Introduction

The CBI is the UK’s leading business organisation, speaking for some 190,000 businesses operating across the UK. CBI members directly employ at least 500,000 people in Scotland, which represents a quarter of the private sector workforce. This includes companies headquartered in Scotland as well as those based in other parts of the UK that have operations and employ people in Scotland.

We welcome the opportunity to respond to the committee’s call for evidence on the draft Lobbying (Scotland) Bill, following the oral evidence we provided on 12 November. CBI Scotland has been closely engaged with the public debate around the regulation of lobbying, including responding to Neil Findlay MSP’s 2012 consultation, providing evidence to the committee’s previous inquiry in 2013-14, and replying to the government’s consultation in 2015.

Our starting point is that lobbying is essential to the public policymaking process in Scotland – it is one of the central means by which policymakers hear views from groups affected by public policy, test the viability of new policies, and are held to account as part of a healthy democratic process. This vital information exchange contributes to promoting better policy outcomes for the people of Scotland, and we welcome the fact that this has been recognised by both the government and the committee.

There remains a lack of evidence of the need for a statutory register of lobbyists, but with legislation now before parliament the focus should must be on implementing it in way that is not unduly burdensome on those it affects

We are clear that lobbying activity must be conducted in an open and transparent way, not least to promote public confidence in the system of government, but there are different options available to policymakers in seeking to deliver upon this objective, of which a register of lobbyists as set out in this bill is just one. We have consistently questioned the case for the creation of a new regulatory regime (which would impose costs on groups which lobby) as a proportionate way of providing such transparency and we remain sceptical of the case for creating a statutory register of lobbyists in Scotland. We have also suggested alternative approaches, including improving the existing system of publishing ministers’ meetings with external parties as well as releasing information about MSPs’ diaries.

At the root of this scepticism is the lack of evidence put forward by the government and other stakeholders about the existence of a particular problem with lobbying in Scotland which necessitates a regulatory response. As the proposals will impose costs on those which it affects, it is right that they are
considered in terms of what makes good regulation, and on this question the principles underpinning the Scottish Government’s Better Regulation agenda provide an effective starting point – including that any new regulatory proposals are proportionate to the problem that is being addressed and evidence-based.

- The lack of evidence of a problem with lobbying in Scotland which needs addressing, a lack of evidence around what a lobbying register would actually achieve, and a limited examination by the government of alternative approaches, mean these proposals risk looking like a solution in search of a problem.

- However, as it’s clear that the government is committed to taking forward the proposals, we want to engage constructively in order to help ensure that the final regulatory regime can be implemented in a way which does not impose overly disproportionate burdens on those affected and to highlight practical issues to be addressed in order to support making the regime effective. In this vein, we responded to the government’s consultation in July, recently provided oral evidence to the committee in November, and set out further evidence in the remainder of this document.

**We welcome measures in the draft bill which attempt to strike the right balance, including making organisations responsible for keeping records, focusing on direct face-to-face contact with MSPs and ministers, and not requiring financial disclosure**

- As with all regulation, it is vital to strike the right balance to ensure that it addresses a clearly defined problem in a proportionate and not overly burdensome way. Notwithstanding the fact that we are sceptical about the need for a lobbying register in Scotland, we welcome some of the measures taken forward in the draft bill which attempt to strike the right balance and not impose additional and unnecessary burdens.

- We welcome the draft bill’s focus on placing the responsibility for registering with organisations rather than individuals. In our submission to the government we highlighted that individual registration would have led to higher costs for businesses affected, because it could lead to ‘double counting’ where more than one individual attends a meeting, as well as many companies being likely to want to keep central records anyway.

- We also welcome that the draft bill proposes to capture face-to-face contact with MSPs and ministers. We also agree that contact with MSPs and ministers is most legitimately of interest because they are directly elected representatives. We strongly believe that any widening of the register to include contact with civil servants and special advisers – as some have proposed – would add disproportionally to the regulatory burden, as would capturing additional correspondence over and above the face-to-face contact with MSPs and ministers as outlined in the draft bill.

