30 May 2013.

SUBMISSION ON GENERAL SCHEME OF THE REGULATION OF LOBBYING BILL 2013

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INTRODUCTION

1. This submission is provided to the Department of Public Expenditure and Reform to offer feedback on its published General Scheme of the Regulation of Lobbying Bill 2013[1], and also to the Oireachtas Joint Committee on Finance, Public Expenditure and Reform which will be subjecting the proposals to pre-legislative scrutiny.

2. It may be helpful if I briefly outline my career experience, as I approach the issue of lobbying regulation with the dual perspective of having been both a lobbyist and an academic researching lobbying. From 1991 to 1999, I was a public affairs consultant in Westminster, first at a small agency and then as a self-employed freelancer. Between 1999 and 2006, I was a lecturer in political lobbying and public affairs at the University of Ulster and course director of an MSc programme of the same title. I have recently established a consultancy – Conor McGrath Public Affairs – based in Dublin, and will shortly begin marketing my services primarily to organisations based in the UK and US. I should note that I have never yet lobbied on a professional basis in this jurisdiction. In the interests of full disclosure, I am or have been a member of a number of relevant professional associations:

- *Public Relations Institute of Ireland:* I was a member from 1999 to 2012 and served on the PRII National Council from 2000 to 2005, and on its smaller Executive Committee between 2002 and 2005. However, I allowed my membership to lapse in October 2012 precisely because of my profound disappointment at the attitude the PRII has adopted towards the government's proposals for lobbying regulation. A fuller statement of my views on this is contained in pp. 5-7 of the response I made in September 2012 to Phase II of the DPER consultation exercise.[2]
- *Chartered Institute of Public Relations:* I have been a full member since 1999, and a member of CIPR Public Affairs (formerly its Government Affairs Group) since 1991. As a requirement of my CIPR membership, since establishing my own consultancy I have also signed up to the register of lobbyists held by the UK Public Affairs Council.

[1] Department of Public Expenditure and Reform (2013) *General Scheme of the Regulation of Lobbying Bill 2013*. Available at http://per.gov.ie/wp-content/uploads/General-Scheme-of-the-Regulation-of-Lobbying-Bill.pdf.

[2] Conor McGrath Public Affairs (2012) *Lobbying Regulation: Response to Policy Proposals*. Available at http://per.gov.ie/wp-content/uploads/Conor-McGrath.pdf.

- *Northern Ireland Government Affairs Group:* I was (in 1999) the founder and first Chairman of this body, which acts as a forum in which local lobbyists could exchange professional experiences and serves as the representative body for the industry there.
- *European Centre for Public Affairs:* I was a member from 2005 to 2010 of the Management Board and of the Research & Publications Committee (and Secretary from 2005 to 2007 and Chairman from 2007 to 2008 of the latter).

3. I should stress that while my views on the regulation of lobbyists are certainly informed by my academic work, they are fundamentally rooted in the fact that as I prepare to become a lobbying practitioner again, I will myself be subject to whatever system of registration and regulation is ultimately enacted. I firmly believe that it is in my professional self-interest for regulation in Ireland to be as rigorous as possible.

4. I have written extensively on aspects of lobbying regulation in Ireland, the US, the UK, and the European Union:

- McGrath, C. (forthcoming) '"They Are Not My People": Barack Obama on Lobbying and Lobbyists', *Journal of Public Affairs*.
- McGrath, C. (2011) 'Lobbying in Ireland: A Reform Agenda', *Journal of Public Affairs*, 11(2), pp. 127-34.
- McGrath, C. (2010) 'Lobbying Regulation: An Irish Solution to a Universal Problem?', pp. 215-34 in Hogan, J., Donnelly, P.F, and O'Rourke, B.K. (eds.) *Irish Business and Society: Governing, Participating & Transforming in the 21st Century*. Dublin: Gill and Macmillan.
- McGrath, C. (2009) 'The Lobbyist with "Balls of Iron and a Spine of Steel": Why Ireland Needs Lobbying Reform', *Journal of Public Affairs*, 9(4), pp. 256-71.
- McGrath, C. (2009) 'Access, Influence and Accountability: Regulating Lobbying in the UK', pp. 53-123 in McGrath, C. (ed.) (2009) *Interest Groups and Lobbying in Europe*. Lewiston, NY: Edwin Mellen Press.
- McGrath, C. (2008) 'The Development and Regulation of Lobbying in the New Member States of the European Union', *Journal of Public Affairs*, 8(1/2), pp. 15-32.
- McGrath, C. (2007) 'Lobbying and the 2006 U.S. Midterm Elections', *Journal of Public Affairs*, 7(2), pp. 192-203.
- McGrath, C. (2006) 'Lobbying and Public Trust', pp. 73-80 in Spencer, T. and McGrath, C. (eds) *Challenge and Response: Essays on Public Affairs and Transparency*. Brussels: Landmarks.
- McGrath, C. (2005) 'Towards a Lobbying Profession: Developing the Industry's Reputation, Education and Representation', *Journal of Public Affairs*, 5(2), pp. 124-135.
- McGrath, C. (2005) *Lobbying in Washington, London, and Brussels: The Persuasive Communication of Political Issues*. Lewiston, NY: Edwin Mellen Press.

5. I should like at the outset to record my appreciation of the work undertaken to date by officials at the Department of Public Expenditure and Reform in preparing this General Scheme in such a thoughtful and thorough manner. While there are a number of specific issues as outlined below on which my personal preference would be for the final legislation enacted to be more rigorous and demanding, nonetheless in general I believe that DPER has produced an excellent package. The willingness of ministers and civil servants to bring forward these proposals stands in stark contrast to the attitude exhibited by the Cabinet Office in the UK which has not even yet managed to publish the full set of responses received to its own consultation of lobbying regulation which closed in April 2012, and on which no further progress has been made since. The measure was notably absent from the recent Queen's Speech setting out the UK government's legislative agenda for 2013-2014.

