

LOBBYING (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Core Concepts

Section 1: Regulated lobbying and the schedule: communications which are not lobbying

4. Section 1 sets out when a person engages in regulated lobbying for the purposes of the Act. “Person” includes a natural person (individual) or a legal person (such as a company). Only persons who engage in regulated lobbying require to register and report details of lobbying activity under the Act (on which see in particular sections 8 and 11).
5. Section 1(1)(a) provides that a person engages in regulated lobbying if the person makes a communication orally and in person, or if not made in person is made using equipment that is intended to allow both parties to see and hear each other, to a member of the Scottish Parliament, a member of the Scottish Government, a junior Scottish Minister, a special adviser or the permanent secretary of the Scottish Government if it is made in relation to Government or parliamentary functions, and if it is not of a kind listed within the schedule. For these purposes a communication which is made “orally” includes a communication which is made using British Sign Language or is otherwise made by signs (see section 1(3)). A communication is made orally and in person if it is made, for example, at a face to face meeting between a person and an MSP, Minister, special adviser or the permanent secretary of the Scottish Government at either party’s offices. A communication is made orally and using equipment which is intended to enable the individual making the communication and the individual receiving the communication to see and hear each other if it is made, for example, by video-conference (or similar mechanism).
6. **Section 1(1)(b)** provides that a person engages in regulated lobbying if in the course of a business (e.g. the business activity of a manufacturer) or other activity (e.g. the non-business activity of a charity) carried on by the person an individual makes a communication of the type described in section 1(1)(a) (see paragraph 5 above) as an employee, director (including shadow director) or other office holder, partner or member of the person.
7. **Section 1(2)** provides that where a person engages in regulated lobbying by virtue of subsection (1)(b) of section 1 the individual mentioned there (i.e. the individual who made the communication) is not to be regarded as engaging in regulated lobbying. That is significant as only persons who engage in regulated lobbying require to register and report details of lobbying activity under the Act (on which see in particular sections 8 and 11).
8. **Section 1(4)** provides that for the purposes of section 1(1) - the circumstances in which a person will engage in regulated lobbying for the purposes of the Act – it does not matter whether the communication occurs in or outwith Scotland.

9. The schedule sets out details of communications which are not lobbying for the purposes of the Act (i.e. the making of which will not amount to engaging in regulated lobbying under the Act). The making of such communications will not therefore trigger the requirements to report details of lobbying activity under the Act (on which see in particular sections 8 and 11).

Communications made on individual's own behalf

10. Paragraph 1 of the schedule provides that a communication made by an individual on their own behalf is not lobbying. The provision means there is no requirement under the Act to register or submit returns of lobbying activity where an individual communicates with an MSP, Minister, special adviser or the permanent secretary of the Scottish Government in relation to the individual's own affairs or views (and not in relation to the affairs or views of a third party).

Communications made to a member for constituency or region

11. Paragraph 2 provides that a communication made to a member of the Scottish Parliament for a constituency or region (in terms of paragraph 4 of the schedule "constituency" and "region" are construed in accordance with the Scotland Act 1998) is not lobbying if made—
- (a) by an individual as an employee or in another capacity mentioned in section 1(1)(b) (see paragraph 6 above) in the course of a business or other activity carried on by another person,
 - (b) on the other person's behalf and not on behalf of a third party, and
 - (c) 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.
12. Paragraph 2 of the schedule can apply only where a communication made by an individual as (e.g.) an employee in the course of a business or other activity carried on by another person (e.g. a company) is made on behalf of that other person. It cannot apply where a communication made by an individual as (e.g.) an employee in the course of a business or other activity carried on by another person (e.g. a company) is made not on behalf of that other person but on behalf of a third party (e.g. a different company). See paragraph 2(b) of the schedule.
13. Paragraph 2 does not apply where the communication is made to an MSP who is a member of the Scottish Government or a junior Scottish Minister. See paragraph 3 of the schedule.

