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An Clár Brústocaireachta
Register of Lobbying

# Second Legislative Review of the Regulation of Lobbying Act 2015:

# Submission by the Standards in Public Office Commission

May 2019

# 1) Introduction.

The Regulation of Lobbying Act (the Act) commenced on 1 September 2015. The Act provides for a publicly accessible online register of lobbying (the Register). Any person within scope of the Act, communicating with a Designated Public Official (DPO) about a relevant matter, must register and submit returns of lobbying activities (returns) three times a year. The Act also establishes a one year post-employment "cooling-off" period during which certain public officials may not undertake specific lobbying activities. Part 4 of the Act, which provides for investigation and enforcement provisions, commenced on 1 January 2017.

The introduction of lobbying regulation was the result of many years of demands for greater transparency in the policy-making process. When the Act commenced, there were concerns that it might create a chilling effect with the reluctance of those lobbying to comply or public officials unwilling to engage. However, implementation of the Act has gone smoothly. We have a modern and robust system with more than 1,800 registrants and in excess of 30,000 returns on the Register.

Most, if not all, of the Act's provisions have now been tested through practical application. The *Code of Conduct for persons carrying on lobbying activities*, which the Commission launched in November 2018, will further support the Act's objectives to foster transparency by providing guidance to those lobbying on how to do so in an ethical and transparent way.

As stated, the requirements of the Act and the process of submitting returns are well bedded in. There are, however, some areas that the Commission has identified where the Act would benefit from amendment or clarification. The Commission is, therefore, pleased to make this submission to the Minister for Finance and Public Expenditure and Reform (the Minister) for consideration in relation to the second review of the Act. The submission is based on the Commission's experience over the past four years of administering the Act. It identifies those areas which might benefit from amendment or clarification, as well as some areas on which the Act is silent and where an explicit provision might be useful. The Commission considers that, if accepted, these recommendations will further strengthen the operation of the Act, and enhance transparency and accountability.

Some of these recommendations are more technical in nature, while others are substantive and would be regarded by the Commission as high priority. Several of the recommendations contained in this submission have already been made either in the Commission's previous submission to the first review of the Act (the first review) or in its annual reports.

The submission is organised into five sections: Definitions, Operations, Post-employment obligations, Enforcement and Other.

# 2) Definitions.

Part 1 of the Act sets out definitions for certain terms in the Act, including the meaning of carrying on lobbying activities. The following identifies issues that might be addressed within this section.

## a) Persons within Scope.

*Representative bodies or informal coalitions with no employees.*

Subsection 5(2)(b) of the Act provides that a person carries on lobbying activities if the person makes, or manages or directs the making of, any relevant communications where 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. We refer to such bodies as representative bodies.

A representative body is only within scope of the Act if it has one or more full-time employees. A number of representative bodies with employees have registered and comply with the requirement to submit returns.

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. This means that certain bodies / associations that communicate regularly with DPOs about relevant matters are not captured by the Act, despite the fact that, in some instances, their constituent members would fall within scope. Organisations that are therefore representing members who are independently within scope of the Act are able to avoid the obligation to register, simply because the representative body through which the lobbying is funnelled does not have employees.

There are also a number of instances where informal coalitions of business interests have been formed to lobby as a group on an issue of mutual industry interest. These informal coalitions generally have a name and/or brand under which they work, including letterhead to issue written communications in the name of the group. It is very likely that the provision of secretariat services is given by one or another of the constituent members. However, there are in most cases no employees of the coalition itself, which is not incorporated, appears to have no published agreement among the parties, and does not appear to have office holders. The Commission has noted examples of such coalitions in the airline industry, software companies and in the entertainment and leisure fields. In such circumstances, where the coalition has no employees, there is no requirement for it to register.

Where it is clear that a particular constituent member or members of the coalition have made, managed or directed the lobbying activity, whether or not under the umbrella of an informal organisation, the Commission would consider that the particular member has an obligation to register the lobbying activities they have led. However, in most cases, it is impossible to say with certainty who has made, managed or directed the communications issued under the coalition's letterhead, or to attribute the communication to any of the constituent members.

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 Commission raised this issue as part of its submission to the first review of the Act. In its report of the review the Department of Public Expenditure and Reform (the Department) stated that it would be "*very difficult to carve out these groups without inadvertently bringing smaller local groups into the requirement to register*." It is important to note that the focus of this recommendation is on representative bodies and informal coalitions representing professional and/or business interests where one or more of the constituent members would fall within scope of the legislation and which would otherwise have an obligation to register if the member carried out the lobbying activity and not the representative body / coalition. The Commission considers that it should be possible to explicitly address this issue in the Act without bringing smaller local interest groups within scope.

