

21st Century Non-Profit Speech around the World – England and Wales*

By Lindsay Driscoll

Summary

In England and Wales there is a long tradition of campaigning and advocacy by non profits. The constraints on non profit speech relate mainly to charities and have been developed in the last century by case law. There are no absolute rules on the amount of political campaigning that can be carried out by charities and although this gives some considerable degree of flexibility, the lack of clarity often leads to over caution and self censorship on the part of charity boards. In addition there are a number of pieces of legislation which may in practice restrict non profit speech. There have been no major developments in charity law on political activities over the last few years, despite calls for law reform but the current guidance on the law published by the Charity Commission as the charity regulator has a more positive approach. Criminal legislation, including terrorist legislation, restricting the right to non violent protest increased under the last government, which has had a “chilling effect” on non profits. A leading case on broadcast law has tested the extent of freedom of expression of non profits, particularly in the context of the European Convention on Human Rights and the margin of appreciation. . Substantial funding of charities by government may also impose constraints in practice but this has been addressed in the Compact.¹

The law on charities and political purposes and activities

The principal restriction on freedom of speech for charities arises from the restriction on political purposes and political activities by charities developed by the courts almost one hundred years ago. In the nineteenth century the courts did not make a distinction between trusts with political or non political purposes and charities with political objects such as the Lords Day Observance Society and the Anti Slavery Society were set up. This all changed with the House of Lords’ judgement of Lord Parker in *Bowman v Secular Society*² where it was held, on scanty authority, that a trust for the attainment of political objects had always been invalid. This principle has been retained and rationalised by the courts over the intervening years³ and the full extent of the principle, particularly as it relates to restrictions on freedom of expression is set out in the *McGovern* case of 1981⁴ concerning a letter writing campaign by Amnesty for the release of political prisoners. The issue is not addressed in charity or tax legislation.

The definition of a political purpose is extremely wide and goes far beyond the party political. The definition used is based on the first instance decision of *McGovern*⁵ where Slade J held that political purposes include those directed at:

furthering the interest of a political party; or
procuring changes in the law of this country; or
procuring changes in the laws of a foreign country; or
procuring a reversal of government policy or of particular decisions of governmental authorities in this country; or
procuring a reversal of government policy or of particular decisions of governmental authorities in a foreign country

POST CONFERENCE DRAFT

This list is not exhaustive and in *Re Koeppler's Will Trusts*⁶ Gibson J added to it “trusts to oppose a particular change in the law”

To promote the maintenance of the existing law or a particular line of political administration is also a political purpose.⁷

The construction of the term “political” was considered in the case of *R .v*

*Radio Authority ex parte Bull*⁸ which concerned an application by the British section of Amnesty International for judicial review of a decision by the Radio Authority to refuse to broadcast an advertisement as being directed towards a political end which was prohibited under the Broadcasting Act 1990. In his judgement McCullough J widened the definition of political.

“once the matter has become the subject of government policy ,or once the need for legislation about it is advocated, particularly if the matter becomes contentious, then it is open...to treat it as political. “

Although this case concerns restrictions under the Broadcasting Act rather than under charity law it has also been discussed in the context of the charity law debate⁹ .

Although charities cannot have a political purpose they can engage in political activities to support the delivery of their charitable purposes, provided that these activities remain merely subsidiary or incidental. . Public campaigning to influence public opinion on political issues unrelated to their own charitable purposes is never permitted under the ultra vires principle. Most of the debate (and confusion) on this issue turns on the practical distinction between a political purpose and a political activity incidental or ancillary to a charitable purpose. This difficulty was acknowledged by Slade J in *McGovern* when he accepted that the distinction was perhaps easier to state than to apply in practice. When does an activity stop being incidental? It seems that the amount or percentage of resources expended is not, of itself, the decisive factor, but the courts have not set down any clear criteria to assist. In the absence of clear criteria from the courts it has fallen to the Charity Commission as the regulator to give guidance on the distinction.

