

## SPICe Briefing

# Lobbying (Scotland) Bill

08 December 2015

15/79

### Denis Oag and Francesca McGrath

On 29 October 2015, the Scottish Government introduced the Lobbying (Scotland) Bill in the Scottish Parliament. The Government's stated purpose of the Bill is to increase public transparency of contacts between lobbying organisations and elected Members by introducing a register of lobbyists to include those who engage directly with Members of the Scottish Parliament and with Scottish Ministers.

This briefing considers the background to the Bill, including the prior consultation by the Scottish Government on its proposals for a Lobbying Bill.



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## EXECUTIVE SUMMARY

In July 2012, Neil Findlay MSP lodged a proposal for a Members' Bill to require certain individuals and organisations who lobby MSPs, Scottish Ministers or relevant public officials, either on their own account or on behalf of third parties, to record relevant information about their lobbying activity in a published register.

However, in June 2013, the Scottish Government announced that it would introduce legislation of its own to give effect to the proposal in Mr Findlay's Member's Bill. As a consequence, Mr Findlay's Bill was unable to proceed.

Between 30 September 2013 and 10 January 2014, the Scottish Parliament Standards, Procedures and Public Appointments (SPPA) Committee carried out an inquiry into lobbying.

In conducting this inquiry, the Committee recognised the importance of lobbying as a legitimate and useful means of informing the thinking of Members and Ministers on policy matters.

The Committee was also clear that there was no evidence that either politicians or lobbyists in Scotland had acted inappropriately and that there were already extensive checks and balances in place. Rather, any requirement for a lobbying register would be based on the need, "... to act as a deterrent for any inappropriate activity in the future" (Standards, Procedures and Public Appointments 2015, para 35)

Another key consideration for the Committee was that any action taken on lobbying should not have the effect of inhibiting engagement with the Parliament or Government. Rather, such action should try to balance the principles of openness and accessibility with the need to enhance the transparency of contacts between elected members and lobbying organisations.

This inquiry reported with 17 recommendations in February 2015. These recommendations included that:

- there should be an online register of significant lobbying activity in Scotland
- the registration process should not inhibit engagement with Parliament
- registering, and updating the register, should be free
- individuals acting in a personal capacity should not need to register
- the register should be targeted at organisations who have significant contact with MSPs or who invest significant amounts of money into lobbying MSPs on behalf of others
- specifically, an organisation needs to register if it is an organisation which:
  - includes commercial lobbyists
  - regularly arranges meetings with and/or holds events involving MSPs more than a prescribed number of times in the previous 12 months
- the register should detail lobbying activity rather than being a list of names of lobbyists

- the register should have proportionate sanctions. It should give organisations a fair opportunity to address inadvertent breaches before considering any public censure
- the Parliament should introduce a code of practice, mirroring the Code of Conduct for MSPs, for those who lobby that includes advice on expected standards of behaviour.

In January 2014, the UK Parliament passed [the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014](#) (the UK Lobbying Act). The provisions of this Act apply only to the UK Government and not to devolved governments or local government or Members of Parliament (MPs).

On 29 May 2015, the Scottish Government issued a consultation on its proposals for a Lobbying Bill. The majority of the 68 responses to the consultation were supportive of the introduction of a lobbying register (Lobbying (Scotland) Bill Policy Memorandum, para 4).

On 29 October 2015, the Scottish Government introduced the Lobbying (Scotland) Bill and accompanying documents in the Parliament.

The Government's stated aim for the Bill is to, "...introduce a measured and proportionate register of lobbying activity". (Lobbying (Scotland) Bill Policy Memorandum, para 2)

The Bill adopts a number of the SPPA Committee's recommendations, including:

- establishment of a register requiring those engaged in paid lobbying activity to register
- enabling voluntary registration for those not engaged in regulated lobbying
- providing for free registration and updating of the register
- attempting to strike a balance between capturing information on lobbying which increases transparency but which does not inhibit engagement with the Parliament.

However, the Bill departs from the Committee's recommendations in some respects. In particular it has:

- not adopted the Committee's recommendation for a threshold for registration based on frequency of contact to ensure only those engaged in significant levels of lobbying are captured by the legislation. Instead, it creates a test of "paid lobbying"
- not sought to capture lobbying activity related to support for cross-party groups or for hospitality for Members which do not involve direct communication
- included, on the face of the Bill, criminal sanctions for certain areas of non-compliance in contrast to the 'light touch' approach advocated by the Committee.

The Bill, as introduced, has been criticised for:

- not including lobbying of senior civil servants, special advisers (Spads) or senior officials from Government agencies
- including only face to face communications rather than a requirement to include all forms of communication between lobbyists and those they lobby.

# BACKGROUND

## LOBBYING AND LOBBYISTS

The origin of the terms 'lobbying' and 'lobbyist' is unknown and there is no agreed definition of what constitutes lobbying. It is generally understood to relate to the activities of individuals and organisations which are intended to affect public policy by influencing the legislative and policy decisions of political representatives and other holders of public office.

The [UK Public Affairs Council](#) (UKPAC) uses this definition:

“Lobbying means, in a professional capacity, attempting to influence, or advising those who wish to influence, the UK Government, Parliament, the devolved legislatures or administrations, regional or local government or other public bodies on any matter within their competence”.

Similarly, there are various definitions of “lobbyist”. UKPAC uses the following definition:

“Lobbyists are those who, in a professional capacity, work to influence or advise those who wish to influence the institutions of government in the UK in respect to:

- the formulation, modification or adoption of any legislative measure (including the development of proposals for legislation);
- the formulation, modification or adoption of a rule, regulation or any other programme, policy or position;
- the administration or execution of a governmental or other public programme or policy within the UK (including the negotiation, award or administration of a public contract, grant, loan, permit or licence)”.

The [Sunlight Foundation](#), an organisation with the stated aim of, “...making government and politics more accountable and transparent to all” Offers the following definition of lobbyist:

“The term “lobbyist” should refer to any individual who, as a part of his or her employment or for other compensation, engages in more than one lobbying contact (oral and written communication, including electronic communication) with an elected official, his or her staff, or high and mid-ranking government employee, for the purpose of influencing the formulation, modification, adoption, or administration of legislation, rules, spending decisions, or any other government program, policy, or position”. (Sunlight Foundation)

Lobbying activity can be conducted through a number of direct or indirect communication methods including personal letters, telephone and emails; forms of social media, such as twitter and facebook; providing briefing material to Members and organising meetings and rallies.

Lobbyists come from various sectors, including:

- individual members of the public
- groups of constituents
- local businesses
- organised pressure groups or campaigners
- commercial organisations.

For many, the term “lobbying” is viewed negatively as attempts by powerful individuals or organisations to gain advantage by exerting inappropriate influence on policy decisions. Lobbying, therefore, can be seen as synonymous with impropriety or even corruption.

This view has been reinforced in recent years by a series of, often media initiated, lobbying scandals in which Members of Parliament have been filmed or recorded offering or agreeing to use their position to influence policy on behalf of third parties in return for payment or party donations. (See, e.g. [BBC News \(2013\)](#)).

In the report on its review of lobbying transparency (2013), the UK wide [Committee on Standards in Public Life](#) argued that public concern with lobbying arose out of, “...the confluence of money, influence and power and vested interests. The Committee went on to observe that, “... it is often not known who is influencing decisions or what may have been done to achieve the influence. This arises from suspicions:

- that some lobbying may take place in secret – people do not know who is influencing a decision and those who take a different view do not have the opportunity to rebut arguments and present alternative views
- that some individuals or organisations have greater access to policy makers, because they or someone they know works with them, because they are significant donors to a political party or simply because they have more resources
- of the way lobbying can be carried out; either because it is being accompanied by entertainment or other inducements or because there is a lack of clarity about who is financing particular activities. (Committee on Standards in Public Life, 2013)

A 2011 [YouGov poll](#) for the Sunday Times (UKPollingReport 2011) found that 54% of people in the UK think that lobbyists have too much influence in politics and 75% would support a register of all meetings between lobbyists and ministers.

While there have been no accusations of inappropriate lobbying activities in Scotland, there remains a question of public transparency in the dealings between lobbyists and elected members and their officials.

## **UK LOBBYING ACT**

Partly in response to incidents like those described above and to the statement by the Prime Minister, David Cameron, that lobbying was the, “...next big scandal waiting to happen”, ([Porter 2010](#)), a UK Bill to provide for a register of consultant lobbyists who lobby Ministers of the Crown and permanent secretaries, was introduced in the House of Commons in July 2013. This Bill also aimed to tighten regulation on campaign spending during election periods and to strengthen the legal requirement on trade unions to keep their list of members up to date.

The Bill received criticism during its passage through Westminster for a number of reasons, including that:

- it defined lobbyists too narrowly, ignoring the vast majority of lobbyists who operate at Westminster
- it was concerned with only a very narrow group of possible lobbying targets – Ministers, permanent secretaries and special advisers; not MPs or civil servants

- the information that lobbyists are required to disclose is very limited - not who is funding the lobbying, or how much, when, or on what subject
- it could restrict campaigns by bodies that are not party political, such as charities
- the arrangements for monitoring compliance are weak
- the sanction of £7,500 is unlikely to act as a major deterrent to anyone seeking to evade the law.

The Bill, now [the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014](#) (the UK Lobbying Act), received Royal Assent in January 2014. Its provisions apply only to UK Government Ministers and senior civil servants and not to devolved governments, local government or MPs.

The UK Lobbying Act states that an organisation must join the Register and submit quarterly information returns if it is carrying on the business of consultant lobbying – i.e. if both of the following apply:

- the organisation intends to make communications personally to a UK government minister, permanent secretary or equivalent, relating to the functions, policy or legislation of the British Government on behalf of a paying client, or have received payment to do so at a later date
- the organisation is VAT-registered (generally, businesses with an annual turnover exceeding £79,000).

For the purposes of the Act, communications that require registration comprise oral or written communications made personally to a Minister of the Crown or permanent secretary relating to:

- government policy
- legislation
- the award of contracts, grants, licences or similar benefits
- the exercise of any other government function.

