CHARITIES AND COLLABORATIVE CAMPAIGNING: LAW, REGULATION AND PRACTICE

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by

Karen Elizabeth Atkinson

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ABSTRACT

This thesis considers the problems (legal and non-legal) which arise in "political" campaigning activity by charities, and explores the benefits and problems of approaching campaigning through collaborative arrangements. In particular, it considers whether the benefits and problems of collaborative working tend to alleviate or exacerbate the existing difficulties of campaigning work. In light of the problems identified, it also explores potential directions for reform of law, policy and practice. The thesis has a socio-legal basis, combining doctrinal and literature-based analysis of relevant issues with analysis of original empirical data. As this thesis is the first legal analysis focused on collaboration in campaigning it is exploratory in nature. It adopts a qualitative, grounded theory approach intended to produce detailed but indicative (rather than general) results.

The doctrinal and literature-based element of the thesis considers: charity law relating to political objects and activities; wider laws which affect campaigning (specifically broadcasting law and criminal laws relevant to public demonstrations and protests); the legal implications of collaboration; and the effect of the policy environment on the non-legal problems of collaborative campaigning. The analysis reveals complexity and unpredictability in the law relevant to campaigning and identifies the potentially severe consequences of contravening both the law on campaigning and the law relevant to collaboration. It also criticises the explanation of legal issues in relevant Charity Commission guidance and notes the effect, genesis and implications of the prevailing focus on risk management in Commission guidance.

The empirical study, which involved detailed interviews with charity personnel, found general low levels of awareness of legal issues and an overriding concern with a variety of non-legal issues of campaigning. These issues all related either to *protection of reputation*, *resource and funding issues* or *relationships with external parties*, themes which were mirrored in the data relating to how collaboration can both alleviate and exacerbate the problems of campaigning.

The thesis concludes that the tendency of study participants to ignore relevant legal issues in campaigning and collaboration is a serious concern, given its potentially severe consequences. However, it also contends that the practical issues which the participants tended to prioritize are actually underpinned by the law. This is because the law is responsible for a further phenomenon: the perception of a *pervasive bias within society against campaigning as a legitimate charitable function.* It is contended that charity law relating to politics both initiated negative attitudes towards campaigning and continues to contribute to the perpetuation of such attitudes within government policy, funding bodies and the general public. Nevertheless, the thesis also concludes that at the time of its submission, attitudes towards campaigning are becoming more positive. This shift has catalysed calls for reform which have, to an extent, been addressed by government policy. Whilst the thesis concludes that planned reforms will be insufficient to address all of the problems identified, it also notes that the complex relationship between societal attitudes, law and government policy may have a domino effect and catalyse further reforms in future.

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TABLE OF CASES

French Protestant Hospital, Re [1951] 1 Ch 567

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Hood, Re [1931] 1 Ch 240

Hopkinson, Re [1949] 1 All ER 346

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Inland Revenue Commissioners v Temperance Council of The Christian Churches of England and Wales (1926) 10 TC 748

Inman, Re [1965] VR 238

Institute for the Study of Terrorism [1988] Ch Com Rep 7, paras.27-34

Jenkins' Will Trusts, Re [1966] Ch 249

Jones, Re (1929) 45 TLR 259

Knowles v Stamp Duties Comr [1945] NZLR 522

Koeppler's Will Trust, Re [1986] Ch 423

Laidlaw Foundation, Re (1984) 13 DLR (4^{th}) 491

Letterstedt v Broers (1844) 9 App Cas 371

Lister v Hesley Hall Ltd [2001] UKHL 22, [2002] 1 AC 215, HL

Liverpool and District Hospital for Diseases of the Heart v Att-Gen [1981] Ch 193

Margaret Thatcher Foundation [1991] Ch Com Rep 13, para.75

McDougal, Re [1957] 1 WLR 81

McGovern v Att-Gen [1982] Ch 321

Molloy v Commissioner of Inland Revenue [1981] 1 NZLR 688

Morice v Bishop of Durham (1805) 10 Ves 522

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

Ogden, Re [1933] Ch 678

Southwood v Attorney-General [2000] WTLR 1199; aff. The Times, 26 Oct 1998

Speight v Gaunt (1883) 9 App Cas 1

Strakosch, Re [1949] Ch 529

Tennant Plays Ltd v Inland Revenue Commissioners [1948] 1 All ER 506

The Church of Scientology [1999] Ch Com Dec November 17, p.29

Tribune Press v Punjab Tax Comr [1939] 3 All ER 469

Trusts of the Arthur MacDougall Fund, Re [1957] 1 WLR 81

Vallance, Re (1876) 2 Seton's Judgements (7th ed) 1304

VGT Verein Gegen Tierfabriken v Switzerland (2002) 34 EHRR 4

Von Ernst et Cie SA v Inland Revenue Commissioners [1980] 1 WLR 468

Webb v O'Doherty and Others, The Times, 11 February 1991

Wilkinson (deceased), Re [1941] NZLR 1065

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Yorkshire Agricultural Society [1928] 1 KB 611

Youth Training [1982] Ch Com Rep 15-17, paras.45-51

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CHAPTER ONE: INTRODUCTION AND METHODOLOGY

1.0 Introduction

The role of charities in political campaigning has been a subject of long-running debate, fuelled recently by high-profile campaigns.[1] The attention paid to this debate has also been increased by public support for charities' role in campaigning from politicians such as Ed Miliband MP.[2] This has been countered by opposition to this role, for example from civil society think-tank Civitas.[3] The debate's re-emergence has resulted in calls for reform to complex and often poorly understood law and guidance which constrain charitable campaigning.[4]

The level of attention paid to the practice of collaborative working in the charity sector has also increased drastically in recent years, reflected by the publication of specific Charity Commission guidance on the subject,[5] by the creation of the Collaborative Working Unit at the National Council for Voluntary Organisations (NCVO),[6] and by reports from numerous major sector funders.[7] However, in contrast to the debated and somewhat stigmatised issue of campaigning, collaborative working arrangements are almost universally viewed as positive and beneficial when carefully planned and conducted. They are seen as a means of

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[1] For example, the Make Poverty History campaign in 2005. See www.makepovertyhistory.org. The MPH campaign is cited as being largely responsible for the "recent fashion for social campaigning" by P. Hilder, J. Caulier-Grice & K. Lalor in *Contentious Citizens. Civil Society's Role in Campaigning for Social Change*, The Young Foundation / Carnegie UK Trust (2007), p.44.

[2] Minister for the Third Sector (until shortly before this thesis was submitted, replaced in July 2007 by Phil Hope). Parliamentary Secretary, Cabinet Office. An example of this support is Mr Miliband's speech '*Charities, campaigns and progressive change*', delivered to the Britain's Most Admired Charity Awards ceremony, 29 November 2006. See further Mr Miliband's comments regarding campaigning, *Charity Finance*, June 2007, p.21. It should also be noted that support for charities' campaigning role was given a firmer basis in Government policy shortly before this thesis was submitted: see consideration of HM Treasury / Cabinet Office, *The future role of the third sector in economic and social regeneration: final report*, (Cm 7189) TSO (2007) in Chapter Five (Section 2.1.4.4) and throughout Chapter Seven.

[3] N. Seddon, *Who Cares?* Civitas (2007).

[4] See *Report of Advisory Group on Campaigning and the Voluntary Sector*, chaired by Baroness Helena Kennedy QC (2007).

[5] Charity Commission, *Collaborative Working and Mergers* (CC34), TSO (2006).

[6] See www.ncvo-vol.org.uk/collaborativeworkingunit.

[7] See, for example, C. Rochester & Z. Woods, *Making a Difference Together' Impact Assessment: The Lloyds TSB Foundation for England and Wales*, Collaborative Grant-Making Programme (2005), and Chapter Five of this thesis for further discussion.

increasing efficiency and responding to the ever-increasing pressure to demonstrate best use of charitable funds to the public. They are also often viewed as a good middle ground between the potential loss of diversity inherent in mergers and the lack of impact inherent in solitary working.

Given the complex and problematic nature of the legal rules surrounding charities and politics,[8] it is unsurprising that there has been a significant amount of legal academic commentary on the subject over a long period of time. However, despite this interest from legal academics, the wider voluntary sector research community has tended to focus on the service provision function rather than the campaigning function of the charity sector.

Research on collaboration has emerged more recently as its popularity has increased, but has been policy and practice orientated rather than focusing on legal implications,[9] and has again tended to focus on the practice in the context of service provision.

Research which focuses on collaboration specifically in campaigning is virtually non-existent, with the exception of an NCVO guide[10] published whilst this thesis was nearing completion. The NCVO guide is largely practice-orientated. Thus, there has been to date no detailed legal or socio-legal analysis which focuses specifically on the working practice of collaboration in the context of political campaigning.

The main purpose of this thesis is thus to examine the problems (both legal and non-legal) which arise in campaigning activity by charities generally, and to explore the benefits and problems of approaching campaigning through the working method of collaboration. In particular, it seeks to explore whether the benefits and problems of collaborative working tend to alleviate or exacerbate the existing difficulties of

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[8] Considered in Chapter Two.

[9] Considered in Chapter Four.

[10] S. Shimmin & G. Coles, *Campaigning in Collaboration. A Joint Publication between NCVO's Collaborative Working Unit and Campaigning Effectiveness*, NCVO (2007).

campaigning work. Additionally, the thesis aims to note potential directions for reform of law, guidance, regulation and practice which may help to address any problems.

This chapter explains the approach and structure of the thesis. Section 2.0 explains the definitions adopted by the thesis of its fundamental concepts: "campaigning" and "collaboration". Section 3.0 explains the socio-legal basis of the thesis. It then considers how this socio-legal basis underpins the structure and approach of the thesis and governs the relationship between its doctrinal and empirical elements. Section 4.0 explains the qualitative, grounded theory approach taken by the empirical study's methodology within its socio-legal basis. It also explains how this underlying approach translated into practice, considering: the study propositions around which the data collection was based; the types of organisation (units of analysis) studied; the ethical dimension of the research; the process of interview data collection and the transcription process; the sampling and coding strategy within the grounded theory approach; the completion of the data collection and coding process; and the use of the analysed data. Section 5.0 explains how the approach described in the chapter is translated into the general structure of the thesis. It does this by exploring the specific purpose and content of the substantive and concluding chapters.

2.0 Definitions: "campaigning" and "collaborative working"

2.1 General points

A common practice for organizations engaging in extensive "political" campaigning but wishing to enjoy the benefits of charitable status is to create a separate body with wholly and exclusively charitable purposes, which can undertake acceptable charitable activities.[11] Conversely, charitable bodies which identify a need for

[11] An example of an organisation which has traditionally adopted this dual structure is Amnesty International UK, which is split into Amnesty International UK Section and Amnesty International UK Section Charitable Trust. However, the two sections are intended to merge (see www.amnesty.org.uk/content.asp?CategoryID-10098 [25/06/07]). This decision follows the re-statements of charitable purposes in the Charities Act 2006 (see Chapter Two, Section 2.1.5.2 for discussion) and revisions to Charity Commission guidance, CC9 (see Chapter Two, Section 3.1 for discussion).

"political" activity outside the accepted boundaries[12] may also set up separate non-charitable organisations to perform such functions.

Whilst the above practice is worthy of investigation, this thesis focuses specifically on charities which undertake campaigning. A detailed discussion of the issues faced by non-charitable campaigning organisations, or by charitable bodies which do not undertake campaigning activity, is thus outside its remit.

2.2 Campaigning

The definition and limits of the term "campaigning" depend upon the context in which it is used. The Oxford Dictionary of English[13] defines the word "campaign" as to undertake an "organized course of action, esp[ecially] to gain publicity". This is a somewhat broader definition than that adopted in this thesis, which aims to explore the types of campaigning by charities which attract the attention of the courts and the Charity Commission.

A definition of "campaigning" more relevant to the context can be found in the most recent version of the Charity Commission's guidance, CC9.[14] This distinguishes between types of "campaigning", and identifies that it can include:[15]

> "public awareness raising and education on a particular issue; influencing and changing public attitudes; political activities which are intended to influence Government policy or legislation, and which may involve contact with political parties".

Whilst the third aspect of this definition is more relevant to judicial concerns with politics[16] and thus to the focus of this thesis, the Charity Commission's definition is necessarily entwined with judicial definitions. It thus suffers from the same problem

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[12] See Chapter Two, Section 2.2 for consideration of these boundaries.

[13] (2nd Edn.).

[14] Charity Commission, *Campaigning and Political Activities by Charities* (CC9), TSO (2004).

[15] *Op. cit.*, p.4.

[16] Considered in Chapter Two.

as the courts: that the boundaries between "non-political" and "political" campaigning are not clear. In particular, the Commission does not identify whether the second aspect of the definition ("influencing and changing public attitudes") is political or not. This is precisely the area in which the courts have been unclear and inconsistent.[17]

As this thesis aims to consider the practical implications of this area of law for charities, it considers the spectrum of campaigning practices which *may* be held "political" by the courts and the Charity Commission. In particular, it aims to consider "borderline" practices (such as swaying public opinion on particular issues) for which it is difficult to predict the reaction of the courts.

The thesis cannot itself adopt the problematic definitions it intends to criticize. Thus, the definition of "campaigning" adopted here is a broad, non-judicial definition. It:[18]

> "... covers the very diverse practices used in civil society for advocating change to decision-makers".

and includes the:[19]

> "... range of activities [used] by organisations 'to influence others in order to effect an identified and desired social, economic, environmental or political change'".

It should be noted that the courts are not generally concerned with "campaigning" *per se*, but with "politics". Thus, the practices associated with "campaigning" as

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[17] See Chapter Two, Section 2.1.5.

[18] P. Hilder, J. Caulier-Grice & K. Lalor, *Contentious Citizens. Civil Society's Role in Campaigning for Social Change*, The Young Foundation / Carnegie UK Trust (2007), p.4.

[19] The definition adopted by NCVO: see T. Kingham & J. Coe, *The Good Campaigns Guide for the Voluntary Sector*, NCVO (2005).

defined here will be explored in Chapter Two in terms of the judicial concern with "political objects" and "political activities".

2.3 Collaborative working

Charity Commission guidance CC34 defines "collaborative working" as:[20] "joint working by two or more charities in order to fulfil their purposes, whilst remaining as separate organisations". This distinguishes the concept from merger, which CC34 defines as:[21] "two or more separate charities coming together to form one organisation".

The above definition is quite narrow, in that it is limited to collaborations between charities. Whilst this thesis restricts its remit to voluntary sector collaborations rather than "partnership" work with the public or private sectors, it nevertheless adopts a slightly broader definition than that of the Commission. In exploring the legal, regulatory and practical issues faced by registered charities it excludes collaborative ventures where no charity is involved, but does include arrangements where the charity in question is working with other voluntary sector organisations which are not registered charities. This broader definition is adopted because charities wishing to collaborate in their campaigning work often wish to do so with organisations which have themselves avoided charitable status because of the legal restrictions on political activities it involves. It was felt to be important not to exclude consideration of the legal issues faced by charities collaborating with such non-charitable organisations.

In terms of collaboration structures, the Charity Commission's 2003 research report on collaborative working, RS4, restricted the collaboration structures it explored to group structures and national structures with members. However, CC34 expanded the types of structure addressed to include the "coalition structure", which it defines (for the purposes of the guidance only) as:[22] "a structure that exists where a number

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[20] Charity Commission, *Collaborative Working and Mergers* (CC34), TSO (2006), Section C1.

[21] *Op. cit.*, Section D1.

[22] *Op. cit.*, Section C5.

of separate charities agree to work together for a common purpose, sometimes described as 'a partnership of equals'". It is the coalition structure which is the focus of this thesis, as it is most relevant in the context of collaborative campaigning.

3.0 Socio-legal approach of thesis: theory and practice

The basic approach of this thesis is socio-legal, the definition of which has inspired much debate. Bradshaw, in exploring what distinguishes socio-legal research from traditional legal research, provides a comprehensive operational definition, stating that:[23]

> "First, socio-legal research considers the law and the process of law (law-making, legal procedure) beyond legal texts – i.e. the socio-politico-economic considerations that surround and inform the enactment of laws, the operation of procedure, and the results of the passage and enforcement of laws. Second, in studying the context and results of law, socio-legal research moves beyond the academic, the judicial and the legislative office, chamber, library and committee room to gather data wherever appropriate to the problem. In summary, in both topic and locus of study, socio-legal research moves beyond legal text to investigate law-in-society".

In terms of the research methods adopted within the socio-legal field, Bradshaw states:[24]

> "Socio-legal research methods are broadly the general methods of social research, particularly those of sociology, plus the case research techniques of traditional legal research".

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[23] A. Bradshaw, 'Sense and Sensibility: Debates and Developments in Socio-Legal Research Methods', in P. A. Thomas (Ed.), *Socio-Legal Studies*, Dartmouth (1997), p.68.

[24] A. Bradshaw, *op. cit.*, (1997), p.109.

On this basis, the research methods employed by this thesis are twofold, involving both legal doctrinal and literature-based study and empirical enquiry.

The doctrinal and literature-based aspect of the thesis explores and critiques existing law,[25] regulation, guidance, government policy and practice issues relevant to campaigning and collaborative campaigning by charities. The preliminary stages of this element of the study (undertaken during the first year of the study) informed the development of the study propositions which underpinned the empirical study.[26]

The empirical aspect of the study (undertaken during the second year of the study) involved a qualitative exploration of charities' experiences of the factors already considered theoretically.

The final stage of the study (undertaken during its third year) was to re-examine and draw conclusions on both the doctrinal and the empirical aspects of the study and to explore and draw conclusions on the interaction between the two. Thus, taken together, the two aspects of the study underpin conclusions relating to both the issues faced by charities undertaking collaborative campaigning, and to potential reforms of law, regulation, guidance and policy.

4.0 Empirical methodology

4.1 Qualitative basis of empirical study

The aim of the empirical study was to explore the perceptions charity representatives have of the relevant law, and the influence of a variety of interrelated factors on their collaborative campaigning activity, rather than to measure specific causes and effects.

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[25] It should be noted that whilst not all provisions of the Charities Act 2006 and the Companies Act 2006 are in force at the time of writing, the doctrinal aspect of the thesis is written from the perspective that both Acts are fully in force. It should also be noted that on the rare occasions that recent changes in the legal and regulatory framework affected the validity of the empirical data collected and analysed in this thesis, the effect is noted as part of the discussion of that data.

[26] See Section 4.3.1 of this chapter.

