



Submission to the Joint Committee on Finance, Public Expenditure and Reform and the Taoiseach

1. Introduction

The Standards in Public Office Commission is an independent, non-partisan body tasked with the oversight of legislation that underpins the State's ethics framework, specifically in the areas of ethics in public office, lobbying regulation and political finance. The Commission administers the *Ethics in Public Office Act 1995* as amended by the *Standards in Public Office Act 2001* (together known as the Ethics Acts); the *Electoral Act 1997*, as amended; the *Oireachtas (Ministerial and Parliamentary Offices) (Amendment) Act 2014*, and the *Regulation of Lobbying Act 2015*.

The Commission has identified a number of recommendations for change to the legislation within remit to enhance and strengthen the transparency framework in Ireland. The Commission has regularly commented in its annual reports¹ on issues arising under the Acts. The Commission's most recent annual reports are available on the Commission's websites. For ease of reference, copies will be provided to the Committee. A full list of all outstanding proposals made by the Commission is published every year in its annual reports.

The government departments responsible for the policy lead on matters within the Commission's remit are the Department of Public Expenditure and Reform (ethics and the regulation of lobbying), and the Department of Housing, Planning and Local Government (political finance).

The Commission has also made submissions to the lead departments in response to reviews of the legislation within remit, with its observations on the implementation of the acts. Most recently, the Commission made extensive submissions to the [second statutory review of the Regulation of Lobbying Act](#) and to the consultation on the [proposal to create an Electoral Commission](#). Both submissions are available on the Commission's websites. A list of all outstanding recommendations made by the Commission in respect of the Ethics Acts is available at **Appendix A**. A list of outstanding recommendations made in respect of the Regulation of Lobbying Act is available at **Appendix B**.

¹ The Commission has the statutory obligation to produce two separate annual reports: the first, [reporting on the Commission's overall activities](#), must be provided to the Minister for Public Expenditure and Reform by 30 June each year for tabling in the Houses of the Oireachtas; the second, [reporting on the Commission's activities under the Regulation of Lobbying Act](#), is tabled directly in the Houses of the Oireachtas by the Commission by 30 June each year.

As requested by the Joint Committee, and having regard to the Committee's legislative remit, this submission provides an overview of the Commission's roles and powers under the Ethics Acts and the Regulation of Lobbying Act, and provides recommendations for measures that would strengthen both of these instruments, which have already been articulated by the Commission in its previous legislative submissions and reports. While the Commission's previously published recommendations also include suggestions for technical or administrative change as well, the recommendations contained in this submission focus on where gaps exist in the implementation and enforcement frameworks of the legislation.

Other procedural or technical issues previously identified by the Commission are not addressed here. The Commission's annual reports contain a comprehensive overview of recommendations made in this regard.

2. Structure of the Commission

The Commission is comprised of six members, including the Chairperson, who must be a current or former judge of the Supreme Court or the High Court, and is appointed to a six-year term by the President, on the advice of the Government and following resolutions passed by both Houses of the Oireachtas. There are four ex-officio members who hold office as part of their substantive roles, namely the Comptroller and Auditor General, the Ombudsman, the Clerk of Dáil Éireann and the Clerk of Seanad Éireann. Finally, the sixth member must be a former member of one of the Houses of the Oireachtas, and is appointed to a six-year term by the Government following resolutions passed by both Houses.

The Commission is supported by a Secretariat, staffed by the Office of the Ombudsman.

The positions of Chairperson and former member of the Oireachtas became vacant in February 2020 with the end of the previous incumbents' terms. Notwithstanding the current vacancies, the Commission is able to continue most of its statutory work, with the exception of proceeding to investigation under the Ethics Acts. The views contained in this submission are those of the current members of the Commission and reflect previously stated positions.

3. The Ethics Acts

Obligations

The Ethics Acts set out obligations for elected members of the Houses of the Oireachtas and senior civil and public servants in respect of the disclosure of registerable interests (and in the case of office holders², the registerable interests of their spouse/civil partner and children or step-children), declarations of material interests and recusals, tax compliance,

² Office holders include Ministers, Ministers of State, the Attorney General, Chairperson or Deputy Chair of Dáil Éireann or Seanad Éireann, and Chairpersons of a Committee of either House of the Oireachtas or a Joint Committee of both Houses of the Oireachtas.

and the receipt and disposition of gifts. They also provide for the publication of codes of conduct for office holders, members of both Houses and public servants.