Since its passage through Westminster, the UK Lobbying Act has continued to receive criticism for its narrow focus on ministers and permanent secretaries, for requiring only those working for lobbying firms whose main business is lobbying to register, and for not including a requirement for a code of conduct for lobbyists.

## UK LOBBYING REGISTER

Part 1 of the UK Lobbying Act created the first statutory register of lobbyists applicable to the UK Government and Parliament.

In March 2015, the [Office of the Registrar of Consultant Lobbyists](#) published the first [register of consultant lobbyists](#). The register had 98 entries on 29 September 2015.

## IRISH LOBBYING ACT

The UK Act has been contrasted unfavourably with a similar act recently passed by the Oireachtas– [the Regulation of Lobbying Act 2015](#). The Irish Act is seen as capturing:



“...a much wider group of lobbyists – the Act requires registration from in-house lobbyists, not just third party lobbyists. It encapsulates a much wider scope of policy-makers: whereas the UK act only covers ministers and permanent secretaries, the Irish act covers backbench MPs. Finally, the Act also includes a statutory code of conduct for lobbyists”. (Anderson 2015)

## **PROPOSED MEMBERS’ BILL**

On 6 July 2012, Neil Findlay MSP lodged a proposal for a Members’ bill to require certain individuals and organisations who lobby MSPs, Scottish Ministers or relevant public officials, either on their own account or on behalf of third parties, to record relevant information about their lobbying activity in a published register. A [public consultation](#) on the proposed bill ran from 9 July to 7 November 2012. The consultation achieved 491 responses of which 417 were collected via an online survey.

Analysis of the consultation responses by Mr Findlay’s Parliamentary office found that, overall, respondents were broadly in favour of the proposals.

Mr Findlay’s Bill received broad support in the Parliament (31 MSPs) and, in May 2013, he lodged a final proposal for his Bill. Subsequently, in June 2013, the Scottish Government announced, under Rule 9.14.13 of the Parliament’s Standing Orders, that it would introduce legislation of its own to give effect to the proposal in Mr Findlay’s Member’s Bill. This procedural rule prevents a Members’ bill progressing and, as a consequence, Mr Findlay lost the right to introduce this Bill.

## **STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE INQUIRY**

On 30 September 2013, the Scottish Parliament’s Standards, Procedures and Public Appointments (SPPA) Committee issued a call for evidence on its own inquiry into lobbying, seeking to build on an earlier inquiry carried out by the Session 1 Standards Committee ([1st Report 2002](#)) which recommended the introduction of a statutory registration scheme for commercial lobbyists and a voluntary code of conduct for all lobbyists.

The SPPA Committee’s inquiry aimed:

“To examine whether there is a problem, either actual or perceived, with lobbying and, if so, how this can most effectively be addressed; to what extent a register of lobbyists would help with this process, who such a register should cover and how it would be operated in practice; and whether other steps might be needed to improve probity and transparency in this area”. (SPPA Committee, 2015)

In its [report](#), published in February 2015, the SPPA Committee described lobbying as a, “legitimate and valuable activity” which is, “a crucial part of a healthy democracy”.

The Committee went on to state that:

“The reality is that the more voices that inform the Government and the Parliament’s thinking in Scotland, the more informed we are to legislate, to develop new policy and to scrutinise. For this reason, and on the basis that the Parliament is founded on principles of openness and accessibility, lobbying should be actively encouraged”. (Standards, Procedures and Public Appointments Committee 2015 p5, para 5).

The Committee also found that an extensive range of checks and balances on lobbyists, and on those being lobbied, already existed and that these served to ensure propriety of behaviour (SPPA Committee, 2015, p9, para 26 and Appendix 1)

However, the Committee also recognised that the words “lobbying” and “lobbyist” have negative connotations for some people. It therefore recommended a range of measures aimed at striking a balance between promoting transparency and facilitating participation at Holyrood.

These recommendations included that an online register of lobbying should be established for commercial lobbying organisations and that it should also capture organisations with in-house lobbyists which have sustained contact with politicians or where these organisations spend significant money employing staff to seek to influence MSPs. An in-house lobbyist is an employee of a person, partnership or company whose lobbying activity is a significant part of their duties or whose lobbying activity along with that of other employees would amount to a significant part of one staff member's duties.

For non-commercial lobbyists, an activity-based threshold for registration would be applied which would exempt those who do not meet MSPs on a regular basis and so would not trigger the criterion of significant lobbying activity. However, the Committee chose not to specify the number of meetings which would trigger this criterion.

The Committee explained its decision to recommend a contact threshold:

“Using an activity based threshold creates a level playing field, requiring those that lobby in-house to register as well as those that represent third parties. Organisations would need to register based on what they do, not who they are. To keep the threshold high enough to avoid small or under resourced organisations from being caught, it should be only those undertaking ‘significant lobbying activity’ that need to be on the register”.  
(SPPA Committee, 2015 para 90)

The Committee also recommended that:

- the Register should be simple to maintain and free to register or update
- upkeep and oversight of the register by a registrar should have a very limited impact on the public purse
- the Register should not inhibit engagement; if it does, the Parliament should be able to change it quickly
- individuals acting in a personal capacity, including those engaging with MSPs as part of their constituency work and collections of individuals such as those involved in campaigns, should not need to register
- the Register should detail lobbying activity as opposed to simply being a list of names of lobbyists
- the Parliament should introduce a code of practice, based on the rule on lobbying in the Members’ Code of Conduct ([Vol 2, Section 5](#)) for lobbyists that includes advice on expected standards of behaviour
- information on lobbying published by the Parliament should be easily accessible to the public and provided in open data format.

Overall, reaction to the SPPA Committee's proposals on transparency in lobbying has been more positive than reaction to the UK lobbying legislation. Particularly welcome were the proposals to include details of lobbying rather than just providing the names of lobbyists, the endorsement of an open and accessible digital register and the inclusion of in-house lobbyists in the register.

Nevertheless, there have been questions over, for example, how effective any register can be if upkeep costs have to be kept low as a priority and on what constitutes significant contact with MSPs. Spinwatch also criticised the Committee's silence on the question of financial disclosure as, "...perhaps the most disappointing aspect of the SPPA report. Spinwatch said:

"When the Scottish government agreed to legislate on lobbying transparency in 2013 and took over Neil Findlay's private members bill the intention to capture the financial resources devoted to lobbying was a core part of the package being proposed".  
([Spinwatch](#), Feb 2015).

The Committee invited the Scottish Government to use the Committee's recommendations as the basis for its proposed legislation on lobbying.

## SCOTTISH GOVERNMENT CONSULTATION

On 29 May 2015, the Scottish Government issued a [consultation](#) on its proposals for a Lobbying Transparency Bill. The Government indicated that it was broadly supportive of the SPPA Committee's recommendations and that these were consistent with the Government's three core policy principles for underpinning reform in this area, and for assessing the merits of any lobbying registration regime. These were:

- to **avoid any erosion of the Parliament's principles of openness, ease-of-access and accountability**. Reforms must adhere to the Parliament's founding principles and not restrict the legitimate activities of non-party political organisations engaging in public policy
- that any proposed measures must **complement existing frameworks** - for example, the Interest of Members of the Scottish Parliament Act 2006, the MSP Code of Conduct, the Ministerial code and public registers of ministerial meetings
- to deliver a **proportionate solution, simple in its operation and which commands broad support** within and outwith the Parliament. (Scottish Government, 2015a)

The consultation document provided background to the Government's proposals and sought responses to 20 questions on various aspects of lobbying. The closing date for responses to the consultation was 24 July 2015. Responses to the consultation are considered below.

Following the consultation, the Scottish Government published two reports:

- [A Consultation on Proposals for a Lobbying Transparency Bill: Analysis Of Written Responses](#) (Produced by Reid-Howie Associates on behalf of Scottish Government Social Research, 21 October 2015)
- A Consultation on Proposals for a Lobbying Transparency Bill: Analysis Of Written Responses [Research findings](#) (25/2015)

The following section of this briefing draws on these reports as well as directly on the [consultation responses](#) themselves.

# RESPONSES TO THE SCOTTISH GOVERNMENT CONSULTATION

## Lobbying register

The consultation asked if respondents agreed that: there is a need for a public register of lobbyists; whether it should comply with the Government's three core principles (as outlined above); and that registration should be free. The consultation also asked respondents whether the onus to register should lie with individuals who lobby as part of their work, or with organisations who lobby.

### *Support for a register*

The analysis of responses to the consultation carried out by [Reid-Howie Associates](#) (2015) on behalf of the Government found that the majority of respondents agreed that a publicly available register of lobbyists should be introduced in Scotland (Reid-Howie para 3.25). Nevertheless, the authors reported that several respondents qualified their support for the register with comments to the effect that such a register:

“... must be “proportionate”; equitable and fair; universal; balanced by other measures; compliant with the core principles; not burdensome; focused on organisations; and covering “lobbying” rather than just “lobbyists”.

However, not all respondents were convinced of the need for a statutory register. In its consultation response, the [Law Society of Scotland](#) argued that the case for a register has not been clearly made and that, therefore, “...it is difficult to determine with any certainty if this indeed should be introduced”.

The [Confederation of British Industry Scotland](#) (CBI Scotland) also rejected the need for a lobbying register. In their response to the consultation they said:

“...with no evidence provided of a problem with lobbying in Scotland, we are sceptical about the case for creating a register and believe it would be disproportionate.” (CBI Scotland)

Similarly, Scottish Council for Voluntary Organisations (SCVO) argued that it did not support the introduction of a lobbying register. However, they recognised the desire of some for a register and went on to say:

“...we would not oppose the introduction of a register of lobbyists provided that it is light touch, does not cause an undue bureaucratic burden for the third sector organisations that complete it and is balanced by an increased responsibility on MSPs to be transparent”. ([SCVO](#))

The Federation of Small Businesses (FSB) also argued that no case has been made for a register and that it would be an unnecessary burden on small businesses:

“The FSB believes that an additional regulatory burden should only be placed on an industry to solve a problem which it has not been possible to address through other means. Not only has none of the less burdensome options, such as publishing MSPs’ diaries, been tested, the FSB is not aware of any evidence that inappropriate lobbying has been any sort of problem at Holyrood. Therefore, we do not believe the case for extra red tape, in the form of statutory registration or regulation, has been made”. ([Federation of Small Businesses](#))

## *Core principles*

The majority of respondents to the consultation said they supported the Government's three core principles. Reid-Howie's report, (Reid-Howie para 3.6), stated, "...most all of those who expressed a clear view and around two thirds of all respondents stated or implied agreement [with the core principles].

