

STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

INQUIRY INTO LOBBYING

SUBMISSION RECEIVED FROM SCOTTISH INFORMATION COMMISSIONER

I understand that the SPPA Committee is conducting an inquiry into lobbying, and the requirement for Scotland to hold and maintain a register. I also understand that it has been suggested that the Scottish Information Commissioner (SIC) might be one of the bodies which could manage the register.

I have attached a document setting out what I see as the main issues, which the Committee may find useful. You will see that many of them are already recognised by the Committee, but hopefully, raising them from the point of view of the SIC, it will add depth to the considerations.

The document is drawn largely from communication I and my officers had with Neil Findlay in September of last year, so as a courtesy I have also sent him a copy of this letter.

If you or the Committee have any questions or require any clarification of the matters raised, please do not hesitate to contact me, or Sarah Hutchison my Head of Policy and Information.

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SCOTTISH INFORMATION COMMISSIONER
19 FEBRUARY 2014

Introduction

1. This document sets out the Scottish Information Commissioner's (SIC) contribution to the Committee's deliberations on the establishment of a register of lobbyists for the Scottish Parliament. The aim of the submission is to raise the Committee's awareness of some of the practical issues that might need to be addressed in the operation and enforcement of the register, and to offer suggestions about how they might be addressed.
2. The SIC suggests that she might have a role, but doubts that the aims would be best served if she were the holder of the register. This document sets out the thinking about why this is, highlighting questions about which the Committee may find it useful to seek the views of others.

Intent and purpose

3. As the SIC understands it, the purpose of a register is to create greater transparency, openness and accountability in relation to lobbying of members of the Scottish Parliament, Ministers in the Scottish Government and relevant public officials. While information in the form of the register is important as a tool to achieve that purpose, the central issue would appear to be **conduct in public life**. That would suggest that the holding and enforcement of the register might benefit from close alignment to organisations that are already concerned with administration of corporate functions for MSPs etc. and standards/ conduct in public life.

Regulation and enforcement

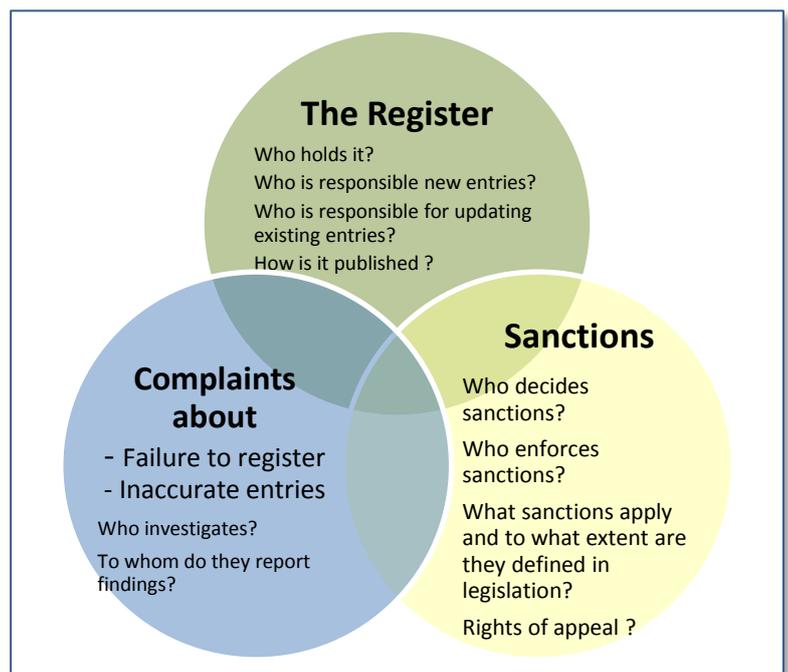
4. The SIC suggests three broad areas that would need to be addressed in order to achieve the stated intention, summarised as shown, and indicating some potential resource implications.

The Register

Standards and Conduct Scotland 1: REGISTER OF LOBBYING ACTIVITY

Who should hold the register?

