

Review of the Lobbying (Scotland) Act 2016

Submission by the Scottish Alliance for Lobbying Transparency (SALT) to the Public Audit and Post-legislative Scrutiny Committee, August 2020.

The Scottish lobbying register was introduced two years ago and its mandatory review is now due to begin. The lobbying register is a critical tool for improving transparency in Scottish politics but one that it is **not yet fully fit for purpose**.

Improved lobbying transparency is crucial if we are to maintain trust in the integrity of Scotland's democracy at home and keep pace with global best practice standards.¹ The review is an important opportunity to upgrade the lobbying register and close the following loopholes.

Key Recommendations

- Close a major loophole in the current rules by removing the exemption for written and oral forms of communication from the definition of regulated lobbying.
- Require lobbyists to report spending on lobbying activities to help shine a light on the relationship between money, access and potential influence in Scottish politics.
- Increase the frequency of reporting to provide more timely information on lobbying activities.

Why is a robust Lobbying Register important?

Across the UK, a **lack of trust in politicians and public disillusionment is pervasive**. In 2020, the Edelman Trust Barometer found that 61 per cent of people believe that politicians are undermining British institutions for their own political gain.²

This situation is fuelled by the perception, and possibly the reality, that **politics works more for private interests than for the public good**. Recent media stories have once again cast a spotlight on lobbying and the integrity of Scotland's public officials.^{3,4,5}

Restoring confidence in the system is more important than ever. The Scottish Government's decisions on the lockdown and recovery efforts in response to the Covid 19 pandemic have had, and will continue to have, a significant impact on the lives of Scottish citizens and businesses. **Maintaining the public's trust during a time of crisis is essential**; however, this becomes more difficult if it transpires key decisions are being influenced in private by those with privileged access to ministers and their advisers.

The founding principles of the Scottish Parliament emphasise openness, accountability, accessibility, and the need to treat all people fairly.⁶ An effective and robust lobbying register is a key tool for ensuring that these principles are respected and that Scottish politics works for the public interest rather than those with the deepest pockets, as it **ensures that the information needed to hold public officials to account is made publicly available**.

The review offers an excellent opportunity to not only close the loopholes in the current register, but reaffirm the Parliament's commitment to the principles upon which it was based.

¹ <http://lobbyingtransparency.net/>

² <https://www.edelman.co.uk/sites/g/files/aatuss301/files/2020-02/2020%20Edelman%20Trust%20Barometer%20UK%20Launch%20Deck.pdf>

³ <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-50222755>

⁴ <https://www.dailyrecord.co.uk/news/scottish-news/secret-lobbying-firm-run-snp-20470255>

⁵ <https://theferret.scot/lobbying-revolving-door-politics/>

⁶ <https://www.parliament.scot/visitandlearn/Education/18651.aspx>

What is working?

The Scottish Parliament took **a strong and positive step by establishing a register of lobbyists on a statutory footing**. Establishing a mandatory requirement for reporting lobbying by those engaged in such activities complies with international best practice standards, and provides a solid foundation to ensure the timely and accurate provision of information to the public.⁷ This is a key area where **the Scottish system for providing transparency over engagement with public officials surpasses Westminster**, which is based mostly on UK Government policy.⁸

Requiring those who are lobbying to report their activity is far more workable and efficient than leaving this to officials in Parliament or government departments. Those seeking to influence public officials will have much better knowledge of when they have had such engagement, why and with whom than any civil servant or clerk tasked with collating transparency returns. Indeed, some registrants have found that they have a more encompassing sense of what constitutes lobbying than those managing the register. The result is the Scottish register of lobbying contains more meaningful information about the purpose of the engagement than is the case for UK ministerial disclosures.

The **current requirements are very light-touch** and, with the right technical systems in place to facilitate efficient filings, should not impose a disproportionate burden on those who have to report. SALT members have filed in excess of 100 meetings with public officials since the rules commenced with little difficulty complying. Those engaged in lobbying on a regular basis will often track their engagement with key stakeholders internally, so the very limited reporting that is required externally by the current system should necessitate little additional work. Reporting more frequently and on a wider range of activities – as is the case elsewhere, like the Republic of Ireland – would not be a major or disproportionate burden. This should help make a significant contribution to greater transparency around lobbying that is not captured currently due to the narrow definition of regulated activities.