While also agreeing with the Government's core principles for a lobbying register, the Law Society went on to say that, "...any principles that are intended to underpin the introduction of any future register should be clear in setting out what the purpose of the register actually is and what it is seeking to achieve". The Law Society also cautioned that:

"The Standards Procedures and Public Appointments Committee considered the introduction of a 'register of lobbying activity'. However, what is being proposed is a 'lobbyist register'. The Scottish Government must be clear in stating and defining which it is proposing to introduce, a register listing lobbying activity, or one requiring details of the lobbyist".

This position was echoed by SCVO which, in its response to the consultation, agreed that the principles were largely successful in defining what the introduction of a register should not do:

"However, the principles don't successfully define what the register is seeking to achieve and what its impact will be. For example, statements that the register should increase public confidence in politics and increase transparency should be incorporated into the core principles. They should be explicit in stating that any register is free to those who complete it" ([SCVO](#)).

## *Fees*

A majority of respondents agreed that there should be no charge for entry onto the register or for updating entries (Reid-Howie para 3.44). For example, the [Alliance for Lobbying Transparency](#) said:

"Lobbying is an essential part of a healthy democracy, when it is open to public scrutiny. There must be no barrier, financial or otherwise, to anyone wanting to engage with decision-makers in a transparent way. In addition, we believe that for a system to attract public confidence it must be entirely independent of lobbyists, which would not be the case were it be industry-funded".

## *Who should register?*

The consultation asked whether both consultant lobbyists and in-house lobbyists should be required to register and whether any types of in-house lobbyist should be exempt from registration. It also asked whether respondents agreed with the Government that paid lobbyists should be required to register and whether the register should allow for voluntary registration by lobbyists.

Most respondents said that the register should include both consultant and in-house lobbyists and that, "...no types of in-house lobbyist should be exempt". (Reid- Howie, para 4.8)

The Royal Society of Edinburgh (RSE), for example, said that it:

"... doesn't see that there should be a distinction between consultant lobbying and in-house lobbying, so if a register is established, both should be treated equally for consistency. Otherwise, certain types of lobbyists could be perceived as having privileged status when lobbying on similar issues" ([RSE](#)).

Similarly, the Salvation Army's response argued strongly for the inclusion of in-house lobbyists on the grounds that, otherwise, it would cast a shadow on the work of such lobbyists, giving the impression that they were less legitimate than consultant lobbyists. The Salvation Army said:

"We believe it is extremely important that in-house lobbyists are required to register as well as consultant lobbyists. The Salvation Army, along with many other charities and voluntary sector organisations, employs individuals whose task is to engage with the Scottish Parliament in connection with issues that concern us as an organisation and in the interests of the people we serve, who are mainly the poorest and most marginalised. If in-house lobbyists are not required to register, their work could appear illegitimate and their ability to influence public policy could be diminished. The effect would be to silence the voices of the people whom the voluntary sector represents. Furthermore, since lobbying in support of our key activities and issues is a necessary part of achieving our charitable purposes, to exclude in-house lobbyists from the register would frustrate such charitable purposes"([Salvation Army](#)).

CBI Scotland considered that there should be no exemptions from registration for charities and trade unions. They said:

"If companies, trade associations and lobbying consultants are to be included, we can see no clear rationale for why the government would treat charities and trade unions differently given that these groups can often have extensive lobbying operations"([CBI Scotland](#)).

#### *Paid lobbyists*

In its consultation document, the Scottish Government (2015b, paras 36 and 37) was clear that only lobbying activity undertaken by those paid to do so should be included in the register. This would, therefore, exclude unpaid volunteers from any registration requirement. Most respondents agreed with the Government on this point. However, several respondents, while agreeing with the Government's view that paid lobbyists should be included, were concerned that any definition of paid lobbyists should be clear and that more consideration needs to be given to voluntary lobbyists. For example, the Scottish Council for Development and Industry (SCDI) said:

"SCDI agrees that paid lobbyists should be required to register, but not that all voluntary lobbying should be excluded. There are some very well resourced and active voluntary lobbyists at a national level. There should be a level-playing field" ([SCDI](#)).

Similarly, the [Association of Professional Political Consultants](#) (APPC) stated their general agreement with the Government:

"... APPC supports the Scottish Government's view that a register should cover all who are paid to lobby, without discriminating between those who lobby as consultants and those who lobby as part of their in-house paid employment".

However, APPC also considered that more thought should be given to lobbying undertaken by volunteers:

"We would however point to very impactful and intensive lobbying campaigns which may be undertaken by volunteers, but are co-ordinated professionally.

Accordingly, we believe further work is required by the Scottish Government to fully explain why volunteer lobbyists should not be required to register. We would point out that volunteer campaign groups can be very common and be very influential. We also

highlight that the concept of individual registration does raise the prospect of a volunteer fulfilling that role for an organisation and thus avoiding registration” ([APPC](#)).

Others also offered qualified agreement. The British Medical Association (BMA) Scotland, for example, said in its response:

“...the BMA is concerned that elected BMA members and secretariat staff could be inappropriately affected by moves to establish a register. Limiting the requirement for registration to those who are paid specifically for their lobbying activity would go some way towards addressing this issue, but whether secretariat staff who may have contact with ministers and government officials could need to register remains ambiguous” ([BMA Scotland](#)).

### *Voluntary registration*

While most respondents agreed with the proposal to include an option for voluntary registration, this view was not universally held. For example:

“We are unconvinced by the argument for allowing voluntary registration. It does not seem to fit with the principle of ensuring a proportionate – but compulsory – system which avoids an unnecessary burden, to then encourage individuals who are not covered by the Bill to voluntarily register and declare their activity. Where certain individuals voluntarily register, this may in fact have the effect of panicking others in similar positions into believing that they too must register, even when they are not covered by the Bill ([Association of British Credit Unions Ltd](#)).

### *Onus to register*

The SPPA Committee recommended that the onus to register should be on organisations rather than individuals. In its consultation response, the RSE agreed with the Committee and said:

“...we would strongly urge the Scottish Government to reconsider its proposed approach of requiring individuals to register. This approach would result in one organisation having multiple registrations. It would also mean that there would be more administration involved in the register, as each time someone changed jobs the register would need to be amended” (RSE).

In its response, the Salvation Army also agreed with the SPPA Committee that the onus to register should rest primarily with organisations. They said:

“We agree should be on the individual who lobbies on behalf of an organisation. However, we also believe that the organisation should have some responsibility for requiring/encouraging their lobbyists to register. Organisations should only use registered lobbyists” ([Salvation Army](#)).

### *Who and what should lobbying activity cover?*

The consultation asked whether respondents agreed that the register should cover the lobbying of MSPs and Ministers and what types of communication should be defined as lobbying activity.

The Government’s proposals in respect of, “...what constitutes a lobbyist and what is meant by lobbying activity” received criticism from a number of respondents, including the Law Society of Scotland, which argued that:

“These terms need to be clearly and unambiguously defined in any future legislation, as they will be the basis on which individuals and organisations will determine if they need to be registered” (Law Society of Scotland, 2015).

In its response, Invicta Public Affairs called for a Scottish lobbying register to cover the lobbying of Government Ministers and senior civil servants (Permanent Secretaries) and not Members. This would reflect the provisions in the UK Lobbying Act. Invicta argued:

“It is Ministers and permanent secretaries who ultimately have decision-making responsibilities which have a direct impact on the public. Furthermore, we have not had the same problem in Scotland as has been experienced in the UK parliament with high-profile backbenchers who have been providing their services on a freelance basis to firms and third parties. The inclusion of the lobbying of MSPs would be unhelpful intrusion into their role, and could potentially be detrimental to the work they carry out in constituencies and on behalf of constituents in Scotland. It may lead to MSPs’ feeling unable to emerge and therefore being less informed” ([Invicta](#)).

### *Face to face communications*

The type of communications to be covered engendered a variety of views but with most agreeing that the register should cover direct face to face communication through pre-arranged meetings and events ([Reid-Howie para 4.98](#)).

However, some, including the Law Society of Scotland, criticised the Government’s position that engaging with an MSP by telephone, email or video-conferencing would not require to be registered. The Law Society described this omission as, “...a loophole [which] risks bringing the system into disrepute”. (Law Society of Scotland, 2015)

While the SPPA Committee did not specifically recommend that only face to face communications should be captured in the register, its response to the Alliance for Lobbying Transparency’s call for a wide range of communications, including telephone conversations, electronic communication and letters, suggest that it supported this position.

The Committee commented:

“Whilst this level of detail is doubtless positive in terms of transparency, in the interests of keeping a register low-burden, recording all oral communication, including chance meetings or quick conversations at events, would prove a daunting prospect. In addition, with such wide requirements, the chance of inadvertently missing a particular communication out when updating the register is high”. (SPPA 2015, p26, para 105)

Other respondents also criticised proposals that lobbying should include only face to face communications. [Melanoma Action and Support Scotland](#), for example, argued that video conferencing and Skype are excellent substitutes for face to face meetings and can only be arranged in advance and should be included.

This view was supported by North Lanarkshire Council which said, “We agree that face to face communication should trigger a requirement to register, however, it is not clear why a video conference or indeed a telephone call would not also be included”.

