Legal Limits On Political Campaigning By Charities: Drawing the Line

Abstract

The fear for charities of being on the wrong side of the law when it comes to campaigning has always been a strong one and recent UK legislation related to political campaigning has caused considerable consternation in the sector, bringing some difficult issues to the fore. This paper reviews recent evidence on legislation and refers to previous regulatory experience to put new developments in a clear context of charity and electoral law. It highlights ambiguities and suggests how further regulatory guidance might help.

Introduction

The UK Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014, which addresses the ability of charities to participate in pre-election public dialogue, has cast a fresh spotlight on the challenging nature of political campaigning for charities.

For constitutional purposes, charity law is a devolved matter in the UK (other than for tax matters) and this policy review relates to charity law as it applies in England and Wales, where the charity regulator is the Charity Commission. The recent publication of a case report from that regulator, which details all the cases in which charities fell foul of charity law principles restricting political campaigning in the period preceding the last UK general election held in May 2015, is very welcome. Charities that read the report will find comfort in the fact that a grand total of only 17 charities were investigated and found to have not complied with Charity Commission guidance in this area. Obviously not all of the 165,000 registered charities participate in activities which brings them within the scope of the legal framework governing political campaigning by charities. Nevertheless, a finding of 17 breaches, all of which were quickly remedied, should provide some reassurance to other charities engaged in this kind of activity. Before charities become too confident, however, a recollection of the difficulties that befell Oxfam (Charity Commission, 2014a) in relation to its 2014 campaign on poverty in the UK (Cooper, Purcell and Jackson, 2014) is a reminder of the challenges when trying to draw the lines in the conventional law in this area. The problems here, however, pale into insignificance when compared to charities’ ability to cope with the new UK-wide electoral law on lobbying by non-party campaigners which came into operation in the period preceding the 2015 UK general election. Whilst we currently await the outcome of Lord Hodgson’s review of this new law, expected in 2016, it is suggested that even more helpful and reassuring for charities would be the publication of a report from the Electoral Commission, in similar style to the aforementioned recent Charity Commission case report, detailing any cases of breach of the electoral law by charities in the 2014-15 regulated period together with an account of how those breaches were remedied. Wide publicity given to such a report would likely give the charitable sector the confidence to regain its ‘campaigning voice’ which was chilled before the 2015 election, largely due to self-censorship (Commission on Civil Society and Democratic Engagement, 2015). This policy review will expand on these ideas. In the first part, it will examine, those longstanding charity law principles that serve to impose limits on political campaigning. This will be followed in the second part by a consideration of the impact of electoral law on charities’ ability to campaign.

Before turning to issues of charity law and electoral law and how they may restrict charities’ freedom to engage in political debate, another potentially important UK development which may impede charities’ campaigning activities should be noted. This is an announcement by the UK government in February 2016 to the effect that, in the future, organisations (including charities) in receipt of government grants will be prohibited from using such funds to engage in political lobbying (Cabinet Office and The Rt Hon Matt Hancock MP, 2016). The announcement referred to ‘extensive research’ undertaken by the Institute of Economic Affairs on so-called ‘sock puppets’, exposing the practice of taxpayers’ money being given to pressure groups and then being diverted to fund lobbying rather than good causes or public services (see e.g. Snowden, 2014). To prevent the continuation of this practice, from May 2016, a clause will be inserted in all government grants to that effect that ‘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’ will not be eligible expenditure. This clause will not prevent organisations from using their own privately-raised funds to campaign as they see fit, subject to any other relevant legal restriction, discussed in this policy review. Nevertheless, the universal introduction of such a clause in all government grants has the potential to mute the charitable sector’s voice even further when it comes to campaigning. The immediate reaction from the sector has been one of condemnation (Rickets, 2016). This restriction on charities’ freedom to engage in political campaigning is in addition to existing charity law and electoral law limitations, which will now be considered in turn.

Charity Law

A charity cannot be legally established with a political purpose (*Bowman v Secular Society Ltd* [1917] AC 406). Nevertheless, it is also the case that charity law recognises campaigning and political activity as legitimate for charities, provided that it is undertaken in furtherance of a charity’s charitable purposes and that the activity is reasonable by reference to its impact and cost (*National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31). Guidance from the Charity Commission (2008) makes clear that 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 must maintain their independence and must not engage in party political activity.

