

WWCDA Submission on Consultation – Second Review of the Operation of the Regulation of Lobbying Act 2015	
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What are the positive features of the Act?

The Act set about achieving transparency in terms of the lobbying activities undertaken by various parties in relation to legislative, planning and public policy matters. In that regard, the lobbying register introduced by the Act appears to have been successful in highlighting and bringing a greater awareness and transparency to lobbying undertaken by various individuals and organisations of public officials.

The commencement of the enforcement provisions in Part 4 of the Act together with proactive approach by the Standards Commission to implementing and enforcing those provisions is a positive step in highlighting the necessity to comply with the Act and in creating an awareness in respect of the implications of non-compliance.

Does the Act fulfil the objectives it set out to achieve?

It is stated on www.lobbying.ie that *'the Regulation of Lobbying legislation is designed to provide information to the public about who is lobbying whom about what.'* The Register of Lobbying introduced by the Act provides a level of transparency that was previously unavailable to the wider public and interested parties in relation to lobbying activities.

It is a recognised and necessary part of the democratic process that organisations are in a position to lobby government officials in order to appropriately influence decisions that may affect them, their business industry or people they represent. Insofar as lobbying activities are registered, and noting that there have been over 31,000 returns made on the lobbying register since its inception, objectively, the Act would certainly appear to have made significant inroads into the objectives that it sought to achieve. However, given that Designated Public Officials (DPOs) are not obliged to register or record their activities or approaches from lobbyists in a similar manner, the true measure of effectiveness of the Act is somewhat more difficult to determine.

Have any unintended consequences occurred, in your view?

The Act makes no distinction regarding where the relevant communication takes place such that if a DPO is being lobbied in relation to a relevant matter, that communication falls within the scope of the Act and thus a return should be made in respect of same irrespective of where the communication takes place. However, given that the Act does not have an extraterritorial element, there may be difficulties with enforcement in respect of communications that take place abroad. Notwithstanding the recognised difficulties in respect of enforcement, the Standards Commission has provided guidance to the effect that all those lobbying Irish DPOs outside the State are 'encouraged to comply' with the spirit of the legislation to ensure transparency.

While most organisations will seek to comply with the legislation, in the absence of an extra territorial enforcement element, there is the potential that organisations or individuals outside the jurisdiction may not, in fact, be aware of the 'encouragement' to comply. For example, a foreign entity who does not have a direct presence in Ireland but who is lobbying an Irish MEP in Brussels may not consider it necessary to register such lobbying activity as both the entity is out of the jurisdiction and, at the time that the lobbying took place, the DPO was also outside the jurisdiction. The absence of an extra territorial enforcement element may therefore have had the unintended consequence that, inadvertently or otherwise, organisations or individuals may circumvent the provisions of the Act by engaging in communications outside the jurisdiction.

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

Section 5(1) of the Act provides that a person carries on lobbying activities if the person *'makes, manages or directs the making of, any relevant communications...'* The reference *'makes, manages or directs the making of'* is ambiguous. It is foreseeable that there will be a situation whereby the organisation *making* the communication will not be the same organisation that is *managing* or *directing* the communication. For example, a parent company may direct that a subsidiary lobby a DPO in relation to, for example, zoning issues. There may be a number of other subsidiaries of the parent who will also be interested in and/or directly affected by the outcome of the lobbying activity but who are not involved in the making, managing or directing of the communication(s). In such instances, the question arises as to who is the appropriate entity to make the return: is it the parent company, is it the subsidiary, or should separate returns be made on behalf of both the parent and subsidiary and indeed on behalf of the other subsidiaries who will benefit from the lobbying communication *directed* by the parent and *made* by the subsidiary in question. The Guidelines for People Carrying on Lobbying Activities issued by the Standards Commission do not definitively deal with such a scenario and clarity should be provided in relation to the requirement for *'makes, or manages or directs the making of'* and whether same are mutually exclusive or otherwise.