**Recommendation 1: The Act should be amended to provide that any business representative bodies or "coalitions" of business interests, irrespective of number or status of employees, are within scope of the Act, where one of more of the members of the body/coalition would be within scope if they were acting themselves. Members of the body/coalition should be required to be named on returns in support of increased transparency.**

### *Communications made by unremunerated persons who hold office in an organisation.*

The Act provides that where a communication is made on behalf of an organisation by a person who is not a paid employee (including volunteers, unpaid Chairpersons, Board Members or Directors), it is not considered to be a lobbying activity for the purposes of the Act.

There have been a number of instances where a representative body or advocacy body with a paid employee has carried out lobbying activities but hasn't been required to register or submit returns as the lobbying activities were not carried out by the paid employee. In many organisations, the paid employee is employed in a purely administrative or secretarial role and is not authorised by the organisation to carry on lobbying activities. All of the organisation's lobbying activities are carried out by its Chairperson or other Board Members/Directors who may be unremunerated.

The Commission considers that lobbying activities made by persons who hold office in an organisation (for example, as a Chairperson or Board Member/Director) should be regarded as being made on behalf of the organisation, regardless of whether the Chairperson or Board Member/Director is remunerated.

The Commission made this recommendation in its submission to the first review. In its report the Department stated that "*the exemption for non-remunerated office holders has*

*always been a policy intention.*" This was based on concerns from stakeholders on the administrative burden capturing communications undertaken by volunteers and that much of the communications undertaken by "grassroots volunteers" would not be of a sufficiently high-level to warrant inclusion on the register.

The Commission agrees that it would be impractical to require that every communication made by an organisation's volunteers be registered. A distinction must be made, however, between an ordinary member / volunteer of an organisation and an office holder of that organisation. The Commission does not consider that it would be an administrative burden for communications made by an unremunerated Chairperson or Board Member/Director of an organisation to be recorded. It is also of the view that if such communications take place with a DPO, then they are at sufficiently high level and should be included on the Register.

The Commission considers that if a representative / advocacy body is within scope of the Act, then the organisation should register and submit a return where a lobbying activity is carried out by either a paid employee or an office holder of the organisation, whether or not the office holder is remunerated.

**Recommendation 2: Section 5(3) of the Act should be amended to provide that, where a relevant communication on behalf of an organisation that falls within scope of the Act is made by either a paid employee or an office holder of the organisation, it will be regarded as a lobbying activity made by the organisation.**

### *Definition of full-time employee.*

The definition of full-time employee provided in section 7 of the Act is "*the meaning given by section 7 of the Protection of Employees (Part-Time Work) Act 2001*" (the 2001 Act). The definition of full-time employee provided in the 2001 Act is "*an employee who is not a part-time employee*". The Commission considers that this is not a particularly instructive definition. Section 7 of the 2001 Act provides the following definition of a part-time employee:

> *part-time employee" means an employee whose normal hours of work are less than the normal hours of work of an employee who is a comparable employee in relation to him or her…*

The Commission recommends that a more comprehensive definition of full-time employee should be provided in the Act. Consideration might be given as to whether there is now a better definition of a full-time employee in use in employment legislation (or other legislation) since the commencement of the Act.

**Recommendation 3: The Act should be amended to provide a more comprehensive definition of a full-time employee in section 7.**

## b) Scope of section 5(1).

The Commission considers that this review of the Act should examine whether there is a need to limit the scope of the provisions of section 5(1)(c) of the Act.

### *Allowing for grassroots communication regarding the zoning or development of land.*

Unlike sections 5(1)(a) and 5(1)(b) of the Act, section 5(1)(c) does not include the term "manages or directs the making of" relevant communications. Section 5(1)(c) refers only to "makes" any relevant communications. Section 5(1)(c) does not, therefore, allow for a "grassroots communication" regarding the zoning of development of land. For example, if a residents' association is campaigning against the zoning or development of land and it asks residents to communicate with their local representatives on the matter, then each resident who contacts the local representative is regarded as having made a relevant communication and is required to register and submit a return of lobbying activities.

The Commission has taken a practical approach to the provisions of section 5(1)(c) and allows a residents' association or similar body organising a grassroots campaign regarding a particular zoning or development matter, to register and submit a single return in respect of the lobbying activities carried out on behalf of the association/body. The Commission requests, however, that the application/return must provide details of the persons (Committee etc.) responsible for managing the campaign, and it is these persons who will be held responsible.

