



Submission on the Regulation of Lobbying (Amendment) Bill 2022 to the Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach

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1. Introduction

As Minister McGrath highlighted in his submission of 2nd November 2021 to the Joint Committee's detailed scrutiny process for the Regulation of Lobbying (Amendment) Bill 2020 [PMB]¹, communication, dialogue and engagement are central to a well-functioning democracy. Interest groups, representative bodies, industry and civil society organisations, NGOs and third party professional lobbyists all provide crucial input and feedback to the political and public administration systems. It is important that this activity is transparent and open to public scrutiny as part of the proper checks and balances which mitigate any attempt to seek to exert undue or improper influence on the conduct of policy formulation, development and decision making.

The Regulation of Lobbying Act 2015 (the Act) sets out the framework to ensure this transparency. The Act provides transparency on "who is lobbying whom about what".

¹https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_finance_public_expenditure_and_reform_and_taoiseach/submissions/2022/2022-03-16_submission-department-of-public-expenditure-and-reform_en.pdf



2. Policy Context & Operation of the Existing Legislative Framework

2.1 Regulation of Lobbying Act 2015

The Act was commenced on 1 September 2015. From that date, there has been a requirement for those who lobby designated public officials (DPOs) to register and report on their lobbying activities every four months on the Register of Lobbying (the Register). The part of the Act providing for investigation and enforcement provisions commenced on 1 January 2017.

The key objective in introducing the Lobbying Register was to make information available to the public on the identity of those communicating with Ministers, Ministers of State, members of the Oireachtas, MEPs, Local Authority members, special advisers, and senior civil and public servants. It does this by providing for:

- A publicly accessible register of lobbying;
- Balanced / proportionate regulatory powers vested in the Standards in Public Office Commission (SIPO);
- Obligations on lobbyists to register and to provide information regularly about their lobbying activities;
- A code of conduct for lobbyists on the carrying on of lobbying activities
- A “cooling off” period of one year for former Ministers, Advisers and senior officials seeking to take up employment as lobbyists related to their area of public service.

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Lobbyists are defined quite broadly in Irish legislation as the following persons who make or manage or direct the making of any relevant communications:-

- Persons with more than 10 employees,
- Representative bodies and advocacy bodies with at least 1 employee,
- Professional third party lobbyists i.e. those who are paid by a client to lobby on the clients behalf, or
- Any person lobbying about the development or zoning of land.

The Register may be viewed at <https://www.lobbying.ie/> and is overseen by SIPO. The lobbying website administered by SIPO includes a suite of information tools designed to help lobbyists, DPOs and the public to fully understand the Act and its obligations.

By regulating lobbying activity through registration and reporting requirements, the aim is to strengthen public confidence in politics and in the business of government, to increase the accountability of decision makers and to subject public policy making, and those who seek to influence it, to greater openness, transparency and to the potential for appropriate independent scrutiny.



2.2 Statutory Reviews of the Act

Section 2 of the Act requires that the operation of the Act be reviewed every 3 years. The first statutory review commenced in September 2016 and was published in April 2017. The second statutory review commenced in early 2019 and was published in January 2020.

The 27 submissions received to the public consultation held as part of that review highlighted some of the aspects of the Act which stakeholders perceived as important, for example:

- the additional transparency the Act has brought to the lobbying space.
- the legislation is seen as comprehensive, regulating a wide range of lobbying activities.
- the increased transparency provided by the Act in relation to lobbying activities was viewed as facilitating greater accountability.
- the Register was considered to be easily accessible, free and updated regularly.
- the website was described as user-friendly and open to public scrutiny.
- the work of SIPO was praised and positive reference was made to the support and guidance given by SIPO via its regular communications and the availability of staff to provide advice to organisations on the Register.
- the part the Register plays in promoting the role of organisations in shaping public policy was also mentioned.
- the importance of the Act in recognising lobbying as a legitimate activity which promotes the development of appropriate and effective policy and legislation was highlighted.
- it was acknowledged that the Act has not led to a 'chilling effect' on lobbying activities.

