



NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

**Submission of the
New Zealand Council of Trade Unions
Te Kauae Kaimahi**

To the

**Government Administration Select
Committee**

on the

Lobbying Disclosure Bill

P O Box 6645

Wellington

5 October 2012

Executive Summary

- The CTU welcomes the opportunity to participate in a discussion on lobbying regulation which is increasingly an issue of international concern.
- The CTU has concerns about the increasing influence of corporate lobbying and the influential impact of professional and secret lobbying.
- The CTU supports the intent behind this Bill to ensure greater transparency of lobbying and to prevent secret lobbying that undermines democracy and parliamentary process, and particularly that with a narrow commercial interest which may conflict with the wider public interest.
- The difficulty lies with the implementation of that principle into workable practice that does not create unwieldy processes and unintended negative consequences. International best practice states that legislation must be developed to suit the political and cultural context of the country if it is to be acceptable and workable.
- A significant problem unaddressed by this Bill is the inability to secure information under the Official Information Act that should be publically available but is not because of commercial sensitivity protections.
- If lobbying regulation is to be introduced it must recognise New Zealand's political and cultural context.
- Lobbying is a core activity of trade unions, but the consequences on trade unions and NGOs from this Bill, if it were to proceed have not been sufficiently considered.
- Some trade unions affiliate to a political party. The political activity by trade unions in this role is not lobbying and this type of activity must be exempted if the Bill is to proceed.

- There are considerable practical difficulties that organisations will face determining among their paid staff whom they would need to register as a paid lobbyist and who not to register.
- The reporting requirements and penalties under this Bill are particularly burdensome on small organisations and NGOs and may have the unintended consequence of limiting political activity and meetings.
- If this Bill were to proceed there should be a differential reporting requirements and obligations on professional lobbyists and there should also be differentiation in the Code of Practice for NGOs and trade unions as compared to professional lobbyists.
- There is a lack of clarity and consideration about how this Bill would affect state sector employees outside of the direct public service.
- The Bill provides an opportunity, if it is to proceed, to consider whether there should be a stand down period for senior officials and former Members of Parliament who move into lobbying roles when they have gained those positions by way of their former political roles and connections.
- The definition of lobbying should cover international treaties, guidelines, codes of practice, standards, certification and similar instruments.
- It may be that a workable compromise or first step towards the aims of this bill lies in establishing a Code of Conduct, and perhaps in addition a register of lobbyists but without the reporting requirements of the bill. This could be reviewed in 3-5 years to consider whether and what further steps are appropriate.

1. Introduction

- 1.1. This submission is made on behalf of the 37 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With some 350,000 members, the CTU is the largest democratic organisation in New Zealand.
- 1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.
- 1.3. The CTU has a strong interest in this Bill. Lobbying is an essential component of participative and democratic government. Lobbying is a common activity of trade unions and is one of the means by which unions advance the interests of the working people they represent to ensure that their needs and views are recognised in the parliamentary process.
- 1.4. We note that the aim of this Bill is to increase the transparency of decision making by Executive Government by:
 - Establishing a register of lobbyists and their activity which is audited by the Auditor General; and,
 - Developing a Lobbyist's Code of Conduct and providing powers to the Auditor General to investigate alleged breaches of the Code.
- 1.5. The CTU welcomes the opportunity to make a submission and the opportunity to have discussion on the issue of lobbying regulation which is of increasing interest both in New Zealand and internationally.
- 1.6. The CTU strongly supports the principle of openness and transparency in the parliamentary processes. As member-driven organisations, unions are of their nature open to public scrutiny, and the CTU is not concerned about any public reporting of the interactions of its officers and staff with Ministers, MPs and other officials. But this Bill has many flow-on effects, and impacts directly

on the day to day activity of trade unions. We have significant concerns about its workability and consequences.

- 1.7. We submit that if this Bill proceeds, it requires major amendment to make it workable and resolve the Bill's negative consequences on many groups including trade unions.
- 1.8. There are also areas and impacts that have not been thoroughly enough considered and there are omissions and drafting problems with the current Bill. Should it proceed, a further period of public consultation is required after a first round of amendments have been made.
- 1.9. This submission outlines issues of concern to us and makes recommendations if this Bill is to proceed.

