

LOBBYING (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 – Oversight and Enforcement

(a) the Clerk

Clerk's duty to monitor compliance

87. **Section 16** imposes a duty on the Clerk to monitor compliance with the obligations imposed by or under the Act on persons who engage in regulated lobbying and voluntary registrants. Section 16(2) makes clear that in exercising the duty, the Clerk must have regard to the parliamentary guidance (see section 43).

Information notices

88. **Section 17** provides that in connection with the duty under section 16, the Clerk may serve a notice (an “information notice”) on any person who is an active registrant, a voluntary registrant or who is not an active registrant but whom the Clerk has reasonable grounds for believing may be, or may have been, engaged in regulated lobbying, whether the person is in or outside Scotland, requiring the person to supply information specified in the notice.
89. **Section 17(3)** states that the information notice must specify (a) the form in which the information must be supplied, (b) the date by which the information must be supplied and (c) contain particulars of the right to appeal under section 19(1).
90. Subsection (4) confirms that the date specified under subsection (3)(b) must not be before the end of the period (21 days) within which an appeal against an information notice under section 19(1) can be made.
91. Subsection (5) confirms that where an information notice has been served on a person, the Clerk may send an additional copy of the information notice by whatever means the Clerk considers appropriate (e.g. by e-mail or hard copy) and may cancel the information notice by serving notice to that effect on the person.
92. **Section 18(1)** provides that an information notice does not require a person to supply information which would disclose evidence of the commission of an offence by the person (other than an offence under section 42(1), section 42(2), or section 42(3) of the Act (offences relating to registration and information returns)). Section 18(1) also provides that an information does not require a person to disclose information which the person would otherwise be entitled to refuse to supply in proceedings in a court in Scotland. This covers for example other privileges recognised by the courts in Scotland such as the privilege which attaches to solicitor/client communications – i.e. information in respect of which a claim to confidentiality of communications as between client and professional legal adviser could be maintained in legal proceedings.
93. **Section 18(2)** provides that an oral or written statement made by a person in response to an information notice may not be used in evidence against the person in a prosecution for an offence, other than an offence under section 21(1) (offences of failure to

provide required information under and information notice or provision of inaccurate or incomplete information) unless the person is prosecuted for an offence under section 42(1), section 42(2), or section 42(3) of the Act (offences relating to registration and information returns) and in proceedings for that offence the person gives contrary evidence and evidence relating to the statement is introduced by the person or on their behalf.

94. **Section 19** sets out a framework for appeals against information notices served by the Clerk under section 17.
95. Subsection (1) provides that a person on whom an information notice has been served may appeal (on fact or law) to the sheriff against the notice or any requirement specified in it.
96. Subsection (2) provides that an appeal under subsection (1) must be made before the end of the period of 21 days beginning with the date on which the person receives the notice.
97. Subsection (3) provides that a decision of the Sheriff Appeal Court on appeal (on fact or law) against the sheriff's decision is final. On appeals from the sheriff to the Sheriff Appeal Court see in particular section 110 of the Courts Reform (Scotland) Act 2014.
98. Subsection (4) makes clear that if an appeal is brought under this section, the person is not required to supply the information specified in the information notice under appeal until the date on which the appeal is "finally determined" (on which see subsection (5)) or the person decides not to proceed with the appeal and it is withdrawn.
99. **Section 20** gives the Scottish Parliament a power, exercisable by resolution, to make further provision about information notices.
100. **Section 20(2)** provides that a resolution under subsection (1) may in particular make provision (or further provision), specifying descriptions of information which the Clerk may not require a person to supply in response to an information notice, about the minimum period between the date on which an information notice is served and the date which must be specified under section 17(3)(b) and about other matters which must be specified in an information notice.
101. **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 easily accessible.
102. **Section 21** sets out the framework for offences relating to information notices.
103. Subsection (1) provides that it is an offence for a person who has been served with an information notice under section 17 to fail to supply the required information on or before the date by which the person is required to do so or to provide information which is inaccurate or incomplete in a material particular.
104. Subsection (2) provides that it is a defence to a charge in proceedings against a person for an offence under subsection (1) to show that the person exercised all due diligence to avoid committing the offence. This imposes an evidential burden only on the person.
105. Subsection (3) provides that a person who commits an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(b) the Commissioner – investigation of complaints and report to Parliament

