

Submission

Department of Public Expenditure and Reform Regulatory System for Lobbying in Ireland

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With regard to the *OECD's ten principles for transparency and integrity in lobbying*, this submission will include:

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General observations

The government's commitment to political reform is welcome.

In February 1991, when in opposition, the current Minister introduced a private members *Ethics in Government and Public Office Bill*. It was defeated on the second stage by two votes. Brendan Howlin TD was accused of exaggerating the problem of gift-giving to politicians. The then Taoiseach said that any provisions governing members' private financial interests 'would run the risk of being in breach of the spirit – if not the letter – of the Constitution'. The Beef Tribunal, which investigated unorthodox lobbying and political donations, was established two weeks later.

Issues regarding lobbying and political donations overlap and complement one another. It is with regret therefore that the lobby legislation and the Electoral (Amendment) (Political Funding) Bill 2011 are not coordinated by the same Department but sponsored by the Department of the Environment, Community and Local Government and the Department of Public Expenditure and Reform. Both Departments have adopted two very different approaches to formulating these significant pieces of legislation.

The Department of Public Expenditure and Reform are to be commended for facilitating public consultation on the Bill. Why did the Department of the Environment, Community and Local Government not facilitate public consultation on the Electoral (Amendment) (Political Funding) Bill 2011? It is noted that the compliance report by the Group of State against Corruption (GRECO) with regard to Ireland's evaluation regulatory framework on political financing is marked 'confidential'.² The evaluation report was critical of Ireland's political financing regulatory framework, noting it was 'very fragmented . . . [and] far from ideal'.

Has the Department of the Environment, Community and Local Government forgone public consultation for expediency in order to meet the time-defined compliance requirements of GRECO?

The Ethics Bill, 1991 signalled the first serious attempt at introduction corruption legislation since the Prevention of Corruption Act, 1916. Public trust has been corrosively damaged by a series of corruption scandals in the 1990s and 2000s which were underlined by unorthodox political donations and lobbying. A focus on expediency, at the expense of wider public consultation and coordination with overlapping lobbying legislation, is short-sighted. This was precisely the mistake of the first wave of political reform.

² Third Evaluation Round (launched in 2007)

http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/ReportsRound3_en.asp

The Ethics in Public Office Act, 1995 marked the first wave of political reform. This era of political reform was wrought by fortuity rather than design. It had counterproductive implications for Ireland's accountability frame-work over the next fifteen years. A crisis-led approach to legislation was devoid of a systematic early consideration of the long-term benefits, enforcement and compliance issues of new regulatory proposals. This contributed to a dense, and at times contradictory, legislative framework which necessitated several attempts to reform the reforms.

The Standards in Public Office Commission annual report, 2009 noted its concern regarding the 'overlapping ethics frameworks'. The Standards Commission called for 'the adoption of a single comprehensive Act' with regard to conflicts of interest and noted its concern 'at the proliferation of statutory provisions' and 'considerable scope for confusion.' The hotchpotch nature of the ethical legislation is such that a bribery offence alone is punishable with four different sentences under the Prevention of Corruption (Amendment) Act, 2001 and the Criminal Justice (Fraud and Theft Offences) Act, 2001 for instance.

Introduction

The Centre for Public Integrity created a ranking system that assigned a score with regard to eight key areas of disclosure for lobbyists and the organizations. This submission will address some of these, which include the Definition of Lobbyist; Individual Registration; Individual Spending Disclosure; Employer Spending Disclosure; Electronic Filing; Public Access (to a registry of lobbyists); Enforcement and Revolving Door Provisions.

The challenge is not just to introduce effective lobbying legislation - in terms of transparency and accountability - but also to balance these eight criteria within an Irish context. Each of the lobbying criteria is different and demand different degrees of regulations - from low, medium and to highly regulated systems.

Indeed highly regulated systems may be wholly undesirable - requiring expensive box ticking exercises without any discernable change in behaviour. Legislation is often guilty of expressing objectives without considering in sufficient detail how to implement these worthy intentions.

Lobbying submissions can be distracted on the question whether lobbyists should file monthly, quarterly or annual disclosure reports listing their clients, issues, institutional targets and compensation. This submission seeks to transcend narrow technical aspects and encompass political dimensions, particularly regarding political finance, lobbying and conflict of interest.

