

REGULATION OF LOBBYING LEGISLATION - POLICY PROPOSALS

*Information
Note*

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Information Note

Regulation of Lobbying Legislation - Policy Proposals

1. Introduction:

Vibrant communication and dialogue and close interaction and engagement between government and citizens are central to a well-functioning democracy and are vital to support informed and evidence-based decision making. It helps ensure that the policy formulation and development process benefits from full information and that all individuals, groups and interests in society have an opportunity to contribute. It also supports the political process in finding a balance between competing interests, in fostering consensus and in helping to guide and educate public and political debate.

Interest groups, representative bodies, industry and civil society organisations, NGOs, charities and third party professional lobbyists all provide crucial input and feedback to the political and public administration systems through communication of the views and concerns of the public to Government. However, they also clearly seek to influence the policy and decision-making process in order to align it to their goals and objectives. These goals and objectives may reflect a private, commercial or sectional interest or what may be represented as a wider public interest or benefit.

By seeking to regulate those involved in this process the aim is to bring about significantly greater transparency so that the public at large will know who is seeking to influence whom in respect of what in relation to public policy.

The reports of the Mahon and Moriarty Tribunals have highlighted *inter alia* the risk that the legitimacy of the political system could be eroded by the corrosive impact of secrecy and undue influence. The regulation of lobbying is one of a suite of measures which the Government is taking to address, through an extensive programme of political and government reform, the serious concerns which have emerged in this area.

By regulating lobbying activity through registration and reporting requirements, the aim is to:-

- strengthen public confidence in politics and in the business of government;
- increase the accountability of decision makers; and
- subject public policy making, and those who seek to influence it, to greater openness, transparency and to the potential for appropriate independent scrutiny.

The value of regulation of lobbying in fostering a culture of integrity is supported by the Organisation for Co-operation and Development (OECD) which states that:-

“...a sound framework for transparency in lobbying is crucial to safeguard the public interest, promote a level playing field for business and avoid capture by vocal interest groups...”¹

Regulation would be expected to contribute to the further professionalisation of and increase the public understanding of lobbying. Regulation of lobbying renders politicians and government officials more accountable and in and of itself helps promote transparency. It is essential that the regulatory regime put in place must be balanced and fair to all parties and designed in a manner compatible with the constitutional framework and appropriately aligned with the positive elements of Ireland’s prevailing political culture. In this context, it is critical that the regulatory regime does not restrict the flow of information, opinions, perspectives or proposals feeding into policy making or legislation providing this process operates in an appropriately transparent manner.

2. Development of Proposals

In December 2011 the Department of Public Expenditure and Reform invited submissions from interested parties on key issues relating to options for the design, structure and implementation of an effective regulatory system for lobbying in Ireland. The consultation process was based on the agreed OECD Principles for Transparency and Integrity in Lobbying which were the subject of a Recommendation by the OECD Council in February 2010. The response to the consultation process was very positive and approximately sixty organisations and individuals submitted views to the Department with meetings taking place subsequently with a number of individuals and bodies who had made submissions on key issues. The main themes emerging from these submissions included:-

- (i) The need for a clear definition of lobbying and what exemptions should apply;
- (ii) The need to have regard to the rules relating to the tax-exemption for charitable organisations;
- (iii) The requirement for independent oversight and monitoring of any regulatory system;
- (iv) The preservation of normal constituent access to his or her political representatives;
- (v) The need for an easily accessible registration system with minimum bureaucracy in registering or updating; and
- (vi) Support for a statutory ‘cooling off’ period to address the ‘revolving door’ issue relating to movement between the public and the private sectors.

The Department commenced a review of international approaches to the regulation of lobbying at the beginning of 2012. Research was undertaken of lobbying regulation in Canada, USA, Australia, New Zealand and several European countries. The voluntary model in place in the European Union institutions were also analysed, as were the proposals for the introduction of a regulatory regime in the UK. This work was advised

¹ OECD January 2010. *Transparency and Integrity in Lobbying* p.1.

and informed by the work of three international experts on lobbying regulation² as well as comprehensive analysis and recommendations published by the OECD on lobbying regulation.

