ibac independent broad-based anti-corruption commission
Victoria

Special report

on corruption risks associated with donations and lobbying

October 2022

Acknowledgement

IBAC acknowledges the Traditional Custodians of the lands on which we work and pays respect to Elders past, present and emerging. We recognise and celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of Victoria.

Ordered to be published by the Victorian Government Printer:
Parliamentary Paper Number 398, Session 2018-22

ISBN: 9781922349323 (print)
ISBN: 9781922349330 (online)

Accessibility

If you need this information in an accessible format, telephone **1300 735 135** or email **communications@ibac.vic.gov.au**
This document can also be found on our website **www.ibac.vic.gov.au**
Alternatively, contact the National Relay Service on **133 677 (www.relayservice.com.au)**.

Letter of transmittal

To

The Honourable President of the Legislative Council

and

The Honourable Speaker of the Legislative Assembly

Special report on corruption risks associated with donations and lobbying

In accordance with section 162(1) of the Independent *Broad-based Anti-corruption Commission Act 2011*, I present IBAC's report on corruption risks associated with donations and lobbying.

IBAC's findings and recommendations are contained in this report.

The Hon Robert Redlich AM KC

Commissioner

Contents

Glossary

Term	Definition
ABN	Australian Business Number
AEC	Australian Electoral Commission
CCC	Crime and Corruption Commission (Queensland)
CEO	Chief Executive Officer
CMI	Chief Municipal Inspector
IBAC	Independent Broad-based Anti-corruption Commission
ICAC	Independent Commission Against Corruption (New South Wales)
LGI	Local Government Inspectorate
MP	Member of Parliament
OECD	Organisation for Economic Co-operation and Development
QIC	Queensland Integrity Commissioner
VEC	Victorian Electoral Commission
VPSC	Victorian Public Sector Commission

Foreword

1

What interests are considered when a decision is said to have been made 'in the public interest'? Which of the many voices in our community are heard? How much authority do they carry? Who has access to the decision makers… and who doesn't?

A lack of transparency and accountability for donations and lobbying can cause the community to question whether decisions (particularly of elected decision-makers) have been made in the public interest or are the result of policy capture by influential donors with privileged access.

In March 2022 the Centre for Public Integrity noted the relative weakness of Victoria's lobbying regime compared with New South Wales, Queensland, South Australia and Western Australia, including the lack of legislative authority or any requirements to publish ministerial diaries.[1] In June 2022, the Queensland Government moved to tighten lobbying regulations in anticipation of the Coaldrake *Review of culture and accountability in the Queensland public sector*.[2] In July 2022, the NSW Government pledged its support for all recommendations directed to the government by the Independent Commission Against Corruption (ICAC) in Operation Eclipse.[3]

There is no reason to believe that these issues are any less prevalent in Victoria, where the lobbying regime does not provide the basic information needed to scrutinise lobbying in the way that the NSW and Queensland reviews have done.

Victoria's current rules on political donations, which were introduced in 2018, do not place any limit on expenditure, meaning Victoria is one of only three Australian states in which there is no electoral campaign spending cap. At the local government level there is no requirement for donors to make a declaration of any kind, while the details of any donations received and declared by candidates are held locally by each council.

Donations and lobbying can be used to gain privileged access to decision-makers within a party, especially if it is in government, by elevating a donor's or lobbyist's profile. Candidates and political parties also obtain donations through fundraising activities, requests for in-kind support, direct payments and via associated entities. Together these factors have the potential to compromise a member of parliament or councillor once elected.

These are matters which can erode public trust in the people and institutions that are relied on to make decisions in the public interest.

Repeated calls to strengthen donation regulations point to regulatory gaps and opportunities for improvement,[4] while investigations in other jurisdictions highlight relative weaknesses of the Victorian framework.[5]

1 The Centre for Public Integrity 2022, *Integrity inadequacies: Victoria*, highlighting the lack of any requirements to publish ministerial diaries and weak lobbying regulations in Victoria. Qld Crime and Corruption Commission 2022, *Influencing practices in Queensland* noted a lack of transparency around the purpose of lobbying contacts, direct employment to avoid lobbying registration requirements, and poor management of conflicts of interest in a jurisdiction where there is legislation governing lobbying activities.

2 See Qld Premier 2022, *New rules for lobbyists*, Media release, 27 June 2022 and Coaldrake P 2022, *Review of culture and accountability in the Queensland public sector,* Final Report.

3 See NSW Premier 2022, *NSW to implement strongest lobbying integrity measures in Australia*, Media release, 19 July 2022, and NSW ICAC 2021, *Investigation into the regulation of lobbying access and influence in NSW*.

4 The Centre for Public Integrity 2022, *Integrity inadequacies: Victoria*, called for expenditure caps and highlighted potential loopholes in the current definition of a 'political donation'. The Local Government Inspectorate 2021, *Summary: 2020 council elections report,* noted that 144 candidates were considered non-compliant with the campaign donation return obligations under the *Local Government Act 2020*, and called for legislative changes to require that a summary of gifts be recorded in an election donation report within two days of the donation being lodged. Also see Kolovos, B 2022 'Bid to overhaul Victoria's political donation laws to target 'backdoor' funding and 'loopholes'', *The Guardian Australia*, 30 March 2022.

5 NSW ICAC 2022, I*nvestigation into political donations facilitated by Chinese Friends of Labor in 2015* (Operation Aero). Qld CCC 2019, *Operation Belcarra: Reforming local government in Queensland*.

A high-level review of the regimes in place to govern lobbying in other jurisdictions makes it clear that the regulation of lobbying in Victoria can be improved and that a failure to do so presents a risk that some lobbyists have disproportionately privileged access to decision-makers.

Lobbying regulations must be transparent and hold both lobbyists and decision-makers to account to protect the public interest.

Just as important, political donations must be carefully scrutinised to deter political parties and their supporters from looking for new ways to supplement their income or identify loopholes to allow greater contributions to be made and received.

The Independent Broad-based Anti-corruption Commission (IBAC) has identified several areas of risk in relation to donations and lobbying, as well as opportunities for regulatory improvement and is uniquely placed to make recommendations aimed at increasing transparency and protecting against improper influence in political decision-making.

In developing this suite of recommendations IBAC consulted with a wide range of stakeholders. In particular, IBAC:

- consulted with interstate agencies regarding the types of strategic issues that have been observed in Victoria, and measures that have been used elsewhere that could be considered for implementation in Victoria to mitigate those risks
- conducted a detailed policy analysis of the issues under consideration, drawing on a range of publicly available research and lessons from other complaints and investigations that IBAC is currently undertaking, some of which are yet to be tabled as special reports
- engaged extensively with the agencies that will ultimately be responsible for acquitting these recommendations to ensure that they are practical and enforceable and allow room for further development where necessary.

1.1 Decision to prepare a public report

The *Independent Broad-based Anti-corruption Commission Act 2011* sets out the critical prevention and education functions that IBAC performs. One of the key ways IBAC does this is by making recommendations to help improve the capacity of the public sector to prevent corrupt conduct.[6] Another is to publicly report on issues identified in the performance of its duties and functions.[7] In doing so IBAC has a responsibility to examine legislation, systems and practices, provide information and consult with the public sector.

IBAC's decision to issue this public report was prompted by a number of factors. First, there is a clear need to address the systemic corruption vulnerabilities associated with donations and lobbying. Second, IBAC is aware that an independent review of the 2018 Electoral Act reforms will be required to report within 12 months of the November 2022 state election suggesting that this is an opportune time to present options for reform.[8] Finally, IBAC also understands that parliament may be considering other reforms in relation to donations and lobbying. With increasing public calls for a focus on integrity, it is critical that IBAC's observations and recommendations are made public at this time to inform these important initiatives.

This report sets out IBAC's recommendations in relation to donations and lobbying based on analysis of Victoria's regulatory framework, the experience of other Australian and comparable international jurisdictions and broader research as follows:

- Chapter 2 sets out IBAC's recommendations
- Chapter 3 discusses the proposed donation reforms in detail
- Chapter 4 discusses the proposed lobbying reforms in detail.

IBAC looks forward to a positive and constructive response from government on these issues.

6 *Independent Broad-based Anti-corruption Commission Act 2011* s 8.
7 Ibid, s 15(7)(b).
8 *Electoral Act 2002* ss 222DB(1) and (2).

Recommendations

2

Recommendation	Discussion in this report
Recommendation 1	
IBAC recommends that the government review the existing regulatory regime for political donations to improve transparency and accountability at both the state and local levels of government through legislative reforms that:	
(a) promote consistent donation regulations at the local and state levels of government so that:	3.2.1.5
i) the specified donation declaration threshold is only indexed once at the beginning of each state and local election cycle	3.2.2.1 3.2.2.2
ii) donors and candidates at the local government level are required to declare donations over $500 to a central authority, namely the Victorian Electoral Commission	3.2.2.3
iii) the $4000 general cap applies to donations made by a donor at the local government level	
(b) deter donors from attempting to split donations, and detect schemes designed to circumvent the general cap at the state and local level, using measures that include, but are not limited to, requiring that:	3.2.1.1
i) donor entities declare: • the entity's Australian Business Number (ABN) • the entity's registered address • the names and addresses of executive committee members • whether any donations have been made by other associated or related entities	
ii) individual donors declare if the funds or resources being donated have been provided to the donor by a third-party for the purpose of making a donation (with reference to the Queensland provisions)	
(c) ensure that campaign donations and expenditure are reported in a manner that provides sufficient information to monitor compliance with donation caps at the state and local level, including, but not limited to, requiring that:	3.2.1.3 3.2.2.3
i) all candidates register details of their dedicated campaign bank accounts with the Victorian Electoral Commission, and/or submit relevant statements for those accounts to the Victorian Electoral Commission as part of their annual returns (with reference to the Queensland provisions)	
ii) all candidates submit a statement of campaign expenditure after an election, to be accompanied by an audit certificate, consistent with the expenditure declaration requirements for parties	
(d) deter donors and candidates from attempting to use third-party campaigners to circumvent the declaration requirements and donation cap at the state and local level, using measures that include, but are not limited to:	3.2.1.4
i) requiring the registration of third-party campaigners	
ii) requiring publication of the register of third-party campaigners	
iii) limiting the number of third-party campaigners to whom a person can donate to three, to mitigate the risk of the general donation cap being circumvented (with reference to the NSW approach)	
(e) provide a disclosure scheme that more closely resembles 'real-time' reporting for state and local donors and candidates (with reference to the Queensland approach)	3.2.2.2

Recommendation	Discussion in this report
Recommendation 1 (continued) **IBAC recommends that the government review the existing regulatory regime for political donations to improve transparency and accountability at both the state and local levels of government through legislative reforms that:**	
(f) ensure appropriate measures are in place to facilitate effective monitoring at the state and local level, including, but not limited to, requiring that: i) local government candidates make a declaration within an appropriate period: • after nomination in relation to donations received prior to nomination • after an election if no donations are received by a candidate ii) donors to local government candidates make a declaration that indicates: • the industry they work in if the donor is an individual, or the type of business the corporation carries on if the donor is a company • any interest they have in a local government matter that is greater than that of other persons in the local government area, as well as the nature of their interest (with reference to the Queensland approach)	3.2.2.2
(g) deter donors and candidates from attempting to use 'fundraising' events to circumvent the declaration requirements and donation cap at the state and local level, using measures that include, but are not limited to: i) capping the amount that can be charged to enter a relevant event ii) expressly stating that the entry fee to attend a fundraising event constitutes a political donation (with reference to the NSW approach) iii) requiring that registered parties: • publish information about the fundraising event in real time, including details of: - the candidates and/or party for whom funds are being raised - ministers, members of parliament or their staff who are promoted as attending the event - funds raised as a result of the event • submit an audited return to the Victorian Electoral Commission for each event that includes details of: - expenses incurred in relation to the event - items donated to raise funds though raffles and the like, their market value and who donated those items - tickets purchased, including details of each individual who purchased a ticket and how many tickets were purchased - funds raised as a result of the event iv) requiring that all payments and expenses relating to a fundraising event be transacted through a dedicated campaign account that has been registered with the Victorian Electoral Commission.	3.2.3.2 4.2.2.1

Recommendation	Discussion in this report
Recommendation 2 **IBAC recommends that the Department of Premier and Cabinet, together with the Department for Jobs, Precincts and Regions, examine and make recommendations that identify:**	
(a) a best practice model for campaign expenditure at the state and local levels of government, including: i) expenditure declaration requirements that provide sufficient transparency and accountability ii) expenditure caps that can be applied in a way that helps to address the corruption risks that result from: • pressure to raise funds • avoidance of donation caps and disclosure thresholds by providing in-kind support that is not declared.	3.2.4.2
(b) a best practice model for monitoring and enforcement of donations at the state and local levels of government, including: i) the structural arrangements, namely which agency or agencies would be responsible for investigating breaches and the resources required ii) the mechanisms required to monitor compliance effectively, such as more detailed audit reporting and/or requirements to produce documents or information iii) options for public reporting of breaches to deter improper conduct, and educate donors and candidates iv) whether a broader range of penalties (including fines) would increase the effectiveness of penalties as a deterrent and facilitate timely enforcement	3.2.2.3
(c) a best practice model to deter donors and candidates from attempting to make in-kind contributions to circumvent the declaration requirements and donation caps at the state and local levels of government, after: i) reviewing donation returns that involve in-kind contributions from the 2020 local government elections and 2022 Victorian state election to assess compliance with existing requirements ii) assessing how training can be improved to ensure awareness of obligations iii) assessing the adequacy of existing penalties and how they apply to in-kind contributions that are not declared	3.2.1.2
(d) steps that can be taken to ensure donations from political parties and associated entities registered in other jurisdictions that are received by political parties registered in Victoria comply with the *Electoral Act 2002*.	3.2.3.1

Recommendation	Discussion in this report
Recommendation 3 **IBAC recommends that the government introduce legislation to regulate lobbying at both the state and local levels of government in a manner that:**	
(a) increases the transparency and accountability of lobbying activities in a way that includes, but is not limited to, the issues set out below	4.1.3
(b) defines the following in legislation:	4.2.1.1
i) 'lobbying activity' in a way that captures any contact with government representatives (with reference to the Scottish approach) that is made in relation to: • government or parliamentary functions, and • decision-making at the local government level	4.2.1.2 4.2.1.3 4.2.3.3
ii) 'lobbyist' in a way that focuses on the activity being undertaken, not persons in the business of lobbying	
iii) 'government representative' in a way that encompasses all public officers who may be subject to lobbying activity, including members of parliament, electorate officers, councillors and council officers	
(c) ensures members of parliament who initiate meetings with a minister or their adviser:	4.2.1.2
i) disclose to the responsible minister's office: • whether the member of parliament has a private interest in the matter about which representations are being made (noting that a private interest in this context should be defined to include donations or other benefits provided by a person or entity who asked the member of parliament to make representations to the minister) • the nature of that interest (if the member of parliament has a private interest) • the names of any persons or entities who have made representations to the member of parliament requesting that they lobby the minister or their adviser (regardless of whether the member of parliament has a private interest in the matter)	
ii) maintain records of those disclosures in a form that is auditable, and can be made available to appropriate entities, including the lobbying regulator	
(d) requires that lobbyists document their contacts with government representatives, and that this information is published via an easily accessible and searchable register that includes, but is not limited to: i) the name and role of the government representative who has been lobbied ii) the subject of the lobbying and its purpose iii) the intended outcome of the lobbying communication	4.2.3.1
(e) mandates the publication of extracts or summaries of ministerial diaries and ministerial staff diaries on a monthly basis, capturing any form of meeting or event (such as attendance at fundraisers), including, but not limited to details of: i) the date of the meeting or event ii) who attended iii) what interests they represented iv) the issues that were discussed at the meeting or event	4.2.2.1 4.2.3.1

Recommendation	Discussion in this report
Recommendation 3 (continued) **IBAC recommends that the government introduce legislation to regulate lobbying at both the state and local levels of government in a manner that:**	
(f) ensures that interactions between a lobbyist and a minister or their staff are transparent, including, but not limited to measures that require: i) the creation and maintenance of records in relation to requests to meet, any associated approvals, and formal meetings between a minister or their staff and any person lobbying the minister or their staff (with reference to the approaches taken in Queensland, Scotland and Ireland) ii) the inclusion in ministerial diaries and ministerial staff diaries of details of contacts with people undertaking lobbying activity to support the monitoring and compliance activities of the lobbying regulator (with reference to the NSW and Queensland approaches) iii) the publication of a uniform Ministerial Staff Code of Conduct required under legislation, which obliges ministerial staff to comply with lobbying regulations iv) training for ministerial advisers to raise awareness of risks associated with lobbyists	4.2.3.1 4.2.3.2
(g) ensures that interactions between lobbyists and electorate officers are transparent, including, but not limited to measures that require: i) electorate officers to maintain records (outlining prescribed details) of contact with those undertaking lobbying activity, noting that those records must be auditable to support the monitoring and compliance activities of the lobbying regulator ii) the Electorate Officers Code of Conduct to specify that electorate officers must comply with lobbying regulations iii) training for electorate officers to raise awareness of risks associated with lobbyists	4.2.3.3
(h) prohibits success fees being given or promised to lobbyists in return for a certain outcome of any lobbying activity	4.2.4.1
(i) ensures that a lobbyist cannot lobby an elected official whose election they have supported directly or indirectly, for example, through donations or in-kind support to a campaign.	4.2.4.2

Recommendation	Discussion in this report
Recommendation 4 **IBAC recommends that the Department of Premier and Cabinet examine and make recommendations in relation to the Victorian lobbying and enforcement framework to:**	
(a) identify a preferred model for establishment of a new lobbying regulator, including: i) sanctions that will serve as an effective deterrent ii) enforcement functions and powers necessary to support regulatory activities iii) resources that will be required to ensure the lobbying regulator is able to monitor and enforce lobbying activity effectively	4.2.4.4
(b) identify an appropriate instrument for the lobbyists' code of conduct, and whether that code should be expanded to outline obligations on government representatives who are subject to lobbying activity	4.1.3
(c) ensure the cooling-off period for those seeking to undertake lobbying activities is appropriate and consider whether the application of that requirement should be extended to all members of parliament.	4.2.4.3

Corruption risks associated with political donations

3

Political donations can be used by individuals with resources to exert improper influence over elected decision-makers without any overt demonstration of a 'quid pro quo'.[9]

This can give rise to a particularly corrosive type of corruption resulting in a loss of confidence that government decisions are being made in the public interest.

