

TASC Submission on the Regulation of Lobbyists

Preface

The intention of the regulatory system for lobbying appears to be “to maintain a level playing field between all stakeholders wishing to influence any specific Government legislative or policy initiative”.

The worst outcome from any regulatory system would be to exclude people, or indeed to further exclude already marginalised and excluded people in society. Regulation should not present any new barriers to citizens’ right of access to public representatives or to policy makers; for example, the need for financial resources or access to professional services to engage in ‘lobbying’ would be barriers.

In the broader context of regulating lobbying, it is important to distinguish the end goal of a level playing field in influencing public policy from regulating lobbyists as a means to achieve that end. There are a number of other necessary conditions, alongside the registration of lobbyists, if the end goal of a level playing field is to be achieved.

These further concerns can be illustrated by reference to the four stages of decision making:

1. Agenda-setting and identification of alternatives
2. Comparative assessment
3. Decision between alternatives
4. Implementation

(Hyland 1995: 56-7)¹

These stages are not linear and the policy making process is iterative and may revert to previous stages as new information arises. Nonetheless, the four stages provide a useful model of the process of generating policy.

Lobbying is often perceived as seeking to influence the third stage; that is, the formal choice between alternatives by a Minister, the Government collectively or the Oireachtas. However, it must be recognised that influence at the first and second stages can prevent the full examination of a whole range of options before a policy proposal reaches the stage where a formal decision is to be taken.

The potential for early stage lobbying to strongly influence the direction of policy emphasises the importance of regulating the on-going meetings of mid to high ranking civil and public servants, and policy advisors, as well as meetings involving ministers and ministers of state.

The potential undue influence of lobbyists in determining what options are considered for decision suggests that there are record-keeping requirements on everyone involved in the policy

¹ Hyland, J.L., 1995: *Democratic Theory: The philosophical foundations*, Manchester University Press, Manchester.

formation process (e.g. civil and public servants and policy advisors as well as members of government) and there should equally be disclosure requirements (e.g. under Freedom of Information). These requirements would include keeping complete diaries in relation to meetings, keeping records of the evolution of policy options, recording a rationale/justification for rejecting options, etc. Transparency is vital to ensuring a level playing field at this juncture.

The need to balance the right of public representatives to meet constituents in confidence with the transparency requirements of regulating lobbying needs to be recognised as a genuine challenge, which is traditionally addressed in advanced democracies through various mechanisms that formally separate the legislative from the executive. Future constitutional change and political reform that may strengthen the role of the Oireachtas should be guided by this principle of the separation of powers.

The registration of lobbyists will not ensure a level playing field in the context where some sections of society may not have adequate resources (financial or personal) to meaningfully participate in the influencing of public policy formation. As such, a complete system designed to ensure “a level playing field between all stakeholders” must include a requirement on policy makers to identify all stakeholders (i.e. those directly or indirectly materially affected by a policy decision). Furthermore some form of consultation requirements should also be in place, so that all information from all stakeholders is obtained prior to closing off policy options.

The fourth stage of decision making (i.e. implementation) can be crucial to the efficiency and importance of public policy decisions made at an earlier stage. The extent to which public bodies can shape public policy through implementation should not be underestimated. Likewise, the extent to which lobbyists can influence the implementation of policy should be explicitly recognised as part of the regulation of lobbyists.

It is also important to note that the outcome of Government-level decision making may either be the establishment of a temporary committee or the giving of responsibility to a state-sponsored body. This body may then revisit all stages of policy formation as they consider in more detail a range of options and strategies to achieve a desired policy outcome. In these cases, a government may be delegating significant influence over policy formation to a group of appointed individuals. As TASC has previously argued (July 2011)², there is a need for a system of independent public appointments to avoid a disproportionate level of power being allocated by any government to unelected and unaccountable persons. In particular, there is a risk that a government may continue to wield significant influence on public policy formation after they leave office, due to the people they have appointed to various boards and committees. TASC recommends that an independent selection system based on transparency, merit and diversity should be implemented.

Finally, in relation to the central goal of achieving a level playing field for all stakeholders in influencing public policy, Hyland (1995: 2) proposes an ideal description of a democratic system, with respect to equality of opportunity to participate in influencing decisions. Under democratic rule “*all those significantly affected by the decisions have equal and effective rights of*

² TASC (July 2011) *Public Appointments: Options for Reform*. Available here: <http://www.tascnet.ie/upload/file/PublicAppointments180711.pdf>

participation at all levels of decision-making, with the understanding that this effectiveness is crucially dependent on adequate access to resources necessary to enable full and meaningful participation.”

