

Consultation Paper

Neil Findlay MSP

Proposed Lobbying Transparency (Scotland) Bill

Proposal for a 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.

(Lodged, 6th July 2012, Consultation period 9th July to 29th October 2012)

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Foreword

The purpose of the proposed Lobbying Transparency (Scotland) Bill is to promote greater transparency, openness and accountability in relation to lobbying of members of the Scottish Parliament, Ministers in the Scottish Government and relevant public officials. It is therefore entirely consistent with the founding principles of the Scottish Parliament.



Underpinning my proposed Bill is a desire to enhance and re-build trust in politics and the political process. Not least as, today, trust in politicians, governments and the wider political process is, arguably, at an all-time low.

I would like to assure people that the proposed register will not impact on the basic relationship between an MSP and his or her constituents nor on small community groups or small charities making representations to their elected representatives.

Lobbying is an important part of the political process, but it must be conducted to the highest possible standards. To ensure this, I believe we require much greater transparency and disclosure about who is lobbying whom, and on what issues. Consideration of these matters is now both timely and appropriate. Legislating calmly in an atmosphere free of scandal would be pro-active rather than reactive and help prevent the scandals that we have seen elsewhere.

I am hopeful that the proposed Bill will attract cross-party support in the Scottish Parliament and, more broadly, from across Scottish civic society. I would urge all interested stakeholders from the political, professional, and voluntary and any other interested sectors to respond to this consultation and ensure the maximum usefulness of the proposed Bill.

Neil Findlay

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How the consultation process works

This consultation is being launched in connection with a draft proposal which I have lodged as the first stage in the process of introducing a Member's Bill in the Scottish Parliament. The process is governed by Chapter 9, Rule 9.14, of the Parliament's Standing Orders which can be found on the Parliament's website at:

<http://www.scottish.parliament.uk/parliamentarybusiness/17797.aspx>

A minimum 12 week consultation period is required, however, I intend to extend the period to 16 weeks, following which responses will be analysed. Thereafter, I would expect to lodge a final proposal in the Parliament along with a summary of the consultation responses. If that final proposal secures the support of at least 18 other MSPs from two or more political parties, and the Scottish Government does not indicate that it intends to legislate in the area in question, I will then have the right to introduce a Member's Bill. A Member's Bill follows a 3-stage scrutiny process, during which it may be amended or rejected outright. If it is passed at the end of the process, it becomes an Act.

At this stage, therefore, there is no Bill, only a draft proposal for the legislation.

The purpose of this consultation is to provide a range of views on the subject matter of the proposed Bill, highlighting potential problems, identifying equalities issues, suggesting improvements, considering financial implications and, in general, assisting in ensuring that the resulting legislation is fit for purpose.

The consultation process is being supported by the Scottish Parliament's Non-Government Bills Unit (NGBU) and will therefore comply with the Unit's good practice criteria. The Non-Government Bills Unit will also analyse and provide an impartial summary of the responses received.

Details on how to respond to this consultation are provided at the end of the document.

Additional copies of this paper can be requested by contacting me at:

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Enquiries about the consultation in any language other than English or in alternative formats should also be sent to me.

An on-line copy is available on the Scottish Parliament's website under Parliamentary Business/Bills/Proposals for Members' Bills/Session 4 Proposals

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/12419.aspx>

Background

Lobbying is at the centre of democratic decision-making. It is widely accepted that the right to bring an issue or grievance to the attention of legislators and policy makers is a fundamental principle of any liberal democracy. Political parties and government must be responsive to the society they serve, and lobbying is one means whereby politicians engage with a wide array of interests and opinions. Furthermore, through lobbying, politicians and officials can learn and gain an understanding of issues, and refine, where they see fit, their policy and legislative proposals.

Businesses invest in lobbying to seek a favourable policy or regulatory regime. Companies and charities may also lobby directly for contracts from government. The purpose of this lobbying activity is to influence legislation and policy so that it is conducive to those organisations' interests and those of their clients. This is in itself not necessarily problematic; indeed arguably it is entirely legitimate – after all, the point of lobbying is to influence policy.

However, there are worries about the *nature* of lobbying. David Cameron has raised genuine concerns that have been raised in relation to lobbying (albeit not in relation to any specific controversies in Scotland). Whilst leader of the opposition at Westminster, he predicted that lobbying was:

“The next big scandal waiting to happen and that secret corporate lobbying goes to the heart of why people are so fed up with politics ... It arouses people’s worst fears and suspicions about how our political system works, with money buying power, power fishing for money and a cosy club at the top making decisions in their own interest.”¹

Lobbying is an industry that has a turnover of £2bn; this is not an insignificant figure and suggests lobbying must have some impact on, and influence over, policy. Lobbying and lobbyists locate deliberately around legislatures. In Scotland, for example, there was a notable increase in lobbying and lobbyists in Edinburgh after the formation of the Scottish Parliament in 1999. Indeed, prior to the Parliament being formed, lobbying activity in Scotland was very limited.

Whilst scandal has in the main been absent from Holyrood, controversy has emerged periodically at Westminster, suggesting lobbying can sometimes prove problematic. Perhaps some lobbyists enjoy greater influence than others as a result of having greater access to politicians and influence over

policy and the decision-making process. Other concerns are that lobbying is secretive and private in nature, unseen and inaccessible to the wider public. While it has also been said that lobbying in itself demonstrates how some more powerful and wealthy organisations and interests have disproportionate access to and influence over Government and the development of policy.

Some in Scotland may argue that the lobbying activity which has fuelled negative public perceptions has occurred largely at Westminster. However, public cynicism does not halt at the border and it is the case that Scottish public attitudes towards the political process tend not to differentiate too much between Westminster and Holyrood. If Holyrood improves its rules in relation to transparency it is my contention that confidence in Scotland's political process would increase.

It could be argued that lobbying which lacks transparency creates concerns and suspicions amongst the public. Transparency is increasingly seen as a central element of good governance, providing effective oversight and scrutiny of the political process. The Organisation for Economic Cooperation and Development (OECD) *Principles for Transparency and Integrity in Lobbying*ⁱⁱ recommends a fair framework for openness and access to decision makers, the enhancement of transparency and thereby the promotion and fostering of a culture of integrity.

