Standards, Procedures and Public Appointments Committee

Lobbying (Scotland) Bill

Written submission received from the Law Society of Scotland

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors.

With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland’s solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

We are pleased to consider and respond to Scottish Parliament’s Standards, Procedures and Public Appointments Committee (the Committee) call for written evidence on the Lobbying (Scotland) Bill. This response has been prepared on behalf of the Law Society of Scotland by members of our Lobbying working party.

General Comments

We note that the Bill was introduced on 29 October 2015. We believe that this Bill is of great importance to all those who regularly and occasionally engage with the members of the Scottish Parliament and Scottish Government Ministers. Given the importance of the Bill, we believe that it deserves to have proper scrutiny, to ensure that it will be an effective and well-functioning piece of legislation, successfully achieving a fair balance between those undertaking lobbying activity, other interested parties and those making important policy and legislative decisions.

We previously responded to the consultation, by Neil Findlay MSP, on a Proposed Lobbying Transparency (Scotland) Bill1 and contributed through written2 and oral

1 http://www.lawscot.org.uk/media/555727/consultation_proposed_lobbying_transparency%20_scotland_bill.pdf
evidence\textsuperscript{3} to the Committee’s Inquiry into Lobbying. We also responded to the recent consultation on proposals for a Lobbying Transparency Bill\textsuperscript{4} and we have engaged with the Scottish Government’s Bill team during the drafting of the Bill.

As recognised by the Committee\textsuperscript{5}, 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. Lobbying activity helps to ensure that parliamentarians are well informed when considering proposed legislation which helps to ensure that the Scottish Parliament introduces laws and measures which have been fully considered and debated.

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

In considering the provisions of the Bill, we are pleased to note that a number of our previous comments and concerns have been taken into account. For example, we are pleased to note that the provisions will extend to all paid lobbyists, those working in-house and individually.

However we do have a number of comments and concerns to put forward in relation to the specific provisions contained within the Bill.

**Specific Comments on the provisions of the Bill**

In relation to section 1, regulated lobbying. We note that a person will be considered as engaging in regulated lobbying activity where he or she makes a communication orally and in person to a member of the Scottish Parliament (MSPs),

\textsuperscript{3} \url{https://www.youtube.com/watch?v=ExjLWiPDZUk&list=PL4l0q4AbG0mkmae5aUjk3d0PkpPSDKsHRD&index=5}
\textsuperscript{4} \url{http://www.lawscot.org.uk/media/557927/lobby-a-consultation-on-proposals-for-a-lobbying-transparency-bill-law-society-of-scotland-response.pdf}
\textsuperscript{5} Standards, Procedures and Public Appointments Committee 1st Report, 2015 (Session 4) Proposal for a register of lobbying activity
members of the Scottish Government or a junior Scottish Minister. This effectively restricts the provisions of the Bill to one singular medium of communication: direct face-to-face. As we have previously stated in earlier responses, engagement with MSPs and Ministers can take place through a number of other channels. It is not clear, and no evidence has been demonstrated, why lobbying through face-to-face communications would be covered by the register but engagement by telephone would not? We believe that imposing such a strict limit on the channels of communications covered risks bringing the system into disrepute, abuse and potential criticism.

The practical effect of restricting the communication to oral and face-to-face, will be that a person may convey orally and over the telephone (for example) views, opinion and advice with the purpose of influencing Government or parliamentary functions (as defined in section 2) and such communication will not be defined a lobbying. However, if that same person communicates the same views, opinion and advice with the same purpose face-to-face, then this will fall to be defined as ‘regulated lobbying’.

We are not suggesting that the register be extended to cover all methods of communication, but we do suggest that further consideration must be given to ensure it covers the most widely used methods, otherwise the policy aim of transparency may be only partially met. Alternatively, or in addition, we would suggest that the emphasis should be more focused on the nature and purpose of the communication.

It is worth noting that the approach taken in the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 is to include any ‘oral or written communications’. This will include e-mails and telephone calls etc.

In relation to restricting lobbying to communications with MSPs, Scottish Ministers and junior Ministers. As we have previously stated, it is also possible to successfully influence public policy decision making through effective engagement with other non-parliamentarians including special advisers and senior civil servants who themselves play a critical role in advising Ministers and devising government policy. We again suggest that consideration be given as to whether engagement with this wider group of individuals should also be included.

