

The Lobbying Act (Scotland) Post Legislative Scrutiny

Friends of the Earth Scotland Submission
August 2020



Friends of the Earth Scotland's has an interest in lobbying transparency from two angles. As an organisation who takes part in lobbying, we have a direct interest in the system used to create transparency in our interactions. Equally, as campaigners we believe the public have a right to transparency on the influence that interest groups, including polluting industries, have on decision making in Scotland.

Overall, we believe the Act presented an opportunity to create greater transparency in Scotland's political process - but it has been proven to be limited in achieving this aim, hampered by a number of exemptions and loopholes. Below we set out some of the issues that have presented since the enactment of the Bill, and some potential solutions. In particular we believe the Act must be amended to address issues including:

- Only capturing face-to-face communication
- An unnecessarily broad exemption for "local interest"
- Working to a very narrow definition of lobbying

Friends of the Earth supports the submission from the Scottish Alliance for Lobbying Transparency (SALT), of which we are a member.

The need for the Act

Friends of the Earth Scotland believes that lobbying has a constructive role to play in our political system - allowing a wide range of views, particularly those from people with lived experience and other expertise, to feed into policy creation. However, without proper scrutiny there is a risk that powerful unelected interests wield a disproportionate amount of influence, and decisions are made with heavy external input but little scrutiny. Fundamentally, people have the right to know who is influencing decisions made by MSPs and the Scottish Government.

Friends of the Earth Scotland supported the Lobbying (Scotland) Act 2016 when introduced, arguing that it would create transparency to an area of Scottish politics where none existed. The Act was an opportunity to give greater oversight of the role vested interests play in decision making within the Scottish Parliament and the Scottish Government, and ultimately enhance and re-build public trust in politics and the political process.

A legislative approach to lobbying transparency, as opposed to a sector-lead or 'opt in' system, should have created a more robust system - making the register mandatory, and adding more gravity and power. Designing a voluntary or non-legislative system risked creating a system with less weight, potentially designed by the industry itself and reliant on self policing.

The Act has not directly changed the way that Friends of the Earth Scotland engages with MSPs and the Scottish Government, though it has created a potentially useful campaigning tool. The Lobbying Register's search functions has potential to enable the monitoring of

engagements related to polluting activity. We have promoted the register to activists who have an interest in transparency or are planning to meet their MSPs, and it has been received with interest.

The Act in practise

The Act has introduced some degree of new insight into lobbying in Scotland, but its ability to create full transparency is limited. The online platform is a useful resource, and the annual report published by the Lobbying Register team could create a welcome insight into registered lobbying in Scotland - but the Act must be strengthened to unlock their potential.

In practise, the Act only fulfils its original intentions in the most basic sense, and its overall impact is limited by narrow definitions and wide ranging exemptions within the legislation. In particular, the Act's impact has been limited by:

- Only capturing face-to-face communication
- An unnecessarily broad exemption for "local interest"
- Working to a very narrow definition of lobbying

We have concerns that, at best, these limitations mean activities which would meet many people's definitions of lobbying are not eligible to be registered, even if the person conducting the lobbying intended to register it. At worst,, they create a framework that could be used to avoid registering instances of lobbying. Regardless of intent, these loopholes mean that activities that meet any one of these exemptions become ineligible for registration, and therefore not put into the public realm.

Face-to-face communications

The Act states that regulated lobbying only occurs when individuals can both see and hear each other. This section means that phone calls or virtual meetings where one or both participants are not using a webcam cannot be submitted to the register, and doesn't capture written forms of communication.

We would question the exemption of non-face-to-face communication, particularly in why audio-only lobbying is deemed any less in the public interest than a video conversation. In practise it has been a stark omission. Often a phone call or email can be the most convenient means of communication, or someone may not have access to video calling technology, but there is no reason that that contact is any less worthy of registering.

Anecdotally we know that when big decisions are made on tight timescales, phone calls and email have been the most feasible means of communication for interested parties - so there is little option but to engage in unregistered lobbying. In the worst case, though, this loophole could create the framework for people to exploit if they didn't want to register some communications.

Local interest

Schedule Two of the Act sets out a number of areas which are not classed as lobbying, and therefore do not require entering into the lobbying register. We have specific concerns about the enactment of the exemptions for lobbyists engaging with an MSP where the person's business or activity is "ordinarily carried on".

This is a sweeping exemption, which offers no differentiation between communications made in a local interest and those made in a national interest. Instead this has been interpreted as exempting any communication with someone from an area, or a business in an area, an MSP represents, regardless of the subject.

In practise this means if a national business or charity lobbied an MSP whose constituency they have a branch in on a national campaign, this could be exempt from the register. At its most extreme level, organisations providing services or with facilities in every constituency could end up not being required to register any of their engagements due to a perceived local interest. This is a particular issue when it comes to national businesses or coalitions coordinating lobbying through local branches or members.