The organisation Spinwatch, went further and saying that, “...at a minimum, a lobbying disclosure register that has any pretence of actually making the process of lobbying transparent must also include (the fact of, rather than the content of):

- written correspondence and telephone communications between lobbyists and Ministers and MSPs;
- face to face meetings, written correspondence and telephone communications, between lobbyists and senior civil servants (e.g. above Grade 6 on Civil Service scale);



- face to face meetings, written correspondence and telephone communications between lobbyists and special advisors;
- face to face meetings, written correspondence and telephone communications between lobbyists and regulators / officials in NDPBs or agencies ([Spinwatch](#)).

Various other consultation responses called for the register to be extended to include government special advisers (Spads) (e.g. Interfaith Scotland; Electoral Reform Society Scotland and Public Relations Consultants Association (PRCA))

The SPPA Committee also criticised several of the policy proposals set out in the Scottish Government's consultation as departing from the recommendations in the Committee's report (SPPA Committee Convener's Letter to Minister for Parliamentary Business, 9 July 2015). In particular, the Committee called for an explanation of why, in its consultation proposals, the Government proposed:

- not to create a threshold for registration based on frequency of contact and instead to create a test of "paid lobbying"
- to require registration before contact with an MSP
- to require individual lobbyists rather than lobbying organisations to register
- to include more extensive criminal justice sanctions than the Committee thought appropriate to achieve a light touch approach.

## Lobbying information

Respondents to the Scottish Government's consultation were asked what kind of information each lobbyist should be required to provide on registration and whether lobbyists should be required to provide a return detailing their lobbying activity.

Typically, respondents felt that the register should include information about:

- the lobbyist
- the lobbyist's organisation/employer
- who the lobbying was being done on behalf of
- the nature of the lobbying activity, and
- relevant financial information, including the source of funds and spend on lobbying activity (Reid-Howie, para 5.6).

Transparency International UK (TIUK) agreed with inclusion of the information listed above but would also include in the register:

- the names of all lobbyists who have lobbied on behalf of an organisation/employer within the previous quarter
- expenditure on lobbying, including gifts and hospitality on politicians and public officials
- information on any public office held previously (during the past five years) by any employees who are engaged in lobbying
- a description of any use of secondments or advisers placed within government to influence policy ([TIUK](#)).

### *Frequency of returns*

The Government's consultation asked for comments on how often registrants should make returns on their lobbying activity. There was no overall agreement on the most appropriate

frequency for such returns, though several respondents warned that making detailed returns too frequently would, "... create a time and cost burden for individuals and organisations that could act as a barrier to engagement for smaller organisations ([BMA](#)).

Most agreed with the Government that six monthly returns would be appropriate. However, the RSE argued for an annual report while the Forum of Scottish Claims Managers (FSCM) argued for returns to be submitted at no more than 2 month intervals. In the view of FSCM:

"Leaving update requirements to a 6 month period could mean that lobbying activity will not appear on the register for up to 12 months after that activity occurred which does not lend itself to any claim of openness or transparency" ([FSCM](#)).

Another respondent added the suggestion that returns should, "... be triggered by a reminder from the register's administrator rather than relying on the organisation to remember" ([Homes for Scotland](#)).

## **Code of Practice/Conduct**

The Scottish Government asked whether respondents thought that the Parliament should introduce a Code of Practice setting out guidance on the registration regime and expected standards of behaviour, and whether there should be the facility to record subscription to other Codes of Conduct.

Most respondents supported the need for a Code of Conduct and agreed that this would help to achieve transparency and clarity. Analysis of consultation responses by Reid-Howie listed the benefits which respondents thought would accrue from a Code of Conduct:

"It was argued that [a Code of Conduct] would enable them to understand their obligations and the behaviour expected (particularly if there was a possibility of sanctions), and that it would provide examples of good practice. A few respondents suggested that a Code of Practice would help to ensure transparency and public confidence, and reinforce the Code of Conduct already in place for MSPs. (Reid-Howie, Para 5.46)

Some respondents pointed to potential disbenefits of producing a Code of Conduct including that such a code could be viewed as a set of minimum standards or that it could undermine existing codes and commitments. (Reid-Howie, Para 5.47)

### *Industry Codes of Conduct*

The consultation asked if the register should include the facility for lobbyists to record whether they subscribe to any industry codes of conduct. Many respondents were positive about this proposal as they believed that recording this information would help to increase public confidence in lobbying. The Electoral Reform Society Scotland, for example, said that, "It promotes recognition of and hopefully compliance with positive codes of conduct" ([Electoral Reform Society](#)).

Invicta Public Affairs agreed that this information should be recorded and that organisations such as themselves would continue to operate to its own code of practice alongside a Scottish Government Code of Practice. Invicta went on:

"However, an industry wide Code of Practice introduced by the Scottish Government should seek to ultimately replace individual codes practiced by organisations" ([Invicta](#)).

## Oversight, sanctions and amending the registration regime

The consultation also asked respondents to comment on who should be responsible for upkeep and oversight of the Register; on what enforcement mechanisms and sanctions would be appropriate and on whether the Parliament should be able to adjust the scope and operation of the registration regime once established.

### *Upkeep and oversight*

Respondents varied in who they considered should be responsible for the upkeep of the register. Suggestions included giving responsibility to, "...an independent body such as the Office of the Registrar of Consultant Lobbyists" (Invicta) or an, "...existing body such as the Scottish Information Commissioner; Standards Commission for Scotland; Public Standards Commissioner" (Scottish Trades Union Congress), to the clerks of the Scottish Parliament's SPPA Committee ([Association of British Credit Unions Limited](#)).

### *Enforcement mechanisms and sanctions*

The SPPA Committee in its report considered that a "light-touch approach" to enforcing compliance with the new regime, "... should be adopted wherever possible, with an emphasis on educative measures and informal resolution". (Para 139) The Committee felt that stronger sanctions should only be applied where there is evidence of any of the following:

- a) financial impropriety;
  - b) deliberately providing misleading information;
  - c) deliberately withholding information; and/or
  - d) repeated failures to comply with the requirements of the register
- ([SPPA Committee 2015, Para 139](#))

Several consultation responses supported this position. The CBI, for example, said:

"We would also question whether the threat of criminal penalties strikes the right balance (whether the responsibility for registering ultimately lies with individuals or organisations) particularly given that laws already exist to govern inappropriate behaviour, such as through the Bribery Act. The government should identify the gaps in current legislation that new criminal sanctions would address, otherwise there is a risk that new measures look disproportionate" ([CBI](#)).

### *Parliament's powers to change regime*

While many respondents agreed that the Parliament should have the power to change or 'fine tune' the registration regime to ensure that it works as intended, others were more cautious. The PRCA, for example, considered that flexibility within the legislation should be necessary only, "... if there were fundamental flaws in the Register but – at this point in the legislative process – we believe these can be identified and addressed from the start" (PRCA).

Invicta were concerned that too many changes would impact adversely on lobbyists:

"Any registration regime which is introduced should be operational for the duration of a parliamentary term. Review of the regime should take place no more than once per parliamentary term, as any more than this would create undue and unnecessary interference within the lobbying industry" (Invicta).

# LOBBYING (SCOTLAND) BILL

On 29 October 2015, the Scottish Government introduced the Lobbying (Scotland) Bill in the Scottish Parliament. The main aim of the Bill is to improve public awareness of direct, face to face, paid lobbying activity directed at MSPs and Government Ministers. To this effect, it proposes to establish a lobbying register, and accompanying framework, for those who undertake regulated lobbying of MSPs and Ministers.

The Bill, as introduced, has taken into account some of the concerns raised by the SPPA Committee in relation to the proposals in the Scottish Government's consultation. In particular, the Bill would require organisations to register rather than individuals, it would also capture in-house lobbyists and it would not require registration before a first meeting, providing instead a 30 day 'period of grace' to register following a first instance of lobbying activity. The Bill also allows voluntary registration for those who intend to engage in regulated lobbying in the future, and provides for free entry onto and updating of the register.

However, the Bill departs from the Committee's recommendations in some respects. In particular it maintains its focus on face to face engagement, excluding other forms of communication, and does not provide for a threshold for registration based on frequency of contact for non-commercial lobbyists, instead employing a 'trigger' based on paid lobbying. Neither has the Bill sought to capture lobbying activity related to support for cross-party groups or for hospitality for Members which does not involve direct communication. It has also included, on the face of the Bill, criminal sanctions for certain areas of non-compliance, arguably in contrast to the 'light touch' approach advocated by the Committee.

The Lobbying Bill is in 5 parts containing 51 sections and 1 schedule. The Bill seeks to establish a register of lobbying, together with an administrative framework. It sets out detailed procedures for the submission, investigation, reporting and withdrawal of complaints on non-compliance with the registration provisions. It also includes provisions which enable the Parliament to make certain changes to the operation of the registration regime.

Part 1 of the Bill is concerned with defining the main concepts in the Bill, including:

- defining the meaning of 'regulated lobbying' as oral, face to face engagement with MSPs and Ministers in relation to their Government or parliamentary functions (s1). This would include 'in person' meetings, events, other hospitality but exclude all other forms of communication such as letters, emails, telephone calls and video conferences.
- for the purposes of section 1, defining "Government or parliamentary functions" as including: the development, adoption or modification of any proposal related to primary or secondary legislation or to any policy of the Scottish Ministers or other Scottish Administration office-holders; the making, giving or issuing by Scottish Ministers or other Scottish Administration office-holders of contracts, agreements, grants, financial assistance, licences or other authorisations. These functions also include anything done in relation to any matters raised in proceedings of the Parliament.

Part 2 of the Bill relates to the establishment and administration of the lobbying register and will:

- require the Clerk of the Parliament to establish and maintain a register containing information about three categories of person:
  - active registrants; inactive registrants and voluntary registrants (s3)

- make provision for the content of the lobbying register (s4), to include information about the identity of the registrant (s5) and information about the regulated lobbying activity (s6).
- impose a duty to register on lobbying firms and other organisations with in-house lobbyists who engage in regulated lobbying but who are not yet registered as active registrants (under s10).
- provide the Scottish Parliament with the power to modify the provisions in sections 4 to 14 of Part 2 of the Bill (s15).

