



Towards the Regulation of Lobbying in Malta

A Consultation Paper

Office of the Commissioner for Standards in Public Life
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Executive Summary

The Standards in Public Life Act sets out the functions of the Commissioner for Standards in Public Life, including the responsibility to identify those activities which are to be considered as lobbying activities, to issue guidelines for those activities, and to make such recommendations as he deems appropriate in respect of the regulation of such activities.

Following comparative research on how lobbying is regulated in several jurisdictions, the Commissioner has formulated proposals for lobbying in Malta to be governed by law. The aim is to increase transparency and improve standards of governance in Malta.

This consultation paper proposes that lobbying should be regulated by means of a new law to be styled the Regulation of Lobbying Act. This Act would define lobbying as any “relevant communication” on “relevant matters” to “designated public officials”. This paper proposes detailed definitions for all three terms.

These definitions should be set out in schedules to the Act, rather than in the body of the Act itself. The Act should provide for the schedules to be amended by legal notice, in accordance with normal legislative practice in Malta. This would enable the Act to be fine-tuned and its scope gradually extended over time as experience is gained in its administration.

It is proposed that some individuals and bodies that engage in lobbying should be required to register in a Register of Lobbyists that would be maintained by the Commissioner. They should submit returns on a regular basis about their lobbying activities. All lobbyists, even those who are not obliged to register, should be governed by a code of conduct.

It is also proposed that ministers, parliamentary secretaries, and the heads and deputy heads of their secretariats should register all relevant communications (including meetings) in a Transparency Register, which should be freely accessible to the public. In addition, ministers, parliamentary secretaries and some other designated public officials should be barred from acting as lobbyists for a specified period of time after they cease to hold office.

It is proposed that there should be a minister responsible for the administration of the Act, in keeping with normal practice. However, the provisions of the Act should be enforced by the Commissioner for Standards in Public Life, who should have power to impose sanctions. Changes to the schedules should be made by the responsible minister on the advice of the Commissioner.

1 Introduction

1.1 The purpose of this document

1.1.1 Article 13(1)(f) of the Standards in Public Life Act (chapter 570 of the laws of Malta) obliges the Commissioner for Standards in Public Life to *“identify those activities which are to be considered as lobbying activities, to issue guidelines for those activities and to make such recommendations as he deems appropriate in respect of the regulation of such activities”*.

1.1.2 This obligation is being fulfilled in two stages. This consultation paper represents the first stage. It sets out the Commissioner’s proposals for the regulation of lobbying in Malta. It is being published to give the public and all interested parties the opportunity to comment on the Commissioner’s proposals.

1.1.3 The proposals in this document are not cast in stone. The Commissioner welcomes comments and suggestions for change and would be pleased to improve the proposals herein through amendments that are in keeping with the overall thrust of this document, which is to make lobbying activities more transparent.

1.1.4 After considering the submissions received in response to this document, and making any changes he considers necessary in their light, the Commissioner will present the revised proposals as formal recommendations to the government in terms of article 13(1)(f) of the Standards in Public Life Act.

1.2 How to make your submissions

1.2.1 You can send your submissions by post to the following address:

Commissioner for Standards in Public Life
11, St Paul Street
Valletta VLT 1210

1.2.2 You can also email your submissions to office@standardscommissioner.com.

1.2.3 The Commissioner for Standards in Public Life will consider all responses received by 30 April 2020.

1.3 Confidentiality

1.3.1 The Commissioner for Standards in Public Life may use your submissions for onward consultation and discussions with interested parties as may be required. The Commissioner may also publish your comments in a summary of responses to this consultation paper. It will be assumed that, unless you specifically include a request to

the contrary in your response, you are giving your consent for the use of your submission in this manner, and that you consent to being identified therewith.

1.4 How this document is structured

1.4.1 Chapter 2 of this paper explains in general terms what the term “lobbying” is understood to mean, and why it is considered important to regulate lobbying. Chapter 3 then reviews the different approaches to the regulation of lobbying in other jurisdictions, with particular emphasis on the United States of America, Canada, the United Kingdom, Australia and the Republic of Ireland. Chapter 4 sets out the proposals of the Commissioner for Standards in Public Life for the regulation of lobbying in Malta.

1.5 Additional future proposals

1.5.1 The Commissioner for Standards in Public Life will be presenting proposals on other matters besides lobbying. Article 13(1)(g) of the Standards in Public Life Act requires the Commissioner:

to make recommendations for the improvement of any Code of Ethics applicable to persons who are subject to this Act and in particular but without prejudice to the generality of the foregoing, to make recommendations on the acceptance of gifts, the misuse of public resources, the misuse of confidential information, and on limitations on employment or other activities after a person ceases to hold office as a Minister, a Parliamentary Secretary or a member of the House of Representatives; ...

1.5.2 The Commissioner for Standards in Public Life will therefore be following up this consultation paper with proposals for changes to the codes of ethics for ministers and members of parliament as set out in the Standards in Public Life Act. Such proposals will be issued shortly and will address the issues set out in article 13(1)(g), with particular emphasis on gifts and restrictions on employment after leaving office (revolving doors).

2 What is Lobbying, and Why Is It an Issue?

2.1 Defining lobbying

2.1.1 The word “lobbying” is derived from “lobby”, which comes from Middle Latin *lobia* (covered walk or cloister). There are two different theories about how the word came to mean making representations to politicians and public officials. The first is based on the historic fact that the lobby of the British parliament was where “lobbyists” sought parliamentarians’ support for their causes prior to votes or parliamentary debates. The second theory is that the term derives from US President Grant’s habit of relaxing in the lobby of the Willard Hotel in Washington DC, where a growing number of lobbyists would gather, seeking to present their cases to him in informal discussions.¹

2.1.2 There are many definitions of lobbying. A comprehensive definition is presented by the Council of Europe in a 2017 paper recommending that lobbying should be regulated by law. This paper defines the term as follows:

*“Lobbying” means promoting specific interests by communication with a public official as part of a structured and organised action aimed at influencing public decision making.*²

2.1.3 This definition rests on two elements – the promotion of “specific interests”, and “structured and organised action”. A specific interest may represent a private interest, such as that of a commercial corporation which may wish to shape legislation to suit its interests better. Alternatively, a specific interest may be representative of more widespread public concerns, for example regarding environmental issues. Thus, this definition covers lobbying activities for private, public or collective ends, whether against payment for the lobbyist or not.