6. It is important to record here the fact that while this submission tends to concentrate on those particular detailed aspects of the government's General Scheme which I believe could usefully be amended in advance of legislation being introduced, my overall impressive is that this reform will prove hugely beneficial to the integrity and transparency of our policymaking system. The basic framework which the government proposes in its General Scheme is generally excellent.

PART I: GENERAL PROVISIONS

7. It is tremendously encouraging that the government proposes such robust definitions under Heads 2 and 4 of the General Scheme. In particular, the focus is on regulating 'lobbying' rather than regulating 'lobbyists', and on 'lobbying communications' rather than on 'attempts to influence', both of which emphases are appropriate in my view. The government's approach here is absolutely correct: the most crucial issue is to produce an explicit statement of what constitutes 'lobbying' – once that is established, then all those who undertake 'lobbying' on a professional basis can be regarded as 'lobbyists'.

8. Head 2 includes a definition of the public officials to be regarded as the 'lobbied'. Personally, I would suggest that this list could be strengthened. Although the list may be extended in the future to cover "such other persons or categories of persons as may be prescribed", I would argue that certain categories should be established at the outset in the legislation. An Information Note published by DPER states that initially the Minister intends

to designate as "senior civil and public servants" those holding Secretary General and Assistant Secretary grades or their equivalents.[3] I believe that lobbying communications directed at officials at lower levels, down perhaps to the Administrative Officer grade, should be covered by this legislation. In addition, the government's definition does not include officials employed by either House of the Oireachtas (as opposed to politicians' personal staff who are included), or the President and his/her officials, or members of the Council of State – all of whom are likely to become the focus of lobbying activity albeit perhaps on a more *ad hoc* basis than is true of those categories of people who are designated in Head 2 as public officials. Finally, my own preference would be for the professional staff of all registered political parties to also be regarded as public officials for the purposes of this legislation, given that lobbyists will legitimately seek to influence election manifestoes, for instance, which could then directly feed into Programmes for Government.

9. Head 2 goes on to define "grass-roots communication", which is in itself progressive as most nations which regulate direct lobbying neglect to cover this sort of indirect lobbying. I would personally suggest that the wording of this definition might be amended slightly. It currently means (in part) communication made "in an attempt to influence the designated public official or office holder to endorse a particular opinion". Firstly, the use here of the notion of 'influence' runs counter to the more general definition of lobbying provided in Head 4 of the General Scheme which states more straightforwardly that lobbying is "all communication … on specific policy, legislative matters or prospective decisions" with no mention made (rightly in my view) of 'attempts to influence'. Secondly, the current wording of Head 2 offers lobbying groups a clear loophole, in that they could potentially argue that particular grass-roots communications do not need to be registered as they were undertaken for purely educational or informative purposes rather than explicitly to influence. Thirdly, the concept of some public officials 'endorsing a particular opinion' may be problematic. If a Minister or TD makes a speech or votes in the Oireachtas, they can be clearly regarded as 'endorsing' a given policy. However, that is not necessarily true of a senior civil servant tendering private advice or briefing to a Minister. I would argue that the definition here would be improved if it read instead: "grass-roots communication means appeals to members of the public or members of a particular organisation through the mass media or by direct communication that seek to persuade members of the public to communicate directly with a

[3] Department of Public Expenditure and Reform (2013) *Regulation of Lobbying Legislation – Policy Proposals*. Available at http://per.gov.ie/wp-content/uploads/Summary-Policy-Proposals.pdf.

designated public official or office holder in respect of specific policy, legislative matters or prospective decisions." In other words, substituting 'in respect of policy, legislative matters or prospective decisions' for 'in an attempt to influence the designated public official or office holder to endorse a particular opinion' is more neutral, less ambiguous, and would tend to capture more lobbying communications.

10. I welcome the fact that Head 2 of the General Scheme includes a wide range of lobbying organisations – companies, industry and professional associations, representative groups, voluntary bodies, trade unions, chambers of commerce, charities and non-profit bodies. Comprehensive inclusion of the entire spectrum of the lobbying industry is crucial in the interest of equity and in the provision of a level playing field for all. Two specific queries arise on which it might be helpful for the government to provide clarification. Will all religious organisations fall under the scope of "a charitable or non-profit organisation, association, society or interest group"? Will all law firms be encompassed as "a company incorporated under the Companies Act 1963", and if so is it explicitly the case that the disclosure requirements of this legislation will take precedence over the client confidentiality clause of their own professional code of conduct? Since substantial lobbying appears anecdotally to emanate from these two sectors, it is important that their activities are covered by this legislation.

11. Head 2 of the General Scheme defines what is meant by "specific policy, legislative matters or prospective decisions". As the accompanying Information Note states, these are focused on "decisions at both administrative and ministerial level" and "on legislation". While the definitions which are given in Head 2 are appropriate in their own terms, I believe they should be extended to more explicitly include the non-legislative work of the Oireachtas. This could be achieved by adding new subparagraphs so that "specific policy, legislative matters or prospective decisions" would also encompass:

- "(vi) the development, introduction, amendment, passage or repeal of any resolution or statutory instrument which is to be or has been laid before either House of the Oireachtas.
- (vii) any parliamentary question or debate.
- (vii) the work of any committee in either House of the Oireachtas."

Furthermore, it may be helpful if the government could clarify that in existing subparagraph (i) "the development of … legislation" explicitly includes the introduction, passage or repeal of legislation; similar clarification that subparagraph (iv) includes the awarding of contracts and licenses would be useful. In line with my recommendation above regarding the inclusion of political parties, I would also like to see this definition extended to cover:

- "(viii) the rules, policies and positions of any political party."

12. In its definition of "specific policy, legislative matters or prospective decisions", Head 2 suggests that there is no need to register details of discussions held with policymakers regarding "implementation matters of a purely technical nature" within an already established policy framework. I entirely disagree with this proposition. Lobbyists seek legitimately to influence the ways in which policy is implemented, but they cannot reasonably argue that such activity does not constitute lobbying. How policy is implemented matters significantly; often as much is at stake for an organisation in the implementation of policy as it is in the formulation of policy. And this exemption raises the possibility of a loophole which could be exploited by lobbyists if they are authorized to determine for themselves whether any communication was of "a purely technical nature."