Hyland’s definition could be considered as the optimum version of a level playing field between all stakeholders. However, Hyland rightly stresses that equal rights to participate are “crucially dependent on adequate access to resources necessary to enable full and meaningful participation”. Such resources include civic education, knowledge of the policy making process, time, skills, financial resources, etc.

Given the prevalence of poverty and social exclusion in Ireland, which is acutely experienced in certain geographical areas or by certain communities or sections of society, it is incumbent on the political system to take meaningful steps, over time, to redress the imbalance of power and influence of the weakest sections of society – those who in many cases are most acutely affected by public policy decisions and in many cases are disproportionately reliant on public services for their quality of life. Redressing the imbalance should include income adequacy for all, improved civic education in schools and for adults returning to education, NALA standards of plain English to be used by public bodies, strengthening of citizens information services, and a range of other measures. In the short term, there may be role for civil society organisations to act as policy advocates and intermediaries on behalf of excluded groups, but always with the explicit goal of empowering people to directly represent themselves.

Democracy in Ireland should involve genuine political equality between all citizens. The regulation of lobbyists is an important contribution to achieving this, but should not be seen as a complete solution to achieving equality of participation in influencing public policy.

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Director

Summary of recommendations

1.1 TASC makes the following recommendations:

- A register of lobbyists be established which includes professional lobbyists, in-house lobbyists and civil society organisations, including charities, which engage in lobbying for the public interest.
- Care must be taken to ensure that civil society organisations which hold CHY numbers and which advocate in the public interest are not disadvantaged by registering, or excluded from the register or from the practice of lobbying.
- Registration must be mandatory.
- Those registered as lobbyists must report their lobbying activities to the registrar on a quarterly basis.
- Compliance measures, including the possibility of removal from the register and/or financial penalties must be included.
- A suitable 'cooling-off' period of at least two years for senior public servants, special advisers and former public representatives (Ministers, TDs and Senators).
- The establishment of the register should be accompanied by a broadening of the FOI Acts to ensure that access to the diaries and records of meetings between senior public servants/ Ministers with lobbyists or organisations in relation to public policy formulation.
- The register must be made available to the public online and free of charge.

Countries should provide a level playing field by granting all stakeholders fair and equitable access to the development and implementation of public policies.

- *What issues need to be examined, in developing an effective regulatory system for lobbying in Ireland, to maintain a level playing field between all stakeholders wishing to influence any specific Government legislative or policy initiative?*
- *What elements of the design or operation of a regulatory regime could create a risk of a diminution of citizen access to their TD?*
- *How can this risk be mitigated?*

2.1 One of the primary motivations for establishing a register of lobbyists and regulating the activity is to ensure that all stakeholders have equal access to decision makers and input into the decision making process. Greater transparency in lobbying and decision making will help in moving towards a level playing field for all stakeholders.

2.2 A register of lobbyists, if properly constructed, will increase transparency in this area. The register must be easily accessible to the public and must include the disclosure of lobbying activities and purpose, and other relevant information. It should also be accompanied by greater access to information through Freedom of Information on meetings between all lobbyists (professional/consultant and organisations including social partners) and ministers, special advisers and senior public servants (Principal Officer level upwards) on the national and sub-national level.

2.3 It is imperative that any registration and disclosure system include appropriate compliance measures and sanctions for those who breach the regulations. A range of sanctions must include the possibility of being struck off the register and fines.

2.4 Care is needed to ensure that organisations with CHY numbers are not excluded or disadvantaged by registering. Any new registration process established must facilitate civil society organisations who advocate in the public interest.

2.5 Registration must be mandatory but simple. An online system of registration should be designed and the State should engage in a public information campaign and civil society training in order to ensure that smaller civil society organisations are not excluded from the process.

Rules and guidelines on lobbying should address the governance concerns related to lobbying practices, and respect the socio-political and administrative contexts.

