

Select Sub Committee on Public Expenditure and Reform
Houses of the Oireachtas
Leinster House
Dublin 2

21 November 2014

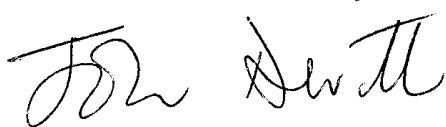
Transparency International Ireland
Submission on Registration of Lobbying Bill 2014

Dear Mr Lenihan,

I attach a submission on behalf of Transparency International Ireland on the Registration of Lobbying Bill 2014. We welcome this opportunity to share our views with the select sub-committee.

Please do not hesitate to contact me at jkdevitt@transparency.ie or on 01 871 9433 if you would like to discuss matters further.

Yours sincerely,



John Devitt
Chief Executive
Transparency International Ireland

Introduction

Transparency International Ireland (TI Ireland) is the Irish chapter of Transparency International, a global movement against corruption (defined as the abuse of entrusted power for private gain). It was founded in 2004 and is part of the only global organisation dedicated to stopping corruption worldwide. Its vision is an Ireland that is open and fair – and where entrusted power is used in the interest of everyone. TI Ireland’s mission is to empower people with the support they need to promote integrity and stop corruption in all its forms. In support of its mission, TI Ireland launched its Speak Up helpline in May 2011, a service for anyone facing an ethical dilemma or considering reporting wrongdoing at work.¹

In 2009, TI Ireland called for the introduction of a register of lobbyists as a matter of urgency.² In March 2012, we made a submission in response to the Department of Public Expenditure and Reform’s consultation on the regulation of lobbyists. On Monday 24th November we will publish our latest research in this area, *Integrity and Influence: Lobbying and its Regulation in Ireland*.³ This study comes at a crucial moment when Ireland’s first lobbying legislation is before the Oireachtas. The research is based on a methodology created by Transparency International as part of a project involving the assessment of lobbying regulations and practices in 19 European countries.⁴ It informs our comments and recommendations on the Registration of Lobbying Bill 2014.

Recommendations

TI Ireland broadly welcomes the provisions in the Registration of Lobbying Bill 2014. However, we believe that the Bill is less robust in several key respects than the general scheme of the Registration of Lobbying Bill that preceded it. In addition, we believe that the wording of some provisions should be amended to close potential loopholes.

Section 5

Grass-roots communication/astro-turfing

The stated legislative intention of this Bill is to include ‘grassroots communications’ in the definition of lobbying activities.⁵ This is where groups appeal to their members or members of the public to directly contact decision-makers about a particular issue. This sort of activity can

¹ TI Ireland has served some 500 people since 2011.

² Transparency International Ireland (2009) *National Integrity Systems – Country Study: Ireland 2009*. Dublin: Transparency International Ireland. This report can be accessed at www.transparency.ie/sites/default/files/NIS_Full_Report_Ireland_2009.pdf

³ This report will be available on our website, www.transparency.ie

⁴ The participating countries are Austria, Bulgaria, Cyprus, Czech Republic, Estonia, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, and the United Kingdom.

⁵ General Scheme of the Regulation of Lobbying Bill, page 9.

involve letter writing campaigns or orchestrated visits to TDs' clinics to press for a particular cause. The register should also capture 'astro-turfing' activities by so-called grassroots groups which are funded either entirely or in part by corporate interests to lobby on their behalf.

An example of astro-turfing would be where a company which produces wine sets up an informal association which, on the face of it, is a wine appreciation society. The company directs the association to make relevant communications which are ostensibly from the association but in reality are made for the benefit of the company.

Section 5 of the Bill covers the meaning of carrying on lobbying activities. However, TI Ireland believes that the current wording of Section 5 of the bill does not cover grass roots and astro-turfing activities with sufficient legal clarity. It states:

5. (1) For the purposes of this Act a person carries on lobbying activities if the person—

(a) makes, or manages or directs the making of, any relevant communications on behalf of a client—

(i) in the course of the person's business, and

(ii) in return for payment (in money or money's worth),

(b) is an employer of other persons and makes, or manages or directs the making of, any relevant communications on the employer's own behalf, or

(c) makes any relevant communications about the development or zoning of land under the Planning and Development Acts 2000 to 2014.

We note that:

- Subsection (a) does not appear to apply to grassroots lobbying or astro-turfing because there may be no official 'client' and the lobbying activities may not be carried out in the course of any 'business' undertaken by the grassroots/astro-turfing individual or group.

In the 'wine association' scenario, there is an argument that this type of activity is covered by subsection (b) on the basis that the wine making company is an employer who is 'directing the making of relevant communications'. However, the words "on the employer's own behalf" may be problematic here. In making relevant communications, the association is likely to put these forward in its own name, with no reference to the wine company. It could be argued that the relevant communications are on behalf of the association, not the company, and that subsection (b) is therefore not applicable to the company. In addition, as the association may not be an employer, there may be no requirement for the association to register the relevant communications either.

