

Submission to the Department of Public Expenditure and Reform 2012 Consultation on the Regulation of Lobbyists

I write on behalf of Transparency International (TI) Ireland to offer its submission on the regulation of lobbyists in Ireland.

This is a very welcome initiative and I am pleased to present you with an overview of TI Ireland's practical recommendations on the issue.

Please let us know if you should like any further information or clarification in the meantime.

Yours faithfully,

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Summary

1. In 2009 Transparency International Ireland called for the introduction of a register of lobbyists as a matter of urgency and we welcome this opportunity to expand upon our views on this important and timely subject.¹ Declining trust in Irish politics has been observed in a number of studies and surveys produced by TI and other organisations.² This might be a result of the legacy of political scandals, the collapse of the economy or an underlying suspicion of politics and politicians that can also be observed worldwide. However, the rate with which distrust has grown in Ireland in comparison to neighbouring jurisdictions highlights the scale of the problem that faces policy-makers here.³
2. In its National Integrity Systems Study for 2009, TI drew attention to the perception of Irish business leaders who suggested that public policy in Ireland was unduly influenced to a greater degree than in many low-income countries. This phenomenon, known as Legal Corruption, is especially prevalent in jurisdictions where influence is sold or trafficked through lawful means such as lobbying or through informal networks reinforced by political donations.⁴ The International Monetary Fund has also identified a link between the influence brought to bear on the regulation of financial services and the current international financial crisis.⁵
3. The issue is further complicated by the right of individuals to influence policies and legislation that affects their legitimate interests. However, it is evident that not all citizens have had equal access to government and those with greater financial means, networks and expertise are better able to access and influence decision makers. It is therefore important that the right of individuals to legitimately influence public policy is balanced with the right of the public to know what policy is being influenced, by whom, how and on whose behalf.
4. Please note that while we support the introduction of a mandatory 'register of lobbyists', we avoid using the terms 'lobbyist' or 'lobbying' in this submission. The goal of any new law should be

¹ 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

² Transparency International, *Global Corruption Barometer 2010*, <http://transparency.ie/content/global-corruption-barometer-2010> and Edelman Trust Barometer <http://www.edelman.ie/index.php/2011/01/edelman-trust-barometer-2011/>

³ See Edelman Trust Barometer <http://www.edelman.ie/index.php/2011/01/edelman-trust-barometer-2011/> Table from <http://www.slideshare.net/fullscreen/edelmanireland/2012-edelman-trust-barometer-ireland-results/6>.

⁴ Daniel Kaufman, *Legal Corruption*, World Bank Institute, 2005, http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Legal_Corruption.pdf

⁵ Igan D., Mishra P., Tressel T., *Working Paper WP/09/287 A Fistful of Dollars: Lobbying and the Financial Crisis*, International Monetary Fund, 2009. The authors found a statistical correlation between lenders who engaged with policy-makers most intensively on issues of mortgage lending, and those who were most negatively affected during the current crisis. These lenders had looser lending standards measured by loan-to-income ratio, greater tendency to securitise, and faster-growing mortgage loan portfolios. The authors conclude that preventing a future crisis might require weakening the political influence of the financial industry or greater transparency in how public policy is influenced.

to prevent and detect attempts to traffic in influence and to open to public scrutiny the means by and extent to which public policy is influenced. To this end, it is unnecessary (and possibly distracting) to attempt a definition of 'lobbyist'. For one thing, it is more common for individuals and organisations engaged in influencing public policy to refer to themselves as 'advocates', 'activists' or 'public affairs consultants'. Individuals already categorised by profession such as solicitors, academics and researchers will also likely object to the use of the term. If the public is to know who and how public policy is formulated, it simply needs to know who is paying, and who is paid, to influence policy, for what reason and by what means.

5. It is therefore important that anyone paid to communicate with policy-makers in favour of or against a particular policy, irrespective of professional category, is legally obliged to file information with a statutory agency, detailing the policy they have attempted to inform or influence, relevant sources of income, and documentation presented in support of their proposals. Those obliged to file returns might include employees of charitable organisations, think tanks, campaign groups and universities as well as professional associations, trade unions, businesses, public affairs consultancies, barristers and legal practices.