Communications not made in return for payment

14. Paragraph 5 of the schedule provides that a communication made by an individual who is not making it in return for payment is not lobbying. The provision means no requirement under the Act to register or submit returns of lobbying activity is triggered by voluntarily made communications with an MSP, a member of the Scottish Government, a junior Scottish Minister, special adviser or the permanent secretary of the Scottish Government.
15. Paragraph 6(a) of the schedule provides that for the purposes of paragraph 5 a communication made by an individual as an employee or in another capacity mentioned in section 1(1)(b) is made in return for payment if the individual receives payment in that capacity regardless of whether the payment relates to making communications.

16. Paragraph 6(b) of the schedule defines “payment” for the purposes of paragraph 5. In particular it means payment of any kind (e.g. payment of salary) but does not include reimbursement for travel, subsistence or other reasonable expenses related to the making of the communication.

Communications by small organisations

17. Paragraph 7 provides that a communication is not lobbying if made—
- (a) by an individual as an employee or in another capacity mentioned in section 1(1)
 - (b) (see paragraph 6 above) in the course of a business or other activity carried on by another person,
 - (b) on the other person’s behalf and not on behalf of a third party, and
 - (c) on a date when the other person has fewer than 10 full-time equivalent employees.
18. Paragraph 7 of the schedule can apply only where a communication made by an individual as (e.g.) an employee in the course of a business or other activity carried on by another person (e.g. a company) is made on behalf of that other person. It cannot apply where a communication made by an individual as (e.g.) an employee in the course of a business or other activity carried on by another person (e.g. a company) is made not on behalf of that other person but on behalf of a third party (e.g. a different company). See paragraph 7(b) of the schedule.
19. Paragraphs 9 and 10 of the schedule make provision about how the number of “full-time equivalent employees” is to be calculated for the purposes of paragraph 7 of the schedule. Paragraph 9 provides that for the purposes of paragraph 7, the number of full-time equivalent employees a person has is calculated as follows—
- (a) find the total number of hours worked by all the employees of the person in the 28 days ending with the date on which the communication was made,
 - (b) divide that number by 140.
20. Paragraph 10 provides that for the purposes of the calculation in paragraph 9, any employee who worked more than 140 hours during the period of 28 days is to be treated as having worked 140 hours (i.e. the number of worked hours for any one employee which fall to be counted for the purposes of the calculation is capped at 140 hours, even if the particular employee in question in fact worked more than 140 hours in the 28 day period)).
21. The calculation in paragraph 9 is based on a notional 35 hour working week for a full-time member of staff (i.e. a notional 140 hours over a 4 week (i.e. 28 day) period).
22. Paragraph 8 provides that paragraph 7 does not apply where the communication is made in the course of a business or other activity carried on by a person if one of the person’s principal purposes is to represent the interests of other persons (e.g. a person which is a body having as a core purpose representing the views of its members).

Communications in Parliament or required under statute

23. Paragraph 11 of the schedule provides that a communication made in proceedings of the Parliament (and therefore already available to the public) or required under any statutory provision or other rule of law, is not lobbying.

Communications made on request

24. Paragraph 12 of the schedule provides that a communication about a topic which is made in response to a request for factual information or views on that topic from the person to whom the communication is made (i.e. MSP, member of the Scottish Government, junior Scottish Minister, special adviser or the permanent secretary of the

*These notes relate to the Lobbying (Scotland) Act 2016
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Scottish Government) or a person acting on behalf of that person (e.g. a member of an MSP's staff acting on behalf of an MSP or a civil servant acting on behalf of a Minister) is not lobbying.

Cross-party groups

25. Paragraph 13 of the schedule provides that a communication made in the context of, and during, a meeting of a group recognised as a cross-party group by the Parliament is not lobbying. Existing parliamentary rules mean information about participation in cross-party groups, including any secretarial support they receive, is available to the public.

Journalism

26. Paragraph 14 of the schedule provides that a communication made for the purposes of “journalism”, a concept recognised in the law, is not lobbying. For discussion of “journalism” in the courts see for example *Commissioner of Police of the Metropolis v Times Newspapers Ltd* [2011] EWHC 2705 (QB), per Mr Justice Tugendhat at paragraphs 131 and 132 in particular.

