based on research into past New Zealand attempts to regulate lobbying, reviews of international approaches, local research into lobbying, and approximately 25 interviews with local and international figures. This report largely follows the draft version published in November 2023, although with some changes following further feedback.

Max Rashbrooke
School of Government, Victoria University of Wellington

Table of Contents

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 *Māori Perspectives on Options for Lobbying Regulations – Key 'Asks'*.

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.

Executive summary

Lobbying can be healthy – or harmful

Democracies must always protect the integrity of their public policy-making: they must ensure, in other words, that political decisions serve a broad public interest rather than narrow private ones. This requires a wide range of voices to be heard with some degree of equity.

Lobbying, defined as attempts by individuals and organisations to influence public decision-making, can be a healthy part of the democratic process, if it provides officials with valuable information. But it can be harmful if it is carried out unethically, abuses confidential information, or leads to large imbalances in access to, and influence over, officials. This can damage the integrity of decision-making and, consequently, public trust in government.

Previous attempts to regulate lobbying in New Zealand have failed, owing in part to the difficulties of defining who is a lobbyist, who gets lobbied, and what counts as lobbying activity. More and more developed countries, however, are regulating lobbying, and the mechanisms they employ are increasingly standardised. This leaves New Zealand as something of an outlier. Moreover, recent incidents and media reports suggest there is sufficient lobbying activity in New Zealand, and sufficient concerns about it, to justify some degree of regulation.

There is no perfect way to define a lobbyist

To be effective, regimes must focus on regulating the most high-intensity, well-resourced or ‘professionalised’ lobbying. The broad international consensus is that regulation should address the lobbying that occurs whenever:

- Anyone from a reasonably well-resourced organisation
- has formal, premeditated contact
- with an MP, a member of their staff, or a senior public servant
- regarding a government law, policy or award of funds.

Capturing only ‘professionalised’ lobbyists, however, is not easy. Limiting the definition to third-party or consultant lobbyists (the **Australian** system), omits the large volume of lobbying done by in-house ‘government relations’ staff and others. But trying to isolate, in law, particular staff members within organisations (the **Canadian** system) is difficult. Under the simplest and most comprehensive regime (the **Irish** system), a lobbyist is deemed to be anyone who contacts senior public officials while representing the interests of a

moderately well-resourced organisation. In practical terms, this is defined as anyone representing:

- a company with at least 10 staff;
- a "representative" body, e.g. a business peak body, with at least one paid staff member;
- an "advocacy" body, e.g. an NGO, with at least one paid staff member; or
- any third party representing the interests of one of the above organisations.

This definition could be augmented by limiting disclosure requirements to those who have a certain number of lobbying contacts (the **French** system).

The Irish system is attractive from a philosophical and practical point of view. It brings into view the lobbying of a wide range of (at least moderately) well-resourced organisations, permitting – among other things – the detection of imbalances in access between them. Communications by "ordinary" members of the public, meanwhile, are kept out of scope. The regime appears to have operated well since its 2015 inception.

But while the compliance costs of the Irish system do not appear burdensome, it is nonetheless a large mechanism to bring into action. Small NGOs might object to being swept up in its net, or it might seem disproportionate to the scale of the issue in New Zealand. For greater political acceptability, the requirement to disclose one's lobbying could, along French lines, be limited to those organisations that have more than a certain number of contacts with government in a 12-month period. This could, however, create undesirable loopholes.

Informal lobbying is a vexed question

This report's proposed definition of 'lobbying activity' is that it consists of premeditated written, electronic and oral communication with senior public officials (also known as 'designated public officials' or DPOs). This would capture texts, emails, phone calls and meetings, and premeditated corporate hospitality. It would not capture unplanned, chance or spontaneous encounters with public officials. Arguably such contacts should fall within scope. But there are practical and philosophical problems in trying to capture them.

The objects of lobbying need to include public servants

The DPOs being lobbied are, for the purposes of this report, members of Parliament (including ministers), certain staff working in their offices, and public servants working in tier 1-3 roles (which typically denotes chief executives, deputy chief executives and general managers). These are, broadly speaking, the individuals with the most significant influence over public policy, and whose engagements with lobbyists are therefore of particular interest. The inclusion of senior public servants is important because, anecdotally, they are frequently the targets of lobbying.

Certain regulatory mechanisms are now standard

Internationally, five regulatory mechanisms are generally regarded as essential:

- an overarching law to regulate lobbying;
- a publicly accessible register of lobbying activity;
- stand-down periods during which former public officials cannot become lobbyists;
- codes of conduct for lobbyists (and sometimes for those being lobbied); and
- a regulatory body empowered to oversee and enforce the above mechanisms.

Three of these mechanisms target the three potential harms of lobbying described at the outset. Codes of conduct are designed to help prevent unethical lobbying; stand-down periods are aimed at preventing confidential state information being misused; and lobbying registers should not only allow the public to see if imbalances in access occur but also spur officials to redress those imbalances. International evidence suggests that these measures can increase transparency about lobbying and help curb its less desirable elements. In doing so, such regulation can help protect the integrity of public decision-making and increase public trust in the outcomes of democratic processes. While the new government's attitude to such measures is not fully clear, National has supported the three key ones mentioned above.

In New Zealand, this report proposes that the above mechanisms be enacted as follows:

- a Regulation of Lobbying Act;
- an online and publicly accessible register in which lobbyists have to make quarterly returns detailing their contacts with DPOs;
- a stand-down period of 1-3 years in which former DPOs cannot lobby government on issues where they had official dealings;
- a statutory (mandatory) code of conduct for lobbyists, and lobbying-related provisions added to existing codes of conduct for DPOs; and
- the creation of an independent Crown Entity, either a narrowly focused Lobbying Commission or a more wide-ranging Integrity Commission, with the power to levy fines, prosecute law-breakers and generally enforce the above provisions.

Transparency alone is not enough

Transparency is clearly needed as to who is lobbying whom; accordingly, it is a key element of the regulations proposed above. But it may only *reveal* large imbalances in access to officials rather than significantly *redress* that problem. Given the importance of the right to free speech, it is not easy or uncontroversial to go 'beyond transparency'. But, globally, stand-down periods and (enforceable) codes of conduct already do so, to some small extent. Moreover, it is worth considering whether policy-makers should face a duty to show they have heard from a balanced range of voices, or to report specifically on lobbying during each policy-making process. Different types of lobbying could also be distinguished in reporting. Consideration could also be given to more rigorous measures, such as the World Health Organisation policy of banning the tobacco industry from lobbying during regulatory reviews, although the wider justification of such measures in New Zealand is unclear.

Treaty obligations need separate consideration

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. Separate research on these and other issues has been commissioned by HCA ('Māori Perspectives on Options for Lobbying Regulation') and should be considered in conjunction with this report.

It should be noted that the key findings of the specific Māori research do not materially alter the conclusions of this report; however, they do identify a range of issues that HCA needs to consider as part of this initiative to regulate lobbying activities in Aotearoa New Zealand.

A positive vision for participation is needed

Finally, the regulation of lobbying must – as above – be seen in the wider context of the need to protect the integrity of public decision-making. This integrity is best preserved if, in addition to mechanisms to regulate those with high degrees of access, there are processes which enhance the access of those not currently well-involved in policy development and democratic decision-making. We need, in short, to open up policy and law-making processes to deeper participation by citizens. That requires, as well as the recognition of the harms created by inequitable access, an overarching shift in the openness of government processes, and the creation of new forums – such as citizens' assemblies and participatory budgeting – to deepen citizen engagement.

1. Integrity protection: background issues

As with a physical body, the body politic – human society as an organised, collective group of citizens – has certain vital signs. One core indicator of its good health is that governmental decisions are informed by a wide range of the public's views. Democracies work best when citizens are deeply engaged, and there is some kind of equity in that engagement. Governments should hear, in other words, from a balanced choir of citizen voices. They are then well-placed to pursue the public interest: the set of shared interests that we all have as citizens (in a functioning rule of law and basic infrastructure, for instance), as opposed to the private interests we pursue in our separate and individual capacities.

In that process of determining the public interest, individuals are not entitled to exactly equal influence: people spreading anti-vaccine disinformation, for instance, should not hold as much sway as scientific experts. But everyone should have equal *opportunity* for influence, the same chance to put their case.[1] Then, when governments make decisions, if some people's views are to be accorded greater weight, it should be on grounds generally recognised as valid – such as having stronger arguments and evidence – rather than grounds generally regarded as invalid, such as having more money or using personal connections to wield greater influence.

It is essential, in other words, that government decisions are made with what is sometimes called 'public integrity'. As defined by the OECD, public integrity is "the consistent alignment of, and adherence to, shared ethical values, principles and norms for upholding and prioritising the public interest over private interests in the public sector".[2] Not only should decisions be made with integrity; if public trust and confidence in those decisions are to be maintained, they should be seen to be made with integrity. An opposed condition is that of policy capture, "where public decisions over policies are directed away from

[1] Jacob Rowbottam. *Democracy Distorted: Wealth, Influence and Democratic Politics*, Cambridge University Press, 2010, pp.7-12.

[2] OECD, 'Public Integrity', Recommendation of the Council on Public Integrity, n/d, www.oecd.org/gov/ethics/OECD-Recommendation-Public-Integrity.pdf (accessed 28 March 2024).

the public interest towards a special interest", something that the OECD argues "can exacerbate inequalities and undermine democratic values, economic growth and trust in government".[3]

To try to preserve public integrity, and avoid policy capture, democracies employ various mechanisms. In New Zealand, a non-exhaustive list of these mechanisms could include:

- regulations on political donations, as overseen by the Electoral Commission;
- the Register of Pecuniary and Other Specified Interests, which lists MPs' financial, business and related dealings;
- the Cabinet Manual, which sets out expectations for ministers' behaviour;
- legislative provisions against bribery;
- legislative protections for public-sector whistleblowers;
- the provisions of Parliament's Standing Orders;
- the new Parliamentary Commissioner for Standards;
- various codes of conduct for ministerial staffers, public servants and others;
- provisions to manage or avoid conflicts of interest;
- the Official Information Act (OIA), which aids transparency of state information and, ultimately, citizen participation;
- the Office of the Ombudsman, which hears complaints about the executive;
- the Office of the Auditor-General, which scrutinises public spending;
- the Serious Fraud Office, which investigates fraud in both public and private sectors;
- the Department of the Prime Minister and Cabinet's work on countering foreign interference; and
- the wider apparatus of the justice system.

These mechanisms, sometimes characterised as a "national integrity system", are periodically assessed by groups such as Transparency International New Zealand.[4] Despite their broadly positive conclusions, these exercises have noted ongoing weaknesses. Like other developed nations, New Zealand is especially vulnerable to a set of (mostly) legal but ethically questionable acts sometimes described as "trading in influence", in the words of the scholar Michael Johnston. These are mechanisms that allow political influence to be bought and sold but which are, for many, an accepted part of the political landscape.[5] New Zealand's weaknesses here include:

[3] OECD, 'OECD Recommendation on Public Integrity', n/d, www.oecd.org/gov/ethics/recommendation-public-integrity/ (accessed 28 March 2024).

[4] See, for instance, Transparency International New Zealand's National Integrity Assessments in both 2013 and 2018.

[5] Max Rashbrooke and Lisa Marriott, *Money for Something: A report on political donations in Aotearoa New Zealand*, Wellington, 2022, p.14.

- **The relative opacity and unconstrained nature of political donations.** Until recently, the identities of political donors were disclosed only if they gave over $15,000; there is ample opportunity for donations to be split up to conceal the true donor's identity; and there is no upper limit on the amounts that can be given. Political donations have been the subject of a growing volume of scandals and, more recently, court cases.[6]
- **The failure to adequately regulate conflicts of interest.** Although public officials are notionally subject to rigorous conflict-of-interest provisions, a string of media reports suggest these provisions are poorly enforced. It is not even clear that all potential forms of conflicts of interest are even regulated.[7]
- **Non-regulation of political appointments.** Appointments to government-controlled entities, boards and working groups are subject to little oversight to ensure they are made based on merit rather than political connections. Unlike some other countries, New Zealand has no independent body to oversee such processes.
- **The failure to implement a register of beneficial interest.** New Zealand lacks a register of beneficial interest that would provide transparency as to the true owners of companies. Such registers internationally are increasingly a key tool in tracing illicit flows of money.
- **Ongoing concerns about weaknesses in the OIA.** Governments frequently succeed in preventing information, including that which relates to lobbying, from being released under the OIA, by delaying or refusing requests, redacting information, or misusing provisions around commercial confidentiality and other issues.[8]

Trading in influence, moreover, may occur through not just one channel but rather a web of interconnected and disproportionate forms of power. Organisations and individuals may, for instance, make donations, win favourable political appointments *and* breach conflict-of-interest rules, all the while disguising this activity through related entities such as shell companies and trusts. And one of the greatest weaknesses in New Zealand's system of integrity protection, identified repeatedly by experts, is its absence of lobbying regulations.

[6] Ibid.

[7] See, for instance: https://www.rnz.co.nz/news/political/404924/new-details-around-new-zealand-first-conflicts-of-interest-timeline-emerge;

https://www.rnz.co.nz/news/national/468428/health-promotion-agency-employee-under-investigation-for-potential-conflicts-of-interest;

https://www.healthcoalition.org.nz/wp-content/uploads/2023/03/Integrity-Protection-for-Public-Policymaking.pdf.

[8] Andrea Vance and Nikki Macdonald, 'Redacted – our official information problems and how to fix them', *Stuff*, 18 April 2019, https://www.stuff.co.nz/national/111181806/redacted--our-official-information-problems-and-how-to-fix-them (accessed 28 March 2024).

2. Lobbying: background issues

While there is no universally agreed definition, the OECD refers to lobbying as "the act of lawfully attempting to influence the design, implementation, execution and evaluation of public policies and regulations administered by executive, legislative or judicial public officials at the local, regional or national level".[9] Along similar lines, the key handbook in this field, *Regulating Lobbying*, defines its subject as "the act of individuals or groups, each with varying and specific interests, attempting to influence decisions taken at the political level".[10]

Within this broad definition, the kind of lobbying which springs to mind – and which is in practice regulated in other countries – is that which consists of the direct contacts (emails, phone calls, meetings, etc.) that individuals and organisations have with senior public officials. There are, of course, wider forms of what might be called 'lobbying', such as shifting public debate (with a view to influencing political decisions) via media appearances and commentary. The OECD has warned that, in light of the rise of digital technologies and social media, the standard focus on oral and written communications with officials may not be sufficient.[11] For reasons of tractability, though, this report concentrates on direct contacts. It also focuses, for similar reasons, on central as opposed to local or regional government, even though planning and other functions of those bodies are vulnerable to lobbying and require regulation.

Lobbying, broadly speaking, can be carried out by *third-party or consultant* lobbyists, who represent the interests of a wide variety of clients, some of whose identities may be unknown; or it can be carried out by *in-house* lobbyists representing the interests of one specific employer. The latter lobbyists can be the heads of key organisations – the Council of Trade Unions, for instance, or Federated Farmers – or they may be staff with job titles such as 'external relations manager'. (A more precise definition of lobbying and lobbyists is outlined below.)

9. OECD, 'Definitions of terms', in *Lobbying in the 21st Century: Transparency, Integrity and Access,* OECD Publishing, Paris, 2021.

10. Raj Chari, John Hogan, Gary Murphy and Michele Crepaz, *Regulating Lobbying: A Global Comparison* (2nd ed), Manchester University Press, 2019, p.4.

11. OECD, 'Executive Summary', in *Lobbying in the 21st Century.*

Some lobbyists object to the term's pejorative overtones, and would prefer a phrase such as 'government relations'. Quite apart, however, from the large extant body of research articles, international agency work programmes and overseas laws targeting 'lobbying', all of which renders the use of another phrase impractical, it is also unclear that the term *need* be pejorative. Indeed, as the OECD notes, "By sharing expertise, legitimate needs and evidence, interest groups can provide governments with valuable insights and data on which to base public policies. This can help policy makers understand options and trade-offs, and can lead, ultimately, to better policies. Lobbying to strengthen environmental standards, improve road safety or increase childcare services, for example, can benefit society as a whole."[12]

Some forms of lobbying, however, can threaten public integrity and risk policy capture. The problems here can be grouped under three loose headings:

- Lobbying may be carried out unethically, for instance by providing misleading information to officials, attempting to avoid public scrutiny, or veering into manipulation or bribery;
- Lobbying may involve the misuse of confidential state information, for instance if former ministers immediately become lobbyists (a phenomenon colloquially known as the "revolving door") and can then inappropriately trade on their insider knowledge; or
- Lobbying may lead to large imbalances in access to, and influence over, officials, heightening the risk of policy capture.[13]

This access and influence can bias officials' decisions but also remove specific issues from their agenda altogether (this is known as agenda-setting power).

