



**TASC submission on the
Public Sector Standards Bill 2015**

SEPTEMBER 2016

Contact: Nuala Haughey, nhaughey@tasc.ie 01-6169050

Introduction

The Public Sector Standards Bill 2015 modernises and streamlines the existing ethics framework and puts in place a uniform regime for managing conflicts of interest at national and local level.

Many of the Bill's provisions reflect recommendations made by bodies including the Mahon Tribunal, the Standards in Public Office Commission (SIPO), the OECD, and the Council of Europe's Group of States against Corruption (GRECO).

This submission from TASC, Think Tank for Action on Social Change, is provided to the Department of Public Expenditure and Reform and also to the Select Sub-Committee on Public Expenditure and Reform, to which the Bill was referred in January 2016.

It is important to note that while this submission tends to concentrate on particular aspects of the Bill which TASC believes could usefully be strengthened, in overall terms there is much to commend in this ambitious new ethics framework. The creation of a new position of a Public Sector Standards Commissioner to oversee a streamlined and improved complaints and investigations procedure is particularly welcome, as is the Bill's emphasis on training, education, guidelines and research.

Summary of recommendations

A summary of TASC's recommendations in relation to the Bill is set out below. Further detail is provided in the individual sections of this submission.

1. Integrity principles and ethics framework

A unique and important feature of the Bill is the set of over-arching integrity principles which it enshrines. These should be further elaborated and enhanced if they are to fulfil their envisaged role as a values-based ethics framework, and the fountainhead from which codes of conduct for public officials flow.

2. Complaints and sanctions for breaches of codes of conduct

The Bill should provide for complaints for alleged breaches of public sector codes of conduct, with appropriate administrative sanctions along the lines of the existing sanctions in the Bill for minor and non-minor breaches of its provisions, which are not offences. Outcomes of complaints of breaches of codes should be published.

3. Responsibility for a model code of conduct

A model code of conduct provided for in the Bill should be drawn up by the Public Sector Standards Commissioner, following consultation with relevant stakeholders and consideration by the relevant Oireachtas committee. The code should be issued by the Minister by way of statutory instrument under the legislation. The model code should be reviewed by the Commissioner at five yearly intervals.

4. Sectoral and local codes of conduct

The Public Sector Standards Commissioner should draw up intermediate or sectoral level

codes of conduct in conformity with the model code. The Bill should require all public bodies to issue their own code of conduct, even if this is just to adopt the model code or an intermediate/sectoral code.

5. Commissioner approval for all local codes

All local codes issued by public bodies should be submitted to the Commissioner for prior approval.

6. Annual reports of the Public Sector Standards Commissioner

The Public Sector Standards Commissioner should furnish its annual reports and any special reports to the appropriate Oireachtas Committee for consideration, rather than to the Minister as provided for in the Bill.

7. Definition of material interest

The Bill's definition of what is a "material interest" for the purpose of ad hoc declarations of interest should be amended in line with the recommendations of the Mahon Tribunal.

8. Publication of declarations of interest and liabilities

Declarations of interest which are required to be published should be made available in an open format on a single, searchable web portal maintained by the Public Sector Standards Commission. Category A officials should be required to disclose certain liabilities in their public declarable interests.

9. Acceptance and disclosure of gifts and other benefits

Certain of the Bill's provisions in relation to the acceptance and disclosure of gifts and other benefits should be amended in keeping with the recommendations of the Mahon Tribunal and OECD guidelines.

10. Post-term employment

The Bill's post-term employment provisions should apply to public officials while they are serving as officials and, in some cases, for a specified period afterwards. Senior public officials required to seek the consent of a new Outside Appointments Board before moving into the private sector should include Ministers and their Special Advisers, Secretaries General and Deputy Secretaries in government departments, and equivalent grades in the public sector.

11. Outside Appointments Board

The Outside Appointments Board should be an independent body which publishes decisions on individual applications by certain senior public officials on its website on a quarterly basis. Consideration should be given to including sanctions for violation of post-employment conditions.

1. Integrity principles and ethics framework

Recommendation 1: A unique and important feature of the Bill is the set of over-arching integrity principles which it enshrines. These should be further elaborated and enhanced if they are to fulfil their envisaged role as a values-based ethics framework, and the fountainhead from which codes of conduct for public officials flow