Section 5(4) of the Act provides that "relevant communications" are communications (whether oral or written and however made), other than excepted communications, made personally (directly or indirectly) to a DPO in relation to a relevant matter. We understand the inclusion of indirect communications was designed to cover a situation whereby a lobbyist intentionally goes through an intermediary or middle man to reach the DPO (as per Minister Howlin - Regulation of Lobbying Bill 2014: Second Stage, Seanad Éireann, 29 January 2015). However, the definition would also seem to catch a situation where a relevant communication is passed on to that DPO without the intervention of the originator of the communication. There is no reference to the use of an intermediary or middle man for the intention of avoiding the application of the legislation.

Section 5(5)(d) of the Act provides an exemption in relation to communications requesting factual information or the provision of factual information in response to a request for information. The term *'factual information'* is not defined in the legislation. In its ordinary meaning, factual information relates to matters of a factual nature. However, by its very nature, lobbying will involve the provision of factual information.

For example, a representative of an organisation involved in the arts may be in communication with a DPO in relation to funding which it obtains on an annual basis. As part of that communication, the DPO may seek information from the organisation in relation to the activities which are due to be undertaken in that year. Query whether this communication would be considered a request for and provision of *'factual information'* and thus an excepted communication for the purposes of the Act? It will be very often be the case that such communication will consist of factual information only. However, it may involve a subjective analysis as to whether or not the communication is strictly factual information and therefore an excepted communication or whether the communication is in relation to a relevant matter i.e. the use of public funds and therefore considered lobbying.

Similarly, a representative of an organisation may be in conversation with a DPO without any intent to lobby that DPO but, by virtue of the conversation that takes place, the DPO may consider that the individual in question intended to and did so lobby the DPO in relation to the particular issue the subject matter of the conversation. This therefore brings into play the question of the *'intent'* of the person making the communication at the particular point in time and whether that is relevant in order for a communication to be considered lobbying. The legislation does not provide for intent. However, one could interpret it such that there must be some level of intent on the part of the

person lobbying that the communication is intended to be a lobbying communication as envisaged by the Act.

Section 14 of the Act provides for 'Delayed Publication' whereby a person who provides a return to the Commission may make an application to delay the publication of certain information contained within that return if the publication of same could reasonably be expected to (a) have a serious adverse effect on the financial interests of the State, the national economy, or business interests generally or the business interests of any description of persons, or (b) cause a material financial loss to the person to whom the information relates or prejudices seriously the competitive position of that person in the conduct of the person's occupation, profession or business or the outcome of any contractual or other negotiations being conducted by that person. In such circumstances, if the Standards Commission considers that making the information publicly available to could reasonably be expected to have the consequences suggested, it may make a determination to (1) delay some or all of the information from a media publication, or (2) make some or all of the information available only in summary form. Any such determination made by the Standards Commission will apply for a specified period of not more than six months or until it is revoked, whichever ever happens first. An application to renew the delayed publication may be made as often as necessary but for no more than six months at a time.

The Act also provides that the Standards Commission may at any time review a determination and, if it appears that the public interest would be better served by making the information available for inspection immediately rather than by delaying making it available for inspection, the Commission may decide to revoke the determination. If it does so, the Commission must inform the applicant and any relevant Minister(s) of the Government of the revocation. However, there does not appear to be any requirement in the Act for the Commission to consult with the person concerned before revoking a determination and it is possible that the information will be in the public domain before that person is made aware of the revocation.

One can also envisage a scenario whereby such delayed publication may be required indefinitely, i.e. if the publication of same at *any* point in time will have the adverse consequences as set out in section 14 of the Act. On a practical level therefore it may prove overly onerous to require an individual or organisation to make a renewed application on a six monthly basis and there should be scope, in exceptional circumstances and in the interests of justice, for the Standards Commission to make a definitive enduring determination in terms of the non-publication of some or all of a return.

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

Please see above.

In summary, the WWCD welcomes the government's review of the Act and the focus on enhancing transparency in relation to lobbying activities. We believe that amending the legislation to take into consideration the above mentioned issues may allow for greater awareness of and adherence with the provisions of the Act and, in turn, greater transparency in relation to lobbying activities conducted not only within the jurisdiction and but also the lobbying of Irish DPOs irrespective of location.

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