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Library & Research Service

Bill Digest

Regulation of Lobbying (Amendment) Bill 2022

Bill 85 of 2022

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Abstract

The amendments to the *Regulation of Lobbying Act 2015* proposed in this Bill aim to strengthen compliance and enforcement, most notably of the 'cooling-off' provision, and also through the insertion of an 'anti-avoidance' clause. With a view to bringing more transparency to lobbying activity and closing off unintended loopholes, it extends the Act's provisions to lobbying activity by certain representative and issue-based bodies and to lobbying conducted by non-remunerated office-holders of other representative and issue-based bodies, and it slightly amends the information required on the register. The Bill creates a system of administrative financial sanctions which can be imposed for some relevant contraventions, including for a breach of the cooling-off provision. The Bill also increases the length of time that will elapse between statutory reviews.

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Legal Disclaimer

Glossary

DPER	Department of Public Expenditure and Reform
DPO	Designated public official (lobbied person) as set out in s6 of the Act
'Relevant matter'	Any matter relating to: (a) the initiation, development or modification of any public policy or of any public programme (b) the preparation of amendment 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 any matter relating only to the implementation of any such policy, programme, enactment or award or of a technical nature. s5(9)
SIPO	Commission on Standards in Public Office
Relevant contravention	Contravention under s18 of the 2015 Act
Relevant communication	Communication (whether oral or written and however made), made personally (directly or indirectly) to a designated public official in relation to a relevant matter (other than exempted communications). (s5(4))

Introduction and guide to this Digest

The *Regulation of Lobbying (Amendment) Bill 2022* was published on 22 September 2022. The Bill aims to address issues which may be preventing the *Regulation of Lobbying Act 2015* from achieving its purpose, which is to bring greater transparency to lobbying activity and, therefore, to the policy-making process.

According to the Minister, this Bill "will further strengthen Ireland's lobbying laws, incorporating the learnings of the last six years."

On publication of the Bill, the Department identified three core objectives:

- To improve the operation and functionality of the Lobbying Register
- To strengthen the existing legislation and its enforcement, and
- To make failure to comply with the post-term employment 'cooling-off' restrictions set out in section 22 of the Act a relevant contravention under the Act. In this respect, the Bill will enable SIPO to impose a [financial penalty] of up to €25,000 and/or a ban on lobbying of up to 2 years for breaches of the cooling-off period.

If enacted, the provisions would come into operation by an Order of the Minister and there may be different commencement dates depending on the provision (section 23, 2022 Bill).

The Minister gave the General Scheme of this Bill to the Joint Committee on Finance, Public Expenditure and Reform (the Joint Committee) in February 2022. The Committee undertook pre-legislative scrutiny and issued its Report on the General Scheme in July 2022 (see Appendix 1 and page 9 below). We draw on this Report and on the Committee's Report on Detailed Scrutiny of the *Regulation of Lobbying (Amendment) Bill 2020* throughout this Digest.

This Bills Digest is set out as follows:

1. The policy and legislative context for the Bill, including the impetus behind the proposal to amend the lobbying regulations
2. A factual overview of the amendments proposed by the Bill, and
3. Principal provisions which is a thematic analysis of the principal amendments proposed in this Bill under five themes, which in each case identifies the problems with the Act and the extent to which the provisions appear likely to address them without creating unintended consequences. In the case of each principal theme, we identify issues which Members may wish to consider when scrutinising this government Bill. These are accessible here:
   - Widen scope by changing disclosure requirements for representative and issue-based organisations
   - Enhancing the effectiveness of the 'cooling-off' provision
   - System of administrative sanctions and civil offence
   - Widen definition of lobbying where it concerns the development or zoning of land
   - Review of the Act – extend period to 5 years

1.Policy and legislative context

Lobbying activity is political communication aimed at influencing policy outcomes. Lobbyists may represent business and professional interests, NGOs, citizen groups, politically-active firms or specialised consultancies hired to lobby on behalf of a third-party organisation.[1] The *Regulation of Lobbying Act 2015* created a statutory regime for those engaged in lobbying activity in Ireland for the purposes of bringing transparency and accountability to the policy-making process.

The legislation had been proposed in the final report of the Mahon Tribunal into certain planning matters and payments (2005) which observed that the regulation of lobbying "is likely to decrease the corruption risks associated with that activity by increasing transparency and accountability in the policy making process."[2] The 2015 Act is part of a suite of legislation which aims to ensure that elected and public officials act in the general interest and are not unduly influenced by private or specialised interests, or faced with conflicts of interest, which mean that decisions are sub-optimal to the general public interest. The legislation includes the Electoral Acts (in particular the *Electoral (Amendment) Political Funding Act 2012*), the *Freedom of Information Acts 1997 and 2014* , *Standards in Public Office Act 2001* and the *Ethics in Public Office Act 1995*. The Government is proposing to reform and consolidate the latter and the Heads of an Ethics in Public Office Amendment Bill are currently being drafted by DPER.

Under the *Regulation of Lobbying Act 2015* **(the Act),** persons engaged in 'lobbying activity' (Box 1) must disclose this activity by registering on the Lobbying Register (maintained by the Commission on Standards in Public Office (SIPO)) and entering regular (three times a year) returns about their lobbying activity, including identifying which 'designated public officials' (DPOs) have been recipients of their lobbying activity and the general purpose of the activity. Persons engaged in lobbying must also 'have regard to' a Code of Conduct on Lobbying (which SIPO is permitted to publish under section 16 of the Act).

Box 1 *Definition of lobbying activity (2015 Act)*

*Lobbying is when 'a person' [see s5(2) and s5(3)] makes, manages or directs the making of, (directly or on behalf of another person in return for payment) a '**relevant communication'** [(s5(1), 5(4)] on 'relevant matters' to a designated public official (DPO [s(6)].*

s5.5 is a list of 'communications' which are exempt from the definition of lobbying under the Act (e.g. presentations to an Oireachtas Committees).

(see also glossary)

The purpose of these obligations is to make it public knowledge who is talking to whom, when and about what policy issues. As noted by political scientist Michele Crepaz, the purpose of the legislation is 'not to restrict the flow of information or of views on policy or legislation, but to bring significantly greater openness and transparency with respect to lobbying activities which is 'an essential part of the democratic process.'[3]

The Act also aims to prevent former DPOs from using political networks built up while in office for the purposes of individual or private

[1] Crepaz and Chari (2022) 'Interest group access to policymaking in Ireland *Irish Political Studies'* published online May 2022 p.1

[2] See Oireachtas L&RS (2014) Bills Digest on the Registration of Lobbying Bill 2014

[3] Dr Michele Crepaz (May 2019) *Submission to DPER's Second Review of the Lobbying Act 2015.*

gain.[4] It does so through a '**cooling-off'** or a '**post-term employment'** provision.[5] Under this provision, certain DPOs who have left office are prohibited from engaging in lobbying activity connected to previous employment for one year (unless he or she is granted a waiver from this provision on application to SIPO in a procedure set out by SIPO).

Under the Act, only 'relevant contraventions' (set out in section 18) are subject to investigation by SIPO and are offences subject to sanction. Currently, the Act provides for the following relevant contraventions:

- engaging in lobbying activity without registering (section 8(1) of the Act),
- failing to make a return providing set information to the Register (section 12(1) of the Act),
- providing false or mis-leading information in a return,
- failing to comply with a requirement under section 19(4) of the Act, and
- obstructing an investigation under section 19 of the Act.

Contravention of the 'cooling-off period' is not currently a relevant contravention, although section 9 of the Bill proposes to add this to section 18 of the Act (see below).

The Act, which has five parts, is summarised in Table 1 below.