2.1.4 A structured and organised action can be understood as a deliberate, planned, methodical or co-ordinated strategy pursued by lobbyists to promote their policy preferences, usually supported by an infrastructural or organisational apparatus. It is this element that crucially distinguishes lobbying as defined here from other efforts to influence policy-makers. Even though these other efforts may concern the process of public decision-making, they are distinguishable from lobbying because they are

¹ Klemens Joos, *Lobbying in the New Europe: Successful Representation of Interests After the Treaty of Lisbon* (Weinheim: Wiley-VCH, 2011), p.15.

² Council of Europe, *Legal Regulation of Lobbying Activities in the Context of Public Decision Making* (Recommendation CM/Rec(2017)2, adopted by the Committee of Ministers of the Council of Europe on 22 March 2017, and explanatory memorandum), p. 7. Available at <https://rm.coe.int/legal-regulation-of-lobbying-activities/168073ed69>.

isolated, unstructured or spontaneous: that is, they do not form part of a pre-determined plan.³

2.1.5 Many activities might potentially be considered lobbying. For instance, lobbying can be taken to involve offering advice or making presentations to officials, either on an occasional or a regular basis; submitting reports to public officials in which specific details for a proposed policy are drafted; pursuing informal contacts with politicians or civil servants (for example, lunch appointments, impromptu visits, telephone calls); sending directed messages via social media or otherwise sending solicited or unsolicited information or documents; participating in public (open) or restricted (closed) consultations; participating in formal consultation through institutionalised channels; participating in hearings, such as parliamentary committees; and participating in a delegation or conference.⁴

2.1.6 The identification of lobbying activities is, to a great extent, the determining factor in who is considered to be a lobbyist. Therefore, the term “lobbyist” can be understood to mean any person or body that engages in lobbying with a view to influencing public decisions on policy and action.

2.1.7 Lobbyists and the interests they defend are innumerable. Everyday examples include a consultant lobbyist acting on behalf of a third party that seeks increased liberalisation of the telecommunications sector; a corporation (with the support of an “in-house” lobbyist) directly lobbying to reduce corporate tax rates; a farming association lobbying to ensure maximum subsidies for agricultural goods; or an environmental group that lobbies for legislation to restrict carbon emissions.⁵

2.2 Why is lobbying an issue?

2.2.1 Lobbying is an essential part of the democratic process. By means of lobbying, citizens and organisations make their views on public policy and public services known to politicians and public officials. It is part of the process by which policy is formulated, implemented and tested. Therefore, free and open access to government in its broader sense, including the legislature and the executive, is necessary for a functioning democracy. Ultimately, those who might be affected by decisions need the opportunity to present their cases.

2.2.2 Moreover, lobbyists can contribute valuable information and data that can enable more informed decision-making and result in more effective public policies. They can ensure that views that might not otherwise be heard by policy-makers are taken into account. This includes those of business professionals and civil society.

³ Council of Europe (footnote 2 above), p. 15.

⁴ Council of Europe (footnote 2 above), p. 16.

⁵ Council of Europe (footnote 2 above), p. 17.

2.2.3 At the same time there is the danger that lobbying may in certain circumstances come uncomfortably close to trading in influence, which is a crime in many countries including Malta.⁶ This danger could be minimised through the introduction of rules of transparency.

2.2.4 Also, there are concerns that lobbying gives special advantages to vocal interests, and that negotiations carried on behind closed doors can undermine democratic processes. While lobbying in itself is widely considered to be a legitimate activity, it has assumed negative connotations thanks to such concerns. It has sometimes become associated with bribery or trading in influence as mentioned above. This has given rise to a decline of trust in business and government and a belief that the cards are stacked in the favour of whomever can afford to pay the most.⁷

2.2.5 Lack of knowledge of who is influencing decisions, or what may have been done to achieve influence, gives rise to suspicions, irrespective whether they are based on real or perceived circumstances.

2.2.6 Specific concerns about lobbying include the following:

- that some lobbying may take place in secret – people do not know who is influencing a decision, and those who take a different view do not have the opportunity to rebut arguments and present alternative views;
- that some individuals and organisations have greater access to policy makers because of their contacts, because they are significant donors to a political party, or simply because they may have more resources;
- that lobbying may be accompanied by entertainment or other inducements, or that there is lack of clarity about who is financing particular activities.⁸

2.2.7 Such concerns have emerged in Malta too, particularly in connection with a case which was investigated by the Commissioner for Standards in Public Life. This case highlighted the need for rules on lobbying and led the Commissioner to state that if ministers hold meetings with persons who have an interest in permits, concessions or

⁶ Article 121A of the Criminal Code (chapter 9 of the laws of Malta).

⁷ Transparency International Ireland, *Responsible Lobbying in Europe: An Overview of Voluntary Lobbying Standards and Practice* (2015), p. 7. Available at https://transparency.ie/sites/default/files/15.12_responsible_lobbying_europe_report.pdf.