Professor Joo-Cheong Tham, the Director of the Electoral Regulation Research Network, who specialises in public law at the University of Melbourne, has observed that corruption through improper influence is arguably more insidious and damaging to the democratic process than explicit forms of corruption. This is because it 'does not require explicit bargains or that a specific act results from the receipt of funds [but rather …] implicit bargains of favourable treatment or a culture of delivering preferential treatment to moneyed interests'.[10]

In recent years, questions have been raised about the sources of political donations, the motivations of donors and the potentially distorting impact of donations on democracy.[11] In response, every Australian state and territory has introduced legislation seeking to better regulate political donations.[12]

In Victoria, the regulation of political donations was enhanced at the state government level in 2018.[13]

Despite these improvements, gaps remain. Notably, Victoria is now one of only three Australian states in which there is no electoral expenditure cap, and there is still no requirement for donors to make a declaration of any kind at the local government level. This suggests that there is opportunity for further reform to ensure that any influence that might accompany donations – at state *and* local government levels – is tempered by strong disclosure and accountability provisions to give the public confidence that political decisions are free and seen to be free from improper influences.

The implied freedom of political communication limits the extent to which political donations can justifiably be banned.[14] The High Court in *McCloy v New South Wales* confirmed that while capping donations and banning donations from developers burdens this implied freedom, that burden is acceptable if applied in a way that is appropriate and adapted to the legitimate purpose of preventing corruption and improper influence.[15] The court made clear that the applicable test concerns objective rather than subjective considerations, stating, 'It is not the subjective intention of the donor so much as the objective tendency of large payments of money to corrupt both government and the electoral system which is the justification for the restriction'.[16]

9 'Quid pro quo' is the transfer of something valuable from the first person to the second person in exchange for some outcome that benefits that first person.
10 Commonwealth Senate, Select Committee 2018, *Political Influence of Donations*, 3.6, parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024147/toc_pdf/PoliticalInfluenceofDonations.pdf;fileType=application%2Fpdf
11 See for example, NSW ICAC 2021, *Investigation into the regulation of lobbying, access and influence in NSW* (Operation Eclipse) and articles concerning donations and state elections in Queensland, Western Australia and Tasmania: Robertson J et al 2020 'Donation to LNP via company linked to property developers sparks complaint to electoral watchdog over prohibited-donor laws', *ABC News*, 28 October 2020; de Kruijff P 2021, 'McGowan's 'gold standard' of transparency lacking with $3 million of 'dark money' received by Labor', *WA Today*, 19 January 2021; and James E 2021, 'Donation darkness in Tasmanian election', *The Examiner*, 29 April 2021
12 In 2020 legislation was introduced in Western Australia and Tasmania to reform donation laws, but neither Bill has yet passed. Donation reforms enacted in the ACT commenced in July 2020 and reforms enacted in Queensland commenced in July 2022 respectively.
13 Electoral Legislation Amendment Bill 2018.
14 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 confirmed that making a donation is an element of a person's implied constitutional right to expression of political thought. *McCloy v New South Wales* (2015) 257 CLR 178; 89 ALJR 857 confirmed that while capping donations and banning donations from developers burdens the implied freedom of political communication, that burden is legitimate and proportional in that it is appropriate and adapted to the legitimate purpose of preventing corruption and undue influence.
15 *McCloy v New South Wales* (2015) 257 CLR 178; 89 ALJR 857.
16 Ibid.

Putting aside the possibility that banning donations may be unconstitutional, Associate Professor Yee-Fui Ng, the Acting Director of the Australian Centre for Justice Innovation at Monash University, whose research centres on strengthening political institutions and enhancing executive accountability, has observed that it would be unlikely to address the issue of improper influence.[17] Similarly, Professor Anne Twomey, the Director of the Constitutional Reform Unit at the University of Sydney University, whose research interests include electoral law, has suggested that a better approach to managing and preventing improper influence would include capping political donations and limiting expenditure on political campaigns, particularly in relation to political advertising.[18]

To the extent that donations are permitted, IBAC considers that the regulatory settings governing those contributions must be carefully crafted to prevent well-resourced donors from exercising improper influence over elected officials. An effective regulatory regime for donations must:

- limit the amount that can be contributed by any one donor 'to ensure that wealthy donors are not permitted to distort the flow of political communication'[19]
- oblige donors and recipients to declare what was given and received in a manner that:
  - provides voters with access to information about donations before they are required to vote
  - identifies contributions that may give rise to a conflict of interest if the elected official is subsequently involved in making a relevant decision
  - is transparent about the transfer of funds within a party to ensure the donation caps are not being circumvented
- mitigate the need for candidates to raise funds by capping election campaign spending
- penalise recipients and donors for failing to adhere to bans, limits and declaration requirements in a meaningful way to promote compliance and public confidence.

As a matter of priority, reform is also needed in Victoria to bring local government donation laws into line with state laws. In particular, donors and candidates should be required to declare donations to a central authority such as the Victorian Electoral Commission (VEC) and a general cap should be applied at the local government level.

In addition, consideration should be given to assessing options to strengthen the state and local disclosure scheme, including more detailed disclosure requirements and real-time reporting, and the extent to which a cap on state and local political expenditure could mitigate the corruption risks of election fundraising and assist in identifying undeclared donations provided in kind.

In doing so, relevant expertise should be engaged, consultations should be held with key stakeholders including the VEC and the Local Government Inspectorate (LGI), and consideration should be given to other review work where possible. In this regard, IBAC notes that the *Electoral Act 2002* (Vic) (Electoral Act) stipulates that an independent review of the amendments made by the *Electoral Legislation Amendment Act 2018* (Vic) must be completed by November 2023.[20]

17 Ng Y-F 2021, Regulating money in democracy: Australian political finance laws across the federation, p 110.
18 Professor Anne Twomey, University of Sydney Law School, NSW Parliament, Inquiry into public funding of election campaigns, Submission 2, 2 January 2010. Professor Twomey also notes that banning donations would also be likely to exacerbate the problems it was intended to resolve by shifting money to third-party single-issue lobby groups who would dominate electoral campaign advertising, leaving parties beholden to their demands.
19 Unions NSW v New South Wales (2013) 88 ALJR 227 per Keane J.
20 *Electoral Act 2002* ss 222DB(1) and (2).

3.1 Current donation regulation in Victoria

3.1.1 Electoral Act 2002

The Electoral Act is the primary legislation governing state electoral expenditure and political donations in Victoria. The 2018 Electoral Act reforms:

- capped donations at $4000 from a single donor over a four-year state election period[21]
- introduced disclosure requirements for donors and candidates in state government elections[22]
- prohibited candidates from receiving donations from foreign donors,[23] anonymous donors,[24] or entities that do not have an ABN.[25]

With the 2018 reforms, the Victorian Government asserted that Victoria would have 'the strictest and most transparent political donation laws in Australia', large donations would be eliminated and Victorians would have 'increased confidence in political decision-making'.[26]

The 2018 Electoral Act reforms also significantly increased the public funding that political parties receive for election activities, based on the number of their MPs and the votes cast for them at the state election, as well as introducing two new streams of funding for administrative expenditure and policy development, as discussed below in 3.2.4.1.

Comparison with other jurisdictions suggests that gaps remain and that elements of the Queensland and NSW donation regimes, in particular, point to the need for further enhancements, including real-time publication of donation declarations and expenditure caps for political parties and candidates.

3.1.1.1 Legislative review

The Electoral Act provides an opportunity to review and strengthen the current donation regulations, by requiring that an independent panel review the 2018 reforms and report within 12 months of the November 2022 state election.[27] That review must examine and make recommendations on:

- whether there should be a cap on political expenditure, and if so:
  - whether the cap should apply generally or to specific persons or entities
  - what value should be capped
  - what the consequences of exceeding the cap should be
- the operation of the disclosure scheme including the operation of disclosure returns.[28]

The review may also examine and make recommendations about electoral funding.[29]

If the review recommends amendments to the Electoral Act, the Minister for Government Services must endeavour to ensure that those amendments are made before the general election to be held in November 2026.[30]

3.1.2 Local Government Act 2020

The regulatory focus of the *Local Government Act 2020* (Vic) (LGA 2020) is on a candidate's disclosure obligations, with no limits on donations or campaign expenditure and no donor declaration requirements. Declarations are made to the CEO of each council, who is in turn obliged to report to the Minister for Local Government.

21 Ibid, ss 206(1) and 217D. The $4000 cap is indexed annually. For the 2022/23 financial year the cap is $4320. See Appendix A.
22 Ibid, s 216. The $1000 threshold is indexed annually. For the 2022/23 financial year the threshold is $1080.
23 Ibid, s 217A(a).
24 Ibid, s 217B in relation to donations of $1000 or more.
25 Ibid, s 217A(b).
26 Premier of Victoria 2018, *Australia's most transparent and open donation regime passes Victorian Parliament*, Media release, 26 July 2018.
27 *Electoral Act 2002* ss 222DB(1) and (2).
28 Ibid, s 222DB(3). The subsection also states the review must examine the impact of the amendments on third-party campaigners, small community groups and not-for-profit entities, and electronic assisted voting.
29 Ibid, s 222DB(4).
30 Ibid, s 222DB(6).

3.1.3 Local Government Bill 2018 and 2019

Following an extensive review of the *Local Government Act 1989* (Vic) and consultation on the exposure draft bill,[31] the then Minister for Local Government introduced the Local Government Bill 2018 in May 2018.[32]

The Bill sought to introduce more centralised, real-time reporting – candidates would be required to lodge an election campaign donation return with the Chief Municipal Inspector (CMI) within:

- seven days of nomination day where the donation was received before that day
- 21 days of receiving a donation in general
- 40 days of the election if no donations were received by a candidate.[33]

In October 2018 this opportunity for reform was lost when parliament was dissolved prior to the November 2018 state election and the Local Government Bill 2018 lapsed.[34]

Following the present government's return, the then Minister for Local Government issued a policy reform proposal paper in June 2019. That paper flagged an intention to 'improve the integrity and transparency of the donations process' for local government elections following the 2018 reforms to the Electoral Act.[35]

That paper proposed that the revised Bill should:

- cap donations from a single donor at $1000 for individual candidates and candidate groups during each donation period (the four-year period starting 30 days after the previous election and ending 30 days after the current election)
- lower the gift disclosure threshold, requiring disclosure of campaign donations and other gifts to councillors above $250 (as opposed to $500)
- prohibit foreign donations.[36]

However, when the Bill was reintroduced in November 2019, the government determined not to proceed with these reforms pending further work on these issues.[37] As a result, these donation provisions are not reflected in the LGA 2020.

31 Department of Jobs, Precincts and Regions, *Local Government Act Review – Consultation Process*, which notes that a discussion paper was released in September 2015, followed by a directions paper in June 2016, targeted consultations throughout 2017 and release of an exposure draft Bill in December 2017. See: localgovernment.vic.gov.au/our-programs/local-government-act-2020-1/local-government-act-1989-review-process
32 Minister for Local Government, The Hon M Kairouz, 24 May 2018, Second Reading Speech, Local Government Bill 2018, Legislative Assembly, Hansard, p 1600.
33 Local Government Bill 2018 cl 335.
34 The Bill lapsed on 30 October 2018.
35 Department of Environment, Land, Water and Planning 2019, *Local Government Bill – A reform proposal*, p 10.
36 Ibid. Note in relation to Melbourne City Council, the paper proposed the cap on donations would be $4000 and the gift disclosure threshold would remain at $500.
37 Minister for Suburban Development, The Hon M Kairouz, 14 November 2019, Second Reading Speech, Local Government Bill 2019, Legislative Assembly, Hansard, p 4322. Also see, Minister for Local Government, The Hon A Somyurek, 27 November 2019, Legislative Council, Debates, Hansard, p 4349.

3.2 Areas for reform

3.2.1 Donors and candidates concealing donations

3.2.1.1 Splitting payments using different entities

Since November 2018 donation splitting has been addressed to some extent at the state level via the $4000 cap on donations from a single donor and $1000 declaration threshold.

At present, Victoria's $4000 general cap over a four-year state election period is the lowest cap in Australia. NSW and Queensland are the only other jurisdictions in Australia that cap donations.[38]

Victoria's current state declaration requirements provide an additional level of accountability around donations at the state level. However, donors are only required to detail their name and residential address or address of their registered office. Further, while the Electoral Act states that donations can only be received from a natural person or a corporation with an ABN,[39] there is no requirement to disclose ABN details in a donor entity's declaration.[40]

There are a number of ways in which Victoria's declaration process can be strengthened. In Queensland, donors must notify the recipient if they are not the source of the gift being made and provide the 'relevant particulars' of the entity that is the source of the gift.[41] The 'relevant particulars' include the name and address of the entity (whether it is an association, trust or other entity), as well as the names and addresses of executive committee members or trustees.[42]

In NSW, a donor's disclosure must include the name and residential address of the donor, or the ABN and address of the registered office of the donor if an entity, for donations at both the state and local level.[43] To deter donors from splitting donations between related entities to circumvent the cap, a donor is also required to disclose particulars of any related corporation that has made a political donation to the same party, elected member, group, candidate, third-party campaigner or associated entity in the same financial year.[44]

However, low caps and declaration thresholds alone are not sufficient to address the issue of donation splitting, particularly if an individual is able to use different names and addresses of entities to donate in excess of the general cap.

The NSW ICAC's investigation Operation Aero demonstrated that even with enhanced disclosure requirements and a $5000 donation cap, a prohibited donor was still able to donate $100,000 to the NSW Labor Party.[45] As a result, the NSW ICAC has made a number of reform recommendations, including increased penalties for senior party office holders who fail to report relevant conduct and enhanced regulatory reporting authority for the Electoral Commission.[46]

Together these examples point to the importance of a multifaceted approach to donation regulation in which caps, disclosure requirements, regulatory mechanisms and sanctions all play a part in promoting transparency and compliance with regulatory requirements.

38 In NSW an annual cap of $6100 applies to donations from a donor to a registered party or group, and $2700 for donations from a donor to unregistered parties, elected members, candidates, third-party campaigners and associated entities at the state and local level, see *Electoral Funding Act 2018* (NSW) s 23. Queensland introduced caps at the state and local level which commenced on 1 July 2022. The caps limit donations from an individual or organisation to $4000 for registered political parties and $6000 for candidates over an election period, see *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Act 2020* (Qld) ss 252 and 443.
39 Electoral Act 2002 s 217A states that donations cannot be received from a natural person who is not an Australian citizen or resident, or a donor who is not a natural person, unless they have a relevant business number.
40 Ibid, s 216(5).
41 *Electoral Act 1992* (Qld) s 205B. Breach of this requirement carries a maximum penalty of 20 penalty units. The 'source of an indirect gift or loan' is defined in s 295A as an entity whose 'main purpose in making the first gift or loan is to enable (directly or indirectly) another person, to make the ultimate gift to the ultimate recipient'.
42 Ibid, s 197 definition of the 'relevant particulars' that must be disclosed.
43 *Electoral Funding Act 2018* (NSW) s 19.
44 Ibid, s 24(6).
45 See NSW ICAC 2022, *Investigation into political donations facilitated by Chinese friends of Labor in 2015* (Operation Aero), in which 20 separate $5000 donations were made to NSW Labor and Country Labor under the names of 12 different individuals or entities to circumvent the statutory donation cap in 2015.
46 Ibid, Recommendations 6 and 7, p 276.

Proposed reforms relating to splitting payments – see recommendation 1(b)

To deter donors from splitting donations and help detect schemes that may constitute an offence under the Electoral Act,[47] donor entities should be required to declare further details of those involved in making the donation, including:

- the ABN and address of the registered office of the donor in the case of an entity (as required in NSW),[48]
- the names and addresses of executive committee members for the entity making the donation (as required in Queensland)[49]
- whether any donations have been made by other associated or related companies (as required in NSW).[50]

The definition of an associated or related entity will be critical to preventing the use of the corporate veil to conceal donations that exceed the threshold.

In addition, the donor should be required to declare whether the funds or resources being donated have been provided to the donor by a third-party for the purpose of making a donation (as required in Queensland).[51]

Once the current donation regulations in Part 12 of the Electoral Act have been tested in a general election, the declarations and information reported must be reviewed to assess whether the details that donors are currently required to disclose are sufficient to properly monitor and enforce the general cap, including attempts to split donations. Victoria's donation disclosure scheme will be the subject of a 12-month review, which will commence immediately after the next state election in November 2022.[52] That review presents an opportunity to address some of the corruption risks associated with political donations identified in this report.

3.2.1.2 Providing support in kind

Instead of making a financial contribution, a donor may provide other assistance. For instance, a donor could contribute to an election campaign by providing property or assets for use by a candidate, paying for services such as printing and postage or through the provision of a loan. These political donations that involve something other than money are sometimes referred to as 'in-kind' donations.

At the state level, the Electoral Act now defines a gift to include any disposition of property, otherwise than by will, made without consideration in money or money's worth, or with inadequate consideration, including the provision of a service.[53] Pursuant to the Electoral Regulations 2012 (Vic), the value of a gift other than money – such as the provision of a service – will be determined with regard to its fair market value.[54]

The VEC declaration process prompts donors to nominate the donation type. If a type other than 'money' is selected, the donor must attach evidence of the value of the political donation made (such as an invoice for the cost of the services). As at 11 September 2022 the VEC had received six donations disclosures involving in-kind political donations (in the period since 25 November 2018), for which receipts were supplied. Recipients are not required to report in-kind donations separately in their annual return and in terms of monitoring compliance, the legislative avenues available to the VEC to identify breaches around the disclosure of goods or services are limited.

Proposed reforms relating to providing support in kind – see recommendation 2(c)

The Electoral Act and LGA 2020 both impose obligations on candidates to declare in-kind support as part of their donation declarations and returns. However, the operation of these provisions has not been reviewed to assess their efficacy. Obligations to declare details of in-kind support are unlikely to be effective in isolation. The current regulatory regime should be tested to help identify mechanisms that would promote better regulation of in-kind donations if the issue of under-reporting is found to persist. This is likely to include other forms of reporting (such as expenditure returns) together with tailored monitoring and training, and targeted penalties.