[4] Crepaz Michele (2017) 'Investigating the Introduction and the robustness of lobbying laws' *submitted for Doctorate at Trinity College Dublin under Supervisor Raj Chari (expert in lobbying regulation).* P.32

[5] Crepaz Michele (2017) 'Investigating the Introduction and the robustness of lobbying laws' *submitted for Doctorate at Trinity College Dublin under Supervisor Raj Chari (expert in lobbying regulation).* P.32

Table 1: *Regulation of Lobbying Act 2015* – Key Sections and Purposes

Part	Sections	Central purpose
PART 1	**Preliminary and General** 1. Short title and commencement 2. Review of Act 3. Expenses 4. Regulations 5. Meaning of carrying on lobbying activities 6. Designated public officials 7. Other definitions	Defines 'lobbying activity' including who is a 'relevant person' (s5(2) and (3)), what is 'a 'relevant communication' and who is a 'designated public official' (s6).
PART 2	**Registration** 8. Requirement to register 9. Register of Lobbying 10. Content and public availability of Register 11. Details to be supplied by applicants for inclusion on Register 12. Returns to be made by registered persons 13. Requirement for further or corrected information 14. Delayed publication 15. Evidence of entries on Register	Sets out the disclosure requirements on registration and on regular updates (returns) about lobbying activity and SIPO's role (s19 and 10 especially). Breaches of s8(1) and s12(1) – registration and returns – are contraventions under s18.
PART 3	**Code of Conduct and Guidance** 16. Code of conduct 17. Guidance	Persons engaging in lobbying activity 'have regard to' a Code of Conduct on Lobbying if published by SIPO (s16).
PART 4	**Enforcement** 18. Relevant contraventions 19. Power to carry out investigation 20. Offences 21. Fixed payments	Defines what is a 'relevant contravention' (s18), empowers SIPO to investigate 'relevant contraventions' (s19) and sets out whether contravention is an offence (s20) and fixed penalties that apply (s21). Non-compliance with some provisions of the Act – e.g. the cooling-off provision – are not 'relevant contraventions.'
PART 5 -	**Miscellaneous and Supplementary** 22. Restrictions on post-term employment as lobbyist 23. Appeals 24. Further appeal on point of law 25. Reports by Commission 26. Delegation of functions by Commission 27. Amendments relating to Commission	Prohibits certain former designated public officials (DPOs) from engaging in lobbying activities which are *connected to* their previous employment for one year after their departure (and provides a mechanism through which former DPOs can apply to SIPO for a waiver from the cooling-off period)

What has prompted proposals to amend the Act?

Ireland's lobbying regime is frequently described as being 'strong' or 'robust' and this has been drawn on as an argument not to amend it. Hogan et al[6] say the Irish legislation is robust because anyone can be a lobbyist, i.e. whether a person has obligations under the Act is determined by their engagement in a specific action (a relevant communication) rather than by who they are. An article published by *Politico* in August 2017[7] praised the Irish model for its broad definition of lobbying:

> "The law uses one of the broadest possible definitions of a lobbyist: anyone who employs more than 10 individuals, works for an advocacy body, is a professional paid by a client to communicate on someone else's behalf or is communicating about land development is required to register themselves and the lobbying activities they carry out."
>
> "That means NGOs and other civil society organizations are just as much subject to the rules as groups representing multinationals or local industries."

The Minister noted that the second statutory review of the 2015 Act "found that there was widespread acceptance and support for it, with the legislation and lobbying register viewed in "a positive and constructive light."[8]

Studies which assess lobbying regimes using 'robustness indices' also tend to place Ireland among the higher performing states.[9] Applying a robustness index created by Holman and Luneberg in 2012, Crepaz (2017) placed Ireland in the 'strong' category.'[10] Ireland was placed second to Slovenia in a Transparency International Study[11] on the robustness of mechanisms for lobbying transparency. However, it also noted that while the Irish regulations scored 48 out of 100, and Slovenia 58 from 100, the Report found that European states as a whole scored very poorly.[12]

Care should be taken with interpreting overall scores on robustness scales as they do not always reflect the possibility that one weakness in the regime can render the strengths of other aspects futile. For example, strong enforcement provisions may be a sign of a robust regime but if the scope of who comes under the Act is narrow the regime may, in fact, be relatively weak when assessed against the overall objective of the system. Alternatively, the scope of the legislation can be wide – requiring almost all persons involved in lobbying to disclose this information - but if enforcement of these requirements is weak the legislation is unlikely to have the intended effect.

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[6] Hogan, Keeling, Feeney (2017) Transparency: Comparing the New Lobbying Legislation in Ireland and the UK (tudublin.ie)

[7] Politico (9 August 2017) Ireland's tough lobbying rules spark cries for similar laws elsewhere

[8] Minister McGrath, 24 November 2020 Dáil Debate on Regulation of lobbying (amendment) Bill 2020 PMB.

[9] Indices originally designed to measure the robustness of lobbying regulation across US States are by Opheim (1991) and by Brinig el al (1993), an index developed by the Centre for Public Integrity (CPI) has 48 variables and was applied by Chari and Murphy to a number of states (2010) and to Ireland and other states (Chari and Crepaz, 2017), Holeman and Luneberg (2012) which was applied by Crepaz to Ireland (2017), and Transparency International's robustness index which applied questions on over 60 variables to 19 European state. See Crepaz M (2017) ''Investigating the introduction and robustness of lobbying laws' Thesis for PhD Trinity College Dublin under Prof Raj Chari. Chapters 5 and 6. Keeling, Feeney and Hogan (2017) Transparency:Comparing the New Lobbying Legislation in Ireland and the UK (tudublin.ie)

[10] Crepaz M ''Investigating the introduction and robustness of lobbying laws' Thesis for PhD Trinity College Dublin under Prof Raj Chari. Chapters 5 and 6.

[11] Transparency International *Lobbying in Europe Hidden Influence, Privileged Access* p.30.

[12] Transparency International (2015) cited above

Two statutory reviews (conducted by DPER in 2017 and in 2019 respectively)[13] identified some problems with the functioning of the 2015 Act, in particular relating to its scope and to the enforcement of some of its provisions. The (then) Minister in 2020 stated that it was premature to address some problems, and that others could be addressed without legislative change which was 'unnecessary.'[14]

Subsequently, two Private Members' Bills (PMBs) were initiated – the *Regulation of Lobbying (Amendment) Bill 2020* and the *Regulation of Lobbying (Post-Term Employment as Lobbyist) Bill 2020* - both of which aimed to address issues raised in the Reviews, the former more extensively than the latter. Both Bills were approved at Second Stage.

Amidst controversy over a former Junior Minister who took up employment with an organisation which appeared to be connected to his previous role,[15] the Taoiseach indicated in late September 2020 that the Government favoured amendments to the Act, in particular the introduction of sanctions for breaches of the 'cooling-off' provision. Then "in the context of the Statutory Reviews and the Private Members' Bills," a decision was made by the Government to undertake 'a more thorough review of the Act which was requested by the Minister for Public Expenditure and Reform.'"[16]

In the meantime, the Joint Committee held hearings in October 2021 and published its Report on Detailed Scrutiny of the Regulation of Lobbying (Amendment) Bill in March 2022. The Cabinet approved a proposal to draft government legislation in February 2022 and the General Scheme of this Bill was given to the Joint Committee. The Committee received submissions and held hearings in May 2022, and published a Report on Pre-Legislative Scrutiny of the General Scheme in July 2022.

This Digest draws on the above material, as well as academic work on lobbying regimes. The **Joint Committee's recommendations on Pre-legislative Scrutiny** are set out in Appendix 1 along with L&RS conclusion on whether or not the proposals were taken on board in the Bill. Appendix 1 also sets out the Joint Committee's conclusions on detailed scrutiny of the *Regulation of Lobbying (Amendment) Bill 2020* as they are very relevant to this Bill.

[13] DPER (2017) First Review of the Regulation of Lobbying Act 2015 and DPER (2020) Second Review of the Regulation of Lobbying Act 2015.

[14] In introduction to Second Statutory Review, 2020.

[15] See Sean Murray '*Lobbying rules not strong enough and unenforceable*' *Irish Examiner* 19 August 2022

[16] Department of Public Expenditure and Reform, Regulatory Impact Assessment, 2022

2. How does this Bill propose to amend the Act?

The Bill proposes major and minor amendments to the Act which we describe in paragraphs 2.1-2.7 below before analysing some in more detail in the Principal Provisions section. It is useful to read the below with reference to Table 1.

2.1 Extension of time-frame for a mandatory review of the Act

Section 2 of the Bill amends section 2(c) of the 2015 Act **to extend the time-frame for a mandatory statutory review** of the Act from three to five years. This means that work to undertake the next statutory review of the Act would begin five years after the commencement of section 2 of this Bill, if enacted.