We note that section 1 introduces the Schedule to the Bill, which sets out those communications which will not be considered as lobbying. Paragraph 4(b) of the Schedule excludes communications made by a holder of judicial office within the United Kingdom or a member of the judiciary of an international court. As currently drafted, this would allow a holder of judicial office to lobby on any matter without a requirement to register. We would suggest that exempted communications for judicial office holders should be limited to communications relating to court and judicial functions.

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6 Section 2 (3) Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014
Paragraph 5 of the Schedule exempts communications made in the course of a meeting arranged by or on behalf of MSPs etc. It is not clear what the position would be if a lobbyist contacts the MSP by telephone, for example, with the intent of influencing those functions as set out in section 2 (which will not trigger the requirements under the Bill to register) and during the course of that communication is invited in by the MSP to discuss further. Will this still be exempted?

We note that section 1(3) extends the provision of the Bill extra territorially. We would question how this is to be monitored and enforced. In addition, section 42 makes it a criminal offence if a person fails to provide information as required under section 8. How will it be evidenced if a person fails to disclose a communication out with Scotland?

section 3 relates to the ‘lobbying register’. It is not clear within the Bill if the register is to be a public register or not. We note that the Clerk will be under a duty to publish information contained in the register relating to active registrants, and the Clerk may, under section 3(3) withhold publishing information on voluntary and inactive registrants if the Clerk considers that the publication of such information would be inappropriate. The provisions, in our view, provide a wide discretion to the Clerk to determine what information to publish. For example, what information would be considered ‘inappropriate’ how is this to be measured and defined? If the register is not to be public, and given the wide discreions as set out in section 3 for the publication of information, then the policy aim of public accessibility and transparency may be significantly diluted. In addition, how is the information (or the register if it is public) to be published, is this to be on the Scottish Parliament website for example. We would welcome clarification from the Scottish Government.

It is also not clear if the intention is to create two separate registers, or a single register. Section 5 sets out the information regarding the identity of the lobbyist, section 6 set out the information to be provided about the regulated activity. Will the information provided in accordance with clause 5 and 6 be collated into a single register or separate registers? We would welcome clarification from the Scottish Government.

We note section 3 introduces three separate classes of lobbyists: active registrants, inactive registrants and voluntary registrants. These are defined at section 3(6). It is not clear why there are to be distinct and separate categories of registrant. The provisions throughout the Bill relating to each distinct category of registrant, and the respective registration requirements are, we suggest, confusing and ambiguous and may be difficult from a bureaucratic perspective to administer. We would suggest that more consideration be given to an approach similar to that in the Transparency of Lobbying Non-Party Campaigning and Trade Union Administration Act 2014 which effectively only has one category of registrant.7

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7 Sections 3-7 Transparency of Lobbying Non-Party Campaigning and Trade Union Administration Act 2014.
In relation to the information to be provided. We note that section 5(c) imposes a requirement to list the names of partners. Many partnerships have a significant number of partners and may have offices throughout the UK. To require the names of each individual partner for large partnerships may be problematic, as partners may join and leave on a regular basis. This may also be a problem for a company (under clause 5 (b)) with a large number of directors or shadow directors.

Section 6 F (ii) requires that information be disclosed on whose behalf the lobbying activity is being conducted. As we have previously stated, from the perspective of Scottish solicitor firms who may conduct public affairs work on behalf of clients, solicitors have a duty of confidentiality to protect the identity of their clients. The registration of client details as set out in section 6F will breach the Society’s regulations on confidentiality. Confidentiality is a duty which is owed to the client, and ordinarily can only be waived with the client’s express permission. If the client does not agree to waive confidentiality, then effectively the law firm will not be able to engage with MSPs on their client’s behalf.

We also note that there is no provision which sets out the timescales for the publication by the Clerk of the information provided. This would appear to be open to discretion. Section 11(6) states that Clerk must update the register as soon as ‘reasonably practicable’ following receipt of the information return. This, we suggest, may be ambiguous. We would further suggest, supporting the policy intent of transparency and public accessibility that, publication timescales be expressly provided, for example 30 days following receipt.

Section 27 provides that the Scottish Parliament is not bound by the facts found by the Commissioner in relation to a complaint and the investigation thereof. It is not clear if this extends to any conclusion or recommendation of the Commissioner’s report to parliament.

Section 40 provides the Scottish Parliament with the power to censure. However, ‘censure’ is not defined. We would welcome clarification of what sanctions this will include, and would suggest that these be set out on the face of the Bill.