It is increasingly acknowledged in other legislatures across the world that lobbying should be more open and transparent (see Appendix). A lack of transparency and controversies and scandals arising from lobbying activity can, and does, undermine public confidence and trust in the political process. There is also increasing concern that the exercise of influence through lobbying works to the advantage of powerful vested interests and is conducted without sufficient external scrutiny. It is very important that lobbying is conducted, and seen to be conducted, to the highest ethical standards and that those involved can be held accountable.

Accountability and openness were at the heart of the Scottish Parliament's founding principles when it was re-established in 1999. I believe that the proposals within this consultation are entirely consistent with, and would augment, these founding principles.

This is not the first time in the modern history of the Scottish Parliament that the issue of lobbying and a statutory register have been discussed. In the first session, the Standards Committee conducted a wide-ranging

consultation and took evidence from numerous witnesses. As a result the Committee recommended, amongst other things:

- Further guidance for MSPs
- Revision of section 7 of the Code of Conduct on Lobbying and Access to MSPs
- The introduction of a statutory registration scheme for commercial lobbyists
- A voluntary code of conduct for all lobbyists.ⁱⁱⁱ

The Parliament debated the Standards Committee report on 3 October 2002, and passed the motion that:

'The Parliament notes the recommendations of the Standards Committee's 1st Report 2002, Lobbying, (SP Paper 507) and agrees to amend section 7 of the Code of Conduct for Members of the Scottish Parliament as set out in Annex E of the report'.^{iv}

Yet, despite noting the Committee's recommendation to introduce a statutory register of *commercial* lobbyists, the Parliament did not bring forward a specific scheme and has yet to introduce such a register.

I would argue that now is the time to act. Today, Scottish politics, the political process and decisions made by the Parliament and Government are under scrutiny like never before. Austerity is impacting on Scottish people across all sectors and in all regions. Wages are being frozen; pensions and working conditions changed, and cuts to public services are at an unprecedented level. In this present context how decisions are made and who is trying to influence them requires greater public scrutiny than ever before.

In addition, the Scottish Government and Parliament will soon have greater powers and the ability to raise and spend more finance. This will almost certainly see lobbying intensify in and around the Parliament. The new powers provided by the Scotland Act 2012, or the even greater powers that would result should further constitutional change occur, will attract even more lobbying of the Parliament. In short, the more powers, the more lobbying activity. This proposed Bill, encouraging and increasing transparency, will prepare the Parliament for that eventuality, should it occur.

Current legislation, rules and regulations linked to lobbying

There is currently no specific legislation relating to the registration of lobbyists in Scotland. However, there are some who would perhaps contend that there are adequate safeguards within the industry that already govern the activities of lobbyists – particularly, the codes of conduct designed by each of the different trades bodies within the industry. The Public Administration Select Committee describes how:

“Umbrella bodies and individual companies have codes of conduct for their members and staff which are generally described as a form of self-regulation. The Association of Professional Political Consultants (APPC), the Public Relations Consultants Association (PRCA) and Chartered Institute of Public Relations (CIPR), the three main membership organisations for public affairs practitioners, each require their relevant members to abide by their separate (although similar) codes of conduct”.^v

These codes of conduct are intended to ensure that general principles of integrity, openness and propriety are adhered to. However, it is worthwhile pointing out that each trade body can only regulate those who choose to join them. It is the case that lobbyists can choose **not** to join any self-regulatory body; therefore, agreeing to any code of conduct is an entirely voluntary act.

In addition, some, though not all, trade bodies within the industry also have registration schemes. These registration schemes offer very limited information. The Association of Professional Political Consultants’ (APPC’s) register, for instance, only provides information on the firm involved in lobbying, a list of staff/consultants’ names, whether any of them have a parliamentary pass and the list of clients for whom they are working. Similarly, the UK Public Affairs Council (UKPAC) has a registration scheme which was set up in response to the Public Administration Select Committee report into lobbying. UKPAC seeks to be all-encompassing and open to all members of all trade bodies. However, the information required for their registration is even more limited – it seeks the same information as APPC, minus any information on whether any staff of the registered organisation has a parliamentary pass.

In Scotland, there are two main trade bodies. There is the Scottish arm of the APPC. APPC Scotland has a code of conduct and the same registration scheme as APPC in the rest of the UK. The other body in Scotland is the

Association for Scottish Public Affairs (ASPA). ASPA does not have a registration scheme; although it does have a code of conduct that its members are expected to follow.

There are some serious doubts about the efficacy of self-regulatory schemes. The House of Commons Public Administration Select Committee was explicit in its critique of how self-regulatory schemes are applied in practice. It expressed concern at the fragmentation of self-regulation and, after careful consideration of various components (trust, consistency of approach and complaints handling), the Committee was unambiguous in its conclusions:

“The conditions are not currently in place for genuine self-regulation by those who carry out this activity. Despite tentative steps towards a very basic consistency of approach, this consistency does not yet exist, and there is no one organisation that has the trust and authority to carry out a regulatory role across the multi-client sector ... The complaints and disciplinary processes are under used and ineffective. In the final analysis, what lobbying organisations refer to as “self regulation” appears to involve very little regulation of any substance”.^{vi}

In the Standards Committee report 2002, similar problems associated with self-regulatory schemes were noted, including:

- The application of a voluntary code to all forms of lobbying would be difficult and complex;
- Very difficult to arrive at a code which would be acceptable to all lobbyists;
- Definitions of what constitutes lobbying activity would be problematic;
- Difficulties involved in monitoring, policing and enforcing voluntary codes;
- May lead to a two-tiered system of those who are signed up and those who are not;
- May be overly bureaucratic, complex and costly to operate;
- There is little evidence of voluntary codes currently in practice being enforced;
- Commercial imperatives mean that commercial lobbying trade associations may not be eager to expose wrongdoings by its members;
- Of little use if not enforced universally;

- May be advantages, commercial or otherwise, in not signing up to a voluntary code.^{vii}

In contrast to the self-regulation which currently exists, what is being suggested in this proposed Bill is a statutory registration scheme. Therefore, all who lobby, within the thresholds set, would be obliged to register. In addition, I would suggest that, in tandem with a statutory registration scheme, a code of conduct for lobbyists, similar to those already in existence within the industry trade bodies, should also be introduced.

