INTRODUCTION

This paper is the response of the Association for Scottish Public Affairs (ASPA) the representative body for the public affairs sector in Scotland, to the Standards, Procedures and Public Appointments Committee’s call for evidence on the Lobbying (Scotland) Bill.

RESPONSE TO SPECIFIC CONSULTATION QUESTIONS

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

In our evidence to the Standards Committee’s previous inquiry into this issue, and in our response to the Government’s consultation paper published in May this year, ASPA expressed scepticism about the value of a lobbying register. This was largely on the basis that there have been no allegations of impropriety about the lobbying of MSPs since the Scottish Parliament conducted its last Inquiry into the subject in 2002. However, we note that there appears to be some support for the establishment of such a register, and the view that a register may be beneficial in terms of maintaining and enhancing public confidence in the Parliament and in lobbying, provided that the regulatory regime is proportionate and does not detract from the principle that Parliament should be "accessible, open, responsive, and should develop procedures which make possible a participative approach to the development, consideration and scrutiny of policy and legislation”, as set out in the Bill's Policy Memorandum.

We would also agree with the finding of the Standards, Procedures and Public Appointments Committee’s previous inquiry that "lobbying is a legitimate and valuable activity". We agree, too, with the sentiments expressed in the Government’s consultation paper that “lobbying is a vital part of a healthy democracy”; and that it is “crucial that elected representatives hear a range of views to ensure that they arrive at rounded and well informed decisions”.

As a piece of business regulation imposing additional costs and administration, the Bill should be assessed against the Scottish Government’s Better Regulation principles, including via a Business and Regulatory Impact Assessment.

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

ASPA is the representative body for the public affairs sector in Scotland. It was established in 1998 by public affairs and policy practitioners in Scotland to represent those working both in-house and consultancy. ASPA is a voluntary organisation run by its members and has no paid staff. Membership is corporate rather than
individual, although some members are sole-traders. Its members comprise a wide range of organisations, including large and small firms, membership organisations. ASPA members also cover the private and not-for profit sectors.

As a result, the extent to which the Bill might affect our members varies considerably. Some of our members who are umbrella/membership organisations whose members include small organisations, or who are small organisations in their own right have expressed concern about the extra administrative burden and costs that the Bill would entail. In the case of smaller charities, for example, that lobby only occasionally, the fear has been expressed that this could deter them from lobbying activity altogether. It should also be noted that only small organisations may find the additional administrative burden resulting from the Bill difficult; the extent of this burden depends on the number of staff involved in public affairs and the complexity of the organisation. For example, one of our members is a very large organisation, with thousands of staff across the UK, but has only one person formally engaged in public affairs in Scotland, and only on a part-time basis. Conversely, a trade association or charity might employ 30 or 40 staff in total, of whom five or six might be in public affairs or policy roles.

We do not accept that there will be any lobbyists who will not incur costs as a result of this legislation. We would query the nil amount entered against ‘Lobbyists’ in the table entitled ‘Overall Summary of Costs’ on page 38 of the Financial Memorandum. Sections 34 - 43 make it clear that in Year 1, there is a range of costs from £0 to £4,100, and that in subsequent years, costs range from £0 to £1,200 (not including complaints or legal procedures). Furthermore, the Financial Memorandum also mentions the costs to the Commissioner of dealing with a complaint but does not set a figure for a lobbyist’s costs for that. The Financial Memorandum also lists costs relating to any criminal procedure but does not accept that the lobbyist would bear costs here as well.

Any amendment to extend the scope of information required would increase costs to our members as well as to other parties

Q 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 believe that any register of lobbyists should apply to all lobbyists without exception, on the basis of the principle of having a level playing field.

We have some reservations about restricting registration only to paid lobbying, because of the potential unintended consequences this may cause in certain circumstances, as outlined below. In general terms, we have much sympathy with the proposition that unpaid ‘volunteer’ lobbyists should not generally be required to register. For example, if a membership organisation such as The National Trust for Scotland or RSPB perceived that a particular policy issue might affect it, and then urged its members to write to their MSP about such a policy, it would be unreasonable for those individual members to be required to register. However, one caveat to the practical application of the ‘paid lobbyists only’ principle is that it might
create a loophole for pro bono work – if a professional is giving their lobbying work free of charge, but getting paid for PR advice or providing some other service.