- *What specific factors need to be considered in the Irish context to ensure that the regulatory system properly recognises the scale and nature of lobbying activity in Ireland?*
- *What are the main lessons to be learned from other jurisdictions in developing an appropriate and effective regulatory system for regulating lobbyists in Ireland?*

- *Is there any specific international approach to the regulation of lobbyists that represents a good model for developing an approach aligned to Ireland's specific requirements?*
- *Given the commitment in the Programme for Government to introduce a statutory register of lobbyists, what features of the system will help ensure it does not impede fair and equitable access to Government and does not give rise to a disproportionate administrative burden?*
- *Please provide any views on the draft Bills previously published by the Government parties in Opposition for the regulation of lobbyists including whether they provide an appropriate legal framework for the regulation of lobbyists in Ireland?*
- *If not, how might they be enhanced to meet regulatory objectives?*

3.1 The small size of the Irish state and the relatively easy access to TDs, Senators and local politicians means that some lobbying activities, either official or unofficial, take the nature of casual encounters. Social partnership structures have also given some civil society actors greater access to decision-makers than others; even though the structures include the community and voluntary pillar and have been broadened out to include the environmental sector, there will always be actors who fall outside of these pillars. For those who are outside these formal and informal structures the perception, legitimate or not, of asymmetric access to power impedes the creation of a level playing field.

3.2 The difference in scale between many jurisdictions that have regulated lobbyists and Ireland means that the State must ensure that any registration process and regulations established should not impose a high administrative cost on those registering as lobbyists or on the State itself. Some countries, Canada for example, have dedicated offices to regulate lobbying.³ Given the ongoing reduction in the numbers of public bodies, and the smaller scale of lobbying in Ireland, TASC does not recommend the establishment of a new organisation; instead the State should identify a suitable organisation/agency which will act as registrar. The Standards in Public Office Commission would be an appropriate organisation for this purpose.

3.3 The access to the Houses of the Oireachtas by former TDs and Senators can advantage those former members of the Oireachtas who have become professional lobbyists. The EU model of registration includes a parliamentary pass for registered lobbyists. While acknowledging that former members of the Oireachtas possess the advantage of access to the Houses of the Oireachtas that other lobbyists do not have, TASC does not recommend following the EU model of passes to the Oireachtas buildings.

3.4 The federal Canadian model, which defines lobbying activities as communication with a public office holder *"in respect: of the development of any legislative proposal etc"* (see point 5.2 for full definition), provides a useful model for Ireland. Canada, while federal, is a common law country with a strong executive, which often makes it a suitable State for comparison. Registration is mandatory for all lobbyists, including civil society organisations which engage in lobbying. The register is online and easily accessible and there are penalties for non-compliance. In-house lobbyists must register if lobbying

³ In Canada, the Office of the Commissioner of Lobbying of Canada, undertakes the regulation of lobbying

amounts to 20 per cent or more of their work. Those whose lobbying activities comprise less than 20 per cent or who do not receive payment for lobbying (e.g. voluntary campaigners), are exempt from the register. This ensures that the register does not lead to a disproportionate administrative burden.

- 3.5** Blocking former public officials (public representatives, senior civil servants and special advisers) from lobbying in their former areas of influence for a minimum of two years (as is the case in Canada) would also help us move towards a level playing field. It would ease the perception that those who have formerly held positions of influence possess an unfair advantage upon their entry into the private sector or civil society organisations.
- 3.6** Like the 1989 Canadian legislation, the Labour Private Members Bill (2008) and Fianna Fáil Private Members Bill (2012) define lobbying so as to include communication with a public official and the arrangement of a meeting with a public official in an attempt to “influence” decision making. However, the idea of communication “in an attempt to influence” was replaced in Canadian legislation with “in respect of” government decisions (Chari, R., Murphy, G, 2007: 21). This means that all forms of communication, whether intended to influence decisions or not, were brought under the regulations. Thus, where a lobbyist or a registered organisation is invited into speak with a public representative or official, they must disclose this communication to the registrar.
- 3.7** Both Bills provide for registration, disclosures by those registered and penalties for those who breach the regulations. They also provide for the power of investigation by the registrar/regulator. As such, they both provide an adequate framework for the establishment of a system of regulation of lobbyists. However, they could be improved by ensuring that transparency on the governmental side is extended to access the details on meetings between Minister and senior public servants (including special advisers) and those engaging in lobbying activities.

Rules and guidelines on lobbying should be consistent with the wider policy and regulatory frameworks.