In the domestic context, the Ministry of Justice has identified a range of public concerns about lobbying, which largely overlap with the above:

- Uncertainty about the motivations, origins and influence of lobbyist groups can erode trust in democratic process;
- Dissemination of biased information can reduce the public's ability to critically engage in matters that affect them;
- Some behaviours could be unethical or illegal, for example if lobbyists deliberately manipulate public opinion with false information;
- Movement between roles in government and lobbying agencies can result in misuse of privileged information and unfair access;
- Voices of those with limited resources or connections can be marginalised; and
- Decision makers can become over-reliant on lobbyist research or perspectives.[14]

14. Ministry of Justice, 'Update on the Political Lobbying Project', 1 August 2023, https://www.justice.govt.nz/assets/Documents/Publications/20230829-Political-Lobbying-Briefing.pdf (accessed 28 March 2024).

12. Ibid.

13. While there may be no evidence of some of these specific practices in New Zealand, they are clearly present globally, and the absence of regulation or much scrutiny of New Zealand lobbying makes it plausible that such practices do take place but go undetected.

14. Ministry of Justice, 'Update on the Political Lobbying Project', 1 August 2023, https://www.justice.govt.nz/assets/Documents/Publications/20230829-Political-Lobbying-Briefing.pdf (accessed 28 March 2024).

Concerns about imbalances in access are particularly salient in societies like New Zealand, where significant imbalances of income and wealth exist, and the distribution of corporate revenue has shifted strongly towards capital at the expense of labour. The richest 10% control approximately 35% of income, while the wealthiest 10% have 70% of all assets. The share of corporate income going to workers, meanwhile, has fallen from roughly 60% to 50% in recent decades, with a resultant increase in the share going to firms' owners.[15]

This is relevant because lobbying involves the use of resources (sometimes considerably so), and is likely to be more available to wealthier individuals and groups. To the extent that the largest fortunes are almost always generated through business activities, these inequalities may bias political decision-making in favour of corporate interests. People possessing social connections to officials, the cultural confidence to exercise power, and value alignments with politicians may also be more likely to take advantage of the opportunities lobbying affords. Lobbying can thus exacerbate pre-existing disadvantages for groups that lack the ability to engage in policy-making processes. (Lobbying, of course, is not the only form of influence that can be unequally distributed: those with greater resources and connections may, for instance, have disproportionate influence in general public debate and in the media. Lobbying is only one part of a wider web of power. Such questions are, however, beyond the scope of this report.)

In short, to repurpose a metaphor used by New Zealand academics Thomas Anderson and Simon Chapple, lobbying may be either "grease in the wheels" of a well-functioning democracy, aiding the efficiency of decision-making, or "sand in the wheels", wasting resources by redistributing income and favours to the well-off and damaging the social fabric.[16]

On the latter point, there is clear international evidence that high-volume, unethical lobbying can lead to public resources being misallocated, productivity lost, and social inequalities worsened.[17] Lobbying by tobacco and oil interests, for instance, has repeatedly undermined legitimate, science-backed attempts to curb smoking and reduce carbon emissions. It has also been argued that "deceitful" lobbying, combined with revolving-door practices that led to deregulation of high-risk banking activities, were partly to blame for 2008 financial crisis.[18]

[15.] Max Rashbrooke, *Too Much Money: How Wealth Disparities are Unbalancing Aotearoa New Zealand,* Bridget Williams Books, Wellington, 2021.

[16.] Thomas Anderson and Simon Chapple, 'Grease or Sand in the Wheels of Democracy? The market for lobbying in New Zealand', *Policy Quarterly*, 14 (2), 2018, p.10.

[17.] OECD, '1. Lobbying in the 21st Century', in *Lobbying in the 21st Century.*

[18.] Ibid.

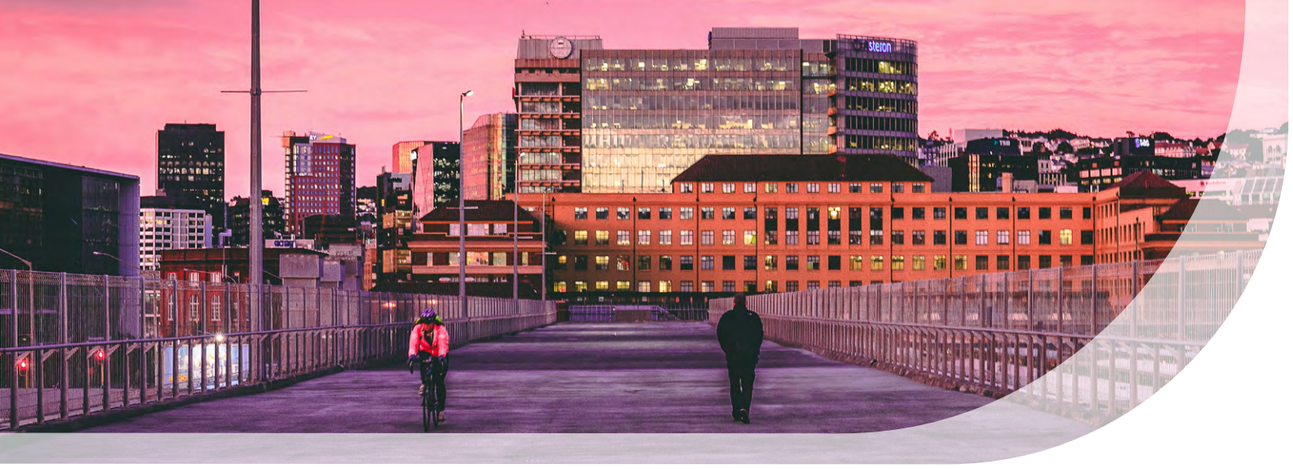
One recent analysis of 300 academic studies showed that lobbying had led to "negative health outcomes, inaction on climate policies, excessive regulation to protect incumbents [and] insufficient regulation to correct market failures or distortions".[19] British research into alcohol lobbying, for instance, suggests the industry has engaged in tactics that include "misrepresenting unfavourable strong evidence and promoting favourable weak evidence. This deliberate moulding of the evidence, or 'bending science', shapes ideas and influences perceptions of data by the public and policy-makers."[20]

Lobbying can, in short, lead to policy-making that lacks integrity, which in turn leads to poor outcomes, poor quality spending and poorly operating markets. As well as these direct negative effects, the abuse of lobbying practices can undermine citizens' trust in the democratic process. These are troubling findings given the well-documented importance of trust to the good functioning of societies (and indeed economies).[21]

[19.] OECD, 'Executive Summary', in *Lobbying in the 21st Century.*

[20.] Jim McCambridge, Kypros Kypri, Colin Drummond and John Strang, 'Alcohol Harm Reduction: Corporate Capture of a Key Concept', *PLOS Medicine*, 11 (12), 2014, https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001767 (accessed 28 March 2024).

[21.] OECD, 'Trust in government', n/d, https://www.oecd.org/governance/trust-in-government/ (accessed 28 March 2024).



3. Lobbying in New Zealand

Although relatively sparsely documented, lobbying in New Zealand undoubtedly has a long history. The attempt to influence government is, arguably, as old as government itself. Many groups like Federated Farmers, which exist in part to carry out lobbying, are over a century old. Prior to the passing of the 1912 Public Service Act, which provided for appointment based on merit, well-connected individuals would successfully lobby for their friends and relatives to be given public-sector positions, irrespective of their merits. And, anecdotally, politicians recall practices dating back at least to the 1980s, including determined lobbying of prudential regulators, lobbying of officials handing out import licences, and alcohol-industry lobbying accompanied by undisguised gifts of the industry's products.[22]

The weight of opinion, moreover, suggests the industry has grown in recent years. Two decades ago, Labour MP Trevor Mallard was already claiming to have seen such an increase, noting furthermore that lobbying was "going to get more sophisticated and more common".[23] And by this time, investigative journalist Nicky Hager had unearthed ample evidence of lobbyists, public officials and companies working together to co-ordinate misleading public relations campaigns.[24] By 2012, concern about lobbying was strong enough to prompt Green MP Sue Kedgley to introduce a Member's Bill to regulate the industry.

The 2012 attempt to regulate lobbying

The Lobbying Disclosure Bill, as initiated by Kedgley, aimed to establish a code of conduct for lobbyists and a register where they would have to file quarterly returns. Both mechanisms were to be overseen by the Auditor-General. The bill defined a 'lobbyist' as anyone who was paid to communicate with a public office holder (an MP, minister, or anyone employed in their office) in an attempt to influence their decision-making.

22. Interviews carried out for this report.

23. Anderson and Chapple, 'Grease or Sand', p.12.

24. Nicky Hager and Bob Burton, *Secrets and Lies*, Craig Potton Publishing, 1999.

The bill was supposedly modelled on long-established Canadian legislation, but a combination of poor drafting and mistaken policy choices created multiple weaknesses. The more minor concerns, which could have been readily addressed, included: the failure to clearly exclude everyone working in the public service from the definition of lobbyist; the failure to include senior public servants as targets of lobbying; the potentially disproportionate size of the penalties for non-compliance; and the fact that the Auditor-General was not the appropriate body to serve as a regulator, a view expressed by many organisations including, indeed, the Auditor-General.[25] Yet further controversy was caused by the explicit intention to regulate not just premeditated encounters between lobbyists and officials but also informal ones.

The most serious issue, however, was that by defining a lobbyist as someone "paid to communicate" with public office holders, the bill risked capturing literally anyone who was in paid employment and communicating with MPs. The Attorney-General, Chris Finlayson, argued the bill would "capture people who send a one-off email to their Member of Parliament on behalf of their incorporated farm or small business regarding any government policy. This is because the bill does not exclude from its scope organisations who are not professional lobbyists and do not have significant involvement in lobbying." The Canadian legislation, by contrast, defined lobbyists as either third-party consultants or in-house staff spending over 20% of their time lobbying government; it also captured only premeditated communications.

Finlayson concluded that the bill constituted a "dramatic over-reach", arguing that individuals "may restrain themselves from making communications if they did not want to be considered a lobbyist and incur potential criminal sanctions for communicating with Ministers or Members of Parliament". This was, in his view, "an unacceptable and dangerous limit on freedom of expression … that risks creating a chilling effect for average New Zealanders". The draft legislation was thus a disproportionate infringement on the Bill of Rights Act.

A wide range of organisations also submitted against the bill. Business New Zealand suggested it would inhibit people from talking to ministers in the street, while the Bankers' Association claimed lobbying was "an issue of little consequence in New Zealand".[26] Many NGOs also expressed reservations, albeit because they thought that lobbying should be regulated but only if carried out

25. Controller and Auditor-General, 'Submission on the Lobbying Disclosure Bill', 9 October 2012, https://www.parliament.nz/resource/en-NZ/50SCGA_EVI_00DBHOH_BILL11278_1_A282266/a0181ff511da04ccdb52807776602b7bee5ea6f9 (accessed 28 March 2024).

26. Business New Zealand, 'Submission on the Lobbying Disclosure Bill', 5 October 2012, https://businessnz.org.nz/wp-content/uploads/2022/09/121005-Lobbying-Disclosure-Bill.pdf;

New Zealand Bankers Association, 'Submission on the Lobbying Disclosure Bill', 5 October 2012, https://www.nzba.org.nz/wp-content/uploads/2017/04/121005-Lobbying-Disclosure-Bill-submission.pdf (both accessed 28 March 2024).

by “commercial” interests.[27] (Such arguments are examined later on.)

Responding to such criticisms, Green MP Holly Walker, who had inherited the bill from Kedgley after the latter left Parliament, proposed various changes, including narrowing the definition of lobbyist to people communicating with government “as a part of their regular duties”.[28] The Government Administration Select Committee, which was examining the bill, nonetheless recommended it should not proceed, reasoning largely along the same lines as Finlayson.

Noting, however, that most submitters had supported the idea of bringing some degree of transparency to lobbying, the committee recommended two smaller reforms. First, Parliament should develop workable definitions of lobbyists and lobbying activity, and issue guidelines for how MPs should handle such interactions, potentially going as far as “proactive disclosure and reporting”. Second, the government should require that all parliamentary bills include details of the non-departmental organisations consulted during the development of policy and legislation. “This should make the involvement of lobbyists and other non-governmental organisations and the development of legislation more transparent.”[29]

These ideas, however, were not implemented, perhaps because of the bill’s negative publicity. Not all the arguments advanced against it had been convincing: one global lobbying expert, Guy Giorno, described Finlayson’s reasoning as “bizarre”, and some organisations’ professions of wanting a strong lobbying regulation regime (just not *this* one) were less than wholly convincing.[30] Nonetheless the bill’s demise diminished the immediate interest in regulation.

[27] See, for instance: Salvation Army, ‘Lobbying Disclosure Bill’, submission to the Government Administration Select Committee, n/d, https://www.parliament.nz/resource/en-NZ/50SCGA_EVI_00DBHOH_BILL11278_1_A282273/b1fb85368564b41752a7278f10a51cbb7f1ff484 (accessed 28 March 2024).

[28] Holly Walker, ‘The Lobbying Disclosure Bill and the Case for Greater Transparency in New Zealand’, *Policy Quarterly*, 10 (4), November 2014, pp.63-5.

[29] Report of the Government Administration Committee, ‘Regulation of Lobbying Bill’, 15-1, n/d

[30] Holly Walker, ‘Canadian expert weighs in on lobbying bill’, *Frog Blog*, 2 July 2012, https://web.archive.org/web/20120715235447/http:/blog.greens.org.nz/2012/07/02/canadian-expert-weighs-in-on-lobbying-bill/ (accessed 28 March 2024).

Recent developments

Lobbying, of course, did not come to a halt alongside the bill. In the last decade, a growing list of incidents, media reporting and scandals has raised concerns about lobbyists’ activities. Such instances will be more comprehensively detailed elsewhere (see forthcoming HCA publications), but a brief list covering the last decade would include:

- anonymous smears by lobbyist Carrick Graham against several public-health academics, including HCA’s Boyd Swinburn, which were published on the Whale Oil site and were eventually the subject of a settlement and apology from Graham;
- the Food and Grocery Council was also alleged to have smeared public-health academics via Whale Oil, but settled out of court during the above process;[31]
- separately, the Food and Grocery Council’s lobbying long delayed the addition of folic acid to bread, in the face of scientific consensus about its health benefits;[32]
- the Auditor-General found that Sky City lobbying had contributed to its preferential treatment in the widely criticised process, under John Key, by which the casino operator received an extended licence in exchange for building a convention centre; [33]
- in the lead-up to the scrapping of a proposed container deposit return scheme, which would have boosted recycling rates by forcing firms to make provision for returning plastic and other containers, the plastics industry had 21 meetings with senior officials while environmental groups had just three;[34] and
- the last Labour-led government received sustained criticism for repeatedly employing lobbyists as the Prime Minister’s chief of staff, allowing them to go through the “revolving door” and use confidential state information for private benefit.[35]

[31] Although these first two instances are not activities covered by this report (i.e. they do not involve direct contact with senior public officials), they nonetheless suggest the lobbying industry as a whole is in need of greater regulation.

[32] Nicholas Jones, ‘Big read: Why folic acid will be added to bread-making flour’, *New Zealand Herald*, 8 July 2021, https://www.nzherald.co.nz/nz/big-read-why-folic-acid-will-be-added-to-bread-making-flour-what-took-so-long-and-the-children-already-lost/JXLXOE5N54733YS2PAQL7VCAMU/ (accessed 28 March 2024).

[33] Controller and Auditor-General, ‘Inquiry into the Government’s decision to negotiate with SkyCity Entertainment Group Limited for an international convention centre’, 2013, https://oag.parliament.nz/2013/skycity (accessed 28 March 2024).

[34] Cécile Meier, ‘Relentless lobbying delayed recycling policy’, *BusinessDesk*, 30 October 2023, https://businessdesk.co.nz/article/environment/relentless-lobbying-delayed-recycling-policy (accessed 28 March 2024).

[35] Bryce Edwards, ‘Andrew Kirton’s past experience shines a bright light on lobbyists in politics’, *New Zealand Herald*, 21 March 2023, https://www.nzherald.co.nz/nz/political-roundup-andrew-kirtons-past-experience-shines-a-bright-light-on-lobbyists-in-politics/CNGGYAFP3NDI5H4KCSIQRZ7U64/ (accessed 28 March 2024).