We also believe that there may be a potential problem in terms of lack of transparency and inequity if groups of citizens do not have to register, thus creating a distinction between paid lobbyists and community campaign groups. The latter can be very well funded and well connected, and can be extremely effective. For example, a conservation society, run entirely by volunteers, may undertake a lobbying campaign to oppose the redevelopement of an area. For clarity, we regard such activity as entirely legitimate, and would not wish to restrict it. However, if such a group was not required to register, whereas a firm arguing the opposite case in relation to the same proposal would be required to register, this would create an asymmetry in the degree of transparency about lobbying on the issue. Indeed, it is possible to envisage a hypothetical scenario where a voluntary, citizens’ campaign group (not required to register) received a significant donation from one commercial organisation – say a golf course – opposed to the plans of another commercial organisation – say a wind-farm developer - and only the latter would be required to register.

As we highlighted in our response to the Scottish Government consultation earlier this year, it should be noted that, as it stands, the Bill may affect a very wide range of face-to-face contacts with MSPs, including by individuals who might not usually be considered as ‘lobbyists’. Many people in an organisation, drawn in for their specific technical expertise, may be involved in meeting MSPs. These may also include paid external advisers joining MSP meetings - ranging from solicitors, to planning/environmental consultants, or many other forms of qualified technical contractors with an involvement in some constituency/parliamentary/legislative matter. These examples would be greatly multiplied if the scope were also to widen beyond meetings with MSPs to meetings with civil servants and/or others in government/parliament, or to other forms of communication. The Committee may wish to examine these aspects carefully.

Q 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?

As drafted, and subject to the caveat regarding the administrative burden on small organisations mentioned in our answer to Question 2, above, and to the comments below, we broadly agree that the Bill succeeds 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.

We have noted calls from some stakeholders for the information requirements to be extended, both in terms of the scope of information required, the persons being lobbied, and the nature of the communication.

Taking the last of these issues first, in our response to the Government’s consultation paper that preceded the Bill, we agreed in principle with the Government that capturing direct, face-to-face communication at pre-arranged meetings would be a reasonable and proportionate measure, as is reflected in
Section 1(a) (i), which defines regulated lobbying as being made ‘orally and in person to a member of the Scottish Parliament, a member of the Scottish Government or a junior Scottish Minister’. This remains our view.

We have considered the case for the scope of regulated lobbying to be extended to include emails, letters and phone calls as well as face to face communications. However, we believe that this would be disproportionate; would detract from, rather than enhance, transparency; and would be unworkable in practice. In practice, this would require the recording on the register of literally thousands of items of correspondence or phone calls, many of which would be on minor administrative matters. Nor can we see any practical way of restricting such communication to ‘significant’ communications, because the definition of ‘significant’ is essentially subjective, and those recording information would err on the side of over-reporting, for fear of accidental breach of the legislation. This would result in so much information being recorded in the register that it would be unwieldy, and hence would detract from transparency, and it would clearly place a disproportionate burden on those required to register.

By way of example of the difficulty of defining ‘significant’, one of our members recently emailed the members of the Education Committee to let them know that some students studying a particular module were intending to attend a committee session as part of their studies, and asked if committee members could speak to the students after the formal session. The purpose of the request was partly to ensure the students had as productive and beneficial an experience as possible; and partly also to raise the profile of the project amongst MSPs – the latter for ‘policy’ reasons. Would that constitute ‘significant’ lobbying? Would it even constitute lobbying at all?

Furthermore, if emails or letters were to be included within the scope of the Bill, then, logically, we cannot see how it should not also cover social media, which would add massively to the volume of information to be recorded, as well as being fraught with difficulty around definitions. Suppose an individual mentions an MSP in a tweet or re-tweets an MSP’s tweet about a particular area of policy. Is this ‘lobbying’? It might be reasonable to exclude that from the scope of the Bill if the person’s Twitter biography included the disclaimers ‘tweeting in a personal capacity’ and/or ‘retweets not necessarily endorsements’. However, what if the person in question happened to be the CEO of an organisation with a direct interest in the area of policy under discussion on Twitter?

We have also noted calls for the scope of the Bill being extended to apply to civil servants and Special Advisers (SpADs). We believe that extending the Bill to cover these groups would place a disproportionate burden on organisations who engage regularly with the civil service. We are also unclear as to what risk or problem such an extension would serve to address. Civil servants are there to carry out the policies of the elected government, and lobbying of ministers and MSPs is already covered by the Bill. Civil servants, including SpADs, are also already covered by the Civil Service Code, and the civil service is a professional body that should be trusted, and part of its role is to liaise and consult with all interested parties, often on very technical and complex issues. In many cases, this consultation is by way of consultation papers that are published on the Scottish Government website, and
where the names of the organisations responding to those consultations are also already published.

