

CHARITIES AND POLITICAL ACTIVITY IN ENGLAND AND WALES: MIXED MESSAGES

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The ability of charities in England and Wales to engage effectively in political activity has been significantly impacted by both legal and political developments in recent years. It is argued that there is clarity concerning the fundamental legal restriction on charities not being allowed to have a political purpose or engage in party political campaigning. However, there have been significant shifts in recent times in terms of the grey areas around *what are* political purposes from the point of view of charity law, the *public perceptions* around charities' activities in these areas, and *the formal regulation of campaigning* around elections. Charity law may be loosening up somewhat in terms of what amounts to a political purpose. However, in general terms, pressure from politicians, together with what might be seen as a clamping down by the Charity Commission (the charity regulator in England and Wales), and finally the impact of new legislation governing electoral campaigning, means that charities are feeling the chilling effect and are finding it more and more difficult to speak out in any 'political' sense.

Before turning to look at a number of legal and political developments, the next section will briefly set out the established charity law in this area and the dilemmas that this causes for charities.

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Charity Law

A charity must be established for exclusively charitable purposes. Whilst there have been recent challenges to this as an absolute principle in Australia¹ and New Zealand,² a political purpose cannot be charitable in the UK.³ Following the decision in *McGovern v Attorney-General*⁴ it has been accepted that a political purpose is one which (i) furthers the interests of a political party; (ii) seeks to procure changes in the laws of this country; (iii) seeks to procure changes in the law of a foreign country; (iv) seeks to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or (v) seeks to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country. Nevertheless, charity law recognises campaigning *activity* as legitimate for charities, provided that it is in furtherance of their charitable purposes and reasonable by reference to its impact and cost.⁵ If the main objects of an institution are exclusively charitable, the fact that the trustees have the power to employ political means for their furtherance will not deprive the institution of its charitable status. Charities must not support or oppose a particular political party or a candidate, but they may engage in campaigning and political activity to secure or oppose a change in the law or central or local Government policy or decisions. In furtherance of their charitable purposes, charities may express support for specific policies that are also advocated by political parties. They may also campaign to mobilise public support on a particular issue or to influence or change public attitudes. In all cases, they should take reasonable care to avoid adverse perceptions of their independence and political neutrality.⁶

It can immediately be appreciated that whilst charities are required by law to be politically impartial, their legitimate campaigns carried out in furtherance of their charitable objects may coincide with those of a particular political party or may

1 *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539. See J Chia, M Harding and A O'Connell, 'Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*' (2011) 35 Melbourne Law Review 353.

2 *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, [2015] 1 NZLR 169.

3 *Bowman v Secular Society Ltd* [1917] AC 406; *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31.

4 [1982] Ch 321, 340. Slade J's formula (which he said was not intended to be exhaustive) was later adopted by the Court of Appeal in *Southwood v Attorney-General* [2000] EWCA Civ 204.

5 See e.g. *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 77 per Lord Normand.

6 For more detail, see Charity Commission, *Speaking Out: Guidance on Campaigning and Political Activities by Charities* (CC9, 2008).

even be adopted by particular political parties. Indeed, the latter result may well be the intended successful outcome of a charity campaign. Yet, there is a very fine line to be drawn here, with charity trustees having to check regularly their charitable activity and its impact to ensure that it does not exceed that permitted within the charity law framework. Even where internal procedures and safeguards have eliminated any actual bias, the *perception* of bias may be just as damaging to both individual charities and more importantly the sector as a whole, as public trust and confidence is affected. This is a particular problem for charities focused on social justice whose paid staff and volunteers may have traditionally been associated with the Labour party.⁷ In such circumstances, Conservative party politicians may well be quick to raise questions of bias. The next section will examine how charities have recently been subject to increasing scrutiny on the part of the media, politicians and the general public, leading to some strong criticism and even, on occasion, action from the Charity Commission.

Charity Campaigning in the Spotlight

From the scandal over pay rates for charity chief executives⁸ to concerns around charities' investment policies⁹ and fundraising tactics,¹⁰ the media seem to consider the charity sector, which has certainly been in the spotlight lately,¹¹ as a legitimate target for critical scrutiny. This has included an increasing number of attacks from Conservative party politicians in relation to charities' campaigning activities.

7 The NCVO refer to the 'revolving door', where ministers, officials and senior civil servants move on to work in the voluntary sector; NCVO, *Upholding Charities' Independence and Reputation: NCVO Recommendations for Best Practice* (2014) 10.

8 See e.g. C Hope, '30 Charity Chiefs Paid More than £100,000' *The Telegraph* (6 August 2013) available at: <http://www.telegraph.co.uk/news/politics/10224104/30-charity-chiefs-paid-more-than-100000.html>

9 See e.g. J Plunkett, 'Comic Relief to Review Investments after Row over BBC Panorama Report' *The Guardian* (10 December 2013) available at: <http://www.theguardian.com/media/2013/dec/10/comic-relief-review-investments-bbc-panorama>

10 See e.g. S Morris and agencies, 'Long-serving British Poppy-seller Died after Being "Tormented" by Cold-callers' *The Guardian* (14 May 2015) available at: <http://www.theguardian.com/uk-news/2015/may/14/bristol-pensioner-body-avon-gorge-olive-cooke>

11 The collapse of the high-profile charity, Kids Company, over the summer of 2015, has only added to the intense media scrutiny of the sector as a whole. On the Kids Company, see e.g. House of Commons Committee of Public Accounts, 'The Government's Funding of Kids Company' (Eighth Report of Session 2015–16, HC 504).