Freedom of Information

Another mechanism which can be used to obtain information is the Freedom of Information (FOI) legislation. FOI can compel the release of some information regarding meetings between Government Ministers and officials and lobbyists. However, FOI is limited in that it only applies to public authorities such as the Scottish Government and not to individual MSPs. Even in relation to the Government, exemptions may apply. For example, the Government can withhold information on the grounds that meetings with lobbyists are part of a policy development process and/or any release of information would impinge on the free and frank provision of advice within that policy development context – although any withholding of information could be appealed, firstly to the Scottish Information Commissioner and then, if necessary, through the courts.

Interests of Members of the Scottish Parliament Act 2006

Section 14 of that Act regulates MSPs' relationships with lobbyists:

“A member shall not by any means, in consideration of any payment or benefit in kind,

(a) advocate or initiate any cause or matter on behalf of any person;
Or,

(b) urge any other member to advocate or initiate any cause or matter on behalf of any person.”

Codes of Conduct

Code of Conduct for Members of the Scottish Parliament

All MSPs must adhere to the Code of Conduct for MSPs in relation, amongst other things, to lobbying. Effectively it reminds MSPs that relationships with lobbyists must be:

“Handled with complete propriety so as to maintain the confidence of the public in the decision-making and the integrity of its representatives in the Parliament. It is essential that there is transparency in the relationship between members and lobbyists.”^{viii}

The Code of Conduct also makes clear that those who lobby must not be given preferential treatment:

“The public must be assured that no person or organisation will gain better access to, or treatment by, any member as a result of employing a commercial lobbyist either as a representative or to provide strategic advice. In particular, a member should not offer or accord preferential access or treatment to commercial lobbyists or their employers. Nor should commercial lobbyists or their employers be given to understand that preferential access or treatment might be forthcoming from another MSP or group or person within or connected with the Parliament”^{ix}

It also reminds MSPs of their responsibilities *“particularly when considering whether to accept any remuneration, gift, benefit or hospitality from another person”*. Specifically, the Code states that MSPs,

“Should not accept any paid work which would involve them lobbying on behalf of any person or organisation or any clients of a person or organisation; should not accept any paid work to provide services as a Parliamentary strategist, adviser or consultant, for example, advising on Parliamentary affairs or on how to influence the Parliament and its members ... and should decline all but the most insignificant or incidental hospitality, benefit or gift if the member is aware that it is offered by a commercial lobbyist”^x

The Code of Conduct does ask MSPs to consider keeping a record of all contacts with lobbyists and/or consider arranging for an assistant or researcher to take notes at any meetings with lobbyists. However, there is no obligation on anyone, MSP or lobbyist, to record that any meeting has taken place let alone the details of it. Arguably, therefore, the Code of Conduct is extremely limited in this regard, especially in relation to transparency.

Ministerial Code of Conduct

The activity of Scottish Government Ministers is regulated by way of the Ministerial Code of Conduct. They are expected to record, on a monthly basis and three months in arrears, details of all engagements carried out in their capacity as Ministers. While Private Offices are expected to record basic details of each meeting, these details are not included on the pages on which engagements are recorded. There is, therefore, in the lists of Ministerial engagements, a record of the meeting but not what the meeting was about. The Ministerial Code does state that the details of the meeting should be recorded; however, these details are not publicly shared. Therefore, the only way an interested party could access that information is through the use of FOI, but even then, as noted above, details may not be provided.

Civil Service Code

The Civil Service Code does not refer directly to lobbying or lobbyists. However, the Code does explain that civil servants must not act in a way that would:

“Help profit either themselves or others and that they must not accept gifts or hospitality or receive other benefits from anyone which might reasonably be seen to compromise their personal judgement or integrity, or disclose official information without authority and disclose official information without authority. This duty continues to apply after you leave the Civil Service”.^{xi}

Civil servants are expected to record meetings and information emanating from any meetings they have. The Code states that they must: “keep accurate official records and handle information as openly as possible within the legal framework”.^{xii} However, this information is not normally shared publicly and again in all likelihood would only be shared if subject to a FOI request.

Aims of the proposed Bill

The proposed Bill aims to ensure that lobbying in Scotland is made as open and transparent as possible by introducing a statutory register containing some basic information that describes lobbying activity. To ensure that a register is effective requires an understanding of what constitutes lobbying and lobbyists. Defining lobbying and/or a lobbyist is a vital part of this consultation.

Definition

The final definition of a lobbyist will, of course, be informed and assisted by the responses to the consultation. Therefore, no final definition will be provided here. However, the following definition provided by the UK Public Affairs Council¹ is, I believe, helpful:

“Lobbying means, in a professional capacity, attempting to influence, or advise 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”^{xiii}.

This is different from the definition provided by the Standards Committee in 2002. The issue of how to define a lobbyist featured prominently when the Standards Committee looked at the issue in 2001, and much of its effort was devoted to trying to find an agreed and workable definition of *commercial* lobbying (the Committee during its inquiry focused solely on the commercial aspect of the industry). The final report settled on the following formulation:

“Commercial lobbyists” are defined as follows: ‘any individual, partnership, company or other undertaking which (a) attempts, on behalf of a third party, to influence the conduct of members in carrying out their Parliamentary duties; or, (b) provides assistance (which may include or consist of strategic advice) to a third party in connection with attempting to influence the conduct of members in carrying out their Parliamentary duties, on a commercial basis.’^{xiv}

¹ It should be borne in mind that this is a definition formulated by a UK wide body and was not designed with a particular view on Scotland. What is important to bear in mind here is the reference to lobbying ‘in a professional capacity’, which is a departure from the more narrow definition incorporating only ‘commercial lobbyists’.

A key criticism of these proposals was the exclusive focus on *commercial* lobbyists, ignoring lobbying undertaken by those employed directly by corporations, trade associations, charities and campaign groups, who all seek to directly represent specific interests and influence policy and legislation. Arguably, the emphasis on lobbying consultants led to some of the problems of definition and what activities should be reported and declared in any register.

