

# STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

## INQUIRY INTO LOBBYING

### SUBMISSION RECEIVED FROM LAW SOCIETY OF SCOTLAND

#### Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

The Law Society of Scotland welcomes the opportunity to contribute to the Standards, Procedures and Public Appointments Committee's (the Committee) Inquiry on Lobbying and to respond to the call for written evidence.

#### General Comments

We previously responded to the consultation, by Neil Findlay MSP, on a proposed *Lobbying Transparency (Scotland) Bill*<sup>1</sup> and to the United Kingdom Government's consultation paper '*Introducing a Statutory Register of Lobbyists*' in 2012<sup>2</sup>. We also continue to engage with the Westminster Parliament on the *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act* providing our views and raising points for further debate as the Bill progresses. Inevitably, many of those comments and views apply to the current call for evidence by the Committee.

Lobbying is a necessary, important and legitimate activity in a democratic society, providing interested parties with the opportunity to engage with politicians in generating effective and considered public policy and legislation, and is a fundamental part of the political and legislative process. One of the key principles from the formation of the Scottish Parliament, detailed in the Consultative Steering Groups report on *Shaping Scotland's Parliament*<sup>3</sup> was that "*the Scottish Parliament should be accessible, open, responsive and develop procedures which make possible a participative approach to the development, consideration and scrutiny of policy and legislation*". To allow, and encourage, active engagement with MSPs ensures that a voice is given, and heard, to those most impacted, and supports this very important principle.

To fulfil our statutory obligations to both our members and public, we regularly engage with the Scottish Government, the United Kingdom Government, and both the Scottish and United Kingdom Parliaments, providing comment, advice and

---

<sup>1</sup>[http://www.lawscot.org.uk/media/555727/consultation\\_proposed\\_lobbying\\_transparency%20\\_scotland\\_bill.pdf](http://www.lawscot.org.uk/media/555727/consultation_proposed_lobbying_transparency%20_scotland_bill.pdf)

<sup>2</sup>[http://www.lawscot.org.uk/media/483253/law%20reform\\_introducing\\_a\\_statutory\\_register\\_of\\_lobbyists.pdf](http://www.lawscot.org.uk/media/483253/law%20reform_introducing_a_statutory_register_of_lobbyists.pdf)

<sup>3</sup>[http://www.scottish.parliament.uk/PublicInformationdocuments/Report\\_of\\_the\\_Consultative\\_Steering\\_Group.pdf](http://www.scottish.parliament.uk/PublicInformationdocuments/Report_of_the_Consultative_Steering_Group.pdf)

guidance on legislative proposals and raising key issues for further consideration and debate. Supporting the principles of transparency, the Society is voluntarily registered on the European Commission's Transparency Register, which provides the public with access to information of those who are actively engaged in guiding and influencing the EU decision-making process.

We recognise the importance of ensuring and maintaining the Scottish public's trust and confidence in the political process and legislative system, and agree that transparency helps to provide effective oversight and scrutiny of the political process and is a central element of good governance. However, we also believe that this has to be balanced with ensuring that there is open communication between interested parties and those making important policy and legislative decisions. Any proposals to introduce a register must ensure that due consideration is given to a fair balance between these interests.

We note that the call for evidence raises a number of important questions, but one question it does not seek comment and views on is; what is lobbying and what constitutes lobbying activity. This has to be clearly defined as it will form the backbone of any future register. Will this be restricted to communications to Scottish Government Minister's, or will it include civil servants and local Government. We believe that the definitions of 'lobbying' and 'lobbyists' must be clear and unambiguous from the outset as they will be the basis on which individuals and organisations will determine if they need to be registered.

We have previously suggested that the definition of lobbying should include direct communication to all parliamentarians, but should be clear in expressly excluding circumstances in which organisations or individuals are directly approached with the objective of seeking views, comment or advice on proposed policy or legislation. There is much lobbying at local Government level, and it is suggested that consideration is given to any impact a central Government register will have at local Government levels. In addition, many activities and communications which may be deemed as lobbying are conducted with Government departments through civil servants. Would those who communicate with civil servants for the purposes of lobbying be required to register?