- 1.1 The Bill for the first time establishes in legislation a set of guiding integrity principles for all public officials, as the values-based foundation for a public sector-wide model code of conduct. This innovative approach provides parliament with a unique opportunity to signal strongly that this ethics framework is not just about detecting non-compliance, but is also about promoting the highest ethical standards in terms of individual behaviour and organisational culture.
- 1.2 A particular value of embedding a high-level statement of principles in statute is that it 'sets the tone' for the rest of the Bill. The principles provide the normative ethical framework upon which codes can then be layered in order to determine the scope and application of the principles for different categories of official.
- 1.3 General principles by definition should be aspirational in nature, inspiring public officials towards the highest ethical ideals in everything they do. Codes of conduct that flow from principles express what those principles mean in particular situations, bringing clarity and certainty and helping officials to understand what the principles require of them. The principles themselves can in turn be used to help interpret the codes of conduct in particular contexts.
- 1.4 This tiered approach is reflected in the Department of Public Expenditure and Reform's policy document on the Bill's draft general scheme. This states that a "set of over-arching integrity principles" will apply to all public officials, and that these will be utilised to "provide a framework for the revision, updating and improvement of codes of standard (sic) and behaviour for different categories of public officials".¹
- 1.5 At the second stage reading of the Bill in Dáil Éireann in January 2016, the Minister for Public Expenditure and Reform stated that by enshrining the over-arching integrity principles for public officials in the legislation, the Bill represented a new departure.²
- 1.6 In its Fourth Round Evaluation on Corruption Prevention in respect of Members of Parliament, Judges and Prosecutors in 2014, GRECO recommended that, in relation to

¹ Government Reform Unit, Department of Public Expenditure and Reform, Policy Document, *Public Sector Standards – a new and reformed legal framework*, June 2015, pars 5.1 and 9.18. Available at: <http://www.per.gov.ie/en/public-sector-standards-bill/>

² See Oireachtas debates:

<http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2016012000017?opendocument>

parliamentarians, the existing ethics framework be replaced with a “uniform and consolidated *values-based normative framework* encompassing the ethical conduct of members of parliament – including their staff as appropriate.....with the aim of providing clear rules concerning their expected conduct (emphasis added).”³

1.7 The challenge for legislators in embedding integrity principles in a statute is to find the optimum level of detail so that the principles can fulfil their high-level function, whilst also providing a suitably flexible framework upon which detailed codes and guidance can be based.

1.8 The integrity principles are contained in Section 10 of the Bill. Under the heading “Standards of Integrity,” Section 10 states that: *in performing his or her functions, it is the duty of every public official:*

(a) to maintain proper standards of integrity and concern for the public interest, and

(b) to use resources efficiently and effectively.

(2) In subsection (1) “concern for the public interest” includes concern for the need to adhere to the principles of accountability and transparency in government and public affairs.

1.9 As a statement of principles, Section 10 is not sufficiently comprehensive to allow it to fulfil the overarching function recommended by various bodies and envisaged by the department itself. For example, it refers to the duty of public officials to maintain “proper standards of integrity,” without setting out in broad terms what these are.

1.10 There are several examples of high-level public sector principles that could be drawn upon to enhance Section 10. Those in use in the UK, Australia and New South Wales are outlined below.

1.11 The UK’s Seven Principles of Public Life

In the UK the Seven Principles of Public Life, commonly known as the Nolan Principles, are the basis of the ethical standards expected of all of those supplying services to the public.⁴ The principles are:

³ GRECO, Fourth Evaluation Round, Corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation Report Ireland, 2014, page 15.

http://www.justice.ie/en/JELR/Greco%20Eval%20IV%20Rep%20_2014_%203E%20Final%20Ireland.pdf/Files/Greco%20Eval%20IV%20Rep%20_2014_%203E%20Final%20Ireland.pdf

⁴ <https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2>

1. **Selflessness:** Holders of public office should act solely in terms of the public interest.
2. **Integrity:** Holders of public office must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends. They must declare and resolve any interests and relationships.
3. **Objectivity:** Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.
4. **Accountability:** Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.
5. **Openness:** Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.
6. **Honesty:** Holders of public office should be truthful.
7. **Leadership:** Holders of public office should exhibit these principles in their own behaviour. They should actively promote and robustly support the principles and be willing to challenge poor behaviour wherever it occurs.

1.12 While the Seven Principles of Public Life are not statute-based, most public bodies have incorporated them into their Codes of Practice and other internal standards that can then be taken into account, for example in cases before the relevant Ombudsman.⁵

1.13 Australian Public Service Values

The Australian Public Service (APS) Values are contained in Section 10 of the Public Service Act 1999.⁶ They embody five principles of good public administration:

1. **Committed to service**

The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.

2. **Ethical**

The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

3. **Respectful**

The APS respects all people, including their rights and their heritage.

⁵ For example, the 2015 Ministerial Code:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468255/Final_draft_ministerial_code_no_AMENDS_14_Oct.pdf

⁶ Section 10 Public Service Act 1999 <https://www.legislation.gov.au/Search/Public%20Service%20Act%201999>

4. Accountable

The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility.

5. Impartial

The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.

