



Irish Heart
Foundation

Irish Heart Foundation

Submission to the Second
Review of the Regulation of
Lobbying Act 2015

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Introduction

The Irish Heart Foundation welcomes the consultation for the second review of the operation of the Regulation of Lobbying Act 2015 and looks forward to working with the Department of Public Expenditure and Reform, and other stakeholders, to improve the transparency of the policy making process. This follows on from our engagement with the Department of Public Expenditure and Reform on the design, structure and implementation of an effective regulatory system for lobbying in Ireland in 2012 and our submission to the consultation on a Code of Conduct for persons carrying on lobbying activities in 2018.

The IHF welcomes all efforts to promote transparency and accountability in the policy making process and to maintain and strengthen the trust of citizens. Being transparent in our advocacy activities is vital to the work of the IHF. This transparency enables the people we represent to see how we are promoting their interests at the highest levels. Our engagement with patients enables us to bring their voices into the decision-making process and can assist policy makers to consider what the impact of their decisions may be for citizens.

Lobbying is an activity embedded in the policy making process. For that reason, transparency frameworks are important to protect the integrity of the process. The Regulation of Lobbying Act 2015 marked an important step in imposing obligations upon Government and all Government Departments, together with the stakeholders involved in the policymaking process, including NGOs and businesses, as well as bringing greater transparency to the lobbying process. However, four years since its introduction, the IHF believe that the Act can go further to monitor supplementary disclosure requirements that could greater identify the interests of lobbyists and where funding comes from, as well as addressing anomalies in the relevant communications. Identifying the context for lobbying is critical given that “the public has a right to know how public institutions and public officials made their decisions, including who lobbied on relevant issues.”¹

This submission seeks to address the relevant questions posed by the Department of Public Expenditure and Reform where possible, referring also to relevant principles identified in the Code of Conduct. Moreover, this submission draws on recent experience with the lobbying register and information retrieval through the Freedom of Information process when suggesting improvements to the Act.

¹ OECD. (2013). OECD Principles for Transparency and Integrity in Lobbying. Available from: <http://www.oecd.org/corruption/ethics/Lobbying-Brochure.pdf> p4

What are the positive features of the Act?

The Irish Heart Foundation believes that the Act's focus on regulating 'lobbying' and its definition of lobbying as 'relevant communications' rather than 'attempts to influence' are positive features of the Act, even if the outworkings of this require further teasing out and development (this is referred to in subsequent consultation responses below).

Have any unintended consequences occurred, in your view?

"Regulation has long been described as the prohibition of conduct which is 'mala prohibita' not 'mala in se': wrong because it is prohibited, not wrong because it is inherently immoral or contrary to human rights"².

With the Regulation of Lobbying Act 2015 the Irish Heart Foundation believes that the lobbying register captures only a partial picture of lobbyists' policy inputs, resulting in a distorted impression of how policy is actually influenced. Drawing on the above quote, the IHF notes that many of the unintended consequences from the Act relate to the operationalisation of the lobbying register and how the communications are reported, monitored and followed up. More specifically, while lobbyists may register some lobbying activity on the lobbying register because they have to, it is not possible to garner a full picture of these inputs or how they affect policy and decisions. This is especially true when follow up is conducted of the relevant communications that are made, as has been done by the Irish Heart Foundation recently in a scoping exercise of lobbying on the Sugar Sweetened Drinks Tax.

The *International Standards for Lobbying Regulation* note that lobbying "should cover any direct or indirect communication with a public official that is made, managed or directed with the purpose of influencing public decision-making"³ and that "the responsibility for transparency should be shared by the lobbyists and the public official, but it is public officials who must be accountable to the public for decisions taken"⁴. The Regulation of Lobbying Act 2015 Section 5 (4) states that "In subsection (1) "relevant communications" means communications (whether oral or written and however made), other than excepted communications, made personally (directly or indirectly) to a designated public official in relation to a relevant matter."

Taken together, these three definitions and references depict a scenario that should ensure transparency of the impact of lobbying on the decision-making process, as well as accountability of decision-makers for policies and legislation enacted. However, this is not a practical outworking of the legislation and the lobbying register currently. In an examination of lobbying conducted on the sugar sweetened drinks tax through the use of the lobbying register and Freedom of Information requests based on these returns, several anomalies and shortcomings were identified. What emerged was a situation where lobbying activity

² Black, J. (2008). Forms and Paradoxes of Principles Based Regulation. LSE Law, Society and Economy Working Papers 13/2008. [Online]. Available from: http://www.lse.ac.uk/law/working-paper-series/2007-08/WPS2008-13-Black.pdf?from_serp=1 p30

³ Access Info Europe, Open Knowledge, Sunlight Foundation, Transparency International. (2015). The International Standards for Lobbying Regulation. [Online]. Available from: <http://lobbyingtransparency.net/lobbyingtransparency.pdf> p5

⁴ Ibid p6

and relevant communications were recorded by lobbyists on the register, but in some cases no record of the communication could be found with the relevant DPO or Department. This raises serious questions about the channels of communication with public officials that are being used, how relevant communications are being monitored for compliance with the Act and how lobbying is actually impacting on policy and decision making when the relevant communications cannot be found to benchmark what lobbyists record, and what has actually transpired.