This consultation is specifically seeking contributions on definitional issues as well as the kinds of lobbying activities that should be disclosed. However, the starting position of this proposed Bill is to define lobbyists, and broaden the scope of who is a lobbyist, in a way that is in contrast to narrow definitions, which capture only commercial lobbyists who act on behalf of third parties.

Who should be covered

It is intended that professional lobbyists (both commercial consultants and in-house) would be included in the register. The register would also cover representative bodies (trade and professional bodies who lobby on behalf of their members), charities, trade unions and employer groups, professional services (accounting, legal firms and management consultants who provide public affairs and lobbying advice), as well as not-for-profit organisations, NGOs and grassroots advocacy groups.

Outlined below are further ideas about who constitutes a “lobbyist” and what potential scenarios might be considered lobbying. I would reiterate that a lobbyist is either a paid employee or is paid by a client, or receives other compensation, to undertake “lobbying activity”. It is said by the Alliance for Lobbying Transparency that “Lobbying activity” may include:

- a. Contact² – arranging or facilitating interaction with MSPs, Scottish Ministers, and relevant “public officials³;
- b. Communication with “public officials” regarding:
 - The formulation, modification, or adoption of legislation;
 - The formulation, modification, or adoption of regulation, policy, or position of Scottish Government or Scottish

² “Contact” or “Communication” might include: telephone conversations and any electronic communication; circulating and communicating letters, information material or position papers; organising events and attendance of as a lobbyist, meetings (formal and informal), or promotional activities in support of a lobbying position.

³ Public Officials can be considered to be civil servants, employees of Non Departmental Public Bodies and appointees of Non Departmental Public Bodies

- Parliament;^{xv} and
- The awarding of any contract, grant or other financial benefit by or on behalf of the Scottish Government or Scottish Parliament;^{xvi}

Thresholds

Thresholds are required in order to capture lobbyists who are involved in significant amounts of lobbying. It is also meant to protect small businesses and smaller charities or other smaller organisations who are involved in only slight levels of lobbying. Having thresholds ensures there will be no bureaucratic burden placed on such small organisations.

Therefore, it is imperative that an approximation, or reasonable estimate, of what is being spent on lobbying is provided. One way to bridge commercial sensitivity concerns would be to introduce a banding system – say £2000 to £5000, £5000 to £10,000, and so on. This would mean that the financial details which are divulged are an approximation rather than an exact figure, thus providing an element of commercial confidentiality.

If any organisation or individual reaches the threshold set, they would then be expected to register. What those thresholds should be is open to question. To stimulate discussion, I would suggest that options for the thresholds might be:

- For a *consultant lobbyist*, I would suggest that registration is necessary if they receive income from lobbying activity of £2000 or more over a 6 month period, or if a group of companies agree to employ several lobbyists for similar work each at under £2000 but the total exceeds £2000 in a 6 month period.
- For an *in-house lobbyist*, if the company or organisation spends a total of £9000 or more on “lobbying activity” over a 6 month period; or, if a group of companies agree to spend less than £9000 on lobbying activity of a similar nature but the total exceeds £9000 over a 6 month period.
- Time: *Registration* is required if a particular amount of time is spent on lobbying activity. I would suggest this figure would be 20% of a person’s workload (time) over a 3 month period.

I am keen to ensure that all who are involved in significant lobbying should be obliged to register. Thus, I am aware that ensuring thresholds are set appropriately is of paramount importance. I am aware that there may be potential loopholes to be taken account of when drafting the Bill. I welcome therefore comments and suggestions over the question and issue of thresholds.

Information to be provided in the register

Vital for the effective and substantive implementation of a register will be the details which the lobbyist has to include in the register. The Standards Committee report on lobbying in 2002 proposed the following framework for a lobbyists' register, but in the context of registering *commercial* consultants only:

- Names of staff involved in lobbying activity
- Descriptive information about the company or organisation, for example the number of employees;
- Identity of clients;
- Where appropriate, specific information on the subject matters lobbied, for example, naming the Bill;
- Details of expenditure in relation to individual lobbying projects;
- Details of fees received in relation to individual lobbying projects;
- Details of MSPs^{xvii} contacted;
- The communication techniques used.^{xviii}

I appreciate that disclosing financial details may provoke concern from some of those who are defined as lobbyists. Commercial confidentiality and sensitivity over publishing financial details will no doubt cause anxieties. However, it is vital that for purposes of transparency the public can see how much is being spent on lobbying. There is a big difference in perception between a lobbying contract worth £2000 and one worth £50,000.

The recommendations above provide some starting points for discussing what information should be included in a register. One other suggestion I would offer is that the *working career* of the lobbyist should also be included in the register. I suggest this as I believe it to be important that we can identify whether and where the so-called "revolving door" is occurring. If politicians, Government and other relevant public officials undertake a

new role in which they engage in lobbying activity after they leave public service, then this could lead to perceptions of impropriety by some. For example, if a Health Minister left office and very soon after found themselves working for a Pharmaceutical company competing for NHS contracts then this information should be publicly available. Thus, I believe that this is an area that should be considered for inclusion when providing information on the register.

On the basis of the above discussion I would suggest the following information should be registered:-

- The name of the lobbyist
- The company/organisation they work for and/or who they are working on behalf of (the client)
- Who they are contacting
- The subject of the contact, for example the particular policy, legislation or contract they are trying to influence.
- The estimated financial worth⁴ or expenditure, for in-house lobbying, or of the lobbying activity over a period of time, or the time expended.
- The career history of the individual lobbyist.

Exemptions

This proposed Bill would be clear - the registration requirements should not impact upon the activities that an MSP engages in as part of their day-to-day local constituency duties. In particular, it should not impact on the contact between an MSP and his or her constituents. I would wish any Bill to make it clear who and what should be exempted from registration.

As an initial discussion point I suggest that the following are exempted:

- Lobbying by public officials acting in their official capacity (this does not apply to a public body employing a lobbying firm to carry out lobbying activity on its behalf)
- Participation in Parliamentary business, for example, giving evidence to a Scottish Parliament Committee.
- Administrative requests made by lobbyists, for example, on the status of a policy, where no attempt is made to influence.
- Communication by media workers in the course of their work,

⁴ The total worth means all costs and expenses associated with the lobbying activity.

