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LOBBYING (SCOTLAND) BILL – STAGE 1

You wrote to James Hynd on 17 November setting out a series of questions in respect of the Lobbying (Scotland) Bill. This letter offers the Government's response to each of those queries. Headings relate to relevant paragraph numbers in your letter.

Paragraph 5

The Delegated Powers Memorandum ("DPM") explains that the purpose of the power in section 15(1) is to provide flexibility in order to ensure the effective operation of the registration regime. A non-exhaustive list provides an illustration of the circumstances in which the power may be exercised. The power also includes, by virtue of section 15(2), the ability to modify sections 4 to 14 of the Bill. Can the Scottish Government explain further why it is considered appropriate for the Parliament to have a delegated power to modify provisions of the Act as passed?

In particular the Government recognises – in the case of a legislative regime regulating a new field such as that provided for in the Bill – that it may be necessary to revisit operational aspects of the register in light of practical experience over time. It is principally for that reason that the power in section 15 to make provision about Part 2 is taken. Section 15(2) makes clear that the power may be exercised so as to modify existing provision in sections 4 to 14. For example, the Parliament may, in light of experience, consider it appropriate that the register contain different information about regulated lobbying activity from that contained in section 6.

As noted in paragraphs 16 to 17 of the DPM, this power for the Parliament to make changes to the Bill was included in particular in light of Recommendation 4 of the Parliament's Standards, Procedures and Public Appointments Committee's Inquiry Report – that the Parliament must be able to change the new registration system readily if the registration process inhibits engagement with Parliament. The power to amend the Bill is accordingly included, and covers the registration measures in the Bill, comprising most of Part 2 on the lobbying register.

The Government believes that the power is proportionate and appropriate to the particular nature of this Bill. As noted in the DPM, it is preceded in the Interests of Members of the Scottish Parliament Act 2006 where paragraph 10 of the schedule to that Act similarly confers power for the Parliament by resolution to modify the detail of primary legislation. That provision allows the Parliament, by resolution, to make modifications of that schedule (which sets out what interests constitute registrable financial interests for the purposes of the scheme).

Paragraph 6

Regarding the choice of procedure, why is it considered appropriate that the power in section 15(1) is exercised by parliamentary resolution notwithstanding that it includes provision to modify primary legislation?

As noted in the DPM and above, the decision to confer subordinate power on the Parliament exercisable by resolution rather than on Ministers in the usual way reflects the Standards Procedures and Public Appointments Committee's Report on proposals for a register of lobbying activity. It expressed the view that "the Parliament must be assured that the new registration process does not inhibit those seeking to legitimately lobby Parliament and Government. The Parliament must be able to change this new system if it considers this is the case."¹ The power for the Parliament to amend these aspects of the framework of the Bill is conferred in order to achieve that aim.

The precedent in paragraph 10 of the schedule to the Interests of Members of the Scottish Parliament Act 2006 which similarly confers power for the Parliament by resolution to modify primary legislation is noted above.

The Government note that a parliamentary resolution requires positive affirmation of the support of the whole Parliament for the measures enacted. This would provide a level of assurance of fuller parliamentary consideration of the measures, in a similar way to the affirmative procedure which is common for subordinate powers to amend primary legislation exercisable by the Scottish Ministers.

Paragraph 7

What further procedural provision is envisaged to be required in the Parliament's Standing Orders? Why is it considered appropriate that these matters are subject to provision made in the Standing Orders, rather than set out on the face of the Bill?

It will be a matter for the Parliament to decide what form of additional procedural provision is necessary and appropriate in relation to the exercise by Parliament of this and other resolution making powers conferred in the Bill. An example, in relation to the resolution making power under paragraph 10 of the schedule to the Interests of Members of the Scottish Parliament Act 2006, is found in Rule 1.8 of the Standing Orders. In particular, that rule provides that such a resolution may be made on a motion of the Standards, Procedures and Public Appointments Committee, and that the Committee must consult other members about the proposed resolution before lodging such motion. Any new provision to be made in Standing Orders could make similar or different provision. By way of example only it could provide for wider public consultation on a draft of any resolution before it is made.

The Bill leaves any further provision to be made in Standing Orders rather than on the face of the Bill. This is in order to provide for flexibility in the arrangements, but also more generally to respect the general position that it is for Parliament to regulate its own internal procedures.