⁸ Committee on Standards in Public Life (UK), *Strengthening Transparency Around Lobbying* (November 2013), p. 5. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/407530/2901376_LobbyingStandards_WEB.pdf.

other benefits from the state, they should do so in a formal setting and in the presence of officials.⁹

2.2.8 Effective standards and procedures that ensure transparency and accountability in decision-making are essential to reinforce public trust. There is a growing recognition that the disclosure of information on key aspects of the communication between public officials and lobbyists is an important aspect of transparency in government. Such disclosure empowers citizens in exercising their right to public scrutiny. As the Organisation for Economic Cooperation and Development (OECD) states, “*Measures promoting a culture of integrity are also an integral part of the ‘good governance’ approach, particularly those that clarify expected standards of conduct in lobbying for both public officials and lobbyists*”.¹⁰ This has led to increased calls for legislation to regulate lobbying and the conduct of both lobbyists and public officials. Merely penalising the illicit influencing of public officials may not be sufficient to maintain trust in public decision-making.

⁹ Commissioner for Standards in Public Life, report on case K/012 (5 February 2020), paragraphs 45 and 46. Available at <https://standardscommissioner.com/wp-content/uploads/Commissioner-for-Standards-case-report-K012.pdf>.

¹⁰ OECD, *Lobbyists, Governments and Public Trust, Volume 1: Increasing Transparency through Legislation* (Paris: OECD, 2009), p. 19.

3 How Other Countries Regulate Lobbying

3.1 The trend towards regulation of lobbying

3.1.1 A growing number of countries are regulating lobbying. The subject is increasingly being discussed in national parliaments throughout the European Union.¹¹

Thus:

- Lithuania has had a mandatory lobby register since 2001, obliging interest representatives to register. As yet, there is no formal requirement for Lithuanian parliamentarians to declare meetings with interest representatives, but in 2018, 75 out of 141 members of Parliament voluntarily declared a total of 676 meetings with interest representatives. There are proposals to make such declarations mandatory.
- France enacted a law on lobbying on 8 November 2016.
- The Belgian Parliament adopted a proposal to establish a mandatory lobby register in July 2018. Persons representing certain organisations and engaged in activities aimed at directly or indirectly influencing the development or implementation of policies or the Chamber's decision-making processes are required to sign up. Another proposal, which is still pending, suggested further amending the Chamber's rules of procedure to ensure that any draft law mentions all persons who have participated in the preparation of the bill, including employees, civil servants, persons who have provided legal and other professional advice, and persons representing organisations or the interests of organisations.
- In Autumn 2018 the Speaker of Finland's Parliament announced plans to establish a lobby register. Studies comparing different lobby registers were taken in hand in order for the government to design a system that would work well for Finland.¹²

3.1.2 Some countries have adopted a system of "soft regulation", that is to say a voluntary approach. Germany and the Netherlands are examples. The German Bundestag keeps a voluntary register for associations that lobby the German parliament and the federal government. The register is published yearly in the Federal Gazette. In 2012 the House of Representatives of the Netherlands also introduced a lobbyist

¹¹ See <https://epthinktank.eu/2017/05/30/lobbying-parliament-public-trust-eu-transparency-register-workshop-of-10-may-2017/>.

¹² European Parliament, "Is Transparency the Key to Citizens' Trust?" (European Parliamentary Research Service, PE 637.923, April 2019). Available at [https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/637923/EPRS_ATA\(2019\)637923_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/637923/EPRS_ATA(2019)637923_EN.pdf).

register which is voluntary in nature. However, this approach is hard to enforce and can result in uneven application.

3.1.3 The remainder of this chapter presents case studies setting out in some detail the approaches taken by different countries in the regulation of lobbying. The Office of the Commissioner for Standards has carried out a comprehensive comparative review of how lobbying is regulated in several jurisdictions including the USA, Canada, Australia, Germany, Ireland, Italy, Poland, and the UK. The Office has also established working relations with the Public Sector Integrity Division of the Organisation for Economic Cooperation and Development and received valuable analytical data and publications on lobbying, which have been consulted in the process of formulation of the recommendations below. Significant consideration has been given to the consultation process for the introduction of a statutory register of lobbyists in the United Kingdom.¹³ However, providing an overview of the approaches taken by all these countries would unduly lengthen this document. In the interests of brevity, therefore, the review below is limited to five countries: the USA, Canada, the UK, Australia and Ireland.

3.1.4 The USA has the longest standing tradition of regulating lobbying. This country provides an interesting model which focuses on professional lobbyists (defined with reference to specific thresholds and time allocations) and includes a rigorous sanctioning system. Australia, Canada and the UK share a common tradition of Westminster-style parliamentary government with Malta, and they have been the focus of extensive comparative research with respect to their ethical and integrity models as well as their approaches to the regulation of lobbying. The Irish model of lobbying regulation is internationally regarded as good practice in terms of its scope, transparency and sanctioning.

3.2 The United States of America

3.2.1 The USA regulates lobbying through the Lobbying Disclosure Act of 1995, as amended by the Honest Leadership and Open Government Act of 2007.

Scope

3.2.2 The Lobbying Disclosure Act defines a lobbyist as any individual compensated by a client for services that include more than one lobbying contact (explained by guidelines as meaning more than one “communication” where there is an attempt to influence), unless the individual’s lobbying activities constitute less than 20 per cent of his or her time over a three-month period. “Clients” are defined as any persons or

¹³ HM Government, *Introducing a Statutory Register of Lobbyists: Consultation Paper* (Cm 8233, January 2012). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78896/introducing_statutory_register_of_lobbyists.pdf.

entities that employ and compensate other persons to conduct lobbying activities on their behalf.

3.2.3 Any lobbyists whose lobbying expenses exceed or are expected to exceed a specified threshold (\$3,000 over a quarterly period) are required to register once they have had a lobbying contact with senior members of the legislative or executive branches of the federal government, or with officials above a particular grade. Groups that carry out lobbying activities on their own behalf must also register.