Commission's role and responsibilities

In support of these statutory obligations, the Commission receives and holds statements of interest and tax clearance certificates, publishes guidance and provides advice to persons with obligations under the Acts. The Commission also has powers to conduct inquiries and investigations of possible non-compliance with the Act's provisions by office holders, as well as non-compliance with codes of conduct and with Part 15 of the Local Government Act 2001.

Shared oversight

Oversight of compliance with the State's ethics framework is shared across a number of bodies. The Committees on Members' Interests of Dáil Éireann and Seanad Éireann oversee compliance of Members of the Oireachtas who are not office holders. Public bodies oversee the day-to-day compliance of their employees. While the Commission may conduct investigations into non-compliance by local authority members, local authorities have day-to-day oversight of compliance within their organisations and may investigate non-compliance in the first instance.

Limitations on the Commission's powers

Under the current legislation, the Commission is limited in respect of certain implementation and enforcement powers, which has undermined the efficient and effective operation of the State's ethics framework. In particular:

- **Statutory responsibility for oversight of ethics is divided across numerous bodies**, including oversight of legislation and codes of conduct. The Commission, the Committees on Members Interests for Dáil Éireann and Seanad Éireann, local authorities, heads of public bodies, and Outside Appointments Boards all play a role. This division has the potential for lack of coherence in interpretation and application of the ethics framework, with an ensuing loss of credibility.
- The **Ethics Acts do not provide for offences for failure to comply with the Act's provisions**, including both technical breaches (filing statements of interest, statements of material interest, or tax compliance within the statutory timelines) or more substantive breaches (such as failure to disclose a registerable interest or using one's position to further a private interest). The only measure the Commission has at its disposal is to investigate and report. While other jurisdictions may allow for prosecution, fine, or even disqualification from holding office for breaches, in Ireland there is no sanction for non-compliance other than public report, and only on foot of a full investigation.

- **Not all public officials are currently covered by the Ethics Acts** – a number of public bodies have been created/merged in recent years without bringing their employees within remit of the Ethics Acts. Moreover, there is currently no code of conduct governing the behaviour of employees in the wider public service.
- No public body currently has the **authority to conduct investigations or inquiries into possible contraventions of the Ethics Acts by former members of the Oireachtas**, other than office holders, once they have left office.
- **Public bodies have no statutory obligation to notify the Commission of appointments to senior office.** Without this, office holders may be unaware of their obligations and the Commission is unable to effectively implement the Act's requirements in respect of tax compliance.
- The Commission **cannot appoint an inquiry officer to conduct a preliminary inquiry on its own initiative**, and can only do so on foot of a complaint. Preliminary inquiries allow the Commission to inquire into a matter in order to assess whether there is prima facie evidence of non-compliance and whether a full investigation is warranted. Preliminary inquiries often answer concerns and questions without having to incur the costs of a full investigation. They also tend to be more discreet and mitigate the risk of reputational damage for those involved, particularly where no prima facie case is sustained.
- The Commission **cannot progress investigations under the Ethics Acts unless all six members are present.** This includes conducting investigation hearings and considering preliminary inquiry reports. In the event that there is a vacancy on the Commission or scheduling challenges, this can lead to unnecessary delays. Allowing for a simple quorum would expedite investigative work.
- The scope of the Ethics Acts is focused on declaration of interests and acceptance of gifts, and has **non-specific rules in respect of committing a "specified act"**. While other jurisdictions also explicitly include rules in respect of nepotism, preferential treatment and improperly furthering a private interest, there are no such specific provisions in the Ethics Acts. The concept of "specified act" is at once both so broad as to potentially capture any behaviour, and not specific enough to give guidance to persons subject to the Acts of what might constitute a breach. Clarification of this provision would be useful.