Part 3 of the Bill provides arrangements for oversight and enforcement, including:

- placing a duty on the Clerk to monitor compliance with the Bill (s16) and providing the Clerk with powers to require information (by serving an ‘information notice’) relating to compliance (s17).
- Providing the Scottish Parliament with the power to make further provision about information notices.
- creating a criminal offence of failing to provide the required information on or before the date specified for those served with an information notice (s21). A due diligence defence is provided under this section.
- establishing an enforcement regime, with the Clerk of the Parliament (the Clerk) overseeing registration, including monitoring compliance.
- giving the Commissioner for Ethical Standards in Public Life in Scotland (the Commissioner) a duty to investigate and report on admissible complaints into non-compliance or breaches (s22), including the power to call for witnesses and documents (s32 and s33) and to take evidence under oath (s35).
- provision of criminal offences relating to registration and information returns, punishable by a fine at level 3 (£1,000) on the standard scale (s42). A due diligence defence is also provided under this section.

Part 4 of the Bill provides that:

- the Parliament may publish guidance (s43) on the operation of the resulting Act and that it must publish, and from time to time review, a Code of Conduct (s44) for lobbyists. “Lobbying” in relation to the Code of Conduct is defined more widely than regulated lobbying, to include communication of any kind by a lobbyist to an MSP in relation to the MSPs’ functions.

Part 5 of the Bill is titled “Final Provisions” and contains various provisions including:

- provision for offences committed by bodies corporate and, in certain circumstances, by specific individuals who played a role in the offence (s45).
- the processes the Parliament must follow to make resolutions under the Bill (s47).
- the application of the provisions of the Bill to a trust (s48).

The Schedule to the Bill lists the forms of communication which are **not** to be considered lobbying activities.

## PROVISIONS IN THE BILL

The following section of this briefing looks at the provisions of the Bill in more detail and, where relevant, draws on the views of those giving evidence to the Committee on the Bill. The briefing does not cover all aspects of the Bill for which readers should refer to the Bill itself and to accompanying documents.

### PART 1: CORE CONCEPTS

#### Regulated lobbying

Section 1, read together with the Schedule to the Bill, seeks to define what constitutes “regulated lobbying” and what does not. A person engages in regulated lobbying if they make an oral communication in person to an MSP or member of the Scottish Government, including a junior Scottish Minister. This communication must relate to Government or parliamentary functions (see below), must be made on behalf of someone else (Para 1 of the schedule excludes communications made on an individual’s own behalf) and the person making the communication must have been paid for so doing (Para 2 of the schedule excludes communications not made in return for payment). Such communications include communications made in the course of business or other activity by an employee, director, partner or member of a company (s1(1)(b)).

#### *Evidence to the SPPA Committee – face to face communication*

In a round-table evidence session, Willie Sullivan (Electoral Reform Society Scotland) said that face-to-face communication should not be the only trigger for registration. He argued that email exchanges and other forms of digital communication should also be subject to registration. If it proved to be too onerous to record every such communication, it would be enough to record that such contacts were made (SPPA Committee [OR 12 Nov 2015](#), Col 8).

Similarly, Neil Findlay MSP, criticised this aspect of the Bill for being, “...based in the 18th and 19th centuries” in that it failed to recognise modern forms of communication such as the telephone, computer and conference calls (OR 12 November 2015, Col 9). Dr William Dinan (Spinwatch) agreed saying that, “...the exclusion of electronic communication, including emails, does not make sense” (Col 19). This point was further reinforced by Professor Raj Chari (Trinity College Dublin) who said that he had never before seen a lobbying Bill which restricted registration requirements to oral and in-person communication. He said, “It pains me to say that even the UK recognises that lobbying takes place by way of written communication” (OR 12 November 2015, Col 21)

In contrast, Richard Maughan (CBI Scotland) argued that the Bill in its present form, “...seems to strike a decent balance when it comes to proportionality” (OR 12 November 2015, Col 16). In particular, Mr Maughan welcomed the focus on face-to-face contact (OR 12 November 2015, Col 17) as a basis for registration. He questioned, however, how the Bill would deal with ‘incidental contacts’ between members of staff and politicians in the course of an MSP’s daily work (OR 12 November 2015, Col 17).

The Committee Convener, Stewart Stevenson, commented that, “...on the basis of informal discussions [...] it seems that the bill is unlikely to survive in its present form in applying only to oral communications” (OR 12 November 2015, Col 10).

In a question to the Minister for Parliamentary Business, Joe FitzPatrick, Cameron Buchanan asked whether lobbyists might choose to avoid making their lobbying public by switching to forms of communication other than face-to-face meetings (OR 19 November 2015, Col 10). The Minister expressed the hope that this would not be the case. He said that:

“Rather than being about probity, this is about transparency, so I hope that those who are lobbying will embrace that increased transparency as a good thing that values their contribution to our democratic processes rather than something that they will try to avoid” (OR 19 November 2015, Col 12).

The Minister said that, in his view, that danger arose, “...only if we were to bring in an onerous framework” (OR 19 November 2015, Col 12).

In response to a question about extending the range of information to be recorded in the register to include other forms of communication, the Minister made a distinction between what constitutes a ‘trigger’ for registration (currently only oral, face-to-face communications) and what might be recorded in the register. He said;

“It would depend on where a change was made. If a change was made so that an email was a trigger, that would significantly increase the number of people who would have to register. [...]

The other approach would be to include written communication that related to an already registrable event” (OR 19 November 2015, Col 13).

He went on to caution that, in such circumstances, care would be required to ensure that recording this increased level of information should not be too onerous on lobbyists to provide or on the Clerk to record (SPPA Committee OR 19 November 2015, Col 14). He pointed out that section 15 of the Bill (Power to specify requirements about the register) would provide the Parliament with the power to make such a change should it choose to do so.

#### *Evidence to the SPPA Committee – targets of lobbying*

Andy Miles (Scottish Environment LINK) argued that one of the “blind spots” in the Bill is that it fails to recognise that the targets of lobbying are often civil servants or Government special advisers (Spads) and not MSPs or Government Ministers (OR 12 November 2015, Col 5). Peter Duncan (Association of Professional Political Consultants) concurred with this view, saying that, “...it would be logical for senior civil servants and special advisers to be included” (OR 12 November 2015, Col 7). This view was echoed by others including Steve Goodrich (TIUK) (Col 10), John Downie (SCVO) (Col 13) and Dr William Dinan (Spinwatch) (Col 18).

In his evidence to the Committee, the Minister said that the Government had considered including other persons in the definition of lobbying but that it had had to consider the need to “strike the right balance” and not to impose a resource burden greater than that envisaged by the Committee in its report on lobbying. He considered that, as it is MSPs and ministers who make decisions, rather than civil servants or advisers, the Bill achieves the correct balance (OR 19 November 2015, Col19). The Minister said:

“We are not saying that there are no other types of lobbying, which is why the code looks at unregulated lobbying, but face-to-face lobbying where one can see the whites of somebody’s eyes is of a different scale” (SPPA Committee OR 19 November 2015, Col 20).

Patricia Ferguson MSP suggested to the Minister that parliamentary liaison officers (PLOs) should, like ministers, be separately identified as targets of lobbying. Ms Ferguson believed that, like ministers, PLOs have a specific role beyond their role as an MSP and that, if they, “... were not specifically covered by the bill, lobbyists might see them as almost fair game as a conduit to ministers” (OR 19 November 2015, Col 22). The Minister undertook to check to ensure that the Bill has not inadvertently created a back door for lobbying.

## *Evidence to the SPPA Committee – paid communication*

Dr William Dinan (Spinwatch) raised a concern that, while the Bill has adopted the trigger of paid lobbying, it is, "...completely silent about the question and magnitude of payment." He went on to suggest that some kind of financial disclosure is needed. He said that this should involve, "...the amount of resources that are devoted to influencing decision making, but we get no sense of that with the current proposals (OR 12 November 2015, Col 19). Richard Maughan warned that financial disclosure is not straightforward and that it threw up questions over commercial sensitivity relating to fees and salaries. He also said that, while financial disclosure seems like a good thing on the face of it, it:

"...can be a blunt instrument and it is not clear what we learn from it. It does not reveal anything about the quality of the lobbying or the influence that is achieved". (Col 23)

Peter Duncan (APPC) agreed saying:

"The fact that an organisation is willing to spend £100, £5,000, £23 or whatever tells us nothing about the effectiveness of the representation" (Col 24).

Neil Findlay MSP took the opposing view, saying that people are, "...interested in whether a lobbyist spends a fiver or £500,000". He went on to say that banding can be used to get around commercial sensitivity to some extent, "Giving the financial information is key, because it reveals the extent of the lobbying" (SPPA Committee OR 12 November 2015, Col 23). Willie Sullivan (ERS Scotland) argued that spend is important because, "It tells you how much staff time is being spent on the activity. It tells you the power of that side of the argument" (Col 24).

On the trigger of paid lobbying, Peter Duncan said that it excluded some very effective unpaid lobbyists from the register:

"You need to look at the definition of the term "paid lobbying", because it excludes some very effective influence that is exerted by volunteers and enthusiasts, who want to take a case across Scotland and make a difference. Very often they make a difference, but they would not be captured by the bill" (OR 12 November 2015, Col 25).

The Minister, in giving evidence to the SPPA Committee, said that the Government had considered two sorts of threshold for registration - the Committee's stated preference for a threshold for registration based on frequency of contact and one based on paid lobbying. On the former, he said:

"We were concerned that having a threshold of a number of meetings over a year would provide a significant potential loophole whereby an organisation could manage the number of meetings in order not to trigger that threshold. Even if there was no intention not to trigger the threshold or to avoid it, an organisation could fail to register significant acts of lobbying. There could be one meeting that was of great significance and which would not require to be registered. That was our concern" (SPPA Committee OR 19 November 2015, Col 23).

The Minister was asked whether consideration had been given to using the level of expenditure on lobbying as a trigger for registration. He said:

"Using the level of expenditure as a trigger would have been pretty easy for third-party lobbyists and consultant lobbyists. They will have a line and will know exactly how much they have spent on a particular campaign, so using that would be dead easy for them, but it would probably be slightly more difficult for the in-house lobbying of big organisations, and it would potentially be quite onerous for some smaller organisations" (OR 19 November 2015, Col 25).