Proposals

1. Disclosure of political donations by lobbyists

Lobbyists, as defined, shall automatically disclose donations or political fundraising activities such as soliciting contributions from others. The trend in Ireland has been to regulate the lobbied rather than the lobbyist and therefore under the current political funding legislation, the emphasis on disclosure is only placed on political parties or political individuals.

2. Closing the revolving door

A statutory two-year cooling off period before public officials or office holders can register as a lobbyist or be employed by a lobbying firm for the purposes of engaging in lobbying activities.³ Lobbying activities during the cooling off period not only include direct contacts but behind-the-scenes activities, advice, or consultations in support of lobbying contacts which have the intent to influence public officials or office holders.

3. Penalties - termination of state contract

A person who knowingly makes any false or misleading statement in any return or other document submitted to the Registrar under this Act, whether in electronic, written or other form, shall be guilty of an offence and liable, depending on the severity of the offence, to

- The termination or retrospective cancellation of a state contract;
- Recording and publicising a proven breach in a register;
- Prosecution and/or fine for criminal offences.

³ A five-year post-employment prohibition for designated public office holder and designated members of Prime Minister's transition teams exists with regard to lobbying the Government of Canada.

4. Register of Lobbyists

Detailed information about lobbyists and their activities including:

- Lobbyist or registrant's name
- Client name
- Institution being lobbied
- Subject matter and particulars of the lobbying
- Lobbying methods used
- Government funding received by the client or employer
- An indication whether a lobbyist was a former public office holder as well as details about offices held
- Information on oral and arranged communications with certain public office holders

5. Lobbying clearinghouse - www.policyadvocacy.ie

To introduce a dedicated website which would become the clearinghouse for all public policy advocacy. This has two complementary objectives – to facilitate more effective evidence based policymaking and to regulate lobbyists.

www.policyadvocacy.ie would be a public forum for lobbyists, stakeholders and other interested parties to publicly and transparently debate legislative proposals. It would provide public officials, media and the wider public timely access to easily navigate information and initiatives on policy.

Making information publicly available – such as an online register of lobbyists - does not automatically mean that such information is useful. If the principles of transparency are to be achieved, then information must be easy to utilize and consequential. Web-based disclosure would allow citizens to meaningfully engage in lobbying regulation.

If all positions and arguments are public then everyone knows who is lobbying for what and why.⁴ The shift to public, rather than private lobbying, will allow the public to see what interest groups are advocating for, what their arguments are, and the information which they are basing those arguments on.

Lobbying is part and parcel of the democratic process. Lobbyists are influential because they provide cost-effective access to relevant and researched policy related expertise. They are an embedded part of a policymaking process. A functioning democracy should

⁴ To a limited extent, Ireland has such a system for Regulatory Impact Analysis (RIA). This is a proposal to extent such a model to policy-making more generally, which has wider benefits for the public policy process, apart from addressing the regulation of lobbying. The 2008 OECD report on the public service recommended that Ireland include “improve focus on long-term policy needs”, greater use of RIAs in policy evaluation, and the centralisation of RIAs.

facilitate different interests to put their arguments forward. When this is conducted behind closed doors or out of the public eye, it may at times be assumed that particular interests have more influence than others. The lobbying profession can help to dispel these myths by participating in a more open process and providing their policy expertise to public officials and educating the public on their position. The quality of public policy depends the quality of information and this proposal seeks to improve on policy by making it more open.

- Levels the playing field – everyone has access. Final draft before reaches Oireachtas would contain written justification for the inclusion or exclusion of proposals;
- Increases inclusiveness, transparency, accountability and public scrutiny;
- More democratic and more thoroughly vetted public policy;
- Systematic early consideration of the benefits, costs and compliance issues of new legislation;
- Opens up decision-making to interested stakeholders and the wider public;
- Cost efficient. A large proportion of a civil servant’s job description encompasses the drafting, implementation and monitoring of regulation. A more efficient policy framework would reduce the personnel needed to regulate lobbying;
- Reignites trust in politics and pioneer direct public participation in the decision-making process;
- Opportunity to meaningfully input before the items on the legislative menu have already been decided.