If the aim of the study had been to determine the strict causes and effects of decisions relating to collaborative campaigning, and to produce results that could be extrapolated to the wider population of charities, a quantitative approach would be appropriate. This would require strict separation and definition of relevant variables, identification of extraneous variables, valid and reliable measurement tools, a rigid sampling matrix, and a relatively large sample. Not only would such a study be far beyond the practical scope of this thesis, given both the complexity of the factors identified and the vast number of unknown variables involved, it would also divert the thesis as a whole from its legal focus, and destroy the intended balance of the thesis between on the one hand, doctrinal analysis of law, and on the other, empirical analysis of charities' *perceptions* of the law and other influences.

The possible influences and problems were, in this context, more appropriately addressed through open and detailed qualitative enquiry, which allowed the subjects of the enquiry to identify, define and explain their complex influences and perceptions.

Use of a qualitative approach meant that the study could produce detailed conclusions relating to the complex interaction between factors. However, it is important to note that these were based on a relatively small sample and are thus merely indicative of perceptions and trends within the wider charity population. Silverman explains this type of result:[27]

> "Generally speaking, qualitative researchers are prepared to sacrifice scope for detail. Moreover, even what counts as 'detail' tends to vary between qualitative and quantitative researchers. The latter typically seek detail in certain aspects of correlations between variables. By contrast, for qualitative researchers, 'detail' is found in the precise particulars of such matters as people's understandings and interactions".

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[27] D. Silverman, *Doing Qualitative Research*, (2nd Edn.) Sage (2005), p.9.

Given the study's focus on perceptions, together with the complex nature of the subject and the inseparability of many of the factors involved, it is appropriate that such indicative but more qualitatively "detailed" results were produced.

4.2 The grounded theory approach

Whilst there are a number of ways of approaching qualitative research, the specific focus and nature of this study lent itself to the "grounded theory" approach. This approach was pioneered by Glaser and Strauss in their 1967 work *The Discovery of Grounded Theory*[28] and developed in a number of subsequent publications. It is not a theory *per se*, but a strategy for generating theory; theories should be grounded in empirical research. Glaser and Strauss, as Denscombe reveals:[29]

> "... were keen to stress that an emphasis on collecting data in the field does not equate their approach with those whose purpose is to amass as much detail as possible about particular situations and then 'let the data speak for themselves'. It differs in this respect from certain kinds of ethnographic research. Always high on the agenda for grounded theory research is a concerted effort to analyse the data and to generate theories from the data".

Denscombe continues:[30]

> "... grounded theory is characterized by the specific way in which it approaches the business of analysing the data. Concepts and theories are developed out of the data through a persistent process of comparing the ideas with existing data, and improving the emerging concepts and theories by checking them against new data collected specifically for the purpose".

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[28] B. Glaser & A. Strauss, *The Discovery of Grounded Theory*, Aldine (1967).

[29] M. Denscombe, *The Good Research Guide for small-scale social research projects*, (2nd Edn.) OUP (2003), p.111.

[30] M. Denscombe, *loc. cit.*, (2003).

Thus, the philosophical basis of the grounded theory approach is appropriate to this particular study, with its emphasis on the practical experiences of campaigning charities. As Locke states:[31]

> "Grounded theory acknowledges its pragmatist philosophical heritage in insisting that a good theory is one that will be practically useful in the course of daily events, not only to the social scientists, but also to laymen. In a sense, a test of a good theory is whether or not it works 'on the ground'".

A further factor which made the grounded theory approach appropriate for this particular study is the dearth of previous research into the legal aspects of charitable collaborative campaigning, discussed in Section 1.0. As Goulding identifies:[32] "usually researchers adopt grounded theory when the topic of interest has been relatively ignored in the literature or has been given only superficial attention". The approach was useful in this sense because it enabled the direction of the research to develop organically, with fewer preconceptions. This allowed the findings to develop in unanticipated directions.

4.3 The grounded theory approach in practice

4.3.1 Initial research areas

A question which needs careful attention in the early stages of the grounded theory approach is that of the level of detail to include in the initial research questions. A balance is needed between being open and retaining focus. As Denscombe explains:[33]

> "In marked contrast to the researcher who sets out to *test* a theory, the researcher who follows the principles of grounded theory needs to approach the topic without a rigid set of ideas that shape what he or she focuses upon during the investigation. Rather than basing an investigation upon whether

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[31] K. Locke, *Grounded Theory in Management Research*, Sage (2001), p.59.

[32] C. Goulding, *Grounded Theory: A Practical Guide for Management, Business and Market Researchers*, Sage (2002), p.55.

[33] M. Denscombe, *loc. cit.*, (2003).

certain theories do or do not work, *the researcher embarks on a voyage of discovery*" (author's italics).

However, Denscombe continues:[34]

> "... an open mind is not a blank mind on a subject. It is informed about an area, even quite aware of previous theories that may apply, but does not approach the analysis of data using preordained ways of seeing things. It avoids using previous theories and concepts to make sense of the data and thus is open to discovering new factors of relevance to an explanation of that area".

This presents a dilemma as to how detailed the initial concepts and the operational interview guide should be. In a practical sense, it would be extremely difficult to conduct meaningful research into perceptions of detailed legal and regulatory provisions without quite detailed starting points. Strauss and Corbin elaborate further on how to obtain an appropriate balance:[35]

> "The initial questions or area for observation are based on concepts derived from literature or experience. Since these concepts ... do not yet have proven theoretical relevance to the evolving theory, they must be considered provisional. Nevertheless, they provide a *beginning focus*, a place for the researcher to start" (author's italics).

The question areas for this empirical study were therefore developed from preliminary analysis of relevant law, regulation, government policy and practice issues. These are considered within each chapter, prior to the empirical analyses. These question areas defined the concepts to be explored and were designed to have theory built around them, but not to specify the direction in which that theory should develop.

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[34] M. Denscombe, *op. cit.*, (2003), p.112.

[35] A.L. Strauss & J. Corbin, *Basics of Qualitative Research: Grounded Theory Procedures and Techniques*, Sage (1990), p.180.

It should be noted that the purpose of the study was not to evaluate the success of collaborative campaigns, which is outside both the subject area and the scope of this thesis and is dependent upon a vast range of complex and unknown variables. Nor was it a study of organisational behaviour and the management of complex charity structures and collaborations, which is better suited to other disciplines. Instead, it attempted to explore whether the law and other factors influence charities' approaches to collaborative campaigning, once their trustees have decided that such activity is the best way to fulfil the charity's purposes and have initiated this activity.

The initial study propositions were:

Political Objects: Law and Guidance

1. Existing law relating to charities and political objects is too complex to enable charities that campaign to predict whether and for what reasons their objects will be held to be political and charitable status will be denied.

2. Charity Commission guidance focuses on political activities rather than objects, and does not effectively explain the boundaries between political and non-political objects.

3. The *perception* of the likelihood of objects being held to be political (and the perceived likelihood or severity of the consequences of this) may be greater among charities that campaign than generally occurs in practice.

Political Activities: Law and Guidance

4. Existing law relating to political activities by charities is too complex to enable charities to determine the boundaries of acceptable activity or predict consequences of activity with any certainty.

5. The confusion of the boundaries between the rules on political objects and the rules on political activity exacerbates the problems caused by the complexity of the law on political objects.

6. Charity Commission guidance is not sufficiently clear in explaining the boundaries between acceptable and unacceptable political activities.

7. The *perception* of the likely legal consequences of excessive political activity may be greater amongst charities than generally occurs in practice.

Political Activities: Other Issues

8. Campaigning work is directly governed by several areas of domestic law separate from charity law. Charities that campaign may not be aware of the impact of these areas, and Commission guidance does not draw sufficient attention to them.

9. Charities engaged in political campaigning may perceive non-legal constraints on their campaigning work, stemming from both internal and external sources.

Collaborative Campaigning

10. Whilst there are few direct legal constraints on collaborative working arrangements, such arrangements must comply with general charity law requirements. Combining collaborative working with political campaigning may also create unique legal issues. Thus, the various possible collaborative campaigning arrangements have different legal implications, some of which charities undertaking them may not be aware.

11. Available Charity Commission publications on collaborative working are not detailed enough to fully inform charities undertaking this method of working of its implications.

12. Aside from the legal issues involved, collaborative campaigning may involve certain advantages and disadvantages.

13. The above advantages and disadvantages of collaboration may alleviate or exacerbate any existing constraints on campaigning.

Risk and risk management

14. The Charity Commission has increasingly taken a "risk-based" approach to regulation. This has given rise to an emphasis within Commission guidance on risk management. The Commission views both campaigning work and collaborative working as carrying particular risks which need to be identified and managed. These "risks" may or may not equate to the uncertainties and problems involved in these activities as perceived by charities themselves.

15. The process of risk management is not sufficiently sophisticated to cope with the complex combinations of legal, regulatory and practical issues (both positive and negative) and the "risks" experienced by charities undertaking collaborative campaigning work. Thus, Charity Commission guidance is not entirely effective in enabling informed decision-making on the legal and other implications of this work.

These research areas were translated into operational research questions in the form of an interview guide. This is discussed in Section 4.3.4 below.

4.3.2 Units of analysis

Denscombe identifies that:[36] "it is neither feasible nor desirable for the researcher to identify prior to the start exactly who or what will be included in the sample". The legal, regulatory and practical issues considered throughout this thesis are relevant both to existing charities which already undertake collaborative campaigning, and

[36] M. Denscombe, *op. cit.*, (2003), p.111.

to new organisations or existing non-charitable organisations seeking charitable registration.

It was acknowledged that it was possible for the sample to "snowball" as the existence of additional organisations with relevant viewpoints become apparent during the course of the research. Nevertheless, whilst specific organisations were not identified at the start of the study, it was important to limit the study's focus and remit. Thus, the units of analysis sampled initially were restricted to registered charities in England and Wales which participated in collaborative campaigning with other voluntary sector organizations.

The specific focus identified above was adopted for both methodological and practical reasons. Methodologically, many of the issues considered in the thesis, in particular the interaction between political objects and activities and the potential repercussions of "unacceptable" political activities for charitable status were more pertinent for existing campaigning charities and thus more likely to have an impact. Practically, it was acknowledged that a broader study than the current one could usefully include a comparison of the data with the perspectives of charities that had chosen not to undertake collaborative campaigning. However, given the study's practical limitations,[37] too wide a remit could result in meaningless data. It was decided that the deliberate limitation of the sample in the way outlined above was appropriate, and allowed those organisations which were most likely to possess relevant information to be targeted.

4.3.3 Ethical issues

The non-sensitive nature of the study's subject matter, coupled with the "expert" rather than personal nature of the interviews meant that no major ethical issues arose. One minor issue with both an ethical and practical dimension was the possibility of participants responding defensively to questions and becoming reticent either in their discussion of internal organisational problems or in their criticisms of external bodies. This issue was satisfactorily addressed by the offer of

[37] See Appendix III for evaluation of research design.

full anonymity to all participants. Anonymity was achieved by removing from the data all references which would allow identification of particular charities. Whilst the process of anonymisation can result in some loss of meaning in data, the guarantee of anonymity was decisive in encouraging several charities to agree to participate. It also allowed for honest exploration of the subject matter. It was thus felt that the benefits of anonymity to the study as a whole offset any minor detriment to the meaningfulness of the data.

An ethical issue of broad application in studies of the charity and voluntary sector is that of benefit to the organisation. It is arguable that where possible, there should be some benefit to participants in order to make the research experience a positive one and encourage them to participate in future studies. All participants were thus provided with a transcript of their interview and a non-legalistic report of the preliminary findings. Several participants gave informal positive feedback relating to the usefulness of the report to their practice. No negative feedback was received.

4.3.4 Interview data collection and transcription process

The main body of the data collected was in the form of transcripts from digitally recorded interviews. The background notes were compiled using available documents relating to the participant charities, and contained as much relevant information as possible in order to facilitate efficient use of interview time.

The interviews were held with representatives possessing appropriate knowledge within each organization. The participant charities were provided with information on the purpose of the study and the type of information required, and chose representatives themselves on the basis of this information.

Interviews in the initial two sampling stages[38] were oral and semi-structured in form, in order to ensure relevant topics were covered whilst allowing informants - in keeping with the grounded theory approach - the freedom to raise points which

[38] See Section 4.3.5 below.

were not pre-determined. Several of the final (discriminate) stage interviews,[39] which required more specific information, were conducted via e-mail.

As mentioned previously, an interview guide was used to aid the course of the interviews. As Flick identifies, this approach can cause problems of:[40]

> "... mediating between the input of the interview guide and the aims of the research question on the one hand, and the interviewee's style of presentation on the other. Thus, the interviewer can and must decide during the interview when and in which sequence to ask which questions. Whether a question perhaps has already been answered *en passant* and may be left out can only be decided *ad hoc*. The interviewer also faces the question of if and when to inquire in greater detail and to support the interviewee in roving far afield, or when rather to return to the interview guide when the interviewee is digressing".

However, Flick continues:[41]

> "... the consistent use of an interview guide increases the comparability of the data ... their structuration is increased as a result of the questions in the guide. If concrete statements about an issue are the aim of the data collection, a semi-structured interview is the more economic way".

The interview guide was based on operational research areas developed from the study propositions (see Section 4.3.1 above). The core topics pursued in the interview guide remained constant throughout the series of interviews in order to ensure consistency. However, the structure of the interviews was left open enough to allow new areas of discussion to arise. The research areas included in the interview guide are contained in Appendix I.

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[39] *Ibid.*

[40] U. Flick, *An Introduction to Qualitative Research*, (2nd Edn.) Sage (2002), p.92.

[41] *Op. cit.*, p.93.

In terms of the level of detail and accuracy of the transcription of the oral interview data, Flick, paraphrasing Strauss,[42] states that it is:[43] "reasonable to transcribe only as much and only as exactly as is required by the research question". It should be noted that as study participants were interviewed in their capacity as representatives of organisations, the interviews were "expert" interviews. In discussing the work of Meuser and Nagel[44] on expert interviews, Flick notes that:[45] "the interviewee is of less interest as a (whole) person than in his or her capacity of being an expert for a certain field of activity".

Given that the interviews in this particular study were "expert", the manner of speech and feelings of the informants did not have as great an impact on the results of the research as they would be when researching more personal or sensitive topics. The approach taken was therefore to omit superfluous conversational pauses, hesitations and "non-verbal fillers" unless it was felt that they had an impact on the information being provided; for example if they betrayed uncertainty or discomfort with the information being provided. No such instances arose.

The transcribed data from each interview was transferred into the *Nvivo* qualitative data analysis programme,[46] which was used throughout the analysis of the data. Specific operations within *Nvivo* are described below.

4.3.5 Sampling and coding strategy

Approximately fifty charities were approached during the course of the study, resulting in interviews with sixteen charities conducted over a period of

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[42] A.L. Strauss, *Qualitative Analysis for Social Scientists*, Cambridge University Press (1987).

[43] U. Flick, *op. cit.*, (2002), pp.171-2.

[44] M. Meuser & M. Nagel, (1991) 'ExpertInneninterviews: vielfach erprobt, wenig bedacht. Ein Beitrag zur qualitativen Methodendiskussion', in D. Garz and K. Kraimer (Eds.), *Qualitativ-empirische Sozialforschung*, Westdeutscher Verlag. pp.441-68.

[45] U. Flick, *op. cit.*, (2002), p.89.

[46] *Nvivo* 2.0, developed by QSR International. Training in *Nvivo* was undertaken by the author during the data collection stage of the study. This training was delivered by Clare Tagg of the Tagg Oram Partnership: see www.taggoram.co.uk.

approximately six months. The characteristics of the participant charities are considered throughout this section.

The sampling strategy involved several stages: open sampling; relational and variational sampling; and discriminate sampling. The coding procedure also involved a number of stages: open coding; axial coding; and selective coding. In practice, the sampling and coding stages were interspersed, and, to an extent, took place concurrently. All the sampling and coding stages (and the interaction between them) are explored in detail below.

4.3.5.1 Open sampling stage

At the start of the research, the informants were determined by open sampling. As Denscombe explains,[47] this means that: "initial informants need only be likely to provide relevant information". "Relevant information" was interpreted in this study as information pertaining to the general topic of collaborative campaigning by charities, rather than to the specific sub-topics identified through the formulation of the research questions. The open sampling stage was approached through existing relevant contacts and through cold contact with relevant organisations. These organisations were located both by using examples of campaigning collaborations collected from the voluntary sector press and through exploratory internet research. Approaches were made via initial letters outlining the basic purposes of the study, followed by more detailed information summarizing the topics covered in the interview guide.

The organisations described below participated in the study during the open sampling stage. Relevant background information was compiled using documents produced by the informant charities (including publicity documents, and Trustees' Annual Reports and Accounts). These documents were acquired through both internet and archive research.

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[47] M. Denscombe, *op. cit.*, (2003), p.116.

The background information, together with additional background information acquired during the interviews was used to assign certain "attributes" to participants within the *Nvivo* analysis. Attributes selected for recording were those considered to be useful in building up a general picture of each organisation and its place within the wider charity sector, and involved a combination of factors included in the Charity Commission's Register of Charities. The background information and the recorded attributes were used to compile the following descriptions of each participating charity. The attributes selected were:

- the legal structure of the charity;
- the charity's most recently reported gross annual income, to the nearest £10k
- the year the charity registered with the Charity Commission;
- whether the charity operated primarily on a local, national or international basis.

In addition, the position of the interview participant within the organisation and the length of time they had worked within the organisation were recorded.

Following a general review of the data, it was felt that some of the charities in the study would be identifiable (particularly by other charities to whom representatives referred) if their field of operation was included in the above attributes. Therefore, in order to avoid compromising anonymity, the object classification of each charity is not identified.

Charity A

Charity A was a charitable company, with a gross annual income in the year ending March 2006 of approximately £155,980,000. It had been registered with the Charity Commission since 1963, and operated primarily throughout England and Wales, with limited activities in Europe. The interview participant had been with the charity for two and a half years and had held the post of Principal Policy Officer for the charity during this period.

Charity B

Charity B was an unincorporated association, with a gross annual income in the year ending March 2006 of approximately £170,000. It had been registered with the Charity Commission since 1994, and operated on a local basis in Staffordshire. The interview participant had been with the charity in various roles for eight years, and was the charity's Director at the time of the interview.

Charity C

Charity C was a charitable company, with a gross annual income in the financial year ending March 2006 of approximately £60,000. It had been registered with the Charity Commission since 1991, and operated on a local basis in Birmingham and the West Midlands. The interview participant had been with the charity in various roles for eighteen years, and was the charity's Director at the time of the interview.