47 *Electoral Act 2002* s 218B.
48 *Electoral Funding Act 2018* (NSW) s 19.
49 *Electoral Act 1992* (Qld) s 197.
50 *Electoral Funding Act 2018* (NSW) s 24(6).
51 *Electoral Act 1992* (Qld) s 205B.
52 *Electoral Act 2002* s 222DB.
53 Ibid, s 206(1). Note that the provision goes on to list things *not* included in the definition of a gift for the purpose of Part 12.
54 Electoral Regulations 2012 r 49, with reference to the *Electoral Act 2002* s 206(1A).

The Electoral Act 1992 (Qld) requires that a broadcaster or publisher who broadcasts or publishes an authorised advertisement relating to an election must submit a return to the Electoral Commission within eight weeks of polling day. That return must identify the broadcasting service, details of the people who requested and authorised the advertisement, whether a charge was applied and, if so, the amount of the charge and whether it involved a discount.[55]

Reporting requirements such as these can improve transparency from different perspectives (such as that of the service provider rather than the donor or the recipient). They can allow the regulator to cross-reference donation disclosures to better detect in-kind donations that have not been declared. However, mechanisms that focus on unique types of in-kind contributions will no doubt be rendered ineffective as modes of communication change and donors find new ways to provide candidates with indirect financial support.

Coupled with tailored training for candidates and appropriate penalties for attempts to circumvent the requirements, these measures can help to ensure candidates understand their obligations and promote the proper declaration of election campaign assistance provided as goods and services.

Options to address this issue should cover:

- how reporting can be enhanced to better identify support provided in kind in an attempt to circumvent cap or declaration requirements
- whether the regulator is adequately resourced to monitor donations and expenditure (including in-kind contributions that have not been declared)
- whether the training and penalties specified are appropriate to ensure awareness of obligations and deter donors and recipients from failing to declare support provided in kind.

3.2.1.3 Donations made to political parties with a request to direct to particular candidates

Under the current regulatory regime, a single donor can only contribute up to the $4000 cap to a party, including any of the candidates belonging to that party, in an election period, making it difficult for a would-be donor to elevate their profile with the leadership of a given party by donations alone.

However, there is arguably still room to improve the accountability of parties and candidates for their election campaign income and expenditure.

Proposed reforms relating to donations directed to particular candidates – see recommendation 1(c)

Reconciliation of accounts can assist to detect financial anomalies. Reconciling amounts received and expended by a party *and candidates* may identify donations that have not been properly declared.

The Electoral Act currently requires that a registered political party submit a statement of expenditure after an election, as well as an annual return of donations received during the financial year,[56] both of which must be accompanied by an audit certificate.[57] No equivalent expenditure disclosure requirement applies to candidates or groups. While the registered agent of an elected member is also required to submit an annual return, that return need only report amounts received, not amounts paid or owed (as required for registered parties).[58] There is no requirement to obtain an audit certificate for an elected member's return,[59] however, the VEC is required to publish any annual returns submitted by reporting entities within six months of the end of the relevant financial year.[60]

55 *Electoral Act 1992* (Qld) ss 284 and 285.
56 *Electoral Act 2002* ss 208 and 217I.
57 Ibid, s 209.
58 Ibid, s 217M.
59 Ibid, s 209, which does not make reference to s 217M.
60 Ibid, s 217P.

In NSW, Queensland and the Commonwealth, candidates are required to disclose their campaign expenditure.[61] It is acknowledged that those requirements may not necessarily capture transfers between affiliated campaign accounts that do not amount to 'expenditure'.

When taken as a whole, reporting requirements should allow an investigator or auditor to reconcile all income and expenditure. Any reform to existing reporting mechanisms must address the apparent gap that allows parties to move money around without scrutiny, noting that more transparent reporting can assist with enforcing the donation regulations.

3.2.1.4 Using third-party campaigners at the local government level

At the state level, a third-party campaigner is a person or organisation that receives political donations or spends more than $4000 in a financial year but is not a registered political entity.[62] This definition effectively captures anyone who receives funds or pays political expenses exceeding $4000 in a 12-month period to campaign for or against a person or organisation, including community interest groups, business associations and unions, who may campaign on an issue relevant to voters at an election without formally aligning themselves with a particular party or candidate.

At the local government level, third-party campaigners are not regulated under the LGA 2020. However, where spending on election campaigning activities by third parties can be perceived as reasonably intended to influence community members to vote for or against a political party or particular candidates, the OECD has noted there should be an appropriate level of transparency around that activity.[63]

Once identified as a third-party campaigner at the state level, the person or their agent must maintain a state campaign account for the purposes of state elections[64] and submit an annual return that summarises the political donations, other amounts received, expenditure and debts incurred during a financial year.[65] That return must include:

- the name and address of all donors who contributed a disclosable amount (at or above the $1000 annual threshold)
- the total amount of undisclosed donations received (including the number of contributors involved)
- the total amount of non-political donations received in the financial year accompanied by a schedule detailing who made each non-political donation
- the total amount of any outstanding debts incurred in the financial year.[66]

The Electoral Act also specifies that a donor cannot donate to more than six third-party campaigners during an election period.[67] This appears to create a situation where an individual could donate up to $24,000 (six multiples of $4000) to support a group of candidates over a four-year election period, which could be misused to circumvent the donation cap.

61 *Electoral Funding Act 2018* (NSW) ss 16, 18 and 20, which apply to state and local candidates; *Electoral Act 1992* (Qld) s 263; and *Commonwealth Electoral Act 1918* (Cth) s 309.
62 *Electoral Act 2002* s 206(1).
63 OECD 2016, *Financing democracy: Funding of political parties and election campaigns and the risk of policy capture*, p 3.
64 *Electoral Act 2002* s 207F. All donations must be paid into the state campaign account, including small contributions.
65 Ibid, s 217K.
66 VEC 2020, *Disclosures user guide: Submitting an annual return. Individual third-party campaigner*. The term 'non-political donations' is used in the VEC guide in a way that suggests it is intended to cover donations that do not meet the definition of a political donation under the *Electoral Act 2002*.
67 *Electoral Act 2002* s 217F.

In NSW, it is unlawful for a person to make political donations to more than three third-party campaigners in the same financial year, for a state or local government election.[68] A third-party campaigner must also be registered before they can make payments of more than $2000 in relation to a local government election.[69] The NSW Electoral Commission maintains the register of third-party campaigners for each election, which includes the name and address of the third-party campaigner, the election being contested and the campaigner's date of registration.[70] As at September 2021, the register recorded that eight third-party campaigners had registered for the December 2021 local government general elections, while 12 third-party campaigners had registered in relation to the May 2021 Upper Hunter state by-election.[71]

In June 2020 Queensland introduced reforms to promote registration of third-party campaigners by setting an expenditure limit of $6000 on non-registered third parties, compared to a general limit of $1,000,000 for registered third parties.

Proposed reforms relating to third-party campaigners – see recommendation 1(d)

Third-party campaigners should be regulated in a consistent manner at the state and local government levels to the extent possible. For this reason, the provisions relating to third-party campaigners in the Electoral Act should be applied to local government as part of the reforms to harmonise state and local government donation regulations.

The Victorian approach of defining a third-party campaigner in the Electoral Act based on the amount they receive and expend is an effective starting point to ensure that a person who is in fact acting as a third-party campaigner (in a financial sense), regardless of how they describe their role, is obliged to lodge a declaration. However, the current provision that allows an individual to donate to up to six third-party campaigners appears to provide a means to circumvent the general donation cap.[72] Donors should be permitted to donate to no more than three third-party campaigners in an election period for a state or local government election, consistent with the NSW approach.

3.2.1.5 Financial support not currently defined as a political donation

The LGA 2020 requires that an election campaign donation return be submitted about gifts received during the donation period by the candidate or on behalf of the candidate, 'to be used in connection with their election campaign'.[73] On this definition a connection with the candidate's election campaign is required to trigger the obligation to disclose a donation.

Proposed reforms relating to financial support not currently defined as a political donation – see recommendation 1(a)

The fact that an election campaign donation return is required only for gifts 'to be used in connection with their election campaign' is inconsistent with the Electoral Act, which requires that MPs declare any donations exceeding the threshold received during their term in office.

All contributions over $500 received by a councillor during their term in office should be subject to general cap and disclosure requirements regardless of their intended use. This would also streamline the declaration processes by removing the separate requirement to declare gifts exceeding $500.

This issue should be addressed through consistent donation regulation at the state and local levels, by applying relevant provisions of the Electoral Act, Part 12 to local government – which should occur as a matter of priority.

68 *Electoral Funding Act 2018* (NSW) s 25(1).
69 Ibid, s 117. In NSW the capped election period for a local government election runs from 1 July in the year of the election to the day of the election. See elections.nsw.gov.au/Funding-and-disclosure/Electoral-expenditure/Caps-on-electoral-expenditure/What-is-the-capped-expenditure-period-for-a-local
70 *Electoral Funding Act 2018* (NSW) s 116.
71 NSW Electoral Commission 2022, *Register of Third-party Campaigners*. Five of the local third-party campaigners identified in the register were related and associated with the Linfield LGA, elections.nsw.gov.au/Funding-and-disclosure/public-register-and-lists/Register-of-Third-Party-Campaigners
72 *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Act 2020* (Qld) ss 297–304, 281E and 281H.
73 *Local Government Act 2020* ss 306(2) and 3(1). 'Donation period' is defined as the period starting 30 days after the previous election and ending 30 days after the election for which a donation return is being completed.

3.2.2 Compliance, enforcement and timely public reporting

Caps and declaration requirements alone are not sufficient to regulate donations. Those provisions must be combined with timely public reporting and effective enforcement mechanisms.

3.2.2.1 Over-reliance on candidate declarations at the local government level

While local government candidates are required to disclose details of election campaign donations received (including in-kind donations), *donors* are not required to declare donations made at the local government level. The onus is entirely on the candidate, which is inconsistent with state regulations.

Proposed reforms relating to candidate declarations – see recommendation 1(a)

Dual reporting obligations would help to promote transparency around donations and in turn 'enhance the fairness of the democratic system by correcting the information asymmetry that may develop where individuals and corporations can hide their activities behind closed doors'.[74]

IBAC recommends that donors and third-party campaigners be required to declare details of donations at the local government level, in addition to candidates. Those provisions should be consistent with the Electoral Act to the extent possible, while allowing for differences between the two levels of government, noting that the LGA 2020 currently requires that councillors declare election campaign donations of $500 or more.[75] However, consistent declaration regimes alone are not sufficient. More timely, transparent public reporting and stronger enforcement mechanisms are required to guard against improper donation activity, as discussed below.

3.2.2.2 Limitations of the current reporting and monitoring process

While council CEOs are required to provide the minister with a list of names of the people who submitted returns within 14 days of the election donation return closure date,[76] there is no obligation to check the accuracy of those returns or pursue candidates who fail to submit a return.

In comparison, the lapsed Local Government Bill 2018 proposed that election campaign donation returns be lodged with the CMI within 21 days of receiving a donation in general, 40 days after the election if no donations are received by a candidate, or seven days after nomination day if the donation was received before the person nominated.[77] The same Bill also proposed that the CMI publish a summary of the gifts recorded in a campaign donation return within two working days of the return being lodged.[78]

In a 2021 report the CMI restated his support for centralised publication of donation declarations within two working days of lodgement, stating it would 'streamline the submission of campaign donation returns and improve transparency'.[79] He also observed that this proposal received strong support from the local government sector.[80]

Responsibility for publishing local government donation returns is centralised in both Queensland and NSW. In Queensland, the Electoral Commission must publish state and local candidate returns within five days of receipt,[81] records relating to candidate returns must be kept for five years,[82] and copies of candidate returns can be accessed and searched via the electronic disclosure system on the commission's website.[83] In NSW, the Electoral Commission must publish disclosures of reportable political donations relevant to both state and local government elections 'as soon as practicable' after receipt,[84] and records relating to reportable political donations must be kept for three years.[85]

74 Ng Y-F 2021, *Regulating money in democracy: Australian political finance laws across the federation*, p 35.
75 Ibid, s 307(1).
76 Local Government Bill 2018 cl 335.
77 Local Government Bill 2018 cl 335.
78 Ibid, cl 338.
79 LGI 2021, *Social media fuels rise in complaints during 2020 council elections*, p 18 and Recommendation 6.
80 Ibid, pp 18 and 21.
81 *Electoral Act 1992* (Qld) s 316 and *Local Government Electoral Act 2011* (Qld) s 128.
82 Ibid, ss 305AB, 305AC and 305D, and *Local Government Electoral Act 2011* (Qld) s 196.
83 Ibid, s 315A. Also see, Electoral Commission Queensland, Electronic Disclosure System, disclosures.ecq.qld.gov.au/
84 *Electoral Funding Act 2018* (NSW) s 22.
85 Ibid, ss 45 and 145.

At the state level in Victoria, when introducing the Electoral Legislation Amendment Bill 2018, the then Attorney-General described the donation disclosure provisions as involving 'real-time reporting [which] will significantly increase transparency in our political system', adding the reforms being introduced would make this information 'available to the public in a timely way'.[86] However, in practice, reporting can take up to 28 days, since the donor or recipient has 21 days to disclose making or receiving a political donation, and the VEC has seven days to publish the disclosure return on its website.

This means a donation could be made in the fortnight before an election, but not be publicly disclosed until two weeks after the election. Given that elections are the key means by which constituents hold their elected members to account and recognising that many donations will be made in the weeks and months prior to the election, the current 28 day 'real-time' reporting appears to be inadequate.

Analysis of donations post-election would help to identify potential attempts to influence outcomes as well as conflicts of interest. However, to fulfil the Attorney-General's stated aim of making the community aware of private donation sources in a way that preserves 'the integrity of the electoral system', disclosure of donations must be made publicly available prior to elections.[87]

Queensland's donation declaration and publication process currently provides the strongest real-time reporting regime in Australia. That scheme requires that both the donor and recipient candidate or party declare cumulative gifts (of $1000 or more at the state level or $500 or more at the local government level) within:

- 24 hours if the donation is made or received within seven days of polling day, or otherwise
- seven business days of making or receiving the donation in general.[88]

This approach of requiring more timely reporting in the lead-up to an election ensures donor activity is published quickly when at its peak and when voters are most likely to want access to that information, while ensuring that all declarations are otherwise published in a timely manner.[89]

To facilitate timely declarations, the Queensland Electoral Commission online electronic disclosure system allows donors and recipients to lodge directly, and the public to filter and map data on donor activity.[90]

Recognising that the closer proximity of councillors to their constituents at the local level gives rise to specific risks, such as local interests seeking to influence decision-makers by making donations, Queensland legislation stipulates that a person making a gift or loan must declare:

- any interest they have in a local government matter that is greater than that of other persons in the local government area, as well as the nature of their interest[91]
- the industry in which the person is employed if the donor is an individual, or the type of business the corporation carries on if the donor is a company.[92]

86 Attorney-General, The Hon M Pakula, 10 May 2018, Second Reading Speech, Electoral Legislation Amendment Bill 2018, Legislative Assembly, Hansard, p 1348.
87 Ibid.
88 *Electoral Act 1992* (Qld) ss 261 (for candidates) and 265 (for donors). Reporting period defined in s 198; and Electoral Regulation 2013 (Qld) rr 8A (for candidates) and 8D (for donors).
Local Government Electoral Act 2011 (Qld) ss 117 and 118, and *Local Government Electoral Regulation 2012* (Qld) rr 5 and 6.
89 Tasmanian Government 2021, *Electoral Act Review, Final Report*, p 65.
90 Electoral Commission Queensland, *Fact Sheet 3 – State Elections, Disclosure of gifts and loans received*.
91 *Local Government Electoral Act 2011* (Qld) s 109(1)(d) specifies that 'if the person making the gift or loan has an interest in a local government matter that is greater than that of other persons in the local government area [they must state] the fact, and the nature of the person's interest'.
92 Ibid, s 109(1)(e).

Proposed reforms to reporting and monitoring process – see recommendation 1(a), (e) and (f)

Timely, centralised declarations by both candidates and donors are essential to promote public access to information about donation activity, particularly in the period immediately before an election. As such, Victoria should move to one disclosure mechanism for all state and local political donations that more closely resembles 'real-time' reporting, while requiring more detailed disclosures at the local government level to assist in identifying and managing conflicts of interest, both modelled on the Queensland approach. In providing public access, consideration must be given to ensuring that data is accessible, clear and user-friendly so that members of the public can be better informed about donations to political parties and individuals.

Donation declarations should be consistent across state and local government to the extent possible. In particular, donors and local government candidates should be required to declare donations over a certain threshold to a central authority such as the VEC and donations should be capped at $4000 within an election period. However, consideration should be given to reviewing the appropriateness of a $4000 cap following the 2024 local government elections, to ensure the cap is fit for purpose at the local government level, noting that most candidates are likely to attract lower-value contributions from donors.[93]

Noting the donation reforms proposed in the Local Government Bill 2018 and the more detailed declaration requirements that apply at the local government level in Queensland, further work should also be undertaken to ensure, among other things, that the regulatory settings:

- make provision for local candidates to declare if no donations were received in an appropriate time frame
- require that donations received by a local candidate immediately before their nomination are declared appropriately
- require that donors declare the industry they work in and the nature of any interest they have in a local government matter above that of the general community.[94]

3.2.2.3 Other measures to assist with enforcement

In Victoria the VEC is responsible for compliance and enforcement of the donation provisions in the Electoral Act,[95] and has been developing its enforcement arm since the November 2018 reforms.[96] At present the focus of the VEC is on 'constructive compliance', primarily by engaging with stakeholders including the two major registered parties, the Liberal Party and the Labor Party, to ensure they understand their obligations.

Adding to the challenges of compliance at the state level, is the annual indexation of the declaration threshold and general cap.[97] Because an individual could donate a number of times over a four-year period, the general cap would be calculated differently for each donor, depending on when their donation(s) were made. Similarly, if an individual scheduled four $1000 donations over the current four-year period, only the first would be captured by the declaration requirements due to indexation. As noted in the VEC's 2019 report to Parliament, 'annual adjustments to these amounts risk contributing to non-compliance as a result of changing values that add ambiguity and complexity over time'.[98] In IBAC's view, the cap and threshold should remain the same throughout each state and local election cycle, to ensure the requirements are clear and consistent for all donors and candidates.