What needs upgrading?

We support the Scottish Parliament Lobbying Team's proposals to address the following issues in this review,⁹ namely:

- The exemption of communications made to a Member for constituency or region (MSP).
- The exemption of communications made on request.
- The definition of communications made in return for payment.
- The exemption of communications by small organisations.
- The requirement to submit multiple information returns for one event.

⁷ <http://lobbyingtransparency.net/standards/transparency/>

⁸ Most detail about who is lobbying Government, when and for what purposes is provided for in the Ministerial Code (paragraph 8.14) not the statutory register of consultant lobbyists https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf The latter only contains information about those lobbying ministers and senior servants on behalf of paying clients.

⁹ Scottish Parliament, *Scottish Parliament lobbying register: annual report 2019* (2019) pp.23-28 https://www.parliament.scot/LobbyingRegister/Scottish_Parliament_Lobbying_Register_Annual_Report_2019.pdf

In addition, we have identified **three critical areas** where there is an urgent need to update the existing legislation:

1. Include all forms of communication, not just face-to-face engagements.
2. Require reporting of lobbying expenditure.
3. Increase the timeliness of disclosures.

In addition, we think there could be scope to streamline the reporting process for registrants to help make it easier for them to submit information returns, which would not require legislative change.

1. Include all forms of communication, not just face-to-face engagements

Scotland is noticeably out of step with other major Western democracies. A major and concerning loophole in the current rules is that only face-to-face or video call meetings count as regulated lobbying. Counter to best practice standards,¹⁰ this means no other form of written and oral communication (including emails, letters, messages, and phone calls) are covered by the rules. Bizarrely, as drafted, the law means that at the click of a button in a Zoom call, a meeting with a minister, special adviser or MSP can avoid regulation and the details withheld from public view.

Significantly, this means that much of the ongoing communication between lobbyists and decision makers will likely be out of public view as long as social distancing is in place. Given the amount that is currently at stake and the gravity of decisions under ministers' consideration, it is untenable that the rules only capture face-to-face discussions. While this narrow definition looked rather dubious when the legislation was being drafted and scrutinised, it now looks wholly unfit for purpose and ill-suited to the realities of contemporary working practices.

The Republic of Ireland's lobbying register covers oral, written and any other communication with decision-makers however made. Similarly, Canada includes verbal (such as arranged meetings, phone calls, informal communication, and grass-roots communication) or written (including hard copy or electronic) contact within their lobbying transparency rules.¹¹

Even countries with less comprehensive lobbying legislation, such as the US and the UK, include oral and written communications in their definitions of lobbying, with the US legislation explicitly clarifying that this includes electronic communication, such as emails.¹² While none of these lobbying registers are perfect, Scotland's current system fails to meet a basic standard found among other countries with similar democratic traditions.

With such a significant information gap, it becomes difficult to identify if there has been any wrongdoing in controversial situations. Moreover, if there has been no wrongdoing, it allows the perception to continue in the absence of any information to the contrary.

Key change required: To meet best practice international standards and close a major loophole for avoiding transparency, update the definition of regulated lobbying to include all forms of oral and written communication.

¹⁰ <http://lobbyingtransparency.net/standards/regulatory-scope/>

¹¹ <http://www.irishstatutebook.ie/eli/2015/act/5/section/5/enacted/en/html#sec5;>
<https://lobbycanada.gc.ca/en/rules/the-lobbying-act/advice-and-interpretation-lobbying-act/communicating-with-federal-public-office-holders/>

¹² <http://www.legislation.gov.uk/ukpga/2014/4/part/1/crossheading/requirement-to-register/enacted;>
https://www.senate.gov/legislative/Lobbying/Lobby_Disclosure_Act/3_Definitions.htm

2. Require reporting of lobbying expenditure

The register currently fails to provide information on the different lobbying capabilities of registrants. Understanding how much lobbyists spend on their work is critical for assessing whether there is equal opportunity for stakeholders to engage in the democratic process. It would help provide a clearer view of the relationship between money, access and potential influence, and help inform changes to defend the founding principles of the Scottish Parliament. A substantial imbalance in spending between interest groups would raise questions about whether money was affecting interest groups' ability to participate equally and meaningfully in Scottish democracy.