Charity D

Charity D was a charitable trust, with a gross annual income in the financial year ending March 2006 of approximately £60,000. It had been registered with the Charity Commission since 1992, and operated throughout England and Wales. The interview participant had been with the charity in various roles for approximately fifteen years, and was the charity's Director at the time of the interview.

Charity H[48]

Charity H was a charitable company, with a gross annual income in the financial year ending March 2006 of approximately £1,720,000. It had been registered with the Charity Commission since 1963, and operated throughout England and Wales. The interview participant had been with the charity in various roles for approximately eight years, and was the charity's Chief Executive at the time of the interview.

[48] Participant charities are listed in the order the interviews took place within each sampling stage. The charities' anonymous tags (e.g. Charity H) do not always follow alphabetical order because of the practicalities of arranging (and sometimes re-arranging) interviews.

Charity J

Charity J was a charitable company, with a gross annual income in the financial year ending December 2005 of approximately £2,020,000. It had been operating since 1995. It operated throughout England and Wales, in particular Merseyside. The interview participant had been with the charity for approximately ten years and was the charity's Campaigns Manager at the time of the interview.

Charity L

Charity G was a charitable company, with a gross annual income in the financial year ending Dec 2005 of approximately £1,460,000. It had been registered with the Charity Commission since 1996, and operated throughout England and Wales. The interview participant had been with the charity for three years, and was the charity's Chief Executive at the time of the interview.

4.3.5.2 Open coding stage

The grounded theory approach involves a coding process which takes place alongside sampling and interviewing. It utilises the "constant comparative method" to analyse data. Denscombe defines this as:[49]

> "... comparing and contrasting new codes, categories and concepts as they emerge – constantly seeking to check them out against existing versions. By comparing each coded instance with others that have been similarly coded, by contrasting instances with those in different categories, even using hypothetical possibilities, the researcher is able to refine and improve the explanatory power of the concepts and theories generated from the data".

Coding involves:[50] "taking the raw data (interviews, field notes, documents etc.) and looking for themes that recur in the data that appear to be crucial for understanding that phenomenon". As mentioned earlier, different stages of coding correspond to different stages of the sampling and data collection process.

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[49] M. Denscombe, *op. cit.*, (2003), p.120.

[50] *Op. cit.*, p.119.

The first stage of coding, applied in conjunction with open sampling, is open coding. This is: "fairly descriptive and … likely to involve labelling chunks of data in terms of their content".[51]

The data was broadly coded from three main bases. The first basis was the research areas themselves.[52] This coding basis allowed data to be extracted on the basis of its subject content.

The second basis of coding was themed findings. These were common (although not universal) threads within responses to the above research areas. These are defined and considered throughout the main discussion in the substantive chapters of this thesis, which are summarised in Section 5.0 below.

The third basis of coding was influential factors – those relating to participant charities which caused notable variations in the above findings. Whilst the "findings" codes are not included here in order to avoid over-simplification of the findings,[53] the influential factors are included in order to illustrate the next stages of the sampling process. These factors were:

- **Charity's size (i.e. income) relative to other charities working in same field**
- **Level of focus on campaigning in relation to other activities**
- **Perceived level of "conservatism" within an organisation or its trustee board**
- **Perceived level of controversy surrounding a specific campaign issue**

These "influencing" themes formed the basis for sampling decisions in the next stage, which further tested their effects and in this way enabled understanding of the links between the research areas and the research findings (above) to be refined.

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[51] *Loc. cit.*

[52] See Section 4.3.4 above and Appendix I.

[53] For further discussion, see evaluation of research design in Appendix III.

4.3.5.3 Relational and variational sampling stage

The next two stages of the sampling strategy involve theoretical sampling. This is a form of purposive sampling. As Glaser and Strauss explain:[54]

> "Theoretical sampling is the process of data collection for generating theory whereby the analyst jointly collects, codes and analyses his data and decides what data to collect next and where to find them, in order to develop his theory as it emerges. This process of data collection is controlled by the emerging theory".

The first of these two theoretical sampling stages is referred to by some authors as the relational and variational sampling stage, in which the researcher "... seeks out those cases or events that help to demonstrate properties and dimensions, and the connections between concepts".[55]

At this stage, potential informants continued to be approached through cold contact, but were selected according to the influencing themes emerging from the open coding stage. The cold contact approach was supplemented by a "snowball" approach to potential informants: potentially relevant organisations mentioned by existing informants were also approached.

Again, background information and the recorded attributes were then used to compile the following descriptions of each charity participating in this stage. The descriptions at this stage also include the reasons for including each charity in the sample.

Charity E

Charity E was a charitable company, with a gross annual income in the financial year ending March 2006 of approximately £3,840,000. It had been registered with the Charity Commission since 1966, and operated throughout England and Wales.

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[54] B. Glaser & A. Strauss, *The Discovery of Grounded Theory*, Aldine (1967), p.45.

[55] G. Payne & J. Payne, *Key Concepts in Social Research*, Sage (2004), p.101.

The interview participant had been with the charity in various roles for approximately five years, and was the charity's Chief Executive at the time of the interview.

This charity was selected in order to further explore one of the factors emerging from the influential coding stage as affecting the findings. This factor was the proportion of the charity's resources currently devoted to campaigning and to other activities. The charities in the first stage had all focused the vast majority of their resources on service provision, and this appeared to have contributed to their attitude towards the law and guidance on campaigning. Charity E deliberately focused a much greater proportion of its resources on campaigning activity than did the charities in the first stage of the study, and was selected in order to observe whether this had a significant affect on its attitude to the legal aspects of the activity.

Charity F

Charity F was a charitable company (previously a charitable trust), with a gross annual income in the financial year ending March 2006 of approximately £219,460,000. It had been registered with the Charity Commission since 1965, and operated throughout England and Wales. The interview participant had been with the charity in various roles for approximately eighteen years, and was the charity's Director of Public Policy at the time of the interview.

This charity was selected in order to further explore one of the factors emerging from the influential coding stage as affecting the findings. This factor was perceived trustee conservatism. The representative of Charity A had indicated that whilst both Charity A and Charity F were large service-providing charities within their particular field, Charity A perceived Charity F's trustees as being much more conservative. This was stated to have affected both Charity F's approach to campaigning and the nature of their campaigning collaborations. Charity F's perspective was thus sought in order to balance the perspectives of the two charities.

Charity G

Charity G was a charitable company (previously an unincorporated association), with a gross annual income in the financial year ending March 2006 of approximately £92,260,000. It had been registered with the Charity Commission since 1969, and operates internationally. The interview participant had been with the charity for seven and a half years, and was the charity's Director at the time of the interview.

This charity was selected in order to further explore one of the factors emerging from the influential coding stage as affecting the findings. This factor was the level of controversy surrounding campaign issues. As Charity G campaigned on some particularly controversial areas, it was selected in order to gain a more detailed insight into how this affected the charity's approach to campaigning.

Charity N

Charity N is a charity incorporated by Royal Charter, with a gross annual income in the financial year ending March 2006 of approximately £92,690,000. It has been registered with the Charity Commission since 1963, and operates throughout England and Wales. The interview participant had been with the charity for eight years, and was the charity's Campaigns Officer at the time of the interview.

This charity was selected because it was the largest member of a campaigning coalition of which several existing study participants were members. This both provided balanced perspectives between charities involved in the same coalition, and enabled further exploration of the remaining (and most notable) factor emerging from the first stage as influencing findings – that of the relative sizes of a charity and those operating in the same field.

The relational and variational sampling stage also included deliberately targeting deviant cases. Deviant cases are those which do not fit into pre-conceptions or the emerging theory. Silverman identifies that researchers must:[56] "overcome any

[56] D. Silverman, *Doing Qualitative Research*, (2nd Edn.) Sage (2005), p.132.

tendency to select a case which is likely to support [their] argument. Instead it makes sense to seek out negative instances as defined by the theory with which [they] are working".

Charity Z

Charity Z was a charitable company, with a gross annual income in the financial year ending March 2006 of approximately £220,000. It had been registered with the Charity Commission since 2003, and operated throughout England and Wales. The charity had been set up as a separate coalition body by a number of charities wishing to campaign collaboratively. The interview participant was employed by one of the charities which had set up the coalition charity, and had been a trustee of Charity Z since its creation.

This charity was selected in order to provide an alternative perspective on campaigning coalitions from an independent coalition body set up by several charities in the form of a charitable company.

Organisation I

This organisation was not a registered charity, but was an independent coalition body set up by several charities in the form of a non-charitable company. This organisation was selected in order to provide a perspective on campaigning coalitions which contrasted both with the general study participant and particularly with Charity Z above.

4.3.5.4 Axial coding stage

The relational and variational stage of sampling is undertaken in conjunction with axial coding. This is where the researcher begins to look for:[57]

> "... relationships between the codes – links and associations that allow certain codes to be subsumed under broader headings and certain codes to be seen as more crucial than others".

[57] *Op. cit.*, p.120.

The links between findings codes and the predominance of some codes are discussed throughout the substantive chapters and drawn together in each chapter's conclusion.

4.3.5.5 Discriminate sampling stage

The final stage of sampling is discriminate sampling, which as Payne and Payne explain, involves:[58] "careful selection of items designed to fill gaps and make final internal comparative tests of the core category".

The final participant charities were selected either to "tie up loose ends" from earlier stages, or they were known to have unique perspectives or specific views on the core category of the debated role of charities in campaigning. They were:

Charity K

Charity K was a charitable company, with a gross annual income in the financial year ending March 2005 of approximately £830,000. It had been registered with the Charity Commission since 1998, and operated throughout the world. The interview participant had been with the charity for four years, and was the charity's Campaigns and Media Officer at the time of the interview. The charity was selected for the study because it co-ordinated a large and unique national campaigning coalition.

Charity M

Charity M was a charitable company, with a gross annual income in the financial year ending December 2005 of approximately £300,000. It had been registered with the Charity Commission since 1996, and operated throughout England and Wales and Europe. The interview participant had been with the charity for approximately one year, and was the charity's Director at the time of the interview. The charity was selected for the study on the same basis as Charity K above.

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[58] G. Payne & J. Payne, *op. cit.*, (2004), p.101.

Charity O

Charity O was a charitable company, with a gross annual income in the financial year ending April 2006 of approximately £293,100,000. It had been registered with the Charity Commission since 1965, and operated outside England and Wales. The interview participant had been with the charity for nineteen years and was the charity's Policy Officer. The charity was selected for the study because it was active in campaigning work and because its representatives had publicly expressed specific views on the role of charities in campaigning.

Charity P

Charity P was a charitable trust, with a gross annual income in the financial year ending March 2006 of approximately £60,300. It had been registered with the Charity Commission since 1982, and operated throughout England and Wales. The interview participant had been with the charity for five years at the time of the interview and was the charity's Director. The charity was selected for the study because, like Charity O, it was active in campaigning work and because its representatives had publicly expressed specific views on the role of charities in campaigning.

4.3.5.6 Selective coding stage

Payne and Payne explain that following axial coding:[59]

> "… an important category is used as a central point around which to explore associated concepts, or 'sub-categories' … The main category is the axis along which this exploration and elaboration takes place …".

The final stage of application of the constant comparative method of coding, which is undertaken in conjunction with discriminate sampling, is selective coding. This:[60] "focuses attention on just the core codes, the ones that have emerged from open and axial coding as being vital to any explanation of the complex social phenomenon".

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[59] G. Payne, & J. Payne, *loc. cit.*, (2004).

[60] *Op. cit.*, p.120.

Following the discussion in the substantive chapters of the range of themed findings together with the links between them and their influencing factors, the main categories are defined and explored in Chapter Seven.[61]

4.3.6 Completion of data collection and coding

The grounded theory approach means that the sample size cannot be determined at the start of the research. This raises the question of when the sampling and interviewing is complete. Given that the aim of the constant comparative procedure (and the grounded theory approach in general) is to identify and explore the relationships between categories, it follows that the research will be complete:[62] "when additional analysis no longer contributes to discovering anything new about a category", referred to as "theoretical saturation". As Payne and Payne explain further:[63]

> "New data no longer add to conceptual density. The core category has been fully refined and could be re-used in other research. This does not imply that all possible situations have been covered, nor that generalisation to other situations is possible on the basis of some statistical process. The sampling has been entirely subordinate to the emergent nature of the core category ...".

It was found that throughout the selective coding stage, the core categories identified were being confirmed and re-emphasized. Whilst potential additional areas of exploration had become apparent, it was relatively easy to draw conclusions based on existing data and to draw limits between the scope of the study itself and areas for future investigation.

The grounded theory approach ultimately aims to produce theory. Whilst it is possible for grounded theory to:[64]

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[61] Section 2.0.

[62] A.L. Strauss, *Qualitative Analysis for Social Scientists*, Cambridge University Press (1987), p.21.

[63] G. Payne, & J. Payne, *op cit.*, (2004), p.102.

[64] K. Charmaz, *Constructing Grounded Theory*, Sage (2000), p.8.

> "reach across substantive areas and into the realm of formal theory, which means generating abstract concepts and specifying relationships between them to understand problems in multiple substantive areas",

most grounded theories are "substantive theories", because:[65] "they address delimited problems in specific substantive areas …". This study aimed to produce substantive theory. In doing so, it aimed to achieve - within its defined topical remit - the following:[66]

> "… for [Glaser and Strauss] a finished grounded theory explains the studied process in new theoretical terms, explicates the properties of the theoretical categories, and often demonstrates the causes and conditions under which the process emerges and varies, and delineates its consequences".

The study's substantive theory is considered in Chapter Seven.

4.3.7 Use of analysed data

Each of the substantive chapters of the thesis (Chapters Two to Six) addresses one or more of the study propositions identified in Section 4.3.1 above. Section 5.0 below outlines the structure and contents of each chapter. In furtherance of the socio-legal basis of the study, each chapter combines initial legal doctrinal or literature-based analysis with analysis of coded extracts of empirical data in the form of quotes from participants. Each chapter thus explores the reality of the law's operation and adds data and an original perspective to information gathered from existing literature.

The different sampling and coding stages outlined above are each explored as follows. The findings codes, the factors which caused them to vary and the links between them are explored through each chapter's main discussion and conclusion.

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[65] *Loc. cit.*

[66] *Op. cit.*, pp.7-8.

The concluding chapter (Chapter Seven) explores them in terms of the core categories and the "substantive theory", as discussed above.

5.0 Thesis contents and structure

Chapter Two considers and critically evaluates case law and Charity Commission guidance relevant to the "rule against politics" and the rules surrounding political activities. It addresses Study Propositions 1-7 above, using data from the empirical study to explore the participant charities' awareness and perceptions of these areas of law and guidance and the potential consequences of contravening them. It also explores whether and to what extent these perceptions cause them to constrain their campaigning activities.

Chapter Three considers and critically evaluates wider areas of domestic law which have a marked effect on charitable campaigning activity. It briefly notes areas of law which may assist campaigning and the range of areas which charities must take into account. The detailed doctrinal analysis focuses on the problematic areas of broadcasting law and criminal laws relevant to public demonstrations and protests. The chapter addresses Study Proposition 8 above using data from the empirical study to explore charities' perceptions and awareness of these areas of law and guidance and the consequences of contravening them.

Chapter Four considers the legal implications of charities involved in collaborative working arrangements specifically in their campaigning activities, and how Charity Commission guidance addresses these issues and their potential implications. The chapter addresses Study Propositions 10 and 11 above, using data from the empirical study to explore charities' perceptions and awareness of the above issues and their potential consequences.

Chapter Five considers potential non-legal constraints on charities' campaigning activities; the advantages and disadvantages of collaborative approaches to campaigning; and how the advantages and disadvantages of collaboration can affect campaigning. To complete the picture of non-legal influences, it also includes

discussions of the indirect effect of the policy environment on campaigning and collaboration. The chapter addresses Study Propositions 9 and 12 above, using empirical data to explore charities' perceptions of the practical advantages and disadvantages of collaborative arrangements and whether they view these factors as affecting any existing issues identified for their campaigning work.

Chapter Six considers the concept of risk management as an approach to addressing the legal, regulatory and practical problems of campaigning and collaboration identified in Chapters Two to Five. It considers both the context and substance of how the approach came to pervade recommendations in Charity Commission guidance. The chapter addresses Study Propositions 14 and 15 above, using empirical data to examine whether the approach is effective in this context and whether it raised any additional issues for the charities in the study.

Chapter Seven concludes the thesis. It first links the conclusions reached in Chapters Two to Six with the study's core categories and substantive theory. It then reconsiders the central study propositions in the context of potential broad directions for reform and considers any current plans for reform and ongoing legal challenges. Finally, it draws conclusions on the current state of collaborative campaigning by charities, noting the implications of the present situation for sector practice and considering how the area is likely to develop in the near future.

CHAPTER TWO: CHARITY LAW AND CAMPAIGNING

1.0 Introduction

This chapter considers the operational impact of the law relating to campaigning[67] by charities. Focusing on the predominant judicial concern with "political objects" and "political activities" rather than with "campaigning" *per se*, it first considers the operation of the rule against political objects and the rules surrounding political activities. Second, it critiques the Charity Commission's guidance in this area, CC9. Third, it examines charities' perceptions of the law and CC9.

Existing commentary on the law relating to charities and politics is extensive.[68] Whilst acknowledging and discussing prior commentary where relevant, the discussion in this chapter does not attempt to replicate its level of detail, particularly as campaigning is only one element of the broader questions addressed in this thesis. Instead, the chapter aims to relate analysis of the law to its impacts in practice.

The law relating to political objects and activities

Chapter One[69] identified a number of study propositions which underpin the substantive chapters of this thesis. Section 2.0 of this chapter addresses the following of those propositions:

1. Existing law relating to charities and political objects is too complex to enable charities that campaign to predict whether and for what reasons their objects will be held to be political and charitable status will be denied.

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[67] See Chapter One, Section 2.2 for consideration of the scope of the term "campaigning".

[68] See footnotes to this chapter and bibliography to the thesis for works considered. Existing commentary is largely critical of the current law; for an exception see S. Swann, 'Justifying the Ban on Politics in Charity' in A. Dunn (ed.), *The Voluntary Sector, the State and the Law*, Hart Publishing (2000).

[69] Section 4.3.1.

4. Existing law relating to political activities by charities is too complex to enable charities to determine the boundaries of acceptable activity or predict consequences of activity with any certainty.

5. The confusion of the boundaries between the rules on political objects and the rules on political activity exacerbates the problems caused by the complexity of the law on political objects.