In 2011, Iain Duncan Smith, Secretary of State for Work and Pensions, attacked the Child Poverty Action Group charity for ‘ridiculous and irresponsible behaviour’¹² in seeking to overturn the Government’s cap on housing benefit in court.¹³ In 2012, when Save the Children launched its first fundraising campaign to tackle child poverty in the UK as a result of the recession, Conservative MP Brian Binley commented: ‘I am becoming increasingly concerned about their political involvement.’¹⁴ In September 2014, during the height of the charity sector’s concerns about the impact of the Lobbying Act on charities’ ability to continue to campaign (see below), Brooks Newmark, in his maiden speech as the new Minister for Civil Society,¹⁵ said that charities should stay out of ‘the realms of politics’ and ‘stick to their knitting.’¹⁶

The atmosphere for charities in relation to their campaigning activities has undoubtedly turned hostile, with their behaviour being regularly challenged. For example, in June 2014, Trussell Trust¹⁷ Chairman Chris Mould gave evidence to the Panel on the Independence of the Voluntary Sector. He revealed that, in a face-to-face conversation in March 2013 with ‘someone in power’, he was told that he must think more carefully about how the Trussell Trust speaks about its figures and welfare, otherwise ‘the government might try to shut you down’.¹⁸

At the same time, concerns were being raised about Oxfam’s ‘Perfect Storm’ tweet and the Charity Commission’s intervention in this case is illustrative of the current anti-campaigning mood. In June 2014, Conservative MP Conor Burns complained to the Charity Commission about Oxfam and its campaign on poverty in Britain. The concern was over an image that Oxfam sent from its Twitter account entitled

12 ‘Legal Challenge to Benefit Changes “A Stunt” - Minister’ *BBC News* (13 October 2011) available at: <http://www.bbc.co.uk/news/uk-politics-15295953>

13 *CPAG v Secretary of State for Work and Pensions* [2011] EWHC 2616 (Admin).

14 J Bingham, ‘Save the Children Defends UK poverty appeal’ *The Telegraph* (6 September 2012) available at: <http://www.telegraph.co.uk/news/politics/9523543/Save-the-Children-defends-UK-poverty-appeal.html>

15 He resigned shortly thereafter, as a result of a sex scandal, and was replaced by Rob Wilson who has retained the post in the new Government.

16 R Mason, ‘Charities Should Stick to Knitting and Keep Out of Politics, Says MP’ *The Guardian* (3 September 2014) available at: <http://www.theguardian.com/society/2014/sep/03/charities-knitting-politics-brook-newmark>

17 The Trussell Trust, whose mission is to end hunger and poverty in the UK, has over 400 food banks in its network.

18 This was later formally discussed in Panel on the Independence of the Voluntary Sector, *An Independent Mission: The Voluntary Sector In 2015: The Panel’s Fourth and Final Annual Assessment* (The Baring Foundation, 2015).

The Perfect Storm which Burns suggested was ‘overtly political and aimed at the policies of the current government’.¹⁹ The tweet contained a picture of a mock poster for an imagined film entitled ‘The Perfect Storm’. Under the title, a number of policy areas were cited and the text of the tweet suggested these were forcing more people into poverty. The tweet was part of a social media campaign leading up to the publication of a report on food poverty,²⁰ produced jointly by Oxfam, Church Action on Poverty and the Trussell Trust. As a result, the Charity Commission investigated and determined²¹ that Oxfam should have done more to avoid being seen as politically biased against the Government. It considered that the tweet could have affected the views of those who received it and could be misconstrued by some as party political campaigning. The Commission accepted that Oxfam had no intention of acting in a party political way and was simply motivated by the desire to draw attention to the problems facing poor people in Britain today. Nevertheless, it concluded that the charity should have done more to avoid any misperception of political bias by providing greater clarity and ensuring that the link to the food poverty report was more obvious. The Commission said in the same report that trustees should have clear oversight of the campaigning work of their charities including written authorisation and sign-off procedures for sending tweets. The Commission noted that this is particularly important prior to elections and referendums. Oxfam accepted the findings and confirmed that it had reviewed its social media procedures to reduce the risk of tweets being misconstrued in the future.

In the same operational compliance case, the Charity Commission also considered Oxfam’s publication of a newspaper advertisement entitled ‘Gaza. Trapped’ which appeared in August 2014. The advert called for the ending of the blockade in

19 In a letter to the Chair of the Charity Commission dated 10 June 2014: see C Hope, ‘Oxfam: MPs Shocked by “Disgraceful” Political Campaigning’ *The Telegraph* (10 June 2014) available at: <http://www.telegraph.co.uk/news/politics/10888966/Oxfam-MPs-shocked-by-disgraceful-political-campaigning.html>

20 N Cooper, S Purcell, R Jackson, *Below the Breadline: The Relentless Rise of Food Poverty in Britain* (Church Action on Poverty, Oxfam GB and Trussell Trust, 2014). This report shows that a combination of changes to the social security system, including a more punitive sanctions regime, a lack of decent work and rising living costs, are contributing significantly to food poverty.

21 Charity Commission, *Operational Compliance Report: Oxfam* (Registration Number 202918) (2014).

Gaza and an end to violence by both sides engaged in the conflict.²² Whilst the Commission regarded this as political activity, it was satisfied that it was undertaken in furtherance of and ancillary to Oxfam's charitable purposes and was within the scope of the Commission's guidance on campaigning and political activity.²³ The Gaza advertisement was part of Oxfam's ongoing relief work in Gaza and wider campaign about the conflict there:²⁴

Where charities engage in such an activity which concerns an area of international conflict with complex causes, they should ensure that the matter is approached in a way which clearly supports the needs of their beneficiaries. We are satisfied that the charity has done so here.

The Commission emphasised that it is for trustees to decide whether a particular campaigning activity is an appropriate and effective way to further their charity's purposes.

There is a fine line here going to the heart of the political purpose/activity conundrum. On one level, the Charity Commission's comments about Oxfam's Gaza advertisement are facilitative, once more giving the green light to charities that carry out legitimate campaigning activity in support of their charitable purposes. Yet, on another level, the Commission's comments on Oxfam's use of its twitter account and in particular the need for written authority to send tweets, if followed to the letter, could effectively remove charities from the 'twittersphere' completely. The Commission's stance certainly presents communications challenges for the sector. The immediacy of Twitter makes the requirement for oversight of each individual 140 character tweet somewhat debilitating. It is unworkable to suggest that every single tweet (or other form of instant message) has 'written authorisation and sign-off procedures' as suggested by the Commission. On a practical basis this will not work. If the Charity Commission's ruling in this area denies charities the opportunity to use this medium to reach its supporters and carry out campaigns, this would be a great shame. Whilst there is no evidence of charities vacating the 'twittersphere' since the Charity Commission's ruling, charities will need to be ready to show that safeguards have

22 The advertisement, which appeared in the national press on 14 and 15 August 2014 and was backed by some social media communications, carried the words 'Gaza. Trapped' in bold, before going on to say: 'The blockade imposed on Gaza by Israel is devastating. It traps people in poverty. And when the bombs fall it leaves no means of escape'. Saying that both Israelis and Palestinians needs lasting peace, it adds: 'This must include a permanent end to violence by both sides, and lifting the blockade.'