106. **Section 22** imposes a duty on the Commissioner to investigate when the Commissioner receives a complaint that a person has or might have failed:
 - (a) to comply with section 8(1) (duty to register in 30 days following first instance of engaging in regulated lobbying when not an active registrant),

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(asp 16) which received Royal Assent on 14 April 2016*

- (b) to provide accurate and complete information in an application made under section 9 (application by person who is not an active registrant and who has not engaged in regulated lobbying),
 - (c) to comply with section 11 (duty on active registrant to submit information returns),
or
 - (d) to supply accurate and complete information in response to an information notice in accordance with section 17.
107. Subsection (2) makes clear that on receipt of such a complaint the Commissioner must (a) assess whether the complaint is admissible (see sections 23 and 24) and (b) if the complaint is admissible, (i) investigate the complaint (see section 25) and (ii) report upon the outcome of the investigation to the Parliament (see section 26).
108. Subsection (3) provides that in exercising the duties imposed by or under this Act, the Commissioner must have regard to the parliamentary guidance (see section 43).
109. Subsection (4) states that an assessment under subsection (2)(a) and an investigation under subsection (2)(b)(i) must be conducted in private.
- Assessment of admissibility of complaints
110. **Section 23** provides for a three part test for admissibility. Subsection (1) explains that a complaint is admissible if it appears to the Commissioner that the complaint:
- (a) is relevant (see subsection (2)),
 - (b) meets the conditions mentioned in subsection (3), and
 - (c) warrants further investigation (see subsection (4)).
111. Subsection (2) states that a complaint is relevant if it appears at first sight – i.e. on its face - to be about a person who may in the future be, or may currently be, or may previously have been, engaged in regulated lobbying and that if all or part of the conduct complained about is established, it might amount to a failure to comply with a requirement mentioned in section 22(1)(a) to (d).
112. Subsection (3) sets out a number of conditions - largely procedural in nature - that require to be met before a complaint will be admissible, including that the complaint must be in writing, must be made by an identifiable individual (rather than in the name of another person such as a company) and made before the end of the period of one year beginning on the date when the complainant could reasonably have become aware of the conduct complained about.
113. Subsection (4) provides that a complaint warrants further investigation if there is sufficient evidence to suggest that the person who is the subject of the complaint may have failed to comply with a requirement mentioned in section 22(1)(a) to (d).
114. **Section 24** sets out the procedure for assessing admissibility of a complaint. Subsection (2) provides that when the Commissioner receives a complaint that a person has or might have failed to comply with a requirement mentioned in section 22(1)(a) to (d), the Commissioner must notify the person who is the subject of the complaint that the complaint has been received, inform that person of the nature of the complaint and, except where the Commissioner considers that it would not be appropriate to do so (e.g. where the complainant might be vulnerable or where to do so could prejudice an investigation), inform that person of the name of the individual who made the complaint.
115. Subsection (3) focusses on the first part of the test for admissibility – whether the complaint is relevant. It provides that if the Commissioner considers that the complaint is not relevant, the Commissioner must dismiss it.