2. The need for this type of legislation

- 2.1. The drivers behind this type of legislation in other overseas jurisdictions have been high profile scandals that have exposed the secret, powerful and negative activities of lobbyists. Another driver has been the growth in influence of the professional lobbying sector and the concerns about the excessive and dominant influence that big business can have on policy and legislation development by virtue of its financial connections and influence.
- 2.2. The CTU shares concerns about the influence and power of corporate lobbyists. Examples include pressure from the owners of the Bluff Aluminium Smelter over its electricity supply and price, lobbying by the insurance industry for privatisation of ACC, and constant pressure from alcohol and tobacco interests to resist control measures. The activities of the Exclusive Brethren Church at the time of the 2005 general election were a source of major public concern for different reasons.
- 2.3. Nevertheless there is some truth in the view that the need for this type of legislation in New Zealand is open to question because our history shows that our public scrutiny processes have often been able to expose such situations publically. However, there is a limit to this self-satisfaction: by

definition we don't know what has not been revealed but has nonetheless been influential in changing government policies.

- 2.4. A more significant issue for the CTU, which this Bill does not help to address, is the ability to access information about financial transactions which are blocked from public availability because of commercial sensitivity protections. The Lobbying Disclosure Bill would not assist in exposing information about the commercial nature of activities which are of public concern and relate to the influence of powerful and corporate interests.
- 2.5. The CTU had to request information under the Official Information Act during the time of the Hobbit to expose the dealings of Warner Brothers and Weta Studio owners. But many papers were, and are still held back and are a subject of complaint to the Ombudsman.
- 2.6. Changes need to be made to the Official Information Act to enable more information to be accessed than is currently possible. The current Bill does little to assist this concern. Knowing that their activities are subject to public disclosure requirements under the Act may be a considerably greater disincentive to unethical activity by lobbyists than any register or Code of Conduct.
- 2.7. That said, New Zealand is recognised for having a relatively transparent and corrupt-free political and public management system. The need for lobbying regulation is therefore less than in countries with less established democratic traditions. There are other checks and balances in place such as that of the Auditor General which provides a check on public sector entities.
- 2.8. A very recent report by Transparency International gave New Zealand a positive pass for its domestic processes on anti corruption and bribery.
- 2.9. We are not convinced that the case for this legislation has been made. It should certainly not be rushed without full consideration of all its complexities and flow-on consequences.

- 2.10. In this regard, we note that the Attorney General's report on the Bill states that the Bill will have an unacceptably limiting effect on freedom of expression and that it "goes well beyond the activities of professional lobbyists to include a wide range of other activities".
- 2.11. The effect of this Bill and the impact on State Sector employees needs further consideration. It excludes departments that are not part of the public service such as New Zealand Police and the Defence Force. There is a lack of clarity about the impact on employees who are not part of the core public sector.
- 2.12. Other issues of concern raised in the Attorney General's report include that (the Bill) "risks creating a chilling effect for average New Zealanders who may fear criminal sanctions for merely communicating with a Member of Parliament on behalf of their business in relation to government policy".
- 2.13. The Attorney General's report fails to include reference to organisations such as trade unions and NGOs which have expressed concerns but similar concerns have been expressed within our constituent groups.
- 2.14. It appears that this legislation has been motivated by moves in other jurisdictions in some, but certainly not all Western democracies, to introduce or consider lobbying regulation.
- 2.15. Reports analysing lobbying regulation are consistent in their view that it is of fundamental importance that lobbying legislation is appropriate to the context of the country for which it is developed and any regime developed around lobbying has to take into account the practice and cultures that are particular to the country.
- 2.16. We think it is of very real concern that this Bill that has been influenced by overseas developments and could, in its current form, impose on the New Zealand political system regulation and reporting system that do not work for our context and culture.

- 2.17. This was emphasised in a report undertaken by the Irish Institute of Public Administration into the regulation of lobbyists in developed countries who concluded that the aim of lobbying regulation must be:

“For each country to devise a regime which is effective and takes account of its own government structure and practices and political and administrative culture”.

- 2.18. A report to the Council of Europe, Lobbying in A Democratic Society, urged that prior consultation should be held with lobbying organisations in any draft legislation in this field. Though we recognise there have been some discussions on this Bill between its sponsor and unions and other groups, the extent and breadth of them has been limited.

There must be appropriate consideration of the New Zealand political and cultural context in developing up this legislation.

More time is required and consultation with all affected groups and organisations to understand how such legislation would operate in New Zealand.

