SUBMISSION BY THE CHARTERED INSTITUTE OF LOGISTICS AND TRANSPORT IN IRELAND TO THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM AND THE OIREACHTAS COMMITTEE ON FINANCE, PUBLIC EXPENDITURE AND REFORM ON THE REGISTRATION OF LOBBYING BILL 2014

KEY POINTS

- We are concerned that the legislation may have unintended consequences which could deter voluntary participation in bodies which engage in lobbying activities.
- The proposal to exempt employers with up to ten employees is welcome but there is a serious doubt about the meaning of the phrase which limits the exemption to communications "relating to the affairs of the employer". This could be narrowly interpreted. The definition of "employee" should be clarified.
- The Minister is given unacceptably wide powers to expand the provisions of the Bill by regulation. Substantive policy changes should be made by the Oireachtas, either in new primary legislation or by resolution confirming Ministerial regulations.
- Charities and NGOs provide services on behalf of public bodies. Communications relating to those services should be exempt from the legislation.
- The Institute strongly supports the application of this legislation to communications with Assistant Secretaries and above in the civil service and equivalent grades in local authorities. However it has concerns that the Minister has power to widen the field of application without reference to the Oireachtas.
- Reporting twice yearly within 30 days of the end of the relevant reporting period would be more than adequate to achieve the aims of the legislation.
- The reporting requirements in section 12 are unclear and could, despite assertions to the contrary and depending on how they are interpreted, impose significant a administrative burden.
- The proposed penalties are excessive, particularly when they are applicable not only to a body but also its officers and directors who in many cases will be volunteers who give freely of their time.
- The provisions in section 22 on post-employment lobbying by public officials are sensible and proportionate but require some clarification.
- It is important that the statutory obligations placed on bodies and individuals are clear and unambiguous and we make a number of proposals for amendments to address this concern.

Introduction

The Chartered Institute of Logistics and Transport in Ireland ("the Institute") is the independent professional body for people engaged in logistics and all forms of transport. The Institute in Ireland is part of an international body with 30,000 members worldwide. As a professional body, the Institute does not lobby on behalf of any sectoral interest, but seeks to take an independent, objective and considered view on matters of public policy.

The main objectives of the Institute are to:

- Promote, encourage and co-ordinate the study, planning and advancement of the science and art of logistics and transport;
- Provide education and training programmes leading to a professional qualification.

It pursues these objectives through the provision of courses, the organisation of conferences, seminars, technical visits and other events, the preparation and promulgation of policy papers and briefs and the making of submissions on matters of public policy.

The Institute is established under a Deed of Trust and is a registered charity. It is governed by a 20 person Council, supported by a Management Committee, Eastern and Southern Regional Committees and Standing Committees dealing with specific topics such as membership, marketing, policy, education and training. The membership of the Council and the Committees is comprised of some 50 people acting in an unpaid voluntary capacity and includes people currently working in the sector and recently retired from it. The Institute has eight employees, both whole-time and part-time.

The submission begins by setting out some general considerations and goes on to make comments on the contents of the Bill, section by section.

General Considerations

The Institute supports in principle the proposed regulation of lobbying and appreciates the circumstances which have given rise to the need for legislative action. However it has some concerns about aspects of the proposals set out in Bill. It requests the Minister and the Committee to consider these concerns during the progress of the Bill through both Houses of the Oireachtas. The Institute will be happy to clarify any of the matters raised in this submission or to assist the legislative process in any other way it can.

The Institute's review of the Bill is guided by the following broad principles:

- That the proposed regulatory response is proportionate to the problem being addressed;
- That the costs, both financial and otherwise, borne by regulated bodies are minimised;
- That the statutory obligations placed on bodies and individuals are clear and unambiguous;
- That the regulatory regime will not have an adverse impact on volunteerism in regulated bodies and sectors.