One of the 10 principles for Transparency and Integrity in Lobbying, as identified by the OECD is that “countries should enable stakeholders – including civil society organisations, businesses, the media and the general public – to scrutinise lobbying activities.”⁵ While it is critical that the public knows how public institutions and public officials made their decisions, including, where appropriate, who lobbied on relevant issues, it is also equally important that all relevant activities are accessible to the public upon further request (i.e. FOI). While the lobbying register is a first step in allowing the public to observe the activities that have taken place, it does not capture fully the picture of the extent of the lobbying i.e. what exactly has taken place. While FOI does allow the public to follow up on these activities, it is commonplace for a disconnect to emerge in the relevant communications reported on the register and those returned through FOI.

The Sugar Sweetened Drinks Tax & the Lobbying Register: Anomalies in relevant communication

| Return reference | Lobbying Activity | Designated Public Officials Lobbied |
|---|-------------------|---|
| https://www.lobbying.ie/return/18187/ibec | Meeting (1) | Feargal Purcell Government Press Secretary (Department of the Taoiseach) Áine Kilroy Special Advisor (Department of Agriculture, Food and the Marine) Roy Dooney Special Advisor (Department of Jobs, Enterprise and Innovation) Stephen Lynam Special Adviser (Department of Public Expenditure and Reform) Matthew Lynch Special Adviser (Department of Justice and Equality) |

⁵ OECD. (2013). TRANSPARENCY AND INTEGRITY IN LOBBYING. [Online]. Available from: <https://www.oecd.org/corruption/ethics/Lobbying-Brochure.pdf>

For this lobbying return, Freedom of Information requests were sent to each of the relevant Departments, from which each of the DPOs were based, requesting the following information:

Details of all correspondence associated with a meeting that was held (Details supplied) at which DPO was in attendance; any follow up emails or correspondence that were sent in relation to this meeting; agenda and meeting minutes associated with the meeting.

One would assume that, at the very least, email correspondence or information pertaining to the meeting would have been recorded by the DPOs. However, at the time of drafting this submission, three Departments have reverted back to advise that records of this meeting could not be found. Those Departments included: Department of Business, Enterprise and Innovation (previously Department of Jobs, Enterprise and Innovation), Department of Agriculture, Food and the Marine and Department of Public Expenditure and Reform. Reasons cited in correspondence on these FOIs include “we cannot locate the records” and “[the Department] does not hold any records in relation to the above matter. Given that the records you have requested do not exist in this Department, your request is being refused”. It would therefore appear that, despite these Departmental DPOs attending a meeting, as per the lobbying register, there exists no record of relevant communications in several Departments, thus raising serious questions about the transparency in communications and lobbying activities. Even where records exist in some Departments of this meeting, for all DPOs not to have records creates unacceptable blurred lines in the lobbying process.

This example highlights a grave flaw in the legislation and draws attention to the need to address these unintended consequences without delay. Suggestions for change are presented later in this submission.

Do you think the Act can be improved in any way and, if so, how?

Central to the IHF position on the code of conduct is transparency and ensuring that lobbying is wholly transparent: who is lobbying, background to lobbying and the interests behind lobbying organisations.

The IHF believe that disclosure of identity and purpose of lobbying activities must be closely linked to the disclosure of interests. More specifically, we would point out that disclosure of interests should be broader in scope than potential conflicts of interests in terms of representation. More specifically, the IHF believe that in the area of public health for example, where an organisation is not representative of patients or the health sector, but may be interpreted to have competing interests, this must be highlighted. For lobbying to be wholly transparent, greater emphasis and work must be done to identify those with commercial interests in policy. In that regard, the IHF have previously argued for a Code of practice for engagement with industry and business interest NGOs with a commercial vested interest in health.

Furthermore, the IHF would welcome the inclusion in the Act of disclosure requirements for funding sources by all organisations engaged in lobbying. Such a requirement could take the form of an annual lobbyist activity report that should contain a listing of funding sources of

the organisation and the proportion of the organisational funding coming from these sources.