¹ http://www.scottish.parliament.uk/S4_StandardsProceduresandPublicAppointmentsCommittee/Reports/stpR-15-01w.pdf - see para 70.

Paragraph 8

Section 47(2)(b) confers power on the Parliament to make the full range of ancillary provision in a resolution under the Bill. Why is that considered appropriate? Can the Scottish Government give an example of the sort of provision it is envisaged might be made under the ancillary powers?

As with the freestanding ancillary power in section 49 of the Bill for the Scottish Ministers, section 47(2)(b) is in recognition of the fact that any exercise of section 15(1) and the other resolution making powers in the Bill, in particular in light of experience over time, may give rise to the need for incidental, supplementary or consequential provisions. There may also be the need to adjust how changes to the regime in the Bill would apply transitionally. It is considered appropriate that such ancillary provision can be made by Parliament in making resolutions under section 15(1) and the other bespoke resolution making powers in the Bill, rather than there being a need to rely on exercise of the section 49 power by the Scottish Ministers. While the Scottish Government recognises the range of different ways in which this power could be used, use of the power would as usual be tightly constrained.

One example of the use of the section 15 power might be that it would allow the Parliament by resolution to alter section 8 of the Bill (duty to register). Section 8 includes for instance the (30-day) timescale for providing the information required. A significant change to section 8 might, for example, need the adjustment of the operation of provision elsewhere in the Bill which is affected by the duty in this section – eg section 22(1)(a) on the Commissioner's duty to investigate. The ancillary power in section 47(2)(b) might in principle be used in connection with those circumstances.

Paragraph 9

Section 47(4) of the Bill provides that Part 1 of the Interpretation and Legislative Reform Act 2010 ("ILRA") is to apply to a resolution as if it were a Scottish instrument. Can the Scottish Government explain the purpose of this provision?

Part 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 ("ILRA") contains general default provision about the interpretation and operation of Acts of the Scottish Parliament and in particular Scottish instruments made under such Acts. The rules apply to such legislation in the absence of express provision to the contrary therein.

A "Scottish instrument" is defined in section 1(4) and (5) of ILRA and does not include a resolution of the Parliament. By providing in section 47(4) of the Bill for Part 1 of ILRA to apply to a resolution of the Parliament as it applies to a Scottish instrument, resolutions of the Parliament will benefit from the interpretative and other rules in Part 1 of ILRA in the same way as any Scottish instrument, subject to any contrary provision made in such resolutions.

We note for completeness that paragraph 186 of the Explanatory Notes to the Bill contains a typographical error as it describes section 47(5) of the Bill and not, as indicated, section 47(4) which is not currently expressly addressed in the Explanatory Notes. We will address this when the Notes are revised in due course.

Paragraph 12

What further procedural provision is envisaged to be required in the Parliament's Standing Orders? Why is it considered appropriate that these matters are subject to provision made in the Standing Orders, rather than set out on the face of the Bill?

As set out in answer above to the point raised at paragraph 7 of your letter, it will be a matter for the Parliament to decide what form of additional procedural provision is necessary in relation to the exercise by Parliament of this and other resolution making powers conferred in the Bill. An example, in relation to the resolution making power under paragraph 10 of the schedule to the Interests of Members of the Scottish Parliament Act 2006, is found in Rule 1.8 of the Standing Orders. In particular, that rule provides that such a resolution may be made on a motion of the Standards, Procedures and Public Appointments Committee, and that the Committee must consult other members about the proposed resolution before lodging such motion. Any new provision to be made in Standing Orders could make similar or different provision. By way of example only it could provide for wider public consultation on a draft of any resolution before it is made.

The Bill leaves further provision to be made in Standing Orders rather than on the face of the Bill. This is in order, again, to provide for flexibility in the arrangements but also to respect the general position that it is for Parliament to regulate its own internal procedures.

Separately, of course, the provision made at section 47(5) to (7) of the Bill – plugging in to section 41(2) to (5) of the Interpretation and Legislative Reform (Scotland) Act 2010 and the Scottish Statutory Instruments Regulations 2011, subject to modifications – provide for parliamentary resolutions under the Bill to be published by the Queen's Printer in the same way as Scottish statutory instruments, ensuring that they are published in a recognised format and so as to be easily accessible.

Paragraph 13

Section 47(2)(b) confers power on the Parliament to make the full range of ancillary provision in a resolution under the Bill. Why is that considered appropriate? Can the Scottish Government give an example of the sort of provision it is envisaged might be made under the ancillary powers?