Academic research suggests the local lobbying industry is now relatively well-developed. The absence of hard data makes definitive conclusions impossible, but by extrapolating from data on lobbyists with 'swipe card' access to Parliament and other information, Anderson and Chapple concluded that the size and intensity of the New Zealand lobbying market "may more closely resemble that of Australia, for example, than New Zealanders probably like to believe". They also noted the continuing growth in lobbying firms, including those of an explicitly partisan nature, as evidence of a likely wider increase.[36]

The lobbying industry has nonetheless largely opposed calls for regulation. James Gluck, who interviewed third-party lobbyists for his 2022 doctoral thesis, observed that his interviewees justified their stance on two grounds. Firstly, they stressed the "informal" nature of New Zealand politics, arguing that in a small society, contact with MPs was widely available. Secondly, and relatedly, they attempted to "normalise" their activities, depicting them not as part of the "dark arts" of influence trading but rather as a valuable democratic service. Many lent on the metaphor of translation, arguing that they merely explained or "translated" government processes for deserving clients who would otherwise struggle to understand the intricacies of bureaucratic and political processes.[37]

Even if taken at face value, of course, this argument is vulnerable to Anderson and Chapple's rebuttal: "The translator metaphor raises a question of justice: who can and can't afford to pay for 'translation services'? And why, if translation is so important, do public servants, on the other side of the divide, not hire such translators for all citizens, rather than only those who can afford them?"[38] Some lobbyists, meanwhile, have pointed to the special position of their trade. In a 2023 interview, Holly Bennett, the founder of lobbying firm Awhi, argued that her industry had privileged access to information – and thus power. "If you hold information that others don't, therefore you have an upper hand, you have leverage. You have the ability to pick and choose your moves before anyone else."[39] Bennett might also have noted that many lobbyists have – by dint of previously working in government – built up close personal connections with officials that can be as central to their business as any information they hold.

Lobbying, however, continued to attract only intermittent attention until two key sets of stories, published in 2022 and 2023, returned it to the spotlight. The first set revealed that former Labour MP Kris Faafoi had gone from reading Cabinet papers in July 2022 to being a lobbyist, and thus able to commercialise his knowledge of those papers, just three months later. This attracted widespread criticism from observers who pointed out that such a swift transition would be illegal in the many developed countries that impose "stand-down" periods during which former officials may not lobby government. The revelations also prompted National, then in Opposition, to call for a mandatory 12-month stand-down period.[40]

Second, in March 2023, RNZ's Guyon Espiner began a series on third-party lobbyists' activities, drawing on thousands of communications obtained under the Official Information Act.[41] The series showed that:

- publicly funded bodies such as universities and Transpower were spending hundreds of thousands of taxpayers' dollars on lobbying firms, asking them to provide political intelligence on MPs, among other things;
- the Labour government refused to say if the prime minister's chief of staff, Andrew Kirton, had followed conflict-of-interest procedures relating to the alcohol-industry clients for whom he had lobbied immediately prior to entering the Beehive;
- there exist very close relationships between lobbyists and senior public officials, who address each other as "mate", "brother" and "comrade";
- at least one lobbyist felt comfortable issuing direct instructions to public officials, telling them that part of a draft bill "needs to be deleted" and getting an immediate response that the relevant official was "on it";
- lobbyists seem to use their close connections with ministers to get their help in ensuring export barriers are removed for clients the lobbyist represents;
- lobbyists were able to set up meetings for their clients with ministers, and get updates on government policy development, to a far greater extent than ordinary members of the public could; and
- one lobbying firm was employed by the Commerce Commission, and given access to highly sensitive information and commission staff, even though the firm represented clients in the industries the commission was supposed to be regulating.

RNZ's reporting did not necessarily prove that lobbyists' *influence* was disproportionate, but it showed, beyond any reasonable doubt, that their *access* was far in excess of that enjoyed by others. The close relationships between lobbyists and officials, the lightning speed at which requests were responded to, the ease with which lobbyists got their clients and their views in front of officials, the privileged access to information on the progress of policies: all this demonstrated an immense degree of access. The access may have been granted in part because the clients in question had valid points to make; but many other organisations, unable to afford lobbyists' services, may have equally valid points but not receive the same access. And while influence does not always flow directly from access (ministers may meet people whose advice they

[36] Anderson and Chapple, 'Grease or Sand', p.13.

[37] James Gluck, *Trading in Influence in New Zealand*, PhD thesis, Victoria University, 2022.

[38] Anderson and Chapple, p.14.

[39] Guyon Espiner, 'Lobbyist Holly Bennett is lobbying her own colleagues to be more accountable to the public', *RNZ*, 28 March 2023, https://www.rnz.co.nz/news/lobbying/486842/lobbyist-holly-bennett-is-lobbying-her-own-colleagues-to-be-more-accountable-to-the-public (accessed 28 March 2024).

[40] RNZ, 'Chris Hipkins: Lobbyists' swipe card access to Parliament a "perception issue"', 4 April 2023, https://www.rnz.co.nz/news/political/487312/chris-hipkins-lobbyists-swipe-card-access-to-parliament-a-perception-issue, (accessed 28 March 2024).

[41] RNZ, 'Mate, Comrade, Brother', https://www.rnz.co.nz/news/lobbying (accessed 28 March 2024).

have no intention of following), the latter is nonetheless the precursor to the former. It is difficult to influence someone when you cannot get yourself, or your client, in front of them.

The RNZ revelations helped refute one common argument against regulation of lobbying, namely, that 'anyone' can get a meeting with a minister and that there are no significant disparities of access. Not that people in disadvantaged communities had ever believed that to be the case. As Māori representatives have, for instance, argued, if commentators say there are no issues with political lobbying it is often because "they have been systemically favoured".[42]

In April 2023, following RNZ's revelations, the prime minister at the time, Chris Hipkins, announced three minor changes to the provisions around lobbying:

- Asking the Speaker to remove lobbyists' swipe cards for the Parliamentary complex;
- Asking the Ministry of Justice (MoJ) to work with third-party lobbyists to develop a voluntary code of conduct; and
- Adding a section to the Cabinet Manual to make it clear that "ministers' conduct and decisions should not be influenced by the prospect or expectation of future employment with a particular organisation or sector".[43]

More substantively, Hipkins also tasked the MoJ with reviewing lobbying regulations in the round. Since then the MoJ has held multiple meetings with the industry, civil society and academics, among others, and provided updates on its work.[44] A draft code of conduct has been published, and at the time of writing, the review continues, although the new government, which took office in late November, had not made clear its position on the work programme.

What is clear, however, from the above discussion is that there is sufficient lobbying – and sufficient evidence of lobbying-related harms – to merit at least some regulation. There is also clearly some degree of public concern about the issue – a fact that, given the importance of maintaining public trust and confidence, further strengthens the case for regulation. The New Zealand Parliament, finally, is – by global standards – an unusually concentrated centre of power with relatively weak checks and balances. There are comparatively few MPs (per capita); there is no upper house; the number of journalists and media outlets scrutinising Parliament is declining; and third-sector groups may be reluctant to criticise Parliament's decisions for fear of losing contracts. The "unbridled power" of Parliament, to quote Geoffrey Palmer, makes it an ideal target for lobbying, once again enhancing the need for regulation.

[42] Ministry of Justice, 'Political Lobbying Project: Wider Regulatory Issues Hui', 21 September 2023, https://www.justice.govt.nz/assets/Documents/Publications/Summary-Political-lobbying-issues-Hui-with-Maori-21-September-2023-Final.pdf (accessed 28 March 2024).

[43] RNZ, 'Watch: PM Chris Hipkins speaks after Cabinet meeting', 3 April 2023, https://www.rnz.co.nz/news/lobbying/487260/watch-pm-chris-hipkins-speaks-after-cabinet-meeting (accessed 28 March 2024).

[44] Ibid.

4. The aims of lobbying regulation

Writing in 2018, Anderson and Chapple concluded there were "good reasons to believe that lobbying may directly throw sand into the wheels of society, as well as indirectly undermining values underpinning democratic citizenship, and [that] these problems are going to be larger in the absence of transparency". There were also, they argued, "reasons for believing that these problems are likely to become worse over time". Such arguments have only been strengthened by subsequent events, as detailed above.

Moreover, the global trend has turned sharply in favour of regulating lobbying. Writing in 2014, OECD researchers noted that, although only a handful of countries had regulation in place in 2009, in the subsequent years many had adopted such laws: "More countries have introduced regulation in the past five years than in the previous 60."[45] By 2021, of the 41 countries the OECD surveyed, over half had some kind of public register to provide transparency about lobbying activities.[46] And three-quarters of developed countries now impose stand-down periods to prevent or limit the "revolving door" phenomenon. As Hipkins acknowledged when announcing his minor reforms, New Zealand "is a bit of an outlier internationally".[47]

The OECD's framework for lobbying regulation argues that governments should aim to build "an effective and fair framework for openness and access", enhance transparency, foster a culture of integrity, and ensure their regulations are regularly enforced and reviewed. The OECD also stresses 10 key principles:

1. Countries should provide a level playing field by granting all stakeholders fair and equitable access to the development and implementation of public policies;
2. Rules and guidelines on lobbying should address the governance concerns related to lobbying practices, and respect the socio-political and administrative contexts;

[45] ROECD, *Lobbyists, Governments and Public Trust Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying*, 2014, p.7.

[46] OECD, 'Executive Summary', in *Lobbying in the 21st Century*.

[47] "Watch: PM Chris Hipkins Speaks after Cabinet Meeting," RNZ, April 3, 2023, https://www.rnz.co.nz/news/lobbying/487260/watch-pm-chris-hipkins-speaks-after-cabinet-meeting.

3. Rules and guidelines on lobbying should be consistent with the wider policy and regulatory frameworks;
4. Countries should clearly define the terms 'lobbying' and 'lobbyist' when they consider or develop rules and guidelines on lobbying;
5. Countries should provide an adequate degree of transparency to ensure that public officials, citizens and businesses can obtain sufficient information on lobbying activities;
6. Countries should enable stakeholders – including civil society organisations, businesses, the media and the general public – to scrutinise lobbying activities;
7. Countries should foster a culture of integrity in public organisations and decision making by providing clear rules and guidelines of conduct for public officials;
8. Lobbyists should comply with standards of professionalism and transparency; they share responsibility for fostering a culture of transparency and integrity in lobbying;
9. Countries should involve key actors in implementing a coherent spectrum of strategies and practices to achieve compliance; and
10. Countries should review the functioning of their rules and guidelines related to lobbying on a periodic basis and make necessary adjustments in light of experience.[48]

But what, exactly, would regulation achieve? The standard tools for regulating lobbying – public registers, codes of conduct and stand-down periods – all have slightly different objectives. The first aims to ensure the public knows who is lobbying whom; the second seeks to weed out unethical or corrupt forms of lobbying; and the third is designed to prevent confidential state information from being abused. Taken together, these reforms can be expected to have positive effects on both the integrity of public policy-making and the perception of that policy-making.

These effects are designed to be felt across different spheres. From the point of view of the most senior officials, namely Cabinet ministers, regulation is designed to ensure that their decisions are protected from improper influence. If lobbyists do not provide misleading information, and transparency encourages policy-makers to listen to a more balanced slate of views, the ultimate officials can have greater confidence that they have received fair advice. The transparency of their decision-making is increased, as is the likelihood of their being held accountable. In this way, the influence of special, private or vested interests on public policy-making is reduced, and the integrity of decision-making is enhanced.

[48] OECD, 'Recommendation of the Council on Principles for Transparency and Integrity in Lobbying', OECD/LEGAL/0379, 2024, https://legalinstruments.oecd.org/public/doc/256/256.en.pdf (accessed 28 March 2024).

From the point of view of those producing policies and advice, namely public servants, the benefits of regulation are broadly similar. Codes of conduct for lobbyists should ensure that their interactions with public servants are carried out in a more ethical manner. Public servants' own codes of conduct should also enhance ethical standards, and their hand may be strengthened if they wish to reject inappropriate approaches from lobbyists. They can have greater confidence that the advice they produce is well-informed and reflects a balanced range of views, and that the integrity of the processes in which they are involved has been protected.

Members of Parliament on both sides of the House, meanwhile, will be strengthened in their scrutiny of legislative proposals. Their work will be aided by knowing whom policy officials and decision-makers have met, and by knowing that officials will have been better able to ensure the integrity of policy-making processes. Transparency in lobbying will also help MPs understand whether opposition to particular proposals is prompted by narrow private interests.

From the public's point of view, regulation can provide a greater assurance that correct procedures have been followed. If regulation, in addition to the above benefits, helps ensure high-quality policy-making, the public will benefit from better and more stable law that is less likely to be overturned as the balance of special interests shifts. The public is, in addition, likely to see policies based on stronger evidence, leading to better services, higher quality spending and improved outcomes. Ideally, then, regulation enhances public trust in decision-making, which in turn brings benefits for officials, who are allowed greater (legitimate) room to govern.

Finally, there may also be benefits to those carrying out lobbying, if regulation (legitimately) gives the public the impression that this lobbying is above board and ethical. Such views are sometimes voiced by lobbyists themselves. Awhi's Holly Bennett, for instance, has argued for all three major forms of lobbying regulation to be adopted, asking her colleagues: "If we believe in our role in democracy, why are we hiding it?"[49] Internationally, one of the most active EU lobbying law firms, Covington, has praised Ireland's relatively comprehensive lobbying laws, arguing that transparency provides "a welcome source of information for media and political pundits. In publishing the headline issues being lobbied upon, it also has the effect of ensuring such issues are not ignored. By providing factual information it limits the potential for inaccuracies and speculation."[50]

[49] Espiner, 'Lobbyist Holly Bennett'.

[50] Covington Team, 'Regulating lobbying in Ireland', *Global Policy Watch*, 21 July 2021, https://www.globalpolicywatch.com/2021/07/regulating-lobbying-in-ireland/ (accessed 28 March 2024).

The effectiveness of reform

As with many regulations, the effectiveness of specific lobbying policies can be hard to determine, partly because they are often introduced at the same time as other measures, in response to scandals. The US, however, provides a 'natural experiment', as the lobbying laws across its 50-odd states can readily be compared with one another. According to one recent piece of research, the states with stronger lobbying regulations "weigh citizens' opinions more equally in the policymaking process". Although all states' decisions are weighted towards the views of their more affluent residents, the states with tougher regulations "tend to exhibit a weaker relationship between income and political influence."

The author of this research, Patrick Flavin, concluded that "those seeking to promote greater political equality … should consider strict laws that regulate the conduct of professional lobbyists, as one important tool for ensuring that citizens' opinions receive more equal consideration when elected officials make policy decisions … lobbying regulations can play an important role in promoting greater political equality."[51] Along similar lines, an analysis of the effect of lobbying regulations on the perceptions of US state legislators found "evidence that legislators perceive interest groups exert less influence over legislative outcomes in states with stricter regulations on lobbyists … legislators are more likely to report that the influence of organized interests has lessened in the past two or three years in states that recently increased the scope of their regulations on lobbying."[52]

In Ireland, meanwhile, research suggests its lobbying register is frequently used by journalists, alongside freedom of information requests, to write stories that may help expose corruption. These sources, in combination, "provide useful materials and avenues of exploration" for journalists, researchers have argued.[53] The register is also used by lobbyists themselves to see who else is lobbying and whether they need to either collaborate or mobilise to oppose others' lobbying. Interviewed for this report, Michele Crepaz, one of the authors of *Regulating Lobbying*, noted that various political actors find the register "helpful for gathering information on [others'] reputation, integrity and objectives".

Relatedly, research on European and American lobbyists' attitudes shows that, far from being hostile towards regulation or regarding it as overly burdensome, lobbyists are in fact favourably disposed towards it in general. As researchers have noted: "Like everyone else, lobbyists realize that they have an image problem and that the best way to address that problem is by operating in the broad daylight of public transparency."[54]

Crepaz adds there are "indications" that regulation has helped professionalise lobbying activities and improve standards, while similar effects apply to elected officials: "They know they are being watched, and that conditions their behaviour." It is plausible, he adds, that such changes would have "spillover" effects on public attitudes, though this might take time to become measurable. The absence of major Irish lobbying scandals post-reform is also an encouraging sign, though falling well short of establishing a causal connection. On a related note, members of the European branch of Transparency International, interviewed for this report, argued that integrity standards had improved markedly more in European institutions that had properly implemented lobbying regulations than in those that had not.

To the extent, of course, that regulation is reliant on making lobbying more transparent, it is subject to the well-known 'paradox of transparency', in which trust can decline if the public sees (or thinks it sees) more wrongdoing as a result of reform. But recent research by Crepaz and others has found that, with regards to specific openness measures, transparency "improves trust evaluations of political parties [and] reduces perceptions of corruption of MPs" although it had no effect on attitudes toward business interest groups.[55] Surveys have also found tentative evidence that lobbying transparency can improve trust and decrease perceptions of corruption, though for this effect to be significant the disclosure of lobbying activity must be comprehensive.[56] Other studies show at least no backlash.[57]

It is legitimate, finally, to argue for regulation from first principles. New Zealand's existing transparency measures (as detailed above), including the OIA and registers of MPs' interests, are not just well-established (no-one would contemplate abolishing them) but also well-regarded, even if precise 'proof' of their effectiveness would be hard to come by. They are valued in part because the plausible case for them (transparency of official information aids participation; registering interests helps prevent corruption) is so strong and so widely accepted across the developed world. Indeed, a substantial part of World

51. Patrick Flavin, 'Lobbying Regulations and Political Equality in the American States', *American Politics Research*, 43 (2), 2014, pp.304-26.