Specific Comments

### **The Need for Change**

#### **Q - Have there been significant changes over the last decade in the way that lobbying is carried out?**

In our view there has been a significant change. Parliamentarians have become more directly accessible through e-mails, social media and the opening of the Scottish Parliament. It must also be borne in mind that the Scottish Parliament was founded upon the principle that the *"...Scottish Parliament should be accessible, open, responsive and develop procedures which make possible a participative approach to the development consideration and scrutiny of policy and legislation..."* It is important to strike a balance so as not to dilute this valued principle but ensuring at the same time that the openness and accessibility is not abused by those engaged in unacceptable behaviour.

**Q-Is there a problem or perceived problem with lobbying in Scotland?**

We are not aware of any significant problem.

**Register of lobbyists**

**Q-To what extent will the introduction of a register of lobbyists address any problem or perceived problem with lobbying?**

This will depend on the extent of the powers conferred on the Registrar, the sanctions which may be imposed and the resources available to ensure that those powers and sanctions are vigorously and actively enforced. It will also depend on the nature (statutory or voluntary) of the register and what information will be required to be registered.

**Q-To whom should such a register apply?**

We are of the view that to apply different rules to different categories of lobbyists may defeat the object of transparency and may raise uncertainties and questions among the public. The Bill currently before the United Kingdom Parliament applies only to third party consultant lobbyists<sup>4</sup>. There has been much debate on this. The consultant lobbyist sector, we suggest, accounts for only a small amount of lobbying activity. Most lobbying activity is conducted by in-house groups. As we have previously suggested, the public is unlikely to differentiate between the different lobbying groups or to understand why one group is required to register whilst the other is not.

**Q-Should it be voluntary or compulsory?**

A compulsory (statutory) register will ensure that all organisations, which carry out lobbying activities, will be treated on an equal basis. A voluntary register may result in the unequal treatment of lobbyists, the development of a two tier profession and fail to achieve the desired level of transparency. Legislation provides a mechanism to set out clear rules, responsibilities and duties applicable to all and ensures equal treatment and may promote public confidence.

**Q-How should it be maintained and who should maintain it?**

We are not in a position to recommend who should maintain and monitor the register beyond suggesting that in order to develop and maintain public confidence, the responsibility to maintain the register should rest with an independent body. This would promote transparency and prevent any perceived or real political interference.

**Q-What level of information should be on it?**

Before finalising what information will be required to be submitted and entered on the register, the purpose of the register should firstly be determined. This would then shape what information would need to be registered. Whatever the purpose, the level of information required should be that necessary for the purposes of transparency and should not include business sensitive information. We would also question the benefit of having to disclose financial information. We noted that Mr Finlay's consultation did not clearly set out any benefit this would achieve or why this would be relevant.

---

<sup>4</sup> Clause 1 Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act.

### **Q-Should thresholds be set for registration?**

If thresholds were to be introduced, then it must be clearly defined what activities will amount to 'lobbying' to ensure that a 'lobbyist' can definitively determine if the threshold triggering the obligation to register has been met. However, we are not convinced that 'thresholds' can provide an accurate, effective or appropriate measure to determine who should register.

It should be noted that the UK Parliament have chosen not to adopt a direct threshold connected to lobbying activity but to place the registration requirement on lobbyists, as defined by the bill, who are registered for VAT, which excludes small businesses.

### **Q-What are the likely cost implications of registration for groups that lobby?**

Any fees which may be imposed should be proportionate to the size and resource of the business concerned. To impose significant fees may deter organisations from registering and stifle legitimate communications with MSP's. However, any fees so imposed must be sufficient to ensure that the register is adequately resourced so as to maintain and develop the infrastructure necessary to ensure reliability and maintain public confidence.