Information requirements

3.2.4 The law requires lobbyists to file quarterly reports on their activities. These reports must set out:

- the name of the registrant;
- a “good faith” estimate, by broad category (rounded to the nearest \$10,000), of the total amount of lobbying-related income from the client, or expenditure by an organisation lobbying in its own behalf, during the quarterly period;
- the specific issues that were the subject of a lobbyist’s efforts, including “to the maximum extent practicable” a list of the bills that were the subject of such efforts;
- a statement saying which of the Houses of Congress (lower or upper chambers of the legislature) and which federal agencies were contacted by the lobbyists; and
- a list of the employees of the registrant who acted as lobbyists on behalf of the client, and a declaration as to whether any of them held specified posts in the executive or legislative branches in the two years prior to registration.

Register operator

3.2.5 The register is operated by the Secretary of the Senate and the Clerk of the House of Representatives.

Sanctions

3.2.6 Criminal and civil penalties apply to deliberate violations of the Lobbying Disclosure Act. A corrupt failure to comply can lead to five years’ imprisonment. For other violations, there can be a fine of up to \$200,000.

3.3 Canada

3.3.1 Canada's first attempt to regulate lobbying was the Lobbyists Registration Act, which came into force in 1989. The 1989 Act provided for the public registration of those

individuals who are paid to communicate with public office-holders with regard to certain matters as described in the legislation. However, it required lobbyists to provide only basic information. The Act was comprehensively overhauled, becoming the Lobbying Act in 2008. Its provisions were clarified and strengthened, and the registrar was made accountable to Parliament instead of the government.

Scope

3.3.2 The Act covers consultant lobbyists (people who are paid to lobby on behalf of clients) as well as in-house lobbyists in corporations (commercial businesses) and organisations (not-for-profit bodies). In-house lobbyists are required to register only where lobbying is a significant part of their work. Guidance on the meaning of “a significant part” explains that this is intended to cover those who spend more than 20 per cent of their time on lobbying, or where the relative importance of lobbying in the context of their work reaches an equivalent threshold.

3.3.3 The Lobbying Act provides for the registration of persons who are paid to communicate with the holders of public office in the federal government on certain matters. Such communication is referred to as “registrable lobbying activity” and covers the following matters:

- the formulation, development or amendment of federal legislative proposals, bills, resolutions, regulations, policies or programmes;
- the award of federal grants, contributions, or other financial benefits; and
- in the case of consultant lobbyists, the award of federal government contracts or the arrangement of meetings with public office-holders and other persons on behalf of the lobbyists’ clients.

3.3.4 There are exemptions for a variety of activities, including communications restricted to a straightforward request for publicly available information, the preparation and presentation of briefings to parliamentary committees, the making of submissions on behalf of employers in respect of the application or enforcement of federal laws, and routine dealings with government inspectors and other regulatory authorities.

3.3.5 In 1995, the Act was amended to make provision for a code of conduct for lobbyists. The Lobbyists’ Code of Conduct came into force on 1 March 1997.

Information requirements

3.3.6 The Registry of Lobbyists is the core instrument of transparency established by the Lobbying Act. Registration requirements include the names of lobbyists and their clients or organisations; the institutions being lobbied; the subjects of the lobbying and the methods used; details of any government funding received by the client or employer; information on lobbyists who used to hold public office; and information on

communications with certain public office-holders. The latter term includes virtually all those occupying an elected or appointed position in the government of Canada, members of Parliament and their staff, and the officers and employees of federal departments and agencies.

3.3.7 In addition to the initial information provided on registration, returns are required on a monthly basis in respect of any communications with designated public office-holders (the key decision-makers within government). They include ministers, senior officials and senior members of the armed forces. Returns must cover the name and title of the designated public office-holder and the subject of the communication.

Register operator

3.3.8 The Lobbying Act mandates the Commissioner of Lobbying to institute and maintain the Registry of Lobbyists through which individuals, corporations and organisations must publicly disclose their lobbying activities. The register is publicly accessible. It enables public office-holders and the public to see who is lobbying which federal official and what bills, regulations, policies and programmes are the subjects of lobbying. The Commissioner is an independent agent of Parliament.

Sanctions

3.3.9 Knowingly giving false or misleading statements in returns can result in a fine of up to \$200,000, or two years' imprisonment. Other contraventions are punishable by a fine of up to \$50,000.

3.4 The United Kingdom

3.4.1 In 2009 the Public Administration Select Committee of the House of Commons conducted an inquiry in response to concerns that a lack of transparency in the lobbying of government was giving rise to privileged access and disproportionate influence on the part of particular persons. The inquiry concluded that the existing self-regulatory regime governing the lobbying industry was inadequate and recommended that the government should introduce a statutory register of lobbyists. The government at the time rejected this recommendation. However, the lobbying industry established the UK Public Affairs Council (UKPAC) to promote and uphold effective self-regulation for those professionally engaged in public affairs and to host a public register of lobbyists. In 2014, Parliament passed the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act, requiring statutory registration of professional lobbyists.

Scope

3.4.2 The UK Lobbying Register (UKLR) is a register of individual lobbyists and organisations involved in lobbying. Although it is owned and operated by the Chartered Institute of Public Relations, it is open to all agency, in-house and free-lance lobbyists,

as well as organisations engaged in lobbying. No fees are charged for registration or for searches in the register.

3.4.3 Any UKLR registration is based on the definition of “lobbying services” to mean activities which are carried out in the course of a business for the purpose of influencing government or advising others on how to influence government.

Sanctions

3.4.4 The UKLR provides the public with a channel to complain about the conduct of a registered lobbyist. All registrants are bound by the code of conduct of the Chartered Institute of Public Relations (CIPR) or another professional body with a recognised code of conduct. If a registered individual or organisation is not a member of the CIPR or another body with a recognised code of conduct, the CIPR code will apply. Misconduct can be sanctioned in accordance with the applicable code.