13. Moving on to the definitions and exemptions contained in Head 4 of the General Scheme, I believe that the categories of people regarded as lobbyists in paragraph 1 could be strengthened. Subparagraph (i) is clear, and deals with lobbying by in-house employees (although see the following paragraph below for further thoughts on this topic). Subparagraph (ii) perhaps could be amended to include 'directors' as well as 'officeholders', unless existing legislation already specifies that directors are regarded as officeholders. This clause does raise the question of what is meant in legal terms by "a purely voluntary capacity", and clarification here may be helpful. Personally, I am unconvinced by the government's decision here to require registration by "an officeholder of a body at national level" rather than simply by 'an officeholder of a body' given that significant volumes of lobbying may be directed at policymakers from those people who hold local or regional office in an organisation. Further, while this clause would capture lobbying by a national officeholder "including those in a purely voluntary capacity", it excludes such lobbying emanating from groups "with no remunerated officers or employees" even though Head 2 has already specified that 'lobbyist' is defined as including representatives of voluntary organisations. Whether or not a voluntary organisation has paid employees seems to me to be immaterial when considering whether

their lobbying communications must be registered, since that lobbying is undertaken not on the person's own behalf but on behalf of the voluntary organisation itself. Finally here, subparagraph (iii) of paragraph 1 deals with commercial consultants who receive "fees or remuneration from a third party". This phrasing will allow the non-registration of any work carried out on a *pro bono* basis, and introduces the possibility of a significant loophole whereby a consultant could charge a client an excessive fee for some non-lobbying work and undertake their lobbying work without charge. Personally, I believe that all professional lobbying should be registered, although perhaps the register could allow lobbyists to indicate specifically which work was performed *pro bono*.

14. As noted above, subparagraph 4(1)(i) deals with lobbying by in-house employees. It is important, in my view, that the legislation recognises that not all in-house lobbying is undertaken by dedicated lobbyists. As currently written, this subparagraph in fact does appear to mean that all lobbying by all employees of an organisation must be registered. It might be useful for the government to clarify that this is indeed the intention. For instance, a corporate CEO may typically spend only a few days a year lobbying policymakers, but such interactions can be very significant. The opportunity exists in this legislation for Ireland to implement a truly original element of lobbying regulation. If subparagraph 4(1)(i) does not already have this effect, I would urge the government to amend it so as to ensure that any organisation which is obliged to register its lobbying activities must record all such contacts between the organisation and policymakers. Tim Hancock (Campaigns Director of Amnesty International) has argued that: "Transparency matters and it matters to understand not only who are lobbyists but it is really important to understand what the contacts are between the lobbyists and the officials or the MPs, but that also means at what level. One thing that is important to understand is the difference and frequency between the contact that Amnesty International has with the Foreign Office and a company like British Aerospace and at what level those contacts are taking place. I am not necessarily saying those contacts are right or wrong but they should be visible."[4] If anyone in an organisation meets the definition of a lobbyist, then all lobbying undertaken by everyone in that organisation ought to be recorded. In practice, this could be done quite simply, in either of two ways: (1) every individual who has at least one lobbying contact or communication must file a return to the lobbying register;

[4] Public Administration Select Committee (2009) *Lobbying: Access and Influence in Whitehall – Volume II Oral and Written Evidence*, HC 36-II, p. 106. Available at http://www.publications.parliament.uk/pa/cm200809/cmselect/cmpubadm/36/36ii.pdf.

or (2) for those groups which register multiple lobbyists, one would be designated as the primary respondent (and naturally if an organisation only registers one lobbyist then he or she is by default the primary respondent) who has the responsibility of ensuring that all contacts between non-registered employees and policymakers are recorded in the register. This measure would at a stroke avoid the series of difficulties which have beset President Obama's lobbying reforms – as the activities of registered lobbyists are increasingly restricted, organisations simply circumvent the restrictions by using unregistered lobbyists and thus reducing the overall amount of transparency and accountability which the system is meant to provide.[5]

15. Head 4 of the General Scheme makes the point that all lobbying regulation in other jurisdictions provides for exemptions from the requirement to register. It is also true, however, that the list of exemptions contained in paragraph 3 here is unusually extensive. The diplomatic exemptions in subparagraphs (i) and (ii) are standard and noncontroversial. Subparagraph (iv) is most welcome, ensuring as it does that this legislation will in no way affect the ordinary right of a citizen to lobby government on his/her own non-commercial behalf. Similarly subparagraph (vi) is useful as regulating employment negotiations do not fall within the objectives of this legislation.

16. Other exemptions, though, are more open to question, in my view. Subparagraph 3(iii) exempts information provided to policymakers at their explicit request which is "strictly factual" in nature, the implication being that this material is offered with no intent to influence policy. Personally, I would reject this claim out of hand. Virtually no information in the policymaking arena is not capable of being used to advocate for a particular policy decision. To take a straightforward example, the number of people who die each year on Ireland's roads is in itself an objective measure of fact. However, the number of lobbying communications which provide that information and only that information are relatively few. Most lobbyists in that area would provide the number and draw from it a subjective opinion as to whether the level of fatalities could be attributed to poor design and manufacturing by car companies, speed limits set too high, dangerous road construction, drink driving, excessive speeds by young male drivers, inadequate roadside signage or lighting, inadequate car safety inspections, or any one of a host of other contributory factors – each of which

[5] McGrath, C. (forthcoming) '"They Are Not My People": Barack Obama on Lobbying and Lobbyists', *Journal of Public Affairs*.

would, if accepted by policymakers, point towards a different public policy solution. It may be possible for the register to allow lobbyists to indicate in their entries those contacts which were initiated by policymakers, but I certainly do not believe that such contacts ought to be entirely excluded. Granting to lobbyists the ability to decide for themselves that any communication is "strictly factual" creates a loophole which will be gradually and surreptitiously widened over time. The Information Note published by DPER suggests that this is an area in which additional transparency could be achieved in the future through secondary legislation, but simply dropping the exemption from the Bill would remove that need.