### **Q-What sanctions should there be for failure to register lobbying activity?**

Any sanctions need to be proportionate and enforceable to achieve effectiveness. A number of measures have previously been suggested as sanctions;

- **De-registration.** It is difficult to see the effectiveness of de-registration as a sanction against a lobbyist who has not registered in the first place.
- **Restriction on lobbying activity and denial of access.** There may be difficulties over how a lobbyist would be prevented from contact directly or indirectly with MSPs and how this would be monitored. Would MSP's be obliged to report any contact from restricted lobbyists. What would be the position if a restricted lobbyist were contacted directly by the MSP? However, putting these questions aside, an approach based on (objectively justifiable) denial of access might arguably achieve more transparency than one based on penalties. The European Transparency Register, on which the Society is registered, has only one sanction for non-registration which is a denial of "*a pass to gain access to the premises of the European Parliament*".
- **Criminal sanctions.** The UK Government's Bill makes it an offence to carry on a lobbying activity unless the lobbyist is registered. We have expressed our concerns that Clause 12 of the UK Government's Bill has the effect of creating a strict liability offence for a person to carry on the business of consultant lobbying unless they are registered, or to engage in lobbying activities if their details, as entered in the register, are inaccurate or incomplete. We would likewise be concerned if any proposed criminal sanctions in Scotland had the same effect by providing that a mere omission, error or inadvertency may result in an offence being committed.
- **Lobbying from outwith Scotland.** It is entirely possible to carry out many kinds of lobbying by means of communication from a place outside the UK, therefore it is necessary to consider what kind of disadvantage or sanction can be visited upon those lobbyists who fail to register as we believe that

Article 16(2) (b) of the Services Directive<sup>5</sup> would appear to preclude the imposition of a mandatory registration requirement upon lobbyists from elsewhere in the European Union that have chosen to refrain from establishing a United Kingdom locus. Also, how would this be enforced?

It is suggested that one sanction option would be to apply a sliding scale of a financial penalty for any failure and continued failure to register, similar to that which is imposed on companies who fail to deliver annual accounts and breach their duty under The Companies Act 2006<sup>6</sup>

**Q- How will the register sit alongside the UK register?**

If two separate registers are to exist, then it is important that these are harmonised as much as possible to avoid confusion, complexity and conflict. Rules and procedures should be harmonised so as not to be over burdensome to business.

**Q- What are the implications of a register for (a) the Parliament, (b) MSPs, (c) organisations that lobby and (d) Ministers and civil servants?**

The implications will be dependent on the intended and recognised purpose of the register and what it is to be used for by each of the aforementioned groups.

For those organisations which lobby, it will create additional red tape and costs which may deter interactions with MSP's.

**Other measures**

**Q- Whether other changes could be made to improve transparency in lobbying in Scotland?**

Ministerial diaries should be made public, as too should minutes of meetings between Ministers and MSP's, and Ministers and third parties with limited public interest and commercial exceptions.

**Q-What, if any, changes should be made to Section 5 of the Code of Conduct for Members of the Scottish Parliament?**

No comments

**Q-Should there be a Code of Conduct for lobbyists? Should it be statutory or voluntary?**

If a Code of Conduct is to be statutory or not will depend very much on whether the register is to be statutory and registration is to be compulsory. A Code of Conduct is a method of setting minimum standards and can be a principal method of ensuring and maintaining a consistent level of behaviour by those it applies to. It provides a way of measuring behaviour and performance and is a method of communicating commitment to professional standards and values. For a Code of Conduct to be

---

<sup>5</sup> Services Directive 2006 / 123 EC Article 16(2) Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

... (b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law...

<sup>6</sup> <http://www.legislation.gov.uk/ukxi/2008/497/made?view=plain>

effective it must be seen to be actively monitored and enforced and its adherence reported upon.

Many professional and regulatory bodies have a Code of Conduct to regulate the activities of their respective members and profession. We would suggest that where a lobbyist is regulated by such a Code of Conduct that is of higher standard than that which may be proposed, then it should be those standards and Code of Conduct against which the lobbyist's activities and behaviour should be judged.

Any rules or code of conduct which would affect solicitors who are registered as lobbyists should not conflict with legal professional privilege or the duty of confidentiality.

**LAW SOCIETY OF SCOTLAND**  
**31 JANUARY 2014**