



Submission to the public consultation on the first review of the operation of the Regulation of Lobbying Act 2015

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Introduction

Lobbying is an activity in Ireland that historically has been conducted behind closed doors. The main impact of the Regulation of Lobbying Act 2015 is to allow citizens to see which lobbyists are seeking to influence whom in relation to public policies and public spending.

The Act has many positive features, and the lobbying regime it has introduced was described as ‘potentially transformative’ in an independent review of Ireland’s first National Action Plan under the Open Government Partnership.¹

Particularly welcome is the Act’s focus on regulating ‘lobbying’ rather than lobbyists and its definition of lobbying as ‘relevant communications’ rather than ‘attempts to influence’.

The main principle guiding the policy is to encourage open dialogue between government and all sectors of society on areas of policy that impact all citizens.

The Act’s objectives can be summarised as follows:

- To shed light on who is lobbying whom about what.
- To provide a framework for holding those engaged in lobbying accountable for their activities.
- To regulate lobbying by former public officials which may pose a threat to integrity in public decision-making.

Purpose of the review

In its Information Note on the Registration of Lobbying Bill 2014 (which became the Regulation of Lobbying Act 2015) the Department of Public Expenditure and Reform stated that a review of the legislation one year after its commencement “will provide an opportunity to ensure that exemptions do not act as a conduit for what might be characterised as unregulated or ‘secretive’ lobbying lacking in transparency.”²

This issue goes to the heart of the objectives of the Act. If the online lobbying register established under the legislation captures only a partial picture of lobbyists’ policy inputs on any particular issue, it will give a distorted impression of how policy is actually influenced. It is therefore vitally important that the impact of the Act’s listed exemptions should be examined as part of this inaugural review of the operation of the Act.

¹ Chari Raj, Independent Reporting Mechanism: Ireland Progress Report 2014–2015
http://www.opengovpartnership.org/sites/default/files/Ireland_2014-15_Final.pdf

² Available here: <http://www.per.gov.ie/en/regulation-of-lobbying/>

TASC Proposals

This submission from TASC, Think Tank for Action on Social Change, makes six proposals for consideration by the Department of Public Expenditure and Reform.

1. Ensure Act's exemptions are not a conduit for secretive lobbying

Proposal

A targeted review of exempted communications in the Act is carried out with a view to ensuring that they are not acting as a conduit for what might be characterised as unregulated or 'secretive' lobbying lacking in transparency.

Rationale

While it is difficult to establish the counterfactual – what lobbying activities would have been captured by the register if there were fewer exemptions in the Act – there is scope for targeted analysis to be carried out. For example, surveys and interviews with a sample of lobbying targets – designated public officials under the Act – could be conducted.

TASC has the following general observations in relation to the exemptions listed in the Act:

1. Section 5 (5) of the Act lists fourteen 'excepted communications' which are not considered to be lobbying and do not therefore have to be recorded in the register. These include standard carve-outs to allow citizens to interact with their public representatives.

One expert has described the Act's exceptions as "excessively long by international standards".³ In addition, some of the excepted communications are sufficiently broadly worded to give rise to concerns that they could be exploited by lobbyists to keep their activities out of the public view.

In particular, under Section 5 (3) communications of "factual information made to a designated public official in response to a request by the designated public official for the information" are excepted communications.

The aim of this provision is entirely legitimate: to allow public officials to seek routine information without their requests automatically triggering a registration requirement.

However, the wording of the clause means that lobbyists themselves are required to make a subjective determination of what is factual and therefore exempt from disclosure. In practice, it may be difficult for a lobbyist to divorce facts from their opinion of the facts. For the avoidance of doubt, Section 5 (3) could be usefully amended to specifically exclude "expressions of opinion or analysis".

³ McGrath Conor, *Registration of Lobbying Bill 2014: A comparison with the General Scheme of the Regulation of Lobbying Bill*, September 2014. Unavailable online. Referenced in *Transparency International Ireland, Influence and Integrity: Lobbying and its Regulation in Ireland*, November 2014. http://transparency.ie/sites/default/files/ti_ireland_III_final28_11_14.pdf

2. Section 5 (1) of the Act defines lobbying activities as making, or managing or directing the making of any “relevant communications”. Relevant communications is defined in Section 5 (4) *as communications (whether oral or written and however made), other than excepted communications, made personally (directly or indirectly) to a designated public official in relation to a relevant matter.*

In turn, a relevant matter is defined under Section 5 (9) as any matter relating to:

(a) the initiation, development or modification of any public policy or of any public programme,

(b) the preparation or amendment of an enactment, or

(c) the award of any grant, loan or other financial support, contract or other agreement, or of any licence or other authorisation involving public funds,

apart from any matter relating only to the implementation of any such policy, programme, enactment or award or of a technical nature.