17. Subparagraph 3(vii) would exempt the registration of communication "which could cause a threat to the life or safety of a person" is doubtless well-intentioned but nonetheless problematic. In the first place, who is authorised to make this judgement – the lobbyist, or the registrar? It may be that truly exceptional circumstances would occasionally arise, but the registration system should be designed around more standard circumstances. One obvious option, for instance, may be that the information would have to be disclosed to the lobbying registrar but publication in the register could be delayed for a set period of time at the discretion of the registrar. Subparagraph (ix) would allow internal policymaking discussions within government to continue to be conducted in private, but it does raise one significant query. As currently written, this clause seems to permit TDs, Senators or councillors who also engage in private employment as lobbying consultants to avoid registering their communications. Personally, I believe it should be written more tightly by specifying that this exemption applies solely to those contacts they have in the normal course of their role as a public representative but not to any contact they make with public officials in their capacity as a lobbyist.

18. Subparagraphs 3(viii) and 3(xi) both have the effect of permitting lobbying communications not to be registered if they take place in a wider context of transparency, such as a hearing of an Oireachtas committee or a forum established by a Minister. In my view any lobbying which arises from an interest organisation's participation in such settings is nonetheless lobbying; and in any event, such activity would not be remotely difficult for the organisation to register in the interests of maintaining as complete and accurate a register as possible.

19. I must record my view that there is one particularly significant weakness in the conceptualisation of lobbying in the government's General Scheme. Lobbying is defined in paragraph 1 of Head 4 as "all communication [by specified categories of people] on specific policy, legislative matters or prospective decisions with designated public officials or officeholders." However, it is crucial in my view that 'communication' does not only mean direct contact between a lobbyist and a policymaker but extends more broadly to encompass the whole range of preparatory work which all lobbyists undertake prior to actual direct communication. One of the clichés of lobbying – but no less valid for that – is that every hour of direct contact first requires 10 hours of background research. For instance, the UK Public Affairs Council's definition of public affairs states that it includes the provision of "lobbying or advice on lobbying" and "services with intent to assist lobbying, including the provision of monitoring, public affairs and programme support, strategic communications advice, profile raising, decision-making analyses and perception auditing services".[6] The government's proposed legislation would be significantly strengthened if its scope was widened such that this type of activity was captured by the definition of 'lobbying'. In the Irish context, the preamble to the Public Relations Institute of Ireland's Code of Professional Practice for Public Affairs & Lobbying states that "public affairs practice" is taken to mean "all activity associated with representing the interests of a client or employer in relation to any matter of public policy" including the provision of information and "professional advice", and the "making of representations, or the advocacy of a point of view, to any persons or institutions".[7] Thus, Irish lobbyists themselves recognise that lobbying involves more than simply direct contact with policymakers, and that it does encompass information gathering and strategic counsel. Indeed, it is anomalous that subparagraph 4(1) of the General Scheme is currently written so that the work involved in the "management or direction" of direct lobbying communications does not need to be disclosed, but that one specific type of such work is singled out – the directing or stimulation of a grassroots lobbying campaign. If the "management or direction" of indirect grass-roots lobbying is sufficiently significant as to require disclosure, then so too is the "management or direction" of the more common day-to-day work of direct lobbying communications.

[6] UK Public Affairs Council (no date) 'Lobbying Definition'. Available at http://www.publicaffairscouncil.org.uk/en/resources/lobbying-definition.cfm.

[7] PRII (2003) *Code of Professional Practice for Public Affairs & Lobbying*. Available at http://www.prii.ie/show_content.aspx?idcategory=1&idsubcategory=1.

20. Given that most consultants rightly regard their role as being to advise clients on how to contact policymakers themselves, I do fear that this omission from the government's conceptualisation of lobbying in the General Scheme might conceivably result in all in-house lobbyists being fully registered but many consultants being able to avoid registration by simply foregoing the relatively small proportion of the work which involves direct representation with policymakers. Something similiar has already become an issue in the US, against a context in which registered lobbyists are increasingly criticised and restricted in their activities to the extent that many seek to avoid registering For instance, a new business model has been developed which is described as a "non-lobbying entity" – K Street Research is a firm which undertakes the research and preparatory work which lobbyists traditionally need to do themselves to inform their lobbying communications; by contracting that work to K Street Research, lobbyists can thus ensure that they spend less than 20% of their time lobbying for a client and so are able to avoid registering.[8] Lobbyists here wishing to escape registration could under the terms of the government's General Scheme ensure that all direct communication with policymakers came from their clients so that an entire lobbying consultancy would not be obliged to register. I urge the government most strongly to reconsider this issue, and to amend its General Scheme so that both direct communication and the full range of strategic advice services provided by lobbyists would have to be registered. A lobbying register which did not fully encompass lobbying consultants would be a most peculiar document without international precedence. I believe that this issue could be avoided by amending paragraph 1 of Head 4 of the General Scheme through the insertion of a new clause:

- (iv) the provision to a third party or employer of services intended to assist communication with a public official – including research, monitoring, political intelligence, programme support, strategic advice and profile raising.

21. Finally so far as Part I of the General Scheme is concerned, Head 6 makes clear that the cost of a lobbying register is to be borne by public funds. The accompanying Regulatory Impact Analysis published by the Department of Public Expenditure and Reform states (p. 11) that it is anticipated that the system will involve start-up costs of €300,000 and annual

[8] Delaney, A. (2010). Lobbying's new frontier: "Not lobbying." *Huffington Post*, January 6. Available at http://www.huffingtonpost.com/2010/01/06/lobbyings-new-frontier-no_n_411639.html.

ongoing costs of €400,000.[9] My strong belief is that this is part of the price of an open and vibrant democracy and DPER should not shy away from making the case for public investment. Equally, though, it is appropriate that lobbyists themselves contribute to the cost of the register, through an annual registration fee of perhaps €200-300 per registrant. One of the significant costs will be the creation of an easily searchable database so that all citizens have access to the information, which requires a reliable IT platform. One of the lessons in the evolution of the current register of the UK Public Affairs Council is surely that this is not something which can be done cheaply if it is to function properly. The government will need to invest significant resources to get such a system established, but we will all derive benefit from having an effective register.

