Standards, Procedures and Public Appointments Committee

Lobbying (Scotland) Bill

Written submission received from FSB

Introduction

As experts in business, FSB offers members a wide range of vital business services, including advice, financial expertise, support and a powerful voice in Government. Its aim is to help smaller businesses achieve their ambitions.

FSB is Scotland's largest direct-member business organisation, representing around 19,000 members.

In addition to representing a number of small public affairs consultancies, our activities as a representative organisation will be affected by the proposals in the Bill. We also have concerns that the Bill as drafted could capture a wide range of activity by almost all of our members and their employees. We are also long-standing contributors to the better regulation debate and thus take a keen interest in any measures which would impact on the business regulation environment in Scotland.

FSB submitted a response to the consultation on proposals for lobbying legislation in July, in which we explained our opposition to introducing a register of lobbyists. This remains our position. In summary, given the lack of evidence of a specific problem, a legislative solution does not appear to be a proportionate response and is likely to have unintended consequences which could result in a less transparent lobbying environment in Scotland.

We also set out a range of questions about the impact of lobbying legislation on both individual small businesses and membership organisations. Some of these points have been addressed with the publication of the Lobbying (Scotland) Bill but a number of questions remain. This submission therefore concentrates on these issues, which broadly align with the Committee’s questions regarding the impact of the Bill on our organisation and the clarity of the Bill’s provisions.

Lack of clarity on the role of volunteers and individuals

In the policy memorandum accompanying the Bill, the Scottish Government states that:

“The Government considers that communications with MSPs and Ministers by individuals on their own behalf and communications made by individuals in a voluntary capacity, because they choose to associate themselves with a particular ‘cause’, should never be caught by the registration and reporting requirements imposed by the Bill.”

1 Paragraph 22, Policy Memorandum
We agree that small business owners, or their staff, should in no way be prohibited from raising issues of concern about their business with local MSPs or relevant Ministers. Equally, as members of FSB, they should be able to discuss wider issues affecting small businesses with parliamentarians. However, in both circumstances, the wording of the Bill leaves uncertainty.

Firstly, the schedule sets out that communications “made by an individual on the individual’s own behalf” are not to be regarded as lobbying. In this respect, businesses which are sole-traders or partnerships could be free to make representations about their own business, subject to the interpretation of s1(b). However, the situation is more worrying for small businesses which are incorporated (Scottish Governmentfigures suggest 28% of businesses are incorporated). In these firms, even where there are no employees, defining the ‘individual’ is trickier, since the business owner is acting as a paid director/employee on behalf of another legal person – i.e. the company – when making representations. Regardless of whether it is the government’s intention that such activity is not intended to be caught by the requirements of the Bill, the sections as drafted could do so.

Secondly, we have concerns about the attempt to establish a dividing line between activities of volunteers (not regulated lobbying) and paid employees (regulated). This is principally done by using payment as the deciding factor.

“In focussing on lobbying undertaken as part of paid work, paid refers to payment of any kind but in particular does not include the payment of reasonable expenses, and so on.”

Payment is further defined as:

“(a) a communication made by an individual as an employee or in another capacity mentioned in section 1 (1) (b) is made in return for payment if the individual receives payment in that capacity regardless of whether the payment relates to making communications,

(b) “payment” –

(i) Means payment of any kind, whether made directly or indirectly for making the communication,

(ii) Includes entitlement to a share of partnership profits,

(iii) Does not include reimbursement for travel, subsistence or other reasonable expenses related to making the communication.”

While the policy intent to exclude volunteers appears clear, the wording of the Bill is not. A number of our volunteer members across the country receive small honoraria or consultancy fees, for example if they hold an office-bearer position in a local branch.

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2 Paragraph 21, Policy Memorandum
3 Section 3 (b), Schedule
In our view, the current wording of the Bill would mean such payment is within scope and, as a result, any of our members receiving such payment would be engaging in regulated lobbying if they communicated with MSPs or Ministers while representing the FSB, despite being (to all intents and purposes) volunteers.

The scope of section 1 and the schedule is so vast that it could catch any number of perfectly legitimate – indeed essential – aspects of the democratic process taking place. For example, the following would be count as regulated lobbying:

- An employee meets their MSP at a school Christmas Fete, when asked how things are going, they recount difficulties at work due to the modern apprenticeship scheme.
- A business owner attending Business in the Parliament and telling an MSP other than the one who invited them how well his business is doing thanks to the Small Business Bonus scheme.
- A business owner invites his or her MSP to his premises to celebrate Small Business Saturday and, during the visit, discusses town centre regeneration.
- An FSB branch secretary meets an MSP at a social event and gives them a copy of an FSB policy document.

Although not a direct concern for FSB, in considering the above, we do wonder how any public sector employees could make representations to their MSP about any aspect of their employment or their employer without taking part in regulated lobbying.

Therefore, as is stands, the Bill potentially places a barrier to genuine dialogue between politicians and many Scots about their business, or the company they work for. This is clearly the polar opposite from the policy intention of the Bill and we submit that it needs to be amended fundamentally before proceeding. In addition, further detailed guidance from the Parliament on this matter will be required before the new legislation takes effect, if many businesses and membership organisations in Scotland are to understand their responsibilities.

**Reporting, monitoring and oversight**

The Bill places a great deal of responsibility on the Clerk appointed to oversee the operation of the new regime. We note the intention to operate an informal, light touch approach to monitoring and compliance. However, given the potentially severe consequences for our organisation, members and employees, we have a number of concerns regarding oversight.

Given the potentially wide-ranging scope of the Bill for an organisation like FSB, keeping track of every regulated communication is likely to present a significant administrative challenge to our organisation. With the sheer amount of communication involved, there will also inevitably be errors in the information returned by large organisations, particularly relating to regulated activity not undertaken by direct employees.

In addition to the likelihood of mistakes, it is also seems likely that the Bill will generate a number of complaints and the possibility of mischief-making has to be
considered. With such complaints likely to be high-profile, the Clerk’s role in managing the process will be critical. In particular, while there must be a formal process for investigating complaints, the process should be staged so that less serious complaints could be dealt with in a more efficient, informal manner.

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