The rationale for the rule against a charity having a political purpose has often been discussed by the courts. The primary reason put forward is that charitable organisations must be publicly enforceable and it is not possible for the courts to decide on whether a proposed change in the law or government policy is for the public benefit¹⁰ and to do so would be for the judiciary to usurp the role of the legislature or executive. This was confirmed in the most recent case concerning political activities, that of *Southwood v Attorney General*¹¹ which concerned a purpose for the advancement of education in militarism and disarmament. This approach has been criticised on the grounds that in other areas the court does determine public benefit¹² and indeed the court often has to determine public benefit in the context of charity law¹³ . Alternatively the court or the Commission do not need to decide whether a proposed change in the law or policy is of merit but whether the advocacy of the argument is of merit.¹⁴ This view was supported in a Government Report of 2001 which stated “advocacy of a range of opinions would itself be valuable and beneficial to the community as the best means of promoting democracy and determining the truth”¹⁵ . One policy reason for the principle, which has also been observed by the courts, is that allowing political purposes would result in a loss of

public trust and confidence in charities and a resulting loss of support. Another related objection has been the exploitation of donors who may find that their donations are being used to fund actions adverse to their¹⁶ own political principles.

Approach of the Regulator, the Charity Commission of England and Wales

The law on political activities by charities has not been substantially developed since McGovern, but in practice it is the interpretation and application of the law by the charity regulator, the Charity Commission of England and Wales, which has more impact on charities. The Commission, which is an independent regulator, has, by statute,¹⁷ a very wide remit which includes the dual roles of support and policing charities and has always placed much emphasis on the governance of charities. The Commission's guidance on political activities¹⁸ sets out its interpretation of the law with examples of acceptable and unacceptable activities. The first formal guidance was produced in 1994 and this has been revised on a number of occasions, each version attempting to clarify the position for charities¹⁹. Different editions have a different emphasis and the principles on political activities set out by the courts are placed in the context of wider charity law and governance considerations. The new editions have usually been triggered by calls for a liberalisation or clarification of the rules.

The first guidance published by the Charity Commission in 1994, following extensive consultation with the charitable sector, was an attempt to stress the range of political activities which could lawfully be undertaken by a charity. This followed criticism of the Commission's handling of an inquiry into Oxfam's campaign to promote sanctions against the South African Apartheid regime. The 1994 version stated that there must be a reasonable expectation that the activity concerned will further the stated purposes of the charity to an extent justified by the resources and that the views expressed are "based on a well founded and reasoned case and are expressed in a responsible way". There was great emphasis on the need for the content of political material to be well reasoned. This was developed in the 1995 guidance where it was accepted that campaign material may have an emotive content but "it would be unacceptable (except where the nature of the medium makes it impracticable to set out the basis of the charity's position) for a charity to persuade government or the public on the basis of material which was merely emotive". It addressed the central issue of what constitutes ancillary activities by stating that to be ancillary "activities must serve and be subordinate to the charitable purposes and must not be allowed to dominate the other activities". The Guidance went on to give examples of acceptable and unacceptable campaigning activities.

One reason for the emphasis on the need for material to be well founded and reasoned is that a leading case on political activities concerned an educational charity where the court held that political propaganda in the guise of education is not charitable.²⁰ In practice educational charities often experience more constraints on their ability to express political or even controversial views, by reason of the need to maintain objectivity. In their Guidance on the Advancement of Education and Public Benefit the Charity Commission states

Although education can have an uncontroversial broad value base, it should allow those being educated to make up their own minds.....

*Promoting a specific point of view may be a way of furthering another charitable aim but it would not be education*²¹

Think tanks in particular may fall foul of this rule and there have been several Commission inquiries into think tanks on these grounds in recent years.²²

In 2002 the New Labour government completed a major review of the legal and regulatory framework for charities²³ which looked at restrictions on campaigning activities by charities. The report recommended that there should be no change in the underlying law, or indeed, the thrust of the Commission's guidance but the Charity Commission guidance should be revised to make the tone is less cautionary and put greater emphasis on the activities which could be undertaken. The resulting 2004 guidance was more positive in tone, but in line with the Commission's new risk based approach to regulation, placed the question of political activities in the context of the risk management duties of charity trustees. Karen Atkinson has written an interesting critique of this approach.²⁴ This version addressed the question of what is dominant by stating "what is dominant is a question of scope and degree upon which trustees must make a judgement. In making this judgement trustees should take into account factors such as the amount of resources applied and the period involved, the purposes of the charity and the nature of the activity. "

