

The Lobbying (Scotland) Bill Passed by Scottish Parliament



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A briefing on recently passed 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

We have previously published an update on the Lobbying (Scotland) Bill (the “**Bill**”), it can be accessed [here](#). The Bill was passed by the Scottish Parliament on 10 March 2016 and will shortly become law.

In our last update we outlined the key provisions in the Bill at the halfway stage of the legislative process:

- The Bill only regulated face-to-face communications made in person, not email, telephone, and other forms of non-verbal communication.
- Such communications only constituted lobbying if they were made to an MSP, a Member of the Scottish Government or a junior Scottish Minister. Civil servants and special advisers were not to be covered by the Bill.
- The Bill included a number of carve-outs. Of particular note were the carve outs for individuals acting on their own behalf and individuals not acting in return for payment.
- Parties that undertook regulated communications would be required to register details about themselves and the topics that they lobbied on, on a regular basis.
- Failure to register as required by the Bill would be a criminal offence, potentially both for the organisation

who should have registered and its directors, partners or managers.

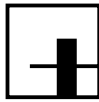
The basic structure of the regulatory regime outlined above remains the same; however, several important details have been changed by amendments agreed in the later stages of the Bill’s passage through Parliament.

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

The final Bill still 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 to a MSP, a Member of the Scottish Government, a junior Scottish Minister, a special adviser or the Permanent Secretary to the Scottish Government;
- is made in person, or via videoconferencing facilities;
- is made in relation to governmental or parliamentary functions; and
- is not specifically carved out elsewhere in the Bill (see below).

The key changes here are the widening of the scope of



the Bill to include special advisers and the Permanent Secretary (but not other members of the civil service) and, also, communication made via videoconferencing. This fact that the Bill originally only addressed 'face-to-face' lobbying had been widely criticised, as any lobbying not done in person (for example, via email, telephone or letter) would be out with the scope of the regime. The Government's inclusion of videoconferencing in the final Bill's regulatory ambit has done little to assuage the disappointment of some opposition politicians and transparency campaigners.

Carve outs

The Bill carves out some communications from its 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.

As we highlighted in our last briefing, businesses or organisations set up as companies, LLPs, partnerships or other legal vehicles would not be able to rely on this carve out even if they were undertaking lobbying on their own behalf. That remains the case. However the Government has included some new carve-out provisions that will mean that many communications made by businesses or other organisations will not be regulated as lobbying:

- **Constituency/Regional MSP contact:** an individual who is an employee, director, other office holder, partner or member of a business or organisation can contact the MSPs for the constituency and region for (i) the place where business/organisation's business or activities are ordinarily carried on and (ii) the place where the individual is himself resident without coming within the Bill's ambit, as long as that communication is on behalf of that business or organisation.
- **Small organisations:** a communication by an individual who is an employee, director, other office holder, partner or member of a business or organisation with less than 10 full-time equivalent employees will not come within the ambit of the Bill, as long as that communication is on behalf of that business or organisation.

Also, communications made in response to a request for factual information or views on a particular topic are not to count as '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. This carve-out has been widened somewhat in the final round of amendments; it previously only covered communications instigated by an MSP, a Member of the Scottish Government, or a junior Scottish Minister.

A further carve-out has been added to the Bill, exempting communications made by a business/organisation or a trade union where the communication forms part of, or is directly related to, negotiations on terms and conditions of employment of business/organisation's employees.

What does this mean for my organisation?

As noted in our previous update, if your organisation is undertaking 'regulated lobbying' as outlined above it will need to register 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. Details about each instance of regulated lobbying undertaken must also be submitted to for registration.

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.

What are the compliance risks? – creation of criminal offences

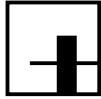
The Bill as passed creates a set of statutory criminal offences. The core offences are:

- 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 any of 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



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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 will shortly receive Royal Assent and become law. When exactly the substantive provisions will come into force is up to the Scottish Ministers. In the meantime, the Clerk of the Scottish Parliament will need to set up

the operational infrastructure required to maintain the register of lobbying activity and monitor compliance with Scotland's new regulatory regime for lobbying. We will keep you updated with any developments, so please check our website and sign up for our email updates.

Businesses and other organisations should take proactive steps now to work out how their interactions with MSPs and the Scottish Government will be affected. Please feel free to contact Natasha Durkin or Liam Maclean in our Regulation and Markets team, or your usual Shepherd and Wedderburn contact, to discuss any issues that you need assistance with.