2.2 Amendments to the meaning of carrying out lobbying activity

Section 4 of the Bill proposes amendments to section 5 of the Act which is the "Meaning of carrying out lobbying activity'.

Section 4(a) substitutes section 5(1c) to **broaden the meaning of carrying out lobbying activity when the matter concerns the development and zoning of land.** The effect is that any person who "makes, *or manages or directs the making of*,'" a relevant communication on the matter (rather than any person who "makes" a relevant communication which is currently the case) must comply with the disclosure regulations set out in the Act. This aligns this definition with that for lobbying on other matters (in section 5(1) (a and b)), while it remains the case that when the subject matter is the development or zoning of land, any individual person, regardless of number of employees, must comply with the regulations. Section 4(a) also updates reference to the *Planning and Development Acts 2000-2021*.

Section 4(b) and 4(c) of the Bill amends section 5(2) and 5(3) of the Act respectively to the effect that a representative/issue-based organisation that engages in lobbying must comply with the regulations:

- even if it has no paid employees, provided that one of its members/groups would come under the scope of the Act in its own right[17] [this is the effect of the proposed new sub-sections (5(2) (d) and (e)]
- And where the person who is lobbying's functions relate to the affairs of the whole body *even if* that person is not remunerated for the position [effect of substitution of section 5(3)(b)].

Section 4(d) inserts a new subsection [(p)] into section 5(5) – exempted communications. This adds a communication by a political party to a member, who happens to be a DPO but who receives the communication in his or her capacity as a party member, to the list of communications which are exempt from the regulations. This is to avoid scenarios whereby consultation by political parties with its members for policy-development purposes is interpreted as coming within the

[17] Under 5(2) a-c.

scope of a relevant communication. This was recommended by SIPO in its submission to both statutory reviews of the Act.[18]

Section 5 inserts a definition of company to section 7 of the Act ('Other definitions); "a company formed and registered under the Companies Act 2014 or an existing company within the meaning of that Act."

2.3 Amendments to section 11 of the Act re. records marked 'ceased lobbying'

Sections 6 and 7(c) and (d) of the Bill aim to close off a loophole whereby a person whose entry is marked 'ceased lobbying' on the Register (under section 11(4) of the Act) can re-commence lobbying activity without being subject to the transparency obligations. Section 6 inserts a new subsection (1A) to section 8 of the Act (Requirement to register) which states that a person whose entry has been marked 'ceased' shall not carry out lobbying activities. Section 7(d) of the Bill inserts a new subsection 11(5) into the Act to provide that if a person whose record is marked 'ceased'' wishes to recommence lobbying activity the person shall notify SIPO, which will then remove 'ceased' from the person's entry on the Register.

2.4 Amendments to information that must be disclosed on registration (section 11)

Section 7(a) and (b) amend the information required on registration (section 11 of the Act), in particular to require that where the person is a representative body or an issue-based organisation with no employees (under proposed new section 5(2) (d) and (e)), they must supply the name of every person who is a member of the organisation [with a view to bringing greater transparency to who is actually lobbying]. [this is done by inserting a new section 11(1) aa.]

The Bill also proposes to substitute section 11(1)(b) to set out that all registrants provide the address at which they carry on business *or carry on the person's main activities* (see Box 2).

Box 2: Proposed information required on registration (section 11(1)(a-c) of the Act)

(a) the person's name,

(aa) the name of every person who is a member of a body referred to in section 5(2) (d) or (e),[19] as the case may be,

(b) the address (or principal address) at which the person carries on busines *or carries on the person's main activities* or (if there is no such address) the address at which the person ordinarily resides,

(c) the person's business or main activities,

2.5 Amendments to section 18 to create new 'relevant contraventions'

Section 9 of the Bill creates new 'relevant contraventions' in section 18 of the Act which are to:

- Engage in lobbying activity when entry is marked 'ceased lobbying' which is a breach of the newly-proposed section 8(1A) [this is via an amendment to section 18(a)]

[18] SIPO (2019) Submission on Second Statutory Review of the Regulation of Lobbying Act, p.7.

[19] Representative bodies (d) or issue-based organisations (e).

- Take actions to avoid one's duties under sections 8(1) and 12(1) (to register if engaging in lobbying activity and to make a timely and correct return on the register) [insertion of new contravention – section 18(f)]. (Anti-avoidance clause).
- Breach by former DPOs of the 'cooling-off period' under section 22(1)* [insertion of new contravention – section 18(g)].

2.6 Amendments to section 22 to create a new sanction regime

The Bill (sections 13-17) creates a new sanction regime – administrative sanctions[20] – by inserting the following new provisions after section 22 of the Act:

- Section 22A (Sanctions for contravention under section 18(f) and of 22(1)),
- Section 22B (Matters to be considered in determining amount of financial sanction to be imposed)
- Section 22C (Financial sanctions),
- Section 22D (Appeal to Circuit Court), and
- Section s22E (Application to Circuit Court to confirm decision to impose major sanction).

Two of the new contraventions – a breach of the cooling-off provision (section 22(1)) or a breachof the newly-proposed anti-avoidance clause - are not considered to be criminal, but rather civil, offences and are subject to a different sanction regime than other relevant contraventions under the Act. The process for investigating a possible civil offence begins in the same way as investigations of possible criminal offences and is set out in section 19 of the Act (which empowers SIPO to conduct investigations in the even that it *reasonably believes that a person may have committed or may be committing a relevant contravention).'* Under the Bill (section 19), a decision to impose a financial sanction may not be delegated and must be taken by the Commissioners. The process for applying administrative sanctions may not be delegated by the Commissioners to staff members of SIPO.[21]

Table 2: Comparing offences and sanctions depending on relevant contravention if Bill is enacted (* indicates it is proposed by this Bill)

Relevant contravention	Offence and sanction (set out in s20 of the Act)
Section 12(1) making a return after the relevant date	*Guilty of an offence and liable on summary conviction to a class C fine. The person may be served with a 'fixed payment notice' which, if is paid by a set date, prosecution will not be initiated.*
Section 8(1) lobbying without registering	
Section 18(c) – providing SIPO any information under the Act known to be inaccurate or	

[20] The RIA refers to this as a regime for the imposition of administrative sanctions, while the Bill refers to them as financial sanctions.

[21] DPER (2022) Regulatory Impact Assessment p.10.

	Guilty of an offence and liable on conviction on indictment, to a fine or imprisonment for a term not exceeding 2 years or both.[22] *The person may be served a 'fixed payment notice' which, if is paid by a set date, prosecution will not be initiated.*[23]
Section 18(d) - mis-leading or failing to comply with a requirement under s19 (investigations)	
**new section 18(e) – lobbying when marked ceased*	
**New anti-avoidance clause under section 18(f)*	*Subject to a minor or a major sanction imposed by SIPO (on confirmation by Circuit Court).*
**Contravention if section 22(1) – under new section 18(g)*	*Major sanctions:* - *Financial sanction not exceeding €25,000,* - Prohibition from registering for up to two years, - Prohibition from making or having a return made under s.12 for up to 2 years, or - Any combination of the above. Minor sanctions are: - advice - a reprimand - a caution, or - any combination of the above *Set out in new proposed sections 22A-22E*

2.7 Amendments to operation of the cooling-off provision including obligations on employers

Section 12 of the Bill aims to provide greater clarity around the process through which DPOs seek waivers to the cooling-off provision and creates new obligations in this respect on employers.

The Bill amends section 22(1) to clarify that *prior* consent from SIPO is required to waive the cooling-off provision and that SIPO may set down conditions when giving consent. Applications for consent to waive are (as is currently the case) made in a manner set out by SIPO (set out in new section 4(A)[24]). A new section 22(5) sets out a clearer procedure for application; this includes that SIPO shall make a decision on an application and make any consultation which can include with 'the person concerned, the person's current, former or intended employer or such other person as the it considers appropriate' (new subsection 5(a)). The new section 22(5) further provides that SIPO:

[22] Under s20, any relevant contravention (except for of s12(1) is an offence liable to a class C fine (on conviction) and to a fine or imprisonment not exceeding two years (on indictment).

