

The Lobbying (Scotland) Bill



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A briefing on prospective legislation which seeks to regulate lobbying in Scotland, with significant consequences for how businesses and other organisations engage with the Scottish Government and Members of the Scottish Parliament.

Background to the Bill

The Lobbying (Scotland) Bill (the “Bill”) is currently progressing through the Scottish Parliament. The Bill followed the Scottish Parliament inquiry into lobbying which ran from September 2013 until February 2015, which was created to investigate the practice of lobbying in Scotland. Several of the suggestions made by the committee that conducted the inquiry have been replicated in the Bill. The Bill makes provision for the regulation of lobbying activities and creates offences following a failure to register as a lobbyist or for providing inaccurate information in relation to lobbying.

Earlier in January 2016, the Scottish Parliament had its first chance to debate the Bill fully and there was cross-party support for its core principles. This suggests that the Bill, while its detailed provisions are still liable to be amended, will not face difficulties in being passed and becoming law. The Bill will be debated again in mid-February and there is a further stage of the legislative process to complete after that. When exactly it will complete the legislative process depends on the Scottish Parliament’s timetable, which doesn’t involve strict time limits. However, the Parliament will be dissolved on 23 March 2016 due to the Scottish Parliament elections on 5 May. In the unlikely event that the Bill is not passed before then it will be discarded and the Parliament would need to restart the legislative process in the new session of Parliament.

What activity will the Bill cover? – ‘face-to-face’ lobbying only

The Bill creates a regulatory architecture which seeks to control some forms of lobbying, which it calls ‘regulated lobbying’. This term is defined broadly in the Bill to include any communication, made in the course of business, or other activity, which:

- is made orally and in person to an MSP, a Member of the Scottish Government or a junior Scottish Minister (but not MPs or UK ministers, even if they are in Scotland);
- is made in relation to governmental or parliamentary functions; and
- is not specifically carved out elsewhere in the Bill (see below).

This fact that the Bill seeks only to deal with ‘face-to-face’ lobbying has been widely criticised, as this leaves any lobbying not done in person (for example via email, Skype, etc.) out with the scope of the regulatory regime. It is undoubtedly true that this simply does not reflect how modern professionals and businesses communicate. It also leaves the system open to manipulation.

Carve outs

The Bill carves out some communications from this very wide initial definition of ‘regulated lobbying’. Of particular note are carve outs for individuals acting on their own behalf and individuals not acting in return for payment. Individual persons will therefore be able to communicate



with MSPs and the Scottish Government on matters of concern without coming within the ambit of the Bill as long as they communicate directly, not using third party lobbyists. It appears, however, that businesses or organisations set up as companies, LLPs, partnerships or other legal vehicles will not be able to rely on this carve out even if they are undertaking lobbying on their own behalf.

Also, communications made in the course of a meeting that was initiated by the Scottish Government or an MSP are not 'regulated lobbying'. As such, parties are free to respond to political and policy related communications (e.g. consultations) without worrying that in doing so they may be bringing themselves within the scope of the Bill.

What does this mean for my organisation?

If your organisation is undertaking 'regulated lobbying' it must be registered with the Clerk of the Scottish Parliament. If it engages in regulated lobbying, and is not at that point registered, it must register within 30 days of when the first instance of regulated lobbying occurred. A failure to register is a criminal offence.

Upon registration as a lobbyist, an organisation (or, indeed, individual) will need to submit various pieces of information, including:

- the organisation or individual's name;
- main place of business (or, if that is inapplicable, residence);
- in the case of a company, various corporate details including the names of office holders and shadow directors; and
- in the case of partnerships, the name of the partnership, the name of the partners and the partnership's head office address.

Details about each instance of regulated lobbying undertaken must also be submitted to for registration. This includes:

- the name of the person lobbied;
- the date when the lobbying took place;
- the location in which the lobbying took place;
- a description of the meeting/event that constituted the lobbying;
- the name of the individual who made the communication which constituted regulated lobbying;
- a statement that the lobbying was undertaken on behalf of registered lobbyist or the name of the person on behalf of whom the lobbying was undertaken; and
- the purpose of the lobbying.

A registered party, who actively undertakes 'regulated lobbying', is required to make information returns every 6 months. Generally, unless the Clerk considers that it would be inappropriate to do so, any submitted information will be made public.

Understandably, some organisations may be concerned about details of their contacts with the Scottish Government or individual MSPs becoming public if they relate to sensitive matters (for example, a commercial venture). Accordingly, the scope of the 'carve outs' from the registration scheme and how the Clerk uses his discretion not to publish inappropriate information will likely be key for organisations in considering regulated lobbying for sensitive or confidential projects.

What are the compliance risks? – creation of criminal offences

The Bill creates a set of statutory criminal offences. The core offences are:

- failing to register and provide required information;
- giving inaccurate or incomplete information in an application for registration; and
- failing to submit an information return, or including in such a return inaccurate or incomplete information.

There is a due diligence defence to all the offences outlined above.

Of particular note for individuals, is the provision for criminal liability of directors, partners or managers of a body corporate. If the individual director, partner or manager consented to, connived in, or negligently caused the commission of an offence by the body corporate then the individual will be criminally liable.

The Clerk has power to request information from both registrants and those who he/she has reasonable grounds to believe are, or have been, engaged in regulated lobbying.

Will guidance be available?

The Parliament is obliged to publish guidance on the operation of the Bill and a code of conduct for those lobbying MSPs.

Next steps

The Bill continues to work its way through the Scottish Parliament. There has already been criticism of the restriction of lobbying to 'face-to-face' activities and the Bill's provisions could well change. In particular, during the recent Scottish Parliament debate on the Bill a number of MSPs spoke in support of widening its scope to include communications such as letters, emails and phone calls. The Scottish Government minister leading the debate emphasised the Government's view that the



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Bill as drafted offered a proportionate approach; however, he also indicated that he was keeping an 'open mind' on widening the scope of the Bill to include other forms of communication.

There will be a further vote on the Bill in February and, while there is no precise timeline for the remainder of the legislative process, the Bill needs to be passed by the Parliament before this session of Parliament is dissolved on 26 March 2016.

Please contact **Natasha Durkin** or **Liam Maclean** in our Regulation and Markets team, or your usual Shepherd and Wedderburn contact, for further updates or to discuss any issues that you need assistance with.