**Recommendation 4: Section 5(1)(c) of the Act should be amended to provide for the managing and directing of relevant communications about the development or zoning of land, in addition to the making of such communications.**

### *Restricting the provisions of section 5(1)(c) to persons who have a material interest.*

Registering in relation to communications on zoning and development might also be limited to persons who have a material interest, or are connected to or communicating on behalf of someone who has a material interest in the land/development concerned.

In its current form, the Act requires any individual that makes a communication to a DPO about the zoning or development of land to register. In practice, this means that individuals or bodies that would not normally come within the scope of the Act are captured by its provisions if they are carrying out a relevant communication concerning the zoning or development of land. For example, a person complaining about a proposed zoning or development matter to a DPO canvassing at the forthcoming elections could be regarded as carrying out a lobbying activity and would be required to register and submit a return of lobbying activities.

A number of persons have registered in relation to communications with their local representatives concerning the zoning or development of land. In many cases these individuals have no material interest in the lands concerned nor are they connected to someone with such an interest. Often they are communicating regarding the addition or loss

of an amenity, or out of environmental concerns. Some of these individuals have incurred Fixed Payment Penalties for failing to submit a subsequent return of lobbying activities on time and in a number of cases pursuing compliance of these persons has resulted in a significant use of resources for the Commission.

Requiring individuals who have no vested interest in the outcome of a zoning or development decision other than as a member of the broader community to register appears to the Commission to be overbroad.

In its report on the first review the Department stated that the requirement to register communications relating to the development or zoning of land is included in the Act to "*meet transparency requirements, as a result, in particular, of the Mahon Tribunal Findings.*" In this regard, the Commission notes that the Mahon Tribunal when recommending the introduction of lobbying regulation noted that lobbying could result in unfair advantages for "vested interests". The Commission considers that the provisions of section 5(1)(c) of the 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 an interest. Relevant provisions of the Ethics in Public Office Acts might be instructive in terms of a suitable definition of a material interest.

**Recommendation 5: The provisions of section 5(1)(c) of the 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 an interest.**

### c) Exemptions to the definition of "Relevant communication"

#### *Political party communications*

Section 5(9) of the Act exempts certain communications from the meaning of carrying on lobbying activities. In its submission to the first review, the Commission recommended that communications made by a political party to its members that are also DPOs, in their capacity as members of the party, should not be considered lobbying. It recommended that the Act would benefit from an amendment to include this in the list of exempt matters.

In its report on the first review the Department recommended that the Commission provide guidance on this issue. While the Commission has provided guidance in its Frequently Asked Questions document and has provided a guidance note to candidates at elections which also deals with the issue of intra-party communications, the Commission is still of the view that a specific exemption should be included in the list of exempt matters, as is the case for other matters.

**Recommendation 6: The Act should be amended to exempt communications made by political parties to their DPO members in their capacity as members of the party.**

### *Exempt communication at section 5(5)(f) of the Act*

Section 5(5)(f) of the Act provides that "*communications forming part of, or directly related to, negotiations on terms and conditions of employment undertaken by representatives of a trade union on behalf of its members*" is an exempt communication. The definition of a trade union is set out in section 7 of the Act and means "*a trade union which is the holder of a negotiation licence under Part 11 of the Trade Union Act 1941 or is an excepted body within the meaning of section 6 of that Act*".

The Commission is aware that there are a number of employee representative bodies which are not trade unions as defined in section 7 of the Act (for example, the Garda Representative Association, Association of Garda Sergeants and Inspectors, Permanent Defence Forces Representative Association & Representative Association of Commissioned Officers). Negotiations on terms and conditions of employment carried out by such bodies is not, therefore, an exempt communication under the Act and could be regarded as a lobbying activity.

The Commission is of the view that negotiations on terms and conditions of employment carried out by such bodies should enjoy the same exemption as that provided to trade unions.

**Recommendation 7: The exempt communication at section 7 of the Act should apply to negotiations on terms and conditions of employment undertaken by other employee representative bodies.**

## 3) Operations.

### a) Expanding the prescription of designated public officials to other organisations or grades

Section 6(1)(f) of the Act provides that the Minister may designate public servants of a prescribed description as DPOs for the purposes of the Act. There was initially some discussion of expanding the group of DPOs to include civil servants at Principal Officer grade. While the Commission understands that there are no immediate plans to do so, the Commission would have views about the operational implications of such a move and advises that the Department consult further prior to making any change.