This definition of a relevant matter is potentially problematic. Specifically, the exclusion from the definition of *any matter relating only to the implementation of any such policy, programme, enactment or award or of a technical nature* is unduly ambiguous and may lead to under-reporting of lobbying activities.

How policy is implemented is often a central concern for those who communicate with policy makers and elected representatives. Indeed, it is the very gaps in the implementation of policy, including those of a technical nature, that form the backbone of the lobbying efforts of many front-line organisations working ‘on the ground’ where policy impacts may be keenly felt.

In addition, the current definition of a relevant matter itself contains an internal dichotomy, in that it encompasses matters related to the *development or modification of any public policy or programme*, while at the same time explicitly excluding matters related to how such policies or programmes are implemented. As policies are often modified based on observed shortcomings in how they are implemented in practice, the wording of Section 5 (9) is incongruous.

While some organisations and individuals who lobby may interpret the clause broadly in order to comply with the spirit of the legislation, ideally the wording of the section should be tightened.

In its submission on the Registration of Lobbying Bill 2014, Transparency International Ireland suggested that Section 5 (9) be amended as follows:

“relevant matter” means any matter relating to –

(a) the initiation, development or modification of any public policy or of any public programme,

(b) the preparation or amendment of an enactment, or

(c) the award of any grant, loan or other financial support, contract or other agreement, or of any licence or other authorisation involving public funds, apart from any matter relating only to the implementation of any such grant, loan or other financial support, contract.⁴

2. Assess extent of adherence to the Act's Transparency Code

Proposal

The Department of Public Expenditure and Reform conducts an audit to establish the extent of adherence to the provisions of the Act's Transparency Code by public bodies subject to it.

Rationale

Section 5 (5) (n) of the Act specifically excludes communications between members of bodies set up at the invitation of a minister or a public service body to review, assess or analyse public policy.

However, the Act recognises the public interest need for transparency in relation to the activities of these kinds of bodies, which include policy working groups, expert groups and advisory groups. Section 5 (7) requires the Minister to publish a Transparency Code governing their activities if they are to constitute a relevant body for the purposes of the excepted communications detailed in subsection (5) (n).

This Transparency Code was commenced on 1st September 2015.⁵ Given that the Act itself is currently under review, it would be a useful occasion for the department to carry out an audit to establish the extent of adherence to the provisions of the Transparency Code by public bodies subject to it.

While this in itself is an implementation matter, it speaks to the request from the department for input in relation to 'unintended consequences' following the implementation of the Act.

If the Transparency Code is not adhered to, then the influence of private interests through expert or advisory groups remains secret. The OECD recently identified the influence of private interests through such groups as '*an emerging risk to the integrity of policy-making*'.⁶

⁴ Transparency International Ireland, Submission on the Registration of Lobbying Bill 2014. <http://www.per.gov.ie/en/regulation-of-lobbying/>

⁵ Available here: <https://www.lobbying.ie/media/5986/2015-08-06-transparency-code-eng.pdf>

⁶ OECD, *Lobbyists, Governments and Public Trust, Volume 3: Implementing the OECD Principles for Transparency and Integrity in Lobbying*, 2014 p 76. http://www.oecd-ilibrary.org/governance/lobbyists-governments-and-public-trust-volume-3_9789264214224-en;jsessionid=3duqso4ie09gf.x-oecd-live-01

Consideration should also be given to including in the Act's listed contraventions in Section 18 a failure by a public body to meet its obligations in relation to the application of the Transparency Code. Finally, the Transparency Code itself should also be reviewed at regular intervals and revised where necessary to take into account new or emerging risks.

3. Give SIPO powers to verify returns and receive complaints

Proposal

The Standards in Public Office Commission (SIPO) should be empowered (and resourced) to conduct thorough spot checks to verify lobbying activities self-reported by registrants in their returns. SIPO should also be empowered to receive complaints against lobbyists, inspect records and verify information.

Rationale

Section 13 (1) of the Act gives the Commission power to require registrants to provide further or corrected information "where it considers" that information supplied is inaccurate or misleading. In addition, under Section 19 (1) the Commission may conduct an investigation where it "reasonably believes" that a relevant contravention has taken place.