Public health advocacy and lobbying

Market forces can have a significant impact on public health outcomes and this provides strong justification for legislative and regulatory responses by government to reduce the influence of commercial interests associated with the alcohol, food, beverage and other industries on public health policy. Several of the risk factors for cardiovascular diseases are represented by strong lobbies and industry often has a vested interest in policy outcomes which are not necessarily conducive to public health. A 2011 report from the House of Lords on Behaviour Change acknowledged the role of industry in public health but stated that “they had major doubts about the effectiveness of voluntary agreements with commercial organisations especially where there are potential conflicts of interest” and highlighted the need for rigorous and independent monitoring.⁶

In our 2012 submission on the design, structure and implementation of an effective regulatory system for lobbying in Ireland, the IHF highlighted the need to develop a code of conduct for engagement with industry (including business-interest NGOs) with a commercial vested interest in health so as to ensure public health policy is not compromised by the obvious conflicts of interests associated with a number of industries.

Disclosure models and declarations of interest should be adopted, particularly in relation to funding sources. This is of special importance in the area of health policy advocacy. In that regard, principle 5 should be strengthened given that disclosure requirements have the potential to provide important information on key aspects of lobbyists and lobbying such as its objective, beneficiaries, funding sources and targets.

The Irish Heart Foundation acknowledges that this is complicated by the right of individuals and organisations to influence policies and legislation that affects their legitimate interests. However, a wider framework and interpretation of these principles should ensure that there is full transparency for the public in knowing who and what these interests are.

Lobbying interventions on behalf of commercial interests, particularly in the area of health, are a tactical investment. Moreover, these interests are frequently in conflict with public health aims and objectives, as well as having the effect of postponing, altering or vetoing public health interventions. If we are to have full transparency for the public, these principles must be strengthened to put an onus on lobbyists to identify their interests. In order to do this, it will be necessary to broaden the disclosure requirements and how lobbyists identify themselves:

“If the public is to know who and how public policy is formulated, it simply needs to know who is paying, and who is paid, to influence policy, for what reason and by what means.”⁷

⁶ Available from: <https://publications.parliament.uk/pa/ld201012/ldselect/ldsctech/179/17908.htm>

⁷ Transparency International. (2012). Submission to the Department of Public Expenditure and Reform 2012 Consultation on the Regulation of Lobbyists. Available from: <https://www.transparency.ie/resources/submissions/tii-submission-department-public-expenditure-and-reform-2012-consultation-regulation-lob> p3

Different provisions in relation to different descriptions of persons carrying on lobbying activities needed

In our submission on the design, structure and implementation of an effective regulatory system for lobbying in Ireland in 2012, the Irish Heart Foundation outlined the position that the regulation of lobbyists must primarily be designed to contain vested interests, which use considerable resources to promote their lobbying positions. In that regard, the Act should make distinctions therefore in relation to the different categories of lobbyists.

In reviewing the Act, the Department should note the specific role of NGOs in providing equitable balance between public and private interests within the promotion of participatory democracy. Advocacy by charities serves a public benefit. The position of NGOs (not-for-profit organisations which serve no commercial interests), should not be confused with business-interest not-for-profit organisations (BINGOs) which are increasingly being used by large corporations and business lobbies to influence decision making. These groups often tend to have consumer facing names, which distort the reality that they are representing business interests, rather than those of citizens. Through full disclosure of identity, purpose of lobbying and interests, it will be easier for both the public and those being lobbied to distinguish who is lobbying, and for what purpose.

Transparency needed to identify true origins and beneficiaries

While the Regulation of Lobbying Act 2015 has provided useful information about how **officially** registered lobbying works, there are some grey areas in the lobbying process that need to be addressed. In its examination of lobbying in Europe, Transparency International noted that sometimes lobbyists “conceal their true origins and beneficiaries from public decision-makers and any external observers.”⁸ While the Regulation of Lobbying Act 2015 has had the effect of making lobbying activities more transparent, it has not necessarily dealt with the identification of true origins and beneficiaries. More specifically, there has been a proliferation of industry associations conducting lobbying on behalf of companies so that there is greater opaqueness on the origins of lobbying activity. This was especially visible throughout the passage of the Public Health (Alcohol) Act. Indeed, we also know that the tobacco industry has often funded think-tanks, research institutions or business organisations to front their lobbying efforts around the world, who then do not disclose their donor base. This then lends itself to creating an opaque view of who is lobbying and to what ends.

What suggestions for changes, if any, would you make?