These issues become particularly acute in the period preceding an election and the Charity Commission regularly publishes additional guidance for charities to cover this specific period (see e.g. Charity Commission, 2014b). Whilst charity law itself does not change at this time, the risk of a charity supporting or being perceived to support a particular political party is obviously greater and therefore any activity requires careful consideration by charity trustees to ensure that it falls the right side of the ‘line’. In 2014-15, the Charity Commission monitored charities’ political activity in the period preceding the 2015 UK general election (September 2014 to May 2015) and, in December 2015, it published a report (Charity Commission, 2015a). This report set out all cases where charities were considered to have engaged in improper campaigning and political activity in the relevant period. Only 17 cases in total were raised. This suggests that the vast majority of relevant regulated charities understand the legal framework governing political campaigning by charities and how it affects their activities specifically, even around the time of elections. The report gives details of each charity’s activity and the regulatory action that the Charity Commission took in each case. The charities concerned were diverse, with no predominance of charities with certain purposes. Most cases were dealt with promptly and without need for escalation within the Commission, indicating that these were not considered to be serious breaches. Reading the issues in detail reveals that some charities were making basic mistakes which could have been avoided if trustees had followed the Charity Commission guidance on campaigning and political activity by charities (Charity Commission, 2008). Whilst concerns about charities’ campaigning or political activity do not arise very frequently in its work, the Commission has recently noted, in its latest report on tackling abuse and mismanagement in 2014-15 (Charity Commission, 2015b), that when they do arise, they can, by nature, be high profile and have the potential to undermine public understanding of and trust in charity.

One case that arose recently in this category concerned Oxfam and two of its 2014 campaigns; one related to its campaign on poverty in Britain, and one related to the conflict in Gaza. Following complaints about its activity, Oxfam became the subject of an operational compliance case in which the Charity Commission examined its conduct (Charity Commission, 2014a). It was ultimately found that the Gaza campaign (in particular, an advert published in August 2014 under the heading ‘Gaza. Trapped’) was legitimate political activity undertaken in furtherance of, and ancillary to, Oxfam’s charitable purposes. However, the poverty in Britain campaign was considered by the Charity Commission to fall on the wrong side of the ‘line’, in terms of its potential to influence public opinion in a party political sense.

In relation to Gaza, the Charity Commission was satisfied that Oxfam’s trustees held reasonable expectations that an ending of the blockade and a peace settlement would further or support the charity’s purposes, in that it would better enable Oxfam to relieve poverty in Gaza.

The concern in relation to the poverty in Britain campaign was over an image that Oxfam sent from its Twitter account on 4 June 2014. The tweet, part of a social media campaign leading up to the publication of a report on food poverty produced jointly by Oxfam, Church Action on Poverty and the Trussell Trust (Cooper, Purcell and Jackson, 2014), contained a picture of a mock poster for an imagined film entitled ‘The Perfect Storm’. A number of policy areas were cited and the text of the tweet suggested these were forcing more people into poverty. The Charity Commission considered that the text of the tweet and the embedded image 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.

As has already been noted elsewhere (Morris, 2016), the Charity Commission’s critical comments on Oxfam’s use of its twitter account and in particular the need for written authority to send tweets, presents communications challenges for the charitable sector in the 21st century. It is unworkable to suggest that every single 140 character tweet (or other form of instant message) has ‘written authorisation and sign-off procedures’ as suggested by the Commission. Moreover, in a political climate in which charities seem to be under attack from all sides (most recently in relation to the sector’s aggressive fundraising methods) this kind of publicity, associating legitimate charities with party political campaigning is unfortunate. This case provides a warning for other charities; if Oxfam can find itself on the wrong side of the ‘line’, with the resources that a large charity such as this has at its disposal in terms of legal and other advice, then the vast majority of small charities must take even greater care to ensure compliance.

The Charity Commission is largely concerned with charity law and its case report on pre-election campaign activity focussed on charity law only. Specifically, it did not concern any potential breaches of the electoral law that may apply to charities since this is enforced by the regulator of party and election finance, the Electoral Commission. The second part of this policy review will now consider the limits on charities’ ability to campaign from the point of view of electoral law.

Electoral Law

The ability of charities to engage in pre-election debate and dialogue has recently been further regulated by the controversial Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (hereafter the Lobbying Act). 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. Once registered, a charity must follow the rules and reporting requirements on campaign spending and donations. The law is complex and specific guidance has been published for charities by the Electoral Commission (2014). ‘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. Activities can be regarded as lobbying even if the intention is to achieve something else, such as raising awareness of an issue. Charity law may permit such activity, so long as the aim is to pursue a charity’s own charitable purposes and its independence and perceptions of its independence are not adversely affected. Yet, the Lobbying Act may place either real or perceived limits on the ability of charities to raise awareness of particular issues.