Recommendations for changes to the Ethics Acts

Based on the above identified gaps, the following legislative amendments are proposed:

- Statutory **responsibility for implementation and oversight of the ethics framework should be streamlined** and made more efficient.
- The Acts should be amended to **provide for offences for breaches of the Act's provisions**, both technical and substantive breaches, and appropriate penalties upon conviction.
- Regulations prescribing **designated positions of employment should be updated regularly** and the prescription of new positions in a body to be established (whether entirely new or bodies being merged) should be considered as part of the process of establishment. In addition, the Commission should be informed of the creation/merger/dissolution of such bodies.
- Explicit provision should be made to **allow investigations against former members of the Oireachtas** in circumstances where the matter relates to actions that occurred during their period in office but which come to light after the member has left office.
- The Act should be amended to **require that public bodies notify the Commission of new appointments** to senior office, to facilitate the effective implementation of tax compliance requirements.
- The Commission should be granted the **power to appoint an Inquiry Officer to conduct a preliminary inquiry into a matter in the absence of a complaint** under the Ethics Acts.
- Provision should be made for a **quorum of not less than three members** (including in all cases, the Chairperson) for the hearing of an investigation under the Ethics Acts.
- Consideration should be given to providing **greater clarification or specificity in respect of the term "specified act"**.

4. The Regulation of Lobbying Act

Obligations

The Regulation of Lobbying Act provides that a person who fits within the scope of the Act, who makes relevant communications to designated public officials, must apply to register on the Register of Lobbying and submit regular returns disclosing their lobbying activities.

The Act provides for the following offences:

- Carrying on lobbying activities without being registered;
- Failing to make a return by the deadline;
- Providing the Standards Commission with any information known to be inaccurate or misleading;
- Failing to co-operate with an investigating officer who is investigating contraventions of the Act; and
- Obstructing an investigation.

Contraventions of the above provisions may be investigated and prosecuted. The Commission may also levy fixed payment penalties for late returns.

The Act also provides for post-employment restrictions for certain designated public officials once they leave office. Specifically, Ministers, Ministers of State, ministerial advisors, and senior civil servants are prohibited from lobbying their former public body or former colleagues with whom they were connected in their last year in office, or from being employed by or providing services to a person who lobbies in such circumstances, without the consent of the Commission.

A person subject to the Act's post-employment provisions may apply to the Commission to waive or reduce the cooling-off period. The Commission may refuse the request, grant it, or grant it subject to conditions. Consent must be obtained in order to engage in any of the lobbying activities prohibited by section 22. Unlike the other obligations set out in the Act, there are no penalties or explicit enforcement powers given to the Commission in respect of breaches of this provision.

Commission's role and responsibilities

The Commission is the Registrar of Lobbying and maintains the online register. It provides guidance on the requirements of the Act, and may decide on applications to hide personal information, delay publication or amend/delete information on the register.

Under section 22 of the Act, the Commission also decides on applications to waive or reduce the post-employment cooling-off period.

Since the Act commenced in 2015, the Commission has received 17 such applications. The majority of these have been from ministerial advisors. A summary of applications received is available at **Appendix C**.

Since the commencement of the Act, the Commission has undertaken significant communications and outreach to the various stakeholders with obligations under the Act, including persons likely to lobby and designated public officials. Tailored guidance has been published, including comprehensive [guidance for TDs, Senators and MEPs](#), and [quick reference tools](#) for DPOs. It is understood that public bodies inform DPOs of their obligations under the ethics and lobbying legislation when taking up their posts. The Commission writes to office holders, including Ministers, Ministers of State and senior civil servants, in respect of their obligations, on appointment, annually, and on their departure.

Limitations on the Commission's powers

The Commission has identified certain gaps in the Act which both impede its effectiveness and limit the Commission's ability to properly oversee compliance. In particular:

- **The Act provides for the publication of a Code of Conduct, but gives it no statutory weight or enforceability.** Section 16(5) of the Act provides that a person carrying on lobbying activities "shall have regard to the code of conduct". There is no authority provided by the Act, however, for the Commission to enforce the Code, nor to investigate or report on breaches of the Code.
- **The Act's post-employment provisions are not enforceable.** Section 22 of the Act provides that Ministers, Ministers of State, special advisers and senior public officials ("relevant DPOs") who have been prescribed for the purposes of section 6(1) of the Act are subject to a one year "cooling-off" period after they leave office. Relevant DPOs are prohibited from engaging in lobbying activities in specific circumstances, or being employed by, or providing services to, a person carrying on lobbying activities in specific circumstances during the "cooling-off" period unless they obtain the consent of the Commission. While the prohibition in the Act is clear, there is no associated offence for breaches, nor are the Commission's investigative powers under section 19 of the Act attached to these provisions. This renders the post-employment provisions essentially toothless. The Commission has commented on this issue in every annual report and legislative submission since the Act's commencement.
- **The Act's post-employment provisions in respect of "connected persons" are narrow in scope.** Currently, certain former DPOs (Ministers, Ministers of State, ministerial advisors and senior civil servants) are prohibited from lobbying, or being employed by or providing services to someone who lobbies, their former public body and former colleagues with whom they were connected in their last year in office.