Definitions

Lobbying legislation must take into account that lobbying is as much implicit as it is explicit. To that end definitions should encompass explicit and implicit explanations of undue advantage or gain.

1. Intent

Does the legislation distinguish if the public official or lobbyist (a) intentionally acts or (b) refrains from acting? Does the legislation specify that the intent of an offence may be inferred from objective factual circumstances?

2. Offer, promise or giving

Does the definition of gain encompass all stages of the gain, even if the gain was not received? A comprehensive definition of gain would include promising, offering and giving of an unorthodox benefit. Article 15 of the UNCAC criminalizes undue advantage from the beginning of the process – from the point it is offered or promised or given.

3. Anticipation of gain

This is as much about the anticipation of an undue advantage as it is the consequence. Conviction is therefore possible where the undue advantage has not yet been received or where the undue advantage may be received in the future even after the public official has acted or has refrained from acting in the exercise of his duties. The emphasis should be on the implicit process of undue advantage rather than the explicit outcome.

At the heart of the Moriarty Tribunals, for instance, was the revelation of how a Taoiseach and a Minister received extraordinarily large donations or undue financial advantage after they retired or some years after a significant policy decision was made.

4. Undue advantage

The definition of undue advantage shall have the same meaning provided for in the Ethics in Public Office Act 1995, as amended. Additional proposals.

Tangible outcomes of value - such as money, gifts, precious objects, goods and services, hospitality and travel.

Intangible outcomes of value - shares, rights, the remission of debts, inside information, preferment in appointments, and similar benefits to family, relatives and any third party where the public official who may receive nothing directly yet has conferred an advantage (or even an obligation) on another.

5. Public official or office holder income

Given that a public official or office holder is remunerated by their employing (public) institution – where an public official or office holder is offered or granted money or other advantages by a person or entity other than their employer in connection with his function, the question is therefore raised whether this is an undue advantage;

6. Foreign public official

The definition of “Office Holder” and “Public Body” shall have the same meaning provided for in the Ethics in Public Office Act 1995, as amended. There are additional proposals:

“Foreign public official” shall mean any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise; (Article 2 of the UNCAC).

7. International civil servant and immunities

“Official of a public international organization” shall mean an international civil servant or any person who is authorized by such an organization to act on behalf of that organization. For example, officials from the International Monetary Fund, the European Central Bank or the European Union. (Article 2 of the UNCAC). No officeholder should be exempt, whether domestic or international. Moreover, an appropriate balance must be placed between any immunities and the possibility of effectively investigating, prosecuting and adjudicating offences. Thus, where immunities exist, constitutional or other legal means should provide for a suspending of immunities to allow a full investigation to take place as expeditiously as possible (article 30 of the UNCAC).

8. Private sector employed by state

Those who provide public services while being employed by or contracted to private sector entities which themselves are contracted by the government, such as public private partnerships. In general, if a person is paid from public money this should be an indicator that the individual is to be regarded as a public official.

9. Intermediaries

Lobbyists or public officials cannot circumvent or avoid punishment by using intermediaries as a proxy. An intermediary does not necessarily have to be a willing accomplice, assistant or instigator but can be an unwitting participant (Article 27 of the UNCAC). The lobbyist or public official cannot therefore hide behind the defence that they were unaware or not responsible for potential criminal conduct of the intermediary. In other words, there are no mitigating circumstances where the lobbyist or public official - sets out with intent to benefit from the act - claims the intermediary misrepresented their functions or were acting outside the requirements of their office or were acting in a private capacity.

10. Lobbyist

Lobbyist: Any individual who is either employed or retained by a client (Any person or entity that employs or retains another person for financial or other compensation to conduct lobbying activities on behalf of the person or entity) for financial or other compensation, as defined.

11. Lobbying activities

Lobbying activities include communicating with public office holders with respect to changing legislation, regulations, policies or programs, obtaining a financial benefit such as a grant or contribution, in certain cases, obtaining a government contract, arranging a meeting between a public office holder and another person. It also includes lobbying contacts and any efforts in support of such contacts, including preparation or planning activities, research and other background work that is intended, at the time of its preparation, for use in contacts and coordination with the lobbying activities of others.