

## **Proposed Lobbying Transparency (Scotland) Bill Consultation response from the Sheila McKechnie Foundation**

### **About the Sheila McKechnie Foundation**

The Sheila McKechnie Foundation (SMK) was established as a charity in 2005 to help develop a new generation of campaigners who are tackling the root causes of injustice. We exist to connect, inform and support campaigners across the UK.

### **Summary and context of our consultation response**

SMK aims to support campaigners to be more effective. Gaining information about how political decisions are made underpins the work of many campaigners, whether they are campaigning on social, environmental or economic issues. Our response to this consultation is therefore guided by a principle of creating greater transparency about the political process, and in doing so providing campaigners with a tool to understand and analyse who is influencing Government.

We believe that properly implemented legislation would create an invaluable tool for 'influence mapping' in Scotland, open to anyone interested in how decisions that affect Scottish people get made. A transparency register updated on a quarterly basis would enable campaigners, researchers, political analysts and indeed members of the public to see something along the lines of a real time record of activity of who is making representations to Government on live issues.

Many campaigners are based within the charity sector, so our response also focuses on the potential impact of a lobbying transparency register on charities that are involved in lobbying.

We advocate a principle of universality where all groups involved in trying to influence Government, including charities should have to register. However, we believe that smaller charities should be exempt from registration, as we are concerned about the regulatory burden that a lobbying transparency register might place on them.

### **Response to consultation questions**

#### **1. Do you support the general aim of the proposed Bill? Please indicate "yes/no/undecided" and explain the reasons for your response.**

Yes, SMK supports the general idea of this Bill, because of its proposed aim to "create greater transparency, openness and accountability in relation to lobbying of members

of the Scottish Parliament, Ministers in the Scottish Government and relevant public officials".

**2. Do you agree that legislation is a necessary and appropriate means of improving lobbying transparency?**

Yes, legislation is both necessary and appropriate. Currently, lobbying Government in Scotland is not regulated. While there have been no notable high profile lobbying scandals in Scotland, it is right that legislation is introduced as a preventative measure.

With any new piece of legislation, however, the 'devil is in the detail'. Poorly designed legislation in this area could actually lead to less transparency overall. We would be concerned about a scenario where lobbyists register to give their activity a veneer of credibility and transparency, yet get away with acting unethically. So, effective regulatory powers would need to be built in to the legislation to make it fit for purpose.

**3. Is there any specific international approach to the regulation of lobbyists that represents a good model for developing an approach appropriate for Scotland?**

There is currently no one international approach that SMK believes represents a good model for Scotland.

However, we believe that there are aspects of approaches used elsewhere, as set out in the consultation paper, which could usefully inform the Scottish approach:

- i. In North America, the serious penalties for willful non-compliance are useful to consider here. While there needs to be legislative 'teeth' SMK suggests that the penalties for charities that do not comply are far less serious than, for example, professional lobbying firms. This is because charities exist primarily for public benefit, and non-compliance is in most cases unlikely to reflect a meaningful breach of the regulations.
- ii. In Canada, the "revolving doors" rules, tracking employment of elected representatives after they leave office, would also be useful to consider, in that it could mitigate against the cosy relationships that often emerge when former politicians go on to work in the private sector to lobby their former colleagues - and friends.

Generally, while there have been some positive steps in improving transparency, as outlined in the consultation paper, there is no country that we are aware of that currently has a comprehensive and robust system. Most systems seem piecemeal, with numerous flaws and gaps that will not extinguish or expose the negative aspects of lobbying.

We believe that Scotland has the opportunity to implement the most transparent and rigorous process across the world, by taking the best ideas from other countries, and moving beyond the limitations in these other jurisdictions.

#### **4. What robust, comprehensive and sufficiently explicit definitions of lobbying and lobbyist can be developed and applied that will ensure all who lobby are captured under the proposals?**

SMK defines a lobbyist as follows:

*“A lobbyist is any professional individual or organisation who seeks to influence policy or political decisions through meeting with, or making direct representations to, Government ministers and senior civil servants and other key decision-makers.”*

This definition does NOT:

- Distinguish between third party and in-house lobbyists.
- Define a lobbyist as someone who necessarily works full-time to influence policy.
- Necessarily exclude the non-profit sector.