52. J. Ozymy, 'Assessing the impact of legislative lobbying regulations on interest group influence in U.S. state legislatures', *State Politics & Policy Quarterly*, 10, 2010, pp.397-420.

53. Michele Crepaz and Liam Kneafsey, 'Usability of transparency portals: Examination of perceptions of journalists as information seekers', *Public Administration*, 100 (4), December 2022, pp.978-98.

54. C. Holman and W. Luneburg, 'Lobbying and transparency: A comparative analysis of regulatory reform', *Interest Groups & Advocacy*, 1, 2012, pp.75-104; Gary Murphy, John Hogan and Raj Chari, 'Lobbying regulation in Ireland: some thoughts from the international evidence', *Journal of Public Affairs*, 11 (2), May 2011, pp.111-19.

55. Michele Crepaz and Gizem Arikan, 'The effects of transparency regulation on political trust and perceived corruption: Evidence from a survey experiment', *Regulation and Governance*, 12 September 2023, https://onlinelibrary.wiley.com/doi/full/10.1111/rego.12555 (accessed 28 March 2024).

56. Direnç Kanol, 'Knowledge of Lobbying Regulations and Attitudes Toward Politics: Findings from a Survey Experiment in Cyprus', *Public Integrity*, 20 (2), 2018, pp.163-78.

57. Michele Crepaz, 'Lobbying transparency and attitudes towards interest groups: a survey experiment', *Interest Groups & Advocacy*, March 2024.

Bank and other development institutions' work for three decades has been designed to help strengthen integrity through openness, in order to reduce corruption and achieve better living standards.

Lobbying regulations can claim similarly plausible justifications. Moreover, opponents of such regulations would have to argue that greater transparency about lobbying, as well as curbs on the abuse of confidential state information, would have either zero or negative effects on the integrity of public decisions and the public's perceptions of those decisions. This does not seem an especially plausible argument, especially given the above evidence and evaluations.

5. General principles of reform

As with any reform project, reform of lobbying regulation must balance different demands. As was clear in 2012, any infringement on speech rights, however slight, must be proportionate to the problem addressed. And in a more general sense, philosophical desirability and practical feasibility can pull in different directions. A regime must be sufficiently comprehensive to capture what is needed, but narrow enough that it is not covering too many organisations. And it must be politically viable: anything too controversial will not get implemented, unless political leadership is especially strong. This report, accordingly, is attentive to both the philosophical ideal and the practical reality.

There is, finally, a tension between 'one and done' and incremental approaches. Reformers may legitimately want to propose ideal, or near-ideal, legislation, especially if they fear the issue is unlikely to be revisited. Conversely, there may be virtue in acting incrementally. Smaller reforms may be more politically viable and, more importantly, may allow greater flexibility.

For this reason, the global expert consensus appears in favour of incrementalism.[58] Though there are certain commonalities, each country's lobbying culture is distinct, and the best regulation is often implemented in discrete steps, as policymakers adapt to the emerging interactions between their initial laws and the local lobbying culture. But any legislation must achieve at least some significant part of its aims; very weak laws, after all, can be worse than none, by providing the appearance of effective regulation but not the substance.

6. Global definitions of 'lobbyists'

Any successful regulatory regime will have to define several key concepts – notably, who counts as a lobbyist, what counts as an instance of lobbying activity, and who are the recipients or targets of lobbying. Of all these questions, probably the most crucial, and controversial, is the definition of a 'lobbyist'. This is especially important because it is those deemed lobbyists who have to disclose their activities in a register; they are also the ones subject to codes of conduct, and it is their activities that former public officials are banned from conducting during stand-down periods.

58. Chari et. al., *Regulating Lobbying*; interviews carried out for this report.

From a strictly theoretical point of view, a 'lobbyist' could be literally anyone contacting government while seeking to influence its policies. And from a strictly theoretical point of view, it might be interesting to try to trace all these contacts and create a comprehensive 'influence map'. In practice, however, this would be undesirable, on at least three grounds. Pragmatically, it would impose a colossal administrative burden. Philosophically, it would create a chilling effect: people contact government on all kinds of sensitive personal issues, and disclosing their encounters with officials, let alone the content of those encounters, could severely hamper democratic communication. From a political point of view, finally, officials' passing interactions with ordinary individuals are of little concern.

Every effective regulatory regime, therefore, seeks to focus on a particular form of lobbying: what might be described as high-intensity, well-resourced or professionalised lobbying. (This report uses the latter term.) This is the lobbying that, carried out with a certain degree of financial backing or professionalism, is most likely to influence officials. The problem, of course, is that there is no objective way to define professionalised lobbying, and every lobbying regime must find a proxy for it, however rough. These proxies can be explored via four lobbying regimes – those of Australia, Canada, Ireland and France – which represent a kind of logical sequence of answers to the question "who is a lobbyist?"

As the table below demonstrates, these countries also reflect the different groupings of how 'lobbyists' are defined within the OECD. It is important to note that this table is based solely on a simple OECD text description of how each lobbying regime works in theory. In practice, given the numerous exemptions in most regimes, the organisations and individuals captured may be different; in particular, it is unlikely that the regimes listed as such really do capture all individuals. This table simply gives a rough sense of the varying approaches used.

Table 1. OECD lobbying disclosure regimes

Target of regulation	Number (countries)
Only third-party lobbyists	5 (Australia, UK, Israel, Lithuania, Poland)
Third-party and in-house lobbyists	2 (Canada, US)
Some organisations but not individuals	6 (Austria, Belgium, EU, Ireland, Holland, Slovenia)
Some organisations and self-employed individuals	2 (France, Romania)
All organisations and individuals (in theory)	6 (Chile, Germany, Italy, Latvia, Peru, Spain)
Hard to categorise	2 (Iceland, Mexico)
Total	**23**

Source: OECD, Lobbying in the 21st Century; author's calculations

Australia

The most obvious, though not necessarily most helpful, place to start is to regulate only third-party lobbyists, as Australia does. This approach has several superficially appealing features. First, it limits the people regulated to a relatively small number – a defined class of professionals – making it easier to justify limits on their speech rights. Second, because third-party lobbyists do not generally disclose their clients, their activities may be most in need of transparency. Third, such a regime may be more politically palatable because there would be fewer people to object to being caught in its net.

The defects of the Australian system, however, are readily apparent. Much lobbying is carried out in-house, and it is hard to see why it should not be regulated. A well-funded lobbying campaign on behalf of a global tobacco giant is just as likely to be effective, and therefore just as much of interest to the public, if it is carried out by staff working in-house as if it is carried out by third-party lobbyists. Yet under the Australian system, the former campaign is essentially invisible. Consequently the Australian regime leaves the public "largely … in the dark", according to one recent academic analysis, and has few defenders among global lobbying experts.[59] Its main problem, in simple terms, is that it follows form (a named category of people) rather than substance (the people actually carrying out the activity). Research from Britain, which similarly regulates only third-party lobbying, suggests that as much as 85% of all lobbying is carried out in-house.[60]

Canada

If third-party lobbyists are an obvious place to start, the logical next step is to bring in-house lobbyists within scope. Again, this has a superficial appeal. If people working as lobbyists within organisations could be identified and, alongside third-party lobbyists, made subject to regulation, the desired outcome might be achieved.

This is not easy, however. In-house lobbyists cannot be defined by a title such as 'government relations manager'; they would simply change title to escape regulation. So – again – some kind of proxy must be found. The Canadian response is to define an in-house lobbyist as someone who works for an organisation (a company, trade association, NGO, etc.) and who spends more than 20% of their work time on lobbying. (The test, strictly speaking, is whether,

[59] Jennifer Lacy-Nichols and Katherine Cullerton, 'Who's lobbying whom? When it comes to alcohol, tobacco, food and gambling firms, we're in the dark', *The Conversation*, 13 November 2023, https://theconversation.com/whos-lobbying-whom-when-it-comes-to-alcohol-tobacco-food-and-gambling-firms-were-in-the-dark-216835 (accessed 28 March 2024).

[60] Ben Worthy and Stefani Langehennig, 'The central problem with lobbying is the lack of data, which only worsens the public's perceptions of the issue', *LSE British Politics and Policy*, 1 June 2021, https://blogs.lse.ac.uk/politicsandpolicy/lobbying-data/ (accessed 28 March 2024).

across the entire entity, the amount of lobbying conducted would amount to 20% of the duties of a single employee if they were treated cumulatively.[61])

Conversations with lobbying experts, however, suggest that this "20% rule" is poorly regarded. It is relatively easy for lobbyists to claim that such activity takes up less than 20% of their time. At least one former Canadian Commissioner of Lobbying has called for its removal.[62] And, in an interview for this report, a New Zealander regarded as one of the most effective (though lowest-profile) lobbyists stated they would not be caught by this rule, because lobbying was (in appearance or in reality) a small part of their workload. Some Canadian provinces, which maintain their own regimes, have moved to a 'minimum hours' threshold (e.g. someone is a lobbyist if they spend more than 50 hours a year on it), but this does not seem much more satisfactory, and poses major definitional issues (e.g. what counts as time spent lobbying).

Ireland

The third step in the chain of logic is to abandon the attempt to identify specific people within organisations, and to instead bring within the net anyone connected to an organisation *with some degree of resources*. This appears to be an increasingly common approach globally. In Ireland, the law defines lobbyists as:

> The following actors who communicate directly or indirectly about a relevant matter with a designated public official:
>
> 1. An employer with more than 10 employees where communications are made on its behalf;
> 2. A representative body with at least one employee communicating on behalf of its members and the communication is made by a paid employee or office holder of the body;
> 3. An advocacy body with at least one employee that exists primarily to take up particular issues and a paid employee or office holder of the body is communicating on such issues; or
> 4. A third party being paid to communicate on behalf of a client who fits into one of the preceding three categories.[63]
>
> For firms, the phrase "are made on its behalf" is relatively capacious: it captures staff, management, directors and owners. "Representative" groups include peak bodies, professional bodies, industry associations and sporting bodies. "Advocacy" groups include NGOs; while the legislation is not entirely clear, it appears at least some think-tanks register as lobbyists, while individual academics do not (but universities advocating for their organisational interests do).

Ireland's lobbying definition is sometimes regarded as "the gold standard".[64] Underpinning a regulatory system implemented in 2015, as a response to egregious corruption by Irish lobbyists, it appears to operate smoothly. The system excludes passing contacts from ordinary individuals; it focuses attention (at least partly) on organisations with some resources behind them; and it is simple and relatively hard to game. It is highly regarded by experts and by Irish organisations, including the lobbying industry itself. It has already been reviewed multiple times, as required by Irish law, and required only minor amendments. It also seems likely to avoid the problems New Zealand faced in 2012.

The Irish definition is, however, open to objections that its scope is either too narrow or too broad. On the first point, any system that focusses on people representing organisations will not deal well with the self-employed. In Ireland, people who are self-employed as *third-party* lobbyists are of course covered, but those representing their own interests – such as sole-trader lawyers – are not. Crucially, perhaps, a wealthy entrepreneur can claim they lobby government as a self-employed individual rather than a "representative" of one of their firms, and thus slip through the net.

On the second point, the Irish system could be argued to capture too many small NGOs that have just one staff member and whose lobbying activity may have little influence. On both the 'narrow' and 'broad' criticisms, another regime, that operating in France, may have something to offer, at least from a political standpoint.

France

French regulation targets loosely the same people as the Irish system: "executives, employees or members" of a wide range of organisations, including companies, representative bodies and NGOs. However, it does not apply a 'resources' test, so all such organisations – including those with no paid staff – fall within scope. The French system also captures self-employed lawyers and consultants and, indeed, any "natural person operating as an individual".[65]

How, then, does the French system make regulation tractable, and avoid – in particular – capturing ordinary citizens' interactions with government? By applying a threshold: no-one need register their lobbying unless they spend over half their time on such activities or they have had over 10 lobbying contacts in a twelve-month period. In this sense, the French system is, compared to the Irish one, simultaneously broader (many self-employed people, and wealthy individuals, could be captured) and narrower (only those repeatedly contacting government will be registered). As is discussed below, any such threshold create loopholes, and it is not clear that the French system is philosophically more desirable than the Irish one. It may, however, have other advantages, and if nothing else it highlights the diversity of approaches taken.

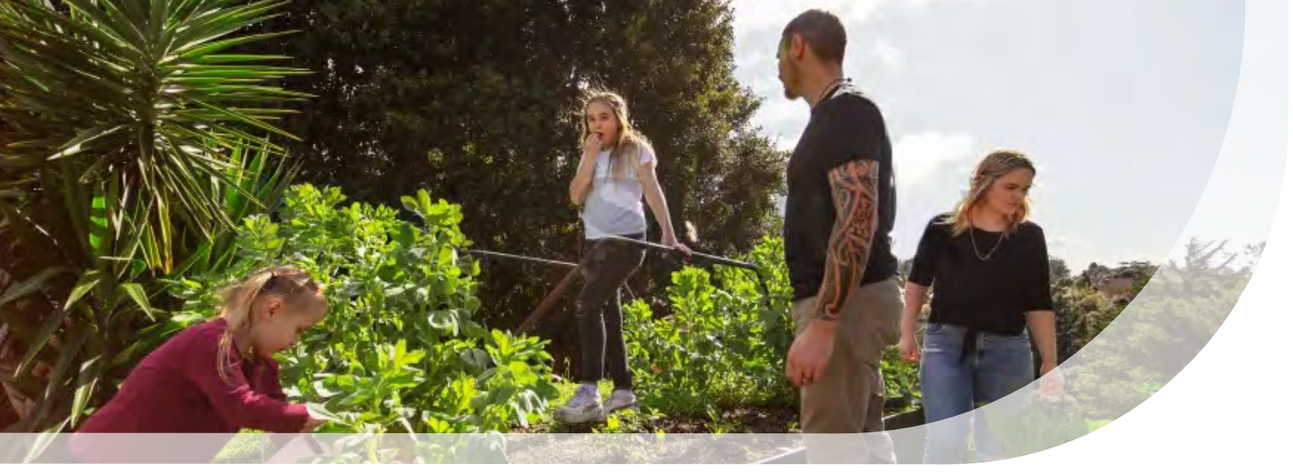
[61] Liam Williams, 'Regulating Lobbyists in New Zealand', Master of Laws thesis, Victoria University of Wellington, 2014, p.52.

[62] Chari et al., *Regulating Lobbying*

[63] The Irish definition also includes "any person communicating about the development or zoning of land", but this is a very specific response to the nation's GFC-era lobbying abuses.

[64] https://www.politico.eu/article/ireland-lobbying-clampdown-model-for-europe/.

[65] Haute Autorité pour la Transparence de la Vie Publique, 'Who is a Lobbyist?', n/d, https://www.hatvp.fr/en/high-authority/regulation-of-lobbying/list/#who-is-a-lobbyist-ri (accessed 28 March 2024).



7. Establishing a New Zealand definition of ‘lobbyist’

This report’s broad conclusion is that, from a purely theoretical standpoint, the Irish definition of lobbyist could, with some modifications, serve as a model for New Zealand. Whether it is politically tenable is another matter. It is important, moreover, to be clear on the assumptions and values underpinning this definition.

Treaty issues

In any definition of ‘lobbyist’, the implications for Te Tiriti o Waitangi/The Treaty of Waitangi will need careful consideration. Would, for instance, Māori organisations – iwi, hapū, etc. – have to register as lobbyists when contacting government? This could be seen as inappropriate, given that – as those organisations have often argued – they are not just another ‘stakeholder’ in New Zealand life but rather organisations acting in equal partnership with the Crown and benefiting from the status and tino rangatiratanga (sovereignty) set out in the Treaty.

One possible response would be to distinguish between the different roles of Māori organisations. An imperfect parallel could be drawn with the treatment of lobbying in the EU, where the peak bodies for trade unions and businesses do not have to register activities carried out as part of their special role as ‘social partners’ (in which, theoretically, such bodies help determine policies alongside officials). They do, however, have to register when they are representing members’ interests in the ordinary way, outside of social-partner processes.

The analogy is imperfect, not least because the ‘social partners’ do not possess sovereignty, but nonetheless hints at the potential for differentiation. As Māori attendees at a Ministry of Justice hui noted, “The rights of rūnanga to engage as a Te Tiriti partner must not be confused with lobbying.”[66] When Māori organisations interact with government as Treaty partners, they could be exempt from registration, but when an iwi corporation such as Tainui Group Holdings or Ngāi Tahu Tourism Ltd is seeking a regulatory change or concession, it might be required to register. The resolution of such questions, however, is beyond the scope of this report, and awaits forthcoming HCA research.