- Communication – a speech, article, book, blog, twitter or social networking group that is made widely and publicly available.

Administration

For the register to make a useful contribution by enhancing the transparency of lobbying in Scotland, and to facilitate accountability, it will be important that it is updated regularly and that the information it contains is verifiable and credible. It is therefore important that whichever agency is charged with overseeing the register has sufficient resources and powers to audit registrations, investigate complaints, and enforce compliance.

A key question is in relation to which organisation is most appropriate to administer the statutory register as proposed in the Bill. I would not envisage that a new body is formed. Instead, I would suggest that an existing body such as the Standards Commission for Scotland, the Public Standards Commissioner, the Scottish Information Commissioner (SIC) or the Scottish Parliament itself should be considered as the registrar and administrator. The current Westminster Lobbying Bill proposes that the Information Commissioner for England and Wales should administer a statutory register. Given the role of the SIC in Scotland, perhaps a detailed consideration of the SIC taking on this role in Scotland should be undertaken. I welcome views on this important question.

Enforcement

What penalties are appropriate is an obvious question to be asked in this consultation. Suffice to say, it is my view that stringent enough penalties should be introduced to incentivise lobbyists to adhere to the register. I would suggest consideration is given to written warnings for first, second and relatively minor offences, temporary suspensions of varying lengths for more serious offences and the permanent removal from the register (ending their ability to operate as lobbyists) as the ultimate sanction. All sanctions should be made public and reported in an annual report – similar to that of the Standards Commission.

Financing the register

Public budgets are under a great deal of pressure and, because of this, I am keen to ensure that costs associated with administering a register are kept to a minimum. How much it would cost has yet to be fully established. I

would however argue that cost alone should not be a reason *not* to introduce a register. Openness, transparency and good governance are vital and how much it costs, within reason, is I believe a price worth paying, even, in fact especially, in such straitened times. Of course, how we pay for any costs requires some thought and again I welcome any suggestions on this issue.

Format

I would seek to design the register in a way which ensures it is neither onerous nor burdensome for those who are registering. The register should be easy to use, both for lobbyists, and for the public and other interested parties. As such, it is proposed that the register should be available online, fully searchable, sortable and that entries can be downloaded. It is envisaged that the register will be fully compliant with best practice in terms of online accessibility and e-governance.

Conclusion

The Scottish Parliament was set up with the aim of being an open and transparent institution. It was also created with the intention of being innovative and ethical - an exemplar of best practice and a model for a new politics. The Parliament has rightly kept its performance against its founding principles under review^{xix}, and while there has been much to be proud of in terms of realising these principles, it remains the case that there is more that could be done: the proposed lobbying transparency register is a contribution to this founding mission.

As such I would contend that a lobbying transparency register will:-

- Make lobbying more accountable to the Scottish public by enabling those inside and outside the institutions at Holyrood to better see and understand who is seeking to influence the exercise of power via lobbying.
- Make a telling contribution to the *accountability* of the Scottish Government to the Scottish Parliament and the Parliament to the people by making information about lobbying contacts and issues public in a timely and accessible manner.
- Make the Scottish Parliament more open and provide greater knowledge and awareness about lobbying at Holyrood.
- Facilitate and enable more *access and participation*;
- Make a tangible contribution to *equal opportunities* by enabling all interested parties to participate in policy making and deliberation based on better information and greater transparency.

As noted, in the Appendix below, there is a variety of lobbying registration and disclosure systems in operation around the world. The scope, nature, and purpose of these systems may vary, but they all share core common elements, underpinned by a belief in the principle of transparency as a means to improve democratic governance and decision-making. The OECD guidelines on lobbying and ethics stress the importance of developing registration and disclosure systems that are appropriate for a particular political culture. The intention of this consultation is to solicit submissions from interested parties on how a Scottish system of lobbying registration

can be developed to deliver transparency, secure probity and enhance participation in decision-making and the formulation of legislation in Scotland.

The framework proposed in this consultation is based on a number of core assumptions and characterised by the following fundamental principles:

- A lobbying registration system should apply to all lobbyists who meet the thresholds set;
- The information disclosed must be up-to-date, comprehensive and accurate;
- The information disclosed must be easily accessed and understood;
- There must be independent oversight and credible sanctions.

Interested parties and individuals are invited to comment on the following questions and issues. These questions reflect some of the key areas where there may well be differing views about scope, definition, how a lobbying registration system should be applied equally and fairly, what precise types of information ought to be disclosed, and how the system will be managed and governed. The following section poses questions in relation to the general principles and details of the proposed Bill.

Questions

1. Do you support the general aim of the proposed Bill? Please indicate “yes/no/undecided” and explain the reasons for your response.
2. Do you agree that legislation is a necessary and appropriate means of improving lobbying transparency?
3. Is there any specific international approach to the regulation of lobbyists that represents a good model for developing an approach appropriate for Scotland?
4. What robust, comprehensive and sufficiently explicit definitions of lobbying and lobbyist can be developed and applied that will ensure all who lobby are captured under the proposals?
5. Who should register on a lobbying register in Scotland?
6. Is it necessary or desirable to develop a Code of Conduct for lobbyists to accompany a lobbying register? If so, what key elements should this code include?
7. Are the current arrangements, whereby lobbyists are governed only through self-regulatory schemes, adequate or is a statutory regime required in order to regulate lobbying?
8. What do you think is the appropriate and necessary information to be disclosed in order to make lobbying transparent and how regularly should entries be updated?
9. Should there be a threshold for inclusion in the lobbying register? If so, what should it be (in terms of time / resources devoted to lobbying, size of organisation, budget, etc.)?

10. Should it only be contact with MSPs, Ministers and civil servants which should require to be recorded on the register, or should all public officials, including from NDPB's, be included?
11. Which organisations should be exempted from registering and why should they be exempted?
12. Is an independent body required to oversee the register? If so, which organisation should be responsible for administering the register?
13. How will compliance be policed and what investigative and enforcement powers would the overseeing body require?
14. How should the administration of a statutory register be paid for? And what is your assessment of the likely financial implications (if any) of the proposed Bill to you or your organisation? What (if any) other significant financial implications are likely to arise?
15. Is the proposed Bill likely to have any substantial positive or negative implications for equality? If it is likely to have a substantial negative implication, how might this be minimised or avoided?