1.14 New South Wales Ethical Framework for Government Sector

In New South Wales, Part 2 of the Government Sector Employment Act 2013 establishes a legal requirement for all government sector employees to act ethically and in the public interest.⁷ The statute's Ethical Framework for the Government Sector includes four core values and 18 principles that guide their implementation. These are:

1. Integrity

*Consider people equally without prejudice or favour.
Act professionally with honesty, consistency and impartiality.
Take responsibility for situations, showing leadership and courage.
Place the public interest over personal interest.*

2. Trust

*Appreciate difference and welcome learning from others.
Build relationships based on mutual respect.
Uphold the law, institutions of government and democratic principles.
Communicate intentions clearly and invite teamwork and collaboration.
Provide apolitical and non-partisan advice.*

3. Service

*Provide services fairly with a focus on customer needs.
Be flexible, innovative and reliable in service delivery.
Engage with the not-for-profit and business sectors to develop and implement service solutions.
Focus on quality while maximising service delivery.*

4. Accountability

*Recruit and promote employees on merit.
Take responsibility for decisions and actions.
Provide transparency to enable public scrutiny.
Observe standards for safety.
Be fiscally responsible and focus on efficient, effective and prudent use of resources.*

1.15 Based upon this Ethical Framework, the New South Wales Public Service Commission has developed a Code of Ethics and Conduct for NSW government sector employees.⁸ This Code identifies mandatory requirements and best practice conduct for all

⁷ Government Sector Employment Act 2013, part 2 <http://www.legislation.nsw.gov.au/#/view/act/2013/40/part2>

⁸ Available here: <http://www.psc.nsw.gov.au/employmentportal/ethics-conduct/behaving-ethically/behaving-ethically-guide/section-2/the-code-of-ethics-and-conduct-for-nsw-government-sector-employees>

government sector employees and heads of government sector agencies, all of which are consistent with the Ethical Framework set out in the Government Sector Employment Act 2013.

2. Complaints and sanctions for breaches of codes of conduct

Recommendation 2: The Bill should provide for complaints for alleged breaches of public sector codes of conduct, with appropriate administrative sanctions along the lines of the existing sanctions in the Bill for minor and non-minor breaches of its provisions, which are not offences. Outcomes of complaints of breaches of codes should be published.

- 2.1 Codes of conduct play a vital role in encouraging the highest standards of conduct and integrity among public officials. Codes serve a triple function: to specify behaviours that are expected or prohibited; to help public officials to meet the required standards; and to inform the public of the conduct it is entitled to expect of public officials.
- 2.2 The Bill provides for a public-sector wide model code of conduct to be issued, drawing upon both the rules and principles contained in the draft legislation. Section 30 (1) states that, *having regard to the provisions of Section 10 and the principles it contains, the Commissioner shall draw up and issue a model code of conduct for the guidance of public officials with regard to compliance with the provisions of this Act.* Each public body may itself issue one or more code of conduct in conformity with the model code.
- 2.3 Section 30 (4) and (5) states that public officials subject to a relevant code *shall have regard to and be guided by it* in the performance of their functions and that the codes will be *deemed to be included in the terms and conditions of employment, contract or other engagement* of a public official.
- 2.4 The Bill makes no provision for the Public Sector Standards Commissioner to receive complaints or impose sanctions for breaches of a code of conduct, unless that breach is in any case a contravention of the legislation. This approach appears to leave the question of monitoring / enforcement of the codes as an exclusive matter for the employer. This contrasts with the Bill's provisions in relation to its standards of integrity, which, under Section 33 (3) can in themselves be the subject of complaints. In overall terms, this leads to a somewhat anomalous situation, whereby the codes of conduct are rooted in the Bill's rules and principles, yet stand apart from the new ethics regime established by the Bill when it comes to monitoring and enforcement.
- 2.5 A more integrated approach would be to allow the Public Sector Standards Commissioner to receive complaints for alleged breaches of codes of conduct *per se*. Such complaints could be handled in the same way as complaints for contraventions of the Act, outlined in Sections 33 to 36 of the Bill. This would mean that, depending

on the severity of the breach, the Commissioner could dismiss the complaint, refer the matter to the public body, issue advice to the respondent, order a preliminary inquiry by a member of staff, or referring the matter to the Deputy Commissioner for investigation.

- 2.6 Section 35 (6) and Section 47 (5) of the Bill already empower the Commissioner to take certain actions following preliminary inquiries and investigations into complaints that amount to minor and non-minor breaches of its provisions, yet are not offences. In such circumstances, the Commissioner may provide confidential advice or general guidance to the person against whom a complaint was made, refer the complaint to their employer, or impose administrative sanctions including censure, warning, order to rectify, or recommended suspension or removal.
- 2.7 The outcome of inquiries/investigations into alleged breaches of a code of conduct should be published, together with the relevant evidence, including where complaints were not upheld. In this way, a case book of determinations by the Commissioner could develop over time. Such a case book could usefully provide guidance for public servants in relation to how the codes of conduct apply to real life situations.⁹ This would assist the Commission in its new training, education and guidance roles.

3. Responsibility for a model code of conduct

Recommendation 3: A model code of conduct provided for in the Bill should be drawn up by the Public Sector Standards Commissioner, following consultation with relevant stakeholders and consideration by the relevant Oireachtas committee. The code should be issued by the Minister by way of statutory instrument under the legislation. The model code should be reviewed by the Commissioner at five yearly intervals.