Consultation and Advisory Bodies

A critical issue for the Irish Heart Foundation in the review of the Regulation of Lobbying Act 2015 is the use of consultation and advisory bodies in the policy-making process. More specifically, the make-up of these bodies and how influential they are in shaping policy, without much transparency.

⁸ Transparency International. (2015). Lobbying in Europe: hidden influence, privileged access. Available from: https://www.transparency.org/whatwedo/publication/lobbying_in_europe p7

Transparency International has raised concerns about “lobbying from the inside” through the use of expert and advisory groups convened by the public sector, which are largely opaque processes.⁹ In the development of policy, these so-called ‘expert’ or advisory groups, play a critical role in shaping the content and framework for new policies, often then producing policies as a *fait accompli* to the public. While it is important that any and all of these groups are balanced, and no single interest dominates, equally it is critical that there is transparency in who these representatives are (reflecting comments in previous sections). Otherwise, when advisory groups are convened away from the public eye with little information on their full composition, concealed interests can wield further influence in policy. This ‘lobbying by the back door’ must be recognised in the Code of Conduct and provision made for moderating how these activities occur and representatives act.

Comprehensive Monitoring

The example of the research conducted by the Irish Heart Foundation on the sugar sweetened drinks tax, which used information from the lobbying register to pursue further information through the FOI process, highlights a grave flaw in the legislation and draws attention to the need for a comprehensive monitoring system. Indeed, in its 2016 submission to the review of the Act, TASC made the recommendation to give Standards in Public Office Commission (SIPO) powers to verify returns and receive complaints,¹⁰ which the Irish Heart Foundation believes is necessary to bolster the effectiveness of the Act and its stated objectives.

The proposal made by TASC was that SIPO should be empowered (and resourced) to conduct thorough spot checks to verify lobbying activities self-reported by registrants in their returns. Moreover, SIPO should also be empowered to receive complaints against lobbyists, inspect records and verify information. This is critical, not just when examining the self-reported activities of the lobbyists, but particularly where DPOs are unable to present records of any relevant communications that have been reported, as was the case in the SSD tax case.

In their submission, TASC base their rationale for this proposal on Section 13 of the Act which gives the Commission power to require registrants to provide further or corrected information “where it considers” that information supplied is inaccurate or misleading. It notes however that there is no clarity as to how the Commission would be drawn to concluding that a contravention has occurred or that information supplied is inaccurate or misleading. In this regard, the legislation does not give the Commission explicit powers to receive complaints, inspect records and returns, and verify information.

The points made here are critical to ensuring transparency however, it should also be the case that inaccuracies in terms of relevant communications made to DPOs are addressed from the side of the DPO, as well as that of the lobbyist. More specifically, if the lobbying

⁹ Transparency International. (2015). Lobbying in Europe: hidden influence, privileged access. Available from: https://www.transparency.org/whatwedo/publication/lobbying_in_europe p9

¹⁰ TASC. (2016). Submission to the public consultation on the first review of the operation of the Regulation of Lobbying Act 2015. [Online]. Available from: https://www.tasc.ie/download/pdf/tasc_lobbyingactreview2016.pdf

register does identify a relevant communication with a DPO and this cannot be followed up, the Commission must be able to investigate.

Similarly, the recommendation in the *International Standards for Lobbying Regulation* for proactive publication is equally relevant here to ensure full transparency and accountability of DPOs:

“the public bodies and officials should proactively publish their organisational, programmatic, administrative, financial, and business schedule information, summaries of meetings and other interactions with third parties, as well as any background documentation and preparatory analyses received or commissioned in the course of their work. These obligations shall also extend to the operation of any expert and consultative bodies convened by the public sector.”¹¹

If we are to expect that disclosure of lobbying activities through the lobbying register to provide sufficient, pertinent information on key aspects of lobbying activities will enable public scrutiny, we must equally expect that relevant bodies and persons are able to show the relevant communications made.

In the example provided in this submission of failures in the practical implementation of the Regulation of Lobbying Act 2015, it is clear that disclosure of lobbying activities on the lobbying register alone were insufficient in providing pertinent information on key aspects of lobbying activities to enable public scrutiny. Moreover, this was only uncovered because of research being undertaken and is only one such example. The IHF believe that there is likely to be many other similar situations where information is missing or cannot be followed up, thus grossly impeding transparency in the policy and decision-making process.

¹¹ Access Info Europe, Open Knowledge, Sunlight Foundation, Transparency International. (2015). The International Standards for Lobbying Regulation. [Online]. Available from: <http://lobbyingtransparency.net/lobbyingtransparency.pdf> p7

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