Public policy virtually always has unintended consequences and it is particularly important that every effort is made to identify what these might be and propose measures to mitigate them. The Institute has a real concern that the proposed regulatory regime could have the effect of silencing some bodies who would have otherwise contributed to public debate and that it may erect barriers between public officials and many in civil society who wish to make a legitimate and disinterested contribution to the development of public policy. A particular concern is that it may deter people who work in a voluntary capacity for a wide range of bodies which engage in discourse on public policy and seek to assist Government in the development and articulation of policy. There is a need during the legislative process to allay this concern in a tangible way; it is not enough to assert that this will not happen or that this is not the intention of Government.

It would have been particularly helpful if the regulatory impact assessment had looked in a structured and research-based way at the potential impact on a small representative sample of bodies likely to be subject to the new regulatory arrangements. This would have assisted in providing a useful picture of the practical impact of the proposals across a range of bodies of different sizes, staff/volunteer mixes and competences. It would also replace assertions with practical examples.

Section 4: Regulations

Any regulations made under sections 5(6), 6(1) or 12(7) should be subject to positive confirmation by resolutions of both Houses of the Oireachtas, informed by a report from the relevant Oireachtas Committee. These regulations deal with matters of substance which have potentially significant policy implications and are not simply administrative or procedural in character.

Section 5: Means of Carrying On Lobbying Activities

The proposal in subsection (3)(b) to exempt "communications by or on behalf of an employer with not more than 10 employees relating to the affairs of the employer

about any matter other than the development or zoning of land under the Planning and Development Acts 2000 to 2014" is welcome and strongly supported by the Institute. However it is unclear what the implications of the phrase "relating to the affairs of the employer" will be in practice. It appears to have the potential to limit the scope of the exemption and creates uncertainty as to whether particular activities of a body are exempt or not. It is not clear if the Institute, as a body employing less than ten people, would be exempt when making representations on wider Government policy and we therefore propose the following amendment:

> In subsection (3)(b) of section 5, delete "relating to the affairs of the employer".

The subsection should also take account of the fact that bodies may have part-time employees. As drafted, it would discriminate against an organisation that has a mix of whole-time and part-time employees. It is also unclear whether "employee" includes temporary employees, interns (such as those engaged under Jobbridge) or persons on student work experience placements. In the light of these concerns, we propose the following amendments:

- In subsection (3)(b) of section 5, delete "10 employees" and substitute "10 whole-time equivalent employees".
- In subsection (7) insert the following definition: " 'employee' excludes temporary employees, interns and persons on short term work experience placements";

Subsection (3)(f) exempts communications requested by a public service body and published by it. While the Institute supports the concept, the drafting is somewhat unfortunate. It leaves the discretion as to publication with the public body and there will therefore a doubt whether a particular communication is an exempted communication or not until it is published. If a communication is requested by a public body, for example via a public consultation, it should not be treated as lobbying and we therefore respectfully propose the following amendment:

> In subsection (3)(f) of section 5, delete "and published by it".

A number of charities and non-governmental organisations provide services on behalf of the State. There are communications between these bodies and Government Departments or agencies in the normal course of business in relation to the delivery of those services. These communications should be exempt as they do not constitute lobbying. An amendment is therefore proposed:

> Insert the following paragraph after paragraph (f) in subsection (3): "(g) communications by a person relating to the provision of services to a public service body by that person;"

Subsection (3)(l) purports to exempt communications between a corporate body in which a Minister holds shares and that Minister. This seems to cover commercial State bodies which are generally set up as companies but does not cover State bodies which do not have shares. This would include bodies which are statutory corporations and other bodies set up directly by or under statute, many of them non-commercial. There may also be circumstances where the line Minister is not the shareholder in a particular body.

There needs to be much greater clarity as to what is meant by a "Transparency Code" in subsection (5) and an amendment should be introduced which specifies in greater detail the intended content of such a Code.

Section 6: Designated Public Officials

The Institute welcomes and strongly supports the proposal in the Information Note that only communications with officials at Assistant Secretary or above (or their equivalent grades in local authorities) would be covered by the reporting provisions. This should be specified in the legislation by an appropriate amendment to subsections (1)(f) and (g). If this is not proposed, then regulations under (f) and (g) should at a minimum be subject to a confirmatory resolution of both Houses of the Oireachtas. If not, the Minister would have very wide and unfettered powers to expand the scope of the legislation to an extensive range of public service officials without any effective input by the Oireachtas. This could include officials at much lower grades than those currently envisaged and officials in a large variety of non-commercial State bodies. Changes of this magnitude should only be made by Act of the Oireachtas.