As set out in answer above to the point raised at paragraph 8 of your letter, as with the freestanding ancillary power in section 49 of the Bill for the Scottish Ministers, section 47(2)(b) is in recognition of the fact that any exercise of section 20(1) in relation to information notices, in particular in light of experience over time, may give rise to the need for incidental, supplementary, consequential or transitional provisions. It is considered appropriate that such ancillary provision can be made by Parliament by resolution under section 20(1) and the other bespoke resolution making powers in the Bill, rather than there being a need to rely on exercise of the section 49 power by the Scottish Ministers. While again the Scottish Government recognises the different uses of these powers, their use would as usual be strictly construed.

The Scottish Government is reluctant to speculate about possible exercise of the power, but one example might be if on the introduction of a change to the rules on the period within which information must be provided, transitional provision were desired about how and when that change had effect in respect of on-going cases.

Paragraph 14

Section 47(4) of the Bill provides that Part 1 of ILRA is to apply to a resolution as if it were a Scottish instrument. Can the Scottish Government explain the purpose of this provision?

The same principles apply for resolutions under section 20 of the Bill as set out in answer above to the point raised at paragraph 9 of your letter.

Paragraph 18

In relation to the power in section 31, why is it considered appropriate that provision regarding the handling of complaints is dealt with in directions, rather than set out on the face of the Bill?

The procedural and other arrangements for Commissioner investigation and report to Parliament under Part 3 of the Bill are based substantially on the equivalent arrangements for Commissioner investigation and reporting to Parliament under the Scottish Parliamentary Standards Commissioner Act 2002. The 2002 Act provides a framework for a system which has been operating successfully for some time now and for that reason in particular it was considered appropriate to adopt that framework in the Bill.

Similar provision is made in section 4 of the Scottish Parliamentary Standards Commissioner Act 2002, enabling the Parliament to issue directions to the Commissioner in relation to the carrying out of the Commissioner's investigative functions under that Act. As with the 2002 Act, providing Parliament with power to issue directions to the Commissioner about exercise of his function, rather than making provision on the face of the Bill, respects the fact that the Commissioner is required to report the outcome of investigations to Parliament and provides for appropriate operational flexibility.

As with the 2002 Act there is an important limit on the power. While such directions may in principle be of either a general or specific character section 31(3) of the Bill makes clear that a direction under section 31(1) may not direct the Commissioner as to how a particular investigation is carried out.

Paragraph 19

Further, can you give examples of the sorts of cases under which it is envisaged the Parliament might direct the Commissioner not to carry out an assessment of a complaint, or an investigation into a complaint?

A particular example which has been raised in the Standards, Procedures and Public Appointments Committee's Stage 1 consideration of the Bill concerns the ability of the Commissioner to refer matters raised in complaints to the Clerk for consideration. The power could, for example, in principle be exercised by the Parliament to direct the Commissioner, where the Commissioner considers it appropriate to do so, to suspend consideration of a complaint received and to refer any matter raised in that complaint to the Clerk to seek to informally resolve the matter with the person to whom it relates in the first instance. This might help to ensure that minor or inadvertent oversights are dealt with through informal action between the Clerk and the person to whom they relate, consistent with the overall intention of the oversight and enforcement arrangements in the Bill, ie to ensure that any questions of compliance can be addressed in an effective and proportionate manner.

Clearly other exercises of the power are possible. The Parliament has exercised its power under section 4 of the 2002 Act in a Direction found in Annex 5 of Volume 4 of the Code of Conduct for Members of the Scottish Parliament². It may be that the Parliament considers that it is appropriate to make similar provision in exercise of the section 31(1) power in the context of the Commissioner's investigations under the Bill.

² <http://www.scottish.parliament.uk/msps/code-of-conduct-for-msps.aspx>

Paragraph 20

In relation to section 24(5)(a), in what sorts of cases where a complaint is inadmissible by virtue of the rules in section 23(3) is it envisaged that the Scottish Parliament would direct the Commissioner to report? Why is it considered appropriate to specify these classes of case in directions, rather than on the face of the Bill?

Again, the procedural and other arrangements for Commissioner investigation and report to Parliament under Part 3 of the Bill are based substantially on the equivalent arrangements for Commissioner investigation and reporting to Parliament under the Scottish Parliamentary Standards Commissioner Act 2002. The 2002 Act provides a framework for a system which has been operating successfully for some time now and for that reason in particular it was considered appropriate to adopt that framework in the Bill.

