

**SUBMISSION BY THE CHARTERED INSTITUTE OF LOGISTICS AND
TRANSPORT TO THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM IN
RESPONSE TO THE POLICY PAPER "*REGULATION OF LOBBYING - POLICY
PROPOSALS*"**

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 has some 900 members in Ireland and 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 Institute is governed by a 20 person Council, a Management Committee, three Regional Committees and five Standing Committees dealing with specific topics such as membership, policy, education and training. The membership of the Council and the Committees is comprised of some 60 people acting in an unpaid voluntary capacity and includes people currently working in the sector and recently retired from it. The Institute has six fulltime employees. It therefore appears that the Institute will fall within the definition of a lobbyist in the Policy Paper and will therefore be subject to the proposed regulatory system governing lobbying of public officials.

The Institute supports in principle the proposed regulation of lobbyists and appreciates the circumstances which have given rise to the need for such legislative action. However it has some concerns about aspects of the proposals set out in the Policy Paper. It requests the Minister to consider these concerns when drafting the legislation to give effect to his policy proposals.

Regulatory Impact Assessment

While the Policy Paper is very comprehensive in its analysis of the issues to be addressed in relation to the regulation of lobbying, it would have been helpful if the policy proposals had been accompanied by a regulatory impact assessment. It is important that the draft legislation, when published, is

accompanied by a comprehensive regulatory impact assessment which demonstrates that:

- the proposed regulatory response is proportionate to the problem being addressed;
- the costs, both financial and otherwise, borne by regulated bodies are minimised;
- 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 the regulatory impact assessment attempts to identify what these might be and proposes 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. The impact assessment needs 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 be particularly helpful if the regulatory impact assessment looked at the potential impact on a small representative sample of bodies likely to be subject to the new regulatory arrangements. This would assist 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.

Definition of Lobbying

According to the Policy Paper, all communications by individuals employed by an organisation or acting as officeholders will be encompassed within the definition of lobbying. The primary legislation will need to clearly define what is meant by “an officeholder” in this context so as to ensure that there is no ambiguity about the categories of persons covered by the legislative provisions. The Institute is concerned that the definition will not be too widely cast

because a very wide definition of “officeholder” could potentially include some 60 people involved in the governance of the organisation, all of them acting in an unpaid voluntary capacity.

Some aspects of the definition of “lobbying” in Recommendation 2 on page 33 should be clarified during drafting. The precise meaning of items (ii) and (v) is unclear. It also appears that lobbying related to the development or amendment of public policy is not explicitly covered by this definition.

Definition of Lobbyist

The Policy Paper recommends that any individual or body who undertakes lobbying would have an obligation to register and report on their lobbying activity. This is a circular definition which does not make it clear which specific individuals within an organisation will be covered by the registration and reporting obligations of that organisation. Clarity on this issue is important, particularly where it affects people who act in a voluntary capacity within an organisation. Some members of the Institute’s committees have already indicated that they expect to have to review their continued participation in the work of the Institute when statutory regulation of lobbying comes into force.

Definition of Persons Lobbied

There needs to be clarity as to what precisely is meant by the phrase “senior civil and public servants”. Presumably this will be dealt with by a detailed listing of the grades and offices covered by the legislation so that lobbying organisations are in no doubt as to which communications with what officials are regarded as lobbying. It will also be important to be unambiguous as to the meaning of the term “special adviser” as a range of terms have been used to cover such individuals, including programme manager. For example, are Ministerial press advisors and personal assistants to be included within this definition?

Information Disclosed in Lobbying Register

Among the information which it is recommended should be submitted on registration is “the specific policy or legislative issues or areas of public administration of interest to the registrant, including the name of the Bill or

other identifier of the legislation”. Some parts of this definition, particularly the latter clause, seem more relevant to regular detailed reporting than to general registration. A more general formulation along the following lines would seem more appropriate to registration: “the general policy or legislative issues or areas of public administration of interest to the registrant”. The more specific issues of interest to a lobbyist, for example a particular piece of legislation, will more appropriately be picked up through the quarterly reporting obligations.

The Policy Paper proposes that there should be quarterly reporting on lobbying activity. What is not clear is the extent to which these reporting obligations impinge on individuals, particularly those who act in a voluntary capacity. To enable an organisation comply with its reporting obligations, will it be necessary for people who act as officers of that organisation in a voluntary capacity to keep a record of all contacts, however fleeting, with public officials? The quarterly report is supposed to include “summary information to determine the nature, scope, intensity and type of lobbying activity during that period”. There needs to be much greater clarity as to what precisely this means. Which the inclusion of the words “summary information” suggests a light touch approach, the rest of the definition seems to involve very onerous reporting obligations for the organisation itself and for its individual employees and officeholders who will have to provide the raw material on which the report is based. Such clarity is of particular importance because it will become the determining factor for continued participation by some people in the governance of bodies covered by the lobbying legislation.