2.3 Operation of the Legislation

Since its introduction, the Act has been viewed internationally as an example of best practice, both by already regulated systems and those in the process of introducing similar laws.

Currently, just over 2,300 organisations or individuals have registered their lobbying activity on the Register and more than 65,000 returns are available to view on the Register.²

The Act provides SIPO with the authority to conduct investigations into possible contraventions of the Act. In 2019, 22 investigations were launched by the Commission

² Figures correct on 19 May 2022 as per www.lobbying.ie



into possible unreported or unregistered lobbying activities and 3 investigations were launched in 2020³. Under the Act SIPO may serve a Fixed Payment Notice of €200 to a person who has submitted a late return of lobbying activities and in 2019, 290 of these fixed payment notices were issued and 379 were issued in 2020. The Commission also issues a notification of offence to any registrant who has failed to make a return by the deadline. In 2019, the Commission issued a total of 97 notices informing the registrant of their intention to prosecute if a return of lobbying activities was not submitted and 150 notices in 2020. In all cases, except one that was referred for prosecution, the registrant complied and prosecution was not pursued.

While these legislative enforcement provisions are vital to promote compliance, education and guidance is equally critical. To this end SIPO actively encourages compliance at an early stage.

The website has been populated with information for both potential registrants and those whom they lobby – featuring tailored guidelines for lobbyists and designated public officials, instructional videos, sample returns and frequently asked questions.

The Commission regularly engages with stakeholders through presentations, publications and events, as well as through its website. It also conducts regular information sessions for any interested member of the public, who may register their interest on lobbying.ie.

The Act is generally perceived to have met the intended objective of increasing transparency and accountability around the lobbying of DPOs – underpinned by a Register that is easily accessible and navigable.

³ The figures for 2021 will be published in the 2021 Annual Report which will be published no later than 30th June this year in line with the requirement in Section 25 of the Act.



3. Policy Rationale for the Regulation of Lobbying (Amendment) Bill 2022

As the Committee will be aware, the Taoiseach indicated in the House in late September 2020 that a review of section 22 of the Act was to be undertaken by the Department of Public Expenditure and Reform.

In response to An Taoiseach's request, in the context of the two statutory reviews of the legislation conducted in 2017 and 2019, and in the context of two Private Members Bills introduced in 2020⁴, a thorough review of the Regulation of Lobbying Act 2015 has been conducted and was concluded in May 2021.

This is a complex policy area and a detailed review was necessary to properly assess the policy, legal and practical implications of the issues raised. The review was informed by the concerns and points raised by Deputies in the House and at Committee hearings.

In addition to consultations with the Office of the Attorney General, the review included:

- an assessment of the current operation of key provisions of the Act;
- consultation with, and consideration of, the views of the Standards in Public Office Commission;
- an overview of lobbying regulation in other jurisdictions; and
- consideration of options to address concerns raised and the policy, legal and practical implications of different responses.

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The core consideration was to look at how the existing solid legislative foundation could be enhanced most effectively and efficiently; strengthening weaknesses which had been identified.

On foot of the review, a number of recommendations were brought forward for legislative change. Cabinet approved these proposals at a Government Meeting in July 2021, along with granting permission for the drafting of Heads of a General Scheme to amend the Act along the lines of the said policy proposals.

The Heads of the Bill were prepared by the Department of Public Expenditure and Reform, working closely with the Office of the Attorney General. On 15th February 2022, the Government approved the publication of the General Scheme, its referral to the Joint Committee for pre-legislative scrutiny, and the priority drafting of the Bill by the Office of the Attorney General. The General Scheme was published and referred the following day.

The Regulation of Lobbying (Amendment) Bill 2022 will strengthen the existing legislative framework. In summary, it will provide for:

⁴ Regulation of Lobbying (Amendment) Bill 2020 and the Regulation of Lobbying (Post Term Employment as Lobbyist) Bill 2020



- The extension of the definition of lobbying, including to ensure that business representative bodies and coalitions of business interests, regardless of the number of employees, are brought within the scope of the Act;
- The improvement of the functionality of the Register, including by providing flexibility for new registrants to use the address of where their main activities are conducted; and
- The strengthening of the existing legislation and its enforcement, including the introduction of an anti-avoidance clause and the enhancement of the operation and enforcement of Section 22 of the Act.