PART II: REGISTER OF LOBBYISTS

22. Part II of the government's General Scheme outlines the mechanics of how the lobbying register will operate. Head 7 ensures that it will be accessible free of charge on the Internet, and leaves it to the registrar to determine how the register shall be organised. In this regard, I endorse the comments made by Rob McKinnon of Who's Lobbying in his written evidence to the House of Commons Political and Constitutional Reform Select Committee inquiry regarding the need for a register to be fully searchable and for lobbying organisations to be clearly identified in it.[10] The register must be updated "a minimum of three times a year" according to Head 8 – in my view, this is the very least we ought to expect of lobbyists, and it would be preferable if the system allowed them to file returns more regularly than this if they wish to do so. Indeed, the anecdotal experience of lobbyists in other regulated jurisdictions is that registration is a relatively straightforward matter which is simplest and least time-consuming when it is done more regularly.

23. Head 9 sets out (in paragraph 1) the categories of information which will initially be registered. Most are straightforward and appropriate. In this regard, the government's proposals certainly meet the test suggested by the UK House of Commons Public Administration Select Committee which concluded (p. 41) that, "If sensibly framed,

[9] Department of Public Expenditure and Reform (2013) *Regulatory Impact Analysis in Relation to the Regulation of Lobbying Bill 2013*. Available at http://per.gov.ie/wp-content/uploads/Lobbying-Regulatory-Impact-Analysis.pdf.

[10] Political and Constitutional Reform Select Committee (2012) *Introducing a Statutory Register of Lobbyists: Written Evidence*, pp. 107-113. Available at http://www.publications.parliament.uk/pa/cm201012/cmselect/cmpolcon/writev/1809/1809.pdf.

regulation would simply require those involved in the process of lobbying to provide information which should already be in their hands."[11] Most lobbying organisations presumably already hold the records of their lobbying activities in the normal course of their internal operation and accounting. It is likely that the time involved in preparing this information in whatever form would be specified by the lobbying registrar would not be onerous – and certainly the benefits to wider accountability and transparency disproportionately outweigh the costs to each lobbying organisation. Subparagraph (viii) would require lobbyists to declare if they have "access rights" to Leinster House or government offices. I would suggest that the legislation ought to establish a rule that any current or former public office holder who also works as a lobbyist must have any privileged access to the institutions of government rescinded for the duration of the time in which they are registered as a lobbyist. According to subparagraph (ix), registration will include "summary information to determine the type, nature and extent of lobbying activity/communication techniques undertaken." While this information would certainly be useful and relevant, it does leave open at this stage the question of what constitutes an adequate summary. One suggestion offered by ASH Ireland, in its submission to Phase I of DPER's consultation exercise, was that lobbyists ought to be obliged to "provide research and/or specific justification for courses of action they wish the government to take".[12]

24. Paragraph 2 of Head 9 then suggests that additional information may be required to be disclosed in the future, but most of the points itemised here appear to be similar or identical to those already specified in paragraph 1. I would urge the government to amend this paragraph by adding a new clause which would leave open the possibility that at some point in the future some financial disclosure may be required. In my view, the material to be initially disclosed under paragraph 9(1) should at minimum include details of any financial or other material contribution given by the lobbyist to a policymaker or political party, and details of any public funding received by the organisation being lobbied on behalf of. At a later stage, if paragraph 9(2) was amended now, financial disclosure regarding lobbying operations ought to be considered. For a registration scheme to operate with no reference whatever to financial issues ensures that critics will continue to be dissatisfied with the extent

[11] Public Administration Select Committee (2009) *Lobbying: Access and Influence in Whitehall – Volume I Report*. Available at http://www.publications.parliament.uk/pa/cm200809/cmselect/cmpubadm/36/36i.pdf.
[12] ASH Ireland (2012) 'Submission from ASH Ireland to the Dept of Public Expenditure and Reform Regarding the Regulation of Lobbyists'. Available at http://per.gov.ie/wp-content/uploads/Action-on-Smoking-and-Health.pdf.

of transparency and accountability it provides. More importantly, though, the absence of any financial information may make it more difficult for the wider public to have confidence in the regulatory framework. Unhelpful, and frankly inaccurate, myths about lobbying can develop when what appears to most people to be relevant information is not available. A total lack of financial disclosure could therefore hinder the industry in the future as it seeks to engage more positively with public opinion and to build a reputation for openness and accountability. I therefore suggest that, after the new system has been introduced and given a chance to bed down, all registered lobbyists should be required to provide good-faith estimates (perhaps to the nearest €20,000) of either lobbying income or lobbying expenditure – with expenditure defined as meaning only direct costs (such as salaries, expenses, events, materials) and not including more indirect costs (such as the proportion of an organisation's office rent which is attributed to their lobbying staff).

25. There are indeed a wide range of subjects which will not initially be disclosed but which would provide more complete disclosure. One topic, for instance, which is gaining increasing prominence in the US relates to disclosure of whether the lobbyist is a close family member (spouse, parent, child, sibling) of any policymaker. In addition, it would be sensible to include in paragraph 9(1) of Head 9 some phrase such as 'any other matters as may be prescribed by the registrar for the purposes of enhancing transparency and accountability in the policymaking process', so that the capacity for the system to evolve over time is built into the law. Other items of information which could usefully be included in any list of the material to be disclosed include: a summary of the lobbyist's employment history; listing any trade associations, professional bodies or advocacy coalitions through which the organisation undertakes any of its lobbying activities; a summary of the lobbyist's position on the policy item which was the subject of the lobbying; a summary of the research and advice provided by a lobbying consultant to his or her client; details of any expenditure by lobbyists on secondary bodies or individuals; copies of all submissions made to policymakers; and a record of all meetings and correspondence between lobbyists and policymakers. Ideally, lobbyists would have the opportunity to include in their filings copies of the actual documents used when communicating with policymakers. One interesting proposal in the House of Commons Public Administration Select Committee report was that a register should go beyond providing the bare details of contacts between lobbyists and policymakers, by using "diary records and minutes of meetings" so that the public can "see what contacts are taking place, and to reach a reasonably informed judgement as to whether decision makers

are receiving a balanced perspective from those they are meeting".[13] Integrating on a single database lobbyists' disclosure with material of this nature provided by policymakers would go a long way towards meeting the OECD principle that a regulator should develop mechanisms by which to verify entries on the register.