66. Ministry of Justice, ‘Political Lobbying Project: Wider Regulatory Issues Hui’.

Arguments for differentiating types of lobbying

The Irish system does not differentiate between types of lobbying except on one criterion (organisational resources). In this view, there is neither anything wrong with lobbying nor any kind of lobbying that is more meritorious than any other. If an organisation – be it a corporation, a peak body or an NGO – attempts to influence policy-making and has any significant level of professionalism or resources, its interactions with officials are of interest and should be regulated. No distinction, in short, is made between “bad” and “good” lobbying.

This contrasts with the views of certain New Zealand NGOs which, either implicitly or explicitly, seek to make some such differentiation and (partially) exempt themselves from regulation. Not all NGOs feel this way, of course: Forest and Bird, in its submission on the 2012 Lobbying Disclosure Bill, argued that “lobbying disclosure by organisations such as ourselves is right … Lobbying is lobbying, whether on behalf of a third party, or oneself.”[67] By contrast, the Council of Trade Unions’ submission on the same bill argued unions were not analogous to “professionalised” third-party lobbyists, and called for a “differential” system of regulation.[68]

There is an intuitively obvious point here. Very small, volunteer-based NGOs do not have the same resources, and are unlikely to have the same lobbying influence, as multinational corporations. But that does not justify excluding the activities of the former from regulation. There is, as above, nothing wrong with lobbying, hence many NGOs carry it out. No stigma should attach to the term; indeed if there was something wrong with the practice, the law would surely seek to ban it, not disclose it. And this disclosure can be positive. As the public law expert Graeme Edgeler argued in his 2012 submission, “Groups who believe they are acting in the public interest should welcome the opportunity to show everyone that they are undertaking the type of advocacy their members and supporters would expect.”[69]

Some NGOs argue for a distinction between ‘lobbying’ and ‘advocacy’, but it is not clear how this is relevant. ‘Advocacy’ could refer to grassroots campaigns to engage the public and ask them to put pressure on officials, but if so, that is not the sort of thing covered by the lobbying regulation envisaged here. Meanwhile,

67. Forest & Bird, ‘Lobbying Disclosure Bill: Written Submission’, 1 October 2012, https://www.parliament.nz/resource/en-NZ/50SCGA_EVI_00DBHOH_BILL11278_1_A281985/5fa96cebc35ba91a581b4e65fb85599e0ac98600 (accessed 28 March 2024).

68. New Zealand Council of Trade Unions, ‘Submission to the Government Administration Select Committee on the Lobbying Regulation Bill’, 5 October 2012, https://www.parliament.nz/resource/en-NZ/50SCGA_EVI_00DBHOH_BILL11278_1_A282128/fcccc7f87ad26a6a4070bd84a616b7586b43ee42 (accessed 28 March 2024)

69. Graeme Edgeler, ‘Submission to the Government Administration Select Committee on the Lobbying Regulation Bill’, n/d, https://www.parliament.nz/resource/en-NZ/50SCGA_EVI_00DBHOH_BILL11278_1_A282710/900ce8d3ebf2a62c4a84eae71fcecad61463957d (accessed 28 March 2024).

if NGOs are contacting officials directly to promote their position, they are carrying out lobbying, whatever term is attached to it.

It could be argued, however, that there is a meaningful and tractable distinction between lobbying in the public interest and lobbying for a private interest. Although such terms are imprecise, they can be defined to some extent. The Register of Pecuniary and Other Specified Interests for MPs, for instance, clearly identifies financial and personal interests that may bias politicians' decisions. Conflict-of-interest policies do likewise for various public officials.

There are, moreover, reasons to highlight private-interest lobbying. From a public-choice perspective, democracies often suffer from the problem that the 'winners' from a proposed policy (the broad public that has an interest in cleaner rivers, for instance) may be dispersed, and thus unlikely to lobby hard for this policy, while the 'losers' (farmers who have a financial interest in not paying to fence their paddocks) are a concentrated group, and thus likely to lobby (successfully) against it. From a political-economy perspective, meanwhile, the vastly greater resources brought to bear by private interests are likely to simply outweigh those of groups representing the public interest; indeed the history of democracies generally is the history of public-interest advocacy taking a very long time to outweigh powerful private-interest lobbying, if indeed it does it all. (Consider, for instance, the decades or centuries taken to create consumer protection laws, health and safety regulations, environmental protections and social safety nets, in the face of private-interest lobbying.)

This does not, however, justify blanket exemptions for some forms of lobbying or the stigmatising of others. Private interests are allowed to lobby, and may have legitimate public-interest aims. Consider a developer who seeks to build high-quality affordable housing in a wealthy suburb but is opposed by a local residents' association motivated by a dislike of poor people. Here, the private firm has a stronger moral claim than the NGO, and if both are lobbying officials, regulators should arguably be more concerned about the latter than the former. Nor are such examples hard to construct, even if they represent the minority of situations. In addition to the above example, which probably fits the moral intuitions of those with individualistic politics, people with collectivist politics might want to consider that any hard line against private-interest lobbying would make life difficult for a company that makes eco-friendly cleaning products, while smoothing the way for an NGO like the Taxpayers' Union.

Finally, if a lobbying regulation regime is to endure, it must be perceived as fair and reasonable across the political spectrum. It would not be politically durable to exempt NGOs, which are typically (though not universally) associated with progressive or left-wing politics, while including businesses, typically associated with conservative and right-wing causes.

Much feedback on this report, however, argued that lobbyists should at least have to declare whether the outcome they seek would create a specific financial or personal benefit to themselves or the group they represent. Although this does not appear to be a feature of lobbying regimes overseas, it could be regarded as a useful innovation. It would allow the public to see if, for instance, ministers' diaries are dominated by meetings with private rather than public interests. In Europe, some distinctions are drawn "between NGOs as promoters of accountability and transparency and of democratic participation in public affairs, and interest groups or lobbies promoting an economic or commercial interest, whose activity may be perfectly legitimate but that need a certain degree of regulation to avert the risk of undermining democratic principles".[70] This, however, is an argument only for differentiated *disclosure*, which could be appropriate because, when the only thing at stake is reporting, it matters less that there is no consistent equivalence of private = bad and public = good. Such a distinction is simply unable to carry the weight that would it have to bear if, as a consequence, some organisations were exempt from lobbying regulation altogether.

Recall, too, that the fundamental problem, in this context, is how lobbying is carried out and whether large imbalances of access or influence occur. On that basis, it is actually *good* for smaller organisations to register their lobbying, as one cannot detect an imbalance between the levels of access granted to massive corporations and tiny NGOs *unless the lobbying of the latter is recorded*. If, to take a recent example, the plastics industry has 21 meetings with government in a short period of time, it is impossible to know whether that is a large or small amount, unless it can be compared to the meetings granted to zero-waste campaigners. Only when it is revealed that campaigners had just three meetings can be imbalance be laid bare.[71]

The Irish system, of course, is much more in line with the desires of New Zealand third-party lobbyists, who dislike being singled out, than with the desires of NGOs who would like to be exempted. But this alignment is not necessarily a bad thing. By being relatively encompassing, the Irish definition removes an argument that third-party lobbyists could use to oppose reform. Moreover, many NGOs – including, it should be noted, HCA itself – acknowledge that they carry out lobbying activity and should be the subjects of regulation.

In short, the Irish system's decision to cover a broad range of lobbying organisations, without distinction between sectors, seems justified. The Irish system does, however, limit it targets only on one dimension (staffing levels), a point that requires further discussion.

[70] Silvia Kotanidis, 'EU Transparency Register 2021 interinstitutional agreement', European Parliamentary Research Service, August 2023, www.europarl.europa.eu/RegData/etudes/BRIE/2023/751434/EPRS_BRI(2023)751434_EN.pdf (accessed 28 March 2024).

[71] My thanks to James Gluck for this important insight.

Options for narrowing the definition

The Irish definition was supported by many report interviewees. Some remained unconvinced, however, by a regime that treats the CEO of a global alcohol giant the same as the secretary of the local rugby club (assuming that club has paid staff). Even if both NGO and corporate lobbying should be captured, the disparity between organisations is, for some, too great for a 'level playing field' to be credible. Relatedly, the system might, in New Zealand, capture too many NGOs, especially those with limited resources. It is also notable that the Irish definition creates a higher threshold for firms (10 employees) than representative or advocacy groups (one employee). It is worth thinking, then, about whether the thresholds should be higher here, at least for representative and advocacy groups, so as to focus on those with more resources or political connections. None of the likely options, though, is without drawbacks.

One option would be a monetary threshold, to catch organisations with a certain level of annual revenue or resources for lobbying. The US, for instance, requires people to register only if they intend to spend over a certain amount on lobbying officials. But it would be difficult to know where to set that threshold; every element of greater complexity would create more room for gaming and hiding (corporations could, for instance, set up low-turnover astroturf 'charities' to disguise their lobbying); and verifying and investigating claims about revenue or spending would complicate enforcement and require significantly more regulatory resources. This does not, broadly speaking, seem like a promising option.

An alternative would be to stick with the basis of the Irish definition, organisational size, but raise the bar. In 2018, Statistics New Zealand published data on "non-profit institutions" (NPIs), organisations reasonably similar to the representative and advocacy groups targeted in Ireland.[72] According to that data, the vast majority of New Zealand NPIs, just over 100,000 or 89%, have no paid staff, and would be already out of scope. (Although these data are five years out of date, NPI numbers do not change rapidly.) But that would still leave 12,500 organisations within scope. This might seem an overly large number, even if many NPIs would do no lobbying of central government in a given year and would not have to register.

The law could, instead, apply only to NPIs with over five paid staff members, which number just 4,000, or 3.5% of the total. This might seem more appropriate, given that, again, only a small proportion would actually register as lobbyists. That could, however, leave out of scope many small-scale organisations that have reasonably frequent contact with government and whose activities are arguably of interest. Temporary coalitions or networks – a group of businesses, for instance, that create a 'Suppliers of Product X Forum' – might wield significant lobbying influence without employing many (or indeed any) staff members directly.

[72] Statistics New Zealand defines NPIs as organisations that, inter alia, must "be organised to the extent that they can be separately identified; be not for profit and not distribute any surplus they may generate to those who own or control them; be institutionally separate from government; be in control of their own destiny; and be non-compulsory in both terms of membership and members' input."

Table 2. Non-profit institutions in New Zealand, 2018, by staffing level

No. of employees	In range		Cumulative	
	No.	%	No.	%
0	103,272	89.2	103,272	89.2
1-5.	8,433	7.3	111,705	96.5
6-19.	2,829	2.4	114,534	98.9
20-99.	1,020	0.9	115,554	99.8
100+	225	0.2	115,779	100
Over 1	12,507	10.8		
Over 5	4,074	3.5		

Source: Statistics New Zealand Satellite Accounts 2018

While staffing levels seem like a more promising criterion than turnover, in part because they are probably harder to manipulate, the truth is that, *any* additional threshold creates complexity and room for gaming. Astroturf 'charities', this time with few or no paid staff, would once again provide a potential means for evading scrutiny. There might, of course, be ways to counter such stratagems. Regulations could require NGOs to state if they receive more than 10% (say) of their funding from any given source, or if they have been created to serve the purposes of another body; and if that source or body meets the proposed criterion (a firm with more than 10 staff or a representative or advocacy group with more than five staff), the NGO would have to register as a lobbyist. Enforcing such rules, though, would inevitably be difficult, so the claimed benefit of the higher threshold (keeping more organisations out of scope) would have to clearly justify the added complexity.

If staffing levels remained the criterion, consideration would be needed as to whether the Irish system of a higher threshold for firms is justified. In response to enquiries for this research, the Irish regulatory body, the Standards in Public Office Commission (SIPOC), argued:

> *The threshold of 10 employees was established as a reasonable threshold number which would capture a significant portion of lobbying activities by the business community and have a reasonable expectation of achieving compliance … Advocacy … and representative bodies, by their very nature, are more likely to be engaged in lobbying activities than the average small firm. They also tend to have lower number of employees. To have applied the 10-employee threshold to these organisations would have excluded significant levels of lobbying activities from the scope of the Act.*

The reasoning here seems plausible, although of course open to dispute. For context, a threshold of 10 employees for firms would, in New Zealand, still capture over twice as many companies (7.7%) as a threshold of five employees would for NPIs (3.5%, as above).

Table 3. Firms in New Zealand by staffing level

Staff	% of all firms	% cumulative
100+	0.5%	0.5%
50-99	0.7%	1.2%
20-49	2.4%	3.6%
10-19	4.1%	7.7%
6-9	4.9%	12.6%
1-5	18.8%	31.4%
0	68.5%	100%

Source: https://ecoprofile.infometrics.co.nz/new%20zealand/Businesses/Size

The third major option for narrowing the scope would be to impose a threshold based on the number of lobbying contacts. Again, the US does so, requiring lobbyists to register only after their second contact with an official. France, as above, requires registration only after 10 contacts in a twelve-month period, in a clear attempt to capture only high-volume lobbying.

Once again, this is not entirely straightforward, as the number of contacts does not necessarily correlate with the effectiveness of lobbying. A single email from a CEO to a minister, for instance, can be enormously powerful. It also creates complexities of enforcement. Currently, the law operates on an individual basis: someone need not register if they have carried out fewer than 10 lobbying contacts, even if the contacts of everyone in their organisation combined are well over the threshold. This creates an obvious incentive to ensure each staff member has nine contacts.

France's lobbying regulator is now calling for the threshold to operate at an organisational level. This would require everyone in an organisation to log their lobbying activity with a centralised person or system, so that it could be tallied up and registration be made once the collective total tipped over 10. This would be complex though not impossible.

If the French system were not thought desirable, specific thresholds could still be applied to self-employed individuals, to capture only the most powerful – those who have also made donations to political parties, for instance, as a proxy for influence or access. Those people might just stop making donations, however, or make them through related entities they control.

This discussion of thresholds is summarised below. First, however, related matters – like human rights implications and administrative requirements – must be discussed.

Rights implications

As is clear from New Zealand's 2012 experience, lobbying regulation may have effects on free speech and other rights. These are fairly minimal: lobbying regulation largely seeks to provide transparency rather than ban any form of speech. Nonetheless it poses some restrictions:

- The mere disclosure that someone has met an official can reveal significant information about their activities, and such disclosure could discourage individuals from important democratic contacts and expressing themselves to officials;
- Lobbying regimes tend to include sanctions such as preventing unregistered or disbarred lobbyists from contacting officials, which clearly inhibits certain kinds of speech; and
- Stand-down periods, by barring former public officials from certain lobbying activities for a designated time, are essentially a (justified) restraint of trade.

Lobbying regulation could, in this way, be seen as inhibiting freedom of association, though this is not a point that seems to be so often raised in this context.

The question then is whether regulation based on the Irish system would be deemed a disproportionate infringement on free speech or other rights. This seems unlikely. The Irish system does not face any such legal challenges domestically. And in general, legal systems do not recognise an unrestricted right to lobby; as with all rights, lobbying (as a form of speech) can be restricted where other rights or principles so demand.[73] As above, lobbying regulation is increasingly common overseas, and is not seen to disproportionately breach rights. All that is required, in New Zealand as elsewhere, is that any restriction on free speech be deemed proportionate to the issue being addressed (the harms from certain forms of lobbying).

The Irish system ensures it is proportionate by making clear that individuals are out of scope, in particular when they are raising issues with MPs as constituents (see below), and by exempting purely volunteer-based representative and advocacy bodies, as well as any firm with fewer than 10 staff. Applied to New Zealand, this focus on (moderately) well-resourced organisations should also be sufficient for regulation to be seen as proportionate and to avoid creating the "chilling effect" feared by New Zealand's Attorney-General in 2012. (And, as above, there are options for further narrowing the focus, so as to even further lessen rights-related fears.)

In a more general sense, the large and rising number of organisations registering as lobbyists in Ireland strongly suggests regulation has not discouraged NGOs and the like from regular and effective contact with policy-makers.[74] The same is true in other jurisdictions with increasingly comprehensive lobbying regulation, such as the EU.[75] Finally, the other possible mechanisms with rights implications – barring particular lobbyists and imposing stand-down periods – do not seem to create legal problems in the many jurisdictions where they are deployed.

Administrative issues

The relatively broad Irish definition of lobbyist underpins a regulatory system in which all those covered by it must, firstly, register as lobbyists and, secondly, fill out thrice-yearly 'returns' detailing their contacts with officials. Several thousand returns are filed for each four-year period, many of them from NGOs.[76]

This could seem inappropriate, either to New Zealand NGOs worried about this administrative workload or to those who, more generally, feel such a large volume of paperwork is unnecessary and inefficient.