- 3.1 Under Section 30 (1) of the Bill, responsibility for drawing up and issuing a model code of conduct for the guidance of public officials, rests with the Public Sector Standards Commissioner.
- 3.2 While TASC agrees that the model code should be drawn up by the Commissioner, it would be more appropriate to have the Minister issue the code by way of statutory instrument under the legislation.
- 3.3 In drawing up the code, the Public Sector Standards Commission should carry out consultations with public bodies and the wider public, and also engage with the

⁹ For example, in the UK, the Parliamentary Commissioner for Standards publishes details of decisions where complaints of breaches of the House of Commons' code of conduct are 'not upheld', together with the relevant evidence. See: <http://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliamentary-commissioner-for-standards/complaints-and-investigations/allegations-the-commissioner-has-not-upheld/>

relevant Oireachtas committee.

- 3.4 Experience internationally shows that codes of conduct benefit from regular reviews to ensure that they are fit for purpose and can address new or emerging issues or problems. The Bill should include a provision for regular reviews of the model code by the Commissioner. Any amendments to the model code should be duly reflected in subsequent codes. Five yearly intervals would be a reasonable time frame for such reviews of the model code.

4. Sectoral and local codes of conduct

Recommendation 4: The Public Sector Standards Commissioner should draw up intermediate or sectoral level codes of conduct in conformity with the model code. The Bill should require all public bodies to issue their own code of, even if this is just to adopt the model code or an intermediate/sectoral code.

- 4.1 Under Section 30 of the Bill, all public officials must have regard to and be guided by the model code of conduct, or any local code/s that their employer may issue in conformity with the model code.
- 4.2 Given the diversity of the categories of public sector officials to whom the model code will apply, a more layered approach to the codes should be considered. The Bill should provide for a second, intermediate, tier of codes to be drawn up and issued by the Commissioner, in conformity with the model code.
- 4.3 These could be tailored either for the different categories of official contained in the Bill (A,B &C) or for different types of official, such as elected, unelected, Ministers, etc., and/or the needs of particular dedicated sectors such as health or education. For example, codes applicable to elected officials may contain guidance in relation to conduct in the chamber that are not applicable to unelected officials.
- 4.4 If such secondary or intermediate level codes were issued by the Commissioner, then each public body could identify the appropriate intermediate code and adopt it for its staff, having considered whether it requires any additional elaboration in order to cater for specific circumstances. In practice this would mean that, depending on the public body, the applicable code of conduct would either be the model code, a secondary level code, or a local elaboration of such a code.
- 4.5 Section 30 (2) of the Bill gives public bodies discretion in relation to issuing their own code/s of conduct in conformity with the model code. It states that each public body *may draw up and issue* one or more code of conduct. This could potentially lead to a

patchwork of codes. To avoid such a risk, the Bill should require every public body to issue its own applicable code of conduct, even if this is just to adopt the model code or an intermediate/sectoral code. Public bodies should be required to issue/adopt a code within a specified time after the issuance of a model code or intermediate/sectoral code.

- 4.6 All subsequent codes should incorporate such mandatory provisions of the model code as are relevant. They should also include any other provisions that are appropriate for the public body, provided these too are consistent with the model code.¹⁰

5. Commissioner approval for all local codes

Recommendation 5: All local codes issued by public bodies should be submitted to the Commissioner for prior approval.

- 5.1 Section 30 (3) of the Bill states that the Commissioner *may review a code of conduct* issued by a public body under Section 30 (2). If the Commissioner is of the opinion that the code is not in conformity with the model code, it can either give a direction to the public body requiring it to amend the code, or make recommendations to the public body for its amendment.
- 5.2 This approach is problematic on two grounds. Firstly, providing the Commissioner discretion over whether or not to review codes of conduct issued by public bodies may lead to inconsistencies across public bodies. Secondly, the dual approach to the Commissioner's powers following reviews of local codes – combining both binding directions and non-binding recommendations – may also lead to inconsistencies.
- 5.3 A more appropriate approach would be to mandate all public bodies which produce their own codes to submit these to the Commissioner for prior approval. This would ensure that that all local codes incorporate such mandatory provisions of the model code as are relevant.

6. Annual reports of the Public Sector Standards Commissioner

Recommendation 6: The Public Sector Standards Commissioner should furnish its annual reports and any special reports to the appropriate Oireachtas Committee for consideration, rather than to the Minister as provided for in the Bill.

¹⁰ See the Scottish Ethical Standards in Public Life Act <http://www.legislation.gov.uk/asp/2000/7/section/3>

- 6.1 Section 31 of the Bill states that the Commissioner’s annual activities report shall be furnished to the Minister, who shall lay copies of it before each House of the Oireachtas.
- 6.2 A more suitable arrangement, in keeping with the establishment, functions and independence of the Commissioner’s office as provided for in Section 26, would be to require the Commissioner to provide his or her annual report to the appropriate Oireachtas Committee for consideration and discussion.