4. Technical, Legal & Drafting Aspects of the Regulation of Lobbying (Amendment) Bill 2022

The General Scheme and a Summary of the Heads of the Regulation of Lobbying (Amendment) Bill were provided to the Joint Committee on 16th February 2022. The General Scheme consists of 21 Heads, which provide for:

1. Short title, collective citation and commencement of the Bill.
2. Definition provision.
3. Increase in the period between statutory reviews from 3 to 5 years.
4. Extension of the definition of lobbying in relation to the development or zoning of land to include the managing and directing of relevant communications as well as the making of relevant communications.
5. Bringing business representative bodies and coalitions of business interests within the scope of the Act irrespective of their number of employees.
6. Bringing non-remunerated office holders who are carrying on lobbying activities within the scope of the Act.
7. Taking account of existing practice by making communications made by a political party to its members excepted communications for the purpose of the register.
8. Prohibition on registered persons from lobbying where they have notified SIPO that they have ceased to carry on lobbying activities.
9. Amendment to the content to be provided to SIPO for inclusion on the register to include the address at which the registered person carries on their “main activities” if applicable.
10. SIPO can mark a registered persons entry with a statement that the person has ceased to carry on lobbying activities once they have been notified of this fact.
11. Increase transparency by requiring members of business representative bodies and coalitions of business interests to be named on lobbying returns.
12. Introduction of a new contravention for carrying on lobbying activities while being marked as ceased on the Lobbying Register.
13. Introduction of a new contravention for any actions of a person that has as its intended purpose the avoidance of obligations to register or submit returns.
14. Introduction of a new contravention for breaches of Section 22 post-term employment restrictions.
15. Breaches of Section 22 post-term employment restrictions are not a criminal offence.
16. Introduction of a system of civil and administrative sanctions for breaches of Section 22 post-term employment restrictions.
17. Introduction of timelines for the processing of Section 22 applications for a waiver of the one year cooling off period.



18. Introduction of a requirement that all public service bodies that employ relevant Designated Public Officials make those individuals aware of their post-term employment obligations under Section 22.
19. An appeal to the Circuit Court for a person aggrieved by a decision of SIPO to impose administrative sanctions.
20. Confirmation by the Circuit Court of a decision by SIPO to impose administrative sanctions.
21. Schedule deleting the citation relating to the Harbours Acts and including the individual names of the State commercial port companies as the Harbours legislation has changed.

The following sections examine in more detail the key Heads in the draft Bill which will build on the existing robust legislative framework. This is by theme:

- Extending the definition of lobbying;
- Improving the operation of the lobbying register;
- Anti-avoidance; and
- Strengthening the enforcement of the post-term employment restrictions in the Act.

4.1 Extending the Definition of Lobbying

SIPO recommended in its annual reports that, based on its experience in implementing the legislation, the definition of lobbying in the Act should be amended to ensure that the Act applies to all relevant parties.

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In this regard, SIPO specifically recommended that the Act should:

- provide for the managing and directing of relevant communications about the development or zoning of land, in addition to the making of such communications.

Unlike the other paragraphs of subsection (1) of Section 5 of the Act, Section 5(1)(c) refers only to the making of relevant communications and not to “managing or directing the making of”. This has meant that where grass roots organisations or residents’ associations organise campaigns to contact elected officials on a particular issue, the requirement to register falls on individuals rather than on the organisation. While SIPO operates a practical approach at present allowing the relevant organisation to register and complete a single return, the provision in the General Scheme will provide certainty in this regard.

- provide that any business representative bodies or ‘coalitions’ of business interests should be within the scope of the Act regardless of number or status of



employees. Members of the body or coalition should be required to be named on returns in support of increased transparency.