[23] This was clarified by SIPO in evidence to the Joint Committee, 19 May 2022.

[24] This is currently the case under s22(5) which the Bill proposes to substitute.

- must notify the person in writing of the decision, and where an application is refused, the reasons for the decision (subsection 5(b))
- must make a decision under subsection 5(a), insofar as practicable, not later than 14 days after receipt of the application (subsection 5(c))
- where a decision is not or not likely to be provided to the person within 14 days, it must notify the person that the period is extended by a further period of up to 14 days (subsection 5(d)).

Section 12 of the Bill inserts new paragraphs (6) and (7) into section 22 of the Act (post-term employment), which respectively create new obligations:

- An obligation on public service bodies to inform departing DPOs of their obligations under section 22(1) of the Act, and
- An obligation on public service bodies to inform SIPO that a DPO is leaving office, as well as provide certain details relating to that official.

3. Principal Provisions

For each theme we set out the issue the provisions are designed to address, assess the extent to which they address it and note any further potential issues and/or possible complications during implementation.

3.1 Widen scope by changing disclosure requirements for representative and issue-based organisations

Policy issue identified

Under the legislation, the definition of lobbying activity depends more on the *type of communication* than on the *person* who is making the communication. As noted above, this approach to the regulation of lobbying is considered best practice in that it ensures that the obligations apply to a wide variety of lobbying activity, and not just to lobbying undertaken by professional lobbyists (as is the case, for example, with the UK lobbying regulations).

The Act does, however, set down some parameters around which 'persons' who engage in lobbying activity must comply with the requirements in the Act. The parameters aim primarily to limit administrative burdens and, in particular, to ensure that small, local organisations can approach local elected representatives or officials without fearing they will be contravening the Act.

Under section 5(2) of the Act, a 'person' engaging in lobbying activity is subject to the regulations if the 'person' has one of the following characteristics[25]:

> (a) has **more than ten full-time employees** and the lobbying activity is made on the 'person's behalf',
>
> (b) is a representative body[26] with at least one full-time employee and the lobbying activity is made on behalf of the members (or any member) or
>
> (c) is an issue-based organisation[27] with at least one or more full-time employee (and the communication is made for the furtherance of the issue).
>
> And, in the case of a representative/issue-based organisations a communication is only relevant (and therefore subject to disclosure under the Act) if it is made by a person who holds a paid position ***and*** whose functions relate to the affairs of the body as a whole (section 5(3)).

These parameters have been criticised for creating loopholes especially for certain types of organisations (see below). Regardless of their purpose, the effect of these provisions is that a representative body or an issue-based body engaging in lobbying activity only comes under the scope of the Act if it has one full-time employee ***and*** if the person making the communication is in a remunerated position which relates to the affairs of the body as a whole.[28] It has been argued that

[25] Except for if the subject matter is the development and zoning of land in which case any person must register.

[26] A "body which exists primarily to represent the interests of its members"

[27] A body which exists primarily to take up particular issues

[28] The original Bill in 2014 had included the same 10-employee condition on representative organisations and, in response to criticisms that this would create many loopholes, the (then) Minister introduced amendments to introduce the one-employee

this creates a loophole which could be used by representative or issue-based organisations if they wish to lobby but to avoid transparency requirements.

Evidence on the extent of use of this loophole is difficult to cite as the extent to which it is used to engage in undisclosed lobbying is by its very nature not known. However, it would appear that lobbying through representative organisations is quite popular; SIPO's Annual Report on the Lobbying Act (2020) noted that representative organisations make up the second largest category of registered lobbyists (with charities and advocacy groups the most numerous) (Figure 1). And Crepaz and Chari suggest that firms may prefer to delegate lobbying to the business association of which they are members.[29] Therefore, closing off any potential loopholes for these bodies is likely to enhance the disclosure of lobbying activity.

At least three of the submissions on the Second Review of the 2015 Act (2020) identified this issue as preventing disclosure of certain lobbying activity.

In its submission (May 2019, 3), SIPO noted that:

> "There are a number of representative bodies, however, that exist primarily to advocate on behalf of their members, but do not have full-time employees and are not, therefore, within scope of the Act."

SIPO said it is "aware of" informal non-incorporated, coalitions of businesses with a name and letterhead but no employees who can undertake lobbying activity with no obligations under the Act. It noted that "it knew of examples of such coalitions in the airline industry, software companies and in the entertainment and leisure fields." SIPO continued that:

> "Whether or not such informal coalitions or bodies have been formed with the intention of circumventing the Act's provisions, the effect has been that the lobbying activity falls outside of scope and is not made transparent. **This undermines the spirit and intent of the legislation and provides an effective loophole for those who might exploit it."**

The Public Relations Consultants Association (PRCA) also drew attention to this issue recommending that the requirement for professional, representative or lobbying organisations to have one full-time employee before being required to register be removed. It pointed to 'several bodies, including informal coalitions of interest, that are influential but do not have full-time staff' and that 'some other threshold would be useful.'[30]

Hogan and Feeney (May 2019), authors of academic work on lobbying policy (Technological University Dublin), stated that since the Act came into force it has been recognised that 'some companies are no longer lobbying for themselves, but instead are choosing to go through their industry associations in order to hide their presence in the lobbying process.' They refer to this as 'legitimate under the law' and suggest that it may need amendment to enhance transparency. [31]

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criteria. It was pointed out that many representative bodies had many members and few employees See See Dáil Debates (30 September and 1 October) on Registration of Lobbying Bill 2014.

[29] Crepaz and Chari (2022) p.13. While most of these associations would have employees and therefore come under the scope of the Act already, the point being made is that businesses may prefer to engage in lobby through associations and not individually.

[30] See PRCA (May 2019) *Submission to the DPER on the Second Review of the Regulation of Lobbying Act 2015 p.11.*

[31] Hogan and Feeney (May 2019) *Submission to the DPER on the Second Review of the Regulation of Lobbying Act 2015*

The Joint Committee argued in its Report on Detailed Scrutiny of the *Regulation of Lobbying (Amendment) Bill 2020* 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."[32]

How is this addressed by the Bill?

The intention of the Bill is to address this issue and to strengthen the transparency requirements for representative/issue-based organisations in two ways.

First, by amending section5(2) and s5(3)[33] of the Act as set out below. If enacted, this would mean that a representative and/or issue-based organisation engaging in lobbying activity would be subject to the regulations, even if the organisation has no paid employees, and where the lobbying activity is made by a non-remunerated person who acts on behalf of the body as a whole.[34] This would be the case, provided that at least one of the organisation's members meets the conditions of section 5(2) i.e. has more than 10 full-time employees. If none of its members meets this condition, the threshold of one employee remains for a representative or issue-based organisation to be within scope (as per section 5(2)).

Box 3: Amendments to s5(2) of the Act: 'persons' to whom the lobbying regulations apply

Part 1: Section 5 (2) of the Act **(amendments proposed by s4(b) and 4(c) of this Bill are in *ITALICS*)**

(2) The circumstances in which this subsection **applies to a person are that**—

(a) the person has more than 10 full-time employees and the relevant communications are made on the person's behalf,
(b) the person has one or more full-time employees and is a body which exists primarily to represent the interests of its members and the relevant communications are made on behalf of any of the members
(c) the person has one or more full-time employees and is a body which exists primarily to take up particular issues and the relevant communications are made in the furtherance of any of those issues, and.

(d) the person has no employees and is a body which exists primarily to represent the interests of its members where one or more of the members of the body would fall within the scope of one of the paragraphs (a) to (c) if such member or members were to carry on lobbying activities outside of the body and the relevant communications re made on behalf of any of the members, or

(e) *the person has no employees and is a body which exists primarily to take up particular issues where one or more of the members of the body would fall within the scope of one of paragraphs*

[32] Joint Committee on Finance, Public Expenditure and Reform (March 2022), Report on Detailed Scrutiny of Regulation of Lobbying (Amendment) Bill 2020 p.23. The Committee also noted the importance of preserving the ability of constituents to raise issues with public representatives, and of avoiding placing small representative organisations with few resources and no employees within the scope of the Act

[33] Amended by s4(b) and (c) of this Bill

[34] In its submission to the Joint Committee the Department stated that the purpose of the amendment to s5(3) is to address situations such as board members or directors who carry out lobbying activities without renumeration i.e. to bring them under the scope of the Act (Joint Committee Report, page 15.