With regard to local government donations, IBAC is aware that the issue of candidates failing to submit accurate and timely election campaign returns is an area of ongoing focus for the LGI. In the year following the 2016 council elections, 15 candidates from councils across the state were charged with failing to submit a campaign donation return,[99] and a further two were charged in the following two years,[100] while a further 159 candidates were issued with warnings.[101] While compliance improved at the 2020 local government elections, 109 candidates still received an official warning from the LGI after failing to submit a campaign donation return.[102] This suggests that poor compliance with the existing declaration requirements is a broader issue that warrants attention.

93 An election campaign donation return must include any 'gift' equal to or exceeding the $500 gift disclosure threshold as defined in the *Local Government Act 2020* s 3, unless a higher amount or value is prescribed by the regulations.
94 *Local Government Electoral Act 2011* (Qld) ss 109(1)(d) and 109(1)(e).
95 *Electoral Act 2002* div 4A.
96 The reforms provided the VEC with additional powers to monitor compliance with the scheme and the authority to appoint compliance officers with powers to gather information to investigate possible contraventions of the Act, *Electoral Act 2002* s 222A.
97 Appendix A sets out details of the annually indexed caps and thresholds for the current election period.
98 VEC 2019, *Report to Parliament on the 2018 Victorian State election*, p 110.
99 LGI 2018, *Annual Report 2017/18*, p 7.
100 LGI 2020, *Annual Report 2019/20*, p 10.
101 LGI 2018, *Annual Report 2017/18*, p 8.
102 LGI 2022, *More than 100 candidates warned, campaign donation transparency improves*, Media release, 9 March 2022.

At present, IBAC understands that the LGI is only able to audit a small sample of campaign donation returns each election period due to resourcing issues. It is likely that many campaign donations that warrant further inspection go unaudited. To monitor and enforce donations regulations effectively, the relevant oversight agency must be provided with appropriate powers and resources to report and address breaches in a timely and proportionate manner.[103] For instance, consideration must be given to the mechanisms needed to ensure that the LGI has appropriate access to the VEC's database once local government donation declarations are centralised with the VEC.

Adding to the difficulty of the task and unlike state government candidates,[104] local government candidates are not required to maintain separate campaign bank accounts or disclose details of their election campaign expenditure. This can increase the difficulty of effectively auditing campaign donations. This issue was reflected in a 2021 LGI report which quoted a 2020 councillor:

> *They need to fix the donation system. It is a system which is based on honesty and if people aren't honest, that is where it ends. Candidates could have to submit a statement of what they spend on and where they spent it. At least there would be some rigour in the system. There is a loophole in campaign donations. Councillors should have to complete the circle, not just have what they say taken at face value.*[105]

The maintenance of dedicated campaign accounts – into which all donations and public funding are deposited and from which all campaign expenditure is paid – is important to promote transparency of campaign finances. In terms of enforcement, isolating income and payments for an election from other income and payments can help to facilitate auditing and investigation activities. To assist with enforcement activities, Queensland participants in a state election campaign (namely, parties, candidates and third-party campaigners) are required to provide the Electoral Commission with details of the dedicated campaign account that they are using.[106]

In both Queensland[107] and NSW[108] local government candidates are also required to maintain a dedicated bank account for campaign funding, suggesting that such a requirement is workable at the local government level. However, instead of providing details of their account to the Electoral Commission, local candidates in Queensland are required to provide the Electoral Commission with a bank statement for their dedicated account for the disclosure period for the election, as part of their expenditure return.[109]

A requirement for local government candidates to maintain a separate bank account, together with more rigorous declaration requirements and greater resources to facilitate monitoring and enforcement activities, would instil a greater focus on compliance and promote greater public awareness of the source of donations and where they are directed. This, in turn, would promote confidence that the local government election process is not unduly influenced by those who are able to donate more.

Proposed reforms relating to other enforcement measures – see recommendation 1(a) and (c)

To facilitate monitoring and enforcement activities:

- local government candidates should be required to maintain a separate bank account for election campaign funds, consistent with current obligations on candidates at the state government level
- state and local government candidates should be required to provide details of the dedicated campaign bank accounts (either in the form of bank account details or a bank statement) to the regulator, as occurs in Queensland
- the declaration threshold and general cap should only be indexed once at the beginning of each election cycle.

103 The need for additional resources was reiterated in the LGI's 2021 report *Social media fuels rise in complaints during 2020 council elections*, Recommendation 7, which states: 'The Local Government Inspectorate should be resourced to adequately manage and scrutinise the campaign donation returns process', p 23.
104 Under the *Electoral Act 2002* s 207F, registered parties, candidates and their agents and the like are required to maintain a separate account for the purpose of state elections, into which all political donations (including small contributions) must be deposited.
105 LGI 2021, *Social media fuels rise in complaints during 2020 council elections*, p 21.
106 *Electoral Act 1992* (Qld) s 221B.
107 *Local Government Electoral Act 2011* (Qld) s 126. The requirement to operate a dedicated bank account only applies if the candidate or group receives or pays funds during the group's disclosure period for the election.
108 *Electoral Funding Act 2018* (NSW) ss 38–41.
109 *Local Government Electoral Act 2011* (Qld) s 125.

Unlike Victoria, state and local donations are regulated by the one body in both NSW and Queensland. Regardless of how oversight is structured, it is clear that the donation regime must be properly monitored and enforced in a consistent manner at the state and local level. Careful consideration must be given to the funding and resources required to give effect to these legislative reforms, particularly those that seek to expand the VEC's administrative and regulatory responsibility with respect to local council elections, with respect to local council elections to ensure that the VEC is able to manage and enforce an expanded legislative scheme effectively.

Care must also be taken to ensure that the administrative obligations associated with a candidate's campaign – particularly at the local government level – are supported by mechanisms that encourage the general public to participate in the democratic process while helping to mitigate corruption risks associated with political finances.

In February 2022, the NSW ICAC made recommendations to enhance the NSW Electoral Commission's audit and enforcement powers in its report on Operation Aero. Those recommendations included measures to:

- increase penalties for senior party office holders who fail to report relevant conduct
- allow the Electoral Commission to issue penalty notices for minor breaches of the prohibition on cash donations, and
- empower the Electoral Commission to publish the results of compliance audits, investigations and regulatory actions.[110]

The most appropriate model for enforcement should be identified, including the structural arrangements and enforcement powers required for state and local government donations, taking into consideration the lessons learnt in Victoria and elsewhere around Australia.

3.2.3 Parties and candidates soliciting donations

3.2.3.1 Use of associated entities to court donations and other contributions

Political parties seek donations to finance election campaigns and have established associated entities that are used in part for this purpose.

The Electoral Act includes annual return requirements for registered political parties and candidates or their agents.[111] Those returns must include:

- details of the total amount received by, or on behalf of, the party, agent or candidate
- details of persons or entities who donated more than the disclosure threshold
- the total amount paid by, or on behalf of, the associated entity during the financial year, which should include receipts *from* an associated entity.[112]

In addition, parties, candidates, elected members and third-party campaigners (among others) must maintain a state campaign account with an authorised financial institution for the purpose of state elections. Again, this should reflect funds received from an associated entity for monitoring purposes.[113]

In 2016, the NSW ICAC reported on Operation Spicer, which investigated allegations of prohibited donations and non-disclosures in the NSW Liberal Party's 2011 state election campaign. ICAC found that the Free Enterprise Foundation was used to channel donations to the Liberal Party to disguise the true identity of donors. A substantial portion of the $693,000 provided by the Free Enterprise Foundation for the use of the NSW Liberal Party came from donors who were property developers and, therefore, prohibited donors under the *Election Funding, Expenditure and Disclosures Act 1981* (NSW).[114] ICAC noted that the Free Enterprise Foundation was not required by federal disclosure laws to disclose details of the individuals who made those donations, which individually fell under the federal disclosure threshold ($11,500 at the time).[115] This highlights the importance of account keeping and disclosure requirements at the state level.[116]

110 NSW ICAC 2022, *Investigation into political donations facilitated by Chinese friends of Labor in 2015* (Operation Aero), Recommendations 6, 1 and 7 respectively, pp 220 and 275–276.
111 *Electoral Act 2002* ss 217I and 217M.
112 Ibid, ss 217I and 217M.
113 Ibid, s 207F.
114 *Electoral Funding Act 2018* (NSW) s 52.
115 NSW ICAC 2016, *Investigation into NSW Liberal Party electoral funding for the 2011 state election campaign and other matters* (Operation Spicer), p 23.
116 NSW ICAC's August 2016 report on Operation Spicer did not include any corruption prevention recommendations, noting that ICAC made 22 recommendations in relation to donations in December 2014, which were largely reflected in the Schott Report, which made 50 recommendations to parliament in December 2014.

All Australian jurisdictions (except Tasmania) now recognise 'associated entities' in electoral legislation and regulate their participation in political campaigns.[117] While associated entities are now generally subject to transparency and disclosure requirements, there is potentially still a significant gap in transparency around funds raised by an associated entity if the initial donation is made in a jurisdiction with less stringent regulatory requirements around donations, such as the Commonwealth, where there is no cap on donations and a relatively high declaration threshold.[118]

The Electoral Act defines a 'political party' as 'an organisation whose object or activity is to promote the election of a member of the party to parliament' (being the Victorian Parliament),[119] and 'political donation' as a gift to a registered political party,[120] noting that the VEC maintains the register of political parties established under the Electoral Act.[121] When read together, these provisions indicate that any contributions that come from a political party registered outside Victoria must be treated in the same manner as any other donation, and are, therefore, subject to the same disclosure and cap requirements as any other donation.

However, Professor Joo-Cheong Tham has raised concerns that the application of a gift could too easily change between the point when the donation is given and when it is used, saying:

> *Money is fungible, therefore, contributions earmarked for a 'federal purpose' could easily free up resources for state and territory elections (including money from public funding payments and investment income) and in that way, support state and territory election campaigns.*[122]

Proposed reforms relating to the use of associated entities – see recommendation 2(d)

Transparency around funds raised by an associated entity could be enhanced, noting that a large proportion of funds raised by Victorian associated entities may be transferred to a political party registered outside Victoria. If the initial donation is made in a jurisdiction with less stringent regulatory requirements around donations, such as the Commonwealth, there is a risk that this could undermine the Victorian provisions if not properly declared.

In response to concerns raised about the redirection of funds from federal to state campaigns, the Advisory Report of the Federal Parliament's Joint Standing Committee on Electoral Matters stated:

> *State Parliaments have the legislative capacity to prohibit fundraising practices by State parliamentarians or candidates, or conversely to define what kinds of fundraising activities would be legal in their jurisdiction. For instance, State law could prohibit individual parliamentarians or candidates in their jurisdiction from organising fundraising for another level of Government, or playing a lead role in such activities. It could be also open to a State Parliament to include more generic anti-avoidance rules, as appropriate to protect the integrity of their respective electoral laws. The Spence case should strengthen the confidence of State Parliaments about their capacity to pass laws to ring-fence their donation rules.*[123]

In *Spence v Queensland,* the High Court upheld the validity of state legislation banning donations from developers in Queensland.[124] Following the Queensland prohibition on developer donations, the federal government introduced legislation that sought to circumvent the state ban by allowing a recipient to keep a gift made to a political party registered under the *Commonwealth Electoral Act 1918*, where the gift *may* be used for Commonwealth electoral purposes.[125] Because this meant the donation might never be used for the purpose of influencing voting at a federal election, the High Court concluded it could not fairly be characterised as a law with respect to federal elections and was, therefore, invalid.

The operation of the existing declaration regime should be reviewed to ensure that funds received by a political party registered in Victoria from a party registered in another jurisdiction are governed in a way that is transparent and complies with Victoria's electoral laws.

117 Tasmanian Government 2021, *Electoral Act Review, Final Report,* p 72.
118 The AEC indicates that the donation threshold is $15,200 for the 2022/23 financial year. See aec.gov.au/parties_and_representatives/public_funding/threshold.htm
119 *Electoral Act 2002* s 3, definition of 'political party'.
120 Ibid, s 206, definition of 'political donation'.
121 Ibid, s 43.
122 Joint Standing Committee on Electoral Matters 2020, *Advisory report on the Electoral Legislation Amendment (Miscellaneous Measures) Bill 2020*, para 1.66, with reference to Professor Joo-Cheong Tham, Submission 2, p 4.
123 Ibid, para 1.80.
124 *Spence v Queensland* (2019) HCA 15.
125 *Commonwealth Electoral Act 1918* (Cth) s 302CA.

3.2.3.2 Fundraising events

The definition of fundraising and guidance on the treatment of payments and funds raised at such events must be clear and unambiguous to ensure donation limits and declaration requirements at the state or local level are not circumvented in relation to fundraisers.

NSW defines a 'political donation' to include:

> An amount paid by a person as a contribution, entry fee or other payment to entitle that or any other person to participate in or otherwise obtain any benefit from a fundraising venture or function (being an amount that forms part of the gross proceeds of the venture or function).[126]

In South Australia, campaigners cannot charge more than $500 to enter a 'relevant event', which is defined as an event that:

(a) is intended to raise money for the benefit of a registered political party, and

(b) is advertised or promoted as an event at which, or in connection with which, attendees will be given access to:

(i) a Minister of the Crown or a Member of the Parliament of South Australia, or

(ii) a member of staff of a Minister of the Crown or a Member of the Parliament of South Australia.[127]

Proposed reforms relating to fundraising – see recommendation 1(g)

Fundraising events are used to raise significant financial support for election campaigns and are not regulated as closely as other donations under the Electoral Act. Firstly, these payments may avoid being labelled as political donations under the current definition because fundraiser tickets involve payment *in exchange* for access to an event.[128] Secondly, a donor can easily obscure their contribution by arranging for tickets to be purchased individually to avoid the donation cap. Thirdly, not requiring event organisers to maintain a record of attendees or ticket purchases makes it difficult for a regulator to assess whether donors and recipients have complied with the declaration and cap requirements for a fundraiser.

More prescriptive requirements for fundraising events, including a clear definition of fundraising and guidance on how to treat funds raised at such events, are essential to ensure that fundraisers are not used to circumvent any limits or declaration requirements, or provide a means of improper access, as discussed in section 4.2.2 in terms of lobbying.

To facilitate compliance, candidates, parties, third-party campaigners and associated entities should be required to use their dedicated campaign account for all payments and expenses relating to a fundraising event. As with other measures designed to promote compliance with the regulatory regime governing political donations, careful consideration must be given to the funding and resources required to allow the regulator to give effect to these legislative reforms.

3.2.4 Pressure to fundraise with no limits set on expenditure

3.2.4.1 Funding arrangements for state elections

The VEC administers the payment of public money to eligible political parties, independent members, and candidates. There are three different types of funding, namely, administrative expenditure funding, policy development funding and public funding. This funding is separate from political donations made by organisations and individuals. The current funding entitlements and payment cycles came into law in November 2018. Prior to November 2018, the VEC administered public funding payments after each State general election.

The Electoral Act and determinations made by the Electoral Commissioner outline what each type of funding can and can't be spent on. For example:

- **Public funding** can be used to cover costs associated with running a state election campaign. These funds are paid to registered political parties and candidates in instalments if they were eligible to receive public funding for the previous election. To be eligible a candidate must either be elected or receive at least four per cent of the primary vote:[129]
  - $6 is payable for each first preference vote for a candidate for election to the Legislative Assembly
  - $3 is payable for each first preference vote for a candidate for election to the Legislative Council.[130]

126 *Electoral Funding Act 2018* (NSW) s 5(2).
127 *Electoral Act 1985* (SA) s 130ZL. Note that this cap applies in circumstances where there are no associated declaration requirements that apply to fundraising events. Indeed, a declaration is only required for political donations in excess of $5000 in South Australia, see s 130ZF.
128 This is because a political donation is defined as a gift including the making of a payment or contribution at a fundraising function given 'without consideration in money or money's worth or with inadequate consideration'. *Electoral Act 2002* s 206(1).
129 *Electoral Act 2002* s 211(3).
130 Ibid, s 211(2A). These base amounts are indexed annually. See Appendix A.