These issues could perhaps be addressed by amending subsection (b) as follows:

(b) is an employer of other persons and makes, or manages or directs the making of, any relevant communications on the employer's own behalf or for the benefit of the employer (whether or not the employer's involvement is disclosed in the relevant communications), or

Professional/Third Party Lobbying

Professional lobbying is covered by section 5(a) of the Bill. However, the Bill requires the registration of lobbying activities that are carried out in return for payment (in money or money's worth). This means that lobbying carried out on a *pro bono* basis for a client would not necessarily have to be recorded in the lobbying register.

There is potential for abuse here in that consultant public affairs professionals could attempt to flout the registration requirements by charging their clients increased fees for non-lobbying work, while conducting lobbying activities technically free of charge.

This could perhaps be addressed by amending subsection (a) as follows:

(a) makes, or manages or directs the making of, any relevant communications on behalf of a client—

(i) in the course of the person's business, and

(ii) in return for payment (in money or money's worth),

For the purposes of this subsection, "client" includes any person who provides any money or money's worth to the person carrying on lobbying activities, regardless of whether or not such payment is made directly in relation to the carrying on of the lobbying activities.

Extraterritorial effect

It is not clear whether Section 5 subsection (b) includes employers who are not based in Ireland and do not have any staff in Ireland.

We would suggest including a definition of employer within the Bill, along the lines of:

"employer" means an employer of persons (wherever formed, incorporated or established) whether in the State or elsewhere

Beneficial Owners

The Bill may not cover beneficial owners of organisation who engage in lobbying activities. We suggest adding a new subsection (d), perhaps as follows:

(d) has a controlling stake in or is a beneficial owner of any organisation and makes, or manages or directs the making of, any relevant communications on the organisation's behalf or for its benefit.

Relevant Communications

Section 5(2) states:

In subsection (1) "relevant communications" means communications (whether oral or written and however made), other than excepted communications, made personally (directly or indirectly) to a designated public official in relation to a relevant matter.

The word “personally” in the above subsection does not fit well with “directly or indirectly”. We submit that it be deleted.

Communications which will not be captured on the register

Section 5(3) of the Bill contains a long list of excepted communications that would not have to be included in the proposed register of lobbying activities.

These include standard carve-outs for diplomatic communications or to allow citizens and trade unions to go about their normal business. However, some of these ‘excepted communications’ are sufficiently broadly worded to give rise to concerns that they could be exploited by lobbyists to keep their activities out of the public view.

A more general concern that TI Ireland has is that the extent of the listed exemptions in the bill could collectively diminish the potential utility of the register as a one stop shop that would allow citizens to track influence. There is a risk that if the register captures only a partial picture of lobbyists’ policy inputs on any particular issue, it will give a distorted impression of how policy is actually influenced.⁶

Specifically, we make the following proposals for changes to tighten and clarify the wording in this subsection:

(b) communications by or on behalf of an employer with not more than 10 employees relating to the affairs of the employer about any matter other than the development or zoning of land under the Planning and Development Acts 2000 to 2014;

There is potential for “affairs of the employer” to be interpreted to mean that many (if not most) in-house lobbyists, non-profit interest groups, trade associations and small businesses would be entirely excluded from the obligation to register. We suggest that the policy intention be clarified and the wording “affairs of the employer” be defined.

(c) communications of factual information made to a designated public official in response to a request by the designated public official for the information

This provision allows policy makers to seek routine information without their request automatically triggering a registration requirement. However, it must only be used to cover information which is genuinely factual. We would suggest adding the following type of wording, for the avoidance of doubt:

(c) communications of factual information (and not including expressions of opinion or policy submissions) made to a designated public official in response to a request by the designated public official for the information

⁶ McGrath

Subsection (6) allows the Minister to further expand upon the list of excepted communications:

(6) The Minister may prescribe descriptions of communications which are to be excepted communications; and in determining whether or not to prescribe any description of communications the Minister shall have regard to the public interest in there being an appropriate level of transparency in relation to communications about any of the relevant matters and (in particular) to any arrangements for opening up such communications to public scrutiny otherwise than in accordance with this Act.

The above subsection affords the Minister full discretion to limit the scope of lobbying activities captured by the Register. We would suggest that a check be included on this discretion, such as a requirement that:

“Every order under subsection (6) shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the order is passed by either such House within the next 21 days on which that House has sat after the order is laid before it, the order shall be annulled accordingly, but without prejudice to the validity of anything previously done under the order.”

Relevant matters

Relevant communications which must be captured on the register of lobbying activities are defined in Section 5(2) as ‘communications.....in relation to a relevant matter. Relevant matters are defined in Section 5(7):

(7) “relevant matters” means any matters relating to—
(a) the initiation, development or modification of any public policy or of any public programme,
(b) the preparation of an enactment, or
(c) the award of any grant, loan or other financial support, contract or other agreement, or of any licence or other authorisation involving public funds,
apart from matters relating only to the implementation of any such policy, programme, enactment or award or of a technical nature.

As problems with the implementation of policy is often a primary concern of interest groups, the last sentence in the above provision is potentially problematic.