(a) to (c) if such member of members were to carry on lobbying activities outside of the body and the relevant communications are made in the furtherance of any of those issues.

The Bill removes the stipulation that a communication by a representative/issue-based organisation (as defined in 5(2) (b) and (c) above) is only relevant if made by a person who is remunerated. It does so by inserting a new wording which omits condition (i) as follows:

New wording to determine when *a communication made by a representative body or issue-based organisation (under 5(2) (b) and (c)) is a relevant communication:*
s5(3b) of the 2015 Act

Existing wording - s5(3)b	Proposed new wording for s5(3)b [35]
(b) where it [a relevant communication] is made up by a person who holds, in the body, any office – (i) in respect of which remuneration is payable, and (ii) the functions which relate to the affairs of the body as a whole, in his or her capacity as such.	*(b) where it [a relevant communication] is made by a person who holds, in the body, any office the functions of which relate to the affairs of the body as a whole.'*

Secondly, it inserts a new subsection into section 12(4) of the Act (Returns to be made by registered persons) [inserted by section 8(c) of the Bill]. This subsection would require that some representative/issue-based organisations must, when making a return on the register, "supply the name of every person who is a member of the body' new subsection (fa)). This aims to bring more transparency to lobbying activity undertaken by some representative/issue-based organisations.

Box 4: Proposed new subsection (fa) to s12 of the Act – Returns to be made by Registered Persons

Section 12 – Returns to be made by Registered Persons
12 (4) If the registered person has carried on lobbying activities in the period covered by the return, the return shall state—
(a) – (e)

(f) the name of each person who is or has been (whether before or after the passing of this Act) a designated public official employed by, or providing services to, the registered person and who was engaged in carrying on lobbying activities, and

*(fa) the name of every person who is a member of a body referred to **in section 5(2)(d) or (e),** as the case may be,*

Does the Bill address the concerns?

As described above, the Bill aims to close off the potential loophole which currently could enable some representative/issue-based organisations to lobby without being subject to disclosure rules. And in stipulating that at least one of the organisations' members must otherwise come within the scope of the Act (as had been suggested by SIPO in 2019 and in the PMB 2020) the amendment avoids bringing small, resource poor organisations with no employees under the scope of the Act.

[35] Inserted into s12(4) of the Act by s4(c) of this Bill

Members may wish to seek clarification on the following issues related to these provisions.

First, the new requirement[36] that representative/issue-based organisations disclose the name of "every person who is a member of the body" when making a return on the register (Box 4) applies to representative/issue-based organisations without employees (provided that at least one of its members already would come under the scope of the Act). In other words, it applies to the new category of such organisations provided for in the new subsection 5(2) (d) and (e). This disclosure does not appear to apply to representative/issue-based organisations which already come under the scope of the Act under s5(2)(b) and (c) i.e. those with at least one employee (see Box above).[37] If this is the case, the Bill requires some representative/issue-based organisations who engage in lobbying activity to disclose the identity of its members and not others.[38] Further, this requirement to supply names would apply to natural persons as well as companies, organisations to be listed (if the organisation comes within the scope of the Act as amended).

In a connected point, the proposal to bring a non-remunerated office-holder engaging in lobbying activity on behalf of representative/issue-based organisation within scope applies to one group of these organisations (those with at least one employee who already come under the scope of the Act) and does not apply to the new categories of 'person' under (d) and (e) (perhaps because these bodies do not include paid employees in the first place) (Box 3).

Secondly, the Bill uses different terminology to that used in the *Regulation of Lobbying (Amendment) Bill 2020* (PMB), in the *General Scheme of this Bill 2022* and by SIPO (2019) when applying the new subsections to representative bodies and issue-based organisations. All of the former referred to "business representative body" or "coalition of business interests" and the General Scheme (Head 5) proposed to insert definitions of both into section 5(9) of the Act. This Bill uses the terminology which is already in the Act (s5(2) (b) and (c); the new requirements are for "a body which exists primarily to represent the interests of its members" (new subsection 5(2)(d)) and "a body which exists primarily to take up particular issues." (new subsection 5(2)(e)). The Bill, therefore, would appear to extend the scope further in that the new provision is not limited to bodies which aim to further business interests.

Thirdly, the Joint Committee in its Pre-legislative Scrutiny Report (2022, 16) noted a recommendation from SIPO, and recommended that the Bill include a comprehensive definition of a 'full-time employee' (Recommendation 2).[39] The Committee sought clarification from the Department that all categories of workers are now included in the scope of the legislation.

Fourthly, in the event that this loophole is closed off, are there other loopholes to which those who wish to avoid transparency may revert?

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[36] By section 4 of this Bill

[37] In response to this proposal which had been raised in the second statutory review of the Act, DPER had stated that placing an obligation on a greater number of representative bodies or coalition of business interests to register might not bring transparency as "currently there is no obligation under the Act for representative bodies to identify their individual members nor to indicate which members have an interest in the lobbying activity." (2020, p.22). The proposal in the Bill does create this obligation but only for the new category of representative and issue-based bodies.

[38] The *Regulation of lobbying (amendment) Bill 2020* proposed to insert a new s5(1) into the Act which would have a similar effect.

[39] The Act defines a full-time employee" in section 7 as "has the meaning given by section 7 of the Protection of Employees (Part-Time Work) Act 2001."

Fifthly, and more broadly, does the fact that a person (other than a representative/issue-based organisation) must have at least ten employees create opportunities for persons to engage in undisclosed lobbying activity?

During the debate on the Bill in 2014, for example, (then) opposition parties objected to the ten-employee condition, with Deputy Fleming noting that many companies who win significant public contracts operate as 'shelf companies' with few employees. It was suggested that another indicator – such as turnover – could be used.

As noted at the start of 3.1 of this Digest, lobbying regimes are considered to work best when lobbying is defined by what it is rather than who is doing it. While parameters are set around what persons engaged in lobbying are within the scope of the Act for a reason, they do create potential loopholes which policy-makers are likely to constantly monitor.

3.2 Enhancing the effectiveness of the 'cooling-off' provision

Former public officials are considered to have certain advantages when it comes to performing lobbying activity. International research has found strong empirical evidence that 'who you know' matters when it comes to the effectiveness of lobbying.[40] Empirical research on interest group access to policy makers in Ireland found that organisations hiring 'revolving door lobbyists' (i.e. people who were formally in positions of influence in the public sector) were twice as likely to secure access to the government or the parliament compared to those without public officer experience.[41] Baturo and Arlow find that the revolving door between public and private sector clearly exists at the level of the Irish civil service leadership (Secretary General level), but also that "the extent of the revolving door problem is lower than in other democracies."[42]

A 'cooling-off provision' is a time-bound prohibition on certain lobbying activity for former office holders designed to avoid a conflict of interest which could arise given their former work. Its purpose is to prevent DPOs who are leaving office from using political networks they have built up for the purposes of individual or private gain. Section 22(1) of the 2015 Act provides for a 'cooling-off period' which prohibits certain former designated public officials (DPOs) from undertaking certain lobbying activity for one year after leaving office – former Ministers, Junior Ministers, political advisors and Senior civil servants[43]- from engaging in certain 'lobbying activity' for one-year after their departure from office.

According to DPER, the provision is to manage the potential for conflict of interest between the public and the private sectors,[44] and to SIPO it is to ensure that 'switching sides,' or the perception of a revolving door between public and private sectors, does not undermine public trust in the impartiality of public bodies.[45] However, weaknesses have been identified with the scope, the

[40] De Figueiredo J.M and Brian Kelleher Richter (2014) 'Advancing the empirical research on lobbing' *Annual Review of Political Science* (2014) Vol.17 163-83. p.169.

[41] Crepaz and Chari (2022) 'Interest group access to policymaking in Ireland *Irish Political Studies'* published online May 2022. P.22.

[42] Baturo and Arlow (2018) 'Is there a revolving door to the private sector in Irish politics?' *Irish political studies,* 33(3) 381-406. [access from Houses of Oireachtas intranet].