In terms of the scope of information to be disclosed, we believe that the Bill as drafted is broadly proportionate. We have noted some stakeholders arguing that financial information should be disclosed. We would strongly oppose this on a number of grounds, not least commercial confidentiality. We would also suggest that money spent on lobbying is a very subjective measure. The correct message coming from the right person, who might be an unpaid volunteer, could have far more impact than an extensive and expensive campaign from an organisation that spends large amounts of money on public affairs activity but is not well co-ordinated or thought out. There would also be practical difficulties in defining any financial information that might be disclosed. Would it include the amount an organisation spent internally, i.e. on salaries, offices, and administrative support staff? In the case of smaller organisations and individual consultants, this could, de facto, lead to the disclosure of the salary of an individual or individuals. It would certainly mean the disproportionate disclosure of commercial information which would be helpful to competitors.

As regards the frequency of information to be submitted to the Clerk for inclusion in the register, we think that the six month period set out in Clause 11 of the Bill is probably broadly proportionate. However, some of our members have suggested that that it might be simpler, for administrative reasons, to provide information more frequently, e.g. every three months.

We therefore suggest that active registrants be allowed to provide information more frequently than six months, if they so choose.

Q 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 currently drafted, we believe that the definitions and exclusions on the face of the Bill appear to be reasonably clear, at least to organisations or individuals whose main function is lobbying. However, this may not be the case in practice.

We remain concerned that smaller organisations for whom lobbying is incidental to their main work, or individuals for whom lobbying is only a small part of their role may be put off from engagement with the Parliamentary process for fear of an inadvertent failure to comply with the Bill. We therefore believe that the Parliamentary guidance to be published under Part 4 of the Bill will be vital in ensuring clarity; that this guidance must, insofar as is possible, be written in plain language; and should be available before the registration provisions of the Bill come into force. This will be even more important should the scope of the Bill be extended in any way, e.g. to involve communication by telephone, as discussed in our answer to Question 4, above.

Issues of the need for potential clarification that have been highlighted to us by our members include:
• The scope of government and parliamentary communication may prove difficult to define as this relies on mutual understanding of what had been said. For example, in the course of a meeting where a lobbyist sought to consult a politician on a planned factory closure, issues of government policy may be raised incidentally by the politician – making the meeting potentially registerable.
• The Bill, as now drafted, covers lobbying where a person has to be present and communicate orally. This might cause confusion as an individual may form part of a group identified as meeting a minister or MSP, but not say anything subject to registration.
• Stakeholders are often invited as guests to roundtables or receptions with dozens or even hundreds of other attendees where MSPs and Ministers will be present. This may include occasions where issues of government policy are raised. Where this MSP/Ministerial engagement was not pre-planned, it is not clear if this activity would be registerable.
• While international government bodies are referenced, it is less clear how requirements would be enforced in relation to companies and NGOs from non-UK countries.

Q 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 in principle that any regime requires sanctions for non-compliance. Any sanctions regime should be proportionate, and we are entirely opposed to the notion that criminal sanctions are at all appropriate for the registrations regime: the sort of behaviour that would merit such sanctions are already addressed under other legislation, such as the Bribery Act.

We are particularly concerned at the prospect of smaller organisations being subjected to criminal procedures while going about their duties in an open democracy. We would seek reassurances that complaints will not be put into the public domain until they have been investigated and that any malicious complaints would be dealt with severely as complaints to the Clerk /Commissioner are likely to have a serious impact on an organisations’ business, especially if they are small public affairs consultancies or sole traders. There appears to be no detail in Section 40 around what form a ‘Parliamentary censure’ might take, and the Committee should be aware that such censure might have a significant commercial and reputational impact on lobbying consultancies in particular. In some cases this might amount to the effective deprivation of someone’s livelihood. This is not to argue against the principle of having the sanction of such a censure, but rather to highlight its potential severity, as well as the need for a robust appeal process.

It also appears to us that the powers proposed for the Clerk of the Parliament in relation to the register seem very extensive. For example, Clause 7 (b) allows the Clerk to require registrants to provide ‘such other information provided by the registrant which the Clerk considers appropriate to include in the register’. We appreciate the need for flexibility, but this power appears somewhat open-ended. It is therefore important that there are proper checks and balances built in to the system from the outset.
Q 7. Are there any unforeseen consequences of the Bill as currently drafted?

The premise of the Bill, as it would apply to in-house lobbyists, effectively rests on the idea that the public affairs department – which might only consists of one or two people - undertakes all lobbying or at least has sight of everything relevant going on. This is very often not the case. In a large academic institution, for example, academics often have relationships of their own with politicians, and they will almost always consider those relationships to be based on their subject knowledge or expertise and the provision of advice, and which neither they nor an independent third party observer would see as 'lobbying'. However, in the course of a discussion where they were giving technical advice (i.e. not 'lobbying') they might well get on to talk about some aspect of higher education policy, which would be regarded as lobbying. If the academic who did this failed to notify the public affairs department and hence the lobbying activity was not registered, would the institution in breach of the law?