Section 43 provides that the Scottish Parliament ‘may’ publish guidance on the operation of the Lobbying (Scotland) Act. We would suggest that guidance ‘must’ be published to ensure that those proposing to engage in lobbying activity are fully aware of the registration requirements and how these requirements impact on their activities.

Section 44 imposes a requirement on the Scottish Parliament to publish a code of conduct for persons lobbying MSPs. We note that section 44 (3) states that lobbying means ‘making a communication of any kind’. This is inconsistent with section 1 and the provisions throughout the Bill which relate to communications

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8 The Society is aware of one law firm, who undertake Public affairs work as a service to clients, with 400 partners.
9 http://www.lawscot.org.uk/media/229006/consultation_proposed_lobbying_transparency%20_scotland_bill.pdf
made ‘orally’. We suggest that the provisions for the proposed code of conduct be subject to full consultation with all stakeholders.

Call for evidence questions
1. Do you agree that the Bill is necessary and that the establishment of a Lobbying Register is desirable?

As we previously stated, we are not convinced that the Bill is necessary. We suggest that before consideration is given as to whether or not the bill is necessary, the clear aim and purpose of the register needs to be crystallised. There is no clear evidence of lobbying mischief or perceived mischief therefore it is difficult to comment if the policy intent itself is justified or if the Bill is necessary.

However, we do agree that from a public perception a lobbying register may support the principles of transparency, although as referred to above, it is not clear if the register is to be publically accessible, and if so how much information will be available given the wide discretion of the Clerk.

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

As we have referred to above, we are supportive of the principle of transparency, oversight and scrutiny in the legislative and political process. We regularly engage with MSPs, Scottish Ministers and junior ministers. We note that the exceptions of communications contained within the Schedule to the bill include, at paragraph 4(b) ‘a communication….required under any statutory provision or other rule of law’.

The Law Society of Scotland’s statutory objectives are set out within the Legal Services (Scotland) Act 2010. Section 1 of the 2010 Act provides that:

1. Regulatory objectives
   ‘For the purposes of this Act, the regulatory objectives are the objectives of—
   (a) supporting—
   (i) the constitutional principle of the rule of law,
   (ii) the interests of justice
   (b) protecting and promoting—
   (i) the interests of consumers,
   (ii) the public interest generally,
   (c) promoting—
   (i) access to justice,
   (ii) competition in the provision of legal services,
   (d) promoting an independent, strong, varied and effective legal profession’
   (e) encouraging equal opportunities (as defined in Section L2 of Part II of Schedule 5 to the Scotland Act 1998) within the legal profession,

To ensure that we actively meet our statutory objectives, we engage with MSPs, Scottish Ministers and senior civil servants. Schedule 1 of the Bill may, we suggest, exclude the Society’s face to face direct communications with MSPs. The Society may consider its position further as the Bill progresses.

10 http://www.legislation.gov.uk/asp/2010/16/contents
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 agree with this approach. However, there may be instances where a member of an organisation lobby’s on behalf of that same organisation and he or she receives no payment beyond expenses. Will this be considered lobbying activity under the provision of the Bill? We would welcome clarification form the Scottish Government.

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?

One of the key principles from the formation of the Scottish Parliament, detailed in the Consultative Steering Group’s report on Shaping Scotland’s Parliament\textsuperscript{11} 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 to those most impacted, and supports this very important principle. We are pleased to note that consideration has been given to this principle in considering the introduction of a lobbying register and in drafting the provisions of the current Bill.

5. 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?

As referred to above, the differing requirements for the three categories of registrant (active, inactive and voluntary) are confusing and may not be sufficiently clear in communicating their respective requirements to individuals and organisations.

6. 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 agree with the light touch, educative approach, with criminal offences and penalties as a last resort.

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

We would suggest that, as information on lobbying activity is published, there may be an increase in the number of requests made under the Freedom of Information (Scotland) Act 2002 for details of the meetings referred to in the register. This may have cost implications and require increased resource.

\textsuperscript{11}\url{http://www.scottish.parliament.uk/PublicInformationdocuments/Report_of_the_Consultative_Steering_Group.pdf}
8. Are there any amendments that would, in your view, enhance the Bill?

We will give further consideration to the provisions of the Bill following publication of the Standards, Procedures and Public Appointments Committee Stage 1 report and we will consider amendments at that time for suggestion at Stage 2. However, we would suggest that a review clause be included to measure and consider the effectiveness of the Act and to ensure that it is, and continues to, meet the policy intent.

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30 November 2015