6. No system that seeks to prevent corruption or inform the public of how government works can be effective on its own. For this reason, it is vital that changes to the Freedom of Information Act⁶, the Electoral Acts⁷ and those envisaged in the Protected Disclosure in the Public Interest Bill⁸, complement those reforms envisaged through the registration and disclosure of Agents' efforts to inform or influence public policy. It is also important that registered persons ('lobbyists') as well as ordinary citizens are encouraged to engage freely in the political process and be given an equal opportunity to do so. Consequently, no funding or spending restrictions should be placed on individuals or organisations subject to this legislation in respect of work aimed at informing or legitimately influencing public policy, and no conclusions should be drawn from a return on the eligibility of non-profit organisations for charitable tax status.⁹ Furthermore, registered persons should not be given special treatment such as access passes to government buildings and Oireachtas or local authority estates even if they are entitled to a pass by virtue of an official position they previously held. To do so might undo another desired outcome of the legislation, which is to open up the policy-making process to greater numbers of citizens and create a level playing field for those attempting to inform public policy.

⁶ The Government should consider removing all application and appeal fees for non-personal information. In addition all documentary submissions made by paid staff or consultants in support of or opposition to public policy reform should be accessible under the terms of a revised Freedom of Information Act.

⁷ Political activity under the Electoral Act should be more clearly defined. Political activity should refer exclusively to any activity undertaken to advance the goals or interests of a political party or a political cause during an electoral or referendum campaign.

⁸ Reporting on failures to comply with provisions in the legislation should be protected disclosures for the purposes of the PDPI Bill.

⁹ This is particularly important given the need to avoid arbitrarily labelling all communications with policy-makers as acts of lobbyists.

7. While there should be few restrictions on legitimate communications with policy-makers, it is vital that any perception that former officials and representatives have the 'inside track' in informing public policy be addressed. For this reason, proportionate moratoria or 'cooling-off periods' should be introduced for all former Office Holders and certain former Public Officials and representatives which limit their opportunities to secure income in return for informing or influencing public policy.

Key Recommendations

A. Introduce a statutory Public Affairs Register that requires any individual, or organisation, that has been offered or received income to influence legislation or public policy in any given three month period to file an online return to the Standards in Public Office Commission.

B. Publish all such returns on the Public Affairs Register which can be easily searched by the field of Agent, Principal (client), Subject (issue), documentation, and financial data. This data should be in open data format to allow for easier interpretation and analysis.

C. Empower the Standards in Public Office Commission with adequate resources and legal authority to randomly audit returns and to appoint an Inquiries Officer to conduct initial inquiries into prima facie anomalies on the basis of, or equally in the absence of, a prior complaint.

D. Provide criminal and civil penalties for knowingly filing a false return or failure to file a return.

E. Provide proportionate moratoria or 'cooling-off periods' for all former Office Holders and certain former Public Officials and Public Representatives which limit their opportunities to secure income in return for informing or influencing public policy.

The Public Affairs Register

8. The dual aims of the Public Affairs Register should be 1) to reliably detect and deter efforts to traffic in influence and 2) to help the public better understand how public policy is informed and influenced.
9. The information presented by those obliged to register should leave a trail which law enforcement agencies and the media could use to investigate attempts to illicitly influence public policy.
10. The Register would present the following information:
 - a. Name and business address of a person¹⁰ (the 'Agent') in receipt of income to inform or influence public policy on behalf of a Principal and/or the name of his/her Employer.¹¹
 - b. Name and business address¹² of any client (the 'Principal') on whose behalf public policy is informed or influenced. Where an employer is not a service provider (such as a non-profit organisation), the name of any donor or indication of any alternative source of income (such as public donations) would be submitted.
 - c. Areas of public policy¹³ which a person/organisation has sought to inform or influence (the 'Subject')
 - d. The name of the Public Representative¹⁴ or Public Body¹⁵ with whom the Agent has engaged and the date on which the engagement occurred.
 - e. Copies of any documentation forwarded to the Public Representative or Public Body in support of any intervention on a Subject made on behalf of a Principal. Documentation will include written submissions on new or existing public policy, correspondence in support of a public policy proposal, and any supporting documentation, including research papers and observations on policy/legislation.

¹⁰ The agent may be a legal or natural person. However, a natural person must be named as the agent where the agent is not a sole trader. In the event that more than one agent is working on behalf of an employer, only one return would be filed on behalf of the employer capturing all relevant activity carried out by other employees acting on behalf of the employer.

¹¹ Applicable where the Agent is not self-employed.

¹² Where a business address is not available, then a residential address would be required. In this case, the Standards in Public Office Commission would record the residential address of the Principal subject to the Data Protection Act.

¹³ Public policy can be defined to include legislation, the Government Legislative Programme, the Programme for Government, statutory instruments, ministerial orders, regulations, circulars, policy papers, administrative procedures and decisions.

¹⁴ Includes Ministers, Ministers of State, TDs, Senators, Members of Local Authorities, and Office Holders for the purposes of the Ethics Acts and Local Government Acts.