The Minister went on to say that there was scope in the Bill for the Parliament to extend registration requirements to include financial information should it choose to do so (OR 19 November 2015, Col 26).

## **Government or parliamentary functions**

For the purposes of the Bill, Government or parliamentary functions (s2) encompass a range of activities including the development, adoption or modification of any primary or secondary legislation or any policy of the Scottish Ministers or other office-holder in the Scottish Administration. Government or parliamentary functions also include government contracts and agreements, grants and financial assistance and the granting of licences or other authorisations. Activities of MSPs within the Parliament are also covered such as speaking, lodging motions or voting on a matter raised in Parliament, as is representing the interest of persons outwith the Parliament (s2(1)(f)). As a 'catch-all', section 2(1)(g) adds, "any other function" of Scottish Ministers, a Scottish Administration office holder or MSP.

## **Communications not to be considered lobbying**

The Schedule to the Bill lists the forms of communication which are **not** to be considered lobbying activities. These include:

- communications by individuals on their own behalf (Para 1)
- communications not made in return for payment (payment includes payment of any kind whether or not directly or indirectly related to the communication) (Para 2)
- communications made in proceedings of Parliament (e.g. witnesses giving evidence) or required by statute (Para 4)
- meetings initiated by a member or minister (Para 5) (except where this is arranged in response to a request from a person attending the meeting) (Para 6)
- communications in Cross-Party Groups (Para 7)
- communications made for journalistic purposes (Para 8)
- communications by political parties registered under Part 2 of PPERA (Para 9)
- communications by or on behalf of UK judicial office holder or judicial member of an international court (Para 10)
- communications by or on behalf of Her Majesty (Para 12)
- Government and Parliament communications (para 13).

### *Evidence to the SPPA Committee – communications not to be considered lobbying*

Professor Raj Chari (Trinity College Dublin) strongly agreed with the Bill that those not being paid to lobby should not be required to register. ([OR 12 November 2015](#), Col 20)

Peter Duncan (Association of Professional Political Consultants) told the Committee that it did not make sense that meetings initiated by an MSP should be excluded from registration requirements (OR 12 November 2015, Col 7).

Professor Raj Chari agreed with this point saying that it was, "...going down the wrong path." Referring to Canadian legislation on lobbying, he said that:

“In its first iteration in the late 1980s and 1990s, the Canadian legislation provided that, if a minister called a lobbyist in, the person did not have to register as a lobbyist. That was a big loophole. The Canadian Government realised that it was a loophole and as a result amended the legislation later. My advice would be not to start with something that will probably go bad”. (OR 12 November 2015, Col 22).

The Commissioner, in his evidence to the Committee, made a similar point, using the example of an event which would not be regarded as a registrable communication - attendance by lobbyists at events held at Holyrood where these are arranged by or for an MSP. He said:

“I wonder whether it is right that any communication that takes place in the course of one of those events should be exempt from being considered to be lobbying. It strikes me that, if I were a lobbyist, I would regard those sorts of events as quite a good opportunity” (OR 19 November 2015, Col 8).

In his evidence to the Committee, the Minister responded to a question about how it might be possible to capture or demonstrate who initiated contact. The Minister said that this would require a degree of self-regulation, “... in that the MSP or minister would know if they had initiated the meeting”. He said:

“The aim is not to hide anything but to preserve the ability for MSPs and ministers to get external third-party policy information without the person whom they have asked to come in being required to register” (OR 19 November 2015, Col 14).

He went on to say that, of the ten models of lobbying regulation the Scottish Government had considered, only 3 (USA, Canada and Slovenia) did not include a provision on initiation. The Minister said that this suggested that such a provision was, “... overwhelmingly considered to be appropriate” (OR 19 November 2015, Col 15).

The Commissioner also questioned whether the exemption for journalism was not too vague and whether some publications such as trade or professional journals might not be considered to adopt a lobbying line on occasion (OR 19 November 2015, Col 9).

The Committee asked the Minister to comment on the situation where a cross-party group follows-up a group meeting with a request to meet a minister to discuss issues which arose in that cross-party group meeting. The Minister said that, if it was the convener of the cross-party group who met with a minister, that would not be covered as the convener would be an MSP (Col 18). However, if non-MSP members requested and held a face-to-face meeting with a minister, that would be separately registrable. Asked whether this would require the cross-party group to register, the Minister stated that such an event would be registrable by the organisation the person represents, not by the cross-party group. That said, he undertook to give further consideration to this point (OR 19 November 2015, Col 19).

## **PART 2: THE LOBBYING REGISTER**

### **The register**

Part 2 of the Bill gives the Clerk of the Parliament a duty to establish and maintain a register of lobbying activity (s3) and defines responsibility for the register and what the register should contain (s4) including information on the identity of registrants (s5) and about the regulated lobbying activity in which they have engaged (s6). This includes providing the name of the person lobbied, the date on and place in which they were lobbied, a description of the meeting, the name of the person instigating the communication, and a statement of whether the lobbying was conducted on the registrant’s own behalf, or the name of the person on whose behalf the lobbying was undertaken. The purpose of the lobbying must also be stated.

### *Evidence to the SPPA Committee – purpose of the lobbying*

Professor Raj Chari (Trinity College Dublin) expressed disappointment that the Bill, as drafted, requires registrants to provide only a general statement on “the purpose of the lobbying” (s6(2)(g)). Contrasting this with the Irish lobbying act, he said:

“That is vague; it does not get to the spirit of giving details of what is being lobbied about, who is being lobbied and exactly what the lobbyist’s intended outcome is. Under the Irish legislation, when a lobbyist is registering they have to include the subject matter, the name of the bill to be influenced, if there is a bill, and the results that the lobbyist intends to secure.” (OR 12 November 2015, Col 21)

Neil McLeod, Principal Legal Officer in the Scottish Government, confirmed that section 6(2)(g) of the Bill (which requires information from registrants on the purpose of the lobbying) can be interpreted broadly and that the Parliament could issue guidance on what this should include or amend these requirements using its resolution-making powers under section 15 of the Bill (OR 19 November 2015, Cols 27 & 28).

On a more general point on the Parliament’s responsibilities under the Bill, the Minister said that the Government had tried to give the Parliament, “...maximum powers in the operation of the Bill”, (Col 28) and this should be sufficient for most purposes. He expected that the Parliament would set out the necessary operational powers in Standing Orders. However, more fundamental changes, such as to the core principles, might require primary legislation.

### *Evidence to the SPPA Committee – regulatory burden*

Andy Miles (Scottish Environment LINK), in the round-table evidence session, expressed a concern that the registration process could be too onerous in civil society. He raised the question of whether, in organisations where all paid staff and volunteers were required to talk to MSPs as part of their job, they would all need to be registered. This could lead to those in civil society shying away from participation (OR 12 November 2015, Col 6). Conversely, Dr William Dinan (Spinwatch) suggested that research on those who ran similar registers in North America suggested that the registration process could have the reverse effect and, in fact, “...begins to explain the system to people a bit more, and they understand how they can interact”. (Col 20)

Neil Findlay MSP argued that registration should be no more onerous than filling in an expenses form (Col 9). He went on to argue, on the basis that it was necessary to capture the range of organisations seeking to influence policy, that it was, “... essential that voluntary organisations, trade unions and others are covered by the Bill” (Col 10). John Downie (SCVO) concurred with this view saying the third sector should be included as, “...we are one of the strongest lobbies in Scotland” (Col 13).

Steve Goodrich (TIUK) said that lobbyists are becoming adept at recording interaction with public officials. He suggested that the regulatory burden could be reduced by introducing registration thresholds based on spend on lobbying (Col 11).

## **Registrants**

Section 8 of the Bill places a duty on those who engage in regulated lobbying (where they have not previously registered) to provide information on their identity and on their lobbying activity to the Clerk. Such organisations must register within 30 days following their lobbying of MSPs and Ministers. Section 9 allows advance registration for persons intending to undertake regulated lobbying in the future.

### *Offences relating to registration and information returns*

Section 42 creates criminal offences relating to registration and information returns, with breaches punishable by a fine at level 3 (£1,000) on the standard scale. A due diligence defence is provided under this section.

### *Clerk's responsibilities*

The Clerk's responsibilities to enter on the register those who have applied for registration under sections 8 and 9 of the Bill and to notify active registrants of the statutory requirement to submit six monthly information returns (as specified in s11), and the date on which this requirement begins, are contained in section 10. Information returns must list all regulated lobbying activity over the period (or a declaration that no such activity took place) and must be submitted before the end of a two week period following the end of each 6 month period (s11). This part of the Bill also provides for the reclassification of registrants as inactive, either on application (s12) or by the Clerk without application (s13).

### *Evidence to the SPPA Committee – frequency of returns*

During the round-table discussion, Peter Duncan (APPC) suggested that there should be a single date for returns. He said:

“I think that the bill should try to get the registration dates in sync. Rather than having that random six-monthly requirement, where everyone will have different return dates, we should have one date. I also think that it should be synchronous with the Westminster registrations regime. Let us try to get as few deadlines as possible, so that it is all immediately apparent” (OR 12 November 2015, Col 30)

In his evidence to the Committee, the Minister explained why the Government had chosen a rolling six months cut-off for returns rather than a set or 'census' day. He said:

“...if there was a census day, that would put an unnecessary burden on the Parliament through all that information coming in at one time, whereas if people did it at their own time, that would be spread out over the year. I hope that that could be managed more easily by the Parliament. That was the main reason for that (OR 19 November 2015, Col 27).

### **Power to modify requirements about the register**

Section 15 of the Bill provides the Scottish Parliament with the power, by resolution, to modify any of the provisions in sections 4 to 14 which include the duties of the Clerk in relation to the register, the contents of the register and the duties of registrants to provide information. This power is intended to enable the Parliament to amend the operation of the register without the need for primary legislation. However, there is no power to alter the core concepts in sections 1 to 3 or those relating to definitions, exclusions, or the 'trigger of paid lobbying, in the schedule.