How to respond to this consultation

You are invited to respond to this consultation by answering the questions in the consultation and by adding any other comments that you consider appropriate.

Responses should be submitted by **29th October 2012** and sent to:

Neil Findlay MSP
Room MG.11
Scottish Parliament
Edinburgh EH99 1SP

Tel: 0131 348 6896

E-mail: neil.findlay@scottish.parliament.uk

Please indicate whether you are a private individual or an organisation.

Respondents are also encouraged to begin their submission with short paragraph outlining briefly who they are, and who they represent (which may include, for example, an explanation of how the view expressed was consulted on with their members).

To help inform debate on the matters covered by this consultation and in the interests of openness, please be aware that the normal practice is to make responses public – by posting them on my website (<http://www.neilfindlaymsp.com/>) and in hard copy in the Scottish Parliament's Information Centre (SPICe).

Therefore, if you wish your response, or any part of it, to be treated as **anonymous**, please state this clearly along with the reasons for this. If I accept the reasons, I will publish it as “anonymous response”. If I do not accept the reasons, I will let you know and give you the option of withdrawing it or submitting it on the normal attributable basis. If your response is accepted as anonymous, it is your responsibility to ensure that the content of does not allow you to be identified.

If you wish your response, or any part of it, to be treated as **confidential**, please state this clearly and give reasons. If I accept the reasons, I will not publish it (or publish only the non-confidential parts). However, I am obliged to provide a (full) copy of the response to the Parliament's Non-

Government Bills Unit when lodging my final proposal. As the Parliament is subject to the Freedom of Information (Scotland) Act (FOISA), it is possible that requests may be made to see your response (or the confidential parts of it) and the Parliament may be legally obliged to release that information. Further details of the FOISA are provided below.

NGBU may be responsible for summarising and analysing the results of this consultation and will normally aim to reflect the general content of any confidential response in that summary, but in such a way as to preserve the confidentiality involved. You should also note that members of the committee which considers the proposal and subsequent Bill may have access to the full text of your response even if it has not been published in full.

There are a few situations where not all responses will be published. This may be for practical reasons: for example, where the number of submissions we receive does not make this possible or where a large number of submissions are in very similar terms. In the latter case, only a list of the names of people and one response who have submitted such responses would normally be published.

In addition, there may be a few situations where I may not choose to publish your evidence or have to edit it before publication for legal reasons. This will include any submission which contains defamatory statements or material. If I think your response potentially contains such material, usually, this will be returned to you with an invitation to substantiate the comments or remove them. In these circumstances, if the response is returned to me and it still contains material which I consider may be defamatory, it may not be considered and it may have to be destroyed.

Data Protection Act 1998

As an MSP, I must comply with the requirements of the Data Protection Act 1998 which places certain obligations on me when I process personal data. Normally I will publish all the information you provide (including your name) in line with Parliamentary practice unless you indicate otherwise. However, I will not publish your signature or personal contact information (including, for example, your home telephone number and home address details, or any other information which could identify you and be defined as personal data).

I may also edit any information which I think could identify any third parties unless that person has provided consent for me to publish it. If you specifically wish me to publish information involving third parties you must obtain their consent first and this should be included in writing with your submission.

If you consider that your response may raise any other issues concerning the Data Protection Act and wish to discuss this further, please contact me before you submit your response.

Further information about the Data Protection Act can be found at: www.ico.gov.uk.

Freedom of Information (Scotland) Act 2002

As indicated above, once your response is received by NGBU or is placed in the Scottish Parliament Information Centre (SPICe) or is made available to committees, it is considered to be held by the Parliament and is subject to the requirements of the Freedom of Information (Scotland) Act 2002 (FOI(S)A). So if the information you send me is requested by third parties the Parliament is obliged to consider the request and provide the information unless the information falls within one of the exemptions set out in the Act, even if I have agreed to treat all or part of the information in confidence and to publish it anonymously. I cannot therefore guarantee that any other information you send me will not be made public should it be requested under FOI.

Further information about Freedom of Information can be found at: www.itspublicknowledge.info.

Appendix

International comparisons

The regulation of lobbying is an issue that is currently under active debate and consideration in many jurisdictions.^{xx} One of the reasons for this is the recognition that lobbying is increasingly important to law-making, and also, that the practice of lobbying is all too often secretive or not widely known. Over the past decade lobbying disclosure and regulation have become more widespread.^{xxi} As highlighted previously the Organisation for Economic Cooperation and Development (OECD) has recognised this and in 2010 published a set of principles that could inform the development of lobbying regulations. They contextualised the increased relevance of lobbying governance, stating:

With the financial and economic crisis – massive government bailouts and stimulus packages, efforts to re-write regulations and formulate exit strategies – the stakes of lobbying are higher than ever. Increased transparency and integrity in lobbying are needed to safeguard public decision making.^{xxii}

North America

Systems for lobbying disclosure are most developed in North America. The US has had a lobbying registration scheme in place since 1946 (this has been updated a number of times, most recently in 1995 and 2007). The current US disclosure system is perhaps the most extensive in operation now, requiring “covered lobbyists” (defined as “someone who makes more than one “lobbying contact” and spends at least 20% of his or her time engaged in “lobbying activities” for his or her client or employer. Additionally, as a requirement to register, the lobbyist must have received at least \$2,500 in a quarterly reporting period from a client, or, if an in-house lobbyist, the organisation had to spend at least \$10,000 on “lobbying activities.”^{xxiii}) To file quarterly reports of their lobbying activities, and 2 reports a year detailing political contributions. The penalties for non-compliance are serious, ranging from a civil penalty of \$200,000 for knowing and willful violations of the Lobby Disclosure Act, to more serious criminal penalties of up to five years for corruption. Falsifying financial disclosures can attract penalties ranging from a \$10,000 fine to one year imprisonment.