¹⁵ Includes Government Departments, State agencies, Semi-State agencies, and State-owned bodies.

11. The priority of this approach is to make information submitted to policy-makers in support of a particular proposal available to the public so they can judge the merits of the arguments and evidence presented in support of any proposal. It is also based on the principle that only those measures that can be enforced or reliably monitored should be legislated for. For that reason, it would be important to either compel those Agents obliged to register with SIPO to disclose only that financial data which could be independently monitored and verified, or not to oblige Agents to report any financial data.

12. All returns would have to be filed online and accessible in open data format (with the exception of supporting documentation (specified in paragraph 9.e) which could be presented in Word or PDF form).

13. Financial data could be presented in a number of ways depending on the type of individual or organisation registered including income received for the sole purposes of influencing public policy (client or donor income); or independently audited financial statements recording all income and expenditure with line items clearly showing amounts received and/or used for the purposes of influencing public policy. This system would take into account the size and capacity of Agents to provide detailed income and expenditure statements. Professional public affairs consultants would be expected to provide a breakdown of pledged¹⁶ and received income by client. In the case of NGOs for example, data showing all donations received over a specified amount, and/or donations received and spent for the purposes of influencing public policy would be published. Those organisations that are unable to publish such data and that retain or employ in-house public affairs staff or consultants would be obliged to provide accrual-based aggregate figures showing staff salaries and/or consultant fees.

14. Whatever disclosure system is established, it would be counter-productive to allow individuals or organisations to arrive at an estimate of income or time spent in influencing policy without reliable financial data. Firstly, it would be impractical to audit returns based on estimates and secondly, it would be easy for an Agent to intentionally present misleading data without detection. In short, the provision of estimates would do little to achieve the aims of the legislation.

15. For the purposes of the legislation, the following information would be disclosable by registered persons (Agents):

Disclosable engagement with a policy-maker

a. Meetings or phone calls with Office Holders and Public Officials aimed at informing or influencing a decision in favour of a particular policy proposal.¹⁷

¹⁶ Pledged income is income offered or contracted by a client for services yet to be rendered or fee income yet to be received for services already rendered.

¹⁷ Only the name of the relevant Minister, Minister of State or Public Body would be required.

- b. Meetings or phone calls with Public Representatives (including T.D.s, Senators, Local Authority Members) aimed at informing or influencing a decision in favour of a particular policy proposal.
- c. Oireachtas presentations (including informal briefings to Oireachtas members).
- d. Party political meetings (including Ard Fheisana).
- e. Public meetings organised by paid staff or consultants (or volunteers under the direction or on behalf of an Agent) and to which a Public Representative, Office Holder or Public Officials, with direct influence over any decision in which the Agent has a direct stake, have been invited.
- f. Social engagements organised by paid staff or consultants (or third parties under the direction or on behalf of an Agent) and to which a Public Representative, Office Holder or Public Officials, with direct influence over any decision in which the Agent has a direct stake, have been invited.
- g. Educational forums (including seminars, roundtables and conferences organised and/or publicised by paid staff or consultants (or volunteers under the direction or on behalf of an Agent) and to which a Public Representative, Office Holder or Public Officials, with direct influence over any decision in which the Agent has a direct stake, have been invited.

Exemptions

Under this proposal anyone who does not fit the definition of an Agent would not be obliged to submit information on their engagement with policy-makers. Examples include:

- a. Expert presentations or submissions made upon request of a Political Party, Public Representative or Public Official where the Expert is not an 'Agent' for the purposes of the Act or contracted to a Political Party, Public Representative or Public Body.
- b. One-to-one meetings held for the purpose of influencing policy-makers by citizens who are not in receipt of or promised income by a client.

Disclosable documentation sent to a policy-maker

- a. Any written or electronic correspondence in support of or clarifying a policy proposal. This would include letter, email and postcard templates prepared by Agents and used for the purposes of 'astro-turfing' policy-makers by citizens.
- b. Policy submissions in support of or clarifying a policy proposal.
- c. Research, surveys, policy and working papers presented in support of or clarifying a policy proposal (or publicly available references to supporting documentation).

Exemptions

Under this proposal anyone who does not fit the definition of an Agent would not be obliged to submit correspondence with policy-makers. Examples include:

- a. Correspondence not containing information or opinions that would serve to inform or influence a Public Official or representative on the merits or otherwise of a particular policy or proposal.

- b. Mass communications through the press, online or broadcast media not directly addressed at policy-makers.

Enforcement and Administration

16. The online Register should provide for ease of reporting and free, instant access for the general public to information collected under the respective categories listed in paragraph 8. It should also provide a cost-effective information management solution for both the State and those required to regularly file returns.

