

LEGAL BRIEFING

Lobbying (Scotland) Act 2016

The Lobbying (Scotland) Act 2016 (“the Act”) received the Royal Assent on 14 April 2016; however, its substantive provisions are not yet in force.

It is expected that the Act will come fully into force in early 2018, with an exact date to be announced later this year.

PURPOSES OF THE ACT

The Act is intended to increase transparency surrounding lobbying in Scotland.

It creates a regulatory framework designed to control some forms of lobbying, defined as “regulated lobbying”.

Regulated lobbying is that which is “face-to-face”, whether in person or audio-visual, between businesses and organisations and the Scottish Parliament or Scottish Government. Other types of communication eg letters, emails and telephone calls do not fall under the definition of “regulated lobbying”.

Under the Act, a lobbying register will be set up to formally record details of instances of regulated lobbying.

REGULATED LOBBYING

Section 1 of the Act stipulates that a person engages in regulated lobbying if they make a communication which:

- is made orally to a member of the Scottish Parliament (“MSP”), a junior Scottish Minister, a special adviser or the permanent secretary (to the Scottish Government),
- is made in person or, if not made in person, is made using videoconferencing equipment such that people can see and hear each other (this would include Skype, webcam etc),
- is made in relation to Government or parliamentary functions, and
- is not a communication which is excluded under the schedule to the Act.

Examples of communications which are not lobbying are those:

- by an individual acting on his own behalf
- by an individual who is not making the communications in return for payment (this is notable - where a lobbying activity on behalf of a business or organisation is voluntary, it is excluded)
- by an individual acting on behalf of a small organisation with less than ten full-time equivalent employees, except where the organisation’s main purpose is to represent the interests of others
- by a business or organisation to their local MSP
- about a topic in response to a request for factual information or views on that topic
- made for the purposes of journalism
- made by or on behalf of a person and which form part of, or are directly related to, negotiations on terms and conditions of employment of the employees of the person.

WHAT WILL THE LOBBYING (SCOTLAND) ACT 2016 MEAN FOR MY BUSINESS OR ORGANISATION?

Businesses and organisations should consider whether any of their activities fall within the definition of “regulated lobbying”.

By way of example, if a business or organisation uses an in-house lobbyist, consultant lobbyist or freelancer, they may have to comply with the Act.

Requirement to Register

Part 2 of the Act provides that if a business or organisation is involved in regulated lobbying, it must register with the Clerk of the Scottish Parliament. The Clerk will maintain the register.

If a business or organisation is not currently undertaking regulated lobbying, but does in the future, they will have 30 days from the first instance to register.

Thereafter, a registered business or organisation will have to submit “information returns” on their lobbying activities every six months. If they have not engaged in regulated lobbying in that period, they must state that.

The Act stipulates the information that must be included in an application. This will include the registrant’s identity, information about the regulated lobbying activity, details of the lobbyist, details of the person being lobbied, the relevant date, the location, a description of the meeting, the purpose of the lobbying and so on.

Similar information must be included in each information return. There will be no cost to register or to submit returns.

Information Publicly Available

Generally, all information submitted to the Clerk will be public, unless the Clerk considers this inappropriate.

This is significant, as businesses and organisations who are required to register might reasonably be concerned about information regarding their communications with public officials being public.

For example, regulated lobbying activities could relate to something that they might wish to be private, eg a confidential commercial deal or community project.

It will be most interesting to see how the Clerk approaches use of the discretion afforded to him to withhold information from public access.

Compliance with the Act

Part 3 of the Act places a duty on the Clerk to oversee compliance, and provides the Clerk with powers to serve an “information notice” requiring information from registrants, or from a business or organisation which is not registered, but which the Clerk has reasonable grounds to believe may be, or may have been, engaged in regulated lobbying.

The Commissioner for Ethical Standards in Public Life in Scotland is charged with investigating possible breaches.

Implications of Non-Compliance

The Act dictates that it will be a statutory criminal offence to fail to register, to fail to provide an information return or to fail to provide accurate and full information in any step of the process. A fine (currently of up to £1,000) will be imposed on offenders.

It is significant that liability will lie with company officers, partners or managers of the business or organisation for causing the offence, either deliberately or through negligence.

Businesses and organisations will also have to consider the reputational implications of being found to have fallen foul of the rules.

Defence to Non-Compliance

It is a defence for a person charged with non-compliance to show that they exercised all due diligence to avoid committing the offence.

GUIDANCE AND CODE OF CONDUCT

The Act provides that the Scottish Parliament must make guidance available on its operation. It also states that they must publish a code of conduct for persons engaged in lobbying.

Requirements and procedures will be clearer once both of those documents are made available.

Interestingly, it is stipulated that the Scottish Parliament must, within two years of it fully coming into force, report on the operation of the Act. The Scottish Parliament can, in their report, recommend amendment as they see fit. They could, for example, decide to extend the types of communications covered to include emails, letters and telephone calls.

TERRITORIAL EXTENT

The Act does not stipulate that the oral communications comprising the regulated lobbying have to be conducted in Scotland. This raises the issue of how compliance with the law will be implemented and checked if the lobbying takes place elsewhere.

COMMENT

As noted, the Act is not yet in force and it seems it will be several months before there is movement on that front. However, this is something that businesses and organisations should most certainly have on their radar.

Whilst the legislature seemingly did not intend for the registration and compliance process to be overly burdensome, the reality is that, once the Act becomes law, responsibilities in relation to Scottish lobbying activities will be significantly increased.

CONTACT US

This briefing note is intended as general guidance on current issues in the law. It is not a substitute for advice and it may not be relied upon as such.

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