3.4.5 If misconduct results in expulsion from membership of the CIPR or another body with a recognised code of conduct, this will also result in the individual or organisation being struck off the UKLR. The CIPR reserves the right to strike any individual or organisation off the UKLR where, in its own judgement, a sufficient breach of professional standards can be proved. In particular, where a registered individual or organisation is not a member of the CIPR or another body, that individual or organisation would still be struck off the Register in the event of misconduct serious enough to warrant expulsion from the CIPR. The names of registered individuals or organisations that are struck off the Register are published on the UKLR website.

3.5 Australia

3.5.1 Australia’s first attempt at the regulation of lobbying was the Lobbyists Registration Scheme, which was introduced in 1983. The scheme set up two confidential registers: a special one for lobbyists representing foreign clients, and a general one for lobbyists representing domestic clients. The scheme required lobbyists to apply to register each time they took on a client and to give a short description of the task undertaken. As registered lobbyists, they were then required to produce a letter of acceptance from the Registrar whenever contacting ministers or officials about this task. The scheme was widely acknowledged to be ineffective, with its provisions rarely adhered to or enforced. It was abolished in 1996.

3.5.2 The Australian government introduced a lobbying code of conduct and a register of lobbyists in 2008. Government representatives are not allowed to engage (knowingly) in lobbying activities with unregistered individuals.

Scope

3.5.3 “Lobbying activities” means communications with a government representative in an effort to influence government decision-making, including the making or amendment of legislation, the development or amendment of a government policy or programme, the award of a government contract or grant or the allocation of funding. The definition does not include:

- communications with a committee of Parliament;
- communications with a minister or parliamentary secretary in his or her capacity as a local member of Parliament or senator in relation to non-ministerial responsibilities;
- communications in response to a call for submissions;
- petitions or communications of a grassroots campaign nature in an attempt to influence a government policy or decision;
- communications in response to a request for tender;
- statements made in a public forum; or
- responses to requests by government representatives for information.

3.5.4 “Lobbyist” means any person, company or organisation who conducts lobbying activities on behalf of a third-party client, or whose employees conduct lobbying activities on behalf of a third-party client, but does not include:

- charitable, religious and other organisations or funds that are endorsed as deductible gift recipients;
- non-profit associations or organisations constituted to represent the interests of their members that are not endorsed as deductible gift recipients;
- individuals making representations on behalf of relatives or friends about their personal affairs;
- members of trade delegations visiting Australia;
- persons who are registered under an Australian government scheme regulating the activities of members of that profession, such as registered tax agents, customs brokers, company auditors and liquidators, provided that their dealings with government representatives are part of the normal day-to-day work of people in that profession; and
- members of professions, such as doctors, lawyers or accountants, and other service providers, who make occasional representations to the government on behalf of others in a way that is incidental to the provision by them of their professional or other services. However, if a significant or regular part of the services offered by a person employed or engaged by a firm of lawyers, doctors, accountants or other service-providers involves lobbying activities on behalf of

clients of that firm, the firm and the person offering those services must register and identify the clients for whom they carry out lobbying activities.

Information requirements

3.5.5 The public register of lobbyists contains the following information about lobbyists who make representations to the government on behalf of their third-party clients:

- the business registration details and trading names of each lobbying entity including, where the business is not a publicly listed company, the names of owners, partners or major shareholders, as applicable;
- the names and positions of persons employed, contracted or otherwise engaged by the lobbying entity to carry out lobbying activities; and
- the names of clients on whose behalf the lobbying entity conducts lobbying activities.

3.5.6 Lobbyists are required to confirm or update their information every six months.

Register operator

3.5.7 The register is held and maintained by the Department of the Prime Minister and Cabinet (equivalent to the Office of the Prime Minister in Malta).

3.6 Republic of Ireland

3.6.1 The Republic of Ireland introduced the Regulation of Lobbying Act in 2015 and a code of conduct for lobbyists in 2019.

Scope

3.6.2 Lobbyists must list themselves on a public register and disclose any lobbying activities. The rules cover any meetings with high-level public officials, as well as letters, emails or tweets intended to influence policy.

3.6.3 The following are considered to be lobbyists if they communicate on relevant matters with designated public officials:

- an employer with more than 10 employees, where the communications are made on its behalf;
- a representative body with at least one employee, if the communication is made on behalf of its members by a paid employee or office-holder in the body;

- an advocacy body with at least one employee that exists primarily to take up particular issues, if the communication is made by a paid employee or office-holder of the body;
- a third party being paid to communicate on behalf of a client who fits into one of the preceding three categories; and
- any person communicating about the development or zoning of land.

3.6.4 To be considered lobbyists, the above categories of persons must be communicating about a relevant matter, which means:

- the initiation, development or modification of any public policy or of any public programme;
- the preparation or amendment of any law; or
- the award of any grant, loan or contract, or any licence or other authorisation involving public funds.

3.6.5 The above does not apply to the implementation of any such policy, programme, enactment or award, or any matter of a technical nature only. There are also a number of other exempted communications.

3.6.6 The law also requires that the communications are made directly or indirectly to designated public officials, which include amongst others members of the Irish Parliament, ministers, members of the European Parliament who represent Ireland, members of local authorities, special advisors to ministers, public servants and others.

Information requirements

3.6.7 The public register of lobbying contains:

- the name and address of the person, company or organisation which has carried out the lobbying activities;
- the business or main activities of the registrant;
- contact details relating to the registrant's business or main activities; and
- in the case of a company, the registered office and company registration number.

3.6.8 In addition, registrants should specify who their clients are; the designated public officials with whom they have communicated; the subject matter of the communications and the results they were designed to secure; the type and extent of any other lobbying activities undertaken; and the names of any persons who are or were themselves designated public officials and who are engaged as lobbyists by the registrant. This information has to be provided on a regular basis.

Register operator

3.6.9 The Standards in Public Office Commission is responsible for establishing and maintaining the register of lobbying.

Sanctions

3.6.10 The Regulation of Lobbying Act introduces sanctions in the form of fines. More serious offences can also lead to imprisonment for up to two years. In June 2019 a Dublin firm was fined €1,250 for late filing of lobbying returns.