The analysis in Section 2.0 focuses on illustrating the general level of complexity involved, identifying areas which are problematic or unpredictable, and emphasizing their practical impact. The discussion includes consideration of the impact of human rights legislation on the current rules, and utilizes limited comparative discussion of the case law of other Commonwealth jurisdictions[70] where it assists in explaining or challenging domestic judicial reasoning.

Charity Commission guidance on political objects and activities

If, as the propositions considered in Section 2.0 suggest, the law in this area is complex and uncertain, questions are raised of how well Charity Commission guidance explains it, and of whether the guidance enables at least a degree of predictability to charities. Section 3.0 of this chapter thus analyses the following propositions:

2. Charity Commission guidance focuses on political activities rather than objects, and does not effectively explain the boundaries between political and non-political objects.

6. Charity Commission guidance is not sufficiently clear in explaining the boundaries between acceptable and unacceptable political activities.

[70] For a detailed analysis of the case law of other jurisdictions, see M.J. Smith, *Charities and Politics*, (LLM thesis) University of Liverpool (2006), Chapter Three. See also P. 6 & A. Randon, *Liberty, Charity and Politics: Non-Profit Law and Freedom of Speech*, Dartmouth (1995).

Section 3.0 thus considers with what degree of clarity relevant Commission guidance explains the law in this area. Section 3.1 briefly considers the latest version of the guidance as a whole, prior to a discussion of its merits and detractors in relation to objects (Section 3.2) and activities (Section 3.3). The section also notes the emphasis placed by the guidance on risk management. This issue forms the basis of several discrete research propositions, identified in Chapter One[71] and addressed explicitly in Chapter Six.

Consequences of improper political activity for existing charities

Whereas Section 2.2 considers the potential for loss of charitable status where political activities are used to determine true objects or charitable status, Section 4.0 considers potential consequences for charities and their trustees where such activities are instead held to constitute a breach of trust. It examines informal action by the Charity Commission; powers of the Commission to institute inquiries; and legal proceedings instituted by the Attorney-General, the Charity Commission and other persons. It also considers the remedies for breach of trust available to the Charity Commission as regulator and available through the High Court.

Sector perspectives on law and guidance

Section 5.0 considers literature-based evidence of current perspectives within the charity sector on law and guidance relating to charities and politics. It examines the views of some within the sector that the law relating to political objects and activities is fundamentally flawed, and notes the range of viewpoints on the updated version of Charity Commission guidance CC9. It also considers calls for reform to both law and guidance published during the final stages of this thesis.

Charities' experiences of the law and guidance on politics

Section 6.0 of this chapter builds on the theoretical analyses contained in the previous two sections, and addresses the following study propositions:

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[71] Section 4.3.1.

3. The *perception* of the likelihood of objects being held to be political (and the perceived likelihood or severity of the consequences of this) may be greater among charities that campaign than generally occurs in practice.

7. The *perception* of the likely legal consequences of excessive political activity may be greater amongst charities than generally occurs in practice.

As this section utilises the results of the empirical study, the analysis is based upon operational research areas which draw together several of the exploratory research propositions into more concrete statements capable of forming the basis of an interview guide.[72] The operational research areas considered in this section are:

a) Charities' perceptions of the existing law on political objects and activities, including their awareness of it; their strategies for compliance; their perceptions of its complexity and the likelihood or severity of the consequences of contravening it.

b) Charities' use of Charity Commission guidance on campaigning (i.e. CC9 and any other guidance which makes reference to the practice); the clarity and usefulness of the guidance (if used); and the effects (e.g. encouragement or constraint) of charities' understanding of the law and guidance on their campaigning activity.

Section 6.1 examines the awareness and understanding of the law regarding charities and politics demonstrated by charities in the study. Sections 6.2 and 6.3 respectively examine the charities' use of Commission guidance and their perceptions of its usefulness, whilst Section 6.4 and 6.5 consider their perceptions of the consequences of contravening the law and their strategies for compliance. Section 6.6 considers the overall effect of the above on charities' campaigning activities.

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[72] See Chapter One, Section 4.3.4 and Appendix I of this thesis.

Section 7.0 returns to the seven study propositions on which the chapter is based, drawing conclusions on both the theoretical problems of the law relating to political objects and activities, and on the impact of the law and of relevant Charity Commission on charities in practice.

2.0 Political Objects and Activities

Section 2.1 considers Proposition 1 above, focusing solely on political objects. Section 2.2 considers Propositions 4 and 5 above, focusing on how political activities can affect the determination of objects and charitable status.

2.1 Political objects

Section 2.1 considers the rule against political objects in isolation. It considers how political objects are determined where the stated objects are the only matter under consideration, i.e. where there are no prior or proposed political activities, which, in circumstances discussed later, may influence the determination of objects.

The rule considered in isolation is most relevant to new organisations which wish to be registered as charities, and which have only their stated objects as evidence of their true aims. Such organisations may be refused registration if their objects involve a "political" element which is deemed to form the main purposes of the organisation. Before attempting registration as a charity, those in control of such an organisation will obviously need to understand how the Charity Commission and the courts will determine its main purposes, and what factors may result in a determination that its objects are "political".

Prior to the main discussion of the "rule against politics", preliminary consideration of two particular complicating factors is necessary.

2.1.1 Changes over time

Given that the judicial definition of "political objects" discussed below includes, *inter alia*, attempting to secure changes in the law or government policy, it is clear that what counts as "political" will change over time as laws and policies change.[73] The impact of changes in the law in this area is illustrated by the treatment of objects which promote good race relations. Whilst such objects were held to be political and not charitable by the High Court in 1949,[74] they have been deemed charitable by the Charity Commissioners since 1983.[75] This change followed the passing of legislation on the subject,[76] resolving the question of public benefit. However, the most notable formerly political purpose now accepted as charitable is the promotion of human rights. This also provides an illustration of the interaction between changes in the law and the rule against politics.

The promotion of human rights (in the sense of rights protected under the European Convention) ceased to be political when these rights were incorporated into domestic law by the Human Rights Act 1998, and could thus be assumed from that point onwards to be for the public benefit. However, as the Charity Commission identifies:[77]

> "... strictly speaking, promoting respect for the Convention rights ceased to be a political purpose in 1966, when the United Kingdom accepted the right of individual petition to the European Commission of Human Rights and recognised the compulsory jurisdiction of the European Court of Human Rights. From that date, no further change of law or policy was necessary to enable individual citizens to enforce their Convention rights".

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[73] It is clear, however, that the political or otherwise nature of a potential charitable trust will be determined at the time the gift is made. This rule will operate regardless of any subsequent changes in the law which could render an object non-political. See *Re Bushnell* [1975] 1 All ER 721, in which the object of the testator's will, to promote socialized medicine, ceased to be political with the introduction of the National Health Service, but was refused charitable status as was held to be political when the trust was declared.

[74] *Re Strakosch* [1949] Ch 529.

[75] [1983] Ch Com Rep 10-11 paras.15-20.

[76] Race Relations Act 1976.

[77] Para.7 of the March 2003 version of guidance *The Promotion of Human Rights* (RR12), which preceded the current version. Despite this fact, it should be noted that prior to the 1998 Act, citizens had no recourse in the domestic courts, but would have to petition Strasbourg to enforce their rights.

The Charity Commission further stated that it considered the "promotion of, observance of, and respect for, the Convention rights in the United Kingdom" to be charitable, by analogy with trusts for the enforcement of the law.[78] The acceptability of the advancement of human rights as a charitable purpose *per se* has now been given statutory basis through its inclusion in the definition of "charitable purpose" in the Charities Act 2006.[79]

Section 2(5) of the 2006 Act preserves particular meanings under existing charity law of any terms used within the descriptions of purposes in Section 2(2). Under existing charity law, "human rights" as defined by the Human Rights Act (HRA) 1998[80] can clearly be charitable. However, the question is raised of how wider definitions of "human rights" than are contained in the Convention fare, given the existence of the rule against politics.

The Commission advises that organizations promoting human rights in a wider sense than that contained in the Convention need to show that the promotion of human rights as the organization defines it is analogous to an existing charitable purpose and is for the public benefit.[81] The Commission states that it will[82] "take a constructive and imaginative approach, adapting the concept of charity to meet constantly evolving social needs", and notes that[83] "the well-established charitable purpose of promoting the moral or spiritual welfare and improvement of the community provides a sufficient (but not the only) analogy for treating the promotion of human rights generally as charitable".

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[78] *Op. cit.*, para.8.

[79] Section 2(2)(h): "the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity".

[80] The HRA (s.1 and sch.1) sets out the rights which are to have effect under the Act. These are those rights contained in Articles 2-12, 14 and 16-18 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Articles 1-3 of the First Protocol to the Convention; and Article 1 of the Thirteenth Protocol to the Convention.

[81] Charity Commission, *The Promotion of Human Rights* (RR12) TSO (2005), para.6.

[82] *Op. cit.*, para.7.

[83] *Op. cit.*, para.8.

Charities promoting human rights in foreign countries present a slightly more complex scenario. The Commission's approach has been that organisations wishing to register must fulfil the same criteria as charities operating domestically. Thus, they must be capable of being charitable if their operations were confined to the UK.[84] This approach was supported in *Re Carapiet's Trust*.[85] In that case, Jacob J decided that once an organisation operating abroad satisfied the above test, it would be presumed to be charitable unless this was contrary to public policy.[86] The Charity Commission's 2005 revision of RR12 clarified the acceptability of charities promoting human rights in countries without existing human rights legislation.[87]

2.1.2 Ancillary objects

If an organisation's governing instrument contains several purposes, all of those purposes must, under general charity law, be wholly and exclusively charitable.[88] However, where stated objects have been found to be the "ancillary" means of achieving an organisation's main objects, trusts have been held charitable.[89] In the present context of "political" objects, this rule has proved difficult to apply.

The complicating effect of the "ancillary" rule is considered briefly here, prior to the main discussion of "political" objects, which, for clarity, excludes questions of "ancillary" objects.

In *Re Scowcroft*[90] a trust to maintain a reading room in a Conservative Club for "the furtherance of Conservative principles and religious and mental improvement and

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[84] See [1993] 1 Ch Com Dec p.17.

[85] [2002] EWHC 1304, para.17.

[86] The second aspect of Jacob J's decision was supported by a previous decision of the Court of Appeal, *Camille and Henry Dreyfus Foundation Inc v Inland Revenue Commissioners* [1954] Ch 672, aff. by the House of Lords [1956] AC 39.

[87] Charity Commission, *The Promotion of Human Rights* (RR12) TSO (2005), para.15. See *Third Sector* magazine, 23 June 2004, pp.4, 17 for comment on potential reaction of human rights charities.

[88] *Morice v Bishop of Durham* (1805) 10 Ves 522 at 539-40 (Lord Eldon LC). For general discussion of this area see P. Luxton, *The Law of Charities*, OUP (2001), Chapter Six.

[89] *Incorporated Council of Law Reporting for England and Wales v Att-Gen* [1972] Ch 73 at 84c: "purposes merely ancillary to a main charitable purpose, which if taken by themselves would not be charitable will not vitiate the claim of an institution to be established for purposes that are exclusively charitable". See H. Picarda, *The Law and Practice Relating to Charities*, (3rd Edn.) Butterworths (1999), p.182.

[90] [1898] 2 Ch 638.

to be kept free from all intoxicants and dancing" was held to be charitable. This finding depended upon the word "and"; a substitution of the word "or" would have meant that the gift could have been applied exclusively for political (and hence non-charitable) purposes. The ruling was followed in the Court of Appeal in *Re Hood*,[91] where a gift to "advance the Christian religion and ultimately to extinguish this enemy of my country's welfare" was made. As the "enemy" was alcohol, the trust was partially aimed at promoting temperance. The Court of Appeal held that the temperance aim was ancillary to the charitable object of advancing the Christian religion. However, as Picarda points out, *Re Scowcroft* has been judicially criticised[92] and is of "doubtful authority".[93]

By contrast, in *IRC v Temperance Council*,[94] a temperance object was held not to be charitable, as the Temperance Council's purpose of "united action to secure legislative and other temperance reform" was clearly the promotion of temperance through securing changes in the law, and was thus political. The *Temperance Council* case was followed in the Tasmanian case of *Re Cripps*,[95] in which a gift to the Prohibition League of Tasmania, the main object of which was "the abolition of the traffic in intoxicating beverages" through "education, legislation and adequate law enforcement" was held void, as the main purpose of the League (evident from its name) was to alter the law. This could not be construed as ancillary to the other purposes.

Later applications of the "ancillary" rule illustrate one of the main difficulties in this area of law. This difficulty is that when dealing with the rules relating to charities and politics, the courts purport to distinguish "ends" and "means". At the same time, they fail to clarify the distinction between the two concepts and – particularly

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[91] [1931] 1 Ch 240, and by the Privy Council in *Tribune Press v Punjab Tax Comr* [1939] 3 All ER 469.

[92] In *Bonar Law Memorial Trust v IRC* (1933) 49 TLR 220.

[93] H. Picarda, *The Law and Practice Relating to Charities*, (3rd Edn.) Butterworths (1999), p.170. See also L.A. Sheridan, *Keeton & Sheridan's The Modern Law of Charities*, (4th Edn.) Barry Rose (1992), p.35, which states, with regards to the deliberations of Stirling J at 641, that: "amusement at those convolutions should not be allowed to obscure the fact that they are wrong".

[94] (1926) 136 LT 27.

[95] [1941] Tas SR 19. A similar conclusion was reached in the New Zealand case of *Knowles v Stamp Duties Comr* [1945] NZLR 522.

when applying the "ancillary" rule - display a tendency to use the two terms interchangeably. This tendency is considered next.

In the case of *Yorkshire Agricultural Society*,[96] the society in question had objects for the general promotion and improvement of agriculture, which included "... watching and advising on legislation affecting the agricultural industry". Atkin LJ, holding the objects of the society to be charitable, stated that:[97]

> "It is said that if that stood by itself, it plainly would not be a charitable purpose; and I can imagine that a society which was formed solely for the purpose of watching and advising on legislation affecting agriculture would not be a society formed for a charitable purpose. But that does not seem to me at all to affect that matter. It is perfectly consistent with the main object of the Society being one for the promotion of agriculture generally, that in order to carry out its object it should watch and advise on legislation affecting agriculture. Supposing a society formed for the admittedly charitable purpose of promoting education, or of promoting the relief of the sick and poor, *it appears to me impossible to suggest that it might not be well within the charitable objects of such a society to watch and advise on legislation*, in the one case affecting education and in the other affecting the relief of the sick and poor. Therefore, in my opinion there is no reason for picking at that particular object so defined as being something so inconsistent with the main charitable purpose to amount to something different, so that there are two purposes and not one (emphasis added)".

The "ancillary" principle was also explored by Lord Normand in *National Anti-Vivisection Society v Inland Revenue Commissioners*,[98] in which the Lords found that they could not construe the (political) object of altering the law as merely ancillary to a charitable object. Lord Normand stated that:[99]

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[96] [1928] 1 KB 611.

[97] *Ibid.* at 632.

[98] [1948] AC 31.

[99] *Ibid.* at 76.

"A society for the prevention of cruelty to animals, for example, may include among its professed purposes amendments of the law dealing with field sports or with the taking of eggs or the like. Yet it would not, in my view, necessarily lose its right to be considered a charity, and if that right were questioned, *it would become the duty of the court to decide whether the general purpose of the society was the improvement of morals by various lawful means including new legislation, all such means being subsidiary to the general charitable purpose*. If the court answered this question in favour of the society, it would retain its privileges as a charity. But if the decision was that the leading purpose of the society was to promote legislation in order to bring about a change of policy towards field sports or the protection of wild birds it would follow that the society should be classified as an association with political objects and that it would lose its privileges as a charity. The problem is therefore to discover the general purposes of the society and whether they are in the main political or in the main charitable. It is a question of degree of a sort well-known to the courts" (emphasis added).

As illustrated by the italicised portions of the above judgements, it appears that in the view of the courts, a charity's stated object can include both purposes (ends) and the means to achieve those ends. It also seems that the "ancillary rule" can refer to either "ends" which are ancillary to other "ends", or specified "means" which are ancillary to the charity's "ends".

Apart from making the "ancillary rule" difficult to apply, this lack of conceptual distinction between ends and means has implications for the operation of the whole body of rules relating to charities and politics.[100] It causes particular difficulties where the courts are trying to decide if an object which sways public opinion on an

[100] For comment on the ends/means distinction, see A. Dunn, 'Charity Law as a Political Option for the Poor', 50(3) *NILQ* 298, p.306; C.J. Forder, 'Too Political to be Charitable?', [1984] 48 *Conv* 263, pp.269-271.

issue implicitly "involves" attempting to change the law[101] and where the courts are using an organization's activities to determine its objects.[102]

In the case of *Re Bushnell*,[103] Goulding J accepted the ancillary principle,[104] stating that: "a certain degree of mingling or association with a political object is by no means fatal to a primary object that is clearly charitable in law". However, he acknowledged the difficulties of the principle, observing (with reference to Lord Normand's statement above), that: "a test propounded in such general terms is, perhaps, easier to state than to apply". It is certainly evident from a number of decided cases that judging what is an independent political object rather than an ancillary purpose is extremely difficult.[105] Some guidance may be taken from the dicta of Santow J in the Australian case of *Public Trustee v Attorney General of New South Wales*,[106] who stated that much depends on:

> "... whether an object to promote political change is so pervasive and predominant as to preclude its severance from other charitable objects or subordinate them to a political end".

In the context of this chapter, the relevant point to be made regarding the ancillary rule is that it is one factor which makes it difficult for aspiring and existing charities with political elements to predict how the courts will view their objects. The difficulties caused are particularly apparent when the more pervasive complications of this area of law are considered. Apart from potentially contending with the vaguely defined concept of "ancillary" political purposes, charities are faced with broad and open-ended definition for the term "political object" itself. The range of

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[101] Considered in Section 2.1.3.2 below.

[102] Considered in Section 2.2.1 below.

[103] [1975] 1 All ER 721, 729 per Goulding J. See also *Re Jenkins' Will Trusts* [1966] Ch 249.

[104] Citing *Re Scowcroft* [1898] 2 Ch 638 and *Re Hood* [1931] 1 Ch 240.

[105] The situation is somewhat clearer if the organization is established as a company with independent objects clauses (a "*Cotman v Brougham* clause": *Cotman v Brougham* [1918] AC 514); such objects cannot be treated as ancillary to others (see *Tennant Plays Ltd v IRC* [1948] 1 All ER 506 at 511; *Oxford Group v Inland Revenue Comrs* [1949] 2 All ER 537).

[106] (1997) 42 NSWLR 600 at 621. See also *Re Inman* [1965] VR 238.

such proscribed objects and the courts' formulation of them will thus be discussed next.