This does not reflect the networks that these individuals have with DPOs outside their particular public body, for example, other officials, advisors or Cabinet colleagues.

- There is **no transparency where applications to waive/reduce the cooling-off period have been granted or refused**. The Commission may publish anonymized summaries in its annual reports of applications received under section 22, but cannot confirm whether an individual has taken up a post with the Commission's consent. This has the effect of potentially causing reputational damage to a person where they have complied with their obligations; it may also give rise to the mistaken belief that someone has consent when no such consent has been granted.
- Unlike under the Ethics Acts, the Act **does not allow for the publication of investigative reports, including in circumstances where no contravention has been found**. This is likely due to the fact that the lobbying legislation provides for criminal offences. However, where there is not enough evidence to proceed to a prosecution, or where evidence demonstrates that no contravention occurred, there is no mechanism for making the facts of the situation known. The associated lack of transparency may also serve to undermine confidence in the enforcement powers of the Commission and the robustness of the lobbying legislation.
- There is **no mechanism to prevent DPOs from continuing to engage with persons who are not compliant with the Act**, whether in respect of their obligations to register/submit returns, or their post-employment provisions. There is therefore no real consequence in respect of breaches – non-compliant persons can continue to have access to DPOs and lobby alongside their compliant counterparts.
- **There is no consequence for a person who takes deliberate action designed to avoid their obligations under the Act**, for example, having unpaid directors in lieu of paid staff making lobbying communications, conducting lobbying offshore to try to avoid the obligation to register, or destroying records of lobbying activities. Anti-avoidance clauses are common tools to prohibit actions taken to avoid statutory obligations, but are absent from the Regulation of Lobbying Act.

Recommendations for changes to the Regulation of Lobbying Act

Based on the above identified gaps, the following legislative amendments are proposed:

- That the Act be amended to **allow the Commission to investigate and report on breaches of the Code of Conduct** for persons carrying on lobbying activities. This could operate along similar lines as the Commission's current powers to investigate and report on ethics breaches.
- The Act's **post-employment provisions should be strengthened** by introducing the following measures:
 - Failure to comply with section 22 of the Act (either in relation to submitting an application for consent, where required, or in relation to complying with the Commission's decision on an application for consent) should be a relevant contravention under section 18 of the Act and an offence under section 20 of the Act.
 - Extend the scope of the definition of "connected persons" to include any public body or DPO with whom a person may have had significant involvement, influence or contacts, and not only his/her own former public body or employees of that body.
 - Allow the Commission to publish certain details regarding its decisions to waive or reduce the cooling-off period under section 22 of the Act.
- The Commission should be able to **publish summary details of investigations**. This would allow for greater transparency and enhance confidence in the oversight of the system without circumventing the court process for prosecutions.
- **Access to DPOs by non-compliant lobbyists should be restricted**, by taking the following measures:
 - DPOs should be required to decline further communications with lobbyists where the DPO is aware that he/she has failed to comply with their obligations under the Act.
 - Where a lobbyist has been convicted of an offence under the Act, the Commission should have the authority to order any DPO not to have dealings with that person.
 - Failure to comply with either of these provisions should be an offence.
- An **'anti-avoidance clause' should be added** to the list of relevant contraventions under section 18 of the Act to make it an offence for a person to take any action that

has as its intended purpose the avoidance or circumvention of his or her obligations under the Act.

5. Conclusion

The role of the Standards in Public Office Commission is to administer and oversee compliance with the legislation that underpins the State's transparency framework. In so doing, the Commission has encountered a number of gaps in both the scope of the legislation and in its own powers in administering and enforcing it. In this submission, the Commission has identified both the gaps and the possible solutions that would enhance and strengthen the legislative framework within which the Commission operates.

It is hoped that the Joint Committee finds this submission useful in its deliberations. The Commission remains at the Committee's disposal should it require further information or clarification.