The Act is silent as to how the Commission would arrive at either forming a reasonable belief that a contravention has occurred or considering that information supplied is inaccurate or misleading.

Specifically, the legislation does not give the Commission explicit powers to receive complaints, inspect records and returns, and verify information. The Act should be amended to give the Commission such powers.

In addition, SIPO should be provided with sufficient resources to allow it to conduct thorough spot checks of a certain proportion of all filed returns. Currently, the vagueness of the information contained on some lobbying returns – particularly in relation the 'intended results' of the communications – risks undermining the value of the online register as an effective tool for public scrutiny. Self-reporting by lobbyists is a unique feature of the regime introduced by the Act, and it is vital that the register captures accurate and meaningful qualitative data on what lobbyists want.

4. Permit identification of individuals who have contravened the Act's provisions

Proposal

SIPO should be given powers under the Act to identify individuals and organisations who have contravened its provisions.

Rationale

Under Section 25 of the Act, the Commission is precluded from identifying in its annual report those individuals against whom determinations or investigations have been conducted, as well as those who have been convicted or received fixed penalty notices.

The fact that SIPO cannot publicly disclose the names of individuals found to have violated lobbying rules denies it the use of what is an important deterrent tool. Routine publication of the names of individuals and organisations found to have contravened the Act would facilitate public scrutiny, thereby enhancing compliance.

5. Expand categories of Designated Public Officials

Proposal

The categories of designated public officials (DPOs) under the Act should be expanded to include all civil servants at Principal Officer grade, as originally envisaged by the Minister. In addition, certain public officials should be added to the list of designated public officials for the purposes of the Act.

Rationale

Under section 6(1) (f) and (g) of the Act, the Minister can prescribe public servants or other public officeholders or a description of persons as designated officeholders for the purposes of the legislation.

Currently, the DPOs covered by the Act do not include civil servants at Principal Officer level. During parliamentary debates on the legislation, the Minister for Public Expenditure and Reform stated that Principal Officers would be prescribed as designated public officials under the Act within twelve months. The Minister added that there might be other categories or designations that will also have to be considered.⁷

While it is the case that not all Principal Officers are in practice the target of lobbying activities, they should be prescribed as DPOs under the Act as a single class. To do otherwise

⁷[http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/\(indexlookupseanad\)/20150205~A?opendocument](http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/(indexlookupseanad)/20150205~A?opendocument)

would be to risk failing to capture lobbying activities in a comprehensive and uniform manner.

It is also apparent that there may be public and civil service positions which, in terms of rank alone, are less senior than Principal Officers, but in practice may be more influential and therefore more likely to be lobbying targets. Consideration should be given during this review of the Act to identifying public officials who fall into this category, and prescribing them as DPOs under the Act.

In addition, consideration should be given to including other categories of public officials as DPOs for the purpose of the Act, taking into account their functions and responsibilities as well as the public interest.

Additional public officials who could reasonably be considered for inclusion as DPOs include:

- Staff of registered political parties
- Staff of Oireachtas members
- Senior officials employed by the Houses of the Oireachtas
- Ministerial private secretaries
- Senior staff in specific non-commercial state agencies, including for example the Central Bank and NAMA
- Permanent representatives of Ireland to the European Union
- Senior officials in semi-state agencies
- Members of the Council of State

6. Clarify database classification of registered lobbyists

Proposal

The data captured in the lobbying database's Directory of Registrants should be amended to more accurately reflect at a high level the relevant categories of registered individuals and organisations.

Rationale

The integrity of the online database established under the Act is vital. Currently, there are certain shortcomings in the data fields captured in the Directory of Registrants on www.lobbying.ie.

Specifically, registrants are required to describe their activities based on the following checklist of twelve organisation types or sectors: Agribusiness; Communications/Electronics; Construction; Defense (sic); Energy & Natural Resources; Finance; Health; Industry body; Lobbying; Manufacturing; Other; Trade Union.

Registrants who select the box 'Other' may then add free text describing their activities. Currently, out of a total of 1,464 registrants, more than half (854 organisations or individuals) are classified as Other in the database. These include charities, representative bodies, solicitors, private businesses, and even professional lobbyists who work for communications companies and therefore do not primarily identify themselves with the database category Lobbying.

The database should be amended so that it more accurately captures those dedicated categories of organisations and individuals that are currently falling into Other. Relevant categories to consider include:

Communications/Public affairs; Professional lobbyist; Private sector/Business; Public affairs consultancies; Not-for-profit organisation; Industry/professional association; Research organisation; Solicitor/Law firm; Church group; Academic; Citizen.