- **Administrative expenditure funding** can be used to pay for the general office running costs but *cannot be* spent on political or electoral expenditure and must not be paid into a state campaign account.[131]
- **Policy development funding** can be used to cover costs relating to policy development but *cannot be* spent on political or electoral expenditure and is paid to registered political parties to reimburse costs relating to policy development.[132]

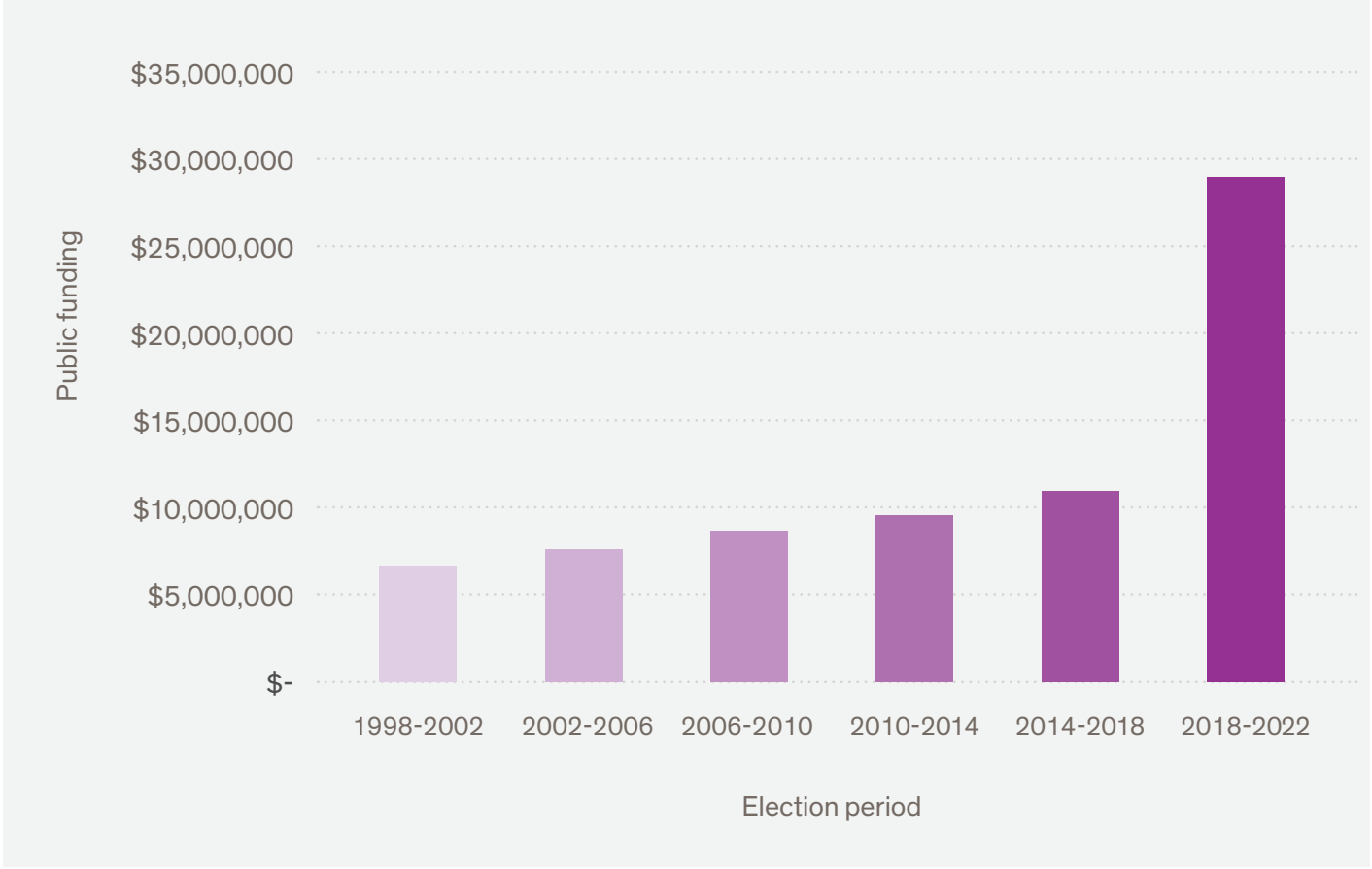
These changes have altered the finances of political parties substantially. For instance, in relation to the public funding stream alone, funding for costs associated with running a state election campaign have gone from approximately $8 million for each election period (up to and including the 2014-2018 election period), to approximately $28 million for the current 2018-2022 election period, as shown in Figure 1.[133]

In addition, the new administrative expenditure funding stream provides significant financial support, namely:

- $200,000 for the first person elected (or only person if the member is an independent)
- $70,000 for the second person elected (only for a registered political party)
- $35,000 for the third to forty-fifth person elected (only for a registered political party).[134]

While administrative expenditure and policy development funds cannot be used for a state election campaign, the burden of other expenses is arguably lesser for those incumbents seeking re-election who are in receipt of administrative expenditure and policy development funding, freeing up other funds for use during an election campaign.

Figure 1. Public funding before and after the 2018 donation reforms



131 Ibid, ss 207G, 207GB(2)(e) and 207GG.
132 Ibid, s 215A. See also vec.vic.gov.au/candidates-and-parties/funding
133 Based on data provided by the VEC on 15 September 2022, noting that these figures are static and do not reflect subsequent adjustments.
134 Note that these payments are indexed annually. See Appendix A.

3.2.4.2 Expenditure caps

At present there are no caps on election campaign spending in Victoria. In comparison, state electoral expenditure has been capped in NSW since 2011, in South Australia, the Northern Territory and the ACT since 2016, and in Queensland since 2020.[135]

Campaign expenditure is a largely public activity, making expenditure caps a valuable tool to reduce the risk of corruption when paired with appropriate donation caps and declaration requirements.[136] The benefits of capping campaign expenditure were explored in the Queensland Crime and Corruption Commission's (CCC) report on Operation Belcarra, which noted that expenditure caps are easier to enforce and help to 'level the playing field' by restricting spending to predetermined amounts.[137]

In a 2021 report prepared for the Electoral Regulation Research Network, Dr Ng noted that capping campaign expenditure can also reduce the pressure on candidates and parties to invest a disproportionate amount of time and resources on fundraising, which can in turn help to mitigate the risk of corruption or unfair influence, stating:

> *As Senator Faulkner noted, the 'arms race' by major parties has 'heighten[ed] the danger that fundraising pressures on political parties and candidates will open the door to donations that might attempt to buy access and influence.'*[138]

However, care must be taken to ensure that those measures do not unfairly distort the democratic process. For instance, the OECD has noted spending limits may favour incumbents over challengers.[139]

As noted earlier, the Electoral Act review is required to examine expenditure caps as well as the operation of the disclosure regime and may consider issues around electoral funding.[140] It is apparent from recent reforms and reviews in other states that there is a move toward greater regulation of expenditure (in addition to regulating donations) in many Australian jurisdictions. IBAC considers this a positive move to help mitigate corruption risks associated with donations.

Proposed reforms relating to funding arrangements and expenditure caps – see recommendation 2(a)

The recent amendments to public funding measures in Victoria reflect a national trend to increase public funding for elections (to reduce the reliance on political donations), but to truly bring Victoria in line with other Australian jurisdictions,[141] proper consideration must also be given to caps on expenditure.

Given the difficulty in demonstrating the nexus between a specific donation and a particular political decision, regulating political donations is critical to address the risk of donors exercising improper influence from the outset. Expenditure caps are an important way to reduce the pressure on political parties and those seeking elected office to solicit or accept financial and in-kind support from individuals and entities with specific interests and agendas. However, care must be taken to ensure expenditure caps do not unfairly discriminate against challengers, independents or minor parties.

135 See *Electoral Funding Act 2018* (NSW) ss 29 and 31; *Electoral Act 1992* (Qld) ss 280–281L; *Electoral Act 1985* (SA) s 130Z; *Electoral Act 2004* (NT) ss 203B and 203C; *Electoral Act 1992* (ACT) ss 205D–205E. While Tasmania does not cap state election expenditure, it does cap local government election expenditure at $10,000 per local government candidate, see *Electoral Act 2004* (Tas) s 160.
136 Orr G 2015, 'Political finance law in Queensland: One step forward two steps back', *Alternative Law Journal*, vol. 40(2), pp 77–81.
137 Qld CCC 2019, *Operation Belcarra: Reforming local government in Queensland*, p 46.
138 Ng Y-F 2021, *Regulating money in democracy: Australia's political finance laws across the federation*, p 56, with reference to Australian Government 2008, *Electoral reform green paper: Donation, funding and expenditure*, p 1.
139 OECD 2016, *Financing democracy: Funding of political parties and election campaigns and the risk of policy capture*, p 54.
140 *Electoral Act 2022* s 222DB.
141 Attorney-General, The Hon M Pakula, 10 May 2018, Second Reading Speech, Electoral Legislation Amendment Bill 2018, Legislative Assembly, Hansard, p 1348.

3.3 Conclusion

While some of the existing and proposed laws may appear onerous, experience has shown that political donations must be carefully scrutinised to deter political parties and their supporters from looking for new ways to supplement their income or identify loopholes to allow greater contributions to be made and received.

Many of the reforms proposed in relation to donations are complex and interact with recommendations about lobbying, suggesting that the regulatory regime must be considered holistically.

Although significant improvements have been made to regulating donations at the state government level, IBAC considers stronger reform to be necessary at both the state and local government level, including measures to:

- enhance existing state declaration processes to address vulnerabilities associated with donation splitting, in-kind support and the movement of funds within parties
- strengthen the donation cap and disclosure requirements at the local level by introducing requirements consistent with amended state provisions to the extent possible
- work towards real-time public reporting of donations at the state and local levels of government, recognising that this can reduce the risk of donations facilitating improper access and influence by better informing the electorate prior to voting
- facilitate better monitoring, reporting and enforcement of the donation regulation regime by requiring dedicated campaign accounts at the state and local level, enhanced candidate expenditure reporting and publication of information about fundraising events
- limit expenditure to reduce the pressure on candidates to raise funds.

The independent review mandated by the 2018 Electoral Legislation Amendment Act provides an important opportunity to refine the donation declaration scheme and explore the option of expenditure caps.[142] In parallel with that process, the major shortcomings IBAC has identified at the local government level should be addressed as soon as possible. Improvements to the state donation regime that are appropriate to local government should also be addressed in a timely way.

There should also be a strengthening of the associated processes of expenditure declarations and monitoring mechanisms to enhance the transparency and integrity of Victoria's regulatory regime for donations at both the state and local level.

142 *Electoral Act 2002* ss 222DB(1) and (2).

Corruption risks associated with lobbying

4

Victoria's very limited regulation of lobbying already falls short of the legislative regimes in place in NSW and Queensland, noting that both of those states have committed to further reforms following recent reviews.[143]

While lobbying plays a legitimate role in the functioning of the democratic process, its use to communicate the views of individuals and different parts of the community to decision-makers carries inherent risks that the decision-making process may become distorted or corrupted. Privileged access increases those risks. Adequate regulation of lobbying activity cannot eliminate these risks, but it can significantly reduce them. As the OECD has noted:

> *In the absence of regulations, [lobbying] can also capture policy making. In fact, powerful interests can use their wealth, power or advantages to tip the scale in their favour at the expense of the public interest.*[144]

Lobbying activities – that is, contact designed to influence government decision-making – are undertaken by a range of players (including registered lobbyists, government affairs directors, unregistered consultants and other interest groups) at state and local government level in relation to a range of matters that require government decisions. However, IBAC has observed that Victoria's current system of lobbying regulation, which defines 'lobbying activity' and 'lobbyist' very narrowly, is too limited in its scope. Unlike other states, there is no register of lobbyists' activities or any requirement to publish ministerial diaries at all. Additionally, the code of conduct for ministerial staff was only made public in July 2022, ahead of the Ombudsman and IBAC's joint report on Operation Watts.[145] The current controls on lobbying and enforcement mechanisms are weak, lacking legislative authority or meaningful penalties.

Stronger controls around lobbying are essential to promote public confidence in government policy and decision-making. To this end, legislation must be enacted to regulate lobbying in Victoria, and that legislation (and any supporting instruments) should:

- define 'lobbying activity' to ensure it captures any contact with government representatives that is calculated to influence government and parliamentary functions
- define 'lobbyist' to ensure a focus on the activity being undertaken, and that it not be confined to persons in the business of lobbying
- define 'government representative' to ensure it covers all public officers who may be subject to lobbying activity, including members of parliament (MPs)
- require MPs who initiate meetings with a minister or their adviser to disclose to the minister's office whether the MP has a private interest in relation to any individual or entity who has made representations to the MP (with 'private interest' to include donations or in-kind contributions)
- require lobbyists to document their contact with government representatives, and
- for that information to be published on an easily accessible and searchable register
- publish extracts or summaries of ministerial diaries monthly, capturing meetings and events (such as attendance at fundraisers), with published information to include the issues discussed at the meeting or event
- ensure records are maintained of formal meetings between ministers and lobbyists
- ensure records are maintained of dealings between ministerial staff and lobbyists, and electorate officers and lobbyists
- broaden the prohibition on success fees
- clarify the requirement for a separation between a lobbyist's political and lobbying activities.

143 NSW ICAC 2021, *Investigation into the regulation of lobbying, access and influence in NSW* (Operation Eclipse), recommended substantial reforms to lobbying regulation in NSW. Coaldrake P 2022, *Review of culture and accountability in the Queensland public sector, called for further reform to lobbying regulation in Queensland*.
144 OECD 2020, *Government at a glance: Latin America and the Caribbean 2020*, Chapter 9.2, Influence in decision-making through lobbying and political finance.
145 IBAC and Victorian Ombudsman 2022, *Operation Watts: Investigation into allegations of misuse of electorate office and ministerial office staff and resources for branch stacking and other party-related activities*, Recommendation 19(b).

IBAC is proposing substantial reforms to lobbying regulation, which will require careful consultation and consideration to ensure effective implementation. Many of the reforms are interdependent and the package of reforms must be considered in its entirety. It will be necessary for government to consider how these issues should be addressed in legislation. Critically, it will also be necessary to develop a model for a new lobbying regulator that has appropriate resources, functions and powers to effectively monitor and enforce lobbying activity.

4.1 Current lobbying regulation in Victoria

In Victoria, lobbying is subject to very limited administrative control. The Victorian Government Professional Lobbyist Code of Conduct (Lobbyist Code of Conduct), issued by the Premier, has been in place since November 2013. The purpose of the code is to ensure contact between lobbyists or government affairs directors and government representatives at the state government level (as defined below) occurs 'in accordance with public expectations of transparency, integrity and honesty'.[146]

Any lobbyist who wishes to lobby a government representative must be registered and agree to comply with the requirements of the Lobbyist Code of Conduct.

Key definitions in the Victorian Government Professional Lobbyist Code of Conduct

- *Lobbying activity*: any contact by a lobbyist with a government representative in an effort to influence government decision-making. This includes the making or amendment of legislation, the development or amendment of a government policy or program, the awarding of a government contract or grant, or the allocation of funding. It does not include statements in a public forum or communications with a minister in their capacity as an MP (that is, not about their responsibilities as minister).
- *Lobbyist*: a person, company or organisation conducting a lobbying activity on behalf of a third-party client. There are many exceptions to the definition, including not-for-profit associations or organisations.
- *Government affairs director*: a person employed by an organisation, business or professional or trade association to make representations to government (for example, advocate for changes to policy).
- *Government representative*: includes ministers, parliamentary secretaries, ministerial advisers (and others in ministerial offices) and Victorian Public Service employees and contractors. MPs are not included in this definition (unless they are also ministers).

146 *Victorian Government Professional Lobbyist Code of Conduct*, s. 1.4.

In broad terms, the Lobbyist Code of Conduct:

- mandates a register of lobbyists and stipulates details to be maintained on that register, including the lobbyist's business registration and ownership, names of employed lobbyists and clients
- obliges government representatives to ensure they are not party to lobbying by an unregistered lobbyist
- requires a registered lobbyist to submit an annual statutory declaration on certain integrity matters (for example, conviction or imprisonment)
- provides a 'cooling off' period that prohibits certain individuals (such as former ministers, ministerial advisers and public service executives) from engaging in lobbying activities relating to any matter they have officially dealt with during the last 12 months (18 months for former ministers).

The code also sets out principles that lobbyists must observe when engaging with government representatives, including:

- not engaging in conduct that is corrupt, dishonest, illegal or threatening
- satisfying themselves of the truth and accuracy of statements and information they provide
- not making misleading claims about the nature or extent of their access to government or political parties
- strictly separating their activity as lobbyists from any involvement on behalf of a political party.[147]

The code prohibits registered lobbyists from receiving success fees, defined as fees contingent on the tendering or awarding of a public project from the Victorian Government or public sector body on or after 1 January 2014.[148]

Policy responsibility for the code rests with the Department of Premier and Cabinet.

4.1.1 The role of the Victorian Public Sector Commission

Pursuant to the *Public Administration Act 2004* (Vic) (Public Administration Act), the Victorian Public Sector Commission (VPSC) must maintain an electronic and publicly available register in accordance with the Lobbyist Code of Conduct.[149] The register outlines the basic details that must be recorded about a lobbyist, including their clients.

The VPSC can only register an individual as a lobbyist if a statutory declaration has been submitted stating the applicant has:

- never been sentenced to 30 months imprisonment or more
- not been convicted, as an adult, in the last 10 years, of an offence, one element of which involves dishonesty, such as theft or fraud
- not received success fees (as discussed above).[150]

The VPSC conducts due diligence of applicants for registration based on open-source information, to confirm the details provided in the statutory declarations. More thorough probity checks or formal interviews with applicants are not conducted.

IBAC is not aware of any application for registration having been declined.

To retain their registration, lobbyists must submit an annual statutory declaration attesting that they continue to comply with the Lobbyist Code of Conduct, and confirming that their details, as recorded on the register, are correct. The VPSC manages this process.

The Victorian Public Sector Commissioner may remove a lobbyist from the register if they have contravened the code, their conduct is inconsistent with the 'general standards of ethical conduct' or the registration details are inaccurate.[151] No lobbyists have as yet been deregistered for contravening the code.

147 Ibid, s 8.
148 Ibid, s 3.6.
149 *Public Administration Act 2004* s 66.
150 *Victorian Government Professional Lobbyist Code of Conduct*, s 9.1.
151 Ibid, s 9.2.

The VPSC has no power, under the Lobbyist Code of Conduct or the Public Administration Act, to require information about lobbying activity undertaken or compliance with the code. The VPSC also has no statutory powers to independently investigate alleged breaches of the code. If the VPSC suspects a person or entity who is not registered is nevertheless engaging in lobbying activity, it can request information; however, there is no mechanism by which it can compel compliance or the provision of information, or otherwise provide a sanction other than potential refusal to accept future registration.

4.1.2 Codes of conduct for ministers, ministerial advisers and electorate officers

The Code of Conduct for Ministers and Parliamentary Secretaries (the Ministerial Code of Conduct) includes a section on dealings with lobbyists.[152] It reiterates the obligation on ministers and parliamentary secretaries to ensure any dealings with professional lobbyists are consistent with the Lobbyist Code of Conduct.

The Ministerial Code of Conduct states that when dealing with a lobbyist who is representing a third-party, it is important to establish whose interests the lobbyist is representing. It also states that ministers and parliamentary secretaries should ensure the lobbyists they are dealing with are registered and report any non-compliance with the Lobbyist Code of Conduct to the VPSC.

In July 2022, the Office of the Premier made the Ministerial Staff Code of Conduct publicly available. That code currently specifies that ministerial staff must comply with all codes of conduct, including the lobbyist code.[153] It also reiterates that ministerial staff cannot engage in lobbying activity on matters they have officially dealt with, for 12 months, with reference to the lobbyist code.[154] However as a policy issued by the Office of the Premier, there is no requirement that successive governments adopt a similar code or make it publicly available.

Ministerial advisers – particularly chiefs of staff – are at risk of being targeted by lobbyists, in an environment where ministerial advisers are subject to limited accountability at best. IBAC, therefore, recommends strengthening the accountability of ministerial advisers, by requiring the issuance of a Ministerial Staff Code of Conduct under legislation so that the same standards are applied to ministerial staff, no matter who is in government. Those requirements should also specify that the code must be made public and oblige ministerial staff to comply with any lobbying regulations.

