

STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

INQUIRY INTO LOBBYING

SUBMISSION FROM THE SCOTTISH CHARITY REGULATOR (OSCR)

1. Introduction

The Office of the Scottish Charity Regulator (OSCR) is established under the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act) as a Non-Ministerial Department forming part of the Scottish Administration. OSCR is the registrar and regulator of charities in Scotland. There are currently over 23,700 charities registered in Scotland.

OSCR has been asked to give evidence to the Standards, Procedures and Public Appointments Committee's inquiry into Lobbying.

This note is intended to outline OSCR's position before the Chief Executive appears before the committee. In forming our view we have considered our overall vision, which is of *charities you can trust and that provide public benefit*, underpinned by the effective delivery of our regulatory role.

It is part of the Scottish Charity Regulator's role to increase public confidence in charities through effective regulation, and through increasing the public accountability of charities. We, therefore, have an interest in any proposal which has the potential to assist in the achievement of these aims.

2. Issues

Charities and campaigning

The 2005 Act, in line with the legislative position in England and Wales, stipulates that charities cannot campaign to advance a political party. Since the Scottish Charity Regulator took up its powers, there has not been a significant or widespread problem with charities getting involved in inappropriate political activity.

In anticipation of the forthcoming referendum on independence, we produced new guidance setting out what this legal restriction means in that context – to date we have received a very small number of concerns about charities' activities in this connection.

That guidance clarifies that campaigning on issues is a legitimate activity for charities where:

- The activity is advancing the charitable purposes of the charity;
- The governing document does not prohibit such activity;
- The activity is not advancing a political party
- The charity trustees can demonstrate that they are acting with due care and diligence and in the charity's best interests.

This means that, for many charities, lobbying the Scottish Parliament will be a legitimate activity.

The principle of accessibility

As many giving evidence to the Committee have highlighted, one of the founding principles of the Scottish Parliament is the accessibility of decision makers. There is the potential that the creation of a register of lobbyists would undermine this principle. This might happen both because of the direct impact of organisations having to register as well as the more unintended consequences of organisations, including charities, becoming reticent to engage because they are unsure about the rules, or they are unwilling or unable (due to lack of resources) to undertake the work necessary to register. We believe that whatever decisions are taken, it is important that this founding principle is taken into account, as this accessibility contributes to a healthy and vibrant public policy debate.

A register of lobbyists

The key proposal being considered in this inquiry is the establishment of a register of lobbyists. The aim of this register would be to contribute to transparency of lobbying related to the Scottish Parliament. We note that some charities have submitted evidence supporting the establishment of a register, and that others are less enthusiastic.

The charity sector in Scotland is extremely diverse. Four out of five charities on our register have an annual income of under £100,000 and 63% have an income of less than £25,000. One key point we would want to endorse is that the impact of any regulatory change is likely to be different depending on the size and nature of the charities in question: many will have a very limited ‘professional’ capacity to take part in lobbying activity.

One of our strategic objectives in the current corporate plan is to “minimise the burden of regulation on charities wherever possible”. This means that we seek to ensure, as the lead regulator for the charity sector, that any further regulatory burden placed on the charity sector is proportionate and does not dissuade charities, who have a legitimate basis for doing so, from engaging with the Scottish Parliament.

Keeping the diverse landscape of charitable organisations in mind is key when seeking to ensure that the benefit arising from additional regulation is not outweighed by the burden placed on the sector by the regulation itself. This could be a direct burden where charities have to register. However, it could also be an indirect burden through the uncertainty a register might create. For instance, depending on definitions adopted, it is possible that small organisations would have to devote a disproportionate level of resources and time on understanding how they might have to engage (or not) with the register.

So, while OSCR recognises that a register could be a route towards transparency with respect to lobbying, there are issues related to burden that need to be considered. Any move towards developing a register should only be made once these potential impacts are understood and mitigated wherever possible.

Definitions and thresholds

One way of diminishing the regulatory burden is to provide a clear definition of “lobbying” and “lobbyists as well as any statutory exemptions. There are currently very different interpretations of what constitutes lobbying activity, and who or what a lobbyist actually is. Clarity around these issues would help minimise uncertainty. If this was linked to very clear guidance, then this would allow charities to engage appropriately and with minimal cost implications.

The Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 gained Royal Assent on 30 January 2014. As others have indicated, a great deal of controversy surrounded the passage of the legislation and it may not therefore provide the ideal template for any statutory measure here. This Act provides that ‘Consultant Lobbyists’ who are paid to lobby the UK Government on behalf of a third party must register. If there is to be a similar provision in a Scottish Act it might be helpful, for organisations operating both North and South of the border, if the definition of ‘Consultant Lobbyists’ was the same in both jurisdictions. There are around 800 cross-border charities, usually quite large in scale, that could be affected by any disparity in definitions.

The establishment of thresholds could be a way of minimising any burden, particularly on small charities. However, there might be issues about the establishment of such thresholds. If a spend-based threshold was used, the data relied on would probably be historical, and this could affect the efficacy of such a threshold. Likewise, a time-based threshold would be difficult because of the way in which it would need to be self reporting which may do little to inspire public confidence in the process.

Compulsory or voluntary

It is OSCR’s belief that if there is to be a register of lobbyists, it would need to be compulsory if it is to play the necessary role in terms of transparency.

Overseeing the register

If a register is to come into force, then its monitoring and “policing” should be properly resourced and any sanctions should be proportionate and enforceable. There are some potential resourcing implications for OSCR: the introduction and operation of a register may generate new queries, complaints and concerns. We would want to keep that under review.

Section 5 of the Code of Conduct for Members of the Scottish Parliament

OSCR notes that the publication of a register of lobbyists is only one route towards creating a more transparent system of lobbying. The suggestion of changing the Code of Conduct to facilitate the publication of diaries of MSPs (and perhaps introducing similar measures for senior officials) as another route towards transparency would seem to have some merit and could be explored as an alternative, or indeed as an addition to, a register of lobbyists.

3. Conclusion

Transparency in public life is important. The proposal of a register of lobbyists is one route towards making lobbying transparent. If such a register is to be created, it is essential that it is clear who is required to register and what they are required to register. Proportionality comes into play and any negative impacts across the sectors affected should be mitigated wherever possible. This would be important both in terms of minimising the regulatory burden for charities as well as ensuring that the principle of accessibility to the Scottish Parliament is upheld.

**SCOTTISH CHARITY REGULATOR
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