PART III: THE REGISTRAR

26. This section of the government's General Scheme is relatively straightforward as to the appointment, functions, responsibilities and powers of the lobbying registrar. Crucially, it enshrines the principle that the registrar must be independent of government. It would be helpful if the government clarified the role of both Houses of the Oireachtas in recommending to the Minister who should be appointed as registrar (Head 14). While subparagraph 2(b) of Head 15 entitles the registrar to refuse to accept any return which "contains information not required to be supplied under this Act", it would be preferable if this power was exercised infrequently as the registrar ought not, in my view, to systematically discourage lobbyists from choosing to be more transparent than they are obliged to be.

27. I welcome the extent of structured review which is envisaged. Introducing, and developing, a wholly new system of lobbying registration and regulation is not a task which can be done in a single step on a given date. The registrar will issue update reports every 6 months for the first two years, in addition to an annual report. He or she is given an appropriate range of powers to conduct investigations – and importantly, is authorised not simply to investigate complaints made but also to instigate investigations even where no complaint has been lodged. The General Scheme envisages a suitable range of offences, from the "minor and inadvertent" to serious criminality, and proposes an equally broad range of procedures and penalties which would apply. However, more troublingly, the Information Note published by DPER to accompany the General Scheme states (p. 5) that the registrar's powers of investigation and the imposition of sanctions "will not come into force until a review of the implementation of the Act by the Minister for Public Expenditure and Reform has been carried out one year after the commencement of the proposed legislation." None of the Heads contained in the General Scheme itself appear to specify this period of delay or the

[13] Public Administration Select Committee (2009) *Lobbying: Access and Influence in Whitehall – Volume I Report*, p.54. Available at http://www.publications.parliament.uk/pa/cm200809/cmselect/cmpubadm/36/36i.pdf.

rationale for it. I would suggest that this point needs to be clarified by the government as a matter of priority.

28. Head 18 sets out the formal process which is to be undergone before the registrar can impose administrative penalties for non-compliance with the legislation or regulations. I believe that this Head would be greatly improved if a new paragraph was added, setting out an automatic financial penalty (of perhaps €50 for each day of non-compliance) in the event of a lobbyist either filing their return late or filing an incomplete return. Such a provision may be useful to the office of the registrar in helping to avoid undue burdens created by relatively minor breaches. However, in order to ensure that such a new provision only applied to minor breaches, it would also be necessary to amend paragraph 5 of Head 20, so that once a set period of time had elapsed without the minor breach being rectified it could still be raised to the level of a more serious offence attracting a more severe penalty.

29. It will be an offence, according to Head 20, for a lobbyist to provide "false or misleading information". However, it is unclear whether that offence occurs in respect of information which is included in returns made to the lobbying register, or of information given by the lobbyist to policymakers in the course of their lobbying activities, or both. It may be helpful if the government could clarify precisely what is intended here.

30. Under Head 21, the registrar is empowered to establish a statutory code of conduct for lobbyists. Such a code would be most welcome, and I wholeheartedly agree with the government's approach here which allows the registrar to develop a code of conduct which can be both rigorous and flexible. I would in addition emphasise the importance of any code of conduct being directed towards the general public as much as it is towards the lobbying industry. For instance, the code adopted by the Public Relations Institute of Ireland groups its first nine articles under the subheading 'Conduct towards the public', but in fact the public is largely excluded in practice from that code. Nothing in that code obliges any lobbyist to make any information at all available to the public, and thus it does nothing whatever to increase general transparency, accountability or public confidence in the lobbying process. Hence the PRII code, while well-intentioned, fails to enhance the public acceptability of lobbying or public trust in the policymaking process. I believe that while a register will be useful in terms of ensuring that uniform levels of transparency can be applied to all lobbyists across the whole industry, it is in no way a substitute for the enforcement of a uniform set of ethical

standards across the industry. This requires a more comprehensive and rigorous system of regulation than can be achieved through a register. By setting fundamental rules and guidelines concerning what lobbyists may legitimately do and what they are not permitted to do, in the form of a code of conduct, the registrar will be able to lay the foundations for a truly ethical and professional lobbying industry in Ireland. I have only one concern about the precise wording of Head 21 – subparagraph 1(e) outlines a number of areas which may be the subject of provisions in a code of conduct, including a lobbyist's responsibilities towards their clients or employers, public opinion, the media, other practitioners and the profession as a whole. All this is commendable, but that subparagraph currently starts by specifying that these areas could apply "in the case of lobbyists acting on behalf of clients" and thus it is conceivable that such obligations would fall only on consultants and not on in-house lobbyists. It may be helpful if the government could clarify whether it is actually intended that in-house lobbyists may not be covered by a code of conduct as regards these particular categories.

31. Ideally, the General Scheme should be amended through the insertion of a new clause which would grants wide-ranging power to the regulator to modify and update the definitions and rules concerning the practice of lobbying in as flexible a manner as possible. No regulatory model is perfect, and some lobbyists will certainly seek to identify any possible loopholes. The registrar needs to be able to close these quickly, and to learn from the evolving lessons of his or her counterparts in other jurisdictions. What the loopholes in Irish legislation will prove to be is almost impossible to predict, but there will inevitably be loopholes and the registrar must be in a position to respond to them. For instance, in 2010 lobbyists in Texas began to avoid lengthy queues to enter the state Capitol by applying for firearms permits so that they could then make use of a separate entrance.[14] That will not be an issue here, but the underlying point remains that some lobbyists are adept at finding new ways around existing rules.

