

**Public Audit and Post-legislative Scrutiny  
Committee  
Operation of the Lobbying (Scotland) Act 2016**



**Response from FSB**

**August 2020**

The Federation of Small Businesses (FSB) is Scotland's leading business organisation. Our mission is to help smaller businesses achieve their ambitions. These micro and small businesses comprise the majority of all enterprises in Scotland (98%), employ around one million people and contribute tens of billions to the economy.

FSB welcomes the opportunity to contribute to the committee's call for evidence on the operation of the Lobbying (Scotland) Act 2016, which enables us to reflect upon the operation of the legislation.

**Questions**

**1. In your view, what concerns was the Lobbying Act seeking to address?**

As FSB has maintained since first considering proposals for a statutory lobbying register in 2015, openness is rightly regarded as some of the Scottish Parliament's defining features. It is one of the most modern, transparent legislatures in the world. We find MSPs to exhibit similarly high standards of integrity and acuity.

It is for these reasons that we have no evidence to support any suggestion that there is, or ever has been, a problem with MSPs acting corruptly or under improper outside influences.

However, we do acknowledge Parliament and the Scottish Government's desire to improve transparency about their engagement and interaction with third parties. There is also today a level of public expectation around government and official openness, which democracies are bound to address.

That said, beyond this top-level aim, there seems to us to have been a lack of clarity around what result the Scottish Parliament and Government intended various aspects of the legislation to achieve. Indeed, it is submitted that, had these intentions been clearer from the outset, the Act's implementation would have been far smoother and more effective.

**2. Two years' on, has the Lobbying Act addressed those concerns? In particular, has the Act added value? If so, in what way? For example, has the Act improved transparency? Do you think it has changed the way lobbying is carried out?**

The requirements of the Act have not had a major impact on how we as an organisation engage with the Scottish Parliament or Scottish Government. This is welcome, as one of the fears when the Act was passed was that it would see an end to, or the severe curtailment of, this sort of activity.

That said, we have had to put in place some internal processes and amend internal rules so that our members are aware of their obligations. These, of course, are by no means cost-free and some suggestions on reducing the ongoing administrative costs are set out at Q6 below.

We have also built in extra administrative steps when running events to which MSPs or Ministers might be invited. Implementing these procedures have proved something of a challenge in practice, however, especially at large events, such as receptions. At such a gathering, for example, we might have an office-holding member from elsewhere in the UK talking in a group with a Scottish Government Minister when the conversation turns to a devolved matter and they give the FSB position. When staff resources are finite, there are obvious logistical issues around ensuring that 100% of such conversations are correctly noted and assessed against registration criteria.

It should also be noted, however, that the vast majority of our direct contact with government or Ministers comes as a result of their seeking factual information or views from us on a particular topic. As such, those communications are exempt and should not be registered.

**3. Do you support a legislative approach to regulating lobbying activity? If so, why? If not, for what reason? Has your view on the value of a legislative approach changed since the commencement of the Lobbying Act?**

FSB did not regard the legislative approach as proportionate when the Bill was first proposed and this view has remained broadly the same since the Act's commencement. We of course accept that, simply because this is not a good piece of legislation, it doesn't necessarily follow that the legislative approach was incorrect. However, our practical experience since the Act came into force has highlighted a number of weaknesses that can be directly attributed to the statutory nature of the regulatory regime.

First, as with any piece of primary legislation, amending any provisions on the face of the Act that are subsequently found wanting requires further primary legislation – with all of the time and resource requirements that entails. In this case, even with the Guidance<sup>1</sup> that was subsequently produced, the drafting of the Act has made it very difficult to address the questions around clarity of definitions and the operation of some exemptions.<sup>2</sup>

Secondly, it will be recalled that this legislation had an eventful parliamentary journey, with various amendments, some significant, being made at Stages 2

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<sup>1</sup> Parliamentary Guidance Published under the Lobbying (Scotland) Act 2016, 1st Edition – January 2018  
<http://www.parliament.scot/LobbyingRegister/2018.02.22ParliamentaryGuidance1stEdition.pdf>

<sup>2</sup> See Q4 below for further discussion.

and 3. While accepting that much of this was done in good faith and in the interests of repairing aspects of the Bill which had been identified as problematic, Stage 3 always offers limited opportunity to examine and debate the implications of amendments which introduce significant changes. Indeed, the constituency exemption – a necessary, sensible and perfectly well-intentioned move – was one of the changes introduced at Stage 3 and has proved to be one of the most difficult to interpret in practice.<sup>3</sup> Further time to debate and refine these provisions could have resulted in clearer, more effective legislation.

**4. In your view, is the Lobbying Act working in the way it was intended? If not, why not? What needs to change to ensure that it is working as intended (i.e without making changes to the legislation)?**

Part of the difficulty with the implementation of the Act has been around the clarity of its provisions and their practical application.

On the face it, many provisions in the Act look fairly straightforward. However, difficulties arise when its definitions and provisions are applied to the sort of commonplace activity that surrounds the political process.

For example, take the exemption around representations to your local or regional MSPs. This makes perfect sense. It's most unlikely that parliament would wish to curtail the ability of, say, a local business owner to make representations to his or her MSP about their local high street.

Paragraph 2(c) of the Schedule defines such a local representations as being made:

"to a member of the Scottish Parliament for the constituency or the region in which any of the following are situated—

- (i) a place where the person's business is ordinarily carried on,
- (ii) a place where the person's activity is ordinarily carried on, or
- (iii) the individual's residence."