116. Subsections (4) to (7) focus on the second part of the test for admissibility – whether the conditions in section 23(3) are met. In particular provision is made in subsections (5) to (7) for where a relevant complaint fails to meet one or more of the conditions mentioned in section 23(3).
 117. Subsection (5)(a) provides that if the complaint is of a kind specified in a direction by the Parliament, the Commissioner must make a report to the Parliament (before the Commissioner considers the third part of the test for admissibility (i.e. whether the complaint warrants further investigation)). Subsection 5(b) provides that if the complaint is not of such a kind the Commissioner will consider whether the complaint warrants further investigation and, if it does, will report to the Parliament. Subsection 5(c) deals with other cases, i.e. where the complaint is not of a kind specified in a direction by the Parliament and where the Commissioner considers that the complaint does not warrant further investigation, in which case the Commissioner will dismiss the complaint.
 118. Subsection (6) sets out the information which a report under subsection (5)(a) or (b) must contain. Subsection (7) provides that after receiving a report under subsection (5) (a) or (b) the Parliament must give the Commissioner a direction to dismiss the complaint for failing to meet one or more of the conditions in section 23(3) or to treat the complaint as if it meets all of those conditions. If the direction is to treat the complaint as if it meets all the conditions and is issued in response to a report under subsection (5)(a), the Commissioner will then require to consider the third part of the test for admissibility – whether the complaint warrants further investigation.
 119. Subsection (8) provides that if the Commissioner considers that the complaint is admissible (in accordance with the three part test, i.e. as (a) relevant, (b) meeting all of the conditions in section 23(3) (or having been directed by the Parliament under subsection (7)(b) to treat the complaint as meeting all of those conditions) and (c) warranting further investigation), the Commissioner must inform all of the Parliament (by making a report to the Parliament), the individual who made the complaint and the person who is the subject of the complaint.
 120. Subsection (9) deals with the situation where the Commissioner considers a complaint is inadmissible and has not already dismissed it under or in pursuance of other provision in section 24 (i.e. subsections (3), (5)(a) or (7)(a)). This will be the case where the Commissioner considers that a relevant complaint which meets the conditions in section 23(3) does not warrant further investigation or where following a report to the Parliament on a relevant complaint under subsection (5)(a) the Parliament directs the Commissioner to treat the complaint as if the section 23(3) conditions are met but the Commissioner then determines that the complaint does not warrant further investigation. The Commissioner is to dismiss the complaint.
 121. Subsection (10) provides that, in dismissing a complaint, the Commissioner must inform the individual who made the complaint and the person who is the subject of the complaint of the dismissal together with the reasons why the complaint is inadmissible.
 122. Subsection (11) confirms that subsections (2), (8) and (10) apply only to the extent that they are capable of applying where the person to whom the complaint relates has not been named in the complaint or the individual who made the complaint is anonymous.
 123. Subsection (12) provides that if the Commissioner has not assessed whether a complaint is admissible within 2 months of receiving the complaint, the Commissioner must, as soon as possible thereafter, make a report to the Parliament on the progress of the assessment of admissibility.
- Investigation of admissible complaint and report to Parliament
124. **Section 25**(1) provides that section 25 applies to the investigation of a complaint assessed as admissible under section 22(2)(a).

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125. Subsection (2) provides that the investigation must be conducted with a view to making findings of fact in relation to compliance with a requirement mentioned in section 22(1) (a) to (d) by the person who is the subject of the complaint.
126. Subsection (3) provides that the Commissioner may make a finding of fact if satisfied on the balance of probabilities that the fact is established.
127. Subsection (4) provides that if the Commissioner has not completed the investigation before the end of the period of 6 months beginning on the date the complaint is found admissible, the Commissioner must, as soon as possible thereafter, make a report to the Parliament on the progress of the investigation.
128. **Section 26** makes provision in respect of a Commissioner's report on the outcome of any investigation of an admissible complaint.
129. Subsection (2) sets out the information that the report must contain, including details of the complaint, the Commissioner's findings in fact and details of any representations made under subsection (4)(b) by the person who is the subject of the complaint.
130. Subsection (3) provides that the report must not make reference to action which may be taken by the Parliament under section 40 (censure by the Parliament or no further action).
131. Subsection (4) makes clear that before the report is provided to the Parliament, the Commissioner must (a) provide a copy of a draft report to the person who is the subject of the report and (b) provide that person with an opportunity to make representations on the draft report.
132. **Section 27**(1) provides that the Parliament is not bound by the facts found by the Commissioner in a report made under section 22(2)(b)(ii) (Commissioner's report on the outcome of an admissible complaint).
133. Subsection (2) provides that the Parliament may direct the Commissioner to carry out such further investigations as may be specified in the direction and report on the outcome of those investigations to it.
134. Subsection (3) provides that subject to a direction under subsection (2), the provisions of the Act and of any other direction made under the Act apply (subject to necessary modifications) in relation to any further investigation and report as they apply in relation to an investigation and report into a complaint.