- *What areas of the wider policy and regulatory framework in Ireland are particularly relevant to the design and operation of a regulatory system for lobbying?*
- *What changes or reforms may need to be considered in these areas to help underpin the effectiveness of the regulation of lobbying activities?*

- 4.1** It is imperative that due attention is given to the particular situation of civil society groups who advocate or campaign on public interest policy issues. It is important that they do not find themselves disadvantaged, through loss of their charitable status or public funding, or excluded from decision making processes.
- 4.2** Transparency in decision making was greatly aided by the introduction of the Freedom of Information Act in 1997. The FOI Act was subject to amendments in 2003 which narrowed its scope. While a register detailing the lobbying activity of those registered

would aid transparency in decision making, there is a need for more transparency on the governmental side. Consideration should be given to broadening the FOI Acts to ensure access to information regarding the meetings between senior public servants on the national and sub-national level (PO level upwards) and lobbyists.

- 4.3** As it currently stands, a citizen cannot request that a Minister provide a list of everyone that s/he had lunch with in a given period, for example, unless it is written in the department's records. Any public records, such as emails within the department which deal with a specific issue, or the departmental diary of the Minister for a particular year, are available through the FOI Acts. Ministers and senior public servants (including special advisers) should be required to keep a strict diary of all meetings relevant to their work as public representatives and public officials and these diaries should be made subject to the FOI Acts. This will provide a clear idea of the level of access gained to decision makers by professional and in-house lobbyists.
- 4.4** The Electoral Bill currently being debated in the Oireachtas provides for the establishment of a published register of corporate donations.⁴ Section 7(1) of the Bill, contains a ban on donations of over €200 from a corporate donor unless the donor first registers with the Standards in Public Office Commission (SIPO). This will provide for the establishment of a published register of corporate donors. The corporate donor must also provide a written statement confirming that the donation was approved by SIPO. This written statement must be furnished with the donation to the donee. Therefore registered corporate donors can make any donations between €200 and €1500 without declaring them, provided their total donations do not exceed €2,500 in a year.
- 4.5** While the Bill could provide more transparency on donations between €200 and €1,500, the provision of a register of corporate donors will allow for the cross-referencing of the register with the register of lobbyists.

Countries should clearly define the terms 'lobbying' and 'lobbyist' when they consider or develop rules and guidelines on lobbying.

- *What is the appropriate scope of lobbying activities that should be regulated in Ireland consistent with these OECD principles which ensures that all forms of 'lobbying' fall within the regulatory system?*
- *Should any exemptions or exclusions be considered?*
- *In view of 4.1 and 4.2 above what robust, comprehensive and sufficiently explicit definitions of 'lobbying' and 'lobbyist' can be developed and applied in practice that will avoid misinterpretation or the emergence of loopholes in an Irish context?*
- *How can any regulatory system be designed to capture not solely individuals who receive compensation for carrying out lobbying activities but professional service providers (e.g.*

⁴ <http://www.oireachtas.ie/documents/bills28/bills/2011/7911/b7911s.pdf> (accessed 27 February 2012)

members of the legal, accountancy, medical and other professions), representative bodies and other organisations that engage in significant lobbying?

- *What thresholds of, for example, time spent on lobbying activities (e.g. as a proportion of working year) or compensation received (e.g. as a proportion of total compensation) might help identify when registration may be appropriate?*

5.1 The OECD defines the “*essence of lobbying*” as involving “*solicited communication, oral or written, with a public official to influence legislation, policy or administrative decisions*” (OECD, 2008: 15).

5.2 Defining lobbying and lobbyists will determine much of the scope of the register. The Canadian model gives the following definition of a lobbyist and lobbying:⁵

individual who “*for payment, on behalf of any person or organisation undertakes to (a) communicate with a public office holder in respect of*

- (i) the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons,*
 - (ii) the introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament,*
 - (iii) the making or amendment of any regulation as defined in subsection 2(1) of the Statutory Instruments Act,*
 - (iv) the development or amendment of any policy or program of the Government of Canada,*
 - (v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada, or*
 - (vi) the awarding of any contract by or on behalf of Her Majesty in right of Canada; or*
- (b) arrange a meeting between a public office holder and any other person”.*

5.3 In the case of ‘in-house’ lobbyists, the Canadian legislation requires registration if, “*the corporation or organization employs one or more individuals any part of whose duties is to communicate with public office holders on behalf of the employer or, if the employer is a corporation, on behalf of any subsidiary of the employer or any corporation of which the employer is a subsidiary*” and if “*those duties constitute a significant part of the duties of one employee or would constitute a significant part of the duties of one employee if they were performed by only one employee*”.⁶

5.4 Defining the amount of time, e.g. 20 per cent, that an in-house lobbyist or an employee of an organisation spends lobbying will ensure that a wide range of interest groups, including trade unions, trade associations and civil society groups, will fall under the scope of the legislation.