[43] Grades of Secretary General, Second Secretary, Deputy Secretary General, Assistant Secretary or Director level (and professional and technical grades) and post of Chief Executive, Assistant Chief Executive and Director of services in local authorities.

[44] DPER (2020) Report on the Second Review of the Regulation of Lobbying Act 2015

[45] SIPO (2019) Submission to the Second Review of the Regulation of Lobbying Act 2015

length of and the application of the rules around the 'cooling off' period. Perhaps the most frequent criticism is around its application and the fact that a breach of section 22(1) is not a relevant contravention under section 18 of the Act. As such, where SIPO reasonably believes that there may be a contravention of section 22(1) it may not initiate an investigation under section 19 and offences and sanctions under section 20 are not relevant, i.e. SIPO does not have powers to investigate or enforce this provision.

That it is not a relevant contravention has been consistently highlighted by SIPO as undermining the potential for the cooling-off provision to reduce incidences of conflicts of interest (see SIPO 2019 and Annual Reports on Lobbying Act). Professor Gary Murphy has criticised the lack of penalty for this central part of the legislation arguing that or lobbying regulation to work, there needs to be strict enforcement of the penalty clauses " for non-compliance.[46] Professor Murphy reiterated this argument in evidence to the Committee in October 2021 saying that it 'beggared belief' that it is not a relevant contravention and that 'regulators need teeth and Bills and Acts need teeth."[47]

Others have argued that compliance with a cooling-off provision is better achieved by encouraging cooperation through outreach and the dissemination of information to public bodies and DPOs, for example, the dissemination of a Guidance Note on section 22(1) issued by SIPO.[48] Indeed, it has been argued by some experts that the damaging effects of conflict of interest may equally be addressed through an organisational culture that promotes ethical behaviour (rather than by a purely legal approach).[49] DPER has argued in the Regulatory Impact Assessment of this Bill that breaching section 22(1) is 'low risk.' However, Crepaz and Chari highlight some well-known cases where former DPOs took up positions connected to their previous employment without notifying the relevant ethics body [50] DPER has noted that breaches have 'a disproportionate effect on public trust' and that for this reason the Government decided to strengthen this provision in this Bill.[51]

What does the Bill do?

As set out above (paras. 2.5 and 2.7), the Bill enhances enforcement by adopting both approaches set out above:

- Makes a breach of section 22(1) a relevant contravention under section 18 which may be investigated by SIPO and subject to a new financial sanction regime
- Creates obligations on public service bodies to inform DPOs of their obligations and to inform SIPO of the departure of DPOs, and
- Sets out a more detailed procedure through which former DPOs can apply to SIPO for a waiver under section 22.

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[46] Murphy Gary 'Calls for tighter lobbying rules fall on deaf ears' *Irish Examiner* 1 October 2020.

[47] Professor Gary Murphy (October 2021) in evidence to the Committee and noted in Joint Committee (March 2022) *Report on Detailed Scrutiny* cited above p.28.

[48] See (then) government position in DPER (2020) Second Statutory Review of the Lobbying Act p.60-61.

[49] Demmke Paulini, Autionierni and Lenner (October 2020) Report commissioned by the European Parliament's Policy Unit for Committee on Citizens' Rights and Constitutional Affairs *The effectiveness of conflict of interest policies in the EU Member States.*

[50] Crepaz and Chari (2022) p.10.

[51] DPER (May 2022), Regulatory Impact Assessment p.15.

Do the proposals address issues with the effectiveness of the cooling-off provision?

Most stakeholders and experts agree that the Bill's proposals to make a breach of section 22(1) a relevant contravention enhances its effectiveness (for reasons set out above). The Bill also aims to ensure that DPOs are aware of the rules - and aware that breaching these obligations is a relevant contravention; it does so by obliging public service bodies to inform DPOs of this provision on departure. Further, under the Bill, public service bodies must also inform SIPO when DPOs are leaving office, which will assist it in monitoring enforcement of the cooling-off provision.

However, rather than treat a relevant contravention of section 22(1) the same way as other relevant contraventions, the Bill creates a new regime for the imposition of administrative sanctions on former DPOs who breach section 22(1). There has been some criticism of this proposal. The criticism is not directed at the concept of a financial sanction regime *per se*, but rather at having two different types of sanction regime within the one Act and at the difficulties this may pose for SIPO to operationalise them.

To enforce a provision a regulator needs both the legal power and the capacity (resources). The Bill addresses the first, by formally empowering SIPO to enforce the cooling-off period. Both SIPO and Transparency International have expressed reservations about the new financial regime on the grounds that it would pose "significant operational challenges for SIPO and would impose unnecessary burdens on the four commissioners (who are in the position ex-officio).[52] As noted in the RIA, the Bill precludes any member of staff, other than the Commissioners, from imposing financial sanctions under the new regime.[53]

Accordingly, SIPO has recommended that contravention of section (22)(1) – the new contravention under section 18(g) – be a criminal offence under the Bill in line with treatment of all other relevant contraventions under the Act and that there be a "single system of criminal sanctions for all contraventions." Transparency International recommended that breaches of the cooling-off periods and other post-term employment regulations be treated as offences, as is the case with other contraventions of the Lobbying Act.[54]

On the other hand, the Minister in his submission to the Joint Committee on the General Scheme stated that the Department's Legal Advisor and the Office of the Attorney General identified legal difficulties with introducing criminal sanctions for contravention of section 22. These include the constitutional right to earn a livelihood, management of conflicts of interest between the private and public sectors, restraint of trade and the presence or absence of severance or compensation.

Following its deliberations on the Bill, the Joint Committee discussed these issues, noted that a capacity review of SIPO is currently ongoing, and recommended that:

> The Department should ensure that there is sufficient capacity with the Standards in Public Office Commission to undertake the civil and administrative sanction regime (Recommendation 4).

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[52] SIPO in address to Joint Committee on Finance, Public Expenditure and Reform (19 May 2022) hearings on the *General Scheme of Regulation of Lobbying (Amendment) Bill* 2022 p.4-5.

[53] DPER (2022) Regulatory Impact Assessment p. 10.

[54] Transparency International in address to Joint Committee (19 May 2022) p.6.

Further issues which Members may wish to consider with respect to this Bill's provisions concerning the cooling-off provision are:

Firstly, **it has been argued that one year is insufficient to mitigate the use of former networks and that a two-year cooling-off provision would be more effective.** When the *Registration of Lobbying Bill 2014* was first published, political scientists (Professors Gary Murphy and Raj Chari), who had been consulted on the Bill throughout by DPER, called for the 'cooling-off' provision to be extended to two years.[55] In evidence to the Committee in October 2021 Gary Murphy pointed to the cooling-off provision as a fundamental part of the Bill and reiterated that it was supposed to be two years in the original Act noting that internationally two years is the minimum and all the evidence points to a two-year minimum because of the revolving door. Transparency International in evidence to the Joint Committee in October 2021 and May 2022 also supported the two-year cooling-off period.[56] Crepaz and Chari questioned whether one year is sufficient to level the playing field for lobbying access.[57] SIPO places more importance on the enforceability of the cooling -off provision; a 'cooling-off provision' that is enforceable is more important than one that is longer in length.[58]

The Joint Committee argued in March 2022 that:

> "a one-year cooling-off provision may be insufficient, and that consideration should be given to extending this period to two years."

The Joint Committee also raised the possibility that different cooling-off provisions may be required depending on the seniority or sensitivity of the DPO's previous role.[59]

The Joint Committee recommended in July 2022 "extending the cooling-off provision for DPOs to two years."[60]

Secondly, it has been argued elsewhere that the scope of the cooling-off provision is too narrow. Section 22(3) prohibits former designated public officials for one year from carrying out "lobbying activity" directed at:

a) "any public service body with which the person *was **connected**"* and/or
b) "a person who was a designated public official c**onnected** with that public service body during that period."

SIPO has argued that the term '*connected'* is too narrow and that former DPOs should instead be prohibited from lobbying activity which is directed at *public bodies and DPOs with whom they "have had significant involvement or held influence over and/or had significant contact with."*[61]This is with a view to bringing greater transparency to interactions within networks which do not necessarily only involve persons with whom one was formally connected. This was proposed by section 7 of the *Regulation of Lobbying (Amendment) Bill 2020* (PMB).