23 Charity Commission, *Speaking Out* (n 6).

24 Charity Commission, *Oxfam* (n 21).

been put in place, so that if campaigns could be perceived as political by some, they are ready to defend their processes and outcomes.

The Charity Commission certainly has political activity firmly on its radar. Its Statement of Regulatory Approach, published in its 2014 annual report,²⁵ states that it will be particularly alert to ‘fraud, terrorist activities, the abuse of vulnerable beneficiaries and to improper politicisation’. The Charity Commission’s guidance on campaigning and political activities by charities (CC9)²⁶ was last updated in 2008 and it was announced in November 2014 that it was to be reviewed after the May 2015 general election.²⁷ Whilst this statement was retracted several months after the election,²⁸ it certainly sounded warning bells for the sector, as the 2008 version of CC9 was considered to be a much more flexible document than its predecessor.²⁹ Whilst of course it did not in any way change the law, the current version is couched in more positive terms and gives campaigning charities clearer advice and greater confidence to do so. In addition, following recommendations made by the Public Administration Select Committee³⁰ and

25 Charity Commission, *Annual Report and Accounts 2013–14* (2014) 2. Interestingly, the current version of this Statement on the Charity Commission’s website (also dated July 2014) omits the reference to improper politicisation: see Charity Commission, ‘Charity Commission Statement of Mission, Regulatory Approach and Values’ (10 July 2014) available at:

<https://www.gov.uk/government/publications/charity-commission-statement-of-mission-regulatory-approach-and-values/charity-commission-statement-of-mission-regulatory-approach-and-values>

26 Charity Commission, *Speaking Out* (n 6).

27 All Party Parliamentary Group on Civil Society and Volunteering, ‘An Exchange with Paula Sussex, Chief Executive of the Charity Commission’ (18 November 2014) available at:

https://www.ncvo.org.uk/images/documents/about_us/media-centre/appg/an-exchange-with-paula-sussex-meeting-minutes-18-11-2014.pdf

28 D Ainsworth, ‘Charity Commission Rules out Immediate Review of Campaigning Guidance CC9’ *Civil Society* (28 October 2015) available at:

http://www.civilsociety.co.uk/governance/news/content/20671/charity_commission_rules_out_immediate_review_of_campaigning_guidance_cc9

29 For a critique of the previous guidance, see Advisory Group on Campaigning and the Voluntary Sector, chaired by Baroness Helena Kennedy, QC, May 2007.

30 House of Commons Public Administration Select Committee, *The Role of the Charity Commission and ‘Public Benefit’: Post-legislative Scrutiny of the Charities Act 2006* (Third Report of Session 2013–14, May 2013, HC 76) [144] available at: <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/76/76.pdf>

accepted by government,³¹ the Charity Commission proposed in June 2014 that there should be a requirement to declare how much charities have spent on campaigning in their annual return.³² Following negative responses to the proposal, the Commission announced in September 2015 that it would not be proceeding with this requirement.³³

Whilst recognising that there remains public interest in charities campaigning, the commission has taken account of the administrative burden that such an additional question would place on charities, and so will not include a question in the 2016 annual return on campaigning expenditure.

Another attack on charities and their campaigning activities came in a written statement to Parliament in February 2015 by the then Secretary of State for Communities and Local Government, Eric Pickles, to the effect that charities may lose government grants if they campaign against government.³⁴ He referred to extensive research undertaken by the Institute of Economic Affairs revealing widespread existence of so-called ‘sock puppets’. These are pressure groups and charities that receive public money which is used to lobby politicians, publish material designed to generate support for the introduction or abolition of legislation, regulation and taxation, as well as support for changes to budgets and funding streams.³⁵ He stated that the Department for Communities and Local Government will be amending its grant agreements to include a new anti-lobbying, anti-sock puppet clause, which will bring about an end to this practice:³⁶

31 Minister for the Cabinet Office, *Government Responses to: 1) The Public Administration Select Committee’s Third Report of 2013–14 - The Role of the Charity Commission and ‘Public Benefit’: Post-legislative Scrutiny of the Charities Act 2006; 2) Lord Hodgson’s Statutory Review of the Charities Act 2006: Trusted and Independent, Giving Charity Back to Charities* (Cm 8700, 2013) [31] available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/237077/Response-charities-legal-framework.pdf

32 Charity Commission, *Consultation: Annual Return for 2015 - Information Collected from Charities* (2014).

33 Charity Commission, *Charity Commission Sets Out Plans for the Annual Return 2016* (Press Release 4 September 2015).

34 Written Statement made by the Secretary of State for Communities and Local Government (Mr Eric Pickles): HC Deb 23 February 2015, vol 593, col 2WS.

35 C Snowdon, *The Sock Doctrine: What Can be Done about State-funded Political Activism?* (Institute of Economic Affairs Discussion Paper, 2014).

36 Written Statement made by the Secretary of State for Communities and Local Government (Mr Eric Pickles): HC Deb 23 February 2015, vol 593, col 2WS.

My Department has set an example to the rest of Whitehall by amending our standard grant agreements to impose a new anti-lobbying, anti-sock puppet clause. The simple, short but effective clause says:

‘The following costs are not Eligible Expenditure: Payments that support activity intended to influence or attempt to influence Parliament, Government or political parties, or attempting to influence the awarding or renewal of contracts and grants, or attempting to influence legislative or regulatory action.’

We hope this can and will be rolled out more widely across the public sector.