### b) Applications to register

Section 11(1)(c) and 11(1)(d) of the Act require that an application to register must include information and contact information respectively about the applicant's business or "main activities". Section 11(1)(b), however, only includes a reference to carrying on business but omits any reference to main activities. A person may not have an address at which they carry on business but may have an address which is not their home address from which they carry out their main activities and with which they may be associated. To ensure that all appropriate contact information is provided, and for the sake of completeness and

consistency, it is recommended that section 11(1)(b) be amended in line with subsections 11(1)(c) and (d).

**Recommendation 8: Section 11(1)(b) of the Act should be amended to include an address where a person carries on business or their "main activities".**

### c) Permanently ceased lobbying

Section 11(4) provides that a person who has "permanently ceased to carry on lobbying activities" may apply to have their entry on the Register marked accordingly. A person who has permanently ceased lobbying is not required to continue to furnish returns. A registrant who has not marked their registration as permanently ceased lobbying has an ongoing requirement to submit returns of lobbying activities (including "nil" returns if no lobbying activities have been carried out). A significant number of persons who failed to submit a return of lobbying activities and who incurred penalties were persons who had ceased lobbying activities but had not modified their registration.

The term "permanently" ceased has caused some concern in this regard, and has been cited on a number of occasions as the reason that the person has been reluctant to deactivate their registration. A person may have registered in relation to lobbying activities carried out on a particular matter. When the particular matter has been resolved or is no longer an issue the person may be in a position to say that they are no longer carrying on lobbying activities. It is more difficult for a person to say that they have "permanently" ceased lobbying as they cannot know if the same issue might arise again or if they will lobby at some future point on another matter.

A person should be allowed to mark their registration as "ceased lobbying". If the person subsequently carries on a lobbying activity, they may apply to reactivate their account. The Commission therefore recommends that the wording at section 11(4) be changed from "permanently ceased" to simply "ceased lobbying".

**Recommendation 9: The word "permanently" should be removed from section 11(4) of the Act.**

### d) Code of Conduct

Section 16(1) of the Act provides that "The Commission may produce, and from time to time revise, a code of conduct for persons carrying on lobbying activities with a view to promoting high professional standards and good practice". In November 2018 the Commission published its *Code of Conduct for persons carrying on lobbying activities*. The Code came into effect on the 1 January 2019.

<u>Laying the Code before the Oireachtas</u>

The Commission considers that any code of conduct published under section 16 of the Act should be laid before the Houses of the Oireachtas. The Commission is including the recently published Code of Conduct as an appendix to its 2018 annual report. The annual

report will be laid before the Houses of the Oireachtas as required under section 25(1) of the Act. The Code will, therefore, be laid before the Houses of the Oireachtas.

While including the Code as an Appendix to the annual report is a mechanism for laying the Code before the Oireachtas, the Commission is still of the opinion that the Act should include an explicit requirement for the Commission to lay any code of conduct published under section 16 of the Act before the Houses of the Oireachtas.

**Recommendation 10: Section 16 of the Act should include an explicit requirement for the Commission to lay any code of conduct published under section 16 of the Act before the Houses of the Oireachtas.**

Enforcement of the Code

Section 16(5) of the Act provides that a person carrying on lobbying activities "shall have regard to the code of conduct". There is no authority provided by the Act, however, for the Commission to enforce the Code, nor to investigate or report on breaches of the Code. Other than directing that a person lobbying must have regard to the Code, the Code does not have any statutory weight and does not even provide that the Commission should have regard to it when considering if a person has contravened the Act.

In its submission to the first review the Commission recommended that it should have the authority to issue guidance on the Code and to conduct inquiries into and report on breaches of the Code. In its report on the review, the Department stated that the Office of the Attorney General had advised that it "*is more usual to require that regard be had to the provisions of a code rather than for mandatory provisions to apply*". It suggested that the Commission may issue guidance on any code of conduct that is produced.

The Commission is still of the opinion, however, that some authority for the Code should be provided for in the Act. The Commission should, at least, be able to take observance of the Code into account under any prosecution of an offence under section 20 of the Act. An authorised officer appointed under section 19 of the Act should also have regard to observance of the Code when carrying out an investigation under section 19 of the Act.

Alternatively, the Act could be amended to provide that the Commission may have regard to a person's compliance with the Code when investigating or making a decision to prosecute offences under the Act.