32. Head 22 is in my view one of the most crucial elements of the whole legislation, dealing as it does with the duty of the registrar to promote both public awareness and compliance with the regime by lobbyists through communication, education and guidance

[14] Ward, M. (2010) 'Lobbyists Getting Gun Permits to Speed Access to Capitol', *Austin American-Statesman*, 1 June. Available at http://www.statesman.com/news/texas-politics/lobbyists-getting-gun-permits-to-speed-access-to-721535.html.

programmes. The registrar will need constantly to balance the necessary enforcement of sanctions for transgressions on the one hand, with on the other the key role of educating lobbyists about the reporting requirements so that they understand fully how to ensure they remain in compliance. A large element of the registrar's job – certainly in the first two years, and less intensively after that – ought to revolve around meeting lobbyists individually and in groups, providing training and workshops on the new system, issuing guidance notes on how lobbyists can comply with the system, ensuring that all professionals know when and what they must register. I believe firmly that the registrar ought to be someone from whom lobbyists will be comfortable in seeking advice and assistance. His or her role should not be adversarial but rather co-operative and collaborative whenever possible.

33. Head 26 establishes various organisational procedures relating to the office of the lobbying registrar. Although the General Scheme makes no mention of this, the DPER's accompanying Information Note states (p. 4) that for at least the first two years of the new system's existence, the registrar's office will be housed within the Standards in Public Office Commission. Certainly, there is some fit with that body's current responsibilities – and I believe it is very helpful that the legislation designates a specific post of Lobbying Registrar so that there will be a clearly identified individual within SIPO – but it remains crucial that the registrar and his or her staff operate with adequate autonomy and sufficiently flexibility to develop and implement a regulatory framework effectively.

34. Finally here, there is one particularly disappointing omission from Part III of the General Scheme. In its original Policy Proposals paper, the DPER stated (p. 74) that it "would intend to establish, in due course, an advisory group composed of relevant experts and key stakeholders who would be in a position to provide information and guidance that will assist in addressing key implementation challenges."[15] Personally, my preference would have been for such an advisory group to be established by the registrar to advise him or her, but nonetheless the concept was an excellent one. It may be useful at this point for the government to clarify why this idea appears to have been discarded.

[15] Department of Public Expenditure and Reform (2012) *Regulation of Lobbying Policy Proposals*. Available at http://per.gov.ie/wp-content/uploads/Regulation-of-Lobbying-Policy-Proposals-3.pdf.

PART IV: OTHER PROVISIONS

35. Part IV of the General Scheme addresses the issues of charitable tax exemption, and the revolving door. Head 27 makes it clear that charities must be treated in the same way as all other organisations for the purposes of lobbying registration and regulation, but that this in no way affects their existing tax exempt status. This is a useful and necessary clause, the intent of which I agree with entirely.

36. The revolving door – through which individuals move between public and private sector jobs – is a difficult issue in every democracy. Head 28 imposes a restriction of up to one year during which former public officials may not lobby their former colleagues (either in the public body where the new lobbyist once worked, or in whatever public body their former colleagues have since moved on to). I believe that a cooling-off period for former policymakers is crucial to protecting the integrity of the lobbying industry and the policymaking process alike. Personally, I would favour a two year period during which no former public servant (including TDs, Senators, Ministers, senior civil servants, ministerial advisers, and staff employed by the Houses of the Oireachtas or by TDs/Senators or by political parties) could work as a lobbyist. I believe that restriction should apply across all lobbying activities rather than simply in the specific area of the person's former public employment. Moreover, I believe that anyone who receives privileges by virtue of their former public employment (such as an access pass or parking rights) should be required to relinquish those for at least the duration of their lobbying career. In my view, former public officials should additionally be forbidden for life from lobbying on behalf of a foreign government. While some restriction on the revolving door is an improvement on the current situation, the government should recognise that its proposals in the General Scheme are the most minimal restriction possible. This provision is most unlikely to provide a permanent solution to the problem. Other nations with much more rigorous restrictions have found that it is still necessary to strengthen them over time. So, for instance, if a senior official in the Department of Public Expenditure and Reform was to leave that post and take up a lobbying job, under the government's proposals he or she would be permitted to lobby civil servants and Ministers in every other department and although he or she could not lobby DPER civil servants or Ministers personally, they could nonetheless direct or manage another lobbyist whose contact with DPER was not restricted.

COMPARATIVE ANALYSIS

37. One of the most striking features of the process which the Department of Public Expenditure and Reform has gone through in producing this General Scheme has been the thoroughness and openness of its consultation exercise. Equally commendable has been the extent to which DPER has been willing to analyse and learn from the experiences of other jurisdictions. In this regard, one of the most valuable resources we have for cross-national comparisons is the academic research published by Raj Chari, John Hogan, and Gary Murphy.[16] Their book draws on the work of the Center for Public Integrity to develop a quantitative ranking of every lobbying regulatory scheme then in existence around the world. I do, though, have one concern over the terminology Chari et al employ. They label various regulatory models as 'low, medium or high'. My own personal view is that no feature of so-called 'highly regulated' systems would be inappropriate or excessive in a new Irish system, but the distinctions between the range of models may perhaps be better described as 'weak, basic or meaningful' regulation. The way in which policy is described matters, and I would like to see officials and ministers proudly proclaiming the introduction of 'meaningful reform' rather than shying away from introducing what could be described critically as a 'highly regulated' system.