It appears that this is an attempt to prevent funds that are directly given to charities by Government, rather than funds acquired from elsewhere, from being spent on such activity, but it may well be difficult to make this distinction. The effect of such a clause will certainly be to mute the sector’s voice even further when it comes to campaigning. This development was uniformly condemned by the sector.³⁷

Charities do seem to be toughing it out and holding their nerve somewhat in the face of the negative publicity surrounding their campaigning activities. Nevertheless, it has been seen that the theme of political bias is present in many of the attacks on political campaigning by charities. This theme lurks in the agenda underpinning the next development to be discussed, which has the potential to impact significantly upon charities’ behaviour during the run-up to elections.

Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014

The ability of charities to undertake political lobbying has recently been restricted further by the controversial Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (the Lobbying Act). The Lobbying Act gained royal assent in January 2014 despite fierce opposition from charities and the wider civil society sector during its passage through Parliament. Charities have always been aware of the extra care that needs to be taken when engaged in

³⁷ See e.g. H Radojev, ‘Political Parties and Charity Bodies Condemn Eric Pickles’ “Sock Puppet” Comments’ *Civil Society* (4 March 2015) available at: http://www.civilsociety.co.uk/governance/news/content/19185/political_parties_and_charity_bodies_condemn_eric_pickles_comments

campaigns around election time.³⁸ This is because the risk of charities engaging in party political activity, albeit inadvertently, is considered to be greater once an election has been announced. However, the concern around the Lobbying Act is that it will further significantly impair charities' ability to speak out in the run-up to elections.

Of course, the Charity Commission should ensure that charities are not established for political purposes and do not engage in party political activity. Nevertheless, Part 2 of the Lobbying Act amends and expands the scope of rules that already existed under the Political Parties, Elections and Referendums Act 2000 (Political Parties Act) so as to further limit the ability of charities to carry on lobbying activities around election times. This is because there may be circumstances where spending by charities on activities that are in pursuit of their charitable purposes means that they must register with the Electoral Commission as non-party campaigners during the run-up to certain elections. The law is complex and specific guidance has been published for charities by the Electoral Commission (in consultation with the Charity Commission for England and Wales, the Office of the Scottish Charity Regulator and the Charity Commission for Northern Ireland).³⁹ The initial guidance was revised after raising concerns across the sector that it did not properly reflect the meaning of the law. The final version was only published in August 2014, within three weeks of the first regulated period.

The Lobbying Act requires charities, campaign groups and other organisations to register with the Electoral Commission as non-party campaigners⁴⁰ if their spending on particular 'controlled expenditure'⁴¹ on regulated campaign activity during the regulated period⁴² exceeds or is planned⁴³ to exceed £20,000 in

38 The Charity Commission has published specific guidance for use by charities during the period (known as *Purdah*) between the announcement of an election (national or local) and the date on which an election is held. See now Charity Commission, *Charities, Elections and Referendums* (2014).

39 Electoral Commission, *Charities and Campaigning* (2014). The Electoral Commission published 16 guidance documents as well as fact sheets on how to ensure common campaigning tactics comply with the new rules. Many who gave evidence to the Harries Commission stated that they found the guidance confusing: Commission on Civil Society and Democratic Engagement, *Impact of the Lobbying Act on Civil Society and Democratic Engagement* (2014) 8.

40 Non-party campaigners are individuals or organisations that campaign in the run-up to elections, but are not standing as political parties or candidates.

41 See Political Parties Act, s 85.

42 UK Parliamentary general elections usually have a regulated period of 365 days, ending on the day of the election. However, the regulated period for the 2015 UK Parliamentary general election began on 19 September 2014 and ended on polling day, 7 May 2015. All other elections have a regulated period of four months, ending on the day of the election: Lobbying Act, s 46.

England, £10,000 in the rest of the UK, or £9,750 in any one parliamentary constituency.⁴⁴ ‘Controlled expenditure’ is money spent on activity that can reasonably be regarded as being intended to influence voters to vote for or against political parties or categories of candidates, including political parties or categories of candidates who support or do not support particular policies.⁴⁵

The Act significantly broadened the list of regulated activities, expenditure on which counts towards total permitted spending. In particular, under section 85(4A) of the Political Parties Act, activities can be regarded as lobbying even if the intention is to achieve something else, such as raising awareness of an issue. Since there is no requirement for the lobbying to be aimed at a particular political candidate or party, charity campaigns which are aimed at generating support for particular policies, in line with a charity’s purposes, may constitute lobbying. The activity may also be regarded as intended to influence voters even if a political party or group of candidates are not named as part of the campaign. It has already been noted that a charity may undertake this activity under charity law, so long as the aim is to contribute to the delivery of its own charitable purposes and its independence and perceptions of its independence are not adversely affected. Nevertheless, as a result of the Lobbying Act, the ability of charities to raise awareness of particular issues may be curtailed, where expenditure exceeds the regulated amount.

Spending on these campaigning activities will only be regulated if the activities can reasonably be regarded as intended to promote or reduce the electoral prospects of a political party or parties, or a group of candidates, including parties or candidates who support or oppose a particular policy. In addition, to be regulated spending, the activities must be aimed at, seen or heard by, or involve the public. This applies widely to: the production or publication of election material; holding of public events and rallies, press conferences and other media events; canvassing and market research; and transport in connection with publicising a campaign.⁴⁶ The Electoral Commission, in its guidance, states that a charity’s members or ‘committed supporters’⁴⁷ (people who support the charity in the same way as members) will not be considered part of the public and therefore activities aimed at

43 If a charity considers that it *may* go over the limit, it should keep records of all spending and donations in case it needs to register later in the regulated period.

44 Political Parties Act, s 94. The Lobbying Act doubled the previous amounts, although the original Bill had clauses in which sought to reduce the original amounts.

45 See Political Parties Act, s 85.

46 *ibid* sch 8A.

47 This might include: regular donors by direct debit; people with an annual subscription; and people who are actively involved in a charity.

them will not be considered regulated campaign activity.⁴⁸ On the other hand, people with whom a charity regularly communicates (such as those who have signed up to social networking sites or who have requested email updates) are considered members of the public unless they are also charity members or committed supporters. In what could be a bureaucratic nightmare for charities, they may be required to record and cost out the time and expense of using social media. Electoral Commission guidance suggests that charities should be aware that organised social media activity that involves employees tweeting about a campaign could count towards the spending limits⁴⁹ and there is some evidence to suggest that, as a result of the Lobbying Act, charities have begun to keep a log and account of the cost of all external communication, including Facebook posts, blogs and tweets.⁵⁰

Once registered, a charity must follow the rules and reporting requirements on campaign spending and donations. In terms of enforcement, the Electoral Commission has significant powers.⁵¹ For example, it can require particular action to be taken (or stopped) so as to ensure compliance. It can issue fines and refer serious breaches for criminal investigation by the police. This could even result in imprisonment for an individual responsible for the breach.