Withdrawal of a complaint

135. **Section 28**(1) and (2) provide that at any time after a complaint has been made to the Commissioner and before a report is made to the Parliament under section 22(2)(b)(ii), the individual who made the complaint may withdraw the complaint by signed written notice to the Commissioner.
136. Subsection (3)(a) and (b) sets out the actions that the Commissioner must take when a complaint is withdrawn during an assessment of admissibility under section 22(2)(a). The Commissioner must cease to investigate and inform the person who is the subject of the complaint.
137. Subsection (4)(a) to (c) sets out the actions that the Commissioner must take when a complaint is withdrawn during an investigation of an admissible complaint under section 22(2)(b)(i). The Commissioner must inform the person who is the subject of the complaint, invite that person to express views on whether the investigation should nevertheless continue and, having considered relevant information, determine whether to recommend to the Parliament that the investigation should continue.
138. Subsection (5) provides that for the purposes of subsection (4)(c) "relevant information" includes any reason given by the individual who made the complaint for withdrawing it

and any views expressed by the person who is the subject of the complaint on whether the investigation should continue.

139. Subsection (6)(a) to (d) sets out the actions that the Commissioner must take when the Commissioner determines to recommend to the Parliament that the investigation should cease (including informing the complainer and person who is the subject of the complaint and reporting to the Parliament).
140. Subsection (7)(a) to (e) provides that where the Commissioner determines to recommend to the Parliament that the investigation should continue the Commissioner must report to the Parliament setting out particular matters, including the reasons for the Commissioner's recommendation.
141. Subsection (8) provides that after receiving a report under subsection (7), the Parliament must direct the Commissioner to either continue the investigation or cease the investigation.
142. Subsection (9) provides that after receiving a direction under subsection (8), the Commissioner must inform the individual who made the complaint and the person who is the subject of the complaint whether the investigation will be continued or ceased.
143. Subsection (10) makes clear that where the Commissioner is required under this section to provide reasons given by the individual who made the complaint for withdrawing it (e.g. under section 28(3)(b)(iii)), the Commissioner may provide a summary of those reasons.

Commissioner's discretionary reports to Parliament

144. **Section 29** provides that the Commissioner may, in such circumstances as the Commissioner thinks fit, make a report to the Parliament as to the progress of any actions taken by the Commissioner in accordance with the Commissioner's duties under section 22(2) or informing the Parliament of a complaint which the Commissioner has dismissed as being inadmissible and the reasons for the dismissal.

Restriction on Commissioner's advice

145. **Section 30(1)** provides that the Commissioner may not give advice as to whether conduct which has been, or is proposed to be, committed by a person would constitute a failure to comply with a requirement mentioned in section 22(1)(a) to (d), or otherwise express a view upon such a requirement, except in the context of an investigation or report mentioned in section 22.
146. Subsection (2) provides that nothing in subsection (1) prevents the Commissioner from giving advice or otherwise expressing a view about the procedures for making a complaint to the Commissioner or the procedures following upon the making of a complaint.

Directions to the Commissioner

147. The general power in **section 31** of the Act for the Parliament to issue directions to the Commissioner provides for operational flexibility in the overall arrangements for oversight of the registration regime by the Commissioner and the Parliament as provided for in Part 3 of the Act (in particular sections 22 to 30).
148. Subsection (1) provides that the Commissioner must, in carrying out the Commissioner's functions conferred by or under the Act, comply with any direction given by the Parliament.
149. Subsection (2) provides a non-exhaustive list of examples of the types of thing a direction given by the Parliament may deal with. A direction may:
 - (a) make provision as to the procedure to be followed by the Commissioner when conducting an assessment (assessment of admissibility of complaint) or investigation (investigation of admissible complaint) mentioned in section 22,