- We also strongly agree with the non-requirement of financial disclosure as set out in the draft bill. On a practical basis, making respondents calculate and provide this information (potentially including, for example, office overheads) would significantly add to the burden for those affected. In addition, providing
commercially sensitive financial information – such as consultancy fees or salaries – would carry significant risks for affected organisations. And, finally, there is a broader risk of financial information becoming a ‘blunt instrument’ in terms of informing the debate about lobbying – the amount of money spent is an overly simplistic indicator of activity and does not address the key transparency issue of who is lobbying and for whom.

- It is important to stress that any additional requirements or proposals to extend the scope of the register must be looked at in terms of whether they impose additional costs to those affected and whether unintended consequences could result – including the potential for engagement with government and parliament to be reduced. Any additional proposals must therefore be subjected to a full regulatory impact assessment.

But there remain some significant practical issues to be addressed in the draft bill, not least clarification around how incidental contacts would be managed, achieving the right level of information about meetings, and putting in place a staged approach to criminal penalties

- Despite the publication of the draft bill and explanatory notes, there is still a pressing need to clarify some of the remaining issues to ensure the register does not create regulatory grey areas. If this is not achieved, there is a risk of a ‘chilling effect’ whereby affected organisations err on the side of caution and potentially reduce engagement with the parliament and government.

- We believe that there still needs to be further clarification as to what ‘face to face’ communication at pre-arranged meetings means in practice. Many types of contact with MSPs and ministers may not necessarily be viewed as ‘lobbying’, e.g. incidental interactions at visits to sites within constituencies or panel appearances at third party events. We have heard from members that uncertainty on what constitutes ‘face-to-face’ lobbying may lead to businesses curtailing contact with local MSPs for events such as site visits, if there is a risk of being inadvertently captured by the new regulations.

- In terms of capturing the right level of information, we would agree in principle that the recommendation in the consultation to include ‘direct, face-to-face’ communication at meetings that are arranged in advance is a sensible criteria at which to focus the activities of the register. However, care must be taken to ensure that the nature of the information captured is proportionate in itself and not does include sensitive commercial information. Again, businesses may be minded to err on the side of caution and cut back on engagement with parliamentarians if there was a risk of sensitive information being captured. To give an example, some companies may discuss potential investment decisions with ministers and MSPs which could be harmed by the inappropriate release of information.

- To reflect the two way communication flow between elected representatives and external stakeholders, we also believe it is important that contacts initiated by MSPs and ministers are reflected.
- We also question why unpaid lobbying has been excluded from the latest proposals, given that this can be highly effective and the desire to create a level playing field.

- We support the intention for a “light touch, educative approach” to implementing and monitoring compliance with the register. We believe that the focus should be on spreading awareness and the need to sign up, and that some moderate sanctions could be in place for serious breaches of the regime. But we believe the threat of criminal penalties is wholly disproportionate, particularly given that laws already exist to govern inappropriate and corrupt behaviour, such as through the Bribery Act.

- There is also an opportunity cost as a result of organisations not doing certain things because they need to focus on the proposals outlined in the draft bill. Moreover, anything that includes criminal sanctions has a legal dimension, with legal fees and costs that organisations will need to bear. Costs might differ according to the types of organisations that might be affected, but these are not trivial and cannot be dismissed by businesses as part of their diligence and compliance activities.

Questions

1. **Do you agree that the Bill is necessary and that the establishment of a Lobbying Register is desirable?**

   - In this case, we do not believe that, overall, an evidence-based case has been made, so we are sceptical about the need for legislating to create more regulation – both for businesses and other groups potentially included in the new regime. The Scottish government has its own set of principles of better regulation, the spirit of which includes that any action should be proportionate to a problem that has been addressed, and that there is both evidence of this problem existing and evidence that the proposed regulation would actually address it. We do not believe the legislation as it stands meets these criteria. However, as highlighted above, given that this regulation now looks like a reality, we want to engage to ensure as simple and effective a regime is created as possible.

2. **How will the Bill affect you or your organisation?**

   - In answering this question we consider both the impact on the CBI and our members.

   - The CBI has regular engagement with the Scottish government and parliament and as part of this we meet ministers and MSPs to discuss matters of importance to the Scottish economy – these meetings would have to be registered under the proposed new regulatory regime. This would create the need for new compliance systems to be formed, capturing information in a different way to how it is currently compiled and diverting staff time from other activities.