2.1.3 Political Objects: Securing Changes in the Law

2.1.3.1 Explicitly

Whilst "party" political objects are the most obviously "political" type of objects, the "securing changes in the law" aspect of the term "political" was the subject of discussion in the leading cases on the "rule against politics". This aspect will therefore be considered first.

In *Bowman v Secular Society*[107] Lord Parker gave some examples of express political objects:[108]

> "... the abolition of religious tests, the disestablishment of the Church, the secularization of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath, are purely political objects. Equity has always refused to recognize such objects as charitable".

However, in the context of the case, Lord Parker made it clear that he was referring to the term "political objects" in the sense of securing changes in the law, stating that[109] "... a trust for the attainment of political objects has always been held invalid".

Whilst trusts to promote the *enforcement* of existing laws may be charitable,[110] the *Bowman* principle has been extended to encompass trusts for the promotion of the *maintenance* of existing laws, or in other words, trusts which attempt to prevent

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[107] [1917] AC 406.

[108] *Ibid.* at 442.

[109] *Ibid.* See also *Inland Revenue Commissioners v Temperance Council of The Christian Churches of England and Wales* (1926) 10 TC 748, in which the main object of the Council was held to be to effect changes in the law, and thus charitable status was denied.

[110] See *Re Herrick* (1918) 52 ILT 213, in which a trust to promote prosecutions for cruelty to animals was held to be charitable. See also *Re Vallance* (1876) 2 Seton's Judgements (7th ed) 1304; *Public Concern at Work* [1993] 2 Decisions 5, 10, in which the Charity Commission accepted that the promotion of compliance with the law was charitable under the fourth *Pemsel* head by analogy with trusts to enforce the law.

particular laws from being changed. Referring to Lord Parker's statement in the *Bowman* case regarding the courts' lack of means of assessing whether a change in the law is for the public benefit,[111] Vaisey J in *Re Hopkinson* said:[112]

> "I venture to add as a corollary to that statement that it would be equally true to apply it to the advocating or promoting of the maintenance of the present law, because the court would have no means in that case of judging whether the absence of a change in the law would or would not be for the public benefit".

The *Bowman* principle and extensions to it such as that in *Re Hopkinson* have also been applied in some of the decisions of courts in other commonwealth jurisdictions. In *Molloy v Commissioner of Inland Revenue*,[113] for example, an object opposing a change in statutory provisions relating to abortion was held by the New Zealand Court of Appeal to be political and could not therefore be charitable.

However, the principle has not been upheld in other Commonwealth courts "with the same certainty".[114] An example is *Public Trustee v Att-Gen of New South Wales*[115] in which Santow J took the view that a purpose directed to change the law in a direction that the law is already going, in particular if reinforced by Treaty obligations, should be charitable.[116]

Further signs of uncertainty over the principle were apparent in *Re Collier (Deceased)*.[117] Whilst the *Bowman* principle was upheld, Hamilton J took the view that a court could recognise an issue of worthy of debate even though the outcome

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[111] *Bowman v Secular Society* [1917] AC 406 at 442.

[112] [1949] 1 All ER 346 at 350.

[113] [1981] 1 NZLR 688.

[114] J. Warburton, *Tudor on Charities*, (9th Edn.) Sweet & Maxwell (2003), p.67.

[115] (1997) 42 NSWLR 600 at 619.

[116] See also G.F.K. Santow, 'Charity in its Political Voice: A Tinkling Cymbal or a Sounding Brass?', (1999) *CLP* 255; M.J. Smith, *Charities and Politics*, (LLM thesis) University of Liverpool (2006), pp.44-51; C.E.F. Rickett, 'Politics and cy-pres', *NZLJ*, February 1998, p.55.

[117] [1998] 1 NZLR 81.

of the debate could lead to a change in the law.[118] This may signify a potential future shift in judicial attitudes towards accepting the public benefit of *advocacy* of changes in the law.[119]

2.1.3.2 Implicitly

The "securing changes in the law" aspect of the rule against politics is made more complex by the courts' willingness to find attempts to secure changes in the law or government policies etc. within objects which do not explicitly state such an intention. If an object "involves" persuading the public to lobby Parliament or exert pressure on the government, the objects will be political even if the subject matter of the purpose is recognised as charitable.[120]

Luxton's analysis of the courts' approach to this area[121] distinguishes between cases where the objects are simply promoting causes (which are capable of attaining charitable status if they are existing or analagous charitable purposes under the fourth *Pemsel* head and are for the public benefit), and cases where the object in question promotes a "theory or attitude that *involves* seeking a change in the law or … a change in government policy" (emphasis added).[122] As Luxton states regarding the latter:[123]

> "such an object, which can be termed 'political propaganda', might be directed either at Parliament or the government directly, or indirectly through trying to influence public opinion so that the public itself is encouraged to agitate for such a change".

Modern case law thus treats such objects as political and therefore not charitable.

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[118] *Ibid.* at 90. Similarly, in the Australian case of *In Estate of Cole (deceased)* (1980) 25 SASR 489, it was held that an object can be construed as educational even if, as a result of the educational programme, the law may be changed.

[119] This is considered further in Chapter Seven, Section 3.1.1.

[120] *Animal Defence and Anti-Vivisection Society v IRC* (No. 2) (1950) 66 (Pt. 2) TLR 1091 at 1094-5. See L.A. Sheridan, 'Charity versus Politics', (1973) 2 *A-ALR* 47, p.51 for discussion.

[121] P. Luxton, *The Law of Charities*, OUP (2001), p.225 (paras.7.12 – 7.13).

[122] *Loc. cit.*

[123] *Loc. cit.*

Whilst this analysis does seem to reflect the various outcomes taken in the decided cases discussed below, the decisions of the courts - or at least their explicit rationales - have been somewhat inconsistent,[124] and it is often difficult to determine precisely the grounds on which the promotion of a cause to the public is considered to "involve" securing a change in the law. This extension of the rule further illustrates the problems with distinguishing "ends" from "means", as discussed above.[125]

In the *National Anti-Vivisection Society* case,[126] Lord Porter (dissenting) thought that only if a change in the law was the *only way* of achieving an organization's main aim should the object be classed as political. He stated:[127]

> "It is in the narrower sense in which I think the phrase 'purely political objects' is rightly used, i.e., as applicable to objects whose only means of attainment is a change in the law. I cannot accept the view that the anti-slavery campaign or the enactment of the Factory Acts or the abolition of the use of boy labour by chimney-sweeps, would be charitable so long as the supporters of these objects had not in mind or at any rate did not advocate a change in the laws, but became political and therefore non-charitable if they did so. To take such a view would to me be to neglect substance for form".

Luxton argues[128] that whilst Lord Simonds did not agree that the expression "political objects" should be confined in the manner suggested by Lord Porter, and that Lord Simonds' opinion appears to be that of the majority, the majority judgements may not necessarily have been disagreeing with Lord Porter's general view. This argument is based on the fact that if the majority had not viewed the

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[124] See Chapter Seven, Section 3.1.1 for discussion of the rule's rationales.

[125] At Section 2.1.2.

[126] [1948] AC 31.

[127] *Ibid.* at 55. Notably, this statement can also be viewed as a precursor to the promotion of fundamental human rights as a charitable purpose (considered above at Section 2.1.1).

[128] P. Luxton, *The Law of Charities*, OUP (2001), p.224 (paras. 7.09 and 7.10).

Society's particular objects as directly attempting to change the law, it seems that they would have been prepared to base their judgement solely on their determination of public benefit.

The questions so far answered in a contradictory (and thus unsatisfactory) manner by the courts are as follows: if an object attempts to sway public opinion on an issue, the promotion of which is not an existing charitable purpose, but does not explicitly state that this is an attempt to persuade the public to press for some change in law or policy etc., on what basis should it be implied that the object is political? Does the achievement of the underlying aim need to be in practice *only* achievable by a change in the law?[129] Alternatively, does a change in the law merely need to be the *best*, or a *likely* or *possible* way of achieving it?[130]

Whether their Lordships in the *National Anti-Vivisection Society*[131] case intended to construe the principle in *Bowman*[132] broadly as applying to all purposes which - even implicitly – *aim* for a change in the law, or whether their intention was in keeping with Lord Porter's narrower proposition[133] that the *Bowman* principle should be restricted to those purposes which can *only* be achieved by a change in the law, it is apparent that a number of later cases have taken a broad approach to the interpretation of this aspect of the rule. The broadest interpretations appear to have moved completely away from determining that objects are "political" in the original sense outlined above of (either explicitly or implicitly) attempting to change the law etc. The courts have been prepared to determine that objects which ostensibly just promote attitudes of mind to the public are political. The bases of these determinations do not fit easily with the original rationales for the political disqualification rule.[134] As this aspect of the rule takes it outside the boundaries of "securing changes in the law", and into "issues of public interest", the discussion of

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[129] As suggested by Lord Porter in the *National Anti-Vivisection Society* case, see Fn. 127 above.

[130] As in *Re Strakosch* [1949] Ch 529 and *Buxton v Public Trustee* (1962) 41 TC 235, both considered below at Section 2.1.5.4.

[131] [1948] AC 31.

[132] [1917] AC 406.

[133] [1948] AC 31 at 55 (dissenting).

[134] Considered in Chapter Seven, Section 3.1.1.

such determinations is resumed below[135] in the discussion of the latter aspect of the rule, following the remainder of the analysis of the more concrete aspects of the rule.

Extension of "legislative changes" rule

In *Re Hopkinson*, Vaisey J extended the rule against politics to government policy with the following statement:[136]

> " ... the testator's object here was plainly to secure, not necessarily a certain line of legislation, but a certain line – and a perfectly proper and permissible line from the point of view of those who advocate it – of political administration and policy. Applying those cases and the principles which they enunciate to the best of my ability, I have come to the conclusion that I am bound to answer the question as to the validity of this particular trust in the negative".

This extension is reflected in the case law of other commonwealth jurisdictions, notably in the case of *Re Wilkinson (deceased)*,[137] in which charitable status was denied to a gift to the League of Nations Union of New Zealand, on the basis that:[138]

> "... a purpose that the central executive authority be induced to act in a particular way in foreign relations or that the people be induced to accept a particular view or opinion as to how the central executive shall act in the foreign relations of this country is, in the broadest sense, a political purpose".

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[135] At Section 2.1.5.

[136] [1949] 1 All ER 346 at 352.

[137] [1941] NZLR 1065.

[138] *Ibid.* at 1077.

In *McGovern v Attorney-General*[139] the political objects identified in previous cases were summarized by Slade J, and extended to changing the law or government policy of foreign jurisdictions:[140]

> "[t]rusts for political purposes falling within the spirit of this pronouncement include, inter alia, trusts of which a direct and principal purpose is either (i) to further the interests of a particular political party; or (ii) to procure changes in laws of this country; or (iii) to procure changes in the laws of a foreign country; or (iv) to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or (v) to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country".

It should be noted that Slade J specified that he did not intend the above categorisation to be exhaustive.[141]

Difficulties in defining "government policy" and the interaction between law and government policy have been identified by Santow J (writing extra-judicially), who asks:[142]

> "Consider what happens when the executive desires to change the law, but there is legislative unwillingness to bring that change about, such as where an upper house will not cooperate. Is a trust directed towards such legislative change *against* the policy of the law? ... And what of a treaty adopted with no domestic legislation enacting its consequences? Is there then *any* policy of the government in such a case, and, if so, what is it?".

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[139] [1982] Ch 321. For general criticisms of the *McGovern* decision, see C.J. Forder, 'Too Political to be Charitable?', [1984] 48 *Conv* 263; T.G.Watkin's casenote: [1982] 46 *Conv* 387; C.E.F. Rickett, 'Charity and Politics', (1982) 10 *NZULR* 169; R. Nobles, 'Politics, Public Benefit and Charity', [1982] 45 *MLR* 704; F. Weiss, 'Quot Homines Tot Sententiae or Universal Human Rights: A Propos McGovern v Attorney General', [1983] 46 *MLR* 385.

[140] [1982] Ch 321 at 340.

[141] *Ibid.*

[142] G.F.K. Santow, 'Charity in its Political Voice: A Tinkling Cymbal or a Sounding Brass?', (1999) *CLP* 255, p.279.

These questions have not been satisfactorily answered by existing authority.

2.1.4 Party Politics

As mentioned earlier,[143] the most obviously "political" objects in the commonly understood sense of the word are those which promote particular political parties.[144] The principle proscribing organizations with such objects from attaining charitable status was first clearly espoused in *Re Jones*,[145] in which a gift of land "to the Primrose League of the Conservative cause to be used as a habitation in connection with the league or in a manner which will benefit the cause" was denied charitable status and held void. Similarly, in *Re Ogden*,[146] a trust promoting Liberal principles was held not charitable.

In the Commonwealth, the Australian case of *Royal North Shore Hospital of Sydney v Att-Gen for New South Wales*[147] upheld the principle that to support a political party cannot be a charitable purpose, as did *Bacon v Pianta*[148] in which a gift to the Communist Party of Australia for its sole use and benefit was held void. Whilst this principle has therefore been clearly applied both in domestic and other Commonwealth jurisdictions, the boundary between "political" and "charitable" is less clearly determinable where the trusts are ostensibly for *education*, but relate to political matters.

Distinguishing "party political" objects and "political education" objects

Trusts for genuine education in political matters can be charitable, but to be considered genuinely educational they need to include discussion of a variety of political opinions. In *Att-Gen v Ross*[149] a student union formed for the charitable

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[143] Section 2.1.3.1.

[144] See Chapter Seven, Section 3.1.1 for discussion of historical situation in relation to such objects.

[145] (1929) 45 TLR 259.

[146] [1933] Ch 678. See also [1982] Ch Com Rep 15-17, paras.45-51, in which an organisation operating under the name *Youth Training* was held to exist for the promotion and assistance of the aims of the Workers' Revolutionary Party.

[147] [1938] 60 CLR 396 at 426.

[148] [1966] ALR 1044.

[149] [1986] 1 WLR 252 at 263.

purpose of furthering the educational function of a polytechnic, promoted the development of political awareness and opinions amongst the polytechnic's students. Scott J held that this practice was in keeping with the charitable education purpose.[150] In *Re Trusts of the Arthur MacDougall Fund*,[151] a trust for the education of the public in political matters and forms of government was held to be charitable even though the trustees were required to hold a particular political view, as regardless of their own views, the trustees were bound to adhere to the terms of the trust.

Conversely, in *Bonar Law Memorial Trust v IRC*[152] a trust with an object, among others, to use the property "for the purposes of an educational centre or college for educating persons in economics, in political and social science, in political history, with special reference to the development of the British Constitution and the growth and expansion of the British Empire, and in such other subjects as the governing body may from time to time deem desirable" was held not charitable on construction of the trust instrument. The court held that under the terms of the trust, the governing body had the discretion to provide "education" which in truth amounted to propaganda of the Conservative party.

In *Re Hopkinson*[153] a trust ostensibly for adult education but based upon the Labour Party's memorandum "A Note on Education in the Labour Party" was held not to be charitable by Vaisey J, who stated that:[154] "Political propaganda masquerading – I do not use the word in any sinister sense – as education is not education within the Statute of Elizabeth … In other words, it is not charitable." In the course of his judgement, however, he did discuss the question of whether the memorandum was merely guidance, or whether it was integral to the trust, thus illustrating the

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[150] However, see discussion of the potential policy reasons behind the decision in this case at Section 2.2 below.

[151] [1957] 1 WLR 81.

[152] (1933) 49 TLR 220.

[153] [1949] 1 All ER 346.

[154] *Ibid.* at 350.

difficulty faced in many cases of distinguishing between genuine political education and political propaganda, and between main and ancillary objects.[155]

A more recent case ostensibly decided in a similar way, but relating to a broader political doctrine rather than a particular party, was *Re Bushnell*.[156] The case involved a trust for "the advancement and propagation of the teaching of Socialised Medicine". Goulding J framed his decision in the following manner:[157]

> "I am quite unable to avoid the conclusion that the main or dominant or essential object is a political one. The testator never for a moment, as I read his language, desired to educate the public so they could choose for themselves, starting with neutral information, to support or oppose what he called 'socialised medicine'. I think he was trying to promote his own theory by education, if you will by propaganda ...".

The "one-sided" nature of the objects of the trust meant that the court was quite correct in refusing to view them as education in political matters, as education must be balanced rather than an attempt to persuade. However, it can equally be argued that the objects did not involve the promotion of party politics within the definition of "political objects" developed in charity law. The teaching of broad political theories appears to fall conceptually somewhere between the promotion of a political party (which is clearly unacceptable in charity law) and the promotion of a particular attitude of mind (which is potentially acceptable[158] under the fourth *Pemsel*[159] head of "other purposes beneficial to the community"). From a philosophical perspective, it is difficult to see where one begins and the other ends. There is thus a strong argument that the question of the trust's charitable status should have been determined on the basis of whether it was charitable under the

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[155] See discussion of ancillary purposes, Section 2.1.2 above.

[156] [1975] 1 All ER 721. The case was applied by the Charity Commissioners in relation to *Commonwealth Magistrates Association* [1975] Ch Com Rep 20-21, paras.63-64.

[157] [1975] 1 All ER 721 at 729. This has now become the general test for holding objects to be implicitly political.

[158] See Section 2.1.5 below.

[159] *Comrs for Special Purposes of the Income Tax v Pemsel* [1891] AC 531.

fourth *Pemsel*[160] head, rather than through the stretching of the concept of "political" outside the scope of the term laid down by earlier authorities. The implications of the courts' tendency to artificially stretch the concept of "political" is discussed further in the next section.

2.1.5 Issues of public interest

The situation becomes increasingly complex where the main object of a trust does not relate to political doctrines, but to issues of public interest. These may be described in a non-legal context as broadly "political" in the sense that they are issues of public concern, and importantly in this context, in the sense that they may be the subject of the policies of political parties and of government policy.[161]

The charity law definition of "political" developed primarily in the *National Anti-Vivisection Society*,[162] *Bowman*[163] and *McGovern*[164] cases is narrower than the non-legal, commonly understood meaning of the word. Nevertheless, later cases appear to have extended the scope of the definition, although they have not done so explicitly, nor provided reasons for doing so. These cases, which are considered next, are unclear both on where the boundaries between "political" and "non-political" lie, and on why, given the rationale of the authorities they depend upon, they should have moved the boundaries at all.