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[55] See Oireachtas L&RS (2014) Bills Digest on Registration of Lobbying Bill
[56] Joint Committee Report on Detailed Scrutiny of *Regulation of Lobbying (Amendment) Bill 2020* p.25.
[57] Crepaz and Chari (2022) p.23.
[58] In evidence to Joint Committee on General Scheme of this Bill, 19 May 2022.
[59] Joint Committee Report (March 2022) p.26.
[60] Joint Committee Report (July 2022) p.20 Recommendation 5.
[61] SIPO (2019) Submission to statutory review of the Regulation of Lobbying Act 2015. Recommendation 14.

In relation to broadening the scope, or increasing the length, of the cooling-off period, DPER has stated that the potential that DPOs face conflicts of interest must be balanced with their right to employment. The Minister, in his submission to the Committee on the 2020 PMB, said that the restriction 'must be proportionate and practical because people have constitutional rights and the provision should not 'narrow or circumscribe people's right to work' or deter participation in politics or in public service roles especially those in positions of short to medium-term duration."[62] A legal opinion on the *Regulation of Lobbying (Amendment) Bill 2020* (PMB) suggested that the amendment "imports concepts of *influence and significant contact* which are vague and capable of inconsistent interpretation and application by SIPO.[63]

Thirdly, the purpose of the waiver clause in s22 of the Act which allows DPOs to seek a waiver from the cooling-off provision is largely to balance the need to prevent conflicts of interest with the right of a person to employment. As set out in para 2.7 above, this Bill proposes amendments to improve the operation of the waiver application process in particular that **prior consent must be sought by DPOs.**

The Bill does not, however, elaborate on what SIPO should consider when assessing the applications. While SIPO reports annually on the number of waiver applications and the category of DPO (e.g. there have been 24 applications under section 22),[64] the Bill does not empower SIPO to make public the applications for waivers (as proposed by SIPO in 2019 and in section 7 of the PMB 2020). A legal opinion on the *Regulation of Lobbying Amendment Bill 2020* (PMB), which included this proposal, found that 'it is not clear that the level of detailed outlined is warranted or necessary to further the stated aims of the legislation."[65]

3.3 System of administrative sanctions and civil offence

As described in para. 2.6 and noted above, the Bill proposes a new system of financial sanctions (also referred to as administrative sanctions) which would apply where there are breaches of section 22(1) and of the anti-avoidance clause (both inserted as new sections 18(g) and 18(f) respectively. The practical sense of having two different sanction regimes was discussed in 3.2 above. Here we briefly examine the Bill's proposed system of administrative sanctions against best-practice.

As noted in the *Oireachtas L&RS Spotlight on Administrative Financial Sanctions*,[66] there are advantages to administrative sanctions; they are seen as efficient and easier to administer- they may be imposed by regulators and administrative bodies to deter misconduct and ensure compliance and they require proof on balance of probabilities (rather than beyond reasonable doubt which is the case for criminal sanctions). The *Law Reform Commission Report's on Regulatory Powers and Corporate Offences* considered administrative sanctions and their compatibility with fairness, compliance with justice, and with Article 34 of the Constitution which assigns the administration of justice to the courts.

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[62] Joint Committee Report (March 2022) p.35.

[63] Joint Committee Report (March 2022) Appendix 2. P.52.

[64] DPER, 2022, Regulatory Impact Assessment p.13

[65] Joint Committee Report (March 2022) Appendix 2 p.52. Legal opinion from the OPLA.

[66] Keyes F (2019) *2019-11-20_l-rs-spotlight-administrative-financial-sanctions_en.pdf (oireachtas.ie)

In this context, the Law Reform Commission proposed a list of recommendations applicable to the use of administrative financial sanctions generally and proposed it as the basis of devising a standardised approach to regulatory powers. The following is a brief summary of the Commission's primary recommendations for administrative financial sanctions generally which can be used to assess the Bill's proposed regime:

> (a) The imposition of the administrative financial sanction should follow an oral hearing before an adjudicative panel.
>
> (b) An adjudicative panel should have the same powers as a judge of the High Court examining witnesses in civil proceedings. The panel should follow the requirements of fair procedures, but should not be bound by the laws of evidence. The standard of proof should be on the balance of probabilities.
>
> (c) The recommendation of the panel to impose a sanction should be subject to confirmation by the High Court, and there should be a statutory right of appeal of the decision of the High Court to the Court of Appeal.
>
> (d) Regulators should publish details of any administrative financial sanction imposed.
>
> (e) An upper monetary limit of any financial sanction should be set down by legislation. In the case of a legal person, the Commission recommends a max of €10 million or 10% of annual turnover. In the case of a natural person, the Commission recommends a max of €1 million or 10% of annual income.

The Bill appears to follow this practice. Under the Bill, having received and considered the investigatory report (under section 19), SIPO decides (*using process set out in new section 22A(4)*) if a relevant contravention occurred and if it will impose a major or minor sanction. Section 13 of the Bill (which inserts a new section 22A into the Act) sets out procedures regarding how a decision is reached by SIPO, including the making of submissions, the carrying out of oral hearings and the provision of information to the person concerned relating to SIPO's decision-making process and decision. The procedure for determining financial sanctions is set out in section 15 (which inserts a new section 22C into the Act).

The Bill sets out the person's right to appeal a decision to impose a minor or major sanction (section 16, which inserts a new section 22D into the Act). Once an appeal has either been heard, or it is clear that it will not be made, any decision to impose major sanctions must be confirmed by the Circuit Court (under section 17 which inserts a new section 22E). The Circuit Court's decision may only be appealed to the High Court on a point of law.[67]

[67] DEPR, 2022 Regulatory Impact Assessment p.14.

3.4 Widen definition of lobbying where it concerns the development or zoning of land

As noted in para. 2.2 above, when the subject of the relevant communication concerns the development or zoning of land, any person must comply with the disclosure rule and the conditions about number of employees set out in section 5(2)(a), (b) or (c) do not apply. This reflects an original impetus behind the Act which was from revelations about [corruption in] the planning process." However, the definition of lobbying where the subject is the development and zoning of land is narrower and the Bill proposes to broaden this to align it with the general definition of lobbying for others (make, manage or direct the making of). This was recommended by SIPO in its submission to the Departmental Review in 2019 (Recommendation 4).

SIPO also argued that the Act's provisions for lobbying on zoning and land development are too restrictive and oblige many persons, with no material interest in a planning application or zoning decision, to register and make lobbying returns. It recommended a further amendment to limit the Act's scope to "persons who have a material interest in relation to the development or zoning of land" or are connected to or communicating on behalf of such person (SIPO's Recommendation 5).[68] This is also recommended by the Joint Committee in its Report on the General Scheme (Recommendation 1).

3.5 Review of the Act – extend period to 5 years (see para 2.1)

According to the Department, the extension of the review clause to five years from commencement is to allow sufficient time for the new Act to operate before the next review. Rather than delaying the next review to account for the time taken for this Bill to be enacted (i.e. to start two years after this Bill is enacted), the Bill proposes that next review will commence five years after the commencement of this Bill.

The review clause is a strength of the Act and reviews are an important mechanism with which to close-off unanticipated loopholes and address any weaknesses. Hogan and Feeney note that amendments to lobbying regimes will always be necessary as lobbying tactics and strategies evolve to circumvent the objectives of the legislation;'[69] Transparency International note that "lobby registers are not a panacea to undue influence, and they must be carefully designed and properly implemented with meaningful oversight in order to make a difference." However, they should be designed without creating un-intended consequences or directing those who wish to avoid transparency to new loopholes. [70]

If this provision is enacted, the Minister is still obliged under Standing Orders to prepare a Post-enactment Review of the Act one year after enactment. And SIPO will continue to prepare an annual report on the 2015 Act (as amended) in which it tends to set out any issues which is preventing the Act from achieving its objectives.