Will responses to public consultations or other communications to public bodies which they routinely publish on their websites be subject to reporting under these provisions? Recommendation 6.5(vi) goes part of the way to answer this question, but the exemption is much too narrowly drawn.

Role of Public Officials

The Policy Paper offers no clear guidance on this issue, other than a general commitment to review the available legislative options. Some of the responses to the earlier consultation seem to almost suggest the maintenance of a parallel lobbying register by public officials. This could give rise to even more

bureaucracy as organisations and public officials cross check with each other that their reporting is consistent, which cross checks would themselves be reportable activities.

Sanctions

It is not clear what specific sanctions are being proposed. The Policy Paper discusses a range of possible sanctions from administrative measures to criminal prosecutions, but most of Recommendation 12 uses very general language which is not helpful to an understanding of the Government's intentions. The Institute can agree with the expressed need for sanctions to be effective, clear and enforceable, but the devil is in the detail. The Policy Paper refers to the Mahon Tribunal recommendation that administrative sanctions such as fines or temporary suspension of registration should be put in place. Fines are not generally regarded as administrative sanctions but as matters appropriate to a Court. The Institute would be opposed to fines being imposed other than by a Court. We would also urge that the creation of criminal offences should be reserved for serious breaches of the law which involve deliberate acts intended to deceive or conceal, such as providing information which the organisation knew was false or misleading.

The regulatory impact assessment should assess the potential impact on volunteerism of any offences created under the legislation. This should include consideration of the matters which should be made criminal offences, the level of penalties and the persons liable to conviction. If volunteer officers of an organisation were to be potentially liable to the types of penalties set out in Canadian legislation (up to \$200,000) or proposed in Private Members Bills (up to €10,000), many would question their continued involvement in the work of bodies such as the Institute. The assessment also needs to take account of the wider context where officers of bodies find themselves faced with ever increasing and onerous obligations across a range of matters from health and safety to child protection. Particular consideration has to be given to the cumulative effect of such measures.

Presumably the purpose of temporary or permanent exclusion from the register is to preclude an organisation from lawfully lobbying public bodies. This is likely to be ineffective in practice since it will not be possible to prevent

individual members of that organisation from lobbying. By encouraging that organisation to engage in indirect lobbying through its individual members, it may have the perverse effect of making such lobbying less transparent.

Implementation Issues

The Institute supports the views expressed by organisations responding to the public consultation in relation to minimising the administrative burden of the proposed regulatory system as summarised in paragraph 11.1.3 of the Policy Paper. It is critically important to minimise the amount of paperwork for example by not requiring the separate reporting of multiple contacts with public bodies on a single issue. Because the Institute is governed by people acting in a voluntary capacity, we would share the concern of others about the imposition of sanctions for inadvertent omissions from reports.

Quarterly reporting can be quite onerous for small bodies which are heavily dependent on volunteers and consideration should be given to annual or twice yearly reporting instead. Reporting within 10 working days of the relevant reporting period is also quite onerous and a longer period of one month should be considered.

The Institute is strongly opposed to the levying of fees or charges on users of the register. If the State wishes to regulate lobbying activity, then it should bear the cost through general taxation. It is difficult to reconcile the two statements in Recommendation 15 that the level of fee will not be a significant disincentive to registration and that the fee will be set to cover the cost of establishing and maintaining the lobbying register.

Cooling-Off Period

The proposal in the Programme for Government that no senior public servant or Minister can work in the private sector in any area involving a potential conflict of interest with their former area of public employment, until at least two years have elapsed, needs to be reconsidered. It raises a serious question as to whether it infringes personal rights under the Constitution. It is also unlikely that any private organisation could lawfully enforce such a restraint on

trade on any of its former employees; a maximum period of one year is about the limit of what could be enforced under an employment contract. Why should public sector employees be treated any differently?

Would a Minister who lost his or her seat at a General Election be precluded from returning to a former employment where there was a potential conflict of interest? Would a former Minister for Health be precluded from returning to work as a medical consultant or a former Minister for Transport be prevented from going back to a previous job as a director of a transport company?

If public officials are to be precluded from working in the private sector for a period, that exclusion should also apply to commercial State companies, most of which are in competition with private companies. For example, if a former Minister for Energy were to be precluded from working for a private energy company, he or she should also be precluded from working for ESB or BGE.

The proposals would also seem to make it very difficult for public officials to embark on a change of career. By contrast private sector employees can relatively easily do so.

The Institute agrees with the comment in the Policy Paper that the wider the restriction, the more vulnerable to legal challenge it will be and supports the suggestion that the restriction should therefore be targeted at prohibiting direct involvement by a former public official in lobbying where that would involve a potential conflict of interest relating to their former public employment.