As this chapter aims to illustrate the practical implications of the law's complexity, this part of the analysis, which relates to one of the most complex developments in this area, will be approached in terms of four hypothetical (main) objects.[165] Each of these objects concerns specific viewpoints on an issue of public interest. Whilst the issue itself is immaterial, the aim is to illustrate how the manner in which the

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[160] *Ibid.*

[161] The *Oxford Dictionary of English* (2nd Edn.) defines "political" as: "of or relating to the government *or public affairs* of a country" [emphasis added].

[162] [1948] AC 31.

[163] [1917] AC 406.

[164] [1982] Ch 321. See Section 2.1.3 above for discussion of these three cases.

[165] For clarity, the discussion disregards the potential for questions of "ancillary" political purposes.

objects approach the issue affects the operation of the rule against politics. The hypothetical objects are:

- first, where the objects are to provide education on or to conduct research into a issue of public interest and/or a viewpoint relating to it;
- second, where the objects are to sway public opinion or promote an attitude of mind to the public, on an issue of public interest which falls within the subject matter of recognised charitable purposes;
- third, where the objects are to sway public opinion or promote an attitude of mind to the public, on an issue of public interest, the subject matter of which is analogous to recognised charitable purposes;
- fourth, where the objects are to sway public opinion or promote an attitude of mind on an issue, the subject matter of which is not part of an area recognised as an existing charitable purpose, and which cannot be demonstrated to be analogous to existing purposes under the fourth *Pemsel*[166] head. The particular issue in question may or may not also be considered by the courts to be "controversial".

As considered in detail below, the first and second types of object above are generally accepted as charitable under the heads of advancement of education or other purposes beneficial to the community respectively, although the reasoning in such cases has sometimes been clouded by the "political" issue. The third type of object should arguably be accepted as charitable by analogy with the second type of object, in accordance with the normal application of rules of charitable status.[167] The fourth type of object is more problematic, and has been subject to a number of different judicial approaches. Whilst such objects can obviously not be charitable under the usual rules of charitable status, it is argued that denial of charitable status should not be on the grounds of the rule against politics.

The four types of object are considered in turn below.

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[166] *Comrs for Special Purposes of the Income Tax v Pemsel* [1891] AC 531.

[167] For discussion of these general rules see P. Luxton, *The Law of Charities*, OUP (2001), Chapters Four, Five and Six.

2.1.5.1 First object type: education on / research into social issues

A charity may have objects of providing education about a social issue, even if the issue is controversial, provided it is genuinely attempting to educate rather than convince.[168] It can even provide education about a specific viewpoint on the issue and the reasons for the viewpoint. In *Re Koeppler's Will Trusts*,[169] the purposes of the formation of an informed international public opinion and the promotion of greater co-operation in Europe and the West were held, on appeal, to be educational and charitable. This was because the objects were held to be:[170]

> "... not of a party political nature. Nor, so far as the evidence shows, are they designed to procure changes in the laws or governmental policy of this or any other country: even when they touch on political matters, they constitute, so far as I can see, no more than genuine attempts in an objective manner to ascertain and disseminate the truth. In these circumstances I think that no objections can rise on a political score".

This mirrors the distinction, discussed above,[171] between (unacceptable) promotion of political parties or doctrines and (acceptable) education in party politics and political doctrines. However, the distinction is as difficult to apply in practice for the "issues of public interest" element of "political" as it is for the "party politics" element. As Sheridan observes:[172]

> "There is a thin line, difficult to discern and possibly without great legal significance, but there all the same, between trying to convert people to a

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[168] However, political propaganda disguised as education will not be charitable (see discussion at Section 2.1.4 above of *Re Hopkinson* [1949] 1 All ER 346). The propaganda element may be discernible on the face of the instrument: see Charity Commission *Animal Abuse, Injustice and Defence Society* [1994] 2 Decisions 1. Where there is ambiguity on the face of the instrument, the courts and the Charity Commission may refer to the organisation's activities. For discussion of the operation of the latter rule, see Section 2.2 below.

[169] [1986] Ch 423, reversing the decision of Peter Gibson J at first instance [1984] Ch 243. See T.G. Watkin, [1985] 49 *Conv* 412 for analysis.

[170] *Ibid.* Slade J at 437.

[171] Section 2.1.4.

[172] L.A. Sheridan, 'The Political Muddle – A Charitable View?' (1977) 18 *Mal LR* 42, p.70.

> point of view and informing them of its existence and of the reasons for it, between propaganda and education".

Santow J[173] agrees that the distinction is not clear, and feels that the Court of Appeal's characterization of the promotional purposes by reference to their educational means, thus saving the organisation as an educational trust, "may not be wholly convincing".[174] He further notes the difficult questions raised by the circumstances arising in the case:[175]

> "How is an educative purpose to be appraised where there is a didactive element in the programme? Can education ever be value-free? When does education merge into propaganda? …".

Thus, whilst the basis of this aspect of the rule against politics is quite clear, it is extremely difficult to apply in practice. However, some other aspects of the rule, considered next, do not even have the benefit of a clear basis.

2.1.5.2 Second object type: objects which promote an attitude of mind to the public and which fall within the subject matter of recognised charitable purposes

A charity's objects can promote an attitude of mind to the public and attempt to sway its opinion in relation to a recognised charitable purpose. Whilst this is one-sided and thus cannot be education, it can be acceptable for objects to fall within any of the other recognised charitable purposes if they relate to relevant subject matter and are of sufficient public benefit. In the *National Anti-Vivisection Society* case,[176] Lord Normand said:[177]

> "The formation of voluntary associations for the furtherance of the improvement of morals is familiar, and such associations are a well

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[173] G.F.K. Santow, 'Charity in its Political Voice: A Tinkling Cymbal or a Sounding Brass?', (1999) *CLP* 255.

[174] *Op. cit.* at 278.

[175] *Op. cit.* at 283.

[176] [1948] AC 31.

[177] *Ibid.* at 76.

> recognized subdivision of the fourth of Lord MacNaghten's divisions of charities in Pemsel's case ... It is also familiar that trusts for preventing cruelty to animals or for improving the conditions of their lives have found a recognised place in that sub-division".

Some of the re-statements of existing charitable purposes contained in the Charities Act 2006 such as "the prevention ... of poverty",[178] "the advancement of human rights ... or the promotion of religious or racial harmony or equality and diversity",[179] advancement of environmental protection or improvement[180] and the advancement of animal welfare[181] confirm the acceptability of organisations which promote specific attitudes, where they related to existing purposes. As Munro identifies,[182] these re-stated purposes have been interpreted as widening the scope of existing purposes to the extent that Amnesty International UK now intends to seek charitable status in unified form rather than as separate charitable and campaigning bodies.[183]

2.1.5.3 Third object type: objects which promote an attitude of mind to the public and which have subject matter analogous to recognised charitable purposes

If, as discussed above, objects which aim to achieve existing charitable purposes through promoting certain attitudes are not "political" and can be charitable, it is logical to expect that objects which aim to achieve purposes *analogous* to existing purposes will also be capable of being charitable and not political. Whilst there may be more than one possible stance on an issue, where its promotion is considered to be sufficiently uncontroversial, analogous to existing purposes, and for the public benefit, it is not precluded from charitable status.[184]

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[178] S.2(2)(a).

[179] S.2(2)(h).

[180] S.2(2)(i).

[181] S.2(2)(k).

[182] C. Munro, 'Time up for the ban?', *NLJ* 22 June 2007, 886-887.

[183] *Op. cit.*

[184] See *Re Price* [1943] Ch 422; *Re South Place Ethical Society* [1980] 1 WLR 1565; *The Church of Scientology* [1999] Ch Com Dec November 17, p.29.

The element of "one-sidedness" inherent in promoting an attitude of mind should not be a barrier to charitable status *per se*. However, as mentioned earlier, objects falling with the fourth scenario (i.e. those which promote an attitude of mind and are not analogous to existing purposes) have been subject to a number of different judicial approaches. The application in some cases falling within the fourth scenario of the rule against politics is both arguably unjustified, and may also have had an negative impact on the development of new charitable purposes with regards to objects in the third scenario. This last point will be considered below.[185]

2.1.5.4 Fourth object type: objects which promote an attitude of mind to the public and which are not analogous to existing purposes

Stated objects with subject matter which is neither related to recognised charitable purposes nor analogous to them can obviously not be charitable. Nevertheless, it is contended here that the basis on which organisations are refused charitable status should be on the usual factors involved in determining charitable status. Objects should not be held "political" unless they fall within the definition of that term laid down by precedent. It is further contended that a number of cases have held objects to be "political" based on irrelevant factors. The two factors which have been particularly instrumental in such cases are first, the element of "promoting an attitude of mind", and second, the finding that the subject matter of the object is "controversial".

Whilst the case law is by no means consistent in this area, a number of decided cases do appear to extend the *Bowman* principle in the way described above. An organisation with main objects of swaying public opinion (i.e. not providing balanced education, but promoting an attitude of mind) on an issue which is "controversial" may be held to be "propagandist" and thus political according to several decided cases.

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[185] At 2.1.5.3.

In *Buxton v Public Trustee*,[186] a trust to "promote and aid the improvement of international relations and intercourse" was held not to be charitable in the educational sense, but "really public utility or political". Delivering the judgement of the court, Plowman J stated that:

> "The only element of education which might be said to be comprehended in those objects appears to be education for a political cause, by the creation of a climate of opinion … not … education of a kind which is charitable … it is really no more than propaganda".

However, this determination of the cause as "political" did not rely on the principle in *Bowman* (i.e. that it involved a change in the law etc.) but on the view that the object was analogous to the object in *Re Strakosch*,[187] a case in which the judgement was itself arguably problematic.

In *Re Strakosch*,[188] the trust's object to "strengthen the bonds of unity between the Union of South Africa and the Mother Country and which incidentally will conduce to the appeasement of racial feeling between the Dutch and English speaking sections of the South African community" was held not to be charitable, as its "very wide and vague scope" would allow it to be applied for political purposes and thus precluded it from falling within the Preamble to the Statute of Elizabeth.[189] Strangely, however, the determination of the potentially political nature of its application was based on opinions formed by the court regarding the means by which the object *could possibly* be achieved, rather than whether the object itself actually was political in the *Bowman* sense of involving a change in the law etc. In terms of the potential for fulfilment through education, Lord Greene stated that:[190]

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[186] [1962] 41 TC 235, followed by Charity Commission [1963] Ch Com Rep 14, para.39. See also *Anglo-Swedish Society v IRC* (1931) TC 34, in which a trust concerned with promoting a closer and more sympathetic understanding between the English and Swedish peoples was held not to be charitable. Whilst the trust was not explicitly held to be political, it was refused charitable status because it was "a trust to promote an attitude of mind, a view of one nation by another".

[187] [1949] Ch 529.

[188] *Ibid.*

[189] *Ibid.* at 536 (Lord Greene MR).

[190] *Ibid.* at 538.

"Field Marshal Smuts (than whom no one can speak with greater authority on this subject) expresses a strong opinion that the proper method for the appeasement of racial feeling is education in its widest sense ... It is unfortunate if, as may well be, these methods were in the testator's mind that he did not seek to constitute a trust which might well have been valid as an educational trust ...".

He continued:[191]

> "The problem of appeasing racial feeling within the community is a political problem, perhaps primarily political. One method conducive to its solution might well be to support a political party or a newspaper which had such appeasement most at heart. This argument gains force in the present case from the other political object, namely, the strengthening of the bonds of unity between the Union and the Mother Country. It would also we think be easy to think of arrangements for mutual hospitality which would be conducive to the purposes set out but would not be charitable. We may mention that the words do not, at any rate to us, suggest the support or promotion of legislation".

The court thus held the objects to be political and thus non-charitable, despite finding that they were not attempting to change or retain legislation, based upon the opinion that they could *possibly* be achieved by political means, and that whilst they were best achieved by educational means, the testator had not constituted the trust as educational.

Sheridan notes the extension to the rule against politics created by the decision, stating that it established the rule that:[192]

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[191] *Ibid.*

[192] L.A. Sheridan, 'Charity versus Politics', (1973) 2 *A-ALR* 47, p.65.

> "... political purposes not qualifying as charity go beyond advocacy of changing the law and embrace all propaganda on policy ... however much the objectives might be for the public benefit if pursued by other means".

However, as Santow J identifies,[193] "the assumption ... that, being a 'problem' and thus impliedly controversial, it must be political, is by no means a reliable guide". Picarda frames criticism of the decision in more direct terms, stating that:[194]

> "This emphasis on means rather than ends is puzzling. It is one thing if a trust specifies that the end is to be pursued by non-charitable means, for example by promoting changes in the law, but if the end is in fact charitable and there is no specific indication that particular non-charitable means should be used one should not assume that the trustees will use those means. If the means adopted promote other objects then arguably the trustees will be in breach of trust".

Picarda qualifies the latter criticism by stating that the point in the *Strakosch*[195] decision regarding means was made to rebut an argument presented by the Attorney-General that educational means were the most likely. However, as Picarda acknowledges, this does not reconcile the *Strakosch*[196] decision with authority to the effect that charitable means should be presumed.[197]

The two cases above should be contrasted with the Court of Appeal decision in *Re Koeppler's Will Trusts*,[198] in which, as mentioned above,[199] the purposes of the formation of an informed international public opinion and the promotion of greater

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[193] G.F.K. Santow, 'Charity in its Political Voice: A Tinkling Cymbal or a Sounding Brass?', (1999) *CLP* 255, p.278.

[194] H. Picarda, *The Law and Practice Relating to Charities*, (3rd Edn.) Butterworths (1999), pp.187-8.

[195] [1949] Ch 529.

[196] *Ibid.*

[197] *McGovern v Attorney-General* [1982] Ch 321; *Re Koeppler's Will Trusts* [1986] Ch 423.

[198] [1986] Ch 423, reversing the decision of Peter Gibson J at first instance [1984] Ch 243. See T.G. Watkin, 'Where there's a will ...' [1985] 49 *Conv* 412.

[199] At 2.1.5.1.

co-operation in Europe and the West were held, on appeal, to be educational and charitable. This was because:[200]

> "... the activities ... are not of a party political nature. Nor, so far as the evidence shows, are they designed to procure changes in the laws or governmental policy of this or any other country: even when they touch on political matters, they constitute, so far as I can see, no more than genuine attempts in an objective manner to ascertain and disseminate the truth. In these circumstances I think that no objections can rise on a political score".

This is problematic in that it could be argued that the "education" in *Re Koeppler*[201] was not in fact unbiased and "educational", but stemmed from a view that improved international relations were desirable and explicitly aimed to promote co-operation, thus trying to change opinions.[202] This can be compared to the Australian case of *Royal North Shore Hospital of Sydney v A-G for New South Wales*,[203] in which a gift to fund an award for an essay directed to the extension of the teaching of technical education in state schools was held to be educational because it was designed to encourage study of the subject and formation of general views, even though the underlying purpose was to promote the donor's own opinion.

The above argument aside, and accepting that the objects in *Re Koeppler*[204] were educational, the three cases viewed together are problematic in a more fundamental way. Whilst the broad aim in all three was the improvement of international relations in some form or another, the finding in *Re Koeppler*[205] that it was to be achieved under the head of education negated "political" disqualification from charitable status, whilst the finding that the underlying aim was to be achieved by

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[200] *Ibid.* at 437.

[201] *Ibid.*

[202] See also *Southwood v Attorney-General* [2000] WTLR 1199, affirming decision of Carnwath J, *The Times*, 26 Oct 1998. In that case, a trust with the purpose of advancing the education of the public in the subject of militarism and disarmament was held to be political, not only because the objects aimed to challenge government policies, but because they disseminated the settlor's own controversial views.

[203] [1938] 60 CLR 396.

[204] [1986] Ch 423.

[205] *Ibid.*

promoting an attitude of mind in *Buxton v Public Trustee*[206] and (only potentially so) in *Re Strakosch*[207] was enough to render them political in the eyes of the courts. Thus, the deciding factor in determining whether the objects were "political" in these cases seems to be whether the trust could be viewed as educational. This argument is supported by the dicta in *Re Strakosch*[208] that the trust would have been held charitable if it had been framed in terms of education.

A more recent case ostensibly decided in a similar way was *Re Bushnell*,[209] which involved a trust for "the advancement and propagation of the teaching of Socialised Medicine". Whilst it could be argued on the facts that the trust was implicitly attempting to change government policy, this case provides another example of an object which was – at least explicitly - held to be political on the basis of its "one-sided" nature, rather than because it was political in the *Bowman* sense. It is submitted that whilst the factor of "swaying public opinion" is relevant to a finding that an object does not fall under the head of education, it is unclear why it should contribute to a finding that the object is political. The decision in *Re Bushnell* is thus an example of the false dichotomy between "education" and "politics" applied by the courts, which is discussed further below.[210]

The above cases, and other recent cases to be discussed below, have clearly extended the political disqualification principle so that an object that attempts to sway public opinion on a social issue is classed as political, regardless of whether it attempts to change the law etc. This appears to contradict previous case law, notably *Russell v Jackson*,[211] which, as Picarda identifies,[212] has been treated as authority[213] for the proposition that the spread of particular doctrines that are not subversive of morality or otherwise pernicious may be charitable.

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[206] [1962] 41 TC 235. See also *Anglo-Swedish Society v IRC* (1931) TC 34.

[207] [1949] Ch 529.

[208] [1949] Ch 529.

[209] [1975] 1 All ER 721. See also earlier discussion of ancillary principle at Section 2.1.2.

[210] Section 2.1.5.6.

[211] (1852) 10 Hare 204. See discussion in context of historical situation in Chapter Seven, Section 3.1.1.

[212] H. Picarda, *The Law and Practice Relating to Charities*, (3rd Edn.) Butterworths (1999), p.169.

[213] 5 Halsbury's Law of England (4th Edn.) para.543.

However, the defining factor in this line of cases often appears to be whether the issue is deemed to be "controversial". Thus, further detailed examination of how the courts have determined what counts as a "controversial" social issue is required.

2.1.5.5 The "controversial" issues factor

The relevance of the "controversial" nature of the objects in question was in dispute in the *National Anti-Vivisection Society* case.[214] Lord Normand was of the opinion (*obiter*) that it was irrelevant:

> "I regret that I cannot agree with the Master of the Rolls in limiting the scope of Lord Parker's words to matters of acute political controversy. Whether a project for new legislation excites acute political controversy may depend on the prudence and good management of the promoters. If they have patiently prepared the way by a gradual education of the public they may succeed in eliminating much of the opposition ... in my opinion it is not relevant to inquire whether the change of policy ... might be accompanied by controversy or not. The relevant consideration is that it would be a change of policy, and that this society makes the achievement of that change by legislation its leading purpose".