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[68] SIPO, (May 2019) Submission to DPER for second statutory review of the Regulation of Lobbying Act

[69] Hogan and Feeney (May 2019) *Submission to the DPER on the Second Review of the Regulation of Lobbying Act 2015*

[70] 2015 cited above p.33.

3.6 Other policy matters

Limits to disclosure a lobbying register can bring

It is important to acknowledge that the lobbying regime has brought a greater degree of transparency to lobbying activity, and that the Irish regime is comparatively-speaking robust. SIPO's most recent Annual Report (2021) sets out the extent of information disclosed on the Register. However, it is unlikely to bring full transparency to lobbying activity. For example, where a person – whether an individual or a company or any other interest group - is specifically asked for advice or to share expertise by a DPO, there is no requirement to register this. Recent research by Crepaz and Chari suggests that DPOs, in particular those in agencies, value the expertise which some groups can bring to the policy process and agencies departments do invite certain 'established players' to sit on advisory bodies. This is access that may not be picked up by the Lobbying Register.

Disclosure of information on expenditure

Crepaz and Chari propose that larger lobbying budgets allow organisations to plan better campaigns, produce better information or hire specialised personal which increases their chances of gaining access to policy-making venues. They find empirical evidence to support the proposition that in Ireland; lobbying budget and organisational capacity are consistently associated with more frequent access.[71] Transparency International has consistently argued that requiring those engaged in lobbying activity to disclose expenditure on lobbying would bring more transparency to who is influencing public policy. Most recently, this was suggested in evidence to the Joint Committee on the General Scheme of this Bill (19 May 2022) by Mr Devitt, who proposed that lobbyists should disclose source of income or funding:

> "The Act does little to meet its first objective of preventing corruption unless there is a corresponding requirement to disclose not just the source, but the amounts of funding received or fees charged by lobbyists with the Lobbying Regulator, as well as details of any gifts, hospitality or travel provided to the targets of lobbying."[72]

Access to Leinster House for former Members engaged in lobbying activity

Given that 'who you know' is found to give distinct advantages to lobbyists (noted in 4.2 above), the Joint Committee has recommended that automatic access to the precincts of Leinster House should be removed from former TDs or Senators who are engaging in lobbying activity (as defined by the Act).

Proposal to place some statutory obligations to disclosure on DPOs

The lobbying regime in Ireland is premised on disclosure by those engaged in lobbying activity, rather than disclosure by the recipients of relevant communications (the DPOs). **The *Regulation of Lobbying (Amendment) Bill 2020 PMB* proposes to place a statutory obligation on DPOs to cease lobbying if they are aware that the person lobbying is in breach of the Act,** a proposal which was supported by SIPO and by Transparency International.

The Department, in its submission on the 2020 PMB, argued that this proposal goes against the structure of Ireland's 2015 Act, which focuses on the duties of lobbyists and not the lobbied. The proposal would place this obligation on DPOs in certain, limited circumstances – where a DPO knows the person lobbying to be in breach of the Act. According to Transparency International, this approach was taken by the European Commission some time ago when European Commissioners agreed not to meet with lobbyists who were not registered on the EU's transparency register.[73] The Mahon Tribunal had, in fact, suggested as one of its five principals for a lobbying regime a broader obligation on DPOs - that "senior office holders should be required to record and publish details regarding their contacts with professional lobbyists."[74]

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[71] Crepaz and Chari (2022)

[72] Transparency International (19 May 2022) Opening Statement on General Scheme

[73] Transparency International in evidence to the Joint Committee (October 2021).

[74] Oireachtas L&RS, Bills Digest: The Registration of Lobbying Bill 2014.

Appendix 1: Recommendations of the Joint Committee on Pre-legislative Scrutiny and on Detailed Scrutiny

The Department informed the L&RS that the Minister would write to the Joint Committee prior to the second stage debate on this Bill to address his reaction to the Joint Committee's Recommendations on the General Scheme. Below we have commented on our interpretation of the Minister's response to the Joint Committee's report.

Appendix Table 1 – Joint Committee Recommendations on the General Scheme

	Joint Committee Recommendations	Assessment of effect on the Bill
1	That the provision of section 5(1)(c)of the Principal Act should be limited to persons who have a material interest in relation to the development or zoning of land or are connected to or communicating on behalf of someone with such interest [re. Head 5]	Not in the Bill
2	That the Department clarify if all categories of workers are included in the scope of the proposed legislation [re.Head 6 see page 16 of Joint Committee Report]	The Bill in the newly-proposed s2(3) sets out that non-remunerated persons who engage in lobbying on behalf a representative/issue-based body will come within the scope of the Act.
3	That the Department should review the sanctions in place for the anti-avoidance clause and consider whether it should be made a criminal offence or receive civil and administrative sanctions	The Bill makes it subject to administrative sanctions (same as the proposed contravention of the cooling-off provision)
4	That the Department should ensure that there is sufficient capacity within the SIPO to undertake the civil and administrative capacity regime	It is unclear. DPER said in the Regulatory Impact Assessment that this will be undertaken in the context of the Estimates process.
5	Extend the cooling-off provision for DPS to two years	Not in the Bill
6	Allow SIPO publish details regarding its decisions to waive or reduce the cooling-off provision under s22 of the Principal Act	No. The waiver applications will be reported in aggregate in the Annual Report as currently is the case under the Act.

7	That for the purposes of the bill, former Oireachtas members who take up positions as lobbyists, are treated the same as normal lobbyists and do not enjoy special privileges like permission to enter the Oireachtas without an invitation	Not in the Bill

The Joint Committee also issued a series of Conclusions in its Report on Detailed Scrutiny on the *Regulation of Lobbying (Amendment) Bill 2020* some of which were in the General Scheme of this Bill. These were noted in this Digest where relevant.

Appendix Table 2 – Joint Committee Detailed Scrutiny of the Regulation of Lobbying (Amendment) Bill 2020

Conclusions of the Joint Committee (March 2022)
The Committee is of the view that the majority of amendments to the Principal Act proposed in this Bill would serve to strengthen and enhance the implementation of current rules and obligations; including by: - enhancing transparency by closing a perceived loophole regarding which persons who engage in lobbying activity must comply with the Act - making non-compliance with a significant provision in the Act – the cooling off provision – an offence for former DPOs, and - broadening the lobbying activities which former DPOs must avoid and lengthening the period of time with a view to preventing undue influence through former political networks. The Committee also notes that the legislation will create new rules and obligations for some persons, specifically DPOs. However, the Committee believes that these are in the spirit of the Principal Act and designed to encourage and support compliance with existing rules. The Committee notes that in refining the current Act, the Bill will create both new powers and new duties for SIPO and that resources would need to be assigned to support the exercise of such powers and duties, including the duty: - to monitor and conduct investigations into breaches of the Code of Conduct - to monitor and conduct investigations and make decisions on breaches of the cooling off provision (taking into account any information on breaches of code of conduct) - to direct DPOs to cease contact with lobbyists it is aware are contravening the Act - to monitor and investigate and make decisions on the compliance of DPOs with such directions - to receive and publicly report on applications for waivers and set out how such applications are assessed in the context of the legislation - to ensure that the persons who now come under the scope of the Act comply

with it.

The Committee notes the significant additional functions that would fall to the Commission should the Bill be enacted and is of the opinion that the provision of adequate resources to SIPO is essential if it is to be in a position to utilise its enforcement powers.

In addition, several sections of the Bill require further consideration of phrases and terms used to describe eventualities caught by the legislation. Nevertheless, the Committee recognises that SIPO noted the similarities of the Bill with its own recommendations on how the Principal Act could be improved, and enforcement enhanced.

The Committee notes the legal opinion provided to it and the various points raised that could and should be addressed through Committee Stage scrutiny of the Bill should it proceed to Committee Stage.

The Committee welcomes the indication in the Minister for Public Expenditure and Reform's written submission that it is intended to address core elements of the Bill, such as extending the definition of lobbying and strengthening the operation and enforcement of section 22, in the Government's general scheme [published in February 2022] and the Committee looks forward to considering that general scheme in due course.

In accordance with Dáil Standing Order 178(4), the Bill will now proceed to the Select Committee on Finance, Public Expenditure and Reform, and Taoiseach for the decision to recommend whether or not the Bill may proceed to Committee Stage.

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