Although more positive in tone, there were still complaints from charities that the 2004 guidance was confusing and did not deal adequately with the central issue of the extent to which charities could engage in political activities and when such activities ceased to be ancillary to the charitable purpose. There was clear evidence that the confusion amongst charity trustees as to the extent of permissible political activity led to undue self censorship and reluctance to engage in advocacy.²⁵ This was because expenditure on undue political activity could constitute a breach of trust with resulting personal liability on the part of the individual trustees to repay the sums expended. Other sanctions which may be imposed include the removal of the organisation from the Register of charities on the grounds that it was established for political purposes ab initio and in extreme cases the removal of trustees. In most cases the only sanction will be a reprimand from the Charity Commission.

An Advisory Group on Campaigning and the Voluntary Sector chaired by Baroness Helena Kennedy QC was set up in 2007 to look at all the constraints imposed by the law which restricted the ability of not for profits to carry out campaigning and advocacy. The Report recommended a change in the law to remove the "dominant and ancillary" rule and permit charity trustees to engage exclusively in political campaigning in furtherance of their charitable purposes so long as they did not support political parties and recommended that prior to any legislation the Commission should continue their more flexible interpretation of the court judgements on political activities. They also recommended that there should be no limits on the resources that a charity could commit to political campaigning activities. These reforms would enable single issue campaigning organisations to have charitable status .It was these organisations which the Advisory Group had identified as being most affected by the current rules.

In response to the Kennedy Report the Commission revised its guidance again in 2008²⁶. This stressed the important campaigning role of charities as the Commission was

concerned that trustees were imposing undue self censorship on their political campaigning activities. The guidance also removed express references to dominant and ancillary activities but introduced a new distinction between activities which supported and those that furthered the charitable purposes. This is a distinction which was not adequately defined and does not appear to have any judicial underpinning. This is explored in an article by Alison Dunn on the 2008 guidance.²⁷ This guidance, which is still current, addresses the issue of the extent of permissible political activity by stating that

“a charity may choose to focus most, or all, of its resources on political activity for a period. The key issue for charity trustees is the need to ensure that this activity is not and does not become the reason for the charity’s existence”

This statement appears to introduce more flexibility into the level of permitted political activity by charities. There is also more leeway on the permitted activities: the Guidance confirms that a charity can do what any other body or person trying to change the law may do ;for example write to the Minister, brief Members of Parliament and request assistance from supporters. The Guidance also confirms that a charity may engage with a political party in ways that support its own charitable purpose but must remain politically neutral. The principle governing this sort of activity being, that a charity may try to influence the policies of political parties in the interests of its beneficiaries but must not assist any political party to get elected. Although the Guidance appears to give greater flexibility in both the level and types of permitted political activity by charities, it takes a broader interpretation of the scope of political activity by including attempts to influence the policy of all public bodies including agencies in the UK and other countries.

Questions on the application of the constraints on political campaigning arise both at the charity registration stage and in the course of investigations by the Commission. At registration any evidence of political campaigning may lead the Commission to query whether there is an unstated political purpose and charitable status may initially be refused on this basis. The most recent published registration decision of the Commission on political campaigning is that of English Pen²⁸, the English branch of International Pen. This organisation has three different purposes one of which is “to promote human rightsof writers, authors ,editors, publishers and other persons similarly engaged”. Activities under this purpose include letter writing and campaigning for the release of prisoners, similar to the activities carried out in McGovern. The application for registration was initially rejected on the grounds that there was a political purpose but this was reversed on appeal when the members of the board of the Commission distinguished McGovern and accepted that the political campaigning activities were ancillary to the charitable purpose of the promotion of human rights. Part of the decision turned on the qualified nature of the right of freedom of association and the registration was conditional on the acceptance by the directors of English Pen that

Some constraints on the right to freedom of speech and other rights are necessary and appropriate and that individual states may have legitimate reasons for limiting the exercise of some human rights

The directors of English Pen also gave an assurance that before campaigning they would consider

“Whether the right of freedom of association has or will be curtailed, whether the constraints can be justified in terms of Article 10.2 of the European Convention of Human Rights and

whether those constraints are necessary and proportionate”

The promotion of human rights was included in the list of charitable purposes set out in statute for the first time in the Charities Act 2006. Other purposes included in the list are the prevention of poverty, the promotion of citizenship and the promotion of animal welfare, all of which could be said to be inherently political and where questions of political campaigning could well arise in the future as the distinction between charitable and political activities may be less easy to determine.