The Code of Conduct for Parliamentary Electorate Officers is silent on lobbying activity.[155]

4.1.3 How should lobbying be regulated in Victoria?

The current lobbying regime in Victoria relies on a non-statutory code of conduct which has not been substantially updated since its introduction in 2013. The VPSC has been established with a legislative mandate to undertake regulation of lobbying activity with the model largely resembling a self-regulated attestation process.

Proposed reforms relating to the need for lobbying regulations to be codified – see recommendation 3(a) and 4(b)

As outlined in the following sections, substantial reforms are necessary to ensure lobbying in Victoria is not a vehicle for corrupt conduct and improper influence. It will not be sufficient to amend the Lobbyist Code of Conduct; rather, Victoria must be brought into line with other Australian states by codifying lobbying requirements and restrictions.[156] Although a step further, harmonisation of the legislation among the states is a desirable outcome given the nature and reach of lobbying activity.

IBAC is also aware that other jurisdictions complement their lobbying legislation with a code of conduct for lobbyists (for instance in NSW, that code of conduct sits in regulations[157]) and notes that it would also be appropriate to consider whether the code of conduct should be expanded to apply to government representatives who are subject to lobbying activity, as recommended by the NSW ICAC in 2021.[158]

152 Victorian Government (undated), *Code of Conduct for Ministers and Parliamentary Secretaries*, vic.gov.au/code-conduct-ministers-and-parliamentary-secretaries
153 Victorian Government 2022, *Ministerial Staff Code of Conduct*, s 6.6.
154 Ibid, s 3.16.
155 Parliament of Victoria 2019, *Code of Conduct for Parliamentary Electorate Officers*.
156 See Qld: *Integrity Act 2009* (Qld); NSW: *Lobbying of Government Officials Act 2011* (NSW) and Lobbying of Government Officials (Lobbyist Code of Conduct) Regulation 2014 (NSW).
157 All lobbyists are required to comply with a code of conduct pursuant to the Lobbying of Government Officials (Lobbyist Code of Conduct) Regulation 2014 (NSW).
158 NSW ICAC 2021, *Investigation into the regulation of lobbying, access and influence in NSW* (Operation Eclipse), p 36.

4.2 Areas for reform

4.2.1 The scope of lobbying regulation is too narrow

4.2.1.1 Narrow definition of 'lobbying activity' and 'lobbyist'

Under the current regulations, lobbying activities can be undertaken to seek to influence government decision-making without falling within the regulatory scope of the Lobbyist Code of Conduct.

Specifically, the Lobbyist Code of Conduct excludes from its definition of 'lobbyist':

> *members of professions, such as doctors, lawyers or accountants, and other service providers, who make occasional representations to Government on behalf of others in a way that is incidental to the provision by them of their professional or other services. However, if a significant or regular part of the services offered by any person employed or engaged by a firm of lawyers, doctors or accountants or other service providers involves lobbying activities on behalf of clients of that firm, the firm offering those services must register and identify the clients for whom they carry out lobbying activities.*[159]

Currently, there is only an onus on the public officer who is meeting with the service provider to determine if the activity is 'lobbying' and if it constitutes a 'significant or regular part' of the provider's activities. A definition which leaves room for differing views about whether an activity is lobbying is unsatisfactory. Lobbying activity must be defined so as to clearly capture any lobbying activity, regardless of whether it is a regular part *or* incidental to the person's profession or business. An onus must be placed on the person engaged in the activity to record and make known to the person being lobbied whose interests they represent.

An assessment of whether individuals are seeking to influence decision-making, as defined in the Lobbyist Code of Conduct, is an allied issue arising from the definition of 'lobbying activity'.

The Lobbyist Code of Conduct defines 'lobbying' to mean communication to 'influence government decision-making', including the making or amendment of legislation, the development or amendment of a government policy or program, the awarding of a government contract or grant, or the allocation of funding. While an individual planning decision to be made under the *Planning and Environment Act 1987* (Vic) is not specifically excluded from the definition, it is not expressly included. The Lobbyist Code of Conduct also excludes certain activities from the definition of lobbying, including petitions or communications of a grassroots campaign nature that attempt to influence a government policy or decision.

Other jurisdictions apply broader definitions of lobbying activity. In Queensland, the *Integrity Act 2009* (Qld) (Integrity Act) defines lobbying activity as contact with a government representative in an effort to influence state or local government decision-making, including:

- making or amendment of legislation
- development or amendment of a government policy or program
- awarding of a government contract or grant
- allocation of funding
- making of a decision about planning or giving of a development approval under the *Planning Act 2016* (Qld).[160]

159 *Victorian Government Professional Lobbyist Code of Conduct*, s 3.4(f).
160 *Integrity Act 2009* (Qld) s 42(1).

In NSW, the *Lobbying of Government Officials Act 2011* (NSW) (LOGO Act) defines lobbying as communication with a public official 'for the purpose of representing the interest of others' about matters concerning legislation, a government decision or policy, a planning application, or the exercise of an official function.[161] The NSW definition relies on the fundamental purpose of lobbying and encompasses efforts to influence as well as to advocate or encourage.[162]

In Western Australia, the *Integrity (Lobbyists) Act 2016* (WA) defines lobbying as communicating with a government representative for the purpose of influencing, whether directly or indirectly, state government decision-making. The definition expressly states that activity does not need to involve payment or reward to be considered lobbying.[163]

A number of international jurisdictions have significantly stronger legislative controls around lobbying of public officers. Scotland, the Republic of Ireland and Canada are perhaps the most commonly cited examples of good practice, including in their approach to defining lobbying activity in a way that focuses on the activity rather than the lobbyist. This report does not detail the regulatory regime for each of these jurisdictions.[164] However, by way of example, regulated lobbying is defined in the *Lobbying (Scotland) Act 2016* as:

- a communication made orally to a member of the Scottish Parliament, a member of the Scottish Government, a junior Scottish minister, a special adviser or the permanent secretary
- communication made in person or, if not made in person, made using equipment which enables the parties to see and hear each other
- communication in relation to government or parliamentary functions.[165]

The *Lobbying (Scotland) Act 2016* does not define 'lobbyist'; rather, those conducting lobbying activity are described as 'registrants',[166] and are required to register for the purposes of regulation. However, there are exemptions. For example, individuals communicating on their own behalf and MPs communicating on a constituent issue are not considered to be engaging in lobbying.

Proposed reforms relating to the scope of lobbying regulation – see recommendation 3(b)

The definition of lobbying *activity* is critical as it triggers the regulatory regime. The definition of lobbying as it currently stands is wholly inadequate as it fails to capture activity clearly calculated to influence government decision-making. The definition must reflect the full gamut of lobbying activity to act as a trigger for regulatory controls. In doing so, it is important to capture all relevant activity, and emphasise the importance of not relying on titles used or the extent to which lobbying activity is regularly part of an individual's work or job description, so that lobbying activities undertaken by government affairs directors, consultants and the like, or occasional lobbying by a consultant are all regulated in a consistent manner.

However, further work is required to determine the breadth of the definition of lobbying in conjunction with a complementary definition of a person or entity who engages in lobbying activity. In drafting definitions of 'lobbying activity' and 'lobbyist', consideration must be given to:

- addressing the current exclusion of certain professions, such as doctors, lawyers or accountants, and other service providers who make occasional representations to government
- including representations made in relation to identified high-risk areas, such as planning, in the definition of lobbying activity
- ensuring payment or reward is not essential for activity to be considered lobbying
- defining lobbying activity as communications with government representatives 'in respect of' decisions in which the person or entity undertaking the lobbying or the person on whose behalf they are lobbying has an interest (rather than seeking to influence).

161 *Lobbying of Government Officials Act 2011* (NSW) s 4(1).
162 In NSW, the current regulation is limited to third-party lobbyists, although the NSW ICAC has proposed extending the definition to in-house lobbyists (that is, a lobbyist who is an employee or permanent staff member of the organisation for which they carry out lobbying activities). NSW ICAC 2021, I*nvestigation into the regulation of lobbying, access and influence in NSW* (Operation Eclipse), Recommendation 7, p 61.
163 *The Integrity (Lobbyists) Act 2016* (WA) s 4(2) states that for an activity to be a lobbying activity (and therefore regulated), it does not need to involve 'any commission, payment or other reward (whether pecuniary or otherwise)'.
164 NSW ICAC 2021, *Investigation into the regulation of lobbying, access and influence in NSW* (Operation Eclipse), details key elements of lobbying regulation in the Republic of Ireland, Scotland and Canada, see p 56 onwards.
165 *Lobbying (Scotland) Act 2016* s 1(1).
166 Ibid, s 6(1).

4.2.1.2 Unregulated lobbying undertaken by MPs

Because MPs' public responsibilities involve advocating on behalf of their constituents to advance their interests, the extent to which communications *between* government representatives (that is, between an MP and a minister) should be subject to lobbying regulation is not without its challenges. As the NSW ICAC heard from the then Director of Strategy in Premier Baird's office, in evidence for Operation Keppel:

> *MPs are elected to advocate for their electorates and the constituents that vote them in … It was the role of people like myself in the Premier's Office or other advisers in other offices to ensure that the appropriate scrutiny was placed on … the projects [in question].*[167]

However, it is clear that MPs are targeted by lobbyists and other interested parties to promote particular decisions. This suggests that regulation is required to ensure an MP's role as elected advocate is not misused by people with money and/or power to indirectly influence a minister, particularly in circumstances where an MP has received a benefit (such as a donation) from the individual.

The current constraints on an MP are those stipulated in the *Members of Parliament (Standards) Act 1978* (Vic) (Members of Parliament (Standards) Act) and include obligations to:

- avoid any actual or perceived conflict of interests with their private interests[168]
- exercise their influence responsibly and not use their influence to improperly further their private interests or the private interests of a specified person.[169]

These provisions took effect in March 2019. Prior to that date, MPs had an obligation to ensure that no conflict existed, or appeared to exist, between their public and private interests.[170] However, there was no explicit requirement not to use their influence improperly to further their own private interests or the interests of another, even though they would be conflicted if they were the decision-maker.

Under the Members of Parliament (Standards) Act, MPs are required to submit a declaration of interests to the Clerk of the Parliaments. These returns must be submitted when members are first elected (primary return) and twice a year after that (ordinary return). Information to be included in the ordinary return includes a 'gift'[171] – but the Act expressly excludes political donation from the definition of a gift.[172] The returns are published in the register, which provides some level of accountability.[173] Prior to March 2019, there was a requirement to lodge returns, but the definition of gift was silent in relation to donations – a gift was broadly defined as any gift of or above the value of $500 received by the MP, from a person who is not related to the MP by blood or marriage.[174]

In Canada, the federal *Lobbying Act 2008* (Lobbying Act) defines designated public office holders (DPOHs) as including members of parliament, as well as ministers and their staff.[175] DPOHs may be asked by the Commissioner of Lobbying to confirm the details filed by lobbyists in a monthly report. DPOHs are encouraged, as good practice, to keep records of meetings with lobbyists, in case the Office of the Commissioner of Lobbying requests confirmation of these communications.[176] However, communications from DPOHs when acting in their official capacity are exempt from the Lobbying Act.

In the United Kingdom, the Code of Conduct for Members of the House of Commons includes provisions regarding lobbying.[177] Specifically, the code prohibits members from receiving payments to advocate for issues in the House, to vote or initiate parliamentary proceedings, or to approach ministers, other members or public officials in return for such payment.[178] The code explicitly prohibits members from initiating proceedings or approaching ministers about matters which could confer any financial benefit on them or their family.

167 NSW ICAC, Operation Keppel public examination transcript, 20 October 2021, p 2024.
168 *Members of Parliament (Standards) Act 1978* s 7(1).
169 Ibid, s 11.
170 Ibid, s 3(1)(e).
171 Ibid, s 20.
172 Ibid, s 2.
173 See, for example, the register of ordinary returns submitted by Members of the Legislative Assembly, as at 28 February 2021, parliament.vic.gov.au/file_uploads/LA_Register_of_Interests_Ordinary_Returns_Feb_2021_VOL_2_czkrKBGR.pdf
174 *Members of Parliament (Register of Interests) Act 1978* s 6(2)(h). A gift is defined in relation to primary returns.
175 Office of the Commissioner of Lobbying of Canada, lobbycanada.gc.ca/en/ten-things-you-should-know-about-lobbying-a-guide-for-federal-public-office-holders/
176 Ibid.
177 UK Parliament, *The Code of Conduct together with the Guide to the Rules relating to the Conduct of Members*, Chapter 3, 'Lobbying for reward or consideration', publications.parliament.uk/pa/cm201719/cmcode/1882/188206.htm
178 Ibid.

Proposed reforms relating to lobbying by MPs – see recommendation 3(b) and (c)

MPs are targeted by lobbyists to champion their causes with ministers in circumstances where MPs may have a sense of obligation as a result of receiving donations. To ensure that lobbying regulations apply to all key lobbying targets, consideration should be given to ensuring that the term 'government representative' includes MPs, either of the governing party or more broadly.

IBAC is conscious of the difficulty in regulating interactions between MPs and their colleagues, including ministers, where an MP is not acting as a paid lobbyist but may be representing the interests of certain individuals or groups to whom they may have an actual or perceived obligation. However, where an MP lobbies on behalf of an individual or entity who has made specific representations to them to lobby, an MP should disclose details of:

- the individual or entity on whose behalf they are lobbying to the minister or their adviser, and disclose
- if they have a private interest in relation to the individual or entity who has made representations to the MP (including donations or in-kind contributions).

This will better inform the minister (and their offices) of different interests at play. It will also assist ministers to identify individuals and groups who may be attempting to lobby through different channels.

This proposal strengthens accountability and will assist MPs to demonstrate they are meeting their obligations under section 11 of the Members of Parliament (Standards) Act, by exercising their influence as an MP responsibly, and not using their influence to improperly further their private interests or those of others.

4.2.1.3 Lobbying undertaken at the local government level

Of course, lobbying activity also occurs at the local government level. However, there is no formal regulation of lobbying at the local government level; the Lobbyist Code of Conduct expressly applies to the state government only, and there are no lobbying controls in the LGA 2020.

In Queensland, the Integrity Act defines lobbying as contact with a government representative, including a councillor,[179] in an effort to influence state or local government decision-making.[180] There are exemptions, including contact with a councillor in their capacity as a local representative on a constituency matter.[181]

In NSW, the LOGO Act does not currently apply to local government, with two exceptions:

- registered lobbyists must not be offered or accept success fees for lobbying government officials, including local government officials
- former ministers and parliamentary secretaries must not lobby government officials, including local government officials, during their cooling-off period.[182]

In 2021, following an investigation into the conduct of councillors and a council planning director, the NSW ICAC recommended the LOGO Act be extended to local government.[183] ICAC's investigation had revealed that more lobbying activity was occurring at the local government level than in previous years, with one individual (who did consulting work for a property developer) effectively engaged in lobbying on behalf of third parties.[184]

Proposed reforms relating to lobbying at the local government level – see recommendation 3(b)

Lobbying occurs at the local government level, which is not subject to regulation beyond council-specific policies that may or may not be enforced. The exclusion of local government from the current lobbying regulation regime is a significant gap.

It is appropriate that a new, more robust regime applies equally to state *and* local government. However, it is acknowledged that the regulation of lobbying at the council level, in particular, would need to be underpinned by support and guidance to councillors and council officers, along similar lines to the regime currently used in Queensland.[185]

179 *Integrity Act 2009* (Qld) s 44.
180 Ibid, s 42(1).
181 Ibid, s 44(2)(b).
182 *Lobbying of Government Officials Act 2011* (NSW) pts 5 and 6.
183 NSW ICAC 2021, *Investigation into the conduct of councillors of the former Canterbury City Council and others* (Operation Dasha), p 185.
184 Ibid, p 184.
185 The Queensland Integrity Commissioner has jurisdiction over lobbying activity at the local government level. Pursuant to its advisory functions, the Commissioner provides advice to councillors regarding their obligations when dealing with lobbyists.

4.2.2 Lobbying enables privileged access to decision-makers

Privileged access to elected officials undermines the principles of democratic decision-making; different views and needs are not necessarily assessed on merit or given equal weight when determinations are made. While lobbying is a legitimate way of ensuring some voices are heard, the absence of measures to limit and manage its role in decision-making can result in a distorted and unfair process.

4.2.2.1 Access to senior members of the government via networking forums and other fundraising events

Registered lobbyists often make contact with elected officials at events organised by forums established to facilitate interactions between business representatives and senior representatives of the respective major parties. These forums raise funds through memberships and pay-to-attend events. At these events, participants have the opportunity to speak with ministers and MPs.

The risks associated with privileged access via fundraising events were recognised in Victoria in October 2011, when the then Liberal Government introduced the Fundraising Code of Conduct.[186] This code, which applied to ministers, parliamentary secretaries and Coalition Government MPs, stated that materials inviting attendance at fundraising events must not 'represent the function or event in a way which claims privileged access to decision-makers or ministers'.[187]

The code stated that when ministers, parliamentary secretaries or government MPs receive:

> *any request to consider issues at fundraising events, functions or activities, they must be conscious of possible conflicts of interest and ensure that their participation in any fundraising event or activity is conducted in a manner consistent with their overall obligations to the people of Victoria for honest, efficient and effective government.*[188]

The Ministerial Code of Conduct includes a provision stating that ministers and parliamentary secretaries should be familiar with the requirements of the Fundraising Code of Conduct, and comply with it.[189] However, the Department of Premier and Cabinet advises that the Fundraising Code of Conduct has not been in force since 2014.

Other jurisdictions have recognised the risk associated with privileged access to senior government representatives, notably ministers.