## **PART 3: OVERSIGHT AND ENFORCEMENT**

Part 3 of the Bill provides arrangements for oversight, complaints and enforcement.

### **Compliance, information requirements and information notices**

A duty is placed on the Clerk to monitor compliance with the Bill (s16) and the Clerk is given powers to require information (by serving an 'information notice') relating to compliance (s17). This part of the Bill also lists limitations on the duty to supply information (s18), including that

there is no requirement to provide information which may incriminate the provider (with certain exceptions relating to the Bill itself), and on the use which can be made of that information. An appeals process is provided for in section 19.

#### *Power to make further provision about information notices*

Section 20 provides the Scottish Parliament with the power, by resolution, to make further provision about information notices, including excluding some types of information which the Clerk may require in an information notice and the time period for response to an information notice.

#### *Offences relating to information notices*

Section 21 provides a criminal offence of failing to provide the required information on or before the date specified for those served with an information notice. As for offences relating to registration and information returns, such failures are punishable by a fine at level 3 (£1,000) on the standard scale. A due diligence defence is also provided under this section (s21(2)).

#### *Evidence to the SPPA Committee – compliance*

Professor Chari questioned why the Bill divides the compliance regime between the Clerk and the Commissioner. He cites the cases of Canada and Ireland as examples of where compliance is carried out by a single person (OR 12 November 2015, Col 29). The Convener explained that the compliance regime in the Bill mirrors that of the members' interest regime. Steve Goodrich agreed with Professor Chari saying that:

“...having the compliance staff, the advice and guidance staff and the enforcement staff in one body helps to ensure that there is co-ordination and an understanding of how these different pieces fit together” (OR 12 November 2015, Col 31).

Mr Goodrich also questioned why the Commissioner has an investigatory role when the available sanctions are criminal. He warned that an investigation by the Commissioner has the potential to impact on any subsequent criminal prosecution. (OR 12 November 2015, Col 31)

The Commissioner specifically recognised this point in his evidence to the SPPA Committee ([OR 19 November 2015](#), Col 3). He pointed to a potential overlap between his investigatory powers under the Bill and the role of the Crown Office and Procurator Fiscal Service in prosecuting potential criminal offences and indicated that this could have an impact on his investigations:

“I have raised before the other issue that troubles me slightly. At the moment, three of the types of complaint that I have to investigate may also be about criminal offences. Under my existing powers, if I come across something that may be a criminal offence, I report it immediately to the procurator fiscal, as that is obviously the system by which potential criminal offences are investigated.

I cannot see anything in the bill that would change that. In other words, quite a lot of the complaints that might come to me could be about criminal offences, and I would have to report them to the procurator fiscal. I am not clear what the attitude of the procurator fiscal or Crown Office would be to dealing with those. At the very least, a bit of a delay in my being able to conclude an investigation would be involved” (OR 19 November 2015, Cols 3 & 4)

On this point, the Minister said that there was, “...no requirement in the bill for the commissioner to report to the procurator fiscal” (OR 19 November 2015, Col 29). Al Gibson (Bill team leader) confirmed that the Parliament could use its direction-making powers under section 31 of the Bill

to instruct the Commissioner on how to handle, "...matters of lesser significance" (Col 30) by, for example, referring them to the Clerk for consideration.

## **Complaints process**

The Bill places a duty on the Commissioner to investigate and report on admissible complaints into non-compliance or breaches under the Bill (s22).

Where the Commissioner receives a complaint alleging that someone:

- who is not an active registrant has engaged in a first instance of regulated lobbying (under s8(1)) and has not provided the information required under section 5 (identity) or section 6 (lobbying activity) before the end of the 30 day relevant period (s8(2)) or,
- who is not an active registrant and has not engaged in regulated lobbying, has not provided accurate and complete information in an application made under section 9 or,
- who is an active registrant, has failed to submit information returns under section 11 or,
- who is an active or voluntary registrant, or who is neither but whom the Clerk has reasonable grounds for believing has been involved in regulated lobbying,

the Commissioner must assess whether the complaint is admissible and, if admissible, investigate the complaint and report to the Parliament.

### *Admissibility of a complaint*

Admissibility and the process to be followed in assessing admissibility are defined in sections 23 and 24 of the Bill. Section 23 sets out three 'tests' of admissibility:

- that the complaint is relevant (s23(1)(a)) and (s23(2)), i.e. it appears to be about a person who is, has been, or may be involved in regulated lobbying; that the alleged conduct would or might amount to a failure to comply with the provisions of section 22(1) (provision of information to the Clerk)
- that it meets the following conditions (s23(1)(b)) and (s23(3)): that the complaint is in writing, is made by an individual and signed by that individual giving his or her name and address, sets out the facts complained about and names the person to whom the complaint refers
- the complaint must also "warrant further investigation" (s23(1)(c)) and (s23(4) by which is meant that the evidence, after an initial investigation, must suggest a failure to comply with the provisions of section 22(1).

Complaints must also be made within a year of the date on which the person making the complaint (the complainant) might reasonably have found out about the conduct or omission complained of (s23(3)(e)).

On receiving a complaint, the Commissioner is required to notify the subject of the complaint including informing that person of the nature of the complaint and, where the Commissioner considers it appropriate, giving the name of the complainant (s24(2)). The Commissioner can also decide to dismiss the complaint if he or she considers it to be irrelevant (s24(3)).

## *Commissioner's reports to Parliament under section 24*

Section 24 also provides (at subsections 4 to 7) that where the Commissioner receives a relevant complaint which fails to meet all of the conditions specified in section 23(3), the Commissioner must, if the complaint is of a kind specified in a direction by the Parliament (s24(5)(a)) or where the Commissioner considers that the complaint warrants further investigation (s24(5)(b)), make a report to Parliament. Otherwise, the Commissioner must dismiss the complaint (s24(5)(c)). In the first two circumstances, the Commissioner must make a report to Parliament giving details of such failures and, if the report is made under section 24(5)(b), state that the complaint warrants further investigation. Such reports must also include a recommendation on whether to dismiss the complaint as inadmissible, or to treat it as if it had met all the necessary conditions (s24(6)(d)).

### *Evidence to the SPPA Committee - Commissioner's reports to Parliament*

In his evidence to the Committee, the Commissioner expressed concern that the complaints process set out in the Bill runs the risk of, "...becoming quite bureaucratic" (OR 19 November 2015, Col 2). He ran through a scenario for the Committee in which he might be required to submit several reports to the Parliament in quick succession on the same complaint. He described this as, "...verging on overkill" (Col 4). He recognised, however, that the Parliament's direction-making powers under section 31 of the Bill could potentially be used to ameliorate or moderate the process:

"If the direction-making powers that are given to the Parliament under section 31 are used in a particular way, it will be possible to avoid the need for repeated reports in such circumstances. I hope that that is the position that we will reach" (Col 4).

### *Admissible complaints*

Section 24(8) of the Bill places a duty on the Commissioner, where they consider a complaint to be admissible, to report to the Parliament and to inform both the complainant and the person subject to the complaint.

The Commissioner must also report to Parliament if they have not made an assessment of admissibility 2 months from when the complaint was received (s24(12)).

### *Inadmissible complaints*

Where the Commissioner considers a complaint to be inadmissible and has not already dismissed the complaint as irrelevant under s24(3), or because it fails to meet the conditions specified in section 23(3) (subject to s24(5)(a) and (b)), they must dismiss the complaint. In dismissing the complaint, the Commissioner is required to inform both the complainant and the person against who the complaint was made, explaining why the complaint was inadmissible (s24(10)).

### *Investigation of complaints*

Section 25 imposes a duty on the Commissioner to carry out an investigation of the facts around an admissible complaint. These facts relate to compliance by the person who is the subject of the complaint with the duty to provide information under section 22(1). The Commissioner may then make a "finding of fact" where satisfied on the balance of probabilities that the fact is proven (s25(3)).

If the Commissioner has not completed an investigation into an admissible complaint within 6 months of a finding of admissibility, he or she must make a report to Parliament on the progress of the investigation (s25(4)).

### *Report on outcome of investigation*

The Commissioner must also provide a detailed report to the Parliament on the outcome of an investigation into an admissible complaint (s26). Such reports must include: details of the complaint; the Commissioner's assessment on admissibility; details of the investigation and the findings of fact into any failure to comply with the information requirements of section 22(1). Before providing such a report, the Commissioner must give a copy of the draft report to the person who is the subject of the complaint and afford that person the right to respond (s26(4)).

Section 27 makes it clear that the Parliament is not bound by the facts found by the Commissioner in the report and may direct the Commissioner to carry out further investigations (s27(2)).

### *Parliament's power to censure*

After receiving a report from the Commissioner under either section 22(2)(b)(ii) or section 27(2), the Parliament has the option of censuring the person who is the subject of the report or taking no further action (s(40)).

### *Power to make further provision about parliamentary procedures*

The Parliament is also required by resolution, under section 41 of the Bill, to make provision regarding procedures to be followed when the Commissioner submits a report to Parliament. Section 47 provides for the process to be followed in relation to making such resolutions, including a requirement for prior consultation with the Scottish Government and for publication in the same way as for Scottish Statutory Instruments.

## **Withdrawal of complaints**

### *Withdrawal of complaints at assessment stage*

Complaints can be withdrawn before the Commissioner submits a report to Parliament on the outcome of an investigation. The withdrawal notification must be in writing and signed by the complainant (s28(2)). If the complaint is withdrawn at the assessment stage, the Commissioner is required to stop investigating the complaint (s28(3)) and to inform the subject of the complaint of the withdrawal and that the investigation has ceased along with any reasons for withdrawal given by the complainant.

### *Withdrawal of complaints at investigation stage*

Section 28(4) makes similar provision for complaints withdrawn during the investigation stage. In addition to informing the subject of the complaint of the withdrawal, and of any reasons given by the complainant for so doing, the Commissioner is required to ask the subject of the complaint for his or her views on whether the investigation should continue (s28(4)(b)). The Commissioner is required to take account of any reasons given for withdrawal of the complaint and of the views of the person subject to the complaint in their recommendation to the Parliament on whether or not the investigation should continue (s28(4)(c)).