Firstly, however, the administrative workload imposed by the Irish system does not appear large. The register (www.lobbying.ie) is fully online and easy to use, and the regulatory authorities provide ample guidance and education. Registered lobbyists can, in the system's back end, create draft returns to which they add details of their lobbying contacts as they eventuate across the four-month period. Then, at the end of that period, they can simply check their return for completeness and press 'send'. This report has not been able to establish the exact amount of time this process takes. However, Irish experts interviewed for this report have argued that filing lobbying returns is now part of the standard tasks of – among others – NGO policy and advocacy officers, and does not pose a significant burden.

Secondly, and more generally, organisations interviewed by Irish media appear supportive of the system and unconcerned by its administrative requirements.[77] In response to enquiries, SIPOC was not able to furnish any specific research on the system's administrative workload nor any detailed cost-benefit analysis. However, the most-cited study of a lobbying system's administrative workload, concerning the Austrian regime, found the costs of compliance were minimal as a proportion of the turnover of affected organisations.[78]

It is perfectly cogent to argue, moreover, that filing an occasional return of lobbying activity (be it twice, three times or four times a year) is a very reasonable price to pay for greater transparency about how decisions are made (and, potentially, for greater trust in the democratic process). Any administrative workload, moreover, would be in proportion. Very small NGOs would presumably have little if any contact with officials, and would spend little time filling out returns. The situation for third-party lobbyists is slightly less clear. If, as they sometimes claim, they have no more privileged access than other citizens, they too will face a relatively small volume of extra work. If, by contrast, their access is somewhat greater than that, they will have to do more paperwork. But if they are frequently in front of officials, and (anecdotally) enjoying relatively large salaries in consequence, they cannot have too many complaints about the time taken to fill out a lobbying return, especially if the system is designed to make this process easy.

[73] For instance: "While recognising the freedom of expression (Article 10) and the freedom of assembly and association (Article 11), the European Convention on Human Rights does not recognise an unfettered 'right to lobby' and nor does the case law of the European Court of Human Rights (ECHR)." Kotanidis, 'EU Transparency Register'.

[74] Standards in Public Office Commission, *2022 Annual Report*, June 2023, https://www.sipo.ie/reports-and-publications/annual-reports/SIPOC-AR-2022-Final-for-Web.pdf (accessed 28 March 2024).

[75] Kotanidis, 'EU Transparency Register'.

[76] Standards in Public Office Commission, *2022 Annual Report*.

[77] Harry Cooper, 'Ireland's tough lobbying rules spark cries for similar laws elsewhere', *Politico*, 9 August 2017, https://www.politico.eu/article/ireland-lobbying-clampdown-model-for-europe/ (accessed 28 March 2024).

[78] "Austria … calculated the regulatory burden on lobbyists of complying with rules. In the Regulatory Impact Assessment … the Federal Ministry of Justice came to the conclusion that the burden on lobbyists was very light compared to their earnings." OECD, *Lobbyists, Governments and Public Trust Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying,* 2014, p.21.

Paid and unpaid lobbyists

There does not appear to be an international consensus on whether lobbying regulation should focus on paid staff members or volunteers, although the former are more frequently in focus. The argument for excluding volunteers is that it helps target, as above, professionalised lobbying; lobbying by volunteers is sometimes thought to be much less significant or influential. This could, however, create a loophole by allowing paid staff members within an organisation to get volunteers to lobby on their behalf, and evade scrutiny.

The Irish system has traditionally tried to deal with this issue by exempting volunteer lobbying *unless* it is done on the instructions of a paid staff member. It is not clear, though, that this is easily enforced. Perhaps more usefully, the Irish system has recently been amended so that volunteer lobbying is also in scope if the volunteer is an office holder, such as an unpaid chairperson or board member. This seems more useful, since such people are, first, readily defined and, second, more likely to exert influence than the average volunteer. Accordingly, any New Zealand legislation could state that, within the relevant organisations (firms, representative bodies and advocacy groups of a certain size), the only people whose contacts count as lobbying activity are paid staff members and officeholders of any kind.

The self-employed

The exclusion of self-employed people from most lobbying regimes is clearly a loophole. Closing it completely, however, would not be easy. New Zealand has a large number of self-employed people, many of them relatively 'ordinary' or poorly resourced individuals whose contacts with government a lobbying regime should probably not try to cover. Attempting to capture them would also leave any reform effort open to the same criticism as the 2012 bill, which was (as above) found to create a "chilling effect" by covering too many people. Whether or not such arguments are philosophically convincing, their ability to obstruct any reform effort represents a strong argument for not including the self-employed. However, as above, the French system finds way to bring certain categories of self-employed people within scope, providing they are high-volume lobbyists. This might be a politically more feasible approach.

There may also be ways of addressing the issue of wealthy self-employed individuals. For instance, regulatory guidance could clarify that if an individual has substantial shareholdings in – or is a director of – a firm, and in their discussions with officials they could be perceived as "representing" the interests of that organisation, they must register as a lobbyist. Moreover, as long as New Zealand continues to publish ministers' diaries, some of the lobbying carried out by wealthy individuals – whose self-perceived status is probably such that they believe they should be talking to ministers – would continue to be captured regardless. For this to be a reliable 'backstop', however, the publication of ministerial diaries would need to greatly improve.

Charitable status

One specific issue raised by NGOs in relation to the Irish definition is the treatment of charitable status. In New Zealand, several prominent NGOs – notably, Greenpeace – have undergone court challenges arguing that the amount of lobbying they carry out is incompatible with that status. Although Greenpeace ultimately won that case, the issue plays on the minds of NGOs, and even just the threat of further cases could have a chilling effect.[79]

In Ireland, however, large numbers of charities register as lobbyists without any consequences. Guidance from Irish regulators has made it clear that lobbying is not incompatible with charitable status, as long as it is connected to the charity's aims. As part of any reform of lobbying regulation in New Zealand, it might be desirable to insert provisions – in whichever law is appropriate – to make that point equally clear in the local context.

Legal privilege

Another specific question concerns the status of lawyers. Their duty of confidentiality to their clients could, on a superficial reading, make it impossible for them to disclose the names of those clients in a lobbying register. This is, however, a question that many other jurisdictions have already resolved, and in those jurisdictions lawyers readily register as lobbyists. (As indeed they must, otherwise large amounts of lobbying activity would simply be transferred to them in order to avoid scrutiny.)

The issue is generally resolved by differentiating between different forms of legal activity. Legal representation – for instance, defending clients under prosecution – is normally protected (that is, not required to be disclosed). When, by contrast, lawyers are contacting officials to represent clients' interests more generally – for instance, by advocating for a law change that would benefit said client – that must be registered as a lobbying activity.

Foreign lobbyists

As the world enters a period of increased international conflict, the question of foreign governments attempting to influence our own, via lobbying, may become more salient. Internationally, however, the treatment of foreign

[79] Nick Young, 'Is Greenpeace a charity in New Zealand?', Greenpeace, 1 March 2021, https://www.greenpeace.org/aotearoa/story/is-greenpeace-a-charity-in-new-zealand-yes (accessed 28 March 2024).

lobbying varies significantly. Some regimes seem to leave it *out* of scope, by exempting communications from foreign governments from the definition of 'lobbying activity'.

The middle path is to bring it partly within scope, by noting that such exemptions do not apply if the communication came via a third party that is distinct from the foreign government itself. This may help address the influence on a domestic government exerted by 'front' organisations or foreign-sponsored groups attempting to shift policy in favour of their parent country. Finally, in countries like Australia, foreign lobbying faces *stricter* scrutiny than other lobbying.

Given the noteworthy but not overwhelming evidence of other countries attempting to subvert New Zealand policy, the middle path noted above may be most appropriate here.[80] And, as above, the general injunction to keep reform proposals simple probably argues against anything more detailed or specific. This is a matter for debate, however.

Exemptions

Every lobbying regime exempts certain forms of communication, such as MPs' constituency business; this is discussed in detail below.

Conclusion

Although there are complexities, the above discussion, and indeed international experience, suggests that defining a 'lobbyist' is perfectly possible. In New Zealand, this definition will need to incorporate indigenous elements, alongside whatever lessons are taken from the decades of experience of overseas lobbying regimes.

The most complex question remains that of setting a threshold for what counts as 'professionalised' lobbying. As ever, it is a balancing act. The advice from global experts is to keep matters simple: lobbyists, just like everyone else, are adept at finding gaps in legislation, and every additional element of complexity, every extra test or threshold, generates further loopholes. All this argues for a streamlined definition along Irish lines. The administrative workload of that system does not appear large. It is, as above, desirable to have a wide range of reasonably well-resourced organisations included, so that imbalances in access can be better measured. And the scope could be narrowed later on, incrementally, if it was felt too many organisations had been captured. From a philosophical and practical standpoint, the Irish system appears the most attractive.

[80] Anne-Marie Brady, 'Magic Weapons and Foreign Interference in New Zealand: How it started, how it's going', *Policy Quarterly*, 17 (2), May 2021, pp.70-9; Eva Corlett, 'New Zealand parliament targeted in China-backed hack in 2021, spy agency says', *Guardian*, 26 March 2024, https://www.theguardian.com/world/2024/mar/26/new-zealand-parliament-china-hack-2021-spy-agency-gcsb (accessed 28 March 2024).

It may not, however, be politically acceptable in New Zealand. Bear in mind that the Irish system could be justified with reference to exceptional levels of lobbying-related corruption that included the imprisonment of one prominent lobbyist, Frank Dunlop, on bribery charges. There is no evidence that lobbying in New Zealand has reached such an egregious depth, nor perhaps the level of public disquiet that would support such sweeping reform. The argument that it would be an unjustified administrative burden to impose might be convincing, even if untrue.

If a narrowing of the scope were sought, the French approach is probably the most promising. Capturing only those groups and individuals with repeated contact with government would probably be both relatively tractable (such contacts can be defined and measured with some certainty) and plausible to the public (it is likely to 'make sense' that repeated lobbyists are of most interest). Whether a threshold of 10 contacts is sensible is another matter; indeed it seems on first glance relatively high. The US, by contrast, has a threshold of just two contacts, thus keeping one-off contacts (e.g. an email to a minister) out of scope while capturing lobbying of any intensity. If this were thought too low, an in-between number – five, say – could be selected.

Either way, narrowing the definition might be worth it in order to get a workable reform over the line, provided it still achieved something tangible. But there would, to reiterate an earlier point, be costs to this approach – notably, the creation of a loophole that would no doubt be exploited to some extent. Moreover, the answer to the question 'what is politically feasible?' is never fixed; argument and advocacy can widen the space for political action. Ultimately these are judgement calls about the balance between philosophical purity and political pragmatism.

8. Defining lobbying activity

Once lobbyists are defined, the next question is to determine what counts as lobbying activity. Internationally, it is usually defined as any premeditated written, verbal or electronic communication with designated officials. The term ‘premeditated’ highlights that the person contacting the designated official has done so intentionally, with a view to raising a particular issue. Or, conversely, the official contacting the lobbyist has done so intentionally. (Officials, as discussed below, are typically defined as MPs, key political staff, and senior public servants.) This definition captures the standard fare of texts, emails, phone calls and meetings. It would also capture any other premeditated encounter where organisations intended to raise issues with officials. A corporate hospitality event or a business breakfast with ministers, for instance, would count as lobbying by the organiser.

What this definition does not capture, however, are informal, unplanned or incidental communications: the fabled “bumping into someone in the Koru Lounge”, the spontaneous chat at a cocktail party or other such function, the chance encounter on the street or in a supermarket. Whether these communications should be included is debatable. On one view, they are a crucial form of lobbying, especially in a small society such as New Zealand where political actors often frequent the same social circles. Significant discussions may be held in these informal settings, or important contacts made, or the seeds of key changes planted. In Ireland, such communication must be disclosed, on the view that “contact is contact”.

On another view, however, such a broad definition might force people to disclose impromptu five-minute conversations with ministerial staffers on Lambton Quay, upon pain of being found to be in breach of the law and potentially fined thousands of dollars (depending on the system of enforcement). This could be seen as an issue philosophically (as something that would have a chilling effect on free speech) or politically (as a ‘problem’ that would be used to oppose lobbying regulation). On the latter point, the downfall of New Zealand’s 2012 bill was in part due to the express intention to capture such informal lobbying. Overall, this is clearly a judgement call, but caution and incrementalism point towards not including informal lobbying. This could, however, be reviewed by a regulator once a system of regulation was established.

Regardless, lobbying is only ever concerned with direct contact with officials. It does not capture, for instance, advice given to another individual about how they might themselves contact an official. General public campaigning, advocacy and media engagements do not count as lobbying. (Conflicts of interest for lobbyists appearing in the media are, admittedly, an important issue, but one out of scope here.) A few regimes overseas require lobbyists to record campaigns that encourage others to contact officials (sometimes termed “grassroots lobbying”), but this is not standard.

Finally, the lobbying activities that must be disclosed are usually those that are not already public. Generally, the desire is to bring transparency to things not already transparent, and to avoid unnecessary bureaucracy. Accordingly, communications such as submissions to government consultations, which should already be made public, are almost always exempted. (It is worth noting, though, that New Zealand lacks clear legal standards for the publication of submissions, an area that requires strengthening.) However, some regimes, such as Ireland’s, require disclosure of – for instance – social media posts directed at public officials. This can help create a unified map of all lobbyist attempts to influence officials. But at least initially, any New Zealand regulation should probably focus only on otherwise undisclosed communications.

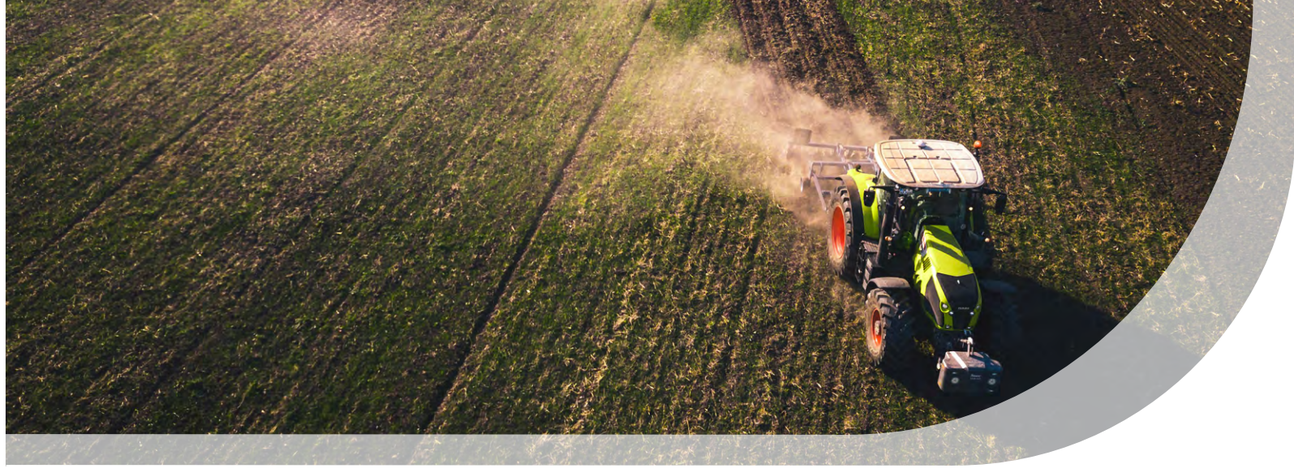
The subject of lobbying

The law must also define the subject of lobbying – that is, the issue under discussion. Typically this includes any governmental law, policy, or award of money. The Irish system, for instance, says that contact with government is lobbying if it concerns:

- The initiation, development or modification of any public policy or of any public programme (for example, proposals for changes in taxation, proposals for changes in agricultural policy, proposals for changing entitlement to health services);
- The preparation or amendment of any law, including secondary legislation such as statutory instruments and bye-laws (for example, proposals to change the law on adoption, proposals to change bye-laws relating to traffic); or
- The award of any grant, loan or other financial support, contract or other agreement, or of any licence or other authorisation involving public funds (for example, the criteria for the award of housing grants for people with disabilities, the purchase or sale of a property or other assets by the government).

Lobbying regimes, however, typically exclude specific forms of contact, on various grounds. In Ireland, the following communications are not regarded as lobbying:

- ***Private affairs:*** Communications by or on behalf of an individual relating to his or her private affairs. Much constituency business is thus exempt.
- ***Diplomatic relations:*** Communications by or on behalf of a foreign country or territory, the EU, the United Nations or any other international intergovernmental organisation.
- ***Factual information:*** Communications requesting factual information or providing factual information in response to a request for the information.
- ***Published submissions:*** Communications requested by a public service body and published by it, for instance during a public consultation process.
- ***Trade union negotiations:*** Communications related to negotiations on workers' terms and conditions undertaken by representatives of a trade union on behalf of its members.
- ***Safety and security:*** Communications the disclosure of which could pose a threat to the safety of any person or to the security of the State.
- ***Committees:*** Communications made in proceedings of a committee of either House of Parliament and already recorded and/or minuted.
- ***Communications by designated public officials (DPOs) or public servants:*** Communications by a DPO (to another DPO) in their capacity as such are exempt, as are communications by public servants (or public service contractors) made in that capacity.
- ***Governance of commercial State bodies:*** Communications by or on behalf of a commercial State body made to an overseeing Minister, or to DPOs serving in the Minister's department, in the ordinary course of the business of the body.
- ***Policy working groups:*** Communications from government-appointed advisory, expert, working and review groups, as long as they abide by a Transparency Code that requires them to publish their membership, minutes, meetings, agendas, etc.