During the regulated period for the 2015 UK parliamentary general election, 68 entities registered as non-party campaigners with the Electoral Commission.⁵² This included charities such as Arthritis Research UK, Stonewall, the Salvation Army, other campaigning groups and private consultants, the cosmetics firm Lush, various individuals and several trade unions. The animal charity, the RSPCA, set up a new legal entity to run its campaigns during the regulated period which it registered as a non-party campaigner. This was said⁵³ to be because the RSPCA

48 Electoral Commission (n 39) 11.

49 Electoral Commission, *Factsheet for Non-party Campaigners: Common Campaigning Techniques: Social Media* (2014).

50 K Barker and T Harrison, *The Lobbying Act: A Waste of Time and Resources? A General Election Special Report* (nfp Synergy 2015) 4.

51 See Political Parties Act, pt X.

52 Electoral Commission, 'Register of Non-Party Campaigners', available at: <http://search.electoralcommission.org.uk/Search/Registrations?currentPage=1&rows=10&sort=RegulatedEntityName&order=asc&open=filter&et=tp®ister=none®Status=r> egistered

53 S Burne James, 'RSPCA Registers as a Non-party Campaigner with Electoral Commission' *Third Sector* (26 November 2014) available at: <http://www.thirdsector.co.uk/rspca-registers-non-party-campaigner-electoral-commission/policy-and-politics/article/1323833>

itself, as a charity incorporated under a private act of parliament,⁵⁴ would not be able to register with the Electoral Commission. It was also reported that this new body, called RSPCA Campaigns, would also be applying for charitable status, but it does not yet appear on the register of charities. The human rights group Amnesty International UK (which does not have charitable status⁵⁵) also registered as a non-party campaigner.

A number of charities stated that they intended to ignore the Lobbying Act so as not to let it silence the sector's voice.⁵⁶ The Charity Commission then warned charities that it would be concerned about charities that deliberately flouted the Lobbying Act.⁵⁷ The question remains as to whether *any* registered charities would ever need to register. According to charity law, charities are unable to support political parties or candidates, and they must uphold their actual and perceived independence. It is therefore questionable whether many charities' activities would fall within the remit of the Lobbying Act, albeit that this has broadened the area of regulated activity. The concern is that if a charity is campaigning on a policy that is very publicly associated with one or more political parties, any spending on public events and media may be regulated by the Electoral Commission if these activities can reasonably be regarded as intended to influence voting choice. However, the Electoral Commission itself does not consider that this will necessarily become regulated activity. In its FAQs, posted on its website,⁵⁸ reassurance is given to charities where a political party 'piggybacks' on a charity campaign:

Spending on your campaign will not become regulated simply because a party has publicly adopted a policy that you are already campaigning for. Similarly, spending on your campaign activity will not be regulated only because the policy issue which you have been campaigning on:

54 It is presently constituted under the Royal Society for the Prevention of Cruelty to Animals Acts of 1932, 1940, and 1958.

55 The Amnesty International UK Section Charitable Trust is a related charity registered in England and Wales and in Scotland. It carries out some advocacy, education and grant funding work and did not register with the Electoral Commission.

56 See e.g. G Martin, 'Charities Won't be Silenced by Lobbying Act' *Third Force News* (6 January 2015) available at: <http://thirdforcenews.org.uk/tfn-news/charities-wont-be-silenced-by-lobbying-act>

57 K Weakley, 'Commission 'Concerned' about Charities that Ignore Lobbying Act' *Civil Society* (2 March 2015) available at: http://www.civilsociety.co.uk/governance/news/content/19150/commission_concerned_about_charities_that_choose_to_ignore_lobbying_act

58 Electoral Commission, 'FAQs for Non-Party Campaigners' available at: <http://www.electoralcommission.org.uk/i-am-a/party-or-campaigner/non-party-campaigners/faqs-for-non-party-campaigners-at-the-uk-parliamentary-general-election-in-may-2015>

- becomes a major dividing line between political parties, or
- has always been aligned in the public's view with a particular political party

... where a charity reacts publicly to policy announcements which clearly affect the achievement of its charitable purposes, this will not generally be regulated.

During the Lobbying Act's progress through Parliament, charities and other organisations complained vigorously that they would be 'gagged'.⁵⁹ As a result of the deep and widespread concern that the Act was likely to have a 'chilling effect' on campaigning,⁶⁰ the Commission on Civil Society and Democratic Engagement, chaired by the crossbench peer Lord Harries of Pentregarth was set up in October 2013. The Harries Commission undertook nationwide consultation and evidence gathering from non-party campaigners and relevant stakeholders. These bodies were not consulted by the government before it tabled the legislation. The Harries Commission then analysed the Lobbying Bill as it progressed through the parliamentary process and advised Parliament on changes needed to the draft legislation to avert damage to democratic engagement.⁶¹ Whilst this led to the sector winning a few small victories along the way through minor amendments to the initial proposals, the legislation was largely passed in its original form.

The third report of the Harries Commission,⁶² published in September 2014, set out the first evidence of the impact of the Lobbying Act on non-party campaigning, ahead of the start of the regulated period. It stated that, even before the regulated period started, charities and campaigning organisations were already feeling the chilling effect of the Lobbying Act and were not speaking out on important issues before the general election. It noted that charities were cautious about campaigning on politically contentious issues because they feared breaking the law or the reputational risk of receiving vexatious complaints.⁶³ It found clear

59 See, for example, the work of the Commission on Civil Society and Democratic Engagement, discussed below.

60 See e.g. 'In the Matter of Part II of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill and the Voluntary Sector' Opinion by Helen Mountfield QC, 30 August 2013.