Should it proceed, a further period of public consultation is required after a first round of amendments have been made.

3. Differential Requirements

- 3.1. A major goal of this Bill is to ensure that the activities of professional lobbyists are reported and transparent. The Bill in its current form treats all lobbyists as if they are equal when lobbyists’ power and influence is very unequal.
- 3.2. Trade unions, for example, are very different to the professional lobbyists who lobby on behalf of business who frequently have very large financial backing behind them.
- 3.3. The power of NGOs is very unequal to the power of business lobbyists. Therefore any reporting regime needs to recognise the different lobbyists’

capacity and resources. We suggest consideration of differential requirements applying dependent upon the type of lobbyist organisation or the type of lobbyist.

- 3.4. The Code of Conduct could also differentiate between different lobbying groups on the basis of whether they are professional lobbyists, NGO or voluntary groups. Also, as Holly Walker notes in her submission, the penalties could be excessive for some. The penalties need to match resources, size and capacity of the offender. The proposed penalties of \$10,000 for an individual and \$20,000 for a company or organisation are almost negligible for a large corporation and high for most individuals and small firms.
- 3.5. We note however that there are significant problems in defining the differentiation in a way that does not allow for widespread gaming of the definition, and is sufficiently wide but not too wide.

The Code of Conduct and the legislation should differentiate between professional lobbyists who are lobbying on behalf of clients, and the NGOs and other groups including trade unions who lobby on a not-for-profit basis on behalf of their constituents or on public interest matters by providing different reporting requirements and penalties.

Consideration should be given to setting a threshold below which lobbying activities are exempt from reporting requirements. This could be in terms of percentage of time spent on lobbying activities by either an organisation or an individual; or scale by income, size or for-profit/not-for-profit status.

4. Specific Trade Union Issues

- 4.1. Trade unions have some specific requirements which have to be recognised if this Bill is to proceed. Trade unions which are affiliates of a political party should be removed from reporting requirements when the activities they are undertaking are by virtue of their being a member or formal associate of the political party. There must be a distinction drawn between the political participation and the parliamentary aspects of lobbying.

- 4.2. In addition, unions are frequently involved in campaigning in coalition with other groups including political parties. It would be very difficult to report every interaction that occurred in the course of such campaigns, and given that they are public campaigns, hardly enlightening to the public. There should be an exemption for activities undertaken in such campaigns.
- 4.3. It is in the nature of union activity that meetings occur throughout the country under the auspices of a union. An MP present at such a meeting may be addressed by a person attending that meeting in the course of questions and discussion and this may be regarded as covered by the scope of the Bill. But the person raising the question as a member of that union would in all likelihood be unaware that this is lobbying as defined in the Bill.
- 4.4. As with any organisation, members (including office holders) are entitled to be politically active in their own right. Any definitions of lobbying activity should be constructed to ensure that personal political activity is not confused with lobbying by the organisation. Such individuals obviously also have a duty to make such distinctions clear if there is ambiguity.

That any activity undertaken by a trade union or its elected officials or staff, which is undertaken by virtue of an affiliation or other formal association with a political party, is exempted from the definition of lobbying activity.

That activities undertaken in the course of public campaigns which include a political party represented in Parliament, also be exempted.

5. Register of Lobbyists

- 5.1. Clause 6 of the Bill requires an individual engaged in any lobbying activity to be registered with the Auditor General as a lobbyist before engaging in lobbying activity.
- 5.2. We have no appetite for a system that would put onerous requirements on small and middle-sized organisations. Many of our affiliates and other NGOs

are very resource stretched. Lobbying reporting requirements must be simple and straightforward.

- 5.3. If the Bill does proceed we would recommend that for groups for which lobbying is not a primary purpose, it should be the organisations and not individuals who are registered and required to make returns on activities to the register. This is making a distinction between the resources and capacity of professional lobbyists on the one hand, and NGOs, unions and other voluntary groups on the other. We note that Holly Walker is recommending that in all cases it should be the organisation and not the individual which should register and report.

For groups for which lobbying is not a primary purpose, it should be the organisations and not individuals who are required to register and make returns on activities to the register.

6. Code of Conduct

- 6.1. If a Code of Conduct sets down rules of behaviour around requirements of honesty, openness and professionalism, it could establish a useful guide to acceptable behaviour. The difficulty will come in the enforcement of that Code. It is not clear who would both have sufficient information about relevant activities and have an interest in reporting breaches of the Code.