Creating a more level playing field between well-funded private interests and citizens is strongly supported by the public. 76 per cent of UK respondents to Transparency International's 2016 Global Corruption Barometer (GCB) survey thought that wealthy individuals often use their influence on government for their own interests and there should be stricter rules to prevent this.¹³

Unlike lobbying transparency registers in the EU¹⁴ and US,¹⁵ Scotland's does not provide any information about the amount spent on relevant activities by those seeking to influence key decisions. This gives the impression that there is equal opportunity for organisations and groups to present their views to ministers and MSPs when there might be a substantial disparity in their resources. Whilst money does not necessarily equate to access and influence, it is clearly a relevant factor when considering whether it is the people of Scotland shaping their future or wealthy vested interests. Therefore, it is information that should be subject to public scrutiny.

Where this information is available elsewhere, it shows how large the scale of spending can be and how vast the discrepancy is between private interests and community groups. Research has shown that just five oil and gas corporations and their lobbyists have spent over a quarter of a billion Euros on lobbying the EU from 2010 to 2019.¹⁶ In the US, a review of lobbying records highlighted that advocates of the Keystone XL Pipeline have spent more than 600 times the amount on lobbying over the past year than the tribes whose water lines would be affected by the pipeline.¹⁷

Consultant lobbyists will have the clearest view of their expenditure given they will have a very clearly defined budget from their clients. As a minimum, we think that in-house lobbyists should be able to report good faith estimates of their annual spending on regulated activities, similar to those requirements for the US and EU lobbying registers. This would provide a reasonable balance between the public interest in knowing lobbying expenditure and the administrative burden of providing it.

Key change required: To provide greater insight into stakeholders' ability to participate in Scottish democracy, registrants should be required to disclose an estimate of their expenditure for lobbying campaigns.

¹³ <https://www.transparency.org.uk/publications/take-back-control/>

¹⁴ The EU rules require lobbyists to report annual costs for activities covered by the register <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0627&from=en>

¹⁵ The US rules require lobbyists to report good faith estimates quarterly https://lobbyingdisclosure.house.gov/amended_lda_guide.html#section6

¹⁶ <https://corporateeurope.org/en/2019/10/big-oil-and-gas-spent-over-250-million-euros-lobbying-eu>

¹⁷ <https://maplight.org/story/analysis-keystone-advocates-have-spent-611-on-lobbying-for-every-1-by-opponents/>

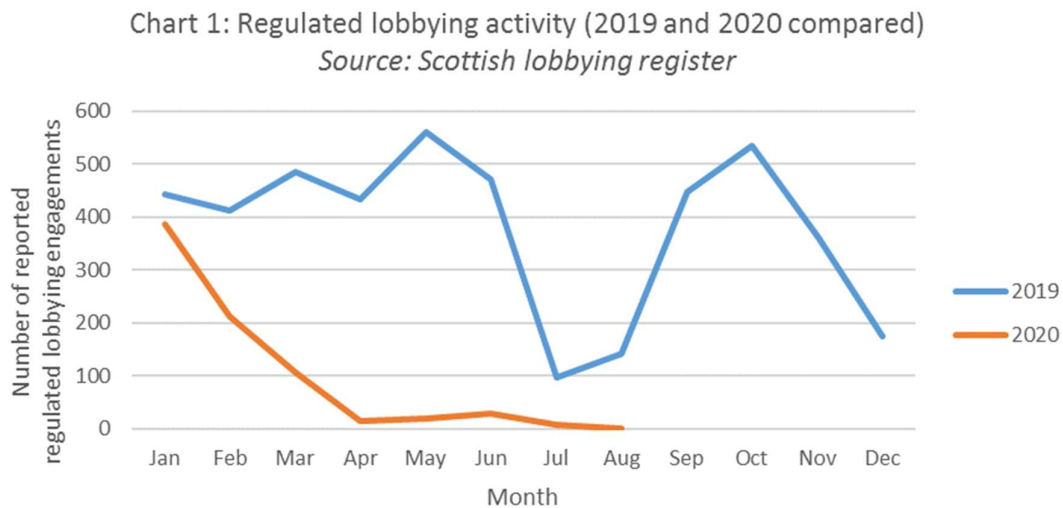
3. Increase the timeliness of disclosures

The disclosure of lobbying activity is far too slow compared to recommended international best practice. Best practice international standards require timely access to information about lobbying activities, which is as at least quarterly.¹⁸ Ideally, reporting should be as close as reasonably practicable to the activities undertaken. The longer it takes this information to reach the public record, the less useful it is for understanding the context of key decisions.