61 Commission on Civil Society and Democratic Engagement, *Non-party Campaigning Ahead of Elections: Consultation and Recommendations relating to Part 2 of the Transparency in Lobbying, Non-Party Campaigning, and Trade Union Administration Bill* (Report 1 and 2, 29 October 2013, 10 December 2013).

62 Commission on Civil Society and Democratic Engagement, *Impact of the Lobbying Act* (n 39).

63 *ibid* 10.

evidence that a number of campaigning groups had already decided not to campaign or not to join with other bodies to campaign on an issue because they were frightened of running foul of the new legal framework. A survey of charities and campaign groups found that 63 per cent of respondents said that the Act would make some or all of their objectives harder to achieve.⁶⁴ Charities have also incurred expenditure on legal advice and internal compliance, either to ensure that they do not need to register with the Electoral Commission, or to ensure that they comply with rules regulating reporting of expenditure and donations once registered.⁶⁵

The Commission's final report, which captures evidence of the impact of the new law on charities and campaign groups during the regulatory period, went further and reported that charities across the spectrum, ranging from the Quakers to the Badgers Trust, felt gagged by the Lobbying Act in the run up to the election.⁶⁶ For example, Quakers in Britain reported withdrawing from the joint Tax Dodging Bill campaign for fear of falling foul of the law,⁶⁷ and the Badgers Trust reported that it had largely resorted to working alone because other wildlife organisations withdrew from campaigning.⁶⁸ The Harries Commission recommended the repeal of Part 2 of the Lobbying Act entirely.

Whether or not any activities of particular charities *are* formally covered by the Lobbying Act, many charities have self-censored their campaigning activities in order to avoid falling within what they consider to be regulated activity. As a result, the previous Coalition Government appointed the Conservative peer Lord Hodgson (who carried out the review of the Charities Act 2006) to review the way that the Lobbying Act is working for third party campaigners, including charities.⁶⁹ Lord Hodgson's report, which is awaited, will draw on evidence that has been gathered on the impact of the Act. One public submission of evidence, from the Public Relations Consultants Association, notes that 'some organisations report bills for lawyers and accountants running into the tens of thousands' and adds that

⁶⁴ *ibid.*

⁶⁵ Barker and Harrison (n 50) 4.

⁶⁶ Commission on Civil Society and Democratic Engagement, *Non-Party Campaigning Ahead of Elections Consultation and Recommendations Relating to Part 2 of the Transparency in Lobbying, Non-Party Campaigning and Trade Union Administration Bill* (Report 4: September 2015).

⁶⁷ *ibid* 13.

⁶⁸ *Ibid* 20.

⁶⁹ Cabinet Office Written Statement made by Minister for the Constitution (Mr Sam Gyimah): HC Deb 28 January 2015, vol 591, col 26WS.

in some cases complying with the legislation could cost charities more than they spend on campaigning itself.⁷⁰

It has been seen that the Lobbying Act broadcast a very negative message to charities in relation to their campaigning work. Yet another legal development, by way of a decision from the First-tier Tribunal (Charity) could potentially provide a much more encouraging mandate to certain charities that are involved in particular kinds of campaigning activity.

The Human Dignity Trust Case

The Human Dignity Trust (HDT) was established to help people throughout the world whose human rights are violated by the criminalisation of private homosexual acts between consenting adults. Over 80 countries continue to have laws which purported to criminalise such acts, making the expression of identity illegal and punishable by imprisonment or even death.⁷¹ HDT's principal activity is bringing litigation to challenge legislation in countries with constitutional human rights protections that appear incompatible with such laws, or that have signed up to international human rights treaties that are inconsistent with them. HDT's application for charitable status was rejected by the Charity Commission. The Commission was of the view that HDT's purpose was a political one, since upholding human rights in an overseas jurisdiction was said by the Charity Commission to involve changing the law in that country. HDT appealed to the First-tier Tribunal (Charity) which allowed the appeal in July 2014 and directed rectification of the register.⁷²

Whilst HDT had based its purposes on the Commission's suggested objects for a human rights charity, the Charity Commission argued that these were too vague for the Commission to be certain that it was established for charitable purposes only.⁷³ The Charities Act 2006 (the 2006 Act) created a list of charitable purposes, explicitly recognising the advancement of human rights.⁷⁴ Some of the purposes in the 'new' list had been explored in case law; others had not. The 2006

70 Public Relations Consultants Association (PRCA), *Charity and Not-For-Profit Group Additional Information Following Hodgson Review Survey* (2015) available at: <http://content.presspage.com/uploads/204/prcaresponsetohodgson-2.pdf>

71 *Human Dignity Trust v Charity Commission* [2014] FTTT 0013 B(GRC) [92]. Adam Parachin also discusses this case in this volume. See Adam Parachin, 'Charity, Politics and Neutrality'.

72 *ibid.*

73 *ibid* 49.

74 See now Charities Act 2011, s 3(1)(h).

Act made it clear that, where a purpose in the list had a particular meaning before the 2006 Act was passed, it would continue to have that meaning.⁷⁵ One of the questions for the Tribunal in this case was whether or not ‘the advancement of human rights’ had a particular meaning before the 2006 Act was passed. If it did not, what did it encompass? Although the Charity Commission published guidance on the advancement of human rights before the 2006 Act was passed,⁷⁶ in the Tribunal’s opinion this did not mean that the term had a particular meaning that was preserved by the 2006 Act: a phrase would only have a particular meaning if it had been expounded by the courts. The courts have not commented on the advancement of human rights (at least, not since the Human Rights Act 2008 was passed) so the Tribunal determined that the phrase should be given its natural meaning. After hearing expert evidence from both parties, the Tribunal held that human rights includes a core set of rights (such as those set out in the Universal Declaration of Human Rights, the European Convention on Human Rights and other widely recognised international human rights treaties), but that it is also a flexible, evolving concept. Given that Parliament had declined to define ‘human rights’ in charity legislation, it must be taken to have intended this evolving meaning. The Tribunal expressly rejected the Commission’s argument that it would only be charitable to advance human rights that were accepted by English law.⁷⁷

The Charity Commission also argued that it was unclear what human rights mean in English law and that the objects should be restricted to the rights in the European Convention on Human Rights. However, the Commission’s own suggested objects for a human rights charity refer to the rights contained in the Universal Declaration of Human Rights and subsequent United Nations declarations and conventions. The Tribunal agreed with the concurring views of the parties’ experts that human rights had a broad, common sense meaning and it was not restricted as newly proposed by the Commission.