It might be argued that the above problem could be addressed by ensuring that all staff in an organization should be instructed to notify the relevant public affairs staff in the event of any contact with MSPs. Indeed, most large organisations already have internal policies about staff not talking to the media or to politicians without reference to the public affairs or press teams. However, in the real world, not everyone always reads or adheres to such policies, particularly where the area concerned appears unrelated to the person’s ‘day job’, and we are aware of instances where this has happened. .

It is also possible that by creating a category of registrants, that this role acquires a status that is misunderstood – implying that an organisation needs to be a registered lobbyist to engage. For consultants whose practice is to advise and facilitate (and do not, as a matter of principle, act as an intermediary for face to face communication) – there is a risk that by not needing to register they may be perceived as 'unlicensed', and hence disadvantaged commercially in the eyes of potential clients (who may use the register as a guide).

Our members have also raised concerns at the impact the Bill might have on situations where, for example, firms seek to make MSPs and ministers aware of commercially sensitive information, such as potential job losses or possible major inward investment/economic development, in advance of commercial decisions being taken. If such activity were required to be disclosed in the register, it might deter political engagement within the decision-making phase of important developments: we cannot believe that this is something Parliament would wish. It would also appear from the list of exclusions in paragraphs 13 and 14 of Schedule 1 that an organ of a nation state (a government corporation/wholly owned enterprise) would not be covered as lobbying, even were it to be engaged in commercial (including investment) activity on a competitive basis within the UK. We would welcome clarification of this point. If the interpretation is indeed correct, David might need to register, but Goliath would not.

While the Bill proposes the registration of face to face lobbying, it proposes that the code of conduct for persons lobbying MSPs should be applied to "making a communication of any kind to a member" which could lead to confusion over what
lobbying activity is to be registered and what lobbying activity is subject to the code of conduct.

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

We believe that there should be corresponding changes to the MSPs’ Code of Conduct to ensure that there is full transparency in lobbying, rather than all of the responsibility for registering lobbying activity being put on lobbyists. This would ensure that if a lobbyist failed to register relevant activity – whether deliberately or through oversight, then the activity would be recorded elsewhere. Ministers already publish their engagements, and if there is a problem, real or perceived, with the transparency of lobbying activity, having MSPs similarly declare their meetings could help address this.

The MSPs Code of Conduct currently refers to commercial lobbyists at parts 5.1.3 and 5.1.4. We would propose this is amended to delete “commercial” and simply refer to lobbyists. This would avoid any implication that in-house lobbyists are exempt from these parts.

In part 5.1.5 of the MSP Code of Conduct it requires members to "consider keeping a record of all contacts with lobbyists". We would suggest this could be strengthened to require all members to keep such a record rather than to merely consider it.

It has also been suggested that meetings initiated by MSPs or ministers to be included in the scope of the Bill: as currently drafted, they would be excluded under Schedule 1. Including meetings initiated by ministers or members would appear logical, if the purpose of the Bill is to increase transparency. However, in practice, it may raise problems. For example, many charities have local shops, often staffed by volunteers, and registering a visit from a local MSP may not be notified to central public affairs staff – who would be responsible for registration - until many months after the fact, if at all.

Also, in the event that meetings initiated by MSPs or ministers are included within the scope of the Bill, we suggest that this should exclude ministerial working groups. There are large numbers of such groups and requiring individuals/organisations participating in them to include their meetings in the register would add nothing to transparency, since their membership and minutes of their meetings are already in the public domain. It is also the case that with some professional representative bodies, representation on such groups is via a mixture of paid employees (who might be required to register their activity under the Bill as drafted) and board/council/committee members who serve in an unpaid capacity, and who would not be required to register their activity under the Bill as drafted.

We believe that it would be helpful to include a ‘sunset clause’ in the Bill, and/or to build in an evaluation process to review the costs and benefits of the legislation on a periodic basis.

Clause 15 on the power to specify requirements about the register states that "The Scottish Parliament may by resolution make provision about this Part". We would
prefer to see secondary legislation used to specify requirements about the register in order to provide for proper process and transparency.

Clause 40 on Parliament's power to censure states that the parliament may "censure the person who is the subject of the report" without reference to what measures of censure may be available to the Parliament. We would welcome more detail on what measures of censure the Parliament would intend to use.

Clause 43 on Parliamentary guidance states that "The Parliament may publish guidance on the operation of this Act". We would propose the Bill is amended to state that "The Parliament will publish guidance on the operation of this Act" in order to remove any doubt that such advice will be provided.

Alastair Ross FCIPR
Convener
Association for Scottish Public Affairs
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