7. Definition of ‘material interest’

Recommendation 7: The Bill’s definition of what is a “material interest” for the purposes of ad hoc declarations of interest should be amended in line with the recommendations of the Mahon Tribunal.

- 7.1 Section 12 of the Bill provides for *ad hoc* disclosure of interests by public officials at meetings of the Houses of the Oireachtas, local authorities and certain committees and boards, where the public official has *actual knowledge that he or she or a connected person has a material interest* in a relevant matter under discussion. Section 13 of the Bill further provides for ad hoc disclosures of interest where a public official has functions to perform.
- 7.2 Section 3 of the Bill defines what constitutes a material interest for a public official or connected person. It states that a material interest exists where the consequence or effect of a public official’s performance of a function or decision concerning that matter *may be either to confer on or withhold from the official or the connected person a significant benefit, or to impose on either of them a significant loss, liability, penalty, forfeiture, punishment or other disadvantage, without also conferring it on, withholding it from or imposing it on persons in general or a class of persons which is of significant size having regard to all the circumstances and of which the person or the connected person is a member.*
- 7.3 This definition of material interest appears to be modelled on Section 2 (3) of the Ethics in Public Office Act 1995, which the Mahon Tribunal described as flawed on several grounds.¹¹ Firstly, it does not cover *apparent* conflicts of interest – it refers to actions of decisions which “may” have the effect of conferring or withholding a benefit

¹¹ Mahon, Justice Alan, The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments 2012, pars 4.76-4.78, pages 2587-2588 http://www.planningtribunal.ie/images/sitecontent_1257.pdf

or imposing a liability, rather than those which could be “reasonably perceived” to do so.

- 7.4 Secondly, it means that the Bill’s ad hoc disclosure obligations apply only to interests that may confer or withhold *significant* benefits or impose *significant* losses, liabilities etc. This excludes those interests which, although not capable of giving rise to significant benefits or liabilities, are still such as to be sufficiently affected by a public official’s exercise of his or her functions as to be capable of influencing that exercise.¹²
- 7.5 Thirdly, the Bill does not oblige public officials to disclose interests enjoyed as a general class of persons. Mr Justice Alan Mahon observed that: “it is not at all evident that such interests are less likely to give rise to a conflict of interests than individual interests. Moreover, even if this is the case, requiring their disclosure still permits others to more accurately judge any contribution made or the reasons for any position taken by the public official making the disclosure. Are parliamentarians which belong to a class of large landowners say, or shareholders in oil, pharmaceutical or medical companies, any less disinterested when legislating in a manner that benefits these grounds than if they are acting to advance an individual private interest? The distinction may not seem too obvious to the public.”¹³
- 7.6 The Bill’s definition of “material interest” should be amended to take on board the recommendations of the Mahon Tribunal outlined here.

8. Publication of declarations of interest and liabilities

Recommendation 8: Declarations of interest which are required to be published should be made available in an open format on a single, searchable web portal maintained by the Public Sector Standards Commission. Category A officials should be required to disclose certain liabilities as public declarable interests.

- 8.1 Section 7 of the Bill lists declarable interests for all public officials. For Category A officials, Section 8 sets out private declarable interests which must be disclosed on a confidential basis to the Commissioner. This distinction aims to strike a balance between the need to ensure the control of conflicts of interest and the right to privacy. Liabilities are included as private declarable interests under Section 8.
- 8.2 Given that liabilities, such as loans or debts, pose particularly acute risks when it comes to conflicts of interest, a more proportional approach would be to require

¹² Ibid

¹³ Ibid

Category A officials to provide certain details of liabilities above a certain sum in their Section 7 declarable interests. Further details could be supplied in private declarations. In the OECD's generic law, parliamentarians must disclose liabilities, including the liabilities of a trust of which a Member or a related person is a beneficiary or a private company of which a Member or a related person is a shareholder.¹⁴

- 8.3 Declarations of interest to be published under the Bill should be made available in an open format on a single, searchable web portal maintained by the Public Sector Standards Commission. Easy public access to published declarations of interests in this way is likely to assist in the enforcement of the Bill's conflict of interest provisions. Specifically in relation to elected representatives, it may lead to increased information being provided by the general public regarding possible instances of non-compliance with those provisions.¹⁵
- 8.4 Private interest disclosures should be made available to investigative authorities, including in particular An Garda Síochána.

Acceptance and disclosure of gifts and other benefits

Recommendation 9: Certain of the Bill's provisions in relation to acceptance and disclosure of gifts and other benefits should be amended in keeping with the recommendations of the Mahon Tribunal and OECD guidelines.