**Recommendation 11: The Act should be modified to give the Commission authority to conduct inquiries into and report on breaches of the Code.**

# 4) Post-employment obligations

## a) Failures to comply with section 22

Section 22 of the Act provides that Ministers, Ministers of State, special advisers and senior public officials ("relevant DPOs") who have been prescribed for the purposes of section 6(1) of the Act are subject to a one year "cooling-off" period after they leave office. Relevant DPOs cannot engage in lobbying activities in specific circumstances, or be employed by, or provide services to, a person carrying on lobbying activities in specific circumstances during the "cooling-off" period. Relevant DPOs may apply to the Commission for a reduction or waiver of the cooling-off period. Under section 22(5) of the Act, the Commission may refuse an application for consent or may grant consent unconditionally or subject to conditions.

The issue of "switching sides" or the perception of a revolving door can serve to undermine public trust in the impartiality of public bodies. Failure to comply with section 22 of the Act, however, is not a relevant contravention under section 18 of the Act. There are no sanctions in the Act for failing to comply with section 22, either in relation to applying for consent where required, or in relation to complying with the Commission's decision on an application for consent and any conditions which may be imposed.

In its submission to the first review of the operation of the Act, the Commission recommended that contraventions of section 22(1) of the Act should be an offence under the Act. In its report on the first review the Department stated that "*evidence should be gathered in light of experience of implementation, before any informed decision could be taken*" on this issue.

Earlier this year the Commission became aware of a possible breach of section 22 of the Act. Following correspondence with the person and employer concerned the Commission was satisfied that section 22 of the Act had been contravened. The Commission had no authority to investigate or prosecute this breach of the Act. The above breach brings into sharp focus the lack of power to enforce the Act's post-employment provisions, or to impose sanctions for persons who fail to comply with these provisions.

The Commission repeats its recommendation that failure to comply with section 22 of the Act should be a relevant contravention under section 18 of the Act and an offence under section 20 of the Act.

**Recommendation 12: Failure to comply with section 22 of the Act (either in relation to submitting an application for consent, where required, or in relation to complying with the Commission's decision on an application for consent) should be a relevant contravention under section 18 of the Act and an offence under section 20 of the Act.**

The Commission further notes that, in the four years since the Act commenced, only nine applications for consent have been made to the Commission to waive or reduce the post-employment cooling-off period. The Commission finds it somewhat implausible that less than ten former DPOs have sought outside employment that engaged their obligations under the Act. While it has no firm evidence of other contraventions, the Commission is of the view that there are likely to have been instances of unreported breaches.

The Commission is of the view that all former relevant DPOs should consider seeking advice from the Commission where the former DPO is in receipt of a job offer and is unsure whether their obligations under section 22 of the Act might be engaged. The Commission can advise on such issues. Moreover, employers of relevant DPOs should ensure that these individuals are aware of their obligations when planning to leave a post, and are able to seek advice from the Commission as needed.

**Recommendation 13: Employers of relevant DPOs should ensure that DPOs are aware of their post-employment obligations when planning to leave a post, and that they may seek advice from the Commission as needed.**

### b) Restrictions in section 22 should not be confined to the connected public body and connected DPOs.

The Commission has previously considered applications for consent under section 22 of the Act where it was evident that although a person was "connected" (as defined in the Act) to a single public body, their role in that public body brought them into regular contact with other public bodies and DPOs employed by those bodies.

A person is only required to seek consent if he/she intends to carry on lobbying activities or be employed by a person carrying on lobbying activities with a public body or with DPOs with which he/she is connected. A relevant DPO might have had sufficient involvement, influence or contacts in another public body or with DPOs with which he/she is not "connected". (For instance if occupying a DPO position in a key economic ministry or an inter-departmental working group.) Such involvement, influence or contacts might confer an unfair advantage in terms of the knowledge and connections the former DPO could bring to a post-employment position.

A person would not be required to seek the Commission's consent or be in breach of the Act if he/she intended to carry out lobbying activities or be employed by a person carrying on lobbying activities with another public body or its DPOs during the cooling-off period. The Commission could not impose conditions (under section 22(5)(a) of the Act) relating to an "unconnected" public body or its DPOs.

Consideration should be given to extending the scope of section 22 to provide for situations where a person may be carrying out lobbying activities with a public body or with DPOs with which he/she is not connected but with whom he/she has had significant involvement, influence or contacts.

**Recommendation 14: The Act should be amended to extend the scope of section 22 to include public bodies and DPOs with whom a person may had significant involvement, influence or contacts.**

### c) Publishing details on consent granted to waive or reduce the cooling-off period under section 22

A number of those who made submissions as part of the consultation process on the Code of Conduct suggested that applications for consent under Section 22 of the Act and the Commission's decision regarding same should be published regularly on lobbying.ie. The Commission is aware from the Department's report on the first review that the possibility of "naming and shaming" was considered when drafting the legislation but was dropped due to data protection concerns.