In July 2012 the Department published a policy paper entitled ‘Regulation of Lobbying Policy Proposals’. This paper set out the policy rationale for regulation of lobbying as well as an overview of the proposed policy framework and recommended options for further consideration on key features of the proposed policy regime. These include definitions, disclosure, exemptions, exclusions, format of the lobbying register, the lobbying Registrar, sanctions, code of conduct, registration fees, the ‘cooling-off’ period and review of the legislation. The paper was the subject of a seminar with large numbers of stakeholder interests and experts at Farnleigh House in July 2012.

This forum provided an opportunity to discuss these proposals and options for the proposed regulatory system and to debate issues that emerged from the consultation process.

A further short and focused consultation phase on lobbying then took place focusing on the issues raised at the seminar. Approximately 30 further responses were received including responses from several Government Departments and public bodies.

Full details of the consultation process including all the submissions received and the reports of meetings which took place with stakeholders can be found at <http://per.gov.ie/regulation-of-lobbyists/>

The Minister in preparing the details of his proposals has also had regard to five Private Members’ Bills published on the topic of regulation of lobbying since 1999, (four of these were introduced by the Labour Party and one was introduced by Fianna Fáil). The Department also reviewed the Fine Gael draft Lobbying Bill included in its “*New Politics*” document published in 2010.

3. Key Features of the Bill

Establishment of a statutory register (Head 7)

The General Scheme proposes the establishment of a statutory web-based register of lobbying activity.

Appointment of a Registrar (Heads 14 and 26)

A Registrar will be appointed to oversee the implementation of the register, to monitor compliance, to provide guidance and direction and, where necessary, to investigate and pursue breaches of legal requirements in due course. Given the current economic climate and the costs associated with the establishment of a new agency, the Minister proposes that the Standards in Public Office Commission (SIPO) act as the Registrar for an initial two-year period in light of the alignment of this area of activity with SIPO’s current functions.

² , Professor Gary Murphy (DCU), Professor Raj Chari (TCD) and Dr John Hogan (DIT)

The Minister is mindful also of work ongoing in his Department in relation to the development of a new ethics framework and the possibility of the establishment in due course of new or revised structures to manage the oversight of integrity obligations. The long-term appointment of a Registrar for Lobbying will be reviewed in light of developments on this wider agenda.

Role of the Registrar (Heads 14 to 26)

The focus of the Registrar in the initial period of the operation of the Act will be on education, guidance and information in relation to the operation of the registration scheme. While the Registrar will have (i) powers of investigation, (ii) power to ‘name and shame’ individuals and organisations who do not comply with registration requirements and (iii) offences provisions to address more significant breaches of statutory requirements, the provisions at (i), (ii) and (iii) above 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. This is considered necessary to facilitate the establishment and effective operation of the lobbying register on a co-operative basis.

A balanced and proportionate approach to registration requirements (Heads 7 to 13)

It is a priority for the Minister to ensure that the Bill does not impose a significant administrative burden on potential registrants. This was highlighted during the course of the consultation process as a concern. The General Scheme is framed with a view to ensuring ease of use and low compliance costs for all organisations interfacing with the register. For this reason, the legislation does not require registration of every contact with designated public office holders or public officials but rather focuses on the subject matter and purpose of the lobbying, the organisations/persons lobbied and the type and intensity of lobbying activity carried out. It would be expected that the information that needs to be provided for registration purposes would not significantly extend beyond the management information that the body conducting the lobbying would compile for both internal corporate governance and external reporting and communications.

Scope of the Bill (Head 2)

Designated Public Officials and Office Holders

The Minister proposes that the legislation will define the category of person lobbied as including:-

- (a) Ministers, Ministers of State;
- (b) TDs, Senators and members of their staff;
- (c) Members of Local Authorities;
- (d) Special Advisers;
- (e) Ombudsman and Comptroller and Auditor General; and
- (f) Senior Civil and Public Servants (as prescribed by the Minister).