- 9.1 The regulation of gifts and benefits pose particular challenges for policy-makers, particularly when it comes to the appearance of corruption or a conflict of interest, which are damaging in themselves.
- 9.2 As Mr Justice Alan Mahon has observed: "On the one hand, gifts are a normal part of social interaction and public officials may be the recipients of entirely legitimate gifts in both their private and public lives. On the other hand, bribes are frequently made under the guise of a gift. Moreover, whether or not that is their purpose, all gifts tend to engender a feeling of reciprocity on the part of the recipient which may also undermine the disinterested performance of his or her public office. Furthermore, even entirely legitimate gifts may easily give rise to an appearance of corruption."¹⁶

¹⁴ OECD, Managing Conflict of Interest in the Public Sector: A Toolkit, 2005, page 62
<https://www.oecd.org/gov/ethics/49107986.pdf>

¹⁵ Mahon, Justice Alan, The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments 2012, par page 2590

¹⁶ Mahon, Justice Alan, Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments, 2012, par 4.49, page 2581

- 9.3 In addition, as the OECD's Toolkit to Managing Conflict of Interest in the Public Sector points out, the value of a gift in itself is not the main policy issue in most cases. How to deal appropriately with the actual or presumed relationship between giver and receiver is what matters most. In that context, "gifts to public officials in their private capacity (as opposed to official gifts to the official's organisation), should raise the question of whether there is a relationship between the giver and the receiver which could constitute a serious risk to the integrity of the individual official, or to the organisation."¹⁷
- 9.4 In the light of such heightened risks, some of the Bill's provisions in relation to gifts, benefits, property and services are problematic. This submission focuses on four areas relating to gifts and benefits: the value of allowed gifts and their connectedness to public officials' functions; the gift disclosure provisions; and the provisions related to travel, accommodation, refreshment and ancillary facilities.

Value of allowed gifts and connectedness

- 9.5 Section 11 (3) and (4) prohibits a public official from accepting a gift above the value of €600, with the exception of gifts which are *unconnected with the performance of his or her functions*. This includes cumulative gifts from the same person which exceed €600 over a one year period. An official who receives a gift worth more than €600 is obliged, unless it is unconnected with the performance of his or her functions, to surrender or remit its value to the State or public body, and notify the Commissioner of this and other details within fourteen days. Section 32 of the Bill makes it an offence for a public official to retain and fail to remit a gift prohibited under Section 11.
- 9.6 The Bill does not place an upper limit on the value of gifts which may be accepted by any public official, where these are not connected with an official's functions. While the Bill does not define the term gift, Section 2 states that it does not include "a donation, or travel, accommodation, refreshment or ancillary facilities."
- 9.7 Section 11 (5) prohibits public officials from accepting or permitting the supply of property or a service for free where its commercial price is more than €600, or for less than the commercial price where this exceeds €600, except if this too is unconnected with the performance of his or her functions.
- 9.8 In terms of the value of gifts connected with officials' public functions that ought to be allowed, the Mahon Tribunal had this to say: "The Tribunal does not see any justification for permitting public officials to receive gifts/benefits which could materially influence the performance of their public office or indeed any gift/benefit connected with that office, with the exception of gifts or benefits of a very nominal amount."¹⁸

¹⁷ OECD, Managing Conflict of Interest in the Public Sector: A Toolkit, 2005, page 44
<https://www.oecd.org/gov/ethics/49107986.pdf>

¹⁸ Mahon, The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments 2012, page 2594

- 9.9 While the Tribunal did not put a figure on what it considered to be a nominal amount, it made its recommendations in the context of the existing disclosure thresholds for certain gifts/benefits above the value of €650. The existing Civil Service Code of Standards and Behaviour allows for the acceptance and retention of gifts of modest value, which it defines as “e.g. diaries, pens, etc.”¹⁹ while the existing codes of conduct for Senators and TDs state that members may accept “incidental gifts and customary hospitality”.²⁰
- 9.10 In addition, there are particular difficulties with the current wording of Section 11, as its prohibitions do not apply to those gifts/property or services that are *unconnected with the performance of an official’s functions*. In practical terms, it may prove difficult for public officials to determine with absolute certainty whether a gift is or is not connected with the performance their functions. Furthermore, this wording does not give due regard to the fact that the *appearance* that a gift is connected with the performance of an official’s functions – whether this is actually the case or not – is in itself something to be avoided.
- 9.11 A more robust formula would be to prohibit gifts, and the supply of property or services, above a nominal value, which *reasonably appear to be or are connected* with the performance of an official’s functions.
- 9.12 The Mahon Tribunal’s recommendation in relation to this issue was that: “Each public official be prohibited from accepting gifts/benefits which could materially influence that official’s performance of his or her public office, or which could reasonably be perceived as being connected to that office. An exception should be provided for gifts and benefits of nominal amounts provided in the course of and for the performance of the recipient’s official functions.”²¹
- 9.13 Accordingly, Section 11 should be revised to prohibit all public officials from accepting gifts, services or the supply of property above a nominal value to be determined, which is less than the Bill’s current upper limit of €600, where these could materially influence the performance of their functions, or which reasonably appear to be or are connected to the performance of their functions.