Currently, details of section 22 applications for consent and the Commission's decisions in relation to same in any given year are published in the Commission's annual report for that year. In accordance with section 25(2) of the Act the applicant's details are not provided.

The Commission sees merit in publishing information on decisions in relation to section 22 where the decision has been made to grant a waiver or reduction of the cooling-off period. It does not regard this as a "naming and shaming" exercise. On the contrary, publication of the decisions would allow those former DPOs and their employers to demonstrate that they have considered and complied with their obligations under section 22 of the Act. It would enhance public trust in the impartiality of public bodies and provide assurance that the issue of "switching sides" or "revolving doors" is being addressed. It would also serve to highlight that there is a "cooling-off" period in operation. Finally, the fact that information concerning applications for consent are in the public domain might also encourage former DPOs who are minded not to apply for consent to do so.

What could be published under such a scheme would be the name of the person, the former public body for which they worked, the dates of the cooling-off period, the amount/duration of any reduction or waiver, and whether conditions applied. Documents related to the consideration of the decision would not be published, nor would the names of any individual refused such consent.

**Recommendation 15: The Act should be amended to allow the Commission to publish certain details regarding its decisions to grant permission to waive or reduce the cooling-off period under Section 22 of the Act.**

# 5) Enforcement.

## a) Taking actions to avoid obligations under Act

It should be an offence under the Act for a person to take any action that has as its intended purpose the avoidance or circumvention of his or her obligations under the Act, for example destroying records. The Commission made this recommendation as part of its submission to the first review. The Department in its report on the review stated that "*the proposed offence of avoiding obligations is catered for under section 19 of the Act*". The Department also referred to section 18(e) of the Act which provides that it is an offence to obstruct an investigation.

The Commission is of the view that the Act, as currently drafted, does not cater for the concept of anti-avoidance. It therefore repeats its previous recommendation. Consideration must of course be given to the scope of such a clause.

**Recommendation 16: An anti-avoidance clause should be added to the list of relevant contraventions in section 18 of the Act.**

## b) Publication of investigation reports

Section 19 of the Act authorises the Commission to carry out an investigation into relevant contraventions of the Act. An authorised officer carries out the investigation on the Commission's behalf, and then must produce a report to the Commission and to the person under investigation. There is no authority under the Act for the Commission to make details of its investigations public.

In its submission to the first review the Commission recommended that the Act be amended to give the Commission the authority to make investigation reports public. In its report the Department stated that to "*include naming and shaming provisions as part of a report as this would contravene data protection provisions.*"

This view is not consistent with other ethics legislation which the Commission supervises. Under the Ethics in Public Office Acts, the Commission may make public its report into an investigation. Data protection concerns notwithstanding, where a body has the statutory authority to conduct investigatory activities, it should be able to publicise some details of those activities.

In its report, the Department further stated that where an "*anonymised report was issued following an investigation it could inadvertently provide information that could identify the individual or organisation*" and that this could also contravene data provisions. This view is not consistent with section 25(2)(b) of the Act, which specifically provides that the Commission's annual report on the Regulation of Lobbying contain (anonymised) details of "any investigations under section 19 concluded in that year."

Information about an investigation made by the Commission may be made public anyway if an alleged relevant contravention is prosecuted by the Commission through the courts. However, where there is not enough evidence to proceed to a prosecution, or where evidence demonstrates that no contravention occurred, there is no mechanism for making the facts of the situation known. This is of particular concern where a matter may already be in the public domain, with the possibility of unfounded reputational damage to a person alleged to have contravened the Act. The publication of an investigation report can also serve to clear a person who may have been reported (in the media or elsewhere) as having potentially contravened the Act.

The associated lack of transparency may also serve to undermine confidence in the enforcement powers of the Commission and the robustness of the lobbying legislation. The Commission considers that as part of the review, the Department should consult with the Data Protection Commissioner and seek the Commissioner's views as to whether and how the publication of an investigation report or at least some detail about an investigation under section 19 of the Act could be achieved. For example, a summary of the subject matter of the investigation, the alleged contravention and the outcome (closed, proceeded to prosecution etc.) would serve to make investigations more transparent without superseding the courts process.

**Recommendation 17: The Commission should be allowed to publish anonymised summary details of investigations under section 19 of the Act.**

# 6) Other

## a) Role of DPOs in supporting the Act

The Act does not set out any requirements for DPOs to register, keep records, submit returns or validate information contained in the returns submitted by lobbyists. DPOs have the right to seek correction of any inaccurate information, and the register has a reporting function built in to enable this.