Similar provision is made in section 7(6) of the Scottish Parliamentary Standards Commissioner Act 2002. As with the 2002 Act, providing Parliament with power to issue directions to the Commissioner about exercise of his function, rather than making provision on the face of the Bill, respects the fact that the Commissioner is required to report the outcome of investigations to Parliament and provides for appropriate operational flexibility.

Again, the Parliament has exercised its power under section 7(6) of the 2002 Act in a Direction found in Annex 5 of Volume 4 of the Code of Conduct for Members of the Scottish Parliament³. It may be that the Parliament considers that it is appropriate to make similar provision in exercise of the section 24(5)(a) power in the context of the Commissioner's investigations under the Bill.

Paragraph 21

What further procedural provision for directions under the Bill, including as regards publication, is envisaged to be required in the Parliament's Standing Orders? Why is it considered appropriate that these matters are subject to provision made in the Standing Orders, rather than set out on the face of the Bill?

As for Parliamentary resolutions under the Bill (on which see for example the above answer to the point raised at paragraph 7 of your letter), it will be for the Parliament to decide what form of additional procedural provision is appropriate in relation to the exercise by Parliament of powers to issue directions under the Bill. An example of procedural provision in relation to the direction making powers under the Scottish Parliamentary Standards Commissioner Act 2002 is found in Rule 3A.2 of the Standing Orders. In particular, that provides that such directions shall be given by the Standards, Procedures and Public Appointments Committee and are so given if signed by the Convener of that Committee. Again, while other provision could be made, the Parliament may wish to make the same or similar provision in relation to directions under the Bill.

On publication, the Parliament could also make provision in Standing Orders as to the means of publication of any direction under the Bill. Standing Orders do not currently make provision for publication of directions under the 2002 Act. Rather, as noted in the above answer to the point raised at paragraph 20 of the clerk's letter, publication of directions under the 2002 Act is dealt with administratively as part of the Code of Conduct for Members of the Scottish Parliament. Where the Bill relates to the activities of persons outwith the Parliament – rather than its Members – a different means of publication may be considered appropriate, for example alongside any parliamentary guidance about operation of the Bill which may in due course be published by Parliament under section 43 of the Bill. That is ultimately a matter for the Parliament, but clearly Parliament will wish to ensure that provision is made for the publication of directions under the Bill in a clearly accessible manner.

³ <http://www.scottish.parliament.uk/msps/code-of-conduct-for-msps.aspx>

In the context of questions regarding publication it is, the Government considers, important to remember that directions under the Bill are by their nature *directions to the Commissioner* rather than to the public at large. Accordingly, while those engaging with the Commissioner will wish to be aware of them – the directions are in principle different from resolutions under the Bill. It is in these circumstances that, unlike the provision for parliamentary resolutions under the Bill to secure their publication in the same manner as SSIs, no specific provision is made on the face of the Bill for publication of directions.

As with further procedural provision for resolutions under the Bill (on which see again for example the above answer to the point raised at paragraph 7 of your letter), the Bill leaves further provision to be made in Standing Orders or administratively rather than on the face of the Bill. This is also in order to provide for flexibility in the arrangements and more generally to respect the general position that it is for Parliament to regulate its own internal procedures.

Paragraph 24

What further procedural provision is envisaged to be required in the Parliament's Standing Orders? Why is it considered appropriate that these matters are subject to provision made in the Standing Orders, rather than set out on the face of the Bill?

As noted, the procedural and other arrangements for Commissioner investigation and report to Parliament under Part 3 of the Bill are based substantially on the equivalent arrangements for Commissioner investigation and reporting to Parliament under the Scottish Parliamentary Standards Commissioner Act 2002. The 2002 Act provides a framework for a system which has been operating successfully for some time now and for that reason in particular it was considered appropriate to adopt that framework.

However, the 2002 Act stopped short of including – or conferring power to make – provision about the procedures to be followed by the Parliament following the Commissioner submitting a report to the Parliament under that Act. Paragraph 11 of the Explanatory Notes to the 2002 Act explains that the 2002 Act does not deal with this “because it is a matter for the Parliament itself by its own internal rules to set out the procedure that is to apply...it will be necessary for the Parliament to make separate provision in the standing orders and the [Code of Conduct for Members of the Scottish Parliament] for the way the Commissioner will make reports to the Parliament and for the procedure that it will follow once the Commissioner has made a report to it...”⁴.