Lord Wright's judgement supported the view of Lord Normand above. His Lordship suggested that the "controversial" nature of an issue should be a factor in the determination of public benefit, rather than of whether objects are political:[215]

> "I think that the whole tendency of the concept of charity in a legal sense under the fourth head is towards tangible and objective benefits and at least that approval by the common understanding of enlightened opinion for the time being is necessary before an intangible benefit can be taken to constitute a sufficient benefit to the community to justify admission of the

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[214] [1948] AC 31 at 78.

[215] [1948] AC 31 at 49.

object into the fourth class. By this test the claim of the appellant society would fail".

Had Lord Wright's approach been adopted by the rest of the House in that case, and followed in later cases, so that objects promoting controversial issues failed on wider public benefit grounds, rather than on political ones, much of the existing confusion and uncertainty would have been negated.

Lord Wright's approach appears to have been adopted in *Re Shaw (decd.)*,[216] in which Harman J stated:[217]

"... in the present case I am stopped on the threshold by the word 'beneficial'. Who is to say whether this project is beneficial? That, on the face of it, is a most controversial question ... I do not see how mere advertisement and propaganda can be postulated as being beneficial".

The "controversial" nature of objects also seems to be a contributory factor to findings in other Commonwealth jurisdictions that they are political, although it is often difficult to distinguish whether the outcomes of the cases are based on the fact that they are swaying public opinion or the fact that they are controversial. In the New Zealand case of *Molloy v Commissioner of Inland Revenue* [218] Somers J held that:[219]

"... reason suggests that on an issue of a public and very controversial character, as is the case of abortion, both those who advocate a change in the law and those who vigorously oppose it are engaged in carrying out political objects in the relevant sense ... In neither case has the court the means of judging the public benefit".

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[216] [1957] 1 All ER 745.

[217] *Ibid.* at 754.

[218] [1981] 1 NZLR 688.

[219] *Ibid.* at 695-696.

Cases from other Commonwealth jurisdictions which tend towards the broadest approach to the term "political" include the Canadian case of *Positive Action against Pornography v Minister of National Revenue*,[220] in which an organisation with the purpose of swaying public opinion against pornography, but without attempting to secure anti-pornography legislation was held not to be a charity. Similarly, in *Human Life International in Canada Inc v Minister of National Revenue*,[221] in which an organization which disseminated biased anti-abortion literature appealed against the revocation of its charitable status, Strayer JA held that activities primarily attempting to sway public opinion on controversial social issues were political, referring to the *Positive Action* case[222] as authority for this proposition.

2.1.5.6 The courts' application of the rule against political objects to issues of public interest: problems and their effects

The above analysis of the definition of "political" objects identifies that the scope of the term appears to have developed from first, objects which *explicitly* attempt to secure changes in the law and government policy etc;[223] to second, objects which *implicitly* attempt to secure changes in the law by promoting an attitude to the public and persuading them to agitate for change.[224] As considered earlier, this extension is problematic in itself. However, a further and more problematic extension of the term "political" incorporated into its definition the additional category of objects which simply attempt to sway public opinion on an issue (particularly a controversial one), or promote an attitude of mind to the public.

Three main criticisms of this final extension to the promotion *simpliciter* of viewpoints on controversial issues can be made.

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[220] [1998] 1 CTC 232.

[221] [1998] 3 CTC 126.

[222] [1998] 1 CTC 232.

[223] Considered at Section 2.1.3.1 above.

[224] Considered at Section 2.1.3.2 above.

First, the extension removes the element of "attempting to change the law" from the definition of "political". This does not fit with the original reasons for the rule against political objects, which were that the courts could not ordinarily determine the public benefit of changes in the law,[225] and in any event wished to avoid usurping the function of the legislature by making such determinations.[226]

Second, the inclusion in decisions of the "controversial" nature of an issue is illogical.[227] It would be preferable if objects based on issues which attract high levels of public controversy were held to be not charitable on the basis that they are not for the public benefit, rather than through distorting the rule against political objects in order to include them. Furthermore, judicial categorisation of an issue as "controversial" rather than determination of public benefit in the usual way is itself subjective, and involves the judiciary making precisely the type of decision that they wish to avoid.

Third, classifying "swaying public opinion on an issue" as "political" on the basis that it is "one-sided"[228] rather than "educational" creates a false dichotomy between politics and education.[229] It is submitted that the mere fact that an object involves attempting to sway public opinion rather than providing education on an issue should not affect whether the object is viewed as political. Even if an object is held to be non-educational, it should still be potentially charitable if it is analogous to an existing purpose under the fourth *Pemsel* head and is for the public benefit, and should be assessed for public benefit in the usual way.

The courts' failure to separate these issues will not cause problems where objects are clearly "political" within the original definition, i.e. where they *explicitly* attempt to secure changes in the law etc., as the political part of such objects will be

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[225] *Bowman v Secular Society* [1917] AC 406.

[226] *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31; *McGovern v Att-Gen* [1982] Ch 321. The rationales are critically evaluated in Chapter Seven (Section 3.1.1) of this thesis.

[227] Considered at Section 2.1.5.5 above.

[228] Considered at Section 2.1.5.3 and 2.1.5.4 above.

[229] See G.F.K. Santow, 'Charity in its Political Voice: A Tinkling Cymbal or a Sounding Brass?', (1999) *CLP* 255 at p.276 for further comment on this distinction.

fundamental to and inseparable from the overall aim. However, in the current context, when determining if an object which ostensibly is just promoting a cause *involves* changing the law, the danger of mixing the questions becomes apparent.

If the issue on which an object is based is charitable, either as an existing purpose or by analogy to one, all legitimate ways of achieving it should be available. However, the above extensions of the rule against political objects to include "swaying public opinion on controversial social issues" have stretched the rule too far.

To illustrate the practical effect of the courts' approach, a comparison of two hypothetical objects can be used. A charitable object which specifies the achievement of its aims by service provision will be accepted if it is analogous to an existing charitable purpose under the fourth *Pemsel* head[230] and for the public benefit.[231] However, a charitable object which specifies the achievement of the same aims by promoting an attitude of mind to the public, even if this does not attempt to change the law, could be held to be political. This arguably stifles the development of legitimate new charitable objects[232] by analogy with existing purposes, as the treatment of the same issue will differ depending upon the specified method of achieving it.[233]

To summarize, this section argues that it is legitimate for the courts to find that an object which sways public opinion on an issue is not charitable on the basis that it does not fall under any of the heads of charity or is not of sufficient public benefit. However, it is not legitimate to find that such an object is charitable on the basis that it is political, unless it also falls within the original definition of that term;

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[230] *Comrs for Special Purposes of the Income Tax v Pemsel* [1891] AC 531. Existing purposes under this head and the creation of new purposes by analogy to recognised purposes have been preserved under the Charities Act 2006, s.2(2)(m) and s.2(4).

[231] Charities Act 2006, s.2(1)(b), s.3.

[232] The Sheila McKechnie Foundation supports this assertion, stating on its website (www.sheilamckechnie.org.uk/getinvolved/Updates.htm [17/06/2006]) that: "[t]here is evidence that the ambiguities about the scope for campaigning activity by charities have acted to prevent the emergence of new charities, as well as restricting the work of existing organisations". Nevertheless, it does not go as far as adducing any such evidence.

[233] Problems inherent in the courts' approach to "ends" and "means" were also considered in the context of the ancillary rule (Section 2.1.2 above) and in relation to political activities (Section 2.2.1 below).

namely that it is attempting to secure changes in the law or government policy (etc.).[234]

If the courts base their view of whether an object is "political" on factors such as its "one-sided" approach,[235] its "controversial" nature,[236] or whether they think it is for the public benefit,[237] the rule against politics has no predictability for non-educational organisations.

2.1.5.7 Separating the issues: an alternative judicial approach

It is submitted that legal clarity on the charitable status of objects based on issues of public interest can only be attained through judicial separation of several questions. These are:

- first, whether an object is "political" (in the sense of attempting to change the law etc.[238] for which the courts currently hold they either cannot or will not determine public benefit.[239] It is important to note that the factors involved in the next two stages (i.e. swaying public opinion, controversiality, or actual public benefit) are not relevant to this question.

- second, whether an object falls under any of the heads of charity, for example:
    - education (this must be balanced, but can be on a particular issue); or
    - other purposes beneficial to the community (this can be promotion of a particular viewpoint on either an issue recognised as an existing

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[234] Considered at Section 2.1.3 above.

[235] Considered at Section 2.1.5.3 and 2.1.5.4 above.

[236] Considered at Section 2.1.5.5 above.

[237] *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31.

[238] Considered at Section 2.1.3 above.

[239] For criticisms of this and other rationales for the rule, see Chapter Seven, Section 3.1.1.

charitable purpose, or a purpose analogous to an existing charitable purpose).

- third, whether an object satisfies the public benefit test, as determined for all potential charities. This determination can legitimately include factors such as whether the issue is "controversial". It is important to note that the question of determining actual public benefit is entirely different from the *refusal* to determine it under the "political" question above.

This separation of the issues appears to have been adopted to some degree in *Re Shaw (decd.)*.[240] After deciding that the objects in question were not educational, Harman J addressed the question of whether they were charitable under the fourth head. As considered earlier,[241] the judge decided that the controversial nature of the issues meant that he could not determine public benefit. Harman J further stated:[242]

> "It seems to me that the objects ... are analogous to trusts for political purposes, which advocate a change in the law. Such objects have never been considered charitable".

It is unclear whether Harman J meant that the purposes in question were in fact political or whether he considered them to be part of a wider – undefined – class for which public benefit cannot be determined; a class that merely *includes* political purposes. Whilst on the latter interpretation, the decision at least formulates the tests more logically, it does make the situation even less clear for organizations which promote what could be deemed "controversial" views.

The above discussion illustrates that the problems surrounding the determination of political objects are complex even when they are considered in isolation. However,

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[240] [1957] 1 All ER 745.

[241] Section 2.1.5.5.

[242] *Ibid.* at 756.

they are further complicated and compounded by the rules relating to political activities. These rules are considered next.

2.2 Political activities

Whilst, as discussed above, political objects cannot be charitable, the courts have emphasized that there is nothing to prevent charities from employing political means in furtherance of non-political charitable purposes,[243] as long as the means are within the powers contained in the governing document and are in furtherance of the objects of the charity.

The above contention that charities can undertake political activities in furtherance of charitable purposes is not as straightforward as it would appear, as it is subject to the rule that activities may be relevant to the determination of objects. The courts and the Charity Commission may refer to a charity's activities when examining its objects.[244] In the case of an existing charity, the activities referred to can be both its past and present activities.[245] Where the organization is new or new to charitable registration, its proposed activities will be examined.[246]

The practical implications of these rules in the context of political activities are pertinent both to existing registered charities which become involved in political campaigning, and to new organisations or existing non-charitable organisations which wish to be registered as charities, and for which there is evidence of their proposed activities.

Whilst the consequences of "unacceptable" political activities for organisations new to charitable status are that they may be proscribed from registering, the

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[243] *McGovern v Attorney-General* [1982] Ch 321 at 340 per Slade J. A similar approach has been taken in other jurisdictions: see *Re Laidlaw Foundation* (1984) 13 DLR (4th) 491 at 506 per Dymond SCJ.

[244] Activities may also be relevant to determining public benefit: see Fn. 260 below.

[245] *Animal Abuse, Injustice and Defence Society* [1994] 2 Decisions 1. See also *Institute for the Study of Terrorism* [1988] Ch Com Rep 7, paras.27-34.

[246] *Southwood v Attorney-General* [2000] WTLR 1199, affirming the decision of Carnwath J, *The Times*, 26 Oct 1998; *Margaret Thatcher Foundation* [1991] Ch Com Rep 13, para.75.

consequences of unacceptable political activities are potentially more severe for existing charities, as they may be at risk of losing their charitable status.

Those in control of organisations in the above circumstances will need to determine not only what constitutes "political activities", but in what circumstances such activities will become unacceptable in terms of their implications for the charity's objects.

An additional consideration is that rather than being used to determine objects or charitable status the activities in question may be held to have been undertaken in breach of trust. Those in control of charities engaging in political activities will also need to understand the potential consequences of such findings for the charity and its trustees. The potential consequences of breach of trust are considered in Section 4.0 below.

Prior to consideration of the application of these rules, it should be noted that the unstated policy reasons behind them may obfuscate understanding of their operation. The decision in *Att-Gen v Ross*[247] to hold a student union to be a charitable body despite its clear and extensive political activities, and against the wishes of its directors, can possibly be explained with reference to the political climate surrounding trades unions present at the time. In many of the cases where political activities are the issue, charitable status (and its benefits) are desired by organisations, but denied because of the extent and nature of their political activities. However, in the instant case the retention of charitable status (and the inherent control it involves over political activities) was actively rejected by those in control of the organization, but was maintained by the courts regardless of the extensive political activities undertaken (including, notably, financial support to striking mineworkers). Whilst such extensive activities would, in many cases, be sufficient to construe ostensibly charitable purposes as political, the issue of control over the organization's activities inherent in charitable status, may, in this case,

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[247] [1986] 1 WLR 252.

have been a decisive, albeit implicit reason for the otherwise surprising decision to maintain charitable status.

Activities are referred to in these contexts in two ways: to determine true objects where they are unclear, and to determine whether purposes are charitable. Section 2.2.1 considers the use of activities to determine objects, the use of activities to determine the charitable nature of objects, and the implications of the conflation of these two questions by the courts.

2.2.1 Political activities and the determination of objects and charitable status

Determination of objects

Where objects are not clearly stated, and a charity's purposes are thus ambiguous in the context of the governing document, activities - as part of the factual matrix accompanying the execution of a trust - can be referred to as evidence of true purposes.[248]

However, clear and unambiguous purposes stated in a governing document are decisive, and reference should be made to nothing else.[249] Where objects are clear, activities may be relevant to questions of breach of trust,[250] rather than to the construction of the purposes themselves. There are two notable cases where political activities, rather than being used to determine objects, were relevant to questions breach of trust. In *Baldry v Feintuck*,[251] a student union with educational and thus charitable purposes applied its funds for non-charitable political campaigns protesting against the government's policy of ending the supply of milk to schoolchildren. It was held that this application was outside the charities' purposes. Similarly, in *Webb v O'Doherty and Others*,[252] the application of the funds of a

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[248] See *Southwood v Attorney-General* [2000] WTLR 1199, affirming decision of Carnwath J, *The Times*, 26 Oct 1998. See also P. Luxton, *The Law of Charities*, OUP (2001), paras.7.23 and 10.52 for discussion of potential differences in this aspect of the judgement at first instance and appeal.

[249] *IRC v Oldham TEC* [1996] STC 1218 at 1234 per Lightman J. See M.J. Smith, *Charities and Politics* (LLM thesis) University of Liverpool (2006), p.45 for discussion of the correct approach.

[250] J. Warburton, *Tudor on Charities*, (9th Edn.) Sweet & Maxwell (2003), p.18 *et seq.*

[251] [1972] 2 All ER 81.

[252] *The Times*, 11 February 1991.

student union to a campaign to end the Gulf War was held to be outside the charity's objects.

Determination of charitable status

If an organisation's objects are stated clearly in the governing document, but it is unclear if they are charitable, the court may look at the trust's activities to help determine whether the main objects are charitable. However, the activities looked at must be *intra vires* and of probative value.[253] Reference to such activities may enable determination of the consequences of pursuing the objects.[254]

An exception to the activities referred to needing to be *intra vires* is where the governing document, whilst setting out clear charitable objects, is a sham and hides the true objects of the trust.[255] This rule is problematic. It is contended that in effect, it is not merely an exception to the *intra vires* rule outlined above,[256] but actually undermines it. The "sham purposes" rule leaves it open for all (both *intra* and *ultra vires*) activities to be looked at even where the purposes are clearly stated. This can result in the organisation being held to have political objects based on its activities, in circumstances where it is arguable that instead the trustees should have been held to have acted *ultra vires* or in breach of trust.

The courts' conflation of "true objects" and "charitable status" questions

To compound the problem outlined above, the courts tend to conflate the questions of determining true objects and determining charitable status.[257] This tendency is problematic. First, it makes it unclear whether the courts are looking at *intra vires* or *ultra vires* activities when determining charitable status. If they have not defined the true objects prior to determining charitable status, it is impossible to define

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[253] *Att-Gen v Ross* [1986] 1 WLR 252. N.B. Whilst the terms *intra vires* and *ultra vires* are technically incorrect when referring to trusts rather than corporations, they are used here for convenience.

[254] *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 at 91; *IRC v Oldham TEC* [1996] STC 1218.

[255] The potential for this was recognised in *Re McDougal* [1957] 1 WLR 81 at 91.

[256] I.e. that only *intra vires* activities should be looked at to determine charitable status, and any *ultra vires* activities should be relevant instead to questions of breach of trust.

[257] See *Southwood v Attorney-General* [2000] WTLR 1199, affirming decision of Carnwath J, *The Times*, 26 Oct 1998.

whether an activity is *intra vires* or *ultra vires*. Second, this exacerbates the existing problem identified above, that the *intra vires* rule is undermined by the "sham purposes" exception.

Luxton asserts that the Charity Commission (in its quasi-judicial, decision-making capacity) takes the approach that it can look at activities when determining objects in all circumstances,[258] and that this approach is dubious in the light of authority that activities should only be considered where there is ambiguity.[259] The Commission also takes the same approach as the courts in terms of combining the question of determining true objects with the question of charitable status.

In practice, however, the above argument is largely academic. Regardless of the potential use of activities in determining objects in the ways outlined above, it is acceptable for the courts and the Charity Commission to refer to activities when determining public benefit.[260] This approach is broad enough to allow reference to activities in most circumstances, regardless of whether objects themselves are clear or ambiguous.

It is further submitted that the practice of referring to activities in all circumstances has practical implications for the predictability and clarity of this area of the law. The Strategy Unit Report stated[261] that the circumstances in which activities can be referred to should be clarified in statute. However, this was not a strict "recommendation" and was therefore not taken up by the Government in the Charities Act 2006.

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[258] *Ibid.* See P. Luxton, *The Law of Charities*, OUP (2001), para.10.54 for discussion.

[259] *IRC v Oldham TEC* [1996] STC 1218.

[260] The question of public benefit is determined by the court forming an opinion on the evidence before it, and activities may form part of this evidence: see *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 44 per Lord Wright; *McGovern v Att-Gen* [1982] Ch 321 at 333 per Slade J. See also the Charity Commission's approach to activities and public benefit: *Draft Public Benefit Guidance* (March 2007), Section C2; *Analysis of the law underpinning charities and public benefit* (March 2007), Section E; *Registration Application Form*, Q9 (available from www.charity-commission.gov.uk/Library/publications/pdfs/app1.pdf).