Communications in relation to terms and conditions of employment

27. Paragraphs 15 and 16 of the schedule provide that a communication made by or on behalf of any employer or by or on behalf of a trade union, to a member of the Scottish Parliament, a member of the Scottish Government, a junior Scottish Minister, a special adviser, or the permanent secretary of the Scottish Government and which forms part of, or is directly related to, negotiations on terms and conditions of employment of the employees of the employer or of the members of the trade union is not lobbying.
28. [Paragraph 17](#) provides the meaning of “trade union”.

Communications by political parties

29. Paragraph 18 of the schedule provides that a communication made by or on behalf of a party registered under Part 2 of the Political Parties, Elections and Referendums Act 2000 is not lobbying. This exception ensures that political discourse within (or between) registered political parties does not trigger any requirement to register.

Communications in the conduct of public affairs

30. Paragraphs 19 to 23 of the schedule have the effect that communications made in the conduct of public affairs are not lobbying.
31. Paragraph 19 of the schedule provides that a communication made by or on behalf of a holder of judicial office within the United Kingdom, or a member of the judiciary of an international court is not lobbying.
32. Paragraph 20 of the schedule defines “holder of judicial office within the United Kingdom” and “member of the judiciary of an international court” for the purposes of paragraph 19.
33. [Paragraph 21](#) provides that a communication made by or on behalf of Her Majesty the Queen is not lobbying.
34. Paragraph 22 of the schedule provides that Government and Parliament communications (i.e. communication made by or on behalf of the holders of public offices (in that capacity), public bodies, organisations and institutions etc. listed in subparagraphs (a) to (o)) are not lobbying.
35. Paragraph 23 of the schedule provides that “State” (listed in paragraph 22(m), which provides that a communication by or on behalf of “a State other than the United Kingdom” is not lobbying) includes, but is not limited to, the government of any

State and any organ of such a government and that the reference to a State other than the United Kingdom includes reference to any territory outside the United Kingdom. The paragraph 22(m) exception therefore covers communications by any of the various organs of government (legislative, executive or judicial) of a foreign country or a territorial unit of such country. Paragraph 23 also defines “international organisation” (listed in paragraph 22(o), which provides that a communication by or on behalf of “an international organisation” is not lobbying).

Section 1: Additions to the Schedule

36. Section 1(5) of the Act provides that the Parliament may by resolution modify the schedule so as to add further descriptions of kinds of communications (which if added would then also be communications which are not lobbying for the purposes of the Act, i.e. the making of which will not amount to engaging in regulated lobbying under the Act) or to modify or remove such descriptions added. Section 48 makes provision in relation to the process to be followed in relation to parliamentary resolutions, including provision for them to be published in the same way as Scottish statutory instruments so that they are published in a recognised format and are easily accessible.

Section 2: Government or parliamentary functions

37. Section 2(1)(a) to (f) sets out what are Government or parliamentary functions for the purposes of section 1. The section complements provision in section 1 which as noted above provides that, subject to the terms of the schedule, it is communications made orally and in person, or if not made in person are made using equipment (e.g. video-conferencing or similar mechanisms) that is intended to allow both parties to see and hear each other, to a member of the Scottish Parliament, a member of the Scottish Government, a junior Scottish Minister, a special adviser or the permanent secretary of the Scottish Government and which is made in relation to Government or parliamentary functions which trigger the requirements under the Act to register or submit returns of lobbying activity.
38. Subsection (2) provides that the retained functions of the Lord Advocate (within the meaning of section 52(6) of the Scotland Act 1998) are not Government or parliamentary functions. And so communications with the Lord Advocate or the Solicitor General in relation only to the retained functions of the Lord Advocate will not trigger the requirements under the Act to register or submit returns of lobbying activity. The retained functions of the Lord Advocate are, as noted, defined in section 52(6) of the Scotland Act 1998. They are any functions exercisable by the Lord Advocate immediately before the Lord Advocate ceased to be a Minister of the Crown on devolution and other statutory functions conferred on the Lord Advocate alone after he ceased to be a Minister of the Crown. These functions relate mainly to the Lord Advocate’s role as head of the systems of criminal prosecution and investigation of deaths in Scotland.