While again the Government wished to respect the position that it is for Parliament to regulate its own internal procedures, with the appropriate operational flexibility that brings, it considered that it was appropriate that in the context of this Bill the Parliament should be required to make appropriate procedural provision by resolution. That is, as noted above, in recognition of the fact that investigations and reports to Parliament under the Bill will be in relation to the activities of private parties rather than, as under the 2002 Act, the Parliament's own Members. Provision for procedures to be followed by the Parliament following the Commissioner submitting a report to the Parliament under the Bill will therefore be of *direct relevance* to such parties. Taken together with the provision in section 47(5) to (7) of the Bill in relation to publication of resolutions in the same way as SSIs, this will ensure that relevant procedural provision is made by the Parliament by resolution and that any such provision is clearly accessible.

⁴ <http://www.legislation.gov.uk/asp/2002/16/notes/contents>

Paragraph 25

Section 47(2)(b) confers power on the Parliament to make the full range of ancillary provision in a resolution under the Bill. Why is that considered appropriate? Can the Scottish Government give an example of the sort of provision it is envisaged might be made under the ancillary powers?

As set out in the above answer to the points raised at paragraphs 8 and 13 of your letter, as with the freestanding ancillary power in section 49 of the Bill for the Scottish Ministers, the provision in section 47(2)(b) is in recognition of the fact that the exercise of section 41 in particular in light of experience over time may give rise to the need for incidental, supplementary, consequential or transitional provisions. It is considered appropriate that such ancillary provision can be made by Parliament in making resolution under section 41, rather than there being a need to rely on exercise of the section 49 power by the Scottish Ministers. While again the Scottish Government recognises the different ways in which this power can be applied, use of the power would be strictly construed. The type of provision which could be made would be of a similar nature to that indicated for the other resolutions.

Paragraph 26

Section 47(4) of the Bill provides that Part 1 of ILRA is to apply to a resolution as if it were a Scottish instrument. Can the Scottish Government explain the purpose of this provision?

The same purpose applies for resolutions under section 20 of the Bill as set out in the above answer to the point raised at paragraph 9 of your letter.

Paragraph 28

The Committee asks the Scottish Government for an explanation as to –

- (a) why it has been considered appropriate that the section does not include requirements for persons to comply with the Code or have regard to the Code; and**
- (b) why it has been considered appropriate that the section does not contain any sanction or enforcement provision in relation to a breach of the Code?**

As noted in paragraph 2 of the Policy Memorandum, The Bill takes account of the views of the Parliament's Standards, Procedures and Public Appointments Committee in its Report on proposals for a register of lobbying activity⁵. Those views have informed the Government's approach to the Bill to a significant extent.

Paragraphs 140 to 148 of the Committee's Report give consideration to a code of practice for those lobbying MSPs. In particular at paragraphs 143 and 144 the Parliament expressed views as follows:-

"143. The Committee considers that there is an argument for providing those who regularly lobby politicians with a non-binding code including guidance that mirrors the rules in the MSP Code of Conduct. This could prove useful in providing advance notice of what forms of approach would or would not be deemed appropriate.

144. This form of code would not be a prescriptive set of rules so there is no justification for making it binding. A non-statutory approach also reflects the fact

⁵http://www.scottish.parliament.uk/S4_StandardsProceduresandPublicAppointmentsCommittee/Reports/stpR-15-01w.pdf

that it is ultimately the responsibility of the MSP to decide whether to meet with people seeking to lobby them, and to be familiar with the binding rules of their Code in deciding which offers to accept."

The Committee went on to conclude in paragraph 148 that:

"148. The Committee recommends that the Parliament should introduce a code of practice for those who lobby that includes advice on expected standards of behaviour. This would mirror the rules on lobbying in the Code of Conduct for MSPs."

Particularly in circumstances where the code of conduct relates to those lobbying Members of the Parliament in their capacity as such, the Government has sought to reflect and respect these views in framing the provision in section 43 of the Bill. It is in these circumstances that the section does not include requirements for persons to comply with the Code or have regard to the Code and that it does not contain any sanction or enforcement provision in relation to a breach of the Code.

Yours sincerely



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