There are a number of representative bodies and informal coalitions that exist primarily to advocate on behalf of their members, but do not have full time employees, and therefore do not fall within the scope of the Act. This means that the activities of some representative bodies are not being captured even though the lobbying of their constituent members is within scope. The provision in the General Scheme will address this issue. It also addresses the issue raised in the Detailed Scrutiny Report prepared by the Joint Committee on the Regulation of Lobbying (Amendment) Bill 2020 [PMB]. In that report, the Committee expressed the view “that the loophole whereby business representative groups or coalitions of interest without employees may engage in lobbying without disclosure requirements reduces transparency and should be addressed”⁵.

Furthermore, the Committee supported “transparency regarding the membership of such a coalition” and this is an element which is being progressed in the drafting of the Regulation of Lobbying (Amendment) Bill 2022.

- extend the scope of the Act to include non-remunerated Office holders.

In SIPO’s experience of implementing the legislative framework, there have been a number of instances where a representative or advocacy body with an employee has carried out lobbying activities but hasn’t been required to register or submit returns as the lobbying activities were not carried out by a paid employee. In many organisations, paid employees carry out an administrative role while non-remunerated Board Members or Directors carry out the lobbying activities. The provision in the General Scheme will address this and ensure all relevant lobbying activity is included within the scope of the legislation.

4.2 Improving the Operation of the Lobbying Register

Section 11 of the Act makes provision for a registered person who has permanently ceased lobbying to notify SIPO and that person will no longer be required to make returns. The Act currently allows for a person to be registered as lobbying or having

⁵https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_finance_public_expenditure_and_reform_and_taoiseach/reports/2022/2022-03-22_report-on-detailed-scrutiny-of-the-regulation-of-lobbying-amendment-bill-2020-private-members-bill_en.pdf



permanently ceased lobbying. However, there is no flexibility to allow registered persons to “take a break” from lobbying and the requirements to submit returns.

There are situations where individuals or organisations wish to cease lobbying when an issue is resolved but a further issue may arise in a number of years where that individual or organisation may wish to lobby again. Allowing an individual or organisation to cease lobbying and notify SIPO when they wish to act as a registered person again would give the necessary flexibility. The provision in the General Scheme will address this issue.

4.3 New Anti-Avoidance Contravention

Section 18 of the Act provides a list of ‘relevant contraventions’. These include:

- lobbying without registering,
- failing to make a return,
- providing misleading or inaccurate information to SIPO,
- failing to comply with an investigation, and obstructing an investigation.

Under Section 20 of the Act, a person will be guilty of an offence if they commit one of these relevant contraventions. The penalties associated with such offences vary from a class C fine on summary conviction to a period of imprisonment of up to two years if convicted on indictment.

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SIPO has recommended that an anti-avoidance clause be added to the list of relevant contraventions in Section 18. The purpose of such a clause would be to capture actions taken expressly by a person to seek to avoid their obligations under the Act to register or submit a return of lobbying activities, such as hiding an organisations role in lobbying, creating a separate entity to avoid obligations to register, hiding evidence of managing or directing the making of lobbying activities, and hiding evidence of payment for lobbying activities.

It is important that individuals know with reasonable specificity what conduct will be criminal, therefore such provisions must be both clear and reasonably specific. The provision in the General Scheme is being further developed in consultation with the Office of the Attorney General to ensure that it can operate effectively.

4.4 Strengthening the Enforcement of the Post Term Employment Restrictions

Post Term Employment Restrictions – Section 22 of the Act

Under Section 22 of the Act, specific categories of Designated Public Officials entitled “Relevant Designated Public Officials” (relevant DPOs) are subject to a one year “cooling-off” period, during which they cannot engage in lobbying activities in specific



circumstances, or be employed by, or provide services to, a person carrying on lobbying activities in specific circumstances.

The relevant DPOs covered by Section 22 are:

- Ministers of the Government and Ministers of State;
- A special adviser appointed under section 11 of the Public Services Management Act 1997;
- The grades of Secretary General, Second Secretary, Deputy Secretary, Assistant Secretary or Director level in the civil service (together with equivalent professional and technical grades) and the posts of Chief Executive, Assistant Chief Executive and Director of Services level in local authorities.