9. The objects of lobbying

One final key question concerns the objects of lobbying – that is, the people who are lobbied. As with the definition of a lobbyist, the definition of the person lobbied could be extremely broad – in theory, anyone in the public sector. This is not wholly implausible: lobbying of non-senior servants can, arguably, change the course of policy. Mid-level officials, such as principals and managers, can exercise disproportionate influence in their respective areas of expertise and policy responsibilities; and they meet lobbyists. In practice, however, requiring 60,000-plus public servants to record their every interaction with designated lobbyists would impose a very large administrative burden, and the greatest interest is in the lobbying of the people this report has described throughout as "senior" officials: those with the ability to decide, or strongly influence, whether policies progress, and in what form. These are equivalent to the designated public officials (DPOs) identified in Ireland.

Clearly this includes ministers, but the definition must go further than that. Staff working in the leader's office of each party's parliamentary wing should, on the above criteria, be within scope. Ministerial staff, as advisers and gatekeepers, also wield significant influence. Backbench MPs and their staff are less powerful, but still have immense privileges, responsibilities and access to confidential information, and are often enlisted to lobby ministers. Most overseas regimes appear to bring MPs and their staff within scope.

Senior public servants, finally, wield considerable influence, and (anecdotally) are the subject of some of the most vigorous lobbying. Defining 'senior' is – predictably – another complex task, but most overseas regimes appear to target the top 2-3 tiers of staff. In New Zealand, tiers 1-3 would denote, in most agencies and departments, the chief executive, deputy chief executives and general managers (sometimes termed 'directors'). The equivalent personnel in Crown Entities, including members of their boards, would also need to be covered. Although the number and importance of such staff will obviously vary from agency to agency, the tier 1-3 definition may be the best rough proxy for 'senior'.

The agencies within scope would also have to be defined. This could encompass every central government body on the list maintained by the Public Service Commission, with a few specific exemptions (school boards of trustees, for instance).[81] Notably, some public agencies listed therein have boards, the members of which should also be covered by lobbying regulations.

If this definition were adopted, lobbying would consist of contact with:

- ministers;
- ministers' senior private secretaries, ministerial advisers and press secretaries;
- leader's office staff;
- MPs;
- MPs' office staff;
- tier 1-3 public servants; and
- senior staff and board members of public sector agencies.

10. Testing the definition

According to the above account, lobbying would, in layperson's terms, occur whenever:

- Anyone from a reasonably well-resourced organisation
- has formal, premeditated contact
- with an MP, a member of their staff, or a senior public servant
- regarding a government law, policy or award of funds.

81. Public Service Commission, 'Central government organisations', n/d, https://www.publicservice.govt.nz/system/central-government-organisations/. (accessed 28 March 2024).

This definition, which broadly follows the Irish model, is coherent and workable. But does it fit the local context? Does it, in other words, look like a basis for putting lobbying in New Zealand on a fair and open footing?

It could be argued that the definition is overly broad. Many of the reservations currently being aired about lobbying in New Zealand concern the activities of third-party lobbyists; and, as above, lobbyists here have not been accused of the kind of naked corruption that helped spur Ireland's comprehensive reform, nor have there been sustained calls for transparency about the lobbying carried out by NGOs. On that basis, some more limited reform – such as an Australian-style register of third-party lobbyists and their clients – might be more appropriate.

The inescapable problem, however, is that such a register omits so much lobbying, and, once regulators are seeking to bring in-house lobbyists within scope, it is very hard not to end up with something like the Irish definition. And there are, as above, strong arguments for the public being able to see a wide range of lobbying activity, including that carried out by NGOs. Given that one of the enduring concerns in New Zealand is about imbalance of access, a broad-based regime, along Irish lines, is in fact well-suited to addressing local problems. It would also – very usefully – provide hard evidence of the extent of such imbalances.

The above definition and regulatory regime would also help avoid the problems faced in 2012:

- By building on the Irish model, it could claim to faithfully reflect an existing regime that has been shown to be workable, proportionate and consistent with human rights;
- By capturing only some kinds of lobbying (namely, that carried out by moderately well-resourced organisations), it would avoid capturing a broad range of actors (as cited by the Attorney-General in 2012) or creating a "chilling effect";
- By capturing only planned contacts, it would not be vulnerable to accusations that it inappropriately regulated informal or spontaneous interactions;
- By bringing into view a broad range of lobbying activity, it would be resistant to third-party lobbyists' arguments that much activity was being missed; and
- By specifying that public servants as well as politicians can be the objects of lobbying, it could not be criticised for singling out the latter.

11. The regulation of lobbying in New Zealand

Having established a workable definition of 'lobbying', we can turn to the question of how it is best regulated. There are, as above, five internationally standard mechanisms. The design of each, and how it might be adapted in New Zealand, is discussed in turn.

1. An overarching lobbying law

The specific mechanisms for regulating lobbying, and their enforcement, must be clearly set out in legislation. To that end, it is proposed that New Zealand enact a Regulation of Lobbying Act. The act would outline principles and aims, and define key concepts such as lobbyist, lobbying activity, and the subjects of lobbying. It would establish a body to regulate lobbying and articulate its powers. It would also set out the design of a register of lobbying and the stand-down periods to be imposed on former public officials. The act would not itself set out the detail of the codes of conduct for lobbyists and public officials, but it would empower the above authority to create such codes, in conjunction with others as appropriate. It would also set out the relevant offences and penalties.

2. A register of lobbying

The register would be a fully online, fully searchable database of lobbying activities in New Zealand. Lobbyists would have to complete an initial registration form, which would be due shortly after their first instance of lobbying. If, for instance, lobbying returns had to be made quarterly (every three months), an initial registration might be due three weeks after the end of the quarter in which the organisation had begun lobbying. (The below provisions are largely modelled on the Irish example.)

The initial registration would have to list various details:

- The name of the person, company or organisation that carried out the lobbying;
- The organisation's business address;
- The business or main day-to-day activities of the organisation;
- Any relevant e-mail address, telephone number or website address; and
- A New Zealand Business Number, or similar NGO identifier, where relevant.

Thereafter, lobbyists would have to file returns of their activities at the specified frequency. Internationally, this frequency varies; some jurisdictions ask lobbyists to file monthly reports, others annually. Although there is no 'correct' frequency, monthly might seem excessive (at least from a political point of view), while yearly could leave the public in the dark for long periods. Disclosure must be timely if it is to be useful. Accordingly, quarterly reporting (four times a year) might be a reasonable compromise.

On this basis, anyone who had carried out lobbying activity in a given quarter would have to file a return detailing the following:

- The DPOs and public bodies lobbied;
- The subject matter of the lobbying. This would have to provide a reasonable level of detail. 'Transport policy' would not suffice: the specific policy instrument, law or contract award would have to be specified, e.g. 'changes to speed limits on New Zealand roads'. The return would also need to specify the intended result of the lobbying, e.g. 'reductions in speed limits';
- The type and extent of the lobbying activities, e.g. the number of meetings, phone calls, etc. The online return form could provide drop-down options to make this easier; and
- The name of the individual primarily responsible for the lobbying.

A separate return would be required for each different subject on which lobbying took place during the relevant period. If, for instance, a third-party lobbyist contacted officials about both natural health remedies and supermarket policy, they would file a return for each.

Third-party lobbyists would also have to provide certain client details:

- The client's name;
- The client's business address;
- The client's business or main activities;
- If the client is a firm, details of subsidiaries that might benefit from the lobbying activity;
- Any relevant e-mail address, telephone number or website address for the client; and
- The client's New Zealand Business Number, or similar NGO identifier, where relevant.

If an organisation had not carried out any lobbying in a given quarter, it could simply (and rapidly) fill out a nil return. If an organisation believed it had permanently ceased lobbying, it could apply to be relieved of the need to fill out (nil) returns.

Lobbyists could also apply to delay the publication of certain information if it could:

- Have a serious adverse effect on the financial interests of the State, the national economy, or the business interests of any particular set of people; or
- Cause a material financial loss to a person, or prejudice seriously a person's competitive position, or prejudice the outcome of any contractual or other negotiations being conducted by that person.

If New Zealand were following the Irish model, an individual could also request that personal data contained in lobbying returns not be made publicly available, if this was necessary in order to prevent the information being misused, protect the safety of any person or protect the security of the State. Such provisions would, however, need to be carefully worded and enforced to prevent them from turning into loopholes, and there would have to be some mechanism for checking and challenging such exclusions.

It would also be an offence to carry out lobbying while not registered, whether the organisation had never registered or had been registered but later struck off. (See below for more details.)

In some countries, lobbyists must detail the time and money devoted to lobbying activity. While this would be useful in New Zealand, it is probably not advisable to require it, at least initially, given the significant extra workload it would impose, the current lack of demands for such disclosure, and the need to propose reforms that are politically viable.

3. Codes of conduct

Specifying the details of codes of conduct is a task beyond the scope of this report. But some general points can be made, particularly as regards codes for lobbyists.

First, most jurisdictions appear to have struggled to make their codes of conduct meaningful. This may be in part because codes tend to be statements of general ethical principles (lobbyists should behave with integrity, honesty, etc.) and in part because the codes do not generally have a legally enforceable status (that is, there is no authority empowered to sanction people for breaching them). In addition, many codes are voluntary rather than mandatory. In New Zealand, matters are complicated by the fact that there is no body that could currently oversee such a code – not even a professional association, since lobbyists have not formed one.

As above, the Ministry of Justice has been holding meetings with lobbyists to investigate the idea of establishing a code of conduct, and has published a draft version. In addition, a few observations can be made. Firstly, although it is not clear how effective voluntary codes typically are, it is worth encouraging the industry to develop one, in the absence of a mandatory code. It cannot do lobbyists harm to discuss, reflect on and refine the standards they would like their profession to achieve. Even a voluntary code, though, would require some minimal oversight from an industry body, which would itself probably be something worth establishing. It is worth noting that some industries, particularly those associated with finance, are required by law to establish bodies and mechanisms for dealing with complaints and related issues.

In the above discussion, 'the industry' denotes third-party lobbyists and perhaps the most active or prominent in-house lobbyists, since they are – realistically – those most likely to devote the time and effort to establishing the above (voluntary) mechanisms. If a compulsory code were established, by contrast, it would have to apply to everyone defined as a lobbyist. Indeed this is the Irish approach: everyone registering as a lobbyist is informed of, and via their registration deemed to have accepted, a mandatory code of conduct. Ideally, too, a regulatory body would have the power to investigate breaches of the code and where necessary apply sanctions. The implications of this for the content of the code, however, are beyond the scope of this report.

There is, finally, the question of codes of conduct for public officials. As the OECD notes, countries should provide clear principles, standards and procedures for the way public official should engage with lobbyists, such that their behaviour would withstand "the closest public scrutiny".[82] In particular, they should preserve their impartiality, share only authorised information, disclose relevant private interests and avoid conflict of interest. Officials should also avoid contact with unregistered lobbyists.

Multiple, more generalised codes of conduct already exist in New Zealand public life. The Cabinet Manual sets out expectations for ministers: it notes that, for instance, care must be taken "to avoid creating a perception that representatives or lobbyists from any one organisation or group enjoy an unfair advantage with the government".[83] Meanwhile, there are separate codes of conduct for ministerial staff and public servants. Provisions relating to dealings with lobbyists would logically be inserted into these pre-existing codes and manuals. This task would, however, be hindered by the fact that there is no overarching code of conduct for MPs. Such a code has often been suggested but never taken up. The need for lobbying-related provisions could, however, provide the impetus for creating such an overarching code.

82. OECD, 'Recommendation of the Council on Principles for Transparency and Integrity in Lobbying'.

83. Cabinet Office, *Cabinet Manual 2023*, Department of Prime Minister and Cabinet, 2023, p.33.

Enforcement of all these codes would also be complex, given that the responsibility for monitoring them currently sits with a range of bodies. Such responsibility could either remain scattered across these different organisations or, more promisingly, sit within the remit of the body to be created to enforce lobbying regulation more generally (see below for details).

4. Stand-down periods

Stand-down periods (a.k.a. cooling-off periods) typically require people who have been senior officials or DPOs (as above, MPs, their staff, and public servants in tiers 1-3) to abstain from certain forms of lobbying for a given period. Former DPOs may bring useful skills and experiences to bear in the private and charitable sectors, but the transition can also have negative impacts. Stand-down periods are designed to deter two things: individuals making decisions while in office in order to curry favour with future employers; and individuals selling relevant state information, gained while in office, to lobbying clients.

For ministers, these practices are notionally covered by the Cabinet Manual, which states that ministers must ensure that, after leaving office, "they do not use any confidential, commercially sensitive, or legally privileged information to which they have had access as a Minister in any way that affects their personal interests or the personal interests of their family, whānau, or close associates, while that information is not generally available to the public". The manual also states: "While in office, Ministers' conduct and decisions should not be influenced by the prospect or expectation of future employment with a particular organisation or sector."[84] It is not clear, however, that such provisions are especially enforceable, particularly since the manual cannot be used to sanction those who have left office. Hence stand-down periods are necessary for ministers, not to mention other public officials.

The two key questions here are what, exactly, former public officials are barred from doing, and how long they are barred from doing it. The two points are partly dependent on each other. If the barred activities are relatively broad, the stand-down period is likely to be relatively short; if they are relatively narrow, the stand-down period may be longer.

Generally, individuals are barred from lobbying their former agency or department or on issues with which they have had official dealings. This reflects a distinction between, on the one hand, a generalised knowledge of how government works, and, on the other, specific knowledge of the activities of, and personal relationships with people in, a particular agency or department. In this worldview, a former public official does no harm – and indeed may perform a useful service – if they immediately start helping their new employers navigate the sometimes arcane mechanisms of bureaucracy, including by lobbying parts of government with which they did not previously have official dealings. This activity is not barred. What the stand-down period does seek to prevent, in contrast, is the commercialisation of specific policy knowledge or relationships within a particular agency, for the reasons described above.

The length of a stand-down period would logically reflect the time it takes for a former public official's knowledge and contacts to stop being current. After a certain point, the knowledge they hold – of internal policy processes, arguments made, dispositions of key officials, likely future developments, etc. – will become irrelevant because so much has happened in the interim. There is, obviously, no perfectly scientific way to determine this duration, but there are some useful rules of thumb.

Internationally, stand-down periods typically last between one year and five years. Some report interviewees argued that the former would be sufficient, as politics moves quickly and even the most confidential insider information rapidly becomes irrelevant. (This view was held even by some people strongly in favour of lobbying regulation.) Conversely, it could be argued that many legislative processes take several years from inception to completion, and knowledge gained early in that process would long remain current.

Determining the right period is ultimately a judgement call. It could be argued that the duration should be three years, on the intuitive grounds that no-one should be a minister and a lobbyist in the same Parliament. Conversely, a period at the lower end of the scale, perhaps 18 months (as is the case in Australia), could be justified.

Those arguing for a shorter period often cite a further justification: the supposedly diminished employment prospects of those working in 'political' roles. Politicians and people working in their offices, it is argued, are often seen as somewhat 'tainted' when looking for subsequent employment, and find that prospective employers are wary of hiring someone closely associated with a particular political tendency. It would be unfair to significantly limit their future employment prospects, from this viewpoint, especially since their skills will be particularly well-suited to lobbying and they may have few other realistic work options.

It seems likely, from anecdotal evidence, that this 'taint' is at least partly real. The strength of the effect, though, is impossible to determine. Nor is it necessarily a strong argument against stand-down periods. Those periods, after all, prevent people only from having direct contact with government on issues where they previously had official dealings, and then only for the designated time (likely 18-36 months). Former public officials are neither barred from lobbying on other subjects nor prevented from instructing their new colleagues in how to lobby.

A former environment minister, for instance, could take up a public-facing role in a conservation charity, abstain from direct contact with government for the designated period, and then – if they so wished – transition into a lobbying role.

84. Ibid, p.37.

Meanwhile, someone who had served in the Minister of Education's office could immediately begin lobbying government about low-traffic neighbourhoods. They could even advise others on lobbying the Minister of Education. Seen from this perspective, stand-down periods are if anything *insufficiently* restrictive.