17. However, it is important that a single state agency be charged with managing the Register, offering guidance to individuals and organisations, monitoring returns, and investigating apparent breaches or anomalies. The Standards in Public Office Commission (SIPO) is probably best placed to perform this role. It has been responsible for managing and monitoring compliance with the Ethics Acts and Electoral Acts for 17 years and is experienced in managing and sharing large amounts of sensitive and publicly-available information.

18. Cost savings to the State would accrue by virtue of the fact that the administrative systems are already in place to manage returns from Office Holders and Public Representatives. In addition, the Public Affairs Register could be developed using open-source software at minimal capital cost to the State.¹⁸

19. SIPO would require both adequate financial and personnel resources as well as legal authority to play a meaningful role in the registration system. It would need to be given powers and resources to randomly audit Agent returns and to appoint an Inquiries Officer to conduct initial inquiries into prima facie anomalies on the basis of or in the absence of a prior complaint.¹⁹

20. Formal guidance on disclosure and summary decisions on failures to comply with the legislation would rest with the Secretary of SIPO. A special-committee of SIPO would be responsible for making final rulings and hearing appeals against a decision of the Secretary. Three SIPO members would constitute a quorum for the purposes of a meeting of the SIPO special-committee when undertaking a review of decisions provided for under the legislation. The Chair of SIPO could appoint a Vice Chair in his/her place to manage proceedings of the special-committee for the purposes of the legislation. Additional SIPO members recruited for the purposes of the legislation could also be deputised to hear appeals or reviews against decisions of the Secretary, with at least one permanent member of SIPO in attendance and chairing the special-committee.

21. An Agent could make an appeal against a decision of the Secretary on the following grounds:

a. The publication of information contained in supporting documentation would endanger the life of a person named in documentation or would compromise State security.

¹⁸ We estimate the initial cost of software development would be between €30,000 and €50,000, although it is possible that it could be delivered at an even lower cost if developed with the support of a non-profit software provider.

¹⁹ TI Ireland has called on Government to grant SIPO authority to appoint an Inquiries Officer to conduct informal inquiries into apparent breaches of the Ethics and Electoral Acts without a prior complaint.

- b. The Agent did not receive proper notice of a failure to comply.
- c. Documentation or engagement was not disclosable for the purposes of the legislation.

22. An exclusion or appeal on the grounds of commercial confidentiality would not be admissible. Agents would therefore be advised not to submit any commercially sensitive information to policy-makers with the intention of informing or influencing public policy.

23. The legislation should also provide for proportionate criminal and civil penalties for knowingly filing a false return or failure to file a return. Those found to have knowingly made a false return or that have failed to have filed a return after a failure has been brought to their attention by SIPO would also be listed on the SIPO/Public Affairs Register website for a period of twelve months from the time a decision has been reached by the Commission.

24. Statutory moratoria ('cooling off periods') should be established for Office Holders upon retirement or loss of their post that limit paid opportunities to directly inform or influence policy-makers. A two-year moratorium would forbid a former Office Holder or any other Public Official receiving payment to inform public policy on behalf of clients who have a commercial or economic stake in decisions made or information gathered by the Office Holder or Public Official while he or she was in office. Chairs of Oireachtas Committees should also be designated as Office Holders for the purposes of the Ethics Acts and be subject to the same post-employment restrictions as Ministers and other senior public servants. SIPO would determine whether a former Office Holder or any other Public Official is eligible for registration as an Agent for the purposes of the legislation.

25. The Code of conduct for Office Holders, the Code of Conduct for members of the Legislature, the Civil Service Code of Standards and Behaviour, the Code of Practice for the Governance of State Bodies, the Code of Conduct for Employees of Local Authorities, and the Code of Conduct for Councillors would be amended to include a provision requiring all those officials and representatives subject to the Codes to record relevant details for the adequate implementation of the legislation. Officials and Public Representatives would be required to cooperate with SIPO in the course of its inquiries.

Conclusion

26. A regulatory system that provides for no mandatory reporting by those engaged in informing public policy would be worse than no regulatory system at all. Similarly, one that provides for mandatory reporting of minimal data such the names of Agents together with times, dates and details of officials with whom one has corresponded, would offer an inadequate response to the public's demand for greater openness, accountability and integrity in government.

27. The online and timely publication of information presented in support of public policy proposals is a *de minimis* requirement of any system that aims to prevent trafficking in influence and informs the public of how and who is shaping public policy.

28. Ultimately, knowing who is or who is not a 'lobbyist' is less important than knowing how those lobbied came to their decisions.

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