The Minister will also be provided with a general power to prescribe other persons or categories of persons.

The Bill will apply, on commencement, to the persons in subparagraphs (a) to (e) above. In relation to subparagraph (f) above, it is intended that on commencement, the Bill will apply to Secretary General and Assistant Secretary grades in the Civil Service and to equivalent grades in Local Authorities. The Minister may by regulation extend the Act to other areas of the public service and to other grade levels, on a phased basis, in line with experience of implementation. The Minister proposes to continue to adopt a targeted and focused approach to the extension of the regulatory system to senior public servants in public bodies based on the authority and decision-making exercised by these public officials. It is essential to ensure that in extending the definition of the Designated Public Officials under the legislation over time, that this does not result in a huge volume of registrations in relation to contacts in respect of which the benefit or necessity for registration is not evident.

Specific policy, legislative matters or prospective decisions

The matters on which lobbying takes place are intended to be comprehensive and defined to include in overall terms, decisions at both administrative and ministerial level, on legislation, policy, rules and regulations for any scheme or public programme and the awarding of any grant, contribution or any financial benefit by a public body including communications prior to the commencement of any formal award process. Excluded from the scope of this definition are technical implementation matters within existing rules and regulations or a decision that is a matter of existing specific statutory entitlement.

Access by citizens to public representatives (Head 4)

An overarching principle of the policy approach that has guided the development of the proposed regulatory regime is the imperative that the introduction of registration requirements does not impede in any way whatsoever the normal interaction between citizens and political representatives. These communications are excluded under the Bill. The exemption focuses in particular on:-

- (i) individuals who are communicating with political representatives in relation to private or personal matters (other than in relation to land-rezoning or development), or
- (ii) micro-enterprises (with less than 10 employees) who are communicating in relation to the business affairs of that micro-enterprise (again other than in relation to land-rezoning or development).

Local community organisations composed entirely of volunteers are also excluded from the proposed registration requirements. This would also extend to local branch officeholders of national organisations providing they are not in receipt of fees and remuneration.

Exemptions and Delayed Publication (Head 4, 10 and 11)

Drawing on international precedent and significant issues raised in the course of extensive consultation a number of important exemptions from registration requirements are included

in the General Scheme. As highlighted above, the fundamental democratic right of individuals to engage with political representatives and the administrative system on their own behalf without being subject to regulatory rules other than in clearly defined circumstances is safeguarded.

Further exemptions relate, for example, to:-

- (i) contacts entirely conducted between public officials or arising in an international or diplomatic context;
- (ii) where a contact was initiated by the public official and relates to the provision of factual information, assessments or analysis required for policy development; or
- (iii) the activities of public service directed groups with private sector representatives with terms of reference relating to some broader public policy objective.

In each of the two latter cases these activities are expected to be made subject to additional transparency requirements under secondary legislation to ensure that they do not act as a conduit for what might be characterised as unregulated or ‘back-door’ lobbying lacking in transparency and not in keeping with the objectives of the legislation.

In addition, Head 10 provides for protection of sensitive information which could have a serious adverse effect on the financial interests of the State or on the ability of the Government to manage the economy through the issue of a Ministerial Certificate providing for delay in the publication of the information.

Head 11 provides for the Registrar to delay the publication of information where the publication could result in a material financial loss or gain to the person to whom the information relates or could seriously prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation, or could seriously prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates. The Registrar would be required to consider whether the public interest would on balance be better served by refusing to grant rather than granting the application.

Charitable Tax Exemption (Head 27)

Charities can avail of tax exemption once they meet certain criteria laid down by the Revenue Commissioners. Such organisations are permitted to engage in advocacy in pursuit of their charitable objectives where such matters are of public benefit. Concerns were expressed by a number of charitable organisations that registration on a register of lobbyists might endanger their charitable status if the Revenue Commissioners interpreted charitable bodies designation under the legislation as lobbyists as incompatible with the retention of their charitable status. The Department of Public Expenditure and Reform has engaged in consultation with the Office of the Revenue Commissioners and with the charity sector in relation to this matter and is satisfied that the approach outlined in Head 27 of the General Scheme will adequately address these concerns.