The Canadian federal lobbying disclosure system was updated in 2008, having originally been introduced in 1989. This operates with three different categories of lobbyist (broadly understood as individuals who are paid to communicate with federal public office holders), namely: consultant lobbyists, In-House Lobbyist (Corporations) and In-House Lobbyist (Organisations) (which is a staff lobbyist in a non-profit organisation). As well as developing rules on revolving door issues (post-public employment of elected representatives and public servants) the Canadian system required lobbyists to disclose details regarding their 'oral and arranged' communications with designated public office holders (DPOHs) who in turn must confirm to the Commissioner of Lobbying the accuracy of the information submitted by lobbyists. Breaches of the Lobbying Act can result in penalties up to a maximum of \$200,000 or imprisonment for a term not exceeding two years, or both.^{xxiv}

Australia

In Australia a new register of lobbyists and a code of conduct for lobbyists was introduced in 2008 (and updated in 2011). Under this system only consultant lobbyists are required to register (defined as 'a person, company or organisation who conducts lobbying activities on behalf of a client or whose employees conduct lobbying activities on behalf of a client').^{xxv} The register defines lobbying activity as 'any oral, written or electronic communications with a Government representative in an effort to influence Government decision-making, including the making or amendment of legislation, the development or amendment of a Government policy or program, the awarding of a Government contract or grant or the allocation of funding'. Information on the register is required to be updated every six months. Should any lobbying organisation breach the regulations they will be removed from the register.

Europe

Across Europe, a number of states have introduced registers of lobbyists, with several created in the last decade. The French system is rather limited, consisting essentially of an official published list^{xxvi} of those who have access passes to the Parliament, but does not disclose details about lobbying activity. The German lobbying register is the longest established in Europe (dating back to 1951). It registers those groups who seek to defend their interests in the Bundestag, and is published annually. The German system is designed to encourage ministers to deal only with registered national associations, somewhat privileging peak business and

trade associations.^{xxvii} However, the register lacks legal force, does not require disclosure of lobbying budgets or issues lobbied on, and does not capture individual? lobbyists working in corporations and consultant lobbyists and their clients.^{xxviii} The Lithuanian lobbying register only covers commercial consultant lobbying on behalf of clients, defining lobbying as ‘an attempt to exert influence to have legal acts amended, supplemented or repealed or new legal acts adopted or rejected, *in the interests of the client* of lobbying activities’.^{xxix} The Georgian registration system introduced in 1998 requires disclosure of names, occupational titles, expenditures and issues lobbied on: ‘However, very few people have ever bothered to register as lobbyists.’^{xxx}

The regulation of lobbying at the European Union has been debated since the launch of the European Transparency Initiative in 2005. This led to the introduction of a voluntary lobbying register by the European Commission in 2008, and a revamped joint Commission and Parliament Transparency Register in 2011. There is no definition of lobbying used in Brussels, rather the guidance suggests that all those ‘engaged in “activities carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and decision-making processes of the EU institutions” are expected to register.’ A code of conduct for lobbyists has been developed to complement the Transparency Register.^{xxxi} The Transparency Register has been widely criticised for its voluntary approach, for the lack of detail and information in the register (lobbyists are not individually identified, nor are the specific issues lobbying has focused on, nor is there detailed financial disclosure) and the fact that the information in the register is not audited.^{xxxii} The EU institutions have committed to monitor compliance with the voluntary register, and have reserved the right to introduce a mandatory lobbying disclosure system if the current approach is seen to be inadequate.

Westminster

As previously noted, at Westminster the House of Commons Public Administration Select Committee (PASC) held an inquiry into lobbying over 2007 and 2008 (the first on this subject since the Select Committee on Members’ Interests examined lobbying in 1990-91). The Committee’s report and asserted that ‘lobbyists’ arguments against regulation (barriers, bureaucracy and stifling inputs from outside interests) were over-stated and even self-serving’.^{xxxiii} The Committee recommended that, in the absence of credible industry disclosure, a mandatory register of lobbyists be created, within a clearly defined framework:

- a) It should be mandatory, in order to ensure as complete as possible an overview of activity.
- b) It should cover all those outside the public sector involved in accessing and influencing public-sector decision makers, with exceptions in only a very limited set of circumstances.
- c) It should be managed and enforced by a body independent of both Government and lobbyists.
- d) It should include only information of genuine potential value to the general public, to others who might wish to lobby government, and to decision makers themselves.
- e) It should include so far as possible information which is relatively straightforward to provide.^{xxxiv}

During the 2010 general election both Labour and the Liberal Democrats made manifesto commitments to introduce a register of lobbyists. A commitment to introducing a lobbying register was part of the Conservative and Liberal Democrat coalition programme agreement. In January 2012 the UK Government published its consultation paper on lobbying. The stated aim was to:

“Create a register which is a proportionate and considered response to public concerns about the lack of transparency in the lobbying industry. It should increase transparency without stifling the useful input into policy making provided by lobbyists. A register should be a public record of who is lobbying and for whom, not a complete regulator for the industry”^{xxxv}

The framing of the consultation only addressed lobbying undertaken by consultants on behalf of clients. The register was envisaged as disclosing the names of lobbyists and their clients. The scope and ambition of the UK government’s consultation has been widely criticised by transparency groups, as well as from within the lobbying industry, principally for its failure to include in-house lobbyists in the register, and also neglecting to disclose the issues that lobbyists work on.^{xxxvi}

Unlock Democracy summarise the concerns stating how,

“We believe that the government’s proposals are fundamentally flawed and will do little to promote transparency in lobbying. Our main concerns are that the definition of lobbying is too narrow and that the level of information recorded in the register would reveal little about