5.5 The definition of lobbying should also take into account the lobbying of senior public servants on the national and sub-national level and special advisers.

⁵ <http://laws-lois.justice.gc.ca/eng/acts/L-12.4/page-4.html#h-8> (accessed 20 February 2012)

⁶ <http://laws-lois.justice.gc.ca/eng/acts/L-12.4/page-5.html#h-10> (accessed 20 February 2012)

- 5.6 In line with regulations in other jurisdictions, diplomatic staff should be excluded from the scope of the regulations.

Countries should provide an adequate degree of transparency to ensure that public officials, citizens and businesses can obtain sufficient information on lobbying activities.

- *What types of information should be disclosed by registered lobbyists in Ireland to allow for adequate public scrutiny, openness and transparency?*
- *What would be considered legitimate exemptions from core disclosure requirements?*
- *Should such information be fully available to the public by way, for example, of an electronic register?*

6.1 The following information should be required of those registering:

- Name
- Organisation
- Nature of Organisation (e.g. private consultancy, NGO, corporation)
- Former Office holder (if applicable)
- Client name (where applicable)
- Subject of representation
- Nature and extent of representation
- Name of department or other governmental institution to be lobbied
- Source of any government funding provided to the client

6.2 Once registered, there is a requirement to regularly disclose lobbying activities to the designated regulator. Professional private consultancies and those who lobby on behalf of others in return for payment should be required to disclose the nature of their contract within ten to fourteen days. All lobbyists/organisations on the register should be required to disclose their lobbying activities to the regulator on a quarterly basis. The disclosure should include the following information:

- Name of the public representative/s (including Ministers, TDs, Senators, Councillors and MEPs)/officials with whom the lobbyist/organisation communicated.
- Date of communication
- Subject of the communication
- Type of communication (e.g. meeting or written submission)
- Client name (if applicable)

6.3 All information held on the register should be fully available to the public online.

Countries should enable stakeholders – including civil society organisations, businesses, the media and the general public – to scrutinise lobbying activities.

- *Do any possible conflicts of objective potentially arise between the public interest in the public being informed on who has sought to influence legislative or policy making processes and other important public policy objectives?*
- *If so, how can these conflicts be properly managed?*

7.1 Issues of commercial sensitivity are already withheld from public access. Section 27 of the FOI Act provides that a public body *shall* refuse to grant access to commercially sensitive information to persons other than the individual or company to whom the information relates. The head of the body has discretion to consider release of the information only in exceptional circumstances where, on balance, he or she is of the opinion that it is in the public interest to do so.

7.2 Under section 21 of the FOI Act, records *may* be protected where disclosure could harm certain operations of a public body i.e. information which could disclose negotiating positions of Government or state agencies. This exemption does not apply if, in the opinion of the head, the public interest would, on balance, be better served by granting than by refusing the request.

7.3 Any new registration system established and broadening of the FOI Acts to include information on meetings between Ministers/senior public servants and lobbyists.

Countries should involve key actors in implementing a coherent spectrum of strategies and practices to achieve compliance.

- *What factors would be expected to yield the best outcomes in terms of compliance with regulatory requirements put in place in Ireland?*
- *What mechanisms should be introduced in order to deter and detect breaches of compliance?*
- *Should there be an electronic registration and report-filing systems for lobbyists?*
- *What sanctions and/or incentives should be introduced to encourage full compliance?*

8.1 The best outcomes in terms of compliance can be achieved if the registration process is straightforward and not costly. Organisations and individuals should be able to register online and should also be able to report disclosures online. Reporting of possible breaches of regulations should be easily facilitated through online procedures.

- 8.2** The organisation which manages the register (e.g. the Standards in Public Office Commission) should be given powers of investigation and the power to randomly audit a registered lobbyist.
- 8.3** Penalties for breaches of regulations must be sufficient to operate as a disincentive. These should include such measures as financial penalties and the possibility of being removed from the register.

Countries should review the functioning of their rules and guidelines related to lobbying on a periodic basis and make necessary adjustments in light of experience.

- *What further consultation mechanisms might be appropriate in relation to the development of legislative proposals for consideration by Government?*
 - *Who should be involved in any consultation process?*
- 9.1** Consultation meetings/roundtables with various stakeholder groups should be considered. In particular, consultation with civil society organisations and the Revenue Commissioners should take place at an early opportunity to ensure that those organisations which are registered as charities do not get excluded from lobbying or disadvantaged by their inclusion in the register.

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