Standards in Public Office Commission
October 2020

Appendix A

Complete list of Recommendations made for reform of the Ethics Acts (from Commission's 2019 Annual Report)

#	Proposed amendment	Year made	Notes
<i>Procedural amendments</i>			
1	The Commission should be granted the power to appoint an Inquiry Officer to conduct a preliminary inquiry into a matter in the absence of a complaint under the Ethics Acts.	2004	
2	Provision should be made for a quorum of not less than three members (including in all cases, the Chairperson) for the hearing of an investigation under the Ethics Acts.	2008	
3	The Commission should directly lay its annual report before each House of the Oireachtas rather than furnishing it to the Minister for Public Expenditure and Reform who then lays it.	2010	
4	Legislation should be introduced to ensure accountability of all former public officials, including those not currently covered by the Ethics Acts.	2019	
<i>Other proposed amendments to the Acts and related legislation</i>			
5	There should be amendments to the time limits within which Statutory Declarations, Tax Clearance Certificates and Application Statements are to be made or issued and furnished to the Commission by elected members and by appointees to senior positions and directorships in the public service.	2003	The Civil Law (Miscellaneous Provisions) Act 2008 amended the deadline for the making of a statutory declaration by a person recommended for appointment to judicial office from one month to three; a similar provision for elected members and senior public servants would be required in order to meet the recommendation.
6	A code of conduct should be adopted for public servants and members of state boards in the wider public service.	2003	
7	Motions should be initiated in the Houses of the Oireachtas to designate the Chairpersons of Oireachtas Committees as office holders for the purposes of the Ethics Acts.	2005	
8	There should be a comprehensive act consolidating the Ethics Acts and all other legislation providing for	2009	

	disclosure of interests and related provisions for public officials.		
9	There should be an amendment of the provisions for complaints about a 'specified act' to allow reference to a high level statement of the ethical principles to be followed by public servants and public representatives.	2009	
10	There should be an amendment of the definition of 'connected person' to provide that a person is a "connected person" to a company of which he or she is a director and that the other directors of that company are also "connected persons" to that person.	2009	
11	There should be a requirement that liabilities be disclosed as 'registrable interests'.	2009	
12	A whole of public service approach to preventing and detecting double claiming of travelling and subsistence expenses should be adopted.	2014	
13	Explicit provision should be made to allow complaints against members of the Oireachtas in circumstances where the matter comes to light after the member has left office.	2017	
14	The Act should be amended to require that public bodies notify the Commission of new appointments to senior office, to facilitate the effective implementation of tax compliance requirements.	2017	
15	That future regulations prescribing designated positions of employment be made effective on 1 January of the year following their promulgation.	2018	
16	That regulations prescribing designated positions of employment be updated regularly and that the prescription of new positions in a body to be established (whether entirely new or bodies being merged) be considered as part of the process of establishment. In addition, the Commission should be informed of the creation/merger/dissolution of such bodies.	2018	
17	Various pieces of legislation that address ethics for elected officials and civil and public servants, including post-employment provisions, should be streamlined with a view to ensuring consistency and efficiency.	2019	
18	The incoming government should give urgent consideration to passage of revised ethics legislation at an early stage.	2019	
<i>Recommendation regarding the Local Government Act 2001</i>			
19	The role of ethics registrar in local authorities should be rotated less frequently than the current two years, to allow for capacity-building and the development of knowledge and expertise, and should be at a senior level within the organisation.	2019	

Appendix B

Complete list of recommendations made as part of the submission to the *Second Legislative Review of the Regulation of Lobbying Act 2015*

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

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

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

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

Recommendation 5: The provisions of section 5(1)(c) of the Act should be limited to persons who have a material interest in relation to the development or zoning of land or are connected to or communicating on behalf of someone with such an interest.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appendix C

Applications to waive/reduce post-employment cooling-off period under s. 22 of Regulation of Lobbying Act 2015 since commencement of Act

Position of applicant	2015	2016*	2017	2018	2019	2020*†	TOTAL
Senior civil servant (local authority)	0	1	0	0	0	0	1
Senior civil servant (government department)	0	0	2	0	0	0	2
Ministerial/special advisor	0	1	3	2	2	6	14
Minister of State	0	0	0	0	0	0	0
Minister	0	0	0	0	0	0	0
Overall total							17

* General election year (turnover expected)

† Figures as of October 2020