The Commission also argued that it was necessary to state in HDT’s objects the activities it would carry out to promote its objects. It is quite common for a charity to have widely drafted objects and then focus its actual activities on a narrower area, depending on practicalities, such as best use of resources. The Charity Commission often makes the argument that the activities need to be specified but this is not based on legal authority and this was confirmed by the Tribunal.⁷⁸

⁷⁵ *ibid* s 3(3).

⁷⁶ Charity Commission, *The Promotion of Human Rights* (RR12, 2005).

⁷⁷ *Human Dignity Trust* (n 71) [43].

⁷⁸ *ibid* [32].

We have considerable sympathy with the Charity Commission's stated intention that a charitable institution's purposes and activities should be immediately clear to any casual reader of the Register of Charities. However, whilst this might be a desirable aim, we find nothing objectionable in principle about an institution which declares wide purposes but, in practice, confines itself to a smaller area of operation than that permitted.

Although the Commission argued that the promotion of the right to human dignity (one of HDT's purposes) did not fall within the scope of the advancement of human rights, its own independent human rights expert explained that the right to human dignity was the 'grundnorm' of human rights⁷⁹ and the Tribunal accepted the views of both parties' experts on the existence of this right.

Importantly, from the point of view of this article, the Charity Commission argued that HDT existed for a political purpose. The Commission relied on *McGovern v Attorney-General*,⁸⁰ where it was held that Amnesty International did not have charitable status because it sought to change the law by putting pressure on foreign Governments to stop torture and abolish the death penalty. HDT argued that the Charity Commission's decision demonstrated a fundamental misunderstanding of the nature of a constitutional human rights challenge, since litigation aimed at upholding a citizen's constitutional rights does not seek to change the law of the relevant jurisdiction but rather to enforce and uphold the superior rights guaranteed by that country's constitution. HDT's case was that litigation in a domestic court or tribunal, aimed at enforcing and upholding the human rights guarantees set out in binding constitutional law, is an activity which seeks to uphold the law not to change it, so that there is no infringement of the doctrine of the separation of powers in its activities. The Tribunal agreed that the particular type of constitutional litigation supported and conducted by HDT was fundamentally different in nature from the activities found to be objectionable as political in *McGovern*.⁸¹

As a separate argument, the Charity Commission objected to the fact that HDT assists people who could afford to pay for their own legal advice. This echoes arguments made (unsuccessfully) in *Independent Schools Council v Charity Commission*⁸² in the Tribunal challenge brought to the Commission's public benefit

79 *ibid* [48].

80 *McGovern v Attorney-General* [1982] Ch 321. See text above at n 4.

81 *Human Dignity Trust* (n 71) [65].

82 *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421.

guidance.⁸³ The law is that people in poverty cannot be excluded from benefiting, not that only people in poverty can benefit.

In this case, several ‘public benefit’ related questions were also raised by the Commission. The Tribunal rejected the argument that HDT had to benefit both the UK community and the community in the countries in which it operates. It held that a purpose will generally be charitable if it would be charitable if it were furthered in the UK, provided that there are no public policy reasons to prevent it from being charitable - for example, if furthering the objects might prejudice relations between the UK and other countries.⁸⁴ The Tribunal added that, even if it was wrong that the community in the UK did not need to benefit, HDT’s method of advancing human rights did benefit people in the UK, partly because there are global benefits to ensuring that everyone’s rights are upheld. Moreover, there was no evidence that HDT’s activities were prejudicial to the UK’s interests.

The Commission also claimed that conducting litigation of the type undertaken by HDT was not a proper way of advancing human rights because HDT was essentially trying to change the law in other countries and that there was no way of knowing if this produced public benefit. A court asked to determine the point would either have to judge the situation according to English notions of public benefit (which may be inappropriate in the context of a foreign country) or apply local concepts (which it would not know). HDT maintained that, on the contrary, it was seeking to uphold the law. The Tribunal held that HDT’s purposes were for the public benefit because the purported criminalisation of relevant conduct represented a serious breach of international human rights norms.⁸⁵ There was a public benefit in seeking to interpret, clarify and protect superior constitutional rights.

The case will naturally give rise to concern that much ‘political purpose’ activity could be re-framed as ‘human rights’ activity and therefore the implications of the case could be very wide indeed. However, once the promotion of human rights as a charitable purpose was recognised (and this was back in 2005) it was inevitable that this would lead us in new directions. Presumably, before this case, charities were already registered using the Commission’s recommended objects and any decision other than the one reached by the Tribunal would have impacted on those other existing registered charities as well. How far the decision takes us beyond the actual facts of this case is as yet unclear. The Tribunal was careful to limit the case to its circumstances, ‘as a matter of law this decision is confined to its own

83 Charity Commission, *Charities and Public Benefit: The Charity Commission’s General Guidance on Public Benefit* (2008).

84 *Human Dignity Trust* (n 71) [78].

85 *ibid* [109].

facts and does not establish a legal precedent for the registration of other prospective charities'.⁸⁶ Further, the Tribunal added that the judgment would not affect charities which are already registered and would not supersede the Commission's guidance or the decisions of higher courts. To the extent that HDT's activities are somewhat unusual, this is no doubt true. Nonetheless, it seems likely that this decision will influence future discussions about the scope of the charitable purpose of advancing human rights.

In the HDT case, the Tribunal accepted that, in the hierarchy of law, international human rights obligations are, effectively, a superior law and that the activities of HDT were an attempt to enforce superior law, and not change domestic law. This is very helpful for those who are carrying out any kind of campaigning work in the field of human rights. Arguably, provided that it can be shown that the rights being campaigned for are recognised as international human rights (such as those that appear in the European Convention on Human Rights, the Universal Declaration on Human Rights, and the International Covenant on Civil and Political Rights), and the territory in which the campaign is being undertaken has signed up to the international instruments, then the campaign becomes one of enforcing existing rights, and not seeking to change existing law. This could potentially significantly widen the scope of permitted political activity.