4 Proposals for the Regulation of Lobbying in Malta

4.1 Introduction

4.1.1 Proposals to regulate lobbying in Malta should take account of the particular circumstances of this country, notably its geographic size and population. The main effects of its small size are the following:

- Decision-makers in government are easily accessible. This means that much lobbying can be undertaken by individuals and entities on their own behalf and there is limited need for the engagement of professional lobbyists. Hence an approach which focussed on the regulation of professional lobbyists who act on behalf of third parties would be of limited scope.
- Constituency relations possibly play a much more important role in local politics than they may do in larger countries, where electoral appeal may be largely based on media campaigns. Constituency politics has its drawbacks, but it is integral to democracy that voters should be able to communicate with their representatives. The regulation of lobbying should not obstruct the exercise of this democratic right.

4.1.2 Arrangements to regulate lobbying in Malta should therefore strike a delicate balance. On the one hand, they should address contacts between decision-makers and private individuals, not just entities or professional lobbyists. On the other hand, they should allow scope for contacts between elected representatives and those private individuals who happen to be their constituents.

4.1.3 The key questions that need to be addressed in devising a functional and efficient system for regulating lobbying in Malta are:

- how to define lobbying activities and lobbyists;
- which public decision-makers should be covered;
- on whose behalf lobbying is being carried out;
- what activities should and should not be subjected to lobbying regulation;
- who should and should not be required to register as a lobbyist;
- what information should be provided in the register;
- how often the register should be updated;
- who should administer the register;
- what sanctions might be considered as appropriate and proportionate.

4.2 Proposed legal framework

4.2.1 As noted in the introduction to this document, article 13(1)(f) of the Standards in Public Life Act empowers the Commissioner for Standards in Public Life to “issue guidelines” and “make such recommendations as he deems appropriate” with respect to the regulation of lobbying. The first question to be addressed is whether lobbying should be regulated within the framework of the Standards in Public Life Act or through a separate enactment.

4.2.2 The provision empowering the Commissioner to issue guidelines on lobbying might be taken as suggesting that lobbying can be regulated through the Standards in Public Life Act. However, this document does not propose such an approach. There are two main reasons for this:

- (a) There are no provisions in the Standards in Public Life Act that would make such guidelines binding. Issuing guidelines on lobbying under this Act would therefore amount to the “soft regulation” or voluntary approach, which has been shown by international experience to have limited effectiveness.
- (b) Article 3(1) of the Standards in Public Life Act specifies that this Act applies to ministers and parliamentary secretaries, other members of the House of Representatives, and persons of trust. Legislation on lobbying should encompass additional persons and entities.

4.2.3 In connection with the latter point, it may be pointed out that, according to article 3(2), the scope of the Standards in Public Life Act may be extended to any other persons or categories of persons as may be specified in regulations issued under this Act. Therefore, it is possible for regulations governing lobbying to be issued under the Standards in Public Life Act and to apply to other categories of persons in addition to those listed in article 3(1). Still, it would be confusing for regulations issued under an act to apply to matters and individuals who are not covered by the parent act itself.

4.2.4 Furthermore, once lobbying is to be governed by a separate piece of legislation, it is better if that legislation takes the form of a fresh act rather than regulations under an existing act. Lobbying is an important subject which merits debate and scrutiny in Parliament. A new act is debated in parliament and considered on a clause-by-clause basis, whereas regulations under an existing act are not.

4.2.5 It is therefore proposed that lobbying should be regulated through the enactment of a purposely-written act to be entitled the Regulation of Lobbying Act. Nevertheless, it is also proposed that key definitions and provisions in this Act should be set out in schedules. The Act should provide for the schedules to be amended by means of legal notices, in keeping with normal legislative practice in Malta. This would make it possible to fine-tune the Act and to gradually extend its scope over time as experience is gained in its administration.

4.3 A brief overview of the proposed Act

4.3.1 The proposals set out in this chapter can be briefly summarised as follows.

4.3.2 Senior decision-makers in government (ministers, parliamentary secretaries, and heads and deputy heads of their secretariats) should be required to compile a *Transparency Register* setting out details of their contacts with lobbyists. This register should be accessible to the public.

4.3.3 Some lobbyists should be required to register in a *Register of Lobbyists* and to submit regular returns about their lobbying activities. This register too should be accessible to the public.

4.3.4 All lobbyists, including those who are not required to register, should be subject to a *code of conduct for lobbyists* which would, among other things, oblige them to provide accurate information to decision-makers and to avoid seeking to improperly influence them (for example, through gifts and hospitality).

4.3.5 Who should be considered a lobbyist? It is proposed that the Act should include a three-pronged definition whereby any person who makes *relevant communications* on *relevant matters* to *designated public officials* is thereby engaging in lobbying. “Relevant communications” include face-to-face meetings.

4.3.6 This definition includes not only lobbyists who act on behalf of third parties (the classic understanding of the term “lobbyist”) but also persons and bodies that lobby on their own behalf or, say, on behalf of a special interest organisation. However, it excludes persons who communicate with public officials on their own private affairs, unless those affairs relate to development permits, the zoning of land, or the use of public funds, land and other resources.

4.4 Who should administer the law?

4.4.1 It is proposed that there should be a minister responsible for the administration of the Act, in accordance with normal practice. However, the operation of key aspects of the Act and its enforcement would be entrusted to the Commissioner for Standards in Public Life, who is an independent officer appointed on the basis of a parliamentary resolution with the support of at least two thirds of all members of the House of Representatives.

4.4.2 The Commissioner should host and maintain the register of lobbyists and enforce the requirement for lobbyists to register and submit regular returns in line with such conditions as may be set out in the Act. The Commissioner should also enforce the requirement for designated public officials to list communications with lobbyists on relevant matters.