Review (Head 24)

The consultation process has demonstrated the complexity of the issues arising in relation to the introduction of regulation in this area for the first time. The Minister wishes to ensure that the correct balance is achieved between the need for maximum transparency in public policy making and the need to avoid unnecessary administrative burden on those sectors which interact with Government. The General Scheme therefore proposes review of the legislation 12 months after commencement in light of experience with implementation of the regulatory arrangements.

“Cooling-off” Period (Head 28)

The Minister is now proposing that the restriction should be focused and targeted on the specific conflict of interest expected to arise in a lobbying situation. Subsequent to the publication of the policy paper on the regulation of lobbying in July 2012, consideration has been given to three significant issues arising in this area:-

- (i) The risk that a blanket ban two year prohibition on taking up post-public employment might conflict with competing rights including in particular the right to earn a livelihood;
- (ii) The requirement for the proposed lobbying legislation to target the specific conflict of interest that potentially arises in relation to post-public employment lobbying activity rather than extending into non-lobbying related conflicts that are being examined as part of the proposed reform of the ethics legislation;
- (iii) The likely impact of a mandatory two year ban on the public service’s ability to recruit experts and specialists to meet specific and priority skills needs.

OECD guidance highlights the requirement for controls in this area:-

“The former employee may have privileged access to government officials. Tapping into a closed network of friends and colleagues built while in office, a government employee-turned lobbyist may well have access to power brokers not available to others. In some cases, these networks could involve prior obligations and favours.”

The proposed legislation requires designated public officials or office holders to apply to the Registrar for approval to lobby their former colleagues (e.g. principals, peers or subordinates) in the public body in which they previously worked (or in a further public body to which such colleagues have subsequently transferred) during a period of one year subsequent to having left the public service. This would allow the Registrar to permit, for example, the take up of employment but to impose restrictions in relation to engagement in certain activities rather than a blanket ban. This approach seeks to deliver on the policy objective of regulating this area while adopting a fair and proportionate approach on a case by case basis

It should also be noted that the ‘cooling-off’ period proposed is limited to one year rather than the two year period included in the Programme for Government and in the policy paper on lobbying regulation issued in the middle of last year. This revised approach reflects a review of the duration of similar provisions in other jurisdictions which

highlights that the introduction of a two-year restriction for a relatively wide body of public officials would fall into the upper-end of the international norms in this area (notwithstanding that there are significantly longer cooling-off periods in force in some jurisdictions). The one-year period also aligns with the current post-public employment restriction in place under the Civil Service Code of Standards and Behaviour.

4. Summary of the General Scheme

Part I - Preliminary and General

Head 1 sets out the short title of the Bill and establishes that the Bill will come into effect on such day or days as the Minister may appoint by Order. This would allow for the later commencement, for example, of provisions relating to powers of investigation, offences and penalties.

Head 2 defines certain terms used in the Bill.

Head 3 sets out the purpose of the Bill in order to provide a clear overall context for the regulation of lobbying.

Head 4 provides for the definition of lobbying and the exemptions to the regulatory requirements set out in the Bill. It defines the communications which constitute lobbying and those that are excluded. It provides that the Registrar can issue guidelines on indirect lobbying.

Head 5 provides for Regulations to be made by the Minister in relation to matters to be prescribed.

Head 6 establishes that any expenses incurred in the administration of this Bill would be paid out of monies provided by the Oireachtas.

Part II - Register of Lobbyists

Head 7 provides that the Registrar will establish an online register of lobbyists. The register will provide information about lobbying activity to the public via the internet.

Head 8 provides for returns to be filed. It establishes the number of returns per year and the final date of each return.