Concluding Comments

Much of the discussion in this article reflects a real dilemma for the charitable sector. Charities play a valuable role in public life and have a long and proud tradition of engaging in campaigning for changes to law or policy that support their purposes. At the same time, however, charities recognise that their independence and political neutrality is of paramount importance. This gives significant credibility to the work of charities. As a result, many have successfully campaigned for change and helped to shape law and policy on issues that affect not only their beneficiaries but also broader society. They are often uniquely placed to advocate for this change and they give expression to the 'voice' of diverse (and often under-represented) groups in society. Today, more than ever, it is vitally important that charities are able to advocate for legislative or policy change and carry out campaigning work in furtherance of their charitable purposes.

The restrictive developments, discussed in the early sections of this article (the Charity Commission's current stance on campaigning, the accusation of charities being 'sock puppets' and the Lobbying Act - all coming in the run-up to a general election) have sent a strong signal that charities may only challenge or oppose

⁸⁶ *ibid* [113].

government policy at their peril and have unquestionably had a chilling effect on the sector. The Lobbying Act has certainly consumed significant time, energy and other charitable resources. For example, before it even came into force, 20% of respondents to a survey had already spent more than 10 working days understanding and/or adjusting plans based on the Electoral Commission guidance.⁸⁷

The passing of the Lobbying Act has undoubtedly shifted the agenda, highlighting the role of charities in campaigning. The increasing interest of politicians in charities' activities in this area and the increasingly adversarial relationship with some elements of the media has made the issue increasingly political, requiring charities to tread very carefully. The perceived regulatory hurdles for charities to overcome are also having an impact. The fear of constant referrals to the regulatory authorities, be that the Charity Commission or the Electoral Commission means that charities are self-censoring by keeping their own activities in check. For example, in the context of the Lobbying Act, the Harries Commission found evidence that it was difficult for charities to know what was and was not regulated activity, and as a result many activities aimed at raising awareness and generating discussion ahead of the election simply did not take place.⁸⁸ It was also noted in Parliament recently that 'we cannot fail to have noticed that in the recent general election campaigning charities were not as prominent as they have been in the past'.⁸⁹

Within this climate of fear, there is perceived to be major reputational risk. Research has already shown that many charities are concerned that if they fall foul of the Lobbying Act, for example, there could be significant reputational damage to their brand.⁹⁰ This is a significant factor in explaining why charities have invested so much time and money in interpreting the legislation. The third sector is generally averse to risk and the enactment of the Lobbying Act has impacted negatively on the conservative nature of charity trustees. Even where charities are considering registering with the Electoral Commission, an influencing factor is that charities are concerned that the very act of registration with a Commission which regulates party politics may lead supporters to believe that the charity is campaigning to influence the outcome of a general election and is therefore

87 Commission on Civil Society and Democratic Engagement, *Impact of the Lobbying Act* (n 39) 7. See also, to the same effect, Barker and Harrison (n 50).

88 Commission on Civil Society and Democratic Engagement, *Non-Party Campaigning* (n 66) [6].

89 HL Deb 10 June 2015, vol 762, col 842 per Baroness Pitkeathley.

90 Barker and Harrison (n 50).

inappropriately politically biased.⁹¹ But of course, charities are prohibited from supporting particular political parties or candidates as a matter of charity law, as they are not able to exist for political purposes. As one interviewee to a survey on the impact of the Lobbying Act stated: 'This isn't a legal issue. This is a perception issue'.⁹² There is an understandable concern that public confidence in charities could be undermined if they are seen as having stepped over the line (even if they have not done so). Nevertheless, charities of all sizes have an important role to play in the political discourse in our society and it would be a great blow to civil society if they ceased to speak up politically because of a lack of understanding (either on the part of the charities themselves or by the public generally) of the Lobbying Act.

Whilst the outcome in the *Human Dignity Trust* case is a positive one in terms of allowing charities to advocate for change, one cannot help but note the Charity Commission's hostility in this case. Its approach to HDT's application for charitable status has been questioned but it should be noted that its decision to reject HDT's application was taken at a time of heightened concern, described in this article, both within the Charity Commission and among politicians and the press about campaigning by charities. The Commission was clearly concerned about what it considered to be the controversial aspects of HDT's work which may challenge public opinion. For example, the Tribunal noted that the Charity Commission had argued that local laws against same-sex relationships 'represent deeply-embedded cultural views which must be taken into account'.⁹³ However the Tribunal continued by noting that the Commission produced no evidence to support this submission.

During the passage of the Charities (Protection and Social Investment) Bill through Parliament in 2015, there was an attempt by a Labour peer, Baroness Hayter,⁹⁴ to insert a clause in the Bill (the contents of which are unrelated to charity campaigning and political activity) to confirm that (1) a charity may undertake political campaigning or political activity in the context of supporting the delivery of its charitable purposes, and (2) a charity may campaign to ensure support for, or to oppose, a change in the law, policy or decisions of central government, local authorities or other public bodies. The Government resisted the amendment, which was later withdrawn, suggesting that any attempt to codify case law risks

91 See e.g. S Burne James, 'Amnesty International UK Registers as a Non-party Campaigner under the Lobbying Act' *Third Sector* (9 April 2015) available at: <http://www.thirdsector.co.uk/amnesty-international-uk-registers-non-party-campaigner-lobbying-act/policy-and-politics/article/1342040>

92 Barker and Harrison (n 50) 9.

93 *Human Dignity Trust* (n 71) 93.

94 HL Deb 1 July 2015, vol 762, col 153GC

changing the boundaries or inviting challenges as to what is permitted. Lord Bridges stated that the existing case law and guidance serve us well and that it is much better to have a case law provision firmly in the realm of the independent regulator and courts, suggesting that if the principles were enshrined in statute, there was a risk that in the future they could be open to political interference. He did however usefully state:⁹⁵

I make it categorically clear that the Government support charities' right to campaign within the law. Many charities use campaigning and advocacy effectively and legitimately to support their charitable purposes.

Whilst this statement is correct, sadly, this article has examined a number of developments that suggest that charities have been the target of mixed messages when it comes to their political activity in recent times.