Although the definition of political campaigning is very broad, many of the cases investigated by the Commission are concerned with party political statements, often in the context of an election, when stricter rules imposed by electoral law apply. A recent example in the 2010 General Election Campaign involved the League against Cruel Sports²⁹ where the charity published a press release entitled “Poll reveals Tories firmly viewed as nasty party on hunting”. The Commission held in their Regulatory Case Report that the wording of the press release was party political and went well beyond the sort of statement that a charity can properly make. In total the Charity Commission investigated sixteen cases of alleged undue political activity by charities following the 2010 General Election.

In practice, where a charity wishes to undertake political activities which go beyond those permitted, these will usually be undertaken through a separate arms length body constituted as a non charitable company limited by guarantee.

Restrictions imposed on non profits by Broadcast Law

Although the restrictions imposed on charities under charity law are well recognised, the more far reaching restrictions on broadcast advertisements imposed on certain non profits, not restricted to charities, are less well known. These restrictions were given wider coverage through the publication of the Kennedy Report on Campaigning and the Voluntary sector³⁰. Under the Communications Act 2003 there is a ban on broadcast advertising by political parties, (which are required to register and then permitted to take advantage of Party Political Broadcasts), and at election time, on third parties seeking electoral influence. There is also a prohibition on any broadcast advertisement which seeks to influence law reform, the legislative process or a governmental policy. It also prohibits any broadcast advertisement, whatever the content, inserted by a body with those objects.³¹ It goes on to ban any advertisement directed towards “influencing public opinion on a matter which in the United Kingdom is controversial”³² This definition goes much further than the charity law restrictions and has had the effect of banning “social advocacy” advertising. The Kennedy Report revealed that the very wide scope of these restrictions has meant that a large number of non profits such as Amnesty International, Make Poverty History, the Countryside Alliance and various animal welfare groups have been classified as political entities and thus banned from any broadcast advertising, whether or not the material is political. Registered charities have also been banned from broadcasting an advertisement on a matter of controversy which forms part of a wider advocacy campaign. The Kennedy Report goes on to cite examples of advertisements banned because of their “political” content as including the RSPA broiler chicken advertisement and Oxfam’s “Make Trade Fair” campaign.

Questions have been raised as to the compatibility of the Communications Act with Article 10 of the European Convention on Human Rights (freedom of expression), as given effect in the UK by the Human Rights Act 1998. Prior to enactment, the Bill was considered by the Joint Committee on Human Rights which concluded that a total ban was likely to be incompatible with the Convention and recommended that the government should examine ways in which more limited but Convention-compliant restrictions could be included. This recommendation was not followed as the government judged that no fair and workable compromise solution could be found and, in 2008 Animal Defenders International sought a Declaration from the House of Lords that the legislation was incompatible with the ECHR. Their arguments relied strongly on the European Court's decision of *VgT*³³ where, on quite similar facts involving animal welfare advertisements, it was held that Swiss restrictions on political broadcasting were incompatible with article 10. The House of Lords distinguished this decision on the facts and held that the United Kingdom's ban on political advertising was necessary in a democratic country and thus compatible with the Convention.³⁴

In their judgements their Lordships argued that the reason behind the ban on political advertising was to ensure that public debate is not distorted in favour of the rich. The case was about "striking the right balance between the two most important components of a democracy; freedom of expression and voter democracy. In her judgement Baroness Hale stated

"There was an elephant in the committee room, always there but never mentioned when we heard the case. It was the dominance of advertising, not only in elections but also in the formation of political opinion, in the United States of America. In the United Kingdom and elsewhere in Europe we do not want our government or its policies to be decided by the highest spenders"

She went on to say that there had to be the same rule for the same kind of advertising whatever the cause for which it campaigns and whatever the resources of the organisation. "We cannot distinguish between causes of which we approve and causes of which we disapprove".