Disclosure of gifts

- 9.14 In relation to the disclosure of receipt of gifts, the Bill has separate regimes in relation to those that are connected to officials’ performance of their functions and those that are not.
- 9.15 Under Section 7 (6), all public officials must publicly declare gifts valued between €200 and €600 which are connected to or could reasonably be perceived to be connected to

¹⁹ Standards in Public Office Commission, Civil Service Code of Standards and Behaviour, 2004 p 16
<http://www.sipo.gov.ie/en/Codes-of-Conduct/Civil-Servants/Civil-Service-Code-of-Standards.pdf>

²⁰ Code of Conduct for Members of Dáil Éireann Other than Office Holders ,and Code of Conduct for Members of Seanad Éireann, 2002, section 8 (ii) <https://www.oireachtas.ie/viewdoc.asp?fn=/documents/press/codeofconduct.htm>

²¹ Mahon, The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments 2012, page 2594

the performance of their functions. Under Section 8, only Category A officials must in addition declare confidentially gifts valued over €200 that are not connected to their functions and are not given by a relative. All other public officials may accept gifts of unlimited value where they are unconnected to their functions without any obligation to declare these either publicly or confidentially.

- 9.16 Considering the risks that private gifts pose, a more proportional approach would be to require all public officials to publicly disclose the receipt of all gifts above a certain value which are not actually or apparently connected to the performance of their functions.
- 9.17 In relation to this issue, the Mahon Tribunal recommended that each public official should be required to periodically disclose “all gifts and benefits of more than a specified amount received by the person in the relevant period which reasonably appear to be unconnected with the person’s public office.”²²

Travel, accommodation, refreshment, ancillary facilities

- 9.18 In relation to travel, accommodation, refreshment or ancillary facilities, Section 7 provides that those valued above €600 must be declared, except where they are provided in the course of and for the performance of an official’s functions and paid for by their employer or another public or State body, or they are provided by a relative and do not influence the official in the performance of his or her functions. Under Section 8, Category A officials only must confidentially declare travel, accommodation, refreshment or ancillary facilities over the value of €600 where these are provided by a non-relative and are not connected with the performance of their functions.
- 9.19 This means that most all public officials may accept benefits such as hospitality, refreshments, travel and accommodation up to the value of €600 without having to declare them either publicly or privately. Furthermore, there is no upper limit on the value of such kinds of benefits that all public officials can accept, as there is with gifts.
- 9.20 Given the risks that non-routine benefits such as hospitality and entertainment etc. may pose in terms of actual, apparent and potential conflicts of interest, they should be further regulated in the Bill. In relation to travel, accommodation, meals and entertainment, the Mahon Tribunal said it considered that a public official “should be generally prohibited from accepting any benefit received from a non-public source which is in excess of a certain amount and which could reasonably appear to be connected to the exercise of his or her official functions. Moreover, a public official should be required to disclose all other benefits received which are in excess of a specified amount.”²³

²² Ibid, page 2575

²³ Ibid, page 2581

10. Post-term employment

Recommendation 10: The Bill's post-term employment provisions should apply to public officials while they are serving as officials and, in some cases, for a specified period afterwards. Senior public officials required to seek the consent of a new Outside Appointments Board before moving into the private sector should include Ministers and their Special Advisers, Secretaries General and Deputy Secretaries in government departments, and equivalent grades in the public sector.

- 10.1 In overall terms, there are many factors to consider in developing an effective legal framework to prevent and manage post public employment problems for different categories of public official. Ideally, the circumstances that could justify post-employment restrictions should be broadly the same for all public officials. The main distinctions in relation to different categories of public official should relate to the processes and decision-making required.
- 10.2 Section 59 of the Bill introduces measures to regulate post-public sector employment by public officials once they have ceased to be public officials. The processes outlined are based on the existing provisions of section 20 of the Civil Service Code of Standards and Behaviour.²⁴
- 10.3 For public officials, excluding TDs, Senators, MEPs and councillors, Section 59 (1) and (2) requires them to provide prior written notice within their administrative hierarchy, before they cease to be an official of their intention to engage with external businesses within 12 months of leaving the public service. Specifically, this obligation arises where an officials *intend to be engaged or connected* with businesses that they have or have had dealings with while a public official, or businesses which *will gain an advantage* over competitors if they engage with it.
- 10.4 For certain senior public officials specified in Section 59 (5), the Bill establishes a new external body, the Outside Appointments Board. Serving officials must seek the prior consent of the Board where they intend to accept an offer of an appointment or a consultancy engagement within 12 months of ceasing to be a public official. This duty applies where the nature and terms of the appointment or engagement *could reasonably lead to a conflict of interest* with the performance of their official duties before ceasing to be a public official.
- 10.5 In relation to the approach outlined in Section 59, several issues arise. Firstly, the post-employment rules apply only to serving public officials. This means that the day

²⁴ Standards in Public Office Commission, Civil Service Code of Standards and Behaviour, 2004, section 20, page 21 <http://www.sipo.gov.ie/en/Codes-of-Conduct/Civil-Servants/Civil-Service-Code-of-Standards.pdf>

after an official quits the public service, the obligation to notify his or her employer, or seek the consent of the Outside Appointments Board, immediately lapses. This fails to take into account the fact that the risks identified in the Bill may be ongoing for months after an official has formally quit public office.