In its 2021 report on Operation Eclipse, ICAC highlighted that fundraisers have certain characteristics that give rise to at least the perception of privileged access, particularly where attendance is limited to a select group, and the event provides some degree of private access to an elected decision-maker:

> *Events with these characteristics provide attendees with opportunities to lobby politicians, exclude those without the funds to purchase tickets, and invite criticisms of unequal access. In addition, discussion between a lobbyist and a politician at an exclusive fundraising event might not be properly recorded or disclosed in any required diary disclosure.*[190]

Therefore, ICAC recommended that the attendance by ministers at any fundraising event, where an attendee pays for any form of exclusive or private access to a minister, should be disclosed in published summaries of ministerial diaries, regardless of whether any lobbying took place.[191]

In Canada, the *Canada Elections Act* states that any fundraising activity which costs more than CA$200 to attend and is attended by a minister, party leader or leadership contestant must be reported by registered political parties, five days in advance of the activity, on the party's website.[192] These activities are also published by the Chief Electoral Officer.[193]

186 Victorian Government (undated), *Fundraising Code of Conduct for Ministers, Parliamentary Secretaries and Coalition Government Members of Parliament.*
187 Ibid, para 4.9.
188 Ibid, para 2.4 and 4.7.
189 Victorian Government (undated), *Code of Conduct for Ministers and Parliamentary Secretaries*, vic.gov.au/code-conduct-ministers-and-parliamentary-secretaries
190 NSW ICAC 2021, *Investigation into the regulation of lobbying, access and influence in NSW* (Operation Eclipse), p 85.
191 Ibid, Recommendation 25, p 86.
192 *Canada Elections Act*, SC 2000, cl 9, s 384.2(1).
193 Elections Canada, *Regulated fundraising events registry*, elections.ca/content.aspx?section=fin&dir=reg&document=index&lang=e

Ministers and parliamentary secretaries in Canada are also expected to follow guidelines outlined in *Open and Accountable Government 2015* when dealing with lobbyists, to maintain an appropriate distance between political activities and fundraising. The general principles behind these guidelines are:

- ministers and parliamentary secretaries must ensure political fundraising does not affect or appear to affect the exercise of their official duties or the access of individuals or organisations to government
- there should be no preferential access or appearance of preferential access to government accorded to individuals or organisations because they have made financial contributions to politicians and political parties
- there should be no singling out or appearance of singling out of individuals or organisations as targets of political fundraising because they have official dealings with ministers and parliamentary secretaries, or their staff or departments.[194]

Proposed reforms relating to access to decision-makers – see recommendation 1(g) and 3(e)

The work of lobbyists, consultants and their clients in making donations and providing other types of support while seeking privileged access to decision-makers reflects an assumption that financial support and privileged access increase the likelihood of obtaining a favourable decision.

It is appropriate that controls be put in place to strengthen transparency around privileged access to elected officials, including pay-for-access events. Attendance at fundraisers should be subject to disclosure obligations, requiring registered political parties to publish information on fundraising activity, including who has attended fundraising events and amounts paid. In addition to further regulation of fundraising activities. Ministers should also be required to record attendance at events which involve pay for access, via their diaries, and extracts or summaries of ministerial diaries should be published, in the interests of greater transparency.

4.2.3 Lobbying provides access to decision-makers and others that is not transparent

4.2.3.1 Lack of transparency around access to elected officials

Under the current Victorian lobbying regulatory regime, a lobbyist has no obligation to report any of their lobbying activities. Nor does a subject of those lobbying activities have any obligation to disclose details of meetings they have had with lobbyists. By registering as a lobbyist, a lobbyist satisfies their key obligation under the Lobbyist Code of Conduct.

Reforms in this area must be targeted at improving the transparency of lobbying activity. They can draw on the systems and controls in other jurisdictions that require the disclosure of meetings between government representatives and lobbyists. These systems and controls provide a greater degree of accountability and transparency around the access certain individuals and entities have to decision-makers.

In Queensland, the Integrity Commissioner maintains a register of lobbyists which is available to the public.[195] Lobbyists are required to report each month:

- the name of the registered lobbyist
- whether, in arranging the contact, the lobbyist advised the government representative or opposition representative that they are a registered lobbyist (and other information required by the code)
- the date of the contact
- the lobbyist's client
- the title or name of the person lobbied
- the purpose of the contact (selected from a drop-down menu).[196]

194 Canadian Government 2015, *Open and Accountable Government*, p 23.
195 *Integrity Act 2009* (Qld) ss 49(1) and (2).
196 Lobbyist Code of Conduct (Qld), September 2013, cl 4.

A 2021 review of the Integrity Commissioner's functions noted that in the six months from January to June 2021, 19 per cent of lobbyist contacts were recorded as 'other', while a further 39 per cent were recorded as 'commercial-in-confidence'. The review noted that this characterisation points to an increasing trend to obscure the purpose of those meetings. The review recommended that lobbyists be required to provide a short explanation of the subject matter when selecting the 'other' category.[197] In response to that review the CCC also recommended that a similar explanation be provided in relation to the 'commercial-in-confidence' category.[198] In June 2022, the Coaldrake review reiterated the need for the lobbying contact log to record better explanations for a range of 'similarly opaque' meeting categories. As a result, that review recommended that lobbyists be required to record 'a short description of the purpose and intended outcome of contact with government'.[199]

In Queensland, summaries of ministerial diaries are also published online. Each month, information is published on the date of meetings and events, the organisation or person the minister has met with and the purpose of the meeting.[200] Although the information published is limited,[201] public access to this information (and potentially other publicly available information such as information on government contracts over a certain value) enables data analysis to be conducted to identify trends in lobbying activity, including key targets for lobbyists. Since 2019, the Queensland Integrity Commissioner (QIC) has undertaken an annual audit to identify discrepancies between locally held records and the lobbyists register for the 12 months prior[202]. For the period to 30 November 2020, 103 discrepancies were reported, including 46 reported by departmental chief executives and 57 reported by local government CEOs.[203]

There is no current statutory obligation in NSW for registered lobbyists to publicly report on their lobbying activities. However, at least two NSW agencies – the Department of Planning, Industry and Environment and the Greater Sydney Commission[204] – require details of contacts between lobbyists and officers of those agencies to be publicly reported. This recognises the heightened risk associated with lobbying on planning matters.

In Operation Eclipse, ICAC recommended establishing a revised online register to make information publicly available about who is being lobbied and about what, including the name and role of the government official being lobbied, and the description, purpose and intended outcome of the lobbying communications.[205] The responsibility for filing this information (electronically) would rest with the registered lobbyist.

Since 2014, NSW has required the quarterly publication of ministerial diary extracts. Ministers are obliged to publish information detailing scheduled meetings including with stakeholders, external organisations, third-party lobbyists and individuals.[206] ICAC has recommended that information from ministerial diaries be published monthly and that they should be overseen by the regulator of the LOGO Act to strengthen the content, format and timeliness of disclosures.[207]

NSW law[208] also requires a 'lobbied' public official to maintain records of significant interactions with lobbyists and others making representations to government.[209]

197 Yearbury K 2021, *Strategic review of the Integrity Commissioner's functions*, p 54.
198 Coaldrake P 2022, *Review of culture and accountability in the Queensland public sector*, Final Report, p 52, with reference to Qld CCC 2022, Submission No 6 to Economic and Governance Committee, Parliament of Queensland, Inquiry into the Report on the Strategic Review of the Functions of the Integrity Commissioner, p 4.
199 Coaldrake P 2022, *Review of culture and accountability in the Queensland public sector*, Final Report, p 58.
200 See, for example, the diary entries published for the Queensland Premier, cabinet.qld.gov.au/ministers-portfolios/annastacia-palaszczuk.aspx
201 The 2021 Strategic Review of the QIC recommended that action be taken to specify criteria regarding the purpose of the meeting recorded in published diary extracts. Yearbury K 2021, *Strategic review of the Integrity Commissioner's functions*, pp 47–48.
202 The audit involves writing to the heads of all departments of government and local councils requesting that a review be undertaken of locally held records of contact with lobbyists, which is then compared to the data entered in the lobbyists' register for the 12 months prior. In the event of a discrepancy between the locally held record and the lobbyists' register, the discrepancy is reported to the QIC for assessment and consideration of action. Although the Act does not permit the QIC to compel public officers to assist the audit, the QIC notes responses were overwhelmingly positive, with all local government CEOs and 20 of 21 departmental chief executives participating as requested. QIC 2021, *QIC Annual Report 2020–21*, pp 18–19.
203 QIC 2021, *QIC Annual Report 2020–21*, pp 18–19.
204 The Greater Sydney Commission has roles and responsibilities in relation to planning for Greater Sydney.
205 NSW ICAC 2021, *Investigation into the regulation of lobbying, access and influence in NSW* (Operation Eclipse), Key Finding 4, p 9; Recommendations 7 and 8, p 12.
206 Premier's Memorandum M2015-05, 'Publication of Ministerial Diaries and Release of Overseas Travel Information', as discussed in NSW ICAC 2021, *Investigation into the regulation of lobbying, access and influence in NSW* (Operation Eclipse), pp 24–25.
207 NSW ICAC 2021, *Investigation into the regulation of lobbying, access and influence in NSW* (Operation Eclipse), p 10.
208 *State Records Act 1998* (NSW) s 12(1) (Records management obligations), which specifies that 'Each public office must make and keep full and accurate records of the activities of the office'.
209 NSW ICAC 2021, *Investigation into the regulation of lobbying, access and influence in NSW* (Operation Eclipse), p 74.

Internationally, Scotland, Ireland and Canada provide examples of strong disclosure regimes that promote transparency around interactions between lobbyists and government representatives. People or entities that engage in regulated lobbying activity are required to publicly report on their efforts. There are also obligations on the officer who is lobbied.

For example, the *Lobbying (Scotland) Act 2016* requires all instances of 'regulated lobbying' to be recorded on a publicly available register.[210] Regulated lobbying is defined as communication made in person with designated public officials.[211] The onus is on organisations and individuals that engage in regulated lobbying to submit details of their activities to the register via six-monthly returns.[212] When information is provided, a link is sent to the relevant public official who has been lobbied, to crosscheck.[213]

The lobbying register is a searchable database that includes details of each lobbying contact, including the date of the contact the officer lobbied, where the lobbying took place, the subject of the meeting and what the contact was aiming to achieve.[214]

The Scottish Ministerial Code also requires basic facts of formal meetings between ministers and outside interest groups to be recorded, setting out the reasons for the meeting, the names of those attending and the interests represented. A monthly list of engagements carried out by ministers is published.[215] The code also states that if ministers do discuss official business with an external organisation or individual without an official present, any significant content (for example, substantive issues relating to government decisions) should be passed back to their private offices as soon as possible after the event, who should arrange for the basic facts of such meetings to be recorded.[216]

Proposed reforms relating to the transparency of access to elected officials – see recommendation 3(d), (e) and (f)

Currently, there is no publicly available information about interactions between lobbyists and elected officials in Victoria. This is a significant deficiency that obscures how private interests can influence government policy and decision-making, and risks undermining community confidence.

It is proposed to significantly strengthen the transparency around lobbying activity by a range of reforms, namely by requiring the lobbying activity to be recorded in a publicly accessible register and publishing information from ministerial diaries.

There is considerable value in ensuring consistency, as much as possible, between key Australian jurisdictions to minimise undue administrative burden associated with additional regulation. For this reason, the reforms proposed by the NSW ICAC in Operation Eclipse regarding the establishment of a register documenting contacts of lobbyists, are supported. However, as noted earlier, the regimes in NSW and Queensland do not go far enough in significant respects.

To further strengthen the transparency of interactions between ministers and lobbyists, Scotland and Ireland require that a public officer be present at meetings between ministers, their advisers and lobbyists or record decisions reached at the end of a meeting. Such provisions would require a shift in thinking around discussions between ministers and lobbyists, and a recognition that it is appropriate for such discussions to occur in a more open and transparent way than is currently the case.

In Queensland, the need for greater transparency was recently acknowledged in an August 2022 update to the *Ministerial Handbook* which now provides that:

- All requests by a registered lobbyist to meet with a Minister, Assistant Minister, or ministerial staff must be made in writing to the relevant Chief of Staff. This includes requests by any person working for the lobbyist in any capacity other than administrative staff.
- A ministerial staff member (senior advisor and above) may only meet with a registered lobbyist or any person working for the lobbyists with approval of their Chief of Staff.
- Lobbying activity, as defined under the *Integrity Act 2009*, is to be recorded on a register of lobbyist contact maintained by each Ministerial Office. [217]

210 Scottish Parliament, Lobbying Register, lobbying.scot/
211 *Lobbying (Scotland) Act 2016* s 1. The officials identified in the Act include Members of the Scottish Parliament or Government, junior Scottish ministers, the Permanent Secretary of the Scottish Government, or Scottish Government special advisers in relation to government or parliamentary functions.
212 Failure to register or failure to provide accurate information will incur a fine.
213 NSW ICAC 2021, *Investigation into the regulation of lobbying, access and influence in NSW* (Operation Eclipse), p 60.
214 Ng Y-F 2020, 'Regulating the influencers: The evolution of lobbying regulation in Australia', *Adelaide Law Review*, vol. 41(2), pp 507–543, 518. Also see lobbying.scot/
215 Scottish Government, *Ministerial engagements, travel and gifts*, gov.scot/collections/ministerial-engagements-travel-and-gifts/
216 Scottish Government, *Scottish Ministerial Code*, 2018 edition, 4.22 and 4.23.
217 Qld Government, *Ministerial Handbook*, 3.6, Lobbying Contact added 5 August 2022, premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/ministerial-handbook/ethics/lobbyist.aspx

It is essential to consider how best to ensure that records of meetings are properly maintained with reference to the approaches taken in Queensland, Scotland and Ireland. The success of these reforms depends on adequate resourcing and oversight, which would be supported by significantly strengthening the monitoring and enforcement of lobbying regulation.

4.2.3.2 Lack of transparency around access to ministerial advisers

Ministerial advisers are perceived as holding positions of influence or authority and, therefore, can be targeted by lobbyists.

In Operation Eclipse, ICAC noted:

> *Research suggests that ministerial advisers play an important role in government decision-making and policy-making. These roles offer similar access to personal networks, government strategy and confidential information (including commercial knowledge) to that which is available to ministers and parliamentary secretaries.*[218]

Under the Victorian Lobbyist Code of Conduct, ministerial advisers are included in the definition of 'government representative' and are, therefore, covered by the code.[219] The Ministerial Staff Code of Conduct also states that ministerial staff must comply with the Lobbyist Code of Conduct.[220] However, there is no obligation for those lobbying contacts to be recorded, declared or publicly reported. In Queensland, the Coaldrake review recently called for the publication of ministerial diaries to be extended to ministerial staff diaries, noting that 'significant lobbying activity, broadly defined, occurs with Chiefs of Staff and other ministerial staffers'.[221]

Currently, documents made or received by a minister's office (including the records of ministerial advisers) are not defined as public records in Victoria under the *Public Records Act 1973* (Vic) (Public Records Act).[222] Based on a number of different investigations, IBAC has observed that no records are permanently retained by ministerial advisers.

In Queensland, registered lobbyists are required to enter details of their lobbying contact with government representatives, including ministerial staff, on a contact log which is published.[223] The mandated details include the title(s) or names(s) of government or opposition representative(s), including ministerial staff.[224]

In NSW, lobbying regulation covers ministerial staff,[225] but lobbyists are not currently required to publicly report on their lobbying activities. However, pursuant to Operation Eclipse, ICAC has recommended that registered lobbyists be required to publish details of their lobbying.[226]

Proposed reforms relating to transparency of access to ministerial advisers – see recommendation 3(f)

The current Lobbyist Code of Conduct covers ministerial staff, which recognises they are a likely target of lobbying activity. However, further reform is required to improve the transparency of lobbying contacts, including through the publication of lobbyists' contacts with government representatives, including ministerial advisers.

As an added control, advisers should be required to obtain the approval of their chief of staff before meeting with a lobbyist, then record and publish specified details of their interaction with a lobbyist.[227] This would help the lobbying regulator to confirm details submitted by lobbyists. At present, documents made or received by a minister's office (including the records of ministerial advisers) are not defined as public records under the Public Records Act.[228] Therefore, it is recommended that ministerial staff be required to obtain approval to meet and maintain records of their dealings with lobbyists.

Ministerial advisers should also be reminded of their obligation to comply with the current Lobbyist Code of Conduct if approached by a lobbyist or a person who seeks to engage in lobbying activity. Ministerial advisers must also be required to comply with any future lobbying laws.

218 NSW ICAC 2021, *Investigation into the regulation of lobbying, access and influence in NSW* (Operation Eclipse), p 78.
219 In the *Victorian Government Professional Lobbyist Code of Conduct*, ss 2.1 and 3, 'Ministerial staff member' is defined as a person employed under s 98 of the *Public Administration Act 2004*;
a person seconded to a ministerial office; or a person otherwise placed, contracted or engaged in a ministerial office.
220 Victorian Government 2022, *Ministerial Staff Code of Conduct*, s 6.6.
221 Coaldrake P 2022, *Review of culture and accountability in the Queensland public sector*, Final Report, pp 52 and 58.
222 *Public Records Act 1973* s 2.
223 *Integrity Act 2009* (Qld) s 68 and Queensland Lobbyist Code of Conduct, September 2013. Also see QIC, Contact log. See lobbyists.integrity.qld.gov.au/who-is-on-the-register.aspx
224 QIC, *Lobbyist Obligations and Code of Conduct*, integrity.qld.gov.au/lobbyists/obligations-code-of-conduct.aspx
225 *Lobbying of Government Officials Act 2011* (NSW) s 3.
226 NSW ICAC 2021, *Investigation into the regulation of lobbying, access and influence in NSW* (Operation Eclipse), Recommendations 8 and 9.
227 Coaldrake P 2022, *Review of culture and accountability in the Queensland public sector*, Final Report, p 47.
228 *Public Records Act 1973* s 2.

4.2.3.3 Lack of transparency around access to electorate officers

Electorate officers are not defined as 'government representatives' under the Lobbyist Code of Conduct, so are not covered by the code. The Code of Conduct for Parliamentary Electorate Officers is silent on any obligations electorate officers might have in their dealings with lobbyists.

IBAC is not aware of any other Australian jurisdiction that extends lobbying regulation to electorate officers. It is possible that electorate officers have not been considered as a high risk of being targeted by lobbyists; it may also be considered problematic to extend regulation to electorate officers given their frequent interactions with constituents, many of whom may engage in activity that could be construed as lobbying.