Others who are defined as Designated Public Officials (DPOs) under the Act are not covered by this section 22 provision, that is, TDs, Senators, MEPs and Local Authority members – i.e. the one year ‘cooling off period’ does not apply.

The cooling-off period applies for a full one year term unless the relevant Designated Public Official applies to the Standards in Public Office Commission for consent to waive or reduce their cooling-off period.

This approach was considered in 2015 to represent a proportionate response to the matter on a case by case basis. This option was adopted rather than placing a mandatory blanket prohibition on relevant DPOs taking up particular roles which could be open to legal challenge by a person, for example, moving from a relevant DPO post in the public sector to a specific post in the private sector.

As indicated by former Minister Howlin in February 2015 regarding section 22 during the course of Committee Stage of the Regulation of Lobbying Bill in the Seanad:

‘The imposition of restriction on post-term employment as a lobbyist on relevant Designated Public Officials must be proportionate and practical, because people have constitutional rights. One of the most difficult things is to narrow or circumscribe people’s right to work, which is what this provision does.’

The approach taken also sought to ensure that the measures would not have the unintended impact of deterring participation in politics or in public service roles, particularly in those positions of short to medium term duration.

It is the responsibility of the relevant DPO to seek consent from SIPO to waive or reduce their cooling-off period prior to taking up an offer of employment or to provide relevant services in circumstances where such employment or services may be, or be perceived to be, encompassed by Section 22.



SIPO may decide to give consent unconditionally or give consent with conditions attached. SIPO may also refuse to give consent for all or part of the cooling-off period. A relevant DPO who is unhappy with the decision of the Commission may appeal.

Operation of Section 22

Since the Act commenced on 1 September 2015, the Standards in Public Office Commission has received 24 such applications.

This apparent low level of applications received by SIPO has given rise to a concern that there should be more applications for consent under section 22 than those received to date. However, work undertaken by the Department of Public Expenditure and Reform in 2020 would appear to indicate that this may not be the case.

The Department sought to analyse the numbers of relevant DPOs who have moved to lobbying positions or apparent lobbying positions between 2015 and 2020. Although this analysis has limitations as it relies on data that is publicly available, almost 250 individuals were identified as having left relevant DPO positions since the introduction of the Act to November 2020, with less than 20 individuals being subsequently identified as having a connection with specific lobbying posts.

The analysis produced by the Department matches broadly with the levels of Section 22 applications that have been received by SIPO over the same period. Although as the Commission data in relation to Section 22 applications is anonymous, as provided for in section 25 of the Act, the overlap between such applications and the Department's analysis cannot be definitively determined.

Enforcement of Section 22

There are currently no enforcement provisions associated with Section 22. Non-compliance represents a breach of a statutory obligation but is not deemed to be a relevant contravention and therefore not an offence under Section 20 of the Act. SIPO has recommended that failure to comply with Section 22 of the Act should be a relevant contravention under the Act and an offence. The perception of a "revolving door" between the public and private sectors can serve to undermine public trust in the impartiality of public bodies.

The Section 22 post-term employment restrictions apply to a relatively small, clearly defined, and high profile cohort of relevant DPOs. Post-term employment restrictions must be proportionate, support the management of conflicts of interest, and balance restrictions on relevant DPOs exiting the public service with the rights of individuals to earn a livelihood. Section 22 post-term employment restrictions bring transparency but it is important that they do not have a chilling effect on those wishing to contribute their



expertise to the public service, particularly in positions of a short to medium term nature.

The General Scheme has a provision making breaches of Section 22 a relevant contravention as welcomed by the Joint Committee in its Detailed Scrutiny Report on the Regulation of Lobbying (Amendment) Bill 2020 [PMB].

SIPO recommended a criminal sanction for breaches of Section 22 and this was reflected in Private Members Bills. The Act currently provides for criminal sanctions in respect of the following contraventions:

- Lobbying without registering,
- Not making a return or making a late return,
- Providing inaccurate or misleading information to SIPO,
- Failing to comply with or obstructing an investigation by SIPO.

The Act provides for a Class C⁶ Fine for a summary conviction or a fine and/or imprisonment for up to two years on indictment. The Act also makes provision for SIPO to issue fixed payment notices of €200 for late returns.