The previous 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. His report is still awaited at the time of writing. In the meantime, the Commission on Civil Society and Democratic Engagement, chaired by the crossbench peer Lord Harries of Pentregarth was set up in October 2013 as a result of the deep and widespread concern that the Act was likely to have a ‘chilling effect’ on campaigning (see e.g. Mountfield, 2013). Crossbenchers are members of the House of Lords who have no party-political affiliation and participate in parliamentary proceedings independently. The Harries Commission consulted with key stakeholders about the impact of the law on campaigning, focusing on charities and campaign groups, faith and community organisations that were not consulted by Government ahead of introducing the law. Its final report, published in September 2015 (Commission on Civil Society and Democratic Engagement, 2015) reported that charities across the spectrum, ranging from the Quakers to the Badgers Trust, felt gagged by the Lobbying Act before the 2015 election. The Harries Commission also 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.

There is an understandable concern that public confidence in charities could be undermined if they are perceived to have stepped over the ‘line’ (even if they have not breached any legal requirements). Nevertheless, charities of all sizes have an important role to play in political discourse 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. After all, the Act does not prohibit charities from carrying on regulated activity. It simply requires registration with the Electoral Commission and then reporting on spending and donations.

Whether or not any activities of particular charities are formally covered by the Lobbying Act, there was sufficient concern that they could be, to ‘chill’ charities campaigning activities. The complexity and ambiguity surrounding the law itself may have achieved this effect in that many charities self-censored their campaigning activities in order to avoid falling within what they considered to be regulated activity. There are complicated psychological issues around registering with the Electoral Commission - the very act of registration with a Commission which regulates party politics may lead supporters to believe that the registering charity is campaigning to influence the outcome of a general election and is therefore inappropriately politically biased (see e.g. Amnesty International UK, 2015). 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’ (Barker and Harrison, 2015; 9).

Concluding Comments

Whilst the 2015 UK general election (and the associated regulated period) is now behind us, the issues around the Lobbying Act have not gone away. The Act also applies to elections in the devolved administrations in the UK and the 5th January 2016 marked the start of the four-month regulated period for Scottish Parliament, National Assembly for Wales, Welsh Police and Crime Commissioner, and Northern Ireland Assembly elections. Also, whilst at the time of writing the date of the UK poll for the public referendum on whether British membership of the EU should continue or not, has not been confirmed, this referendum will also trigger the operation of the Act.

A report from the Electoral Commission, similar to the one published by the Charity Commission in 2015, giving details of any complaints against charities and how they were dealt with would be helpful in terms of giving confidence to charities to continue to pursue their legitimate campaigning activity. In addition, clearer guidance from the Electoral Commission would also be beneficial, with more concrete examples and case studies. Its initial guidance for charities was revised after concerns were raised 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 start of the first regulated period. In addition to the specific guidance for charities, the Electoral Commission also published 16 guidance documents as well as fact sheets on how to ensure that common campaigning tactics complied with the new rules. It is no wonder that many who gave evidence to the Harries Commission stated that they found that the guidance was confusing (Commission on Civil Society and Democratic Engagement, 2014).

Regulatory burdens also increase due to the complexity of the law; a survey on the impact of the Lobbying Act found that it led to charities incurring expenditure on legal advice and internal compliance, either to ensure that that they did not need to register with the Electoral Commission, or to ensure that they complied with rules regulating reporting of spending and donations once registered (Barker and Harrison, 2015). Whilst not fool proof (see above), the Charity Commission’s guidance on campaigning (Charity Commission, 2008) includes a checklist for trustees to help charities think through all of the issues that they need to consider in order to help ensure compliance with charity law. It is also couched in more positive terms than the previous version of the guidance, giving charities clearer advice as to where the ‘lines’ are to be drawn and therefore greater confidence to campaign.

The Charity Commission guidance makes it clear that charities may undertake a wide variety of campaigning activities as part of their work. In many cases, these campaigns and activities will not be regulated under electoral law. This is an important message to be understood in order to empower charities to campaign confidently and effectively. The second and equally important message is that if the activities are or may be regulated by electoral law, then there is no stigma around registration with the Electoral Commission for charities that are still bound by charity law limitations. Charity law will always protect charities by requiring them to maintain their independence.

For those concerned with charity regulation in other jurisdictions beyond England and Wales, the potentially significant consequences of changes to electoral law on charities and their ability to participate in public debate and dialogue during the important periods that precede elections and referendums should be noted.

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