#### **5. Who should register on a lobbying register in Scotland?**

While we agree with the Scottish Council for Voluntary Organisations (SCVO) that it is not the actions of the VCS that have created the need for more regulation we also agree with the consultation paper's suggestion for the need for a wide range of individuals, groups and organisations to fall within the scope of the legislation. SMK suggests that those considered to be lobbyists, for the purposes of a lobbying transparency register, would include (but not be restricted to):

- Professional lobbyists (commercial consultants and firms, as well as in-house)
- Representative bodies (trade and professional bodies, who lobby on behalf of their members)
- Registered charities (of a certain size or scale of lobbying activity)
- Trade Unions

A register's scope should ensure that it is difficult for individuals and organisations to circumvent either the letter or spirit of its rules. For example, in 2011 Sarah Southern boasted about her lobbying expertise, while saying that the UK Government's proposed lobbying register would not affect her because she is a “consultant”, not a “formal lobbyist”.<sup>1</sup> The UK Government's proposals were too narrow – we welcome the current consultation taking a much broader view of who can be considered a lobbyist.

It is important to ensure that all lobbying, including pro bono lobbying falls within the remit of the legislation. The potential consequence of NOT including pro bono lobbying is that lobbying is undertaken on a purely pro bono basis for clients, in exchange for remuneration for other 'services'. This would enable some lobbyists to easily circumvent the need for registering.

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<sup>1</sup> <http://www.guardian.co.uk/politics/2012/mar/25/cash-for-access-sarah-southern>

**6. Is it necessary or desirable to develop a Code of Conduct for lobbyists to accompany a lobbying register? If so, what key elements should this code include?**

SMK believes it is necessary to develop a Code of Conduct. As the consultation paper itself argues, the Current Code of Conduct is very limited in that there is currently no obligation, on the part of an MSP or lobbyist to record that a meeting has taken place, let alone the detail of that meeting.

A more comprehensive Ethical Code of Conduct must apply to MSPs, *and* those who seek to influence MSPs,

**7. Are the current arrangements, whereby lobbyists are governed only through self-regulatory schemes, adequate or is a statutory regime required in order to regulate lobbying?**

Whether currently effective or not, as point of political and democratic principle, SMK believes self-regulation is wholly inappropriate in this area – a Government cannot assure its citizens that they have transparent practices, when an important component of the policy making process is not independently regulated and scrutinised.

While there have been no high profile lobbying scandals in Scotland, this does not mean self-regulation is effective, and that there will be no impropriety in the future.

The Scottish Government should not wait for a high profile lobbying scandal – instead, they should act now.

**8. What do you think is the appropriate and necessary information to be disclosed in order to make lobbying transparent and how regularly should entries be updated?**

The amount of money being spent on lobbying should be an essential part of a register, as it provides key context about the relative 'weight' of activities being undertaken by different individuals, organisations and sectors.

We suggest that the principles and priorities for an effective regulatory register should be to answer the following questions:

1. **What is the lobbying objective?** (i.e. What policy/decision specifically is the lobbyist seeking to influence)
2. **Who is lobbying, and if different, on whose behalf are they conducting the lobbying?** (So if it is a third party lobbyist, both they and the organisation(s) on whose behalf they are lobbying would need to be included).
3. **Who is being lobbied?** (So the name and office of the Ministers and senior civil servants who are being lobbied should be mentioned).

4. **What lobbying mechanisms and routes are being used?** (This needs to record, for example, whether it is a face-to-face meeting).
5. **How much money is being spent on lobbying?** (This would be an estimate based on, for example, staffing allocation to the lobbying activity, and the value of any third party contracts).

There is also a value to recording information about public funding, such as where this is provided to private sector firms as Government contracts.

However, we do not feel that charities, if they are brought in to the register's scope, should be required to provide such information. Our concerns arise from recent instances in England where spurious and unwarranted criticisms have been made of charities that receive public funding and are also seeking to influence policy. The voluntary sector across the UK has a right to receive statutory funding yet retain the right to lobby. Charities' political activity is already regulated by the Office of the Scottish Charity Regulator.

A lobbying transparency register, if updated on a quarterly basis would enable the public and others who are interested in 'influence mapping' to see timely information about who ministers and senior civil servants are meeting with and what policies they are discussing.

An annual return could be too infrequent to serve a useful purpose in 'real time', and a monthly register would be too bureaucratic.