While the Act does not set out any registration or reporting obligations for DPOs, they are positioned to play an important role in supporting the effective implementation of the Act. In its submission to the first review the Commission suggested some obligations for DPOs which may be considered that would further support the Act's implementation and encourage compliance.
The suggestions were that DPOs should decline further communications with lobbyists where the DPO is aware that the lobbyist has failed to register previous communications and that where a person has been convicted of any relevant contravention identified in section 18, the Commission should be able to order any DPO not to have dealings with that person. It was also suggested that the Commission should have the authority to investigate breaches of these provisions, and to determine what action should be taken. The purpose of these recommendations was to further strengthen the Act.

In its report on the first review the Department stated that it would neither be appropriate nor possible on a practical level for DPOs to "*police the activities of lobbyists*". It was stated that the Commission's proposals could have the effect of changing the "*nature of the relationship between organisations that are lobbying and the State, and may act as a disincentive to public officials to encourage and facilitate contact with stakeholders*".

In the current absence of formal obligations for DPOs under the Act, the Commission has identified a number of best practices, which are outlined in its Guidelines for DPOs, Guidelines for TDs, Senators and MEPS, and Guidelines for Local Authority Members. These guidelines are available on www.lobbying.ie. The Commission is still of the opinion, however, that a person who is not complying with their requirements under the Act should not be allowed to continue to have access to and lobby public officials while not in compliance. The only way to achieve this is to restrict DPOs from communicating with non-compliant lobbyists. In that regard, therefore, the Commission repeats the recommendations it made in its submission to the first review as follows:

**Recommendation 18: The Act should be amended to introduce obligations for DPOs to decline further communications with persons where the DPO is aware that the person has failed to register previous lobbying activities by the relevant date.**

**Recommendation 19: The Act should be amended to provide the Commission with the authority to order any DPO to refuse to have dealings with a person who has been convicted of a relevant contravention.**

**Recommendation 20: The Act should be amended to provide the Commission with the authority to investigate breaches of the provisions outlined in recommendations 19 and 20 above.**

### b) Raise awareness of the Transparency Code

Section 5(5)(n) of the Act provides that communications between members of a relevant body are exempt if the body adheres to the Transparency Code. The Code, put in place by the Minister, provides that if a relevant body publishes its terms of reference, membership, agendas and minutes of meetings on its website, communications between the members of the group would not be regarded as a lobbying activity and would be exempt from the requirement to register.

In order to clarify and identify which groups are adhering to the Transparency Code it was agreed that the Commission would maintain a central repository of bodies adhering to the Transparency Code. The Commission has maintained a central repository since 2018 and has had significant engagement with public bodies regarding relevant bodies and the Transparency Code. It has also published an information note for public bodies on their requirements to publish certain information relating to the Act.

While there has been an improvement in the information published by public bodies in relation to the "relevant bodies" under their aegis, the Commission is aware that there are far more relevant bodies in operation than are being reported on the public bodies' websites. For example, out of 17 government departments, eight have no information on their websites relating to relevant bodies operating under their aegis. This would suggest that these government departments either have no such working groups, or that these groups are not operating in accordance with the Transparency Code. If the latter, then the external members of these bodies may be required to account for "lobbying activities" relating to communications made within the Group. It is possible that such groups and their members may still not be aware of the exempt communication under section 5(5)(n) of the Act and the existence of the Transparency Code.

The Commission has noted a similar issue in relation to Local Authority Strategic Policy Committees (SPCs). SPCs contain members of the local authority and external members who are generally drawn from community, voluntary or private sector backgrounds and who have relevant expertise in the policy area that the SPC deals with. If the external member is within scope, then it is quite likely that he/she is communicating with a DPO regarding a relevant matter. Some local authorities publish information relating to SPC membership, minutes and agendas. The Commission has engaged with the Corporate Committee of the County and City Management Association (CCMA) to ensure that external members of SPCs are aware of the requirements of the Act, including the fact that communications within an SPC might result in an obligation to register; and highlighting the exemption for relevant bodies who comply with the Transparency Code.

As the Transparency Code is within the remit of the Minister, the Commission considers that further outreach should be undertaken by the Minister to create awareness of the exempt communication regarding relevant bodies and the existence of the Transparency Code. The Commission considers that the Department is best placed to lead this outreach / guidance with appropriate support from the Commission and perhaps in partnership with local authorities and / or the Department of Housing, Planning and Local Government.

**Recommendation 21: An education programme led by the Department should be undertaken to inform public bodies about the exempt communication under section 5(5)(n) of the Act and the requirements of the Transparency Code.**

### c) Provide clarity in relation to the "ordinary course of the business" referred to in the exempt communication at section 5(5)(m) of the Act.