A stronger definition of lobbying

Step three of the Five Tests in the Parliamentary Guidance suggest lobbying only needs registered if "*you used the opportunity to inform or influence decisions on behalf of your organisation*". This excludes any meetings where lobbyists might introduce or discuss their organisation's work without reference to a specific action they wish the person being lobbied to take. These meetings are still a key part of the lobbying process, and can lay the foundations for other opportunities to inform or influence decisions which may not appear on the register - such as a follow up phone call or email. Creating a system which only captures some meetings also puts the onus on an individual to make a very subjective interpretation of whether a meeting is regulated or not.

There have been instances where registrants have had their submissions returned and asked to highlight the specific decision they were trying to inform or influence. This could lead to some withdrawing their submission, or avoiding future submissions, if they think the meeting itself could be viewed as not fitting this tight definition.

Rectifying these issues

Reflecting on the above issues that have been highlighted by the Act's implementation, there are a number of changes that should be made to help the Act achieve its purpose. The below suggestions would create a more robust Lobbying Act, creating more meaningful transparency on how decisions are actually made in Scotland.

1. Include audio-only and written communications

Friends of the Earth Scotland would be very supportive of expanding the types of communication that are captured by the legislation to include audio only and written communications. As stated previously, it is particularly hard to see how an audio only

conversation is any less in the public interest than a video conversation - and the increase in virtual meetings, where webcams can be optional, blurs this line even further. Committee should particularly consider this in the context of the era of changing work habits we're in, with person-to-person conversations unlikely to return in the near term, and a greater long-term shift to remote working.

Written communications, particularly email and letter, also play a key role in the lobbying process, being used to supply more detailed written information - both in support of and in place of face-to-face meetings. As highlighted earlier, the narrow definition of regulated lobbying creates a system where face-to-face meetings with no explicit attempt to influence decisions can be followed up by written or audio communication containing a specific ask, with neither communication needing to appear on the register.

The Act created powers to add "a description of a kind of communications", which should be used to resolve these loopholes. It is important that this power is used to introduce a system that is broad enough to adapt with evolving technology, recognising the impact of emails, telephone calls, and online virtual meetings and webinars that can be conducted without being 'face-to-face' - as well as the prominence of written communication.

2. Balancing the onus on lobbyists and those being lobbied

To address the issues associated with self definition of lobbying and the large number of exemptions, the Committee should consider whether a system should be introduced for publishing some details of the calendars of MSPs and others covered by the lobbying register. This should sit alongside the lobbying register, not replace it.

Currently, putting the onus entirely on lobbyists creates an imbalance in reporting responsibility, leaves no means to cross check the register's accuracy, and means any lobbying that falls through the loopholes goes unreported. Publishing details of MSPs calendars would go some way to rectifying these problems.

Providing top level information on relevant meetings from MSP and Scottish Government diaries, eg who they have met and when, would retain a high degree of privacy while creating greater transparency in the political system. This could be complemented by the register, which would provide the detailed overview of those meetings which meet the criteria. Combined, this would create a more robust system and go much further to achieving the Act's original aims of creating transparency in our political system.

3. Close the 'local interest' loophole

As detailed earlier, the Act's exemption where business or activity is "ordinarily carried on" in an MSPs constituency has proven to be overly broadly interpreted. We would welcome the Committee visiting this issue, to see whether clarification can be made, either in legislation or clearer guidance, to differentiate between genuine local interest and instances where lobbying is part of a national campaign or broader issue.

This is particularly relevant to lobbying undertaken on behalf of umbrella bodies, coalitions, and national businesses by local members or branches, but also impacts organisations whose office is coincidentally in an MSPs constituency.

4. Creating a more accessible register

A more robust lobbying register would present a fantastic resource for those with an interest in transparency to see who was influencing Scotland's political process, whether their interest is in their local representatives, or lobbying on a specific topic. However, the current register is difficult to search and not widely known.

Steps should be taken to make the Register's search system more user friendly, to encourage broader use of the lobbying register by those who aren't familiar with it. As an example, the system could be made easier by allowing people to search by keywords rather than exact terms, or search all fields rather than specific fields.

In tandem, work should be done to see how the register can be better promoted - so more people understand this layer of transparency in our political system. Friends of the Earth Scotland works with grassroots activists across Scotland, many of whom have an interest in transparency - but don't know some of the tools that exist, such as the register of interests, and Lobbying register.

5. Expanding the definition of lobbying

As previously detailed, the guidance on the act uses a narrow definition of what constitutes lobbying - only accepting returns where a specific 'ask' has been made of an MSP or member of the Scottish Government. We believe the Committee should reflect on whether this actually covers the extent of influence in Scotland, and whether there is a case for a truer definition of lobbying to be used.

We would suggest a definition that captures more meetings, particularly where organisations also engage in work which is intended to influence decisions. This would capture meetings which lay the foundations for more explicit 'lobbying' through unregistered means.

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