9. **Should there be a threshold for inclusion in the lobbying register? If so, what should it be (in terms of time / resources devoted to lobbying, size of organisation, budget, etc.)?**

Yes. See response to Q11

10. **Should it only be contact with MSPs, Ministers and civil servants which should require to be recorded on the register, or should all public officials, including from NDPB's, be included?**

It is tempting to say that all public officials should be included within this remit.

However, this should perhaps follow in a second iteration of the new regulation. It is more important to devise a regulatory framework that is fit for purpose where it is most needed i.e. central Government (including Ministers, MSPs and senior civil servants). After the new framework has had time to get bedded in, and creases are ironed out, then would be the right time to broaden its remit.

11. **Which organisations should be exempted from registering and why should they be exempted?**

We are aware of the Scottish Council for Voluntary Organisations' (SCVO) response to this consultation, and their views that charities should be exempted from a statutory register. We share many of their concerns.

However, we do hold a different position. We believe that in the pursuit of greater transparency of who is meeting and potentially influencing Government, charities should be included, albeit with conditions. While we agree with SCVO that charities are fundamentally different to private sector companies who may lobby for personal/corporate monetary gain, SMK believes there should be a fundamental democratic imperative and principle that – whatever your interests and motivations – if you are trying to influence Government decisions, you should be included in a register.

Beyond this principle of universality, there is also a pragmatic reason for the inclusion of charities. If charities are *not* included, there is a potential that private lobbying firms will set up charities as a façade for their commercial lobbying interests, easily circumventing the regulations.

Having said all of this, we believe the sanctions for non-compliance should be different for charities compared to those in the private sector. Charities are already well regulated by the Office of the Scottish Charity Regulator. It is also important to note that these proposals have arisen out of concerns associated with private sector lobbyists, not charities. As such, we think it would be unfair if charities were to become included and then to face potentially significant sanctions for non-compliance.

Notwithstanding our views that charities should be required to register, SMK does believe that small charities should be exempted. We would suggest that there is further consultation about the exact turnover threshold beneath which organisations should be exempt from registering. But we do share SCVO's concerns about the burden and bureaucracy that this could unfairly place on small, under-resourced organisations.

**12. Is an independent body required to oversee the register? If so, which organisation should be responsible for administering the register?**

For the register to have credibility, it must be operated by an independent body. It should not be operated by the lobbying industry - such self-regulation would be completely inappropriate and counter-productive for an issue such as ensuring transparency.

The regulatory body could be an existing or newly create one. We do not have a view about who this should be.

**13. How will compliance be policed and what investigative and enforcement powers would the overseeing body require?**

For any statutory register to have 'teeth' penalties for non-compliance are important. They should be sufficient to send out a clear message that non-compliance is a serious matter. However, the starting point should be a statutory code of ethical conduct, followed by published sanctions for non-compliance or breaches. These could include fines and/or exclusion from the register (as long as this was accompanied by a ban from undertaking any further lobbying activity). In extreme cases, existing criminal laws should apply regardless of the existence of any register.

If charities are included in the register we believe the sanctions should be different for them in comparison to those in the private sector, as justified in other sections of our consultation response.

**14. How should the administration of a statutory register be paid for? And what is your assessment of the likely financial implications (if any) of the proposed Bill to you or your organisation? What (if any) other significant financial implications are likely to arise?**

We agree with the consultation paper that despite the immense pressure on public budgets, there is a price worth paying to ensure greater openness, transparency and good governance.

We do not hold a particular view about how a register should be financed. However, we would be very concerned if charities, large or small, had to pay. We believe that a register should be financed by the Scottish Parliament and/or by registration fees of private sector lobbyists. Charities should pay no more than a nominal cost for inclusion as they already register and account for their public benefit actions. Small charities should be completely exempt from paying.

**15. Is the proposed Bill likely to have any substantial positive or negative implications for equality? If it is likely to have a substantial negative implication, how might this be minimised or avoided?**

Our concerns around 'equality' primarily relate to concerns about potential disproportionate impact on charities if a lobbying transparency register is implemented badly, and/or without due consideration to the accountability that charities already demonstrate. We want to ensure that there is an equitable yet nuanced system, which is universal, shines a light on discussions that are taking place at high levels of Government, without creating a regulatory and unfair burden on charities who, unlike private lobbyists, lobby in the public interest.

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