Currently, registrants in Scotland are only required to report on activities every six months, which is much less frequent than any other Western polities with a similar democratic tradition. It is even less frequent than the reporting requirements for consultant lobbyists in Westminster and the reporting cycle for UK Government departments. If Scotland intends to lead the UK by example, then it should increase the regularity with which information about lobbying is made available to the public.

The Covid-19 pandemic has highlighted why this delay is highly problematic. Ministers have made critical decisions concerning public health and the economy in recent months, which have had significant consequences for the Scottish public and businesses. Although registered lobbyists can submit information returns voluntarily during their six-month reporting cycle, we may not know about the full scale and nature of regulated lobbying during this critical period until September 2020 at the earliest. As you can see from Chart 1 below, there is a substantial difference in the number of reported regulated lobbying engagements during quarter 1 of 2019 and 2020. It is yet unclear whether this is due to registrants' reporting cycles or a decrease in registerable activity resulting from behavioural change, such as social distancing and a decline in face-to-face meetings, caused by the pandemic.

Key change required: To provide more timely information on lobbying activities, the reporting period should be shortened to at least every quarter.



¹⁸ <http://lobbyingtransparency.net/standards/transparency/>

About us

The Scottish Alliance for Lobbying Transparency (SALT) is an alliance of civil society groups who are concerned about the growing influence of lobbying on decision-making in Scotland. We believe only increased transparency can begin to restore trust in policy making and make ministers, elected representatives and officials more accountable to the public.

SALT includes Alcohol Focus Scotland, Common Weal, Electoral Reform Society Scotland, Friends of the Earth Scotland, Spinwatch, Transparency International UK, and Unlock Democracy.

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Annex 1 - Lobbying Registers: An International Comparison

| | |
|--|-----------------------------|
| | Nearest to best practice |
| | In-between |
| | Furthest from best practice |

| Country | Scope: Lobbyists | | Scope: Public officials | | Form of communication | | | | Reporting | | |
|---|--|--|--|--|--|--|--|--|--|----------|---|
| | In-house | Consultant | Executive | Special advisors | Legislators | Face-to-face | Written | Oral (remote) | Purpose of lobbying | Spending | Reporting period |
| US (statutory register) Est. 1946 | SEC 3(7) 2 USC 1602 | SEC 3(9) 2 USC 1602 | SEC 3(3) 2 USC 1602 | SEC 3(3) 2 USC 1602 | SEC 3(4) 2 USC 1602 | SEC 3(8) 2 USC 1602 | SEC 3(8) 2 USC 1602 | SEC 3(8) 2 USC 1602 | SEC 5 2 USC 1604 Example | | Quarterly |
| Canada (statutory register) Est. 1989 | Section 7 | Section 5 | Section 2(1) | Section 2(1) | Section 2(1) | SOR/2008-116 (Sections 6 and 9) Section 5(1)(a) | Section 5(1)(a) NB. is included in registration details | Section 5(1)(a) NB. is included in registration details | Section 5(2) Example | | Monthly SOR/2008-116 (Sections 6 and 9) |
| Ireland (statutory register) Est. 2015 | Section 5(2) | Section 5(1) | Section 6(1)(a) | Section 6(1)(e) | Section 6(1)(b) | Section 5(4) | Section 5(4) | Section 5(4) | Section 12 Example | | Every four months (Sections 7 and 12) |
| Scotland (statutory register) Est. 2016 | Section 1 | Section 1 | Section 1(1)(a)(1) | Section 1(1)(a)(1) | Section 1(1)(a)(1) | Section 1 incl. video conferencing | | | Section 6 Example | | Biannually (Section 11) |
| UK (statutory register) Est. 2014 | | Section 2 | Section 2(3) | Can be introduced via S.I. | | Section 2(3) | Section 2(3) | Section 2(3) | Section 5 Example | | Quarterly (Section 5) |
| UK (ministerial code) | | | | | | | | | Example | | Quarterly ¹⁹ (Para 8.14) |

¹⁹ In practice this is dependent on Government's discretion and is subject to the grid.