Proposed reforms relating to transparency of access to electoral officers – see recommendation 3(b) and (g)

Consideration should be given to extend lobbying regulation, in total or in part, to electorate officers by defining them as 'government representatives' (or other terms as appropriate to signify the person subject to the lobbying activity).

At a minimum, electorate officers should be required to record details of their contact with those undertaking lobbying activity in a way that is practicable, noting the frequency with which electorate officers deal with constituents. These records would be available to the lobbying regulator and agencies undertaking investigations, such as IBAC.

Such an obligation would also be consistent with the value of accountability, enshrined in the *Parliamentary Administration Act 2005* (Vic) and in the Code of Conduct for Parliamentary Electorate Officers, which states:

> *Parliamentary electorate officers maintain accurate and reliable records as required by relevant legislation, policies and procedures and instructions as determined by the Presiding Officers. Records are kept in such a way as to ensure their security and reliability and are made available to appropriate scrutiny when required, including inspections by the Auditor-General.*[229]

Training should also be provided to ensure electorate officers are made aware of the risks associated with dealings with lobbyists and the importance of maintaining accurate and detailed records of any such dealings. Finally, electorate officers must also be required to comply with any future lobbying laws. This would help to protect the integrity of their MP's office and ensure that they do not inadvertently facilitate improper influence in government decision-making.

4.2.4 The current controls on lobbying are ineffective

4.2.4.1 Success fees

In Victoria, the Lobbyist Code of Conduct prohibits registered lobbyists from receiving success fees, defined as fees 'contingent on the tendering or awarding of a public project from the Victorian Government or public sector body'.[230] This prohibition has been in place since 2014.

Success fees give lobbyists an incentive to engage in potentially unethical or corrupt behaviour to secure that fee. In 2009, when Queensland was considering a prohibition on success fees, a report was prepared for the Department of Premier and Cabinet. The report stated that the advantages of a ban on success fees – including reduced incentives for inappropriate lobbying, increased confidence in government contracting, and a more ethical lobbying industry – outweighed the costs.[231]

Other jurisdictions prohibit the payment of success fees to lobbyists, but define success fees more broadly than Victoria. For example, in Queensland, success fees – defined as an amount of money or other reward contingent on the outcome of the lobbying activity – are prohibited.[232] The definition is not limited to certain lobbying activity. Similarly, in NSW, success fees – broadly defined and not limited to specific lobbying activity – are prohibited.[233]

229 Parliament of Victoria 2019, *Code of Conduct for Parliamentary Electorate Officers*, cl 5.4.
230 *Victorian Government Professional Lobbyist Code of Conduct,* s 3.6.
231 Synergies 2009, *Public Benefit Test of Ban on Success Fees to Lobbyists*, Final Report to the Department of Premier and Cabinet (Qld), pp 3 and 4.
232 *Integrity Act 2009* (Qld) ss 69(1), (2) and (5).
233 *Lobbying of Government Officials Act 2011* (NSW) s 14.

Proposed reforms relating to success fees – see recommendation 3(h)

The current prohibition on lobbyists being offered or accepting success fees is inadequate. The definition of success fees should be broadened beyond procurement activities. The prohibitions in place in NSW and Queensland are sound models.

4.2.4.2 Lobbyists' involvement in political activities

The Lobbyist Code of Conduct requires lobbyists to 'strictly separate' their lobbying from their 'personal activity or involvement on behalf of a political party'.[234] However, lobbyist affiliations with political parties are not prohibited. Indeed, under the Lobbyist Code of Conduct, a lobbyist or government affairs director who wishes to engage in lobbying activity must provide their details, which are recorded on the register of lobbyists, including whether they have held the positions of national or state secretary, director or deputy or assistant secretary, or director of a registered political party.[235]

The intent of the requirement that lobbyists keep their lobbying activities separate from their political party involvements is not entirely clear. Involvement in a political party may give rise to potential conflicts of interest for the lobbyist and may provide additional opportunity for the lobbyist to exert influence if the decision-maker is from the same party. Registered lobbyists are frequently aligned with a particular political party and that alignment underpins their ability to obtain privileged access and seek to influence decision-makers.

The NSW and Queensland lobbying codes of conduct impose the same requirement on lobbyists to separate their lobbying from their political activities.[236]

In Queensland, the lobbyist code of conduct specifies that lobbyists are required to keep their lobbying activities separate from their personal activities on behalf of a political party. While this prohibits a lobbyist from making their political support for a government representative dependent on a lobbying outcome, it does not prevent a lobbyist from being involved with a political party.[237] In circumstances where lobbyists wear 'dual hats', acting for clients to influence government as well as helping with election campaigns for particular parties or candidates, the Coaldrake review noted '[m]ost people would be incredulous at the proposition that a lobbyist working with a political leader in one capacity can later exercise special influence'.[238] The review also recommended 'an explicit prohibition on the "dual hatting" of professional lobbyists during election campaigns [so that] they can either lobby or provide professional political advice but cannot do both'.[239]

In 2021, a review of the QIC and its lobbying functions noted that some lobbyists had 'internal processes' to manage conflicts of interest that could arise from their political activities. The review recommended the lobbyists code of conduct be amended to include specific provisions around conflicts of interest arising from political activities, in the interests of consistency and clarity.[240]

The Canadian Lobbyists' Code of Conduct states:

> *When a lobbyist undertakes political activities on behalf of a person which could reasonably be seen to create a sense of obligation, they may not lobby that person for a specified period if that person is or becomes a public office holder. If that person is an elected official, the lobbyist shall also not lobby staff in their office(s).*[241]

This provision would prevent a lobbyist who has donated to a candidate for office, or provided other support to their campaign, from then lobbying that official.

234 *Victorian Government Professional Lobbyist Code of Conduct*, s 8.1(d).
235 Ibid, ss 5.1(e) and 5.2.
236 NSW Lobbying of Government Officials (Lobbyist Code of Conduct) Regulation 2014 cl 13; Queensland Lobbyist Code of Conduct s 3.1(g).
237 QIC 2020, QIC *Annual Report 2019–20,* p 12.
238 Coaldrake P 2022, *Review of culture and accountability in the Queensland public sector*, Final Report, p 56.
239 Ibid, p 58.
240 Yearbury K 2021, *Strategic review of the Integrity Commissioner's functions*, pp 55–56.
241 Lobbyists' Code of Conduct (Canada), 2015, p 6.

Proposed reforms relating to involvement in political activities – see recommendation 3(i)

The current requirement on lobbyists to separate lobbying and political activities is unclear. If it is to be directed to the risk of a conflict of interest and the special advantage that flows from political involvement, the proposed reform, based on the Canadian Lobbyists' Code of Conduct, is intended to prevent lobbying when there is a heightened risk that an elected official would be obligated to a lobbyist. This issue requires further examination to determine workability and effectiveness. It may also be appropriate to consider this issue more broadly, to assess whether other conflicts arising from political connections require stronger controls.

4.2.4.3 Cooling-off periods

The practice of former government representatives moving into private sector lobbying roles in industries or areas for which they have previously had portfolio responsibility has been identified as a significant issue in discussions around lobbying. Without sufficient controls around 'cooling-off' periods, it can provide an unfair advantage to the parties involved.[242] It has also been argued the practice is associated with a lack of innovation in different policy areas.[243]

The Lobbyist Code of Conduct prescribes the following cooling-off periods:

- former ministers or cabinet secretaries shall not engage in lobbying for 18 months after they cease to hold these positions, in matters with which they had dealings in the last 18 months in office
- former parliamentary secretaries shall not engage in lobbying for 12 months after they cease to hold office, in matters with which they had dealings in their last 12 months in office
- former executives and ministerial officers shall not engage in lobbying for 12 months after they cease employment, in matters with which they had dealings in their last 12 months of employment.[244]

Cooling-off periods exist to mitigate corruption risks associated with government representatives having access to and being able to use inside information and contacts. This risk is heightened for senior government representatives – such as ministers, their advisers and senior executives – but also applies to MPs, who are likely to have relationships, knowledge and understanding of government processes that can benefit private interests.

An enforced cooling-off period is a common mechanism to mitigate this risk. The intention behind a 'minimum time interval [to restrict] former public officials from accepting employment in the private sector'[245] is to reduce the risk of conflicts of interest occurring. The risk is considered to decline over time, so imposing a ban on immediate appointments is intended to diminish the advantages former elected officials could have in the private sector.

In Queensland, 'former senior government representatives' are prohibited from working as lobbyists for two years from the time they leave office. However, MPs are not included in the definition of senior government representatives.[246] Enforcement provisions for the cooling-off period involve deregistration and fines.

Similarly, in NSW MPs are not covered by the 18-month cooling-off period. In Operation Eclipse, ICAC recommended strengthening the cooling-off provisions by extending them to former ministerial advisers (12 months) and former public officers who have held designated high-risk positions (six months).[247] ICAC also recommended that the lobbying regulator be empowered to request that former 'public officials' who have a role in an organisation that employs lobbyists provide information to verify whether they are engaged in lobbying activities during the cooling-off period, or are complying with relevant codes.[248]

242 Evans M, Stoker G, Halupka M 2018, 'Australians' trust in politicians and democracy hits an all-time low: new research', *The Conversation*, 5 December 2018.
243 Rennie G 2016, 'The revolving door: why politicians become lobbyists, and lobbyists become politicians', *The Conversation*, 22 September 2016.
244 *Victorian Government Professional Lobbyist Code of Conduct*, s 6.
245 Martini M 2015, 'Cooling-off periods: Regulating the revolving door', *Transparency International*, p 1.
246 *Integrity Act 2009* (Qld) s 45(1)(a).
247 NSW ICAC 2021, *Investigation into the regulation of lobbying, access and influence in NSW* (Operation Eclipse), pp 71–72.
248 Ibid, p 117.

Proposed reforms relating to cooling-off periods – see recommendation 4(c)

The movement of senior public officers to lobbying positions, using their knowledge-base, relationships and networks, is a well-recognised integrity risk. Adequate cooling-off periods for elected officials are critical to managing the corruption risks associated with lobbying activities.

It would be beneficial to broadly review the effectiveness of Victorian provisions around cooling-off periods. An important issue to consider is the possible extension of cooling-off periods to former MPs to recognise the relationships and knowledge they are likely to have developed in their official positions. Consideration could also be given to whether a cooling-off period should apply to former councillors.

Other issues to be considered include whether the cooling-off periods are long enough, whether different periods should apply to different former officials (depending on the level of risk) and the adequacy of enforcement provisions.

4.2.4.4 Enforcement of lobbying regulation

As stated earlier, the existing regulatory framework around lobbying is inadequate. IBAC has recommended that legislation be enacted to ensure lobbying is regulated in a way that clearly defines the obligations of those undertaking lobbying activity and the public officers who are lobbied, and puts in place a range of transparency and accountability mechanisms to minimise the risk of improper influence or corrupt conduct around public decision-making.

To be effective the legislation must include appropriate enforcement provisions, including mechanisms to deal with breaches of obligations by lobbyists and those who are lobbied. Sanctions must be meaningful to encourage compliance, while being proportionate to the conduct.

The identification of an appropriate agency to undertake monitoring and enforce lobbying regulation is an important reform priority. An independent regulator (for example, an independent statutory authority) and adequate enforcement by regulators are both key elements of effective lobbying regulation.

To date, the VPSC has been responsible for administering the registration of lobbyists and maintaining the register. However, under the current statutory framework the VPSC cannot act to monitor the activities of registered lobbyists or to determine if lobbying is being undertaken by unregistered individuals or entities. The VPSC has no statutory powers to investigate alleged or actual breaches of the code of conduct. In any event, the only action the VPSC could take would be to remove a registered lobbyist from the register.

Proposed reforms relating to the need for a lobbying regulator – see recommendation 4(a)

Consideration could be given to expanding the VPSC's functions to include a more active role in lobbying monitoring and enforcement. However, this may distract the VPSC from its focus on ensuring public sector efficiency, effectiveness and capability, by providing advice or support on issues including public sector administration, service delivery, governance and workforce management and development.[249]

An alternative to expanding the functions and powers of the VPSC would be to establish a new standalone regulator. In addition to monitoring and enforcement functions, the regulator could also provide advice and guidance to lobbyists and public officers, to encourage compliance.

In NSW, ICAC has recommended appointing a dedicated lobbying commissioner to regulate lobbying activity in that state (currently lobbying is overseen by the NSW Electoral Commission).[250] However, ICAC deferred to the NSW Government to determine whether this commissioner should sit within an existing or a new, standalone agency. ICAC did, however, recommend that the government should provide the new regulator with the additional resources and powers needed to carry out the expanded functions recommended by ICAC.[251]

249 VPSC, *About the Victorian Public Sector Commission*, vpsc.vic.gov.au/about-vpsc/
250 NSW ICAC 2021, *Investigation into the regulation of lobbying, access and influence in NSW* (Operation Eclipse), Recommendation 5, p 9.
251 Ibid, Recommendation 18, pp 76–77.

Those functions would include:

- overseeing the conduct of public officials and lobbyists under the LOGO Act and code of conduct, including criminal, administrative and ethical aspects of the regulation
- establishing formal processes for accepting complaints and referrals on lobbying matters
- auditing compliance
- investigating suspected breaches (including of its own initiative) and referring matters for further investigation or sanction
- publishing and disseminating relevant findings
- providing advice and setting standards.[252]

In Queensland, the QIC oversees lobbying and its main functions are to:

- maintain a register of lobbyists and publish it on the QIC website[253]
- determine an entity's application for registration as a lobbyist[254]
- cancel a lobbyist's registration on specified grounds.[255]

Lobbying regulation in Queensland was the subject of review in 2021, in the context of a five-year strategic review of the QIC's functions.[256] That review highlighted the lack of powers enabling the QIC to investigate allegations of misconduct by registered lobbyists, or lobbying activity undertaken by unregistered lobbyists. It recommended that the QIC be empowered to refer matters to the Queensland CCC if a lobbyist is suspected of engaging in corrupt conduct, or an individual or entity is lobbying without being registered.[257]

In Canada, lobbying is regulated by the federal Lobbying Act, which is administered by the Office of the Commissioner of Lobbying.[258] The key functions of the Office of the Commissioner of Lobbying are:

- maintaining the Registry of Lobbyists, which enables public access to the details provided by lobbyists
- developing and implementing education programs to foster public awareness of the requirements of the Lobbying Act
- conducting reviews and investigations to ensure compliance with the Lobbying Act and the Lobbyists' Code of Conduct.

The Office of the Commissioner of Lobbying has the power to prohibit, for a maximum of two years, any person who commits an offence under the Act from communicating with a public office holder about the development of legislation or policy. The Commissioner can also elect to make public the nature of the offence and the name of the person who committed it. Fines and imprisonment can also be enforced on summary convictions (a fine of up to $50,000 or up to six months imprisonment) or indictments (a fine of up to $200,000 or up to two years imprisonment).

The issue of whether a new regulator should be established to monitor and enforce lobbying regulation requires further consideration. However, any new agency or existing agency whose functions are expanded must be sufficiently resourced and empowered to effectively enforce the regulatory regime. Unless that occurs, the present environment in which the Lobbyists' Code of Conduct is given scant regard, will not change.

IBAC notes that a consistent model of regulation and oversight across Australia would be advantageous, including reducing the administrative burden on lobbyists who operate across jurisdictions. Of relevance, a number of other IBAC investigations are examining the conduct of ministers, electorate officers and ministerial advisers. It is likely recommendations will be made to strengthen oversight of these officers. An agency similar to the QIC, which provides advice on ethics and integrity to ministers, parliamentarians and ministerial staff, could play an important role in giving effect to these recommendations.

252 Ibid, Recommendation 19, pp 77.
253 *Integrity Act 2009* (Qld) s 49.
254 Ibid, ss 54 and 55.
255 Ibid, s 62.
256 Yearbury K 2021, *Strategic review of the Integrity Commissioner's functions*.
257 Ibid, pp 51–53.
258 Office of the Commissioner of Lobbying of Canada, lobbycanada.gc.ca/en/

4.3 Conclusion

A high-level review of lobbying regulation in other jurisdictions makes it clear that the regulation of lobbying in Victoria is inadequate. The existing regulatory regime does not serve to fully protect the public interest and to restrain, or at least constrain, the disproportionate, excessive and privileged practices of lobbyists.

IBAC has proposed numerous ways to better regulate lobbying in a way that:

- recognises and preserves the legitimate role of lobbying in helping the public to access and influence their public officials
- reduces the risk of improper access and influence that may distort, or possibly corrupt, government decision-making processes
- supports trust and public confidence in public administration and government by promoting transparency of dealings between lobbyists and public officials.

Some of the proposed reforms are substantial and require careful consultation and consideration to ensure effective implementation. It is also noted that many of the reforms are interdependent and the package of reforms must be considered in its entirety.

Appendix A

Indexed figures for donation caps, disclosure thresholds and VEC administered funding

Financial year		2018-19	2019-20	2020-21	2021-22	2022-23
Donation disclosure threshold		$1,000	$1,020	$1,040	$1,050	$1,080
General donation cap		$4,000	$4,080	$4,160	$4,210	$4,320
Small contributions (up to and including)		$50	$51	$52	$53	$54
Administrative expenditure funding for independent elected members		$200,000	$204,100	$208,200	$210,870	$216,210
Administrative expenditure funding for registered political parties (capped at 45 members)	For 1st member	$200,000	$204,100	$208,200	$210,870	$216,210
	For 2nd member	$70,000	$71,430	$72,860	$73,790	$75,660
	For 3rd to 45th member	$35,000	$35,720	$36,440	$36,910	$37,850
Public funding (per first preference vote)	Legislative Assembly candidates	$6.00	$6.12	$6.25	$6.33	$6.49
	Legislative Council candidates	$3.00	$3.06	$3.12	$3.16	$3.24
Policy development funding (whichever is more)	Per first preference vote	$1.00	$1.02	$1.04	$1.05	$1.08
	Lump sum	$25,000	$25,510	$26,020	$26,350	$27,020

ibac independent broad-based anti-corruption commission
Victoria

Independent Broad-based Anti-corruption Commission

Level 1, North Tower
459 Collins Street
Melbourne VIC 3000

GPO Box 24234
Melbourne VIC 3001

Phone: 1300 735 135
Email: info@ibac.vic.gov.au

www.ibac.vic.gov.au