Criminal Restrictions on Campaigning by Non Profits

Several changes to the criminal law were introduced under the last Labour Government which have had the effect of restricting the ability of non profits to carry out peaceful protests. These include the Serious Organised Crime and Police Act 2005, the Public Order Act, the Protection from Harassment Act 1997 and the Terrorism Act 2000. These are all couched in very general terms and are of general application and whilst there have been no prosecutions against non profits, there have been occasions where the police, the courts and authorities have utilised restraining powers granted by the legislation. The Kennedy Report gives several examples of the use of such new powers. This may also have led to some self censorship on the part of non profits, concerned about the risk.

Another recent piece of legislation which initiated a debate on the limitations on freedom of expression, particularly for religious organisations, was the Racial and Religious Hatred Act of 2006. The Bill originally outlawed words and behaviour that insulted or abused religious groups and this was opposed by an unlikely alliance of comedians and religious groups. A high profile campaign met with success and the Lords removed the offending provisions and introduced a very wide exemption for free speech so that the Act does not prohibit

“Discussion, criticism, expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents or proselytising or urging adherents of a particular religion to cases practising their religion”.

In 2008 the Archbishop of Canterbury delivered an important lecture on the Race and Religious Hatred Act and the wider issues of freedom of expression in the context of religion.³⁵

Restrictions imposed on commenting on government policy arising through funding relationship

The last fifteen years have seen a major increase in the delivery of public services by charities and other voluntary organisations in the United Kingdom. This has raised concerns about the possible loss of independence of charities in these circumstances, particularly the loss of the ability of a charity to criticise or comment on the policy of the Government body which funds it. In some cases a funding agreement has led to the “gagging” of charities either formally, under the terms of the funding agreement, or informally. In practice this could constitute a greater constraint than that imposed by charity law or other legislation. This was addressed in the Compact on Relations between Government and the Voluntary and Community Sector in England signed in 1998 which included an undertaking by the Government

To recognise and support the independence of the sector, including its right within the law, to campaign, to comment on government policy and to challenge that policy, irrespective of any funding relationship that might exist and to determine and manage its own affairs.

The Compact was revised in December 2010 and the new wording of the Government undertaking requires them to

*respect and uphold the independence of CSOs to deliver their mission, including their right to campaign, regardless of any relationship, financial or otherwise which may exist.*³⁶

Recent Initiatives to reform laws restricting non profit speech

The last few years have seen several different initiatives and approaches to the reform of the law in this area. As discussed, a test case was brought in 2008 to challenge the restrictions on broadcasting imposed by the Communications Act. With regard to charity law, the government based Strategy Unit report of 2002 carried out extensive consultation and produced a report in 2002 which held that the case had not been made for legislative reform of the ability of charities to engage in political activities but any problems could be addressed by more enabling guidance. As the resulting 2004 Charity Commission guidance did not provide the required assurance to charities, a full independent review of constraints on campaigning was carried out by the Kennedy Advisory Group in 2007. This chimed with the new thinking of the Labour Government, particularly of the then Minister for the Third Sector, Ed Milliband (now Leader of the Opposition). The Government published their Third Sector Review shortly after the publication of the Advisory Group Report in 2007. This included the role of enabling voice and campaigning as one of the four common goals for government and the sector. The Review also appeared to support the case for reform of the law.

“It is surely possible in a well run charity for political activity to be dominant and yet enable it to further its charitable purpose”.