Where the Commissioner recommends that the investigation should cease, they must inform both the complainer and the person who is the subject of the complaint and report to Parliament (s28(6)).

Where the Commissioner recommends that the investigation should continue, they must report to the Parliament notifying the Parliament that the complaint has been withdrawn, with any reasons given by the complainant for withdrawal, any views given by the subject of the complaint on whether the investigation should continue and the reasons the Commissioner



considers that the investigation should continue (s28(7)). The Parliament must then direct the Commissioner either to continue or to cease the investigation ((s28(8)) and the Commissioner must inform both parties of the direction (s28(9)).

### *Discretionary reports*

Section 29 gives the Commissioner discretion to make reports to the Parliament on progress with actions related to their duties relating to the assessment of admissibility or the investigation of complaints or of any complaints they have dismissed as inadmissible (s29).

### *Restrictions on Commissioner's advice*

Section 30 prevents the Commissioner from giving advice on conduct which has or may constitute a failure to comply with the information provisions specified in section 22(1) of the Bill, except in relation to an investigation carried out or a report produced under this section. The commissioner may, however, give advice or express a view on the procedures for making or investigating a complaint (s30(2)).

### *Directions to the Commissioner*

The Commissioner's functions under the Bill are subject to directions given by the Parliament (s31). Such directions may cover any of the Commissioner's functions under the Bill but may not direct the Commissioner as to how a particular investigation should be conducted (s31(3)).

When receiving a report from the Commissioner under section 24 (see above), the Parliament must give a direction to the Commissioner either to dismiss the complaint as inadmissible or to treat it as having met all the necessary conditions (s24(7)).

### *Evidence to the SPPA Committee - Directions to the Commissioner*

As noted earlier in this briefing, the Commissioner has expressed the view that directions given by the Parliament under section 31(2)(b)(iii) of the Bill could be used to make the process of reporting to the Parliament less bureaucratic. The Commissioner also referred to section 31(2)(b) in relation to the potential of directions issued by the Parliament under this section to enable the Commissioner to deal with relatively minor failures by way of information notices and, in such circumstances, refer them to the Clerk to be dealt with. The Commissioner said:

“I am keen—as I detect that certain members of this committee are—to avoid having to go down a fairly formal investigative process if there are ways of dealing appropriately with issues that could be picked up by other means” (OR 19 November 2015, Col 7).

### *Witnesses and documents*

Section 32 gives the Commissioner power to compel persons to attend the Commissioner's proceedings, or to produce documents in their custody or control, in relation to investigations into complaints under section 22 (2)(b)(i) of the Bill. However, the same limitations which apply to the power of the Scottish Parliament to call for witnesses and documents (s23 of the Scotland Act 1998) apply to the powers of the Commissioner in this respect.

This section also provides that, where this section requires a person to answer a question, any statement made in answer is not admissible in criminal proceedings except where these proceedings concern perjury relating to that statement (s32(4)). An exception is also provided at section 34 for persons to refuse to answer questions or to produce documents which they would not be required to answer or produce in a Scottish Court. Certain exceptions are also provided in relation to the Scottish Law Officers and procurators fiscal (s34(2)).

## *Evidence under oath*

The Bill provides the Commissioner with the power to require those giving evidence to take an oath (s35 (1)). Failure to take an oath when required by the Commissioner will be an offence attracting, on summary conviction, up to 3 months in prison or a level 5 fine (£5,000), but not both (s35(3)).

## **Criminal offences and penalties**

A number of other criminal offences and penalties are provided for as part of the enforcement regime. These are summarised below. The Scottish Government has stated that it sees these sanctions as a last resort (Policy Memorandum, para 33).

The sanctions which attach to offences relating to registration and information returns and information notices (sections 42 and 21) are relatively light while those which attach to offences related to the work of the Commissioner (sections 35 and 36) are considerably more severe:

- section 42 creates criminal offences relating to registration and information returns, punishable by a fine at level 3 (£1,000) on the standard scale.
- section 21 provides a criminal offence of failing to provide the required information on or before the date specified for those served with an information notice.
- section 35 makes it a criminal offence to refuse to take an oath when required by the Commissioner. Conviction could attract imprisonment for a period not exceeding 3 months or a fine at level 5 (£5,000) on the standard scale, but not both.
- section 36 makes it a criminal offence to fail to attend before the Commissioner, to produce documents or to deliberately alter, suppress, conceal or destroy a document required by notice given under s33. Both offences could attract imprisonment for a period of up to 3 months or a fine at level 5 (£5,000) on the standard scale, but not both (s36).

## *Evidence to the Committee – criminal sanctions*

In the Committee's round-table evidence session, Richard Maughan (CBI Scotland) reiterated the CBI's view that criminal sanctions should not be applied in cases where, "...someone got something wrong on a form" (OR 12 November 2015, Col 17). Similarly, Steve Goodrich (TIUK) cautioned that:

"If there are only criminal sanctions, the danger is that there will be persistent non-compliance with, for example, reporting requirements that it might not be in the public interest to pursue via criminal prosecution, and there will be no other means of redress or deterring future non-compliance. That would result in an enforcement gap whereby there is non-compliance but no means of getting people to start to comply" (Col 18)

John Downie (SCVO) warned of the need for a proportionate and scalable approach:

"We cannot go from zero to criminal acts right away; we need a scale that tells charities what it means if they are not compliant with the register. It is about proportionality. How the register is kept up to date and who checks what people are saying will be really important" (OR 12 November 2015, Col 29).

## **Commissioner's functions**

Sections 38 and 39 are concerned with making modifications to the Scottish Parliamentary Commissions and Commissioners etc. Act 2010 to reflect the new duties of the Commissioner

under the Bill and to ensure that the Commissioner is included as a person subject to investigation by the Scottish Public Services Ombudsman under the Scottish Public Services Ombudsman Act 2002 in relation to the functions conferred by this Bill.

## **PART 4: GUIDANCE AND CODE OF CONDUCT**

Part 4 of the Bill provides for the publication by the Parliament of guidance on the operation of the resulting Act and of a code of conduct for those who lobby MSPs.

### *Parliamentary guidance*

Section 43 gives the Parliament the option of providing guidance on the operation of the resulting Act and provides that this guidance may describe the circumstances in which a person is or is not engaged in regulated lobbying and in which a communication is or is not of the kind listed in the schedule to the Bill.

### *Code of Conduct*

Section 44 requires the Parliament to publish a code of conduct for those lobbying MSPs and requires periodic reviews of the code. This section of the Bill provides for the code to cover a definition of lobbying which goes beyond 'regulated lobbying' to mean, "...making a communication of any kind to a member of the Parliament in relation to the member's functions" (s44(3)).

### *Evidence to the SPPA Committee - Code of Conduct*

The Minister, in responding to a question from the Committee on why section 44(3) was broader than the scope of the rest of the Bill said:

"That is intentional, because the bill is dealing with registered lobbying and the code is dealing with all lobbying. It is therefore appropriate for the code to go wider if the Parliament seeks to do so in, for example, providing guidance" (OR 19 November 2015, Col 16).

## **PART 5: FINAL PROVISIONS**

Part 5 makes various provisions including for: offences committed by corporate bodies; the process for making resolutions relating to the Bill (discussed earlier in this briefing); matters relating to the application of the resulting Act to trusts; and powers for the Scottish Ministers to make ancillary provision by regulations.

### *Ancillary provision*

Section 49 of the Bill will provide the Scottish Ministers with powers to make regulations concerning, "... incidental, supplementary, consequential, transitional, transitory or saving provision made by or under this Act" (s49(1)). For regulations which seek to add to, replace or omit any part of an Act, the procedure to be followed is the affirmative one. For all other purposes, the negative procedure is to be followed. (s49(3) and (4)).

## **SCHEDULE**

The schedule to the Bill lists those forms of communication which are **not** to be regarded as communications for the purposes of this Bill. See page 26 above.

## FINANCIAL MEMORANDUM

The Scottish Government considers that no costs will accrue to the Scottish Government or to local authorities in relation to the Bill. Rather, the main costs will fall on:

- The Scottish Parliamentary Corporate Body (SPCB) in relation to the establishment and maintenance of the Register. The Financial Memorandum (FM), based on figures provided by the SPCB, estimates the following costs:
  - set-up costs to the SPCB will be in the region of £230,000 to £400,000 in 2016-17
  - on-going annual costs to the SPCB will vary between £98,450 and £177,200 in 2016-17 to between £180,450 and £259,200 in 2020-21.
- The Commissioner for Ethical Standards in Public Life in relation to investigation of complaints of non-compliance under the Bill:
  - Between £0 and £70,000 per year based on receiving between zero complaints and 10 complex complaints per year

It should be noted that, while the FM states, at paragraph 49, that the Commissioner believes that any additional investigations arising as a result of the Bill can be absorbed within his existing resource, in his evidence to the SPPA Committee the Commissioner said that this was not his position (OR 19 November 2015, Col 3). In his evidence to the Committee (OR 19 November 2015, Col 32), the Minister accepted the Commissioner's position and agreed to give further consideration to this.

- Lobbyists (in relation to staff time) in complying with the registration regime. These costs include:
  - initial registration - between £0 and £400 per organisation;
  - making six monthly returns - between £0 and £900 per organisation and,
  - for organisations which undertake regular and co-ordinated lobbying, possible costs relating to setting up internal compliance systems. These costs are estimated to be between £1,500 and £2,500 per organisation to set up such a system, and between £200 and £300 per month in on-going maintenance.
- Court and other legal costs, in relation to potential criminal proceedings against lobbyists under the Bill including:
  - Summary proceedings costs of between £95 and £1,523 per case
  - Legal aid of between £568 and £802 per case.

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Published by the Scottish Parliament Information Centre (SPICe), The Scottish Parliament, Edinburgh, EH 99 1SP

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