38. The methodology devised by the Centre for Public Integrity and later developed by Chari et al essentially poses 48 questions of each regulatory framework in operation and assigns points depending on the presence or absence of various criteria. The maximum possible score any regulatory system could achieve is 100, although no system anywhere in the world perfectly addressed every one of the CPI's questions.[17] When Chari et al used the CPI questions to analyse global lobbying regulations, they produced a range from Washington State in the US scoring 87 down to the European Parliament's then system scoring only 15. They found 26 jurisdictions which were described as high regulation (60-100 points), 40 described as medium regulation (30-59 points), and 4 described as low regulation (0-29 points). While it is not possible to be definitive on the basis of the text of the Genera Scheme rather than the text of this legislation once it is enacted, nonetheless I have applied the CPI questions to the government's proposals and produce an indicative score of 35 points.

[16] Chari, R., Hogan, J. and Murphy, G. (2010) *Regulating Lobbying: A Global Comparison*. Manchester: Manchester University Press.
[17] The CPI questions are available at http://www.publicintegrity.org/2003/05/15/5914/methodology.

At first glance, that suggests that this framework is relatively weak: 35 points out of a possible 100 would place Irish regulation at the low end of what Chari et al describe as medium regulation. Indeed, a score of 35 would mean that Ireland is placed 9th from the bottom of the CPI classification, as the 63rd of 71 schemes. However, I believe it is possible to be much more optimistic about the strength of the government's proposals. The CPI methodology was originally designed as a means by which to compare the regulatory systems in the 50 US states plus the US federal system. As such, fully 52 of the available 100 points are awarded for criteria relating to the disclosure and regulation of lobbying spending, which is a much less significant factor in most other jurisdictions including Ireland. Therefore, taking these questions out of the calculations reveals that the government's proposals on lobbying alone score 35 points out of an available 48 – a much more robust proportion.

CONCLUSION

39. The basic features of the lobbying regulation system which the government is proposing are essentially sound and sensible. While I have concentrated my comments above on suggesting potential amendments (generally relatively minor) which I believe would result in an even more rigorous framework, nonetheless my overall conclusion is that the DPER has managed to produce a system which will be meaningful and significant. I have only two serious reservations about the General Scheme published by DPER: 1) the absence of any trigger for registration based upon preparatory work and advice (discussed in paragraphs 19 and 20 above) could potentially result in many commercial and in-house lobbyists being able to avoid registering; and 2) the omission of any reference to financial information in the register, both initially and on the list of topics with which the register could be extended in the future (discussed in paragraph 24 above). I do believe that it would be helpful for these issues to be considered again before the government introduces its legislation. However, to conclude on a more positive note, it is important to highlight the ways in which this framework is beneficial: a statutory register covering the full spectrum of the lobbying industry; clear definitions of what lobbying involves, including grass-roots lobbying, and of which policymakers and what policy issues are involved; a register which is freely available on the Internet, with lobbyists filing their returns electronically; clear rules on the information which must be disclosed on the register; appropriate provision for delayed publication of information in specified circumstances only; the establishment of an Office of the Lobbying Registrar which shall be independent of both government and industry; clearly delineated

functions and responsibilities of the registrar; regular review of the system and reporting by both the registrar and the Minister; appropriate powers for the registrar in conducting investigations, and a range of potential offences with administrative and criminal penalties; the possible development of a statutory code of conduct; an awareness of the vital importance of the registrar promoting both public confidence in the system and compliance by lobbyists; recognition that charitable tax exemption is unaffected by this legislation; and the introduction of some restriction on future employment by former public officials.

40. That sort of level of registration and regulatory regime will in my view be entirely appropriate and in no way counter to any of the supposedly exceptional characteristics of Irish political culture. It will benefit all stakeholders[18]:

- *Policymakers* can more easily determine which groups have lobbied on a particular issue and are thus in a better position to assess whether an equitable range of views have been taken into consideration during the policy formulation process.
- *Lobbyists* currently spend a great deal of time simply trying to discover which of their competitors have been active on an issue, and would more easily be able to determine whether it was necessary to attempt to counteract such lobbying which would otherwise be conducted in secrecy.
- *The public* could be better reassured that policymaking was conducted in an open and legitimate manner free from any appearance of corruption.

41. One final point is important, I believe. Once the new system is in place, lobbyists are entitled to be treated by policymakers as valuable partners who represent significant and legitimate socio-economic interests which want to play a constructive role in the formulation and implement of public policy. One potential risk of any policy designed to boost transparency can be that it drives some activity underground. If lobbyists have a role to play through the register and code of conduct in helping to improve the public's confidence in the integrity of our policymaking process, so too do politicians and civil servants. Policymakers must not shy away from contact with lobbyists simply because that relationship will now be

[18] Cohen-Eliya, M. and Hammer, Y. (2011) "Nontransparent Lobbying as a Democratic Failure", *William & Mary Policy Review*, 2(2), 265-87.
Holman, C. and Luneburg, W. (2012) 'Lobbying and Transparency: A Comparative Analysis of Regulatory Reform', *Interest Groups & Advocacy*, 1(1), 75-104.

disclosed. Rather, they should embrace the valuable contribution which lobbyists can make to the effective formulation and implementation of public policy, and be willing to openly explain and defend their dealings with lobbyists. Frankly, there is an obligation on politicians to conduct their official business in an official manner. Ministers, for instance, should not hold substantive policy discussions with interest groups in the absence of civil servants. Tailored education programmes should be organised by the lobbying registrar for policymakers (and their staff) in order that public officials are entirely clear on the standards required of lobbyists, how their relationships with lobbyists should be conducted, and the mechanisms available to them should they wish to make a complaint about a lobbyist's behaviour. Indeed, a successful regulatory regime would be one which featured in the everyday life of policymakers, as they routinely checked the status of those wishing to lobby them and queried any communication they received from unregistered lobbyists. I would also urge the government to enhance the benefits to lobbyists of engagement through a series of relatively simple measures such as: daily emails alerting registered lobbyists to significant events and activities, consultation papers, etc; encouraging officials to be more receptive to meeting with lobbyists; providing easier availability to parliamentary papers in a timely fashion; encouraging government departments to hold briefing sessions for registered lobbyists about new policy issues; and so on. Those who meet their obligations under this legislation should be encouraged at every opportunity by policymakers and the lobbying registrar.