4.4.3 Power to amend the schedules as proposed in paragraph 4.2.5 above should be assigned to the minister, acting on the Commissioner's advice. The Commissioner should also be required by the Act to review the legislative framework and its implementation and to issue recommendations from time to time for its improvement.

4.5 Definition of lobbying for the purposes of the proposed Act

4.5.1 For the purpose of the proposed Act, lobbying should be defined as any *relevant communication* on a *relevant matter* to a *designated public official*.

Relevant communications

4.5.2 A relevant communication is a communication that:

- (a) may be written or oral;
- (b) deals with a relevant matter; and
- (c) is made personally (directly or indirectly) to a designated public official.

4.5.3 Relevant communications can include informal meetings, correspondence using unofficial email accounts, and messages by SMS, WhatsApp, and similar applications.

4.5.4 It is proposed that this definition should be set out in a schedule to the Act in order to facilitate amendment, as indicated earlier.

Relevant matters

4.5.5 A relevant matter means any matter relating to –

- (a) the initiation, development or modification of any public policy, action or programme;
- (b) the preparation or amendment of any enactment, that is to say a law or other instrument having the force of law;
- (c) the award of any grant, loan or other form of financial support, and any contract or other agreement involving public funds, land (including concessions of public land) or other resources;
- (d) the grant of any license, permit or other authorisation; and
- (e) the award of development permits and the zoning of land.

4.5.6 A relevant matter includes matters relating to the implementation or non-implementation and the enforcement or non-enforcement of a policy or decision that falls within the above-mentioned categories.

4.5.7 Relevant matters do *not* include:

- (a) communications by or on behalf of an individual concerning his or her own private affairs;
- (b) formal applications for grants, loans, contracts, authorisations, licenses or permits to officials whose duty it is to handle such applications in accordance with normal procedures, and communications with those same officials concerning the applications, once made;
- (c) diplomatic relations (communications by or on behalf of other states and supranational organisations);
- (d) requests for factual information;
- (e) submissions as part of a public consultation process or on summons by a public body in the course of its duties, where such submissions are made public either immediately or on the conclusion of the process;
- (f) trade union negotiations;
- (g) communications which, if disclosed, would pose a risk to the safety of any person or the security of the state;
- (h) communications by public bodies or by public officials (including members of official boards) in their official capacity;
- (i) communications by or on behalf of religious entities and organisations;
- (j) communications by or on behalf of political parties; and
- (k) communications that are already in the public domain.

4.5.8 All these exceptions, apart from (b), should not include communications concerning development permits, the zoning of land, concessions of public land, and the use of public funds, land and other resources. So, to take an example, if a private individual were to speak to a designated public official about a development permit concerning his or her own private property, it would still be considered lobbying. The same applies to religious bodies and political parties. Submitting an application for a development permit through the normal channels does not count as lobbying, but speaking to a minister in the hope of getting the permit approved does.

4.5.9 It is proposed that the definition of relevant matters, including the exceptions, should be set out in a schedule to the Act.

Designated public officials

4.5.10 Designated public officials should comprise the following:

- (a) the Prime Minister, ministers, parliamentary secretaries and (if appointed) parliamentary assistants;
- (b) other members of the House of Representatives;

- (c) the heads and deputy heads of the secretariats of ministers and parliamentary secretaries;
- (d) the Principal Permanent Secretary, permanent secretaries and directors general in the public service of Malta; and
- (e) mayors, other local councillors, and executive secretaries in local councils;
- (f) chairpersons and chief executive officers in companies owned by the state, government agencies, foundations set up by the government (on its own or in conjunction with other bodies), and other government entities as defined in the Public Administration Act;
- (g) members of the Executive Council, the Planning Board and the Planning Commission within the Planning Authority; and
- (h) members of the board of the Environment and Resources Authority.

4.5.11 It is proposed that this definition should be set out in a schedule to the Act.

4.6 Registration as a lobbyist

4.6.1 Any person who makes a relevant communication on a relevant matter to a designated public official is thereby a lobbyist. "Person", in this context, can mean both a natural and a legal person. In other words, both an individual and a group or organisation can be regarded as lobbyists for the purposes of the proposed Act, unless they happen to fall within the exceptions set out in paragraph 4.5.7 above.

4.6.2 However, not all lobbyists should be obliged to register as such. It is proposed that the requirement to register in the Register of Lobbyists should apply only to the following:

- (a) persons engaged by third parties to make relevant communications on relevant matters to designated public officials on their behalf (that is to say "professional lobbyists");
- (b) non-government organisations that exist primarily to take up particular issues ("pressure groups"); and
- (c) representative bodies, that is to say bodies whose primary aim is to represent the interests of their members.

4.6.3 Such persons (again, understood to include both individuals and groups) must register in the Register of Lobbyists within fourteen days from engaging in an initial lobbying activity. The registration is a prerequisite for their engagement in lobbying activities after this period.

4.6.4 Any registered person may file a statement that it has ceased to engage in lobbying activities in order to deactivate their registration in the Register. However, such

a person must reactivate its registration before engaging in further lobbying activities in future.

4.6.5 Breaches of these requirements should be subject to sanctioning as proposed below.

4.6.6 The Register of Lobbyists should be maintained by the Commissioner for Standards in Public Life. It should be online and open to the public for viewing free of charge. However, the Commissioner should have the power to withhold from the public any personal data contained in the Register of Lobbyists if the Commissioner considers that it is necessary to do so to prevent it from being misused, or to protect the safety of any individual or the security of the State.

4.6.7 In this context, “personal data” refers to information about natural persons. Information about legal persons does not constitute personal data.

4.6.8 The Register of Lobbyists should contain each registrant’s name, contact details, business or main activities, and company registration number (where applicable).