Head 9 provides for the form and content of the returns and allows for additional information in returns to be prescribed having regard to the need to balance the requirement for transparency with the need to avoid an undue burden on those engaged in lobbying activity and with the right to privacy.

Head 10 provides for the safeguarding of highly sensitive information which could have a serious adverse affect on the financial interests of the State or on the ability of the Government to manage the economy through the issue of a Ministerial Certificate providing for delay in the publication of the information.

Head 11 provides for the Registrar to delay the publication of information where the publication could result in a material financial loss or gain to the person to whom the

information relates or could seriously prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation, or could seriously prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates. The Registrar would be required to consider whether the public interest would on balance be better served by refusing to grant rather than by granting the application.

Head 12 provides for certification of both the filing date of the return and information provided in the return.

Head 13 provides for documents to be returned in electronic form.

Part III - The Registrar

Head 14 establishes the office of the Registrar and states that the holder of that office will have the title of Lobbying Registrar.

Head 15 provides for the Registrar to maintain the register and sets out the functions of the Registrar. It allows for returns to be removed where they do not meet the terms laid down in Head 8.

Head 16 provides for an annual report to be prepared by the Registrar in respect of the administration and operation of the regulatory system. It also provides for the Registrar to prepare 6 monthly reports on any implementation issues arising for the Minister for Public Expenditure and Reform and for the Finance, Public Expenditure and Reform Committee during the first 2 years of the Act.

Head 17 provides the Registrar with powers to inspect the records of lobbyists that are relevant to the purpose of the inspection. It allows for complaints to be made to the Registrar. Where the Registrar believes that non compliance with the legislation has occurred, the Registrar has the power to investigate to determine if such a breach has occurred.

Head 18 allows for non-financial administrative penalties to be imposed by the Registrar for breaches of the legislation other than minor or inadvertent breaches which have been corrected within the appropriate time limit by the lobbyist under Head 17. It also provides that the standard of proof for contraventions of this legislation is similar to that applying in civil proceedings in a court.

Head 19 establishes that a special report will be prepared for investigations carried out under Head 17 detailing the findings, reasons and the conclusions reached. It requires these reports to be placed before the Houses of the Oireachtas.

Head 20 provides for prosecution for serious offences under the legislation and the imposition of penalties for those offences.

Head 21 provides that the Registrar may develop a statutory code of conduct for lobbyists.

Head 22 provides that the Registrar shall have an explicit outreach and education mandate to raise awareness of the rationale for and requirements of this Bill for lobbyists, their clients and public office holders.

Head 23 provides for any document to be recorded on an electronic system. It also establishes that an understandable reproduction of an electronic copy of any document signed

and certified by the Registrar as being a true copy is admissible as evidence including for the purpose of a prosecution of an offence under this Bill unless it can be proven that it is not a true copy.

Head 24 provides for a regular review of the operation, implementation and effectiveness of the legislation.

Head 25 provides for the Registrar to confer the powers to carry out the duties of the Office on any person employed by the Registrar.

Head 26 sets out the terms and conditions of the Registrar. The initial appointment will be for a period of two years and each appointment thereafter will be for a period of five years.

Part IV - Other Provisions

Head 27 establishes that the registration of a charitable organisation in respect of lobbying activities on matters connected with the organisation's charitable purpose and where such matters are of public benefit shall not of itself affect the determination of the tax exemption status of charities.

Head 28 places restrictions on post-public employment. It provides for certain designated public officials within one year of having left the public service to apply to the Registrar for approval to lobby their former colleagues in the public body in which they previously worked (or in a further public body to which such colleagues have subsequently transferred). This approach allows the registrar to permit, for example, the take up of employment but to impose restrictions in relation to engagement in certain activities rather than a blanket ban.

Head 29 provides for an administrative appeal system against certain decisions of the Registrar in relation to delayed publication of certain information (Head 11), administrative penalties (Head 18) and restrictions on post-term employment (Head 28).

Head 30 clarifies the reference to the term "lobbyist" in certain other legislation.