Submissions received by the Commission as part of its consultation on the Code of Conduct expressed concerns regarding an alleged misuse by certain commercial state bodies of the excepted communication regarding "the ordinary course of business" at section 5(5)(m) of the Act. It was suggested that the Department might issue guidance on this "excepted communication" to all state agencies. One of these organisations made a similar suggestion as part of the consultative process on the first review of the Act. The report of the review provided some clarification on the matter. The report also mentioned that the Commission

was developing a "Frequently Asked Question" on the matter. The Commission subsequently published an FAQ on its website.

The Commission considers that further outreach or guidance should be provided to state agencies to which the exemption at section 5(5)(m) might apply. The outreach/guidance should create awareness of the exempt communication and the circumstances in which it should, or should not, be used. Again the Commission considers that the Department is best placed to lead this outreach / guidance, with appropriate support from the Commission.

**Recommendation 22: An education programme led by the Department should be undertaken to inform relevant state agencies about the exempt communication under section 5(5)(m) of the Act and the circumstances in which it applies.**

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# Appendix 1 - List of Recommendations

**Recommendation 1:** The Act should be amended to provide that any business representative bodies or "coalitions" of business interests, irrespective of number or status of employees, are within scope of the Act, where one of more of the members of the body/coalition would be within scope if they were acting themselves. Members of the body/coalition should be required to be named on returns in support of increased transparency.

**Recommendation 2:** Section 5(3) of the Act should be amended to provide that, where a relevant communication on behalf of an organisation that falls within scope of the Act is made by either a paid employee or an office holder of the organisation, it will be regarded as a lobbying activity made by the organisation.

**Recommendation 3:** The Act should be amended to provide a more comprehensive definition of a full-time employee in section 7.

**Recommendation 4:** Section 5(1)(c) of the Act should be amended to provide for the managing and directing of relevant communications about the development or zoning of land, in addition to the making of such communications.

**Recommendation 5:** The provisions of section 5(1)(c) of the 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 an interest.

**Recommendation 6:** The Act should be amended to exempt communications made by political parties to their DPO members in their capacity as members of the party.

**Recommendation 7:** The exempt communication at section 7 of the Act should apply to negotiations on terms and conditions of employment undertaken by representatives of other employee representative bodies.

**Recommendation 8:** Section 11(1)(b) of the Act should be amended to include an address where a person carries on business or their "main activities".

**Recommendation 9:** The word "permanently" should be removed from section 11(4) of the Act.

**Recommendation 10:** Section 16 of the Act should include an explicit requirement for the Commission to lay any code of conduct published under section 16 of the Act before the Houses of the Oireachtas.

**Recommendation 11:** The Act should be modified to give the Commission authority to conduct inquiries into and report on breaches of the Code.

**Recommendation 12:** Failure to comply with section 22 of the Act (either in relation to submitting an application for consent, where required, or in relation to complying with the Commission's decision on an application for consent) should be a relevant contravention under section 18 of the Act and an offence under section 20 of the Act.

**Recommendation 13:** Employers of relevant DPOs should ensure that DPOS are aware of their post-employment obligations when planning to leave a post, and that they may seek advice from the Commission as needed.

**Recommendation 14:** The Act should be amended to extend the scope of section 22 to include public bodies and DPOs with whom a person may had significant involvement, influence or contacts.

**Recommendation 15:** The Act should be amended to allow the Commission to publish certain details regarding its decisions to waive or reduce the cooling-off period under section 22 of the Act.

**Recommendation 16:** An anti-avoidance clause be added to the list of relevant contraventions in section 18 of the Act.

**Recommendation 17:** The Commission should be allowed to publish summary details of investigations under section 19 of the Act.

**Recommendation 18:** The Act should be amended to introduce obligations for DPOs to decline further communications with persons where the DPO is aware that the person has failed to register previous lobbying activities by the relevant date.

**Recommendation 19:** The Act should be amended to provide the Commission with the authority to order any DPO to refuse to have dealings with a person who has been convicted of a relevant contravention.

**Recommendation 20:** The Act should be amended to provide the Commission with the authority to investigate breaches of the provisions outlined in recommendations 19 and 20 above.

**Recommendation 21:** An education programme led by the Department should be undertaken to inform public bodies about the exempt communication under section 5(5)(n) of the Act and the requirements of the Transparency Code.

**Recommendation 22:** An education programme led by the Department should be undertaken to inform relevant state agencies about the exempt communication under section 5(5)(m) of the Act and the circumstances in which it applies.

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