   - CBI members operating in Scotland will also be affected. As it stands, the proposals have already created uncertainty, due to the remaining lack of clarity over what meetings will have to be recorded. Some members have informed us
that due to the need to keep additional records and data, they will be burdened by extra costs of compliance. This is true for businesses of all sizes, but smaller businesses without dedicated compliance and legal teams may find this a greater problem. Larger organisations would face more complex challenges, especially if a firm has multiple sites around the country.

- Whatever is finally decided, we strongly believe a grace period should be included, to ensure that those required to sign up are not unfairly penalised for minor and inadvertent transgressions while the new system is implemented.

3. **Registration is triggered only when lobbying is being done in exchange for payment (either as a consultant or an employee) and does not capture lobbying carried out in the course of voluntary work or when it is done by an individual on his or her own behalf. Do you agree with this approach?**

- We question the proposed exemptions for the unpaid lobbyists outlined in the draft bill. There does not appear to be a convincing case given as to why this form of lobbying, which can which often have extensive capacity, should be treated differently to others which are proposed for coverage by the register. We would favour a level playing field whereby, if a register is to be created, it applies to all organisations which lobby.

4. **Do the provisions set out in the Bill succeed in striking a balance between capturing information of value and ensuring that access and participation with the work of Parliament and Government is not discouraged?**

5. **Are there any unforeseen consequences of the Bill as currently drafted?**

- As highlighted above, notwithstanding our overall scepticism to these proposals, we do believe that there has been an attempt to strike the right balance.

- We believe that capturing oral, face-to-face communication with ministers and MSPs is the correct approach to take if a register is to be implemented. At the same time, efforts should be made to ensure that the register of ministers’ meetings is updated on a regular basis to ensure compliance on behalf of all interested parties. We have also proposed improving the Scottish parliament’s own transparency regime by publishing MSP’s diaries and engagements.

- Widening the scope to non-elected figures, or gathering other types of written and electronic communication, would cause a significantly larger burden on those required to register and may have an impact on businesses engaging with the work of the Scottish parliament and government – for companies of all sizes this could amount to a significant amount of correspondence and activity that would need to be monitored, captured and regulated, potentially also containing sensitive commercial or financial information. Therefore, we would strongly oppose widening the scope of the register to avoid additional costs and any unforeseen impact on parliamentary engagement.

- If the register was to be extended, an additional impact assessment would need to be carried out, to capture the increased burden created by widening the scope of its activities.
6. Do you feel that the definitions and exclusions are sufficiently clear? Do they, for example, allow individuals and organisations to easily know whether their activity requires to be registered?

- The CBI has consistently highlighted in our engagement with the lobbying register process that there is a lack of clarity over what ‘face-to-face’ contact with ministers and MSPs would constitute in practice.

- Many types of contact with MSPs and ministers could fall into a regulatory grey area, e.g. visits to sites within their constituencies, or panel appearances at third party events. Despite the publication of the policy memorandum and explanatory notes with the draft Bill, it is still unclear whether individual members of staff who might meet politicians as an incidental part of these activities be classed as lobbyists and be required to register on behalf of their companies. If this is the intention of the bill then we would question it as being highly disproportionate.

7. The Bill’s Policy Memorandum states the Bill aims for a “light touch, educative approach” and that “criminal offences and penalties [are] provided for as a last resort”. What are your views on this approach?

- We support the intention for a “light touch, educative approach” to implementing and monitoring compliance with the register. We believe that the focus should be on spreading awareness and the need to sign up, and that some moderate sanctions could be in place for serious breaches of the regime.

- However, we believe the threat of criminal penalties is wholly disproportionate, particularly given that laws already exist to govern inappropriate behaviour, such as through the Bribery Act. The government should identify the gaps in current legislation that new criminal sanctions would address - and the ultimate threat of jail or significant financial penalties looks disproportionate. Again, the threat of these sanctions may discourage engagement with the Scottish government and ministers.

- If criminal sanctions are to be imposed, there must be a staged approach to ensure that minor infractions are not overly penalised, and that organisations affected are kept fully informed.

8. Are there any amendments that would, in your view, enhance the Bill?

- As highlighted above, amending the draft Bill to include unpaid lobbyists would ensure a level playing field for those affected, and ensure that all professional lobbying activity was covered equally.

- We would also call for clarity on the exclusion of incidental face-to-face contact with parliamentarians, and for clarity around the phasing of any criminal sanctions.

CBI Scotland
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