Section 7: Other Definitions

The definitions of "relevant period" and "relevant date" mean that reports will be required every four months and within 21 days of the end of each reporting period. These are unnecessarily onerous requirements, particularly for smaller bodies, and alternatives of a six monthly reporting period and 30 days to report would adequately meet the objectives of the Bill.

Section 11: Details to be Supplied by Applicants for Inclusion on the Register

A registered person who has permanently ceased to carry on lobbying activities should have the relevant details deleted from the register after a reasonable period of, say, one year and an amendment is therefore proposed:

In section 11 at the end of subsection (4), add the following new subsection: “One year from the notification the Commission shall permanently delete that person’s entry from the register unless it considers that the public interest would be better served by delaying that deletion for a specified period.”.

Section 12: Returns to be made by Registered Persons

The explanatory literature asserts that compliance will not impose a significant administrative burden and that details of each individual lobbying contact will not be required. This assurance seems to be at variance with the actual provisions of section 12. The manner and form of reporting will be determined by the Standards in Public Office Commission so there is currently no transparency as to what will actually be required, nor is there any requirement in the section to minimise the administrative burden. The report which lobbying bodies are required to submit must state the subject matter of the lobbying communications, the results they were intended to achieve, the type and extent of the lobbying activities and such other information as the Minister may prescribe. To be able to comply with these requirements, bodies and persons working for them will have to keep detailed records of contacts with public bodies so as to be able to list the officials contacted, the subject matter, type and particularly the extent of lobbying activity. How else, for example, will it be possible to provide an accurate assessment of the extent of lobbying activity? This has significant implications for people who work in a voluntary capacity and give freely and for free of their time. In addition the Minister will be able to prescribe additional requirements above and beyond those already specified in the section and the provisions of subsection (7) give the Minister very wide and untrammelled powers in this regard. In particular, paragraph (b) of that sub-section is drafted in remarkably wide and unconstrained terms and contains no reference to minimising the administrative burden.

To help redress these concerns, it is strongly recommended that the following amendments be made:

- Delete paragraph (d) of subsection (4). It should be quite sufficient to report on the subject matter and intended purpose of the lobbying as provided for in paragraph (c).
- Delete paragraph (g) of subsection (4) and subsection (7). Any changes of this type should be made by an Act of the Oireachtas.
- Impose a statutory obligation on the Minister and the Commission to minimise the administrative burden and require that their actions in specifying the form and content of reporting are subject to positive confirmation by both Houses of the Oireachtas.

Section 13: Requirement for Further or Corrected Information

This section gives the Standards in Public Office Commission power to require the provision of further or corrected information. Where a body does not comply with this requirement, the Commission must remove the existing information from the public register. Surely it is in the interests of transparency that information on the particular lobbying activity is retained on the register, even if accompanied by details of the Commission's concerns as to its extent and accuracy? Otherwise there will be no record at all of that lobbying activity. Subsections (2) and (3) should be deleted and replaced with a provision enabling the Commission to add details of any notice issued under subsection (1) to the offending information.

Section 14: Delayed Publication

This section allows for delayed publication of information where it could have serious adverse effects on the financial interests of the State, the national economy or business interests or cause a material financial loss to a person. The determination is made by the Commission which may postpone publication for a maximum of six months. Subsection (11) seems to envisage an extension of that period but the wording used is curious and imprecise. The Commission should have more discretion to determine the length of a delay on publication or to permanently bar publication, if warranted. The following amendments are therefore recommended:

- In subsection (5), delete the words ", not exceeding 6 months," and substitute the following "permanently or for such specified period as it considers appropriate and".
- Substitute the following for subsection (11): "The Commission may amend a determination made by it under subsections (4) and (5) to extend the period specified therein.".

The exemption from the Freedom of Information Acts should also apply to **all** records relating to the Commission's determination, as these records could reveal the subject matter of the exemption from publication.