- 10.6 In keeping with the Mahon Tribunal recommendations,²⁵ the Bill should stipulate that, for certain senior public officials at least, post-employment rules continue to apply for a specified period after the official has ceased to be a public official. Such an approach could mirror Section 22 of Regulation of Lobbying Act 2015, which states that a person who is or has been a designated public official under its provisions shall not engage in lobbying in certain circumstances during a particular period, except with the consent of the Standards in Public Office Commission.
- 10.7 Secondly, for public officials to whom the provisions of Section 59 (1) apply, the Bill imposes a duty to notify their employer of their intention to engage or connect with an external business. There are circumstances where a notification of intention in itself would not be sufficient and additional steps should be available to employers. For example, an employer could excuse a public official from duties that could pose a potential conflict of interest with their likely responsibilities with their future business. Alternatively, an exit interview may be appropriate to determine possible conflict of interest situations and identify remedies.²⁶
- 10.8 Finally, the Section 59 post-term restrictions do not apply to TDs, Senators, local authority members and MEPs. There is considerable logic to this approach, not least on the basis that periods in elected office can often be short-lived. At the same time, the GRECO evaluation team's fourth round evaluation report encouraged the Irish authorities to reflect on the possibility of strengthening post-employment rules/guidelines for members of parliament as appropriate.²⁷ The Bill could usefully make provision for the scope of the applicability of the post-term rules to be subject to periodic review, and to allow the Minister to amend the categories of public official that the rules apply to where necessary.
- 10.9 The categories of public officials required under Section 59 (5) to seek the consent of the Outside Appointments Board should clearly include Ministers and their Special Advisers, as well as Secretaries Generals and Deputy Secretaries in government departments, and equivalent grades in the public sector.

²⁵ Mahon, The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments 2012, page 2598

²⁶ OECD, Principles for managing post-public employment problems, in Post-Public Employment: Good Practices for Preventing Conflict of Interest, 2010 http://www.keepeek.com/Digital-Asset-Management/oecd/governance/post-public-employment/principles-for-managing-post-public-employment-problems_9789264056701-6-en#.V9qxCfkrIdU#page1

²⁷ GRECO, Fourth Evaluation Round, Corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation Report Ireland, 2014, page 5

http://www.justice.ie/en/JELR/Greco%20Eval%20IV%20Rep%20_2014_%203E%20Final%20Ireland.pdf/Files/Greco%20Eval%20IV%20Rep%20_2014_%203E%20Final%20Ireland.pdf

10.10 As currently worded, it is not clear whether the duties relating to public officials covered by Section 59 (1) also apply to those officials identified in Section 59 (5), to whom Subsection 6 applies.

11. Outside Appointments Board

Recommendation 11: The Outside Appointments Board should be an independent body which publishes decisions on individual applications by certain senior public officials on its website on a quarterly basis. Consideration should be given to including sanctions for violation of post-employment conditions.

- 11.1 Section 60 the Bill provides for the establishment of an Outside Appointments Board. Further detailed provisions should provide for its independence to be reflected in its composition and methods of appointment.
- 11.2 The OECD has noted that the absence of and ineffective measures for tracking compliance with post-employment decisions signals that a post-public employment system has “no teeth” or that public authorities are not clear about applying prohibitions or restrictions.²⁸ In order to avoid such a scenario, the Bill should include provisions for monitoring and compliance. Specifically, the Outside Appointments Board should be permitted to receive complaints against public officials who have failed to adhere to its conditions. Consideration should also be given to including clear and proportional sanctions for violations of post-employment conditions applied by the Outside Appointments Board.
- 11.3 The Outside Appointments Board should publish its decisions on individual applications by certain senior public officials on a quarterly basis on its website, in addition to publishing them in its Annual Report.²⁹ This transparency measure would facilitate public scrutiny and in itself enhance compliance by enabling the tracking of compliance with its decisions in specific cases.

Contact: Nuala Haughey, nhaughey@tasc.ie. Tel 01-6169050

²⁸ For further discussion and country examples, see OECD, Implementing the Post-Public Employment Principles: A good practice framework, in Post-Public Employment Good Practices for Preventing Conflict of Interest, 2010, pages 82-85 http://www.keepeek.com/Digital-Asset-Management/oecd/governance/post-public-employment/implementing-the-post-public-employment-principles-a-good-practice-framework_9789264056701-7-en#.V-llpvkrldU#page45

²⁹ See the UK’s Advisory Committee on Business Appointments <https://www.gov.uk/government/organisations/advisory-committee-on-business-appointments>