5. It may be helpful to link this question to the purpose. Are there similar registers or published documents that serve a similar purpose (i.e. that give information relating to the conduct of MSPs etc.)? If so, it may be that a lobbyists' register should be held by the same body which is responsible for holding those registers and documents. If that body were a Scottish public authority for the purposes of FOI law, publication of the register would then be covered by the SIC's duties and powers in relation to



publication schemes. This may be of some reassurance to the Committee as a route to ensuring the register is publicly available.

6. In terms of any subsequent bill drafting, the issue the Committee may wish to consider is whether the regulatory body should be named in primary legislation, or whether it would be more appropriate to do so through secondary legislation.

Who is responsible for new entries?

7. The question is, to what extent should Parliament's intent in terms of what and who is included in the register, be defined in statute? Would the register need to be supported in the same way that the MSP register of interests is, through guidance and a governing code? The SIC suggests that these considerations should focus on the information sought and which it is in the public interest to publish about lobbyists, rather than trying to register activity alone. Proportionality is a factor that, if misjudged, could create an unnecessarily bureaucratic burden.
8. How the register is updated would need to be considered, as the choice of methodology will have resource implications. Will it be by updating a published document in real time, simply requesting changes to be made by the holders by email, completing a registration form and so on? Again speaking with bodies that already manage similar documents might be helpful.

Who is responsible for updating existing entries?

9. This question gives rise to many of the same issues as the previous question, but the underlying issue is whether it should be defined in statute, subject to an underpinning code of practice or set of instructions.

How is it published?

10. This question is pertinent to the issue of resources for administering a register.

Complaints

11. The issues here relate to what can be complained about. Is it complaints about failure to declare activity (or to update entries), or complaints about impropriety in declared activity? Put another way, will they be about failure to complete the Register (accurately or at all), or dissatisfaction about the lobbying activity of those declaring or those lobbied?
12. As regards alleged impropriety, for example by Ministers, there is already a Ministerial Code and an established route for complaining. Complaints about lobbyists are more difficult. If it is a general complaint, then the organisations concerned may have their own complaints procedures, or types of professions may have an industry/ profession regime (e.g. legal practitioners). If complaints amount to serious allegations about bribery, criminal activity, breach of procurement legislation or involve issues such as whistleblowing, the Committee may need to look at interactions with other relevant legislation.
13. More pertinent is complaints about failure to register. Going right back to the purpose of the register and the general context of conduct, the SIC suggests looking at what already exists to investigate conduct in public life to see

whether this is an additional similar function for the same organisations. Just as Ombudsmen from time-to-time take on investigations of new areas of complaints, those who investigate conduct may also be appropriate to investigate failure to register/ update. They would, presumably, already have procedures in place which could be adapted. There would still need to be a consideration of the financial implications of complaints for any body.

Sanctions

Who decides sanctions?

14. A number of different models exist in relation to this: e.g. the investigating body, a separate body such as a Commissioner or a Committee/ Tribunal. Again looking at current models for how sanctions are decided in relation to conduct in public life may be a helpful starting point. The Committee may find it helpful to talk the Standards Commission about this

Who enforces sanctions?

15. The key questions are: who enforces, and what powers do they have?
16. By way of example, the SIC's enforcement powers are enshrined in statute. As can be seen from sections 51-53 of the Freedom of Information (Scotland) Act 2002, they are strong and clear, and they are the necessary ultimate sanction which ensures bodies comply with SIC decisions. This is also the case for many other Regulatory type bodies. Again, referring to how this is currently provided for in relation to conduct could be a useful starting point.

To what extent are sanctions defined in legislation?

17. It may be helpful to consider how this is covered in other 'conduct' regimes: e.g. if it involves fines is there a cap, could it involve restrictions in relation to future lobbying and so on? Sanctions would need to be proportionate and realistic for both the enforcers and the organisations covered.

Rights of appeal

18. In the spirit of fairness and natural justice what mechanism is there to appeal or challenge decisions about failure to register or the sanctions applied?