"In some cases," the Guidance notes, "a local presence will be obvious", such as where a business has a physical presence or a geographically defined market.

In other cases, however, the definition of "a place where the person's business is ordinarily carried on" is far less clear. Does it cover a major utility with customers in almost every postcode in Scotland? Does it cover businesses who operate exclusively online and offer their services to the whole of the UK?

If one then further consults the Guidance for clarification on what is and is not covered by this definition, it is clear that the parliamentary authorities also find it difficult to pin down:

*"However some businesses and organisations are based, or operate, in multiple locations across all of the Scottish Parliament constituencies and*

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<sup>3</sup> See Q4 below for further discussion.

*regions in Scotland. The Act does not provide a specific measure for the level of business or activity undertaken in a constituency or region necessary for this 'local' exemption to apply – that would be very hard to define across such a varied range of possibilities.*

*"Rather, the Act exempts any discussions between you and a local MSP if your business or activity is 'ordinarily carried on' in their constituency or region. As this exemption effectively removes from regulated lobbying all communications between MSPs and those they have a genuine local relationship with, you should consider whether your business or activities are significant or relevant enough to be those which are 'ordinarily carried on' in that local area."<sup>4</sup>*

While this is probably as far as the authorities felt they could go, based on the provisions of the Act, it does not give businesses a working definition on which they can rely with confidence. Rather, registrants are left to determine for themselves whether or not a particular piece of activity meets the relevant definitions and register (or not) that activity accordingly. This is far from ideal, not least because it runs counter to the better regulation principles of transparency and consistency.

Further, anecdotal evidence suggests that this has led to widespread variation in how different Scotland-wide organisations are interpreting this particular aspect of the legislation. While none of these organisations (certainly to the best of our knowledge) is deliberately breaking the rules, neither can any be entirely confident that they are complying fully with Parliament's intentions.

There are many other examples – such as the definitions around when a casual conversation might drift over the line and become registrable – but the central point is the same: imprecise drafting, augmented with limited guidance, leading to uncertainty when registrants come to apply the tests to real-world situations.

It is therefore suggested that the Guidance could be updated in light of how the Lobbying Registrar has applied the tests over the past two years. If patterns or precedent have emerged, these could be used to give registrants a clearer steer on how things should be interpreted. Should the Registrar not feel he has sufficient legal authority to do so, a further parliamentary intervention may be required.

**5. Could the legislation be improved in any way? If so, please indicate why and in what way? In particular, do you have any views on whether the changes should be made to the following (please indicate why and in what way):**

- a. the Act covers lobbying to a Member of the Scottish Parliament, a member of the Scottish Government, a junior Scottish Minister, a law officer, a special adviser or the permanent secretary. Does the Act cover the right groups of decision makers?**

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<sup>4</sup> Parliamentary Guidance, Page 16

- b. the Act requires face-to-face communications, including via video conferencing and other similar means, which are also regulated lobbying to be registered. Are these the right communications to capture?**
- c. the circumstances in which a person undertaking "regulated lobbying" is required to provide information, to be included in the register, about costs incurred by them when engaging in regulated lobbying. Bill assumptions v. reality of the Act**

The sort of measures outlined in the final paragraph of Q4 above would, we submit, improve the effectiveness of the Act.

Asides from making the obvious high-level point that it is hard to see how extending the scope of the Act to emails, letters, telephone calls, social media interactions and more would be practical, it is premature, given some of the issues identified around the Act's mechanics, to talk in any great detail about the merits of expanding or contracting its scope at this stage.

It would be helpful if the result of this review was a clear statement from Parliament about what it is seeking to achieve – and, crucially, what it is determined to avoid – through this regulatory regime. This could be followed by amendments to the current system to this effect.

With tighter definitions and more easily applicable guidance on which registrants can rely, it may then become easier to have the more detailed conversation to which this question alludes.

**6. Have assumptions made at the Bill's introduction in its Financial Memorandum and Policy Memorandum and during its passage through Parliament held true (for example, on costs or impact) and, if not, why not?**

We have a limited sight of the broader picture on this. However, speaking purely from our own organisation's perspective, as noted above, while there have been additional administrative costs and resource implications, we have been able to absorb such costs into existing budgets.

There has also been feedback from those who are responsible for actually making the returns that these administrative costs could be reduced considerably were the online submission interface to be improved.

For example, enabling registrants to have their default basic information pre-populated in certain key fields in all new returns would save them re-entering the same details time after time. Introducing the ability to include a return which would cover multiple conversations at the same large event would also save considerable time and resource, as would the ability to import data from external sources, such as spreadsheets.

**7. Are there any other issues you would like to raise in connection with the operation of the Lobbying Act?**

FSB is proud to have worked closely with the Scottish Parliament since its inception in 1999. While we have not been convinced of the need for a statutory lobbying register, we entirely respect parliament's decision to establish one. We therefore remain keen to engage in any efforts to refine and improve this legislation so that it delivers a system that does what MSPs want it to do. We are also very clear that, as with any other form of business-facing regulation, the system must exemplify regulatory best practice.

Should further discussion of how to realise these aims be helpful, FSB would be more than happy to assist.

## **Contact**

For further information please contact Colin Borland, Director of Devolved Nations, [Colin.Borland@fsb.org.uk](mailto:Colin.Borland@fsb.org.uk)