the network of relationships between government and those who lobby.^{xxxvii}

References

- ⁱ David Cameron (2010) 'Rebuilding Trust in Politics', 8 February.
- ⁱⁱ http://www.oecd.org/document/48/0,3746,en_2649_34135_44644592_1_1_1_1,00.html
- ⁱⁱⁱ Standards Committee (2002) *1st Report 2002 Report on Lobbying*, 8 February.
- ^{iv} [Official report 3 October \(2002\)](#), col 11371-11388. Motion S1M-3428
- ^v PASC (2009) *Lobbying: Access and Influence in Whitehall*, Vol. 1, HC 36-1, London: The Stationery Office Limited. p. 16
- ^{vi} PASC (2009) *Lobbying: Access and Influence in Whitehall*, Vol. 1, HC 36-1, London: The Stationery Office Limited. p.22
- ^{vii} Standards Committee (2002) *1st Report 2002 Report on Lobbying*, Paragraph 44, <http://archive.scottish.parliament.uk/business/committees/historic/standards/reports-02/str02-01-01.htm>
- ^{viii} Code of Conduct for Members of the Scottish Parliament http://www.scottish.parliament.uk/S4_PublicPetitionsCommittee/General%20Documents/code_final.pdf (5th edition, Vol 2, para 5.6)
- ^{ix} Code of Conduct for Members of the Scottish Parliament http://www.scottish.parliament.uk/S4_PublicPetitionsCommittee/General%20Documents/code_final.pdf (5th edition, vol 2, par 5.9)
- ^x *ibid*
- ^{xi} Civil Service Code, <http://www.scotland.gov.uk/Resource/Doc/923/0110016.pdf> (Sec 7)
- ^{xii} Civil Service Code, <http://www.scotland.gov.uk/Resource/Doc/923/0110016.pdf> (sec 6)
- ^{xiii} UK Public Affairs Council, *Lobbying Definition*, <http://www.publicaffairsCouncil.org.uk/en/resources/lobbying-definition.cfm>
- ^{xiv} Standards Committee (2002) *1st Report 2002 Report on Lobbying*, Paragraph 33, <http://archive.scottish.parliament.uk/business/committees/historic/standards/reports-02/str02-01-01.htm>
- ^{xv} See ALT (2012) *Essential Provisions for a Statutory Register*, <http://www.lobbyingtransparency.org/content/view/14/12/>
- ^{xvi} *Essential Provisions for a Statutory Register*, Alliance for Lobbying Transparency, http://www.lobbyingtransparency.org/images/alt_essential_provisions_for_a_statutory_register.pdf (sec 1.1.b)
- ^{xvii} This should also include contacts with Ministers & public servants
- ^{xviii} Standards Committee (2002) *1st Report 2002 Report on Lobbying*, Paragraph 55, <http://archive.scottish.parliament.uk/business/committees/historic/standards/reports-02/str02-01-01.htm>
- ^{xix} See Scottish Parliament Annual Reports since session 1. See also RSE (2001) [Enquiry into the application of the Consultative Steering Group Principles in the Scottish Parliament](#), Edinburgh; EHRC (2009) *Equal opportunities and the Scottish Parliament: a progress review*, Autumn, Glasgow.
- ^{xx} For example, there are currently consultations leading to lobbying disclosure legislation at Westminster and in the Republic of Ireland. A members bill is also currently under consideration in New Zealand. In Austria a lobbying act is being brought forward as part of a wider anti-corruption and transparency package. Denmark is also reported to be considering introducing a lobbyists register. According to Holman and Luneberg 'Georgia adopted a lobbyist registry in the mid-1990s, as did the European Parliament (EP). The movement toward developing lobbyist registration systems in Europe has increased dramatically in more recent years. Registries have been implemented in Lithuania (2001), Poland (2005), Hungary (2006, repealed in 2011), the European Commission (2008), Macedonia (2008), France (2010), Slovenia (2010) and Austria (2011). Several other countries are expected to adopt a regime of lobbying regulation in the very near future, including Croatia, Ireland and the United Kingdom. And many more countries are studying the issue, including Bosnia, Bulgaria, the Czech Republic, Latvia, Norway, Romania, Switzerland, Turkey and Ukraine. Indeed, the regulation and transparency of lobbying has become one of Europe's most catching reform drives in recent years' (2012: 2). Holman, C and Luneberg, W (2012) 'Lobbying and transparency: A comparative analysis of regulatory reform', *Interest Groups & Advocacy* Vol 1, 1, pp.1-30
- ^{xxi} See for instance the useful overview of lobbying regulation at <http://www.regulatelobbying.com>
- ^{xxii} www.oecd.org/gov/ethics/lobbying
- ^{xxiii} See 2 U.S.C. § 1602 (7) and Luneberg, W. V. and Susman, T. (eds) (2009) *The Lobbying Manual: A Complete Guide To Federal Law Governing Lawyers And Lobbyists*, American Bar Association, 3rd edition.

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- ^{xxiv} For more information see Office of the Commissioner of Lobbying of Canada, http://ocl-cal.gc.ca/eic/site/012.nsf/eng/h_00000.html
- ^{xxv} <http://lobbyists.pmc.gov.au/faq.cfm#4>. The Code does not apply to in-house lobbyists, such as government relations staff employed by companies to make representations to Government on behalf of the company that employs them, or staff employed in peak industry bodies or trade unions who make representations to Government on behalf of their industry or their members
- ^{xxvi} See <http://www.assemblee-nationale.fr/representants-interets/liste.asp>
- ^{xxvii} <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmpublic/36/3612.htm>
- ^{xxviii} Council of Europe (2009) *Lobbying in a democratic society* (European Code of conduct on lobbying), appendix 1, p. 9. Doc 11937
- ^{xxix} <http://www.oecd.org/dataoecd/17/30/38944570.pdf>
- ^{xxx} Holman and Luneberg (2012) p. 15.
- ^{xxxi} http://europa.eu/transparency-register/about-register/code-of-conduct/index_en.htm
- ^{xxxii} See <http://www.alter-eu.org/documents/2012/04/transparency-register-guidelines>
- ^{xxxiii} For an overview of the debate on lobbying regulation in the UK see Dinan, W and Miller, D. (2012) ‘Sledgehammers, nuts and rotten apples: Reassessing the case for lobbying self-regulation in the United Kingdom’, *Interest Groups and Advocacy*, Vol 1 ,1
- ^{xxxiv} PASC (2009) p 50, 51.
- ^{xxxv} Cabinet Office (2012) *Introducing a Statutory Register of Lobbyists: Consultation Paper*, Cm 8233, London: The Stationery Office Limited. p. 9.
- ^{xxxvi} <http://www.lobbyingtransparency.org/content/view/14/12/>
- ^{xxxvii} Unlock Democracy’s response to the Introducing a Statutory Register of Lobbyists consultation paper, http://b.3cdn.net/unlockdem/da847d994c005b1953_vam6bh11.pdf