Section 16: Code of Conduct

These provisions are welcome. However there should be a **mandatory** requirement on the Commission to produce such a Code and greater clarity on what its purpose and contents will be. It is also important to distinguish between the purpose and content of the Code of Conduct under section 16 and the guidance provided for under section 17. Persons carrying on lobbying activities are required to "have regard" to the Code but it is always difficult to establish precisely how one can demonstrate that they have had regard to something. In other contexts, where a

person can demonstrate that he or she acts in accordance with a code of practice or a code of conduct, they are deemed to have complied with their statutory obligations.

Part 4: Enforcement

The Information Note accompanying the Bill states that it is intended that the enforcement powers will not be brought into force until the Minister has carried out a review of the implementation of the legislation at the end of one year in operation. This should be explicitly written into the legislation:

> "Part 4 will not come into force until the Minister has completed the first review of the operation of this Act as provided for in section 2.".

Section 20: Offences

The proposed penalties for offences are excessive, especially in circumstances where persons act in a voluntary capacity as officers or directors of corporate bodies. Subsection (6) makes a corporate body **and** its directors, managers and officers liable to substantial penalties for offences. They are also all liable to the fixed payment in lieu of prosecution under section 21. Therefore each individual officer and director is liable to the following penalties:

- For making a late return: a maximum fine of €2500 or a fixed payment in lieu of prosecution of €200.
- For any other offence: an **unlimited** fine and/or up to two years in prison on conviction on indictment or a maximum fine of €2500 on summary conviction.

Exposure to this level of penalties, coupled with the other requirements imposed by the Bill, could have a chilling effect on participation by volunteers in many charitable and other bodies that provide valuable services to society as well as acting as advocates in relation to issues of public policy. At a minimum the following changes should be made:

- The fixed payment option should be available to the Commission in respect of all offences.
- There should be a range of fixed payments available to the Commission. For example levying a €200 payment on an individual for a late return seems excessive.
- There should be a lower penalty for first offences, particularly for late returns or failure to make a return. A Class E fine of a maximum of €500 would seem appropriate.
- The unlimited fine for conviction on indictment should be replaced by a specified fine or a range of specified fines.

Section 22: Restrictions on Post-Term Employment as Lobbyist

The Institute welcomes and strongly supports the provisions of this section relating to the carrying on of lobbying activities by former public officials. They are sensible and proportionate and we particularly welcome the provision enabling a person to apply to the Commission for consent to carry on lobbying activities during the first year following retirement or resignation. However, a number of issues arise in relation to the application and interpretation of these provisions:

- Do they apply to former public officials who act in a voluntary capacity on behalf of a lobbying body, as distinct from being a paid employee of or service provider to that body? For example, if somebody offers their services to a charity or non-governmental organisation on a voluntary basis, should they be subject to the same strictures as somebody employed or contracted by that body? Perhaps the wording of subsection (1)(b) should be "provide **paid** services to".
- Former senior employees of a wide range of State bodies (commercial and non-commercial) would have valuable knowledge similar to that of senior civil servants and local authority officers, yet they are exempt from these provisions.
- Should these provisions also be applicable to persons designated under section 6 (1)(g) – "any other prescribed office holders or description of persons"?

- The meaning of subsection (4) is unclear. How is a senior official "connected with" a public service body? Is that official connected with it if he or she was a member of a board or committee of that body, worked with it on some project, oversaw its work or otherwise had regular interactions with it? If that wide interpretation were applied, it could cover an extensive range of governmental and public service activities. The subsection also uses the phrase "at any time". If it means "at any time during the said period of one year", it should explicitly say so. Otherwise it is capable of a very wide interpretation.

Section 23: Appeals

The Institute welcomes and supports the provisions allowing for appeal of Commission decisions but suggests that the nomination of an appeal officer under subsection (5) should be done by the Minister rather than the Commission.

Section 25: Reports by Commission

The reporting of determinations under section 14 (delayed publication) should not identify the subject matter of the determination. As drafted, subsection (2) only protects the identity of the person but not any sensitive information.

Chartered Institute of Logistics and Transport in Ireland
September 2014