This was the first time in recent years that the Government appeared to support a liberalisation in the law in this area but, coming so soon after the major reform of

charity law in the Charities Act 2006, the prospect of legislation was quite remote. The advent of the Conservative-Liberal Democrat Coalition Government in May 2010 brought in a different approach to the third sector. The Office of the Third Sector has been renamed the Office for Civil Society and within the overarching framework of the Big Society, the emphasis is now more on the roles of civic engagement and service provision than on voice and campaigning. As yet there have been no major pronouncements on the new government's approach to the freedom of speech for non profits. Traditionally, members of the Conservative party have sought to limit the political activities of charities. In 2007 Greg Clarke, the then Shadow Charities Minister wrote in a letter to the Times³⁷

"I think [allowing charities to be dedicated exclusively to political campaigning] would contribute to undermining the trust that charities as a whole enjoy and whose activities are presumed to be rooted in good works"

It is unlikely that any steps will be taken to liberalise the law in the lifetime of this Parliament. Nor is the issue of law reform in this area a priority for non profits at the present time as they face extensive funding cuts. However according to a recent article³⁸, charities could be caught up in new proposals to impose rules on lobbyists who seek to influence government ministers. The Cabinet is now consulting on the definition of lobbying prior to the introduction of new rules.

.

¹ Compact on Relations between Government and the Voluntary and Community sector in England 1998 .See infra

² Bowman v Secular Society [1917]A.C 406

³ See also National Anti-Vivisection Society v Inland Revenue Commissioners[1948] AC 31

⁴ McGovern v Attorney-General[1981]3AER

⁵ See supra

⁶ 1984 Ch243

⁷ Re Hopkinson[1949]1AER346

⁸ 1995 4 AER 481

⁹ The 1990 Broadcasting Act has now been replaced by the 2003 Communications Act. see infra.

¹⁰ Bowman v Secular Society supra at 442

¹¹ Southwood & Anor v Attorney General [2000] EWCA Civ 2004

¹² Restricting the freedom of speech of charities: Do the rationales stand up? Perri 6 Demos

¹³ Charities and Campaigning Rosamund McCarthy,2008 Private Client Business Issue 4 Sweet and Maxwell

¹⁴ Advisory Group on Campaigning and the Voluntary Sector Report see infra

¹⁵ Campaigning and Political Activities of Charities and Voluntary Organisations published by the Performance and Innovation Unit 2001

¹⁶ See White Paper, Charities: A Framework for the Future 1989 para 2.41

¹⁷ Charities Act 2006 sections 6 and 7

¹⁸ CC9 Speaking Out Guidance on Campaigning and Political Activities by charities published 2008 at www.charity-commission.gov.uk

¹⁹ Versions of CC9 were published in March 1994,June1995,February 1997,September 1999,September 2004 and April 2008

²⁰ Re Hopkinson[1949]1 AER 346

²¹ The Advancement of Education for the Public Benefit Charity Commission 2008 at www.charitycomission.gov.uk

²² Inquiry Report Smith Institute. Case Reports on Policy Exchange and Reform Research Institute all at www.charitycommission.gov.uk

²³ Private Action ,Public Benefit A review of Charities and the Wider Not for Profit Sector Strategy Unit September 2002 (the Strategy Unit is part of the Cabinet Office)

²⁴ Charities and Political Campaigning: The Impact of Risk-Based Regulation Liverpool Law Review Vol 29 Number 2 pp143-163

²⁵ 2007 Report of Sheila McKecknie Foundation, a charity set up to assist campaigners

²⁶ CC9 Speaking Out-Guidance on Campaigning and Political Activities by charities at www.charity-commission.gov.uk

²⁷ Charities and restrictions on Political Activities: Developments by the Charity Commission for England and Wales in Determining the Regulatory Barriers at www.icnl.org/knowledge/ijnl/vol1iss1/special_3.htm

²⁸ Decision made 21 July 2008 at www.charity-commission.gov.uk

²⁹ 1st April 2010 Regulatory case report at www.charity-commission.gov.uk

³⁰ See supra

³¹ S321(3)(b)(c) Communications Act 2003

³² S321(3)(f) ibid

³³ VgT Verein gegen Tierbriken v Switzerland (2001) 34 EHRR 159

³⁴ 2008 UKHL15

³⁵ Religious Hatred and Religious Offence. Delivered 29th January 2008 at www.archbishopofcanterbury.org

³⁶ 2010 version of the Compact at www.compactvoice.org.uk

³⁷ Letter to the Times on 23rd October 2007 www.timesonline.co.uk

³⁸ Article in the Times 19th October 2011