7. Requirements on the “Lobbied”

- 7.1. Most Australian states have a code of conduct for MPs as well as a Code of Ministerial Conduct. This could, if necessary, extend to them reporting on communications. It would appear reasonable to place some responsibility on both sides.
- 7.2. An issue for deliberation in the Select Committee should be a requirement on MPs and Ministers to also be transparent and accountable in regard to lobbying directed at them. A possible resolution of many of the problems inherent in this bill is for the responsibility to be on Ministers and MPs rather than on lobbyists to report lobbying activity. This would include gifts and other

potential inducements, but a specific requirement could be made for lobbyists to also report any such gifts and potential inducements as a cross-check.

8. Stand Down Period

- 8.1. An omission from this Bill, which is a feature in the Canadian Lobbying Act, is a ban on Ministers and MPs and senior public servants taking up lobbying roles after leaving public service or parliamentary employment. This is in recognition of the power of some lobbyists who have been Ministers or MPs and then take up roles as lobbyists in sectors where they have extensive and inside knowledge of the sector and have significant influence resulting from their former roles.
- 8.2. The CTU recommends that the Select Committee consider the issues and practice of other jurisdictions that have a stand-down period for Ministers, MPs and senior public servants before they take up a lobbying role in an area where they have had previous decision making responsibilities or inside knowledge. Overseas, these periods can be as high as five years but they are more commonly in the realm of 18 months.
- 8.3. We note that lobbying of senior public servants, New Zealand embassy staff and others with potential influence in government are not covered by the bill. This is a significant omission, but we recognise it could require major changes to the bill to remedy.

We recommend that the Select Committee consider the issues and practice of other jurisdictions that have a stand-down period for Ministers, MPs and senior public servants before they take up a lobbying role in an area where they have had previous decision making responsibilities or inside knowledge.

9. Exemptions from Lobbying Definition

- 9.1. An amendment to this Bill is needed to ensure that the normal political activity and interaction that individuals have with their MPs in their electorates is

excluded from the legal definition of lobbying. We note that Holly Walker recognises that this is necessary.

Clause 5 should be amended to include that lobbying activity does not include any communication between a constituent and their Member of Parliament.

10. Other

- 10.1. We note that the definition of lobbying and lobbyist in Clause 7(2) applies to legislation, regulations, government policies and programmes, but not to the negotiation, signing and ratification of international treaties. International treaties, particularly commercial treaties such as international trade and investment agreements, are increasingly important – some considerably more so than much legislation – and are the subject of intensive commercial lobbying. They should be covered by lobbying legislation.
- 10.2. Other omissions include various forms of guidelines, codes of practice (such as Approved Codes of Practice under the Health and Safety in Employment Act 1992), standards and certification which can have significant impact on important matters such as health and safety of people, food, plants and animals, but which represent a cost to those required to comply with them.

Clause 7 should be amended to cover international treaties, guidelines, codes of practice, standards, certification and similar instruments.

11. Conclusion

- 11.1. The CTU supports the intent behind this Bill to ensure greater transparency of lobbying and to prevent secret lobbying that undermines democracy and parliamentary process, and particularly that with a narrow commercial interest which may conflict with the wider public interest. The difficulty lies with the implementation of that principle into workable practice that does not create unwieldy processes and unintended negative consequences. International best practice states that legislation must be developed to suit the political and cultural context of the country if it is to be acceptable and workable.

- 11.2. Some trade unions have affiliations or other formal associations with political parties which require recognition if this Bill were to proceed. There are serious concerns about the burden of reporting requirements on trade unions and similar organisation such as NGOs and that this could have an effect on reducing participation in the political process. There are much clearer reasons for reporting requirements being placed on professional lobbyists with substantial capacity and resources, but we recognise there are significant difficulties in defining such individuals and organisations.
- 11.3. If there is to be greater transparency of lobbying, unions do not seek an exemption on the basis of being unions but do seek differential requirements that recognise differences in capacity, resources, and the nature of membership based organisations, and their activities.
- 11.4. It may be that a workable compromise or first step towards the aims of this bill lies in establishing a Code of Conduct, and perhaps in addition a register of lobbyists but without the reporting requirements of the bill. This could be reviewed in 3-5 years to consider whether and what further steps are appropriate.