Two further points deserve clarification. Firstly, the bar on lobbying activities is probably best couched as relating to issues on which the DPO had official dealings, rather than relating to their previous department or agency. While the latter might seem a 'cleaner' solution, the reality is that many issues do not sit neatly within departmental boundaries. If, moreover, such provisions are to apply to MPs, as indeed they should, a departmental or agency-based criterion would not work, as MPs are not assigned to specific agencies. They will, however, have been actively involved ("had official dealings") with specific issues.

Secondly, and relatedly, it could plausibly be argued that ministers, by dint of partaking in Cabinet discussions, have had official dealings with all major areas of government policy, and that the stand-down period would therefore prevent them from engaging in any kind of lobbying activity. While this might seem drastic to some (and the more so the longer the stand-down period), it is in fact appropriate given the immense power and access to information that Cabinet ministers possess. Nor does it seem an unreasonable restraint of trade. The argument that lobbying is somehow the only viable post-employment line of work for Cabinet ministers is profoundly unconvincing, given the opportunities for, variously, entrepreneurship, trade-union and NGO employment, or business-sector boards of director and other appointments. And, as above, stand-down periods are not as restrictive as they may first appear.

Finally, there is also the question of those *entering* rather than leaving office, which may raise 'revolving door' concerns if lobbyists are hired into public posts. Should they also be subject to stand-down periods? The issues here are less clear-cut. By definition such people are not (potentially) abusing confidential state information, because they do not yet have any. The danger, rather, is that they might use their new public position to further their old causes.

This would be, in effect, a conflict of interest. But it is, accordingly, better dealt with as such, through a thorough application of current conflict-of-interest procedures in which those taking up public positions are asked to declare notable interests in their previous work (during, say, the previous five years) and absent themselves from any discussions or decisions concerning those interests. Such practices could be strengthened by ensuring they capture all relevant financial and personal conflicts and that conflict-of-interest declarations are publicly available. (The lobbying register would also disclose individuals' former clients and activities.)

Moreover, a large number of those looking to serve in ministerial or other such offices would, on the above definition, have previously been lobbyists, since potential staffers are often politically active people who have frequently been advocating causes to government. So a stand-down period would unwarrantedly bar large numbers of eligible staffers from employment.

In summary, this report has not been able to establish a 'correct' stand-down period for those leaving public office. It is likely, however, to be somewhere between one and three years. The former has been publicly endorsed (at least for ministers) by members of the current government; the latter is probably the limit of what is justifiable. For political reasons, a one-year stand-down period might be the most acceptable option, especially if three years could seem overly long to average members of the public (even if it is not so in practice, given the sometimes quite limited reach of stand-down periods). Conversely, three years has compelling theoretical justifications. It is, once more, a question of balancing the ideal and the possible.

5. A regulatory agency

For the above measures to be meaningful, they must be monitored and enforced by a regulatory agency with sufficient resources to carry out its duties. Internationally, such points are often neglected, leading to lobbying regulation that looks good on paper but is ineffective in practice.

As a first point, legislation must clearly state that breaches of the above mechanisms are offences and carry specific penalties. It must be an offence, for instance, to carry out lobbying activities while unregistered, to commit serious breaches of a code of conduct, or to violate stand-down periods.

While research for this report has not established what exactly those penalties should be in New Zealand, some general points can be made. First, penalties should be graduated according to an offence's seriousness. In Ireland, SIPOC issues €200 fixed-penalty notices for relatively minor indiscretions such as failing to file a return on time. (In New Zealand, the equivalent amount might be $500.) In the very rare cases of wilful or continuing non-compliance with the rules (1-2 a year, according to its annual reports), the commission prosecutes offenders. It has, among other things, the power to bar lobbyists from the register and, therefore, from lobbying officials.

Second, the penalties applied in New Zealand should probably be broadly in line with similar offences, such as those relating to political donations. If, however, the penalties include fines, a question is raised about their proportionality. One issue that affects legal sanctions as a whole, but is especially pertinent here, is that a fine of a fixed size means very different things to differently resourced

individuals and groups. Some commentators on the 2012 lobbying bill, for instance, argued that the $20,000 fines it proposed would be extremely onerous on small charities, while others believed such fines would be far too small to make a difference to large corporates. The obvious answer, from a theoretical standpoint, is to have fines that increase in proportion with an individual's income or an organisation's turnover. While this approach does not appear to be widely used in New Zealand, it is overseas, and would be worth exploring here.

In terms of the regulatory agency's general operations, it should be empowered to carry out the full range of activities. Irish experts argue that SIPOC, for instance, is in constant and productive communication with lobbyists and potential lobbyists, interacting closely with the industry and ensuring, as far as possible, that every relevant organisation is aware of its responsibilities. At the more forceful end of the scale, the commission receives complaints and allegations of misdemeanours, as well as continuously monitoring media reports and other sources to check for likely breaches of the law. The lobbying regulations are, by law, reviewed every five years.

Determining the best design and status for such a regulatory agency in New Zealand is not straightforward. As above, in 2012 the Auditor-General was not deemed a suitable agency to take on such responsibilities, nor would any other existing public body be today. Accordingly, a new entity would be required. While it has sometimes been suggested that this entity should be an Office of Parliament, report interviewees strongly argued that this would be inconsistent with the basic purpose of such offices, which is to carry out functions that Parliament could do itself but prefers to delegate to agencies operating at arm's length. Any lobbying regulator would, by contrast, be enforcing rules and sanctions on MPs (among others), something that is not within the remit of Officers of Parliament. A lobbying regulator would, therefore, most logically be an independent Crown entity, a status enjoyed by bodies such as the Climate Change Commission, the Commerce Commission and the Electoral Commission.

A final question concerns the proposed regulator's exact remit. Internationally, a wide range of models are deployed, from those that are narrowly focused, like Canada's Office of the Commissioner of Lobbying, to those with a broad remit, like Ireland's SIPOC. Philosophically speaking, the latter has much to recommend it. SIPOC has oversight of a wide range of integrity-related issues, including lobbying but also, crucially, political donations and public conflicts of interest. While this question merits further investigation, it seems eminently plausible that bringing these different issues together under one roof would give such a body greater heft and, perhaps crucially, allow it to take a broad overview of integrity-related issues and better detect offending, for instance by looking for connections between abuses of lobbying, donations and conflict-of-interest regulations. The regulator should have 'own motion' powers so that it can initiate investigations into issues it believes need scrutiny, rather than being limited to investigating individual complaints it receives.

Pragmatically, however, the work involved in setting up such an agency in New Zealand would be significant. An Integrity Commission would have to take a wide range of responsibilities and powers from other agencies, including the Electoral Commission. It would logically take over the responsibilities of the Registrar of Pecuniary and Other Specified Interests, and given that the registrar currently reports to Parliament, this would involve Parliament abrogating part of its privilege, something it is often very reluctant to do. In less technical terms, MPs would have to vote to create an independent body with significant power to sanction them (again, not generally a task they approach with any great enthusiasm). An Integrity Commission would also centralise the monitoring of the various public sector codes of conduct (as above), something the Public Service Commission, the current monitor of those codes, may resist.

Given all the above, and in the absence of the colossal corruption scandals that have led to the creation of bodies like SIPOC or, in Australia, the National Anti-Corruption Commission, it seems unlikely that any New Zealand government would create an Integrity Commission in the foreseeable future. While reformers should still advocate for the creation of such a commission, a more pragmatic alternative, in the short term, would be the establishment of a narrowly focused Lobbying Commission with a mandate to oversee the above mechanisms.

The new government's attitude to these ideas

The prospects for the above reforms are not clear. In Opposition, National's deputy leader, Nicola Willis, expressed support for a one-year stand-down period, at least for ministers, as well as "something a bit harder" than a voluntary code of conduct for lobbyists, and "a transparent, publicly accountable register of who's doing the lobbying and who they're lobbying for".[85] National did not, however, make the above statements manifesto pledges, and its coalition partners are either explicitly opposed to regulation (ACT) or likely to be so (New Zealand First).[86] And even the new Opposition's views are unclear: the Green Party and Te Pāti Māori support regulation, while Labour's position is presumably under review.

85. RNZ, 'Chris Hipkins: Lobbyists' swipe card access'.

86. Q+A, 'Professor Charles Sampford: What NZ can learn from Australia on corruption', *TVNZ*, 2 April 2023, https://www.youtube.com/watch?v=ZwAXaKfbVDY (accessed 28 March 2024).

12. Beyond convention

The above discussion has focused on the five conventional mechanisms used to regulate lobbying overseas. It is worth, however, considering further possible measures. In particular, registers of lobbying may be insufficient to achieve the integrity protections sometimes ascribed to them. It is likely that officials, knowing their interactions with lobbyists will be registered, will be 'nudged' into hearing a balanced range of voices. Likely – but not guaranteed. Transparency may simply reveal how bad things are. It is also not guaranteed that, even with strong enforcement, lobbyists will record all their activities.

Ministerial diaries

As a first point, then, New Zealand's current system of publishing ministerial diaries should be continued – and strengthened. Firstly, on a 'self-reinforcing' basis, ministerial diaries could be checked for encounters with lobbyists and those meetings cross-checked with the lobbying register, as a further means of ensuring compliance and detecting misbehaviour. Secondly, as above, ministerial diaries could bring transparency to lobbying otherwise out of scope (that carried out, for instance, by self-employed individuals).

In order to function properly, ministerial diaries would need to be better published than they are now – in non-machine-readable PDFs, sometimes late or missing, and, when published, scattered across different parts of the Beehive site. They should, by contrast, be published in machine-readable formats, within a set time after the end of each month, and in one location. They should be accessible as open data, use a consistent set of subject-matter tags, and provide the NZBNs of companies with whom meetings are held. Ideally a regulator would monitor publication and impose penalties for non-compliance.

Legislative footprints

In other countries, reformers are calling for the introduction of 'legislative footprint' measures that require officials to disclose the lobbying they have experienced during specific legislative processes.[87] What that would look like, in practice, is a report accompanying every major policy-making process – the preparation of a bill, a significant policy programme, the awards of grants from a large government fund – in which the officials working on that process detail the contacts they have had with lobbyists. This would allow the public to see very clearly the balance of voices and interests heard during the creation of a particular policy. There are already analogues for this kind of document, as legislation must be accompanied by a departmental disclosure statement and regulatory impact assessments, as well as statements on the legislation's impact on rights. (Some kind of threshold might have to be applied so that legislative footprints were not being prepared for every minuscule policy process.)

This could be seen as unnecessary duplication, if, as recommended above, virtually all such lobbying is already published in a register. However, as with ministerial diaries, it could be seen as a self-reinforcing mechanism, a kind of 'belt and braces' defence against incomplete declarations by lobbyists. It would also save members of the public, journalists and watchdogs the trouble of searching for this information on a case-by-case basis, and officials the task of responding to more OIA requests. Such a clear disclosure of the balance of meetings, moreover, would provide a greater-than-usual incentive for ministers and other officials to ensure they had taken a wide range of advice. It would also, as above, be in line with past select-committee advice to disclose lobbying case-by-case.

Relatedly, it is worth contemplating whether ministers should in fact be under some kind of duty to show that, on any major policy process, they had provided due access to people on every side of the issue at hand. This would move noticeably beyond transparency-based measures, attempting to ensure balance rather than merely hoping that disclosure brings it about. Whether it would be workable, however, is unclear. Such a rule could obviously not mandate that ministers give opposing sides *equal* access, because (as described at the outset) some parties may have far stronger cases than others. The duty would have to be couched in terms such as 'taking reasonable steps', much as employers must take reasonable steps to ensure the health and safety of their workers. Even then, it is not clear if it would be workable. It could, in contrast, open the door to bad-faith delaying tactics, as opponents of a legislative change dragged the issue through the courts by claiming they had not been afforded a 'reasonable' amount of access. It is, however, an idea worth contemplating.

87. Janina Berg, 'EU Legislative Footprint: What´s the real influence of lobbying?', Transparency International EU Office, 2015, https://transparency.eu/priority/eu-money-politics/lobbying/ (accessed 28 March 2024).

Targeted control measures

Another move to alter the balance of voices would be to limit, in specific situations, the lobbying of industries or groups that have consistently and seriously abused previous processes of public engagement. One model here is Article 5.3 of the World Health Organisation's Framework Convention on Tobacco Control, which reads: "In setting and implementing their public health policies with respect to tobacco control, [countries] shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law."

This does not mean the tobacco industry should not be consulted on policies that affect it, nor that it should be prevented from putting its case to the general public. It does imply, though, that tobacco lobbyists should not, in the words of the anti-smoking group ASH, "have a seat at the table in deciding what tobacco control measures should be developed, implemented, funded or evaluated. Nor should any permitted engagements with the tobacco industry be conducted in secret." In practice, this might mean that policy-makers prohibit lobbying (in the sense of direct and un-minuted contacts) from the tobacco industry, interacting with it only in fully public forums such as select-committee hearings. Such measures are, as ASH notes, justified by the twin facts of the industry's extraordinary past deceit of policymakers and the innately fatal nature of its product.[88] It is not clear, though, that any other industry meets this high bar, either in practice or – almost as importantly – in the public mind, and it has proved to be beyond the scope of this report to resolve this question.

[88] Action on Smoking and Health, 'Why Do We Treat the Tobacco Industry Differently from Other Industries?', n/d, https://ash.org.uk/uploads/Document-3-Why-Do-We-Treat-the-Tobacco-Industry-Differently-Article-5.3-Toolkit.pdf?v=1653406021 (accessed 28 March 2024).

13. Towards everyday democracy

Although parts of this report have inevitably been couched in the negatively oriented language of prevention and scrutiny, this should not distract from the wider, positively oriented goal, which is to broaden – and indeed deepen – the public's engagement in shaping the decisions that affect their lives. This ideal of active citizenship is sometimes known as everyday democracy, as it seeks to make engagement in policy-making a regular and normalised part of citizens' lives. Everyday democracy is built on the twin premises of participation (citizens taking a direct part in public decision-making) and deliberation (high-quality public discussion that ensures this participation is well-informed and reflects considered viewpoints).[89]

Everyday democracy is not a replacement for representative democracy but a complement to it, rebalancing the democratic 'division of labour' more towards citizen engagement while retaining an important role for politicians and indeed other groups, including subject-matter experts. It argues not that the public should take every decision directly (something that would be impractical on multiple fronts) but rather that citizens should have as many opportunities to be involved as is practical and to the extent that they desire. Because such opportunities are often most easily realised at the local level, everyday democracy is generally consistent with the idea of the devolution of decision-making power to more local levels of government. (If, of course, more power were devolved to New Zealand's local and regional councils, the case for regulating lobbying at those levels would only be strengthened.)

Everyday democracy can take a range of forms. One is participatory budgeting, in which local authorities put aside a proportion of their new infrastructure budget for the community to discuss amongst themselves and then allocate. This allows – indeed requires – residents to debate what their community most needs and to then spend the money accordingly, drawing on their collective wisdom and the fact that they are all, as the saying goes, experts in their own lives. In some cities worldwide, tens of thousands of people are engaged in

[89] Max Rashbrooke, *Government for the Public Good: The Surprising Science of Large-Scale Collective Action*, Bridget Williams Books, Wellington, 2018.

such processes every year, delivering spending that is more effective, and more weighted towards the interests of the most disadvantaged, than that delivered by conventional methods.

Another form of everyday democracy is the citizens' assembly, in which a demographically representative group of perhaps 100 ordinary people is brought together to hear evidence, listen to experts, debate with each other and deliver consensus recommendations on a key public issue. Such forums allow deep, considered discussion, free of the points-scoring and partisan divides of conventional politics, and have a better claim than any other forum to demonstrate what the public, after such informed discussion, truly needs. Overseas, these assemblies are increasingly used to address issues with complex moral trade-offs and make progress on subjects where politicians have become deadlocked.

Everyday democracy has a wide range of proven benefits. By bringing people more deeply into the decision-making process, it enhances trust in specific processes, in politicians and in democracy more generally. By bringing together people from different walks of life, it can push back against polarisation and misinformation. It fosters active civic engagement and spurs people to become more politically active in other parts of their lives. And it delivers decisions that are more closely aligned with the public's needs and are therefore more enduring.[90]

Everyday democracy is increasingly popular worldwide, and is beginning to be taken up in New Zealand. Public bodies in Auckland and Wellington have recently trialled citizens' assemblies and are exploring participatory budgeting. In Porirua, Ngati Toa are working with other community members to develop a fully Tiriti-compliant version of the citizens' assembly process. An embrace of everyday democracy has also been urged by the recent Future of Local Government Review and the Public Service Commission's recent Long-Term Insights Briefing. These innovations, and this advocacy, are all in line with the general thrust of this report, which is to bring as many people as deeply as possible into the democratic process, so that policy capture is kept at bay and the integrity of public decision-making is protected.

[90] Ibid.

Health Coalition Aotearoa

LEVEL THE Lobbying PLAYING FIELD

healthcoalition.org.nz