4.6.9 In addition, the Register of Lobbyists should include returns by registrants setting out the following details on a quarterly basis:

- (a) the type and extent of the lobbying activities undertaken;
- (b) the clients on behalf of whom such activities were carried out;
- (c) the designated public officials who were contacted;
- (d) the subject matter of these communications and the results they were intended to secure;
- (e) if the registrant is a body, the name of the individual who had primary responsibility for carrying out the lobbying activities; and
- (f) the name of any individual who is or has been a designated public official and who is carrying out lobbying activities on behalf of the registrant.

4.6.10 It is proposed that the requirements for inclusion in the Register of Lobbyists should be listed in a schedule to the Act to facilitate amendments and additions.

4.6.11 The Commissioner for Standards in Public Life should be empowered to direct registrants to make corrections or supply missing information, either in their basic data or in their quarterly returns, where this is necessary. Failure to comply should give rise to the possible application of sanctions.

4.6.12 Should a registrant believe that the publication of any information in the register could have serious adverse effects on the financial interests of the state, the national economy, or the business interests of any person including the registrant’s own interests, the registrant should be able to inform the Commissioner accordingly. If the

Commissioner, after consulting any state authority as he deems fit, agrees, he or she may withhold the information in question or else make it available for public viewing in summary form only.

4.7 Provision for a code of conduct for lobbyists

4.7.1 The proposed Act should include in its schedules a code of conduct for lobbyists. The code should apply to all lobbyists, not only those who are obliged to register in the Register of Lobbyists.

4.7.2 The code should set out principles by which lobbyists should govern themselves in the course of carrying out lobbying activities, namely:

- (a) demonstrating respect for public bodies;
- (b) acting with honesty, integrity and good faith;
- (c) ensuring accuracy of information communicated to designated public officials;
- (d) disclosing information about lobbying activities as required by law, while otherwise preserving confidentiality as appropriate; and
- (e) avoiding improper influence (such as giving gifts, benefits and hospitality to designated public officials).

4.7.3 Appropriate and proportionate sanctions should be introduced for breaches of the code.

4.8 Imposition of restrictions on involvement in lobbying for certain former public officials

4.8.1 The proposed Act should bar certain designated public officials from carrying out lobbying activities for a set term after they cease to hold office.

4.8.2 Ministers, parliamentary secretaries and the Principal Permanent Secretary should not be permitted to carry out lobbying activities for a period of three years after they cease to hold office.

4.8.3 Members of the House of Representatives, permanent secretaries, directors general, and the chairpersons and chief executive officers of government companies, foundations and other entities should not be permitted to carry out lobbying activities for a period of one year after they cease to hold office.

4.9 Transparency Register

4.9.1 The proposed Act should oblige ministers, parliamentary secretaries, and the heads and deputy heads of their secretariats to establish a Transparency Register in which they should list all relevant communications as defined in paragraph 4.5.2 above.

Thus if (for example) an individual or body holds a meeting with the head of a minister's secretariat, and that meeting deals with a relevant matter as defined by the Act, the head of the minister's secretariat would be obliged to record it in the Transparency Register.

4.9.2 The Transparency Register should be freely accessible to the public. It should include the following details:

- (a) the name of the persons (including legal persons) with whom each relevant communication was held;
- (b) the subject matter of the communication;
- (c) in the case of a meeting, the date and location, the names of those present, and who they were representing; and
- (d) any decisions taken or commitments made through the communication.

4.9.3 It is proposed that these requirements should be listed in a schedule to the Act to facilitate amendments and additions.

4.9.4 This proposal builds on and extends the practice recently adopted by Dr Aaron Farrugia, Minister for the Environment, Climate Change and Planning, who has voluntarily committed himself to publishing a register of his meetings with stakeholders.¹⁴

4.9.5 As noted earlier, relevant communications can include informal meetings, correspondence involving unofficial email accounts, and messages through other applications. However, it is proposed that the code of ethics for ministers and parliamentary secretaries, which is set out in the second schedule of the Standards in Public Life Act, should include the following requirements:

- (a) where possible, meetings with persons who have an interest in obtaining permits, authorisations, concessions or other benefits from the state should be held in an official setting in the presence of officials; and
- (b) ministers and parliamentary secretaries should not conduct official business through unofficial email accounts.

4.9.6 These amendments will be included in a revision of the code of ethics for ministers and parliamentary secretaries which is to be proposed by the Commissioner for Standards as a separate exercise in terms of the Standards in Public Life Act.

¹⁴ "New environment minister plans to log and publish all stakeholder meetings", *Malta Today*, 19 January 2020. Available at https://www.maltatoday.com.mt/news/national/99831/new_environment_minister_plans_to_log_and_publish_all_stakeholder_meetings#.XlfcX6hKiUl.

4.9.7 As with the Register of Lobbyists, the Commissioner for Standards in Public Life should have the power to direct that corrections should be made, or missing information added, to the Transparency Register. There should be the possibility of sanctions in the case of non-compliance.

4.9.8 It should also be possible for information in the Transparency Register to be withheld from the public in the same circumstances that information in the Register of Lobbyists can be withheld, provided that the Commissioner for Standards gives his consent.

4.10 Sanctions for non-compliance with the proposed Act

4.10.1 It is proposed that the Act should provide for two levels of sanctions: administrative fines to be levied by the Commissioner for Standards in Public Life, and criminal penalties imposed by the courts.

4.10.2 The Act should set out the range of penalties which can be imposed by the Commissioner depending on the nature of the breach. The Act should provide for the procedure to be followed by the Commissioner in notifying the person or body of the possible offence and ensure that the person or body is given the opportunity to make representations before the penalty is imposed. The Act should also give the person or body recourse to the courts as an alternative to paying the administrative penalty.

4.10.3 The Act should also provide for the possibility of criminal action being taken against persons and bodies who fail to settle an administrative penalty once it becomes definitive. The Act should set out the sanctions that would apply in such a case. This would, however, be without prejudice to the possibility of action being taken in terms of ordinary criminal law in cases where noncompliance with the Act also constitutes an offence in terms of such law.