The General Scheme provides for civil and administrative sanctions of a caution or reprimand, a monetary penalty of up to €25,000 and/or a prohibition from lobbying of up to 2 years for breaches of Section 22. The rationale for this is set out in detail below.

Civil and Administrative Sanctions for Contraventions of Section 22

SIPO's recommendation was assessed as part of the Department's 2021 Review of the Regulation of Lobbying Act 2015. The Department's Legal Adviser and the Office of the Attorney General identified a number of significant legal difficulties surrounding the introduction of criminal sanctions for contraventions of Section 22, including:

- restraint of trade;
- the constitutional right to earn a livelihood;
- the management of conflicts of interest between the private and public sectors; and
- the presence/absence of severance/compensation for the person concerned.

In the context of international good practice, Ireland is a leading jurisdiction in relation to the regulation of lobbying activities, particularly in the realm of providing for a 'cooling-off' period. Canada is one of the other few common law jurisdictions that has introduced a *statutory* regime for lobbying. The United Kingdom has introduced legislation, but this has a narrow application as it only encompasses consultant lobbyists

⁶ The maximum fine for Class C is €2,500.



engaging with Ministers and Permanent Secretaries. Australia's lobbying regime operates on a non-statutory basis. There are no penalties for breaches of the cooling off period in the UK or Australia. Canada has administrative penalties at State level and criminal penalties at the federal level.

In the EU, seven member states (Austria, France, Germany, Ireland, Lithuania, Poland and Slovenia) have statutory lobbying regimes, four have voluntary systems (Belgium, Italy, the Netherlands and Romania), seven have self-regulation systems (Croatia, Czech Republic, Denmark, Finland, Latvia, Spain and Sweden), and the rest have no lobbying rules. Only three other EU Member States (France, Lithuania, and Slovenia) have introduced a cooling off period in their domestic legislation and four (Germany, Italy, Spain, and Sweden) have cooling off rules that are not on a statutory basis⁷.

Based on its analysis, the Department concluded that criminal sanctions constituted an inappropriate policy response to breaches of Section 22. Each contravention must be considered in its own particular context as well as how it functions as part of the overall regulation of lobbying framework. In line with the advice from the Office of the Attorney General, the Department recommended the introduction of civil and administrative sanctions for breaches of Section 22.

The provisions in the General Scheme for a civil and administrative sanctions regime to be introduced for breaches of Section 22 of the Act are being further developed with the Office of the Attorney General. The sanctions proposed are a caution or reprimand, a monetary penalty of up to €25,000 and/or a prohibition from lobbying of up to 2 years.

This approach is a proportionate policy response; it balances the constitutional right of an individual to earn a living with the need to limit potential conflicts of interest that could undermine public trust. The instances of breaches of the post-term employment restrictions set out in Section 22 of the Act appear to be relatively low. Notwithstanding, where breaches occur, however infrequent, they can have a disproportionate impact in undermining public trust. Proportionate and appropriate enforcement provisions being introduced, combined with the new notification requirements to increase awareness of the Section 22 provisions, should ensure fewer instances of breaches of Section 22 and the ability to adequately enforce Section 22 where breaches do occur.

⁷ French High Authority for Transparency in Public Life, Comparative study of lobbying regulation mechanisms, published 21 Oct 2020.



5. Conclusion

The critical drivers of trust in Government and public bodies are transparency, citizen participation and collaboration with stakeholders. The Regulation of Lobbying Act 2015 has, from its introduction, proved to be an example of best practice in using these drivers to best advantage. The extent of lobbying activity is a good measure of engaged citizenry, but it should be open to public scrutiny as part of the desirable checks and balances in a democracy. The legislative proposals detailed in the General Scheme of the Regulation of Lobbying (Amendment) Bill 2022 will help to strengthen our regulation of lobbying regime even further and ensure it continues to deliver on the objectives we have set for it.

Good progress has been made with the Office of the Attorney General on the drafting of the Bill. The Joint Committee's input through pre-legislative scrutiny is an important element in the development of legislative proposals in this policy area.