- (b) set out circumstances where, despite receiving a complaint mentioned in section 22(1), the Commissioner:
 - (i) may decide not to conduct an assessment under section 22(2)(a) (assessment of admissibility of complaint) or an investigation under section 22(2)(b)(i) (investigation of admissible complaint) or, if started, may suspend or stop such an assessment or investigation before it is concluded,
 - (ii) must not conduct such assessment or investigation or, if started, must suspend or stop such assessment or investigation before it is concluded,
 - (iii) is not required to report to the Parliament under sections 22(2)(b)(ii), 24(5)(a) or (b), (8)(a) or (12), 25(4) or 28(7), or
 - (c) require the Commissioner to report to the Parliament upon such matter relating to the exercise of the functions of the Commissioner under the Act as may be specified in the direction.
150. Subsection (3) makes clear that a direction under subsection (1) may not direct the Commissioner as to how any particular investigation is to be carried out.
- Commissioner investigations: witnesses and documents
151. **Section 32**(1) provides that the Commissioner may for the purposes of an investigation under section 22(2)(b)(i) (investigation into an admissible complaint) require any person, whether in or outwith Scotland, to attend the Commissioner's proceedings (i.e. any formal activity the Commissioner undertakes as part of his investigation) for the purpose of giving evidence or to produce documents in the person's custody or under the person's control.
152. Subsection (2) provides that for the purposes of subsection (1) a person is to be taken to comply with a requirement to produce a document if that person produces a copy of, or an extract of the relevant part of, the document.
153. Subsection (3) makes clear that the Commissioner may not impose such a requirement on any person whom the Parliament could not require, under section 23 of the Scotland Act 1998, to attend its proceedings for the purpose of giving evidence or to produce documents.
154. Subsection (4) provides that a statement made by a person in answer to a question which that person was obliged under this section to answer is not admissible in any criminal proceedings against that person, except where the proceedings are in respect of perjury relating to that statement.
155. **Section 33** provides that notice must be given to a person of a requirement under section 32(1) to attend for the purposes of giving evidence or to produce documents in the person's custody and what information must be provided to the person in such notice.
156. Paragraph (a) specifies what information must be contained in the notice where the person is required to give evidence.
157. Paragraph (b) specifies what information must be contained in the notice where the person is required to produce a document.
158. **Section 34**(1) provides that a person is not obliged under section 32 to answer a question or to produce a document which that person would be entitled to refuse to answer or produce in proceedings in a court in Scotland. As noted above this covers for example various privileges recognised by the courts in Scotland such as the privilege against self-incrimination and certain other privileges in connection with litigation.

159. Subsection (2) provides that the Lord Advocate, the Solicitor General for Scotland or a procurator fiscal is not obliged under section 32 to answer any question or produce any document which that officer would be entitled to decline to answer or to produce in accordance with section 27(3) or, as the case may be, section 23(10) of the Scotland Act 1998. This provides for these persons to refuse to answer questions or provide documents about particular criminal proceedings when it is considered that it would be prejudicial to those proceedings or contrary to the public interest to do so.
160. **Section 35**(1) provides that the Commissioner may administer an oath to any person giving evidence to the Commissioner and require that person to take an oath.
161. Subsection (2) provides that a person who refuses to take an oath when required under subsection (1) commits an offence.
162. Subsection (3) provides that a person who commits an offence under subsection (2) is liable on summary conviction to a fine not exceeding level 5 on the standard scale or imprisonment for a period not exceeding 3 months.
163. **Section 36**(1) provides that a person to whom a notice under section 33 has been given (notice of requirement to attend for the purposes of giving evidence or to produce documents in the person's custody) commits an offence if the person (a) refuses or fails to attend before the Commissioner as required by the notice, (b) refuses or fails, when attending before the Commissioner, to answer any question concerning the matters specified in the notice, (c) deliberately alters, suppresses, conceals or destroys any document which that person is required to produce by the notice, or (d) refuses or fails to produce any such document.
164. Subsection (2) provides that it is a defence to a charge in proceedings against a person for an offence under subsection (1)(a), (b) or (d) to show that there was a reasonable excuse for the refusal or failure. This imposes an evidential burden only on the person.
165. Subsection (3) provides that a person who commits an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a period not exceeding 3 months.