In addition, the phrase “of a technical nature” is vague. We would suggest amending the wording as follows:

*(7) “relevant matters” means any matters relating to—
(a) the initiation, development or modification of any public policy or of any public programme,
(b) the preparation of an enactment, or
(c) the award of any grant, loan or other financial support, contract or other agreement, or of any licence or other authorisation involving public funds, apart from matters relating only to the implementation of such grant, loan or other financial support, contract or other agreement, or of any licence or other authorisation involving public funds.*

Returns by Registered Persons

Section 12 sets out the type of information that should be shared by registered persons:

*12. (1) A registered person shall, after the end of each relevant period but not later than the relevant date, make to the Commission, in such manner and form as the Commission may require, a return covering the relevant period.
(2) Subsection (1) shall not apply to a registered person whose entry on the Register has been marked under section 11(4) with a statement indicating that the person has permanently ceased to carry on lobbying activities.
(3) If the registered person has not carried on any lobbying activities in the period covered by the return, the return shall state that fact.
(4) If the registered person has carried on lobbying activities in the period covered by the return, the return shall state—
(a) where any of the communications concerned were made on behalf of a client, the relevant information relating to the client,
(b) the designated public officials to whom the communications concerned were made and the public service body by which they are employed or in which they hold any office or other position,
(c) the subject matter of those communications and the results they were intended to secure,
(d) the type and extent of the lobbying activities carried on,
(e) the name of the person who had primary responsibility for carrying on the lobbying activities,
(f) the name of each person who is or has been a designated public official employed by, or providing services to, the registered person who was engaged in carrying on lobbying activities, and
(g) any such other information relating to carrying on lobbying activities as may be prescribed under subsection (7).*

We submit that this provision be expanded upon, to include requirements to supply documentation shared in the course of making relevant communications; the amount of any payment received from any client or third party in respect of the relevant communications (whether or not directly related); and any activities undertaken on behalf of political parties,

elected officials or election candidates. This would include any voluntary support a lobbyist has given public/media relations, fundraising, strategic advice and research to parties and candidates.

Delayed publication

Section 14 allows the Commissioner to delay making information available for inspection in certain circumstances. Subsection 1 sets out the grounds on which an application for such a determination may be made:

14. (1) Where a person who gives information to the Commission in an application under section 11 or a return under section 12 considers that making any information available for inspection could reasonably be expected to—

(a) have a serious adverse effect on—

(i) the financial interests of the State,

(ii) the national economy, or

(iii) business interests generally or the business interests of any description of persons, or

(b) cause a material financial loss to the person to whom the information relates or prejudice seriously the competitive position of that person in the conduct of the person's occupation, profession or business or the outcome of any contractual or other negotiations being conducted by that person, the person may make an application to the Commission for the making of a determination under this section in relation to the information.

Subsection (a)(iii) is extremely wide and is unnecessary, given the terms of subsection (b) which aims to protect the financial interests of a business. As such, we submit that it be deleted.

Code of conduct

Section 16. (1) states that

The Commission may produce, and from time to time revise, a code of conduct for persons carrying on lobbying activities with a view to promoting high professional standards and good practice.

We suggest that the word 'may' should be amended to 'shall'.

Power to carry out investigation

The Bill gives the Commission powers to request further or corrected information [reference relevant sections] and (under section 19(1)) to investigate possible breaches of the law:

19. (1) If the Commission reasonably believe that a person may have committed or may be committing a relevant contravention, the Commission may authorise the carrying out of an investigation under this section.

It is unclear how the Commission would form a reasonable belief that a person may have committed or may be committing a relevant contravention, in the absence of a complaint or a public controversy.

Whereas the General Scheme Head 17 (2) gave the Commission powers to inspect records, verify information or receive complaints, these powers have been removed from the published Bill. As the Commission is a statutory body, if the Commission is to undertake any such activities, explicit powers should be included within the Bill to avoid complaints that the Commission is acting ultra vires. See sections 22 of the Ethics in Public Office Act 1995 and section 4 of the Standards in Public Office Act 2001 for similar provisions. We submit that powers to undertake inspections, audits and investigate complaints should be included within the Bill. All persons should have the right to make a complaint.

Reports by Commission

Section 25(2) deals with the Commission's annual report:

25. (1) The Commission shall prepare an annual report relating to the operation of this Act and shall cause a copy of it to be laid before each House of the Oireachtas no later than 30 June in the year following that to which it relates.

(2) A report under subsection (1) shall (in particular) include, in a form which does not enable the identification of the persons involved, information relating to—

(a) any determinations under section 14 made or in force in that year,

(b) any investigations under section 19 concluded in that year,

(c) any applications for consent under section 22, and all decisions on such applications, made in that year,

(d) any convictions for offences under section 20 in that year, and

(e) any fixed payment notices served under section 21 in that year.

Subsection (2) makes clear that identifying information must be removed before publication. While this is an understandable consideration in circumstances where, for example, an investigation is undertaken and the Commission concludes that there has been no contravention, the rationale is less clear where there has been a conviction or the issuing of a fixed payment notice. These should be matters of public record and ought to be included in full in the report.