Commissioner investigations - restriction on disclosure of information

166. **Section 37**(1) provides that a person mentioned in subsection (2) must not disclose information which is (a) contained in a complaint, (b) provided to or obtained by the person in the course of, or for the purposes of, an assessment under section 22(2)(a) (assessment of admissibility of a complaint), or (c) provided to or obtained by the person in the course of, or for the purposes of, an investigation under section 22(2)(b) (i) (investigation of an admissible complaint).
167. Subsection (2) provides that the persons referred to in subsection (1) are the Commissioner, a member of the Commissioner's staff, or any other person appointed by the Commissioner.
168. Subsection (3)(a) makes clear that subsection (1) does not prevent disclosure of information for the purpose of enabling or assisting the Commissioner to discharge the Commissioner's functions:
- (i) conferred by or under the Act (including by a resolution of the Parliament under section 41 (power to make further provision about the Parliament's procedures on receipt of a report from the Commissioner under Part 3 of the Act)),
 - (ii) conferred by or under any other enactment, or
 - (iii) in the standing orders of the Scottish Parliament.
169. Subsection (3)(b) makes clear that subsection (1) does not prevent disclosure of information for the purpose of the investigation or prosecution of any offence or suspected offence.

Commissioner's functions etc.

170. **Section 38** sets out a series of modifications (as provided for in subsections (2) to (4)) to the Scottish Parliamentary Commissions and Commissioners etc. Act 2010 in consequence of this Act. That Act makes general provision for the Commissioner and exercise of the Commissioner's functions under existing legislation. The modifications are to reflect the conferral of further functions on the Commissioner under the Act.

Investigation of performance of Commissioner's functions

171. **Section 39** provides for consequential changes to schedule 2 to the Scottish Public Services Ombudsman Act 2002 so that the Commissioner in exercise of functions under the Act is a person liable to investigation by the Scottish Public Services Ombudsman for the purposes of that Act.

Parliament's power to censure

172. **Section 40** provides that after receiving a report under section 22(2)(b)(ii) (report of outcome of investigation of admissible complaint) or section 27(2) (report of further investigations after direction by the Parliament following receipt of report of outcome of investigation of admissible complaint under section 22(2)(b)(ii)), the Parliament may censure the person who is the subject of the report or take no further action.

Power to make further provision about Parliament's procedures etc.

173. **Section 41**(1) provides that the Parliament must, by resolution, make provision about procedures to be followed when the Commissioner submits a report to the Parliament under this Part. Subsection (2)(a) to (d) sets out what, in particular, a resolution under subsection (1) may make provision about.
174. **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 easily accessible.

(c) offences

175. **Section 42** makes provision for offences in relation to registration and information returns. Subsection (1) provides that it is an offence for a person who is required to provide information under section 8(1) (duty to register in 30 days following first instance of regulated lobbying when not an active registrant) to fail to provide the information on or before the date by which the person is required to do so or provide information which is inaccurate or incomplete in a material particular.
176. Subsection (2) provides that it is an offence for a person to provide, in an application for registration under section 9, information which is inaccurate or incomplete in a material particular.
177. Subsection (3) provides that it is an offence for a person who is required to submit an information return under section 11 to fail to submit the return on or before the date by which the person is required to do so or provide information which is inaccurate or incomplete in a material particular.
178. Subsection (4) provides that it is a defence to a charge in proceedings against a person for an offence under subsections (1) to (3) to show that the person exercised all due diligence to avoid committing the offence. This imposes an evidential burden only on the person.
179. Subsection (5) provides that a person who commits an offence under subsections (1) to (3) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.