[261] Cabinet Office (Strategy Unit), *Private Action, Public Benefit*, TSO (September 2002), p.79. Only recommendations in bold type in the report were adopted by the government in their proposals for legislation.

2.2.2 Type and extent of allowable political activities

Section 2.2.1 considered the circumstances in which political activities are referred to by the courts. It is now important to consider how the type and extent of political activities undertaken can render objects political and result in denial of charitable status.

There is no exhaustive specification of what political activities can be undertaken by charities, and very little decided case law. In terms of wider charity law, political activities, like any other activities undertaken by charities, must be reasonably expected to further the charity's *own* wholly and exclusively charitable purposes. They must also be permitted by the charity's governing document and comply with wider domestic law.[262]

Human rights legislation may have an effect in this area. Luxton argues that Article 10 of the ECHR may present a challenge to the current constraints on charitable political activity.[263] In support of this proposition is the case of *Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v Ireland*,[264] where it was held that the right of two non-profit companies to freedom of expression had been violated by Irish law, which prevented them from providing the public with information on the availability of abortion facilities outside Ireland.

However, as Luxton also identifies, some of the current restraints on charities' engagement in political activity are based in trust law, and are irrelevant to issues of freedom of expression.[265] Freedom of expression for a charity (as an institution, not in terms of its individual members) is "a freedom exercisable only for the purpose of furthering its charitable objects", and acting outside of this boundary will involve breach of trust. Luxton notes that this is consistent with *Open Door Counselling*

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[262] Considered in Chapter Three of this thesis.

[263] P. Luxton, *The Law of Charities*, OUP (2001), para.1.123.

[264] (1992) 15 EHRR 244.

[265] Although wider constraints such as those imposed by broadcasting legislation are relevant to freedom of expression: see Chapter Three, Section 2.0 for consideration of this area.

above, as the provision of abortion advice was within the objects of the companies in question.

Assuming that the rule against political *objects* is justifiable under Article 10(2) ECHR,[266] the question is raised as to whether the current restrictions on political *activities* by charities are also justifiable.

A possible justification identified by Moffat[267] is that the rule may protect "the rights of others" by not allowing charities unfair (tax and moral status) advantages over others in promoting their views. He also raises several arguments which tend to refute this assertion. Firstly, commercial bodies in receipt of other tax benefits or government subsidies are not prevented from engaging in political process. Secondly, the influence of charities is in any case minor compared to that of other organizations. Thirdly, tax status is irrelevant to the primary question of whether an organization should be registered as a charity. Finally, the fact that charities are already permitted to engage in a degree of political campaigning tends to undermine the rationale of the argument that engaging in political activity provides them with an unfair advantage.

Having considered the complexities and inconsistencies of the law surrounding political objects and activities, the next section will consider how Charity Commission guidance approaches the task of explaining it.

3.0 Charity Commission Guidance on political objects and activities

As identified in Section 1.0, this section considers with what degree of clarity relevant Commission guidance explains the law in this area. Section 3.1 briefly considers the latest version of the guidance as a whole, prior to a discussion of its merits and detractors in relation to objects (Section 3.2) and activities (Section 3.3).

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[266] Under Article 10(2) of the ECHR. See G. Moffat, 'Charity, Politics and the Human Rights Act 1998: Chasing a Red Herring?' (2001) *IJNL* 4(1) for discussion of the arguments in favour of and against this proposition.

[267] *Op. cit.*, Section C1(d)(ii).

3.1 Overview of Charity Commission guidance

The Strategy Unit report of September 2002[268] observed that the existing Commission guidance[269] was "written in a somewhat cautionary style which could be said to overplay the potential difficulties of campaigning work".[270] The report made observations about the desirability of encouraging charitable campaigning work and involvement in public policy debate, and about the existing recognition in policy initiatives such as the *Compact on Relations between Government and the Voluntary and Community Sector in England* of the rights of charities to campaign and remain independent.

In the light of its observations, the Strategy Unit report recommended that no legislative changes should be made in this area. The report did, however, recommend that the relevant Commission guidance should be "revised so that the tone is less cautionary and it puts greater emphasis on the campaigning and other non-party political activities that charities can undertake".[271] It also recommended that the Commission should make a clear distinction between its statement of the law, and any advice it published on good practice. The Commission responded to these recommendations by publishing an updated version of CC9 in September 2004, which incorporated the old CC9a guidance.

The Commission's efforts to make the guidance "less cautionary" are certainly apparent. The introduction to the older guidance states that the examples used are "derived from general principles rather than from specific judgements of the courts" and therefore need "to be tested on the basis of practical examples". However, emphasis is not placed on the fact that the list is non-exhaustive, and that, as the Strategy Unit report identifies, "trustees have the freedom to pursue whatever

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[268] Cabinet Office (Strategy Unit), *Private Action, Public Benefit*, TSO (2002).

[269] Charity Commission, *Campaigning and Political Activities by Charities*, (CC9); *Campaigning and Political Activities by Local Community Charities*, (CC9a) TSO, last updated in 1999 and 1997 respectively.

[270] Cabinet Office (Strategy Unit), *Private Action, Public Benefit*, TSO (2002), p.46. For history of the Commission's approach and guidance on political activities, see G. Griffiths, 'The art of the possible', [1996] *NLJ Christmas Appeals Supplement* 30 at 32-33.

[271] Cabinet Office (Strategy Unit), *Private Action, Public Benefit*, TSO (2002), p.46.

activities they judge to be in the best interests of the charity". The new guidance rectifies this by repeatedly stating that the examples given are not exhaustive.

The new guidance does make a clear effort to separate the law and good practice advice. It defines the legal and regulatory framework and explains its consequences. It then provides examples in a separate section.

The "legal and regulatory framework" section also includes new guidance on the need to assess impacts and risks, a theme which permeates the rest of the guidance. The Commission's view on the specific risks of campaigning is contained in Paragraph 28 of the guidance, which states that: "for campaigning and political activities two particular risks – achievement of objectives and reputation – are likely to require special consideration". The relevance of these particular risks to the experiences of charities and the usefulness of the risk management process are considered in Chapter Six.

3.2 Political objects

The revised[272] Charity Commission guidance provides the same definition of political objects as the previous guidance.[273] This draws together the categorisation of political purposes developed through the case law discussed above, defining them as any purposes directed at:

> "... furthering the interests of any political party; or securing, or opposing, any change in the law or in the policy or decisions of central government or local authorities, whether in this country or abroad".

It is notable that the Commission guidance does not discuss the fact that the second of these two can be, in the view of the courts, implicit in an object which ostensibly seeks to promote a cause.[274] The guidance also fails to state that attempting to sway

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[272] Charity Commission, *Campaigning and Political Activities by Charities*, (CC9) TSO (2004).

[273] Charity Commission, *Campaigning and Political Activities by Charities*, (CC9) TSO (1999) and *Campaigning and Political Activities by Local Community Charities*, (CC9a) TSO (1997).

[274] Considered at Section 2.1.3.2 and 2.1.5 above.

public opinion on controversial social issues has been held by the courts to be political in a number of cases.[275] Thus it seems that information on the tendency of the courts towards holding organizations to be political even where their objects do not explicitly state an aim to change the law is omitted from the guidance.

The above omission can be explained to an extent by the fact that the guidance is aimed at existing charities which undertake political activities, rather than at organizations attempting to set up as charities. It states its own remit as giving "guidance on the legal and regulatory framework for charities wishing to engage in campaigning and political activity".[276] This may explain the lack of detailed consideration of the courts' approach to political purposes. However, this factor can be seen as reason for criticism in itself, as arguably the guidance should give equally detailed advice to both existing and potential charities – particularly given the complexity of the court's approach to political purposes.

It is contended that given both the broad scope of the term "political" applied by the courts[277] and the use of activities in the determination of objects and charitable status,[278] the guidance should pay as much attention to the subject of political objects as it does to activities, even if it is aimed at existing rather than prospective charities.

3.3 Political Activities

The 2004 version of the guidance advises that in the case of non-political campaigning, all of a charity's available resources can be used, (provided the usual basic considerations are made). However, it further states[279] that:

> " ... where the campaign or other activity is of a political nature (i.e. seeking to advocate or oppose a change in the law or public policy), charity trustees

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[275] See Section 2.1.5.5 above.

[276] Charity Commission, *Campaigning and Political Activities by Charities*, (CC9) TSO (2004), para.1.

[277] Discussed at Section 2.1 above.

[278] Discussed at Section 2.2 above.

[279] Charity Commission, *Campaigning and Political Activities by Charities*, (CC9) TSO (2004), para.23.

must ensure that these activities do not become the dominant means by which they carry out the purposes of the charity. These activities must remain incidental or ancillary to the charity's purposes".

The publication clarifies what it means by "dominant":

"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".

Paragraph 24 of CC9 states:

"Where political activities do begin to dominate the activities of the charity, an issue will arise as to whether the charity trustees are acting outside of their trusts …".

The legal authority for this statement is not apparent. Whilst it is understandable that the political nature of activities may be relevant to charitable status, discussed next, it is not clear why the political nature of activities should be relevant to breach of trust, unless the governing instrument specifically excludes them. Further, it is unclear how the proportion of resources applied affect questions of breach of trust. If it is acceptable within the terms of a trust to use 20 per cent of a charity's income for a certain type of activity, it is not apparent why is should be unacceptable to use 80 per cent, unless the terms of the trust specifically exclude this.

Paragraph 24 of CC9 continues:

"In exceptional cases this might also lead us to reconsider whether the organisation should ever have been registered as a charity, or whether it was in fact established for non-charitable political purposes".

This makes more sense than the above statement relating to breach of trust, as organisations which are essentially political cannot, as the law stands, be charitable. However, the basis on which the Commission holds that the *extent* of the activities (rather than just their nature and presence) will render the purposes political is not entirely clear.

Paragraph 24 does not make it clear whether political activities will make the Commission question the construction of the objects themselves, or just their public benefit and thus charitable status. Both the courts and the Commission tend to combine the two questions, and the uncertainty over the circumstances in which they can refer to activities was discussed above.[280]

In addition to the above uncertainty, it is unclear whether in the above circumstances the Charity Commission would take into account the view expressed in *Att-Gen v Ross*[281] that the main purposes of an organisation should be assessed at the time of its formation, and that evidence of activities at or shortly after that time has a greater probative value than evidence of activities carried out subsequently.[282]

Whichever approach the Commission takes, the statements in CC9 regarding "dominant" means create inconsistency and uncertainty for charities. A hypothetical example, comparing two charities, illustrates this inconsistency. Both charities are formed for identical exclusively charitable purposes, and have undertaken a careful process of decision-making on how to apply their funds. External circumstances lead the first charity to fulfil them through service delivery, which is unquestioned. The second charity undertakes the same process of decision-making on how to apply its funds. Its assessment of the external circumstances (maybe including the fact that the first charity is meeting the current need for services to beneficiaries) leads it to different conclusions. The second charity thus devotes a "dominant" proportion of its resources to campaigning for a change in the law which would

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[280] At Section 2.2.1.

[281] [1986] 1 WLR 252.

[282] See P. Luxton, *The Law of Charities*, OUP (2001), para.10.52.

benefit the charity's beneficiaries and reduce the need for service provision in the long term.

Regardless of whether this is indeed the best method of achieving the charity's objects in the circumstances, and regardless of the genuine intentions and careful decision-making of those in control of the charity, the second charity runs the risk of losing its charitable status.

It should be noted that CC9 guidance does state that the above conclusions will only be drawn in exceptional circumstances. In fact, the Commission have not been particularly harsh in imposing sanctions. However, the point is that the Commission has been quite ready to instruct charities to cease such activity in the past,[283] and is able to impose more serious consequences if it chooses. Charities will shape their decisions whether and how to campaign around the guidance.

A 2005 report in *Third Sector* magazine[284] stated that the Charity Commission had altered its advice in this area, and that charities "can now spend as much as they wish on promoting their cause so long as it is for a clearly defined period". The article quoted the Charity Commission's head of regulatory policy in support of these alterations. However, no revisions to CC9 or other guidance were apparent at the time of the report, and it must therefore be assumed that the "dominant" rule still stands.

To summarize, the rule against political activity being the "dominant" means of fulfilling charitable objects does not appear to have any specific legal authority. Even if such authority can be cited, it is submitted that it is flawed, as it does not take into account factors external to a charity which necessitate the use of different amounts of resources, for different periods of time, and for different activities. Further, it does not take into account internal factors such as adherence to objects and careful decision-making which is in line with other Commission guidance on

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[283] E.g. see *War on Want. Report of an Inquiry submitted to the Commissioners 15th February 1991*, HMSO; *Oxfam. Report of an Inquiry submitted to the Charity Commissioners 8th April 1991*, HMSO.

[284] *Advice on campaign spending revised by Commission*, 13 April 2005, p.2.

how trustees should behave.[285] The rule, in effect, inhibits the ability of trustees to apply the charity's resources in furtherance of the charity's objects.

It is submitted that it would be preferable for the guidance to emphasize the need for political activity to be in furtherance of the charity's objects, balanced and not damaging to the charity's reputation, rather than placing an inflexible blanket "not dominant" veto on it.

The effectiveness of the current version of CC9 in terms of explaining the law is further explored through the empirical analysis in Section 4.0. It usefulness in a wider sense is considered in ensuing chapters, and its emphasis on risk management is explored specifically in Chapter Six.

In response to criticisms of CC9 from within the sector,[286] the Charity Commission has recently published supplementary guidance[287] in the form of "questions and answers". As well as attempting to reassure charities regarding the Commission's approach to political activity and addressing various other matters, it addresses confusion over the "dominant" rule explored above:

> "We say in our guidance that political activity cannot be the dominant means by which a charity carries out its charitable purpose. What underlies that advice is case law, which has established that a political purpose cannot be a charitable purpose. That rule would not amount to much if it was possible for an organisation to have a charitable purpose but nonetheless to engage solely in political activity. The law is clear and well established on this point and it is not open to the Commission to take a different approach
> ...
> If a charity does engage solely or predominantly in political activity then that **may** indicate that the organisation isn't really a charity at all, but is

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[285] E.g. Charity Commission, *The Essential Trustee: what you need to know*, (CC3) TSO (2007).

[286] See Section 5.1 below for discussion.

[287] *Campaigning and political activities by charities – some questions and answers* (April 2007).

instead a political organisation, or that it is operating in breach of legal requirements. On the other hand, it may be that the trustees have exercised their discretion properly, looked at the range of means open to them, and have decided that for the time being the charity's purposes are most effectively pursued through political activity. However, if political activity dominates what your charity does to the absolute exclusion of all other activities, you may well have failed to exercise your discretion properly".

Three criticisms of the above statement are immediately apparent. First, the case law on political purposes is arguably not clear.[288] On the question of whether it is well-established, the case law dealing with the political or otherwise nature of objects in general is at least abundant. However, case law of relevance to the "dominant" rule, i.e. relating to political activities by existing charities, is scant. As considered earlier in this section, what case law there is does not provide authority for the rule. The first paragraph above goes no further than CC9 in producing legal authority for the rule.

Second, the two paragraphs quoted above are contradictory. The first states that charities *cannot* engage solely in political activity, as this would make the rules on political purposes meaningless. The second states that charities *can* engage solely in political activity "for the time being", but only if trustees have exercised their discretion properly.

Third, the second paragraph creates a circular argument. After stating that proper exercise of discretion can render "dominant" political activities acceptable, it states that "dominant" political activities can be evidence that discretion has not been exercised properly. At best, this adds nothing to understanding of CC9. At worst, it further confuses the issue.

It is contended that a better approach to "dominant" political activities is contained in the next paragraph of the supplementary guidance:

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[288] As considered in Section 2.1.

"The decision for trustees is whether the political activity furthers their charity's purpose to an extent that justifies the resources used. They need to be able to explain their reasoning and its link to the charity's purpose, and to be able to counter criticisms that the change in the law was too remote a possibility, or that what they were pursuing was linked to their personal political views rather than furthering their charitable purpose".

Whilst the above would have been a sensible approach if it stood alone, the presence of the problematic preceding paragraphs of the guidance limit its effectiveness in resolving the question of the "dominant" rule.

Further criticisms of the supplementary guidance from within the sector are considered below.[289] It should be noted that the Commission apparently intends to publish a revised version of CC9 in Autumn 2007.[290]

4.0 Consequences of improper political activity for existing charities

This section considers potential consequences for charities and their trustees where "unacceptable" political activities - rather than being used to determine objects or charitable status where either of these is unclear - are held to constitute a breach of trust. It examines informal action by the Charity Commission; powers of the Commission to institute inquiries; and legal proceedings instituted by the Attorney-General, the Charity Commission and other persons. It also considers the remedies for breach of trust available to the Charity Commission as regulator and available through the High Court.

4.1 Informal action by the Charity Commission

The consequence of improper political activities which constitute a breach of trust (or *ultra vires* activities in the case of a charitable company) is usually a warning and advice from the Charity Commission rather than the more serious action

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[289] Section 5.2.

[290] According to HM Treasury / Cabinet Office, *The future role of the third sector in economic and social regeneration: final report*, (Cm 7189) TSO (2007), para.2.32.

detailed below. The Commission will also seek an assurance from the trustees that the activities will cease, but have, in the past, been prepared to repeat the above process where charities have continued to engage in proscribed activities.[291] Whilst the likelihood of action being taken against a charity is therefore low, it is arguably understandable for charities to be reluctant to test the boundaries of the rules and risk punitive action from the Commission, however unlikely it is. They may even be reluctant to invoke warnings from the Commission, given the damage to reputation that this has the potential to produce.

4.2 Formal action by the Charity Commission and the courts

If trustees act in breach of trust as described above, a range of powers are available to the Charity Commission and the courts to protect charitable assets. Legal proceedings may also be instituted by certain other parties. These are considered in turn below.

4.2.1 Powers of the Charity Commission to conduct inquiries

The Charity Commission will only use its statutory powers[292] to conduct inquiries into the affairs of charities in specific circumstances. Its policy in this respect is described in publication CC47:[293]

> "Complaints that the Commission will take up as regulator are, generally speaking, ones where there is a serious risk of significant harm or abuse to the charity, its assets, beneficiaries or reputation; where the use of our powers of intervention is necessary to protect them; and where this represents a proportionate response to the issues in the case".

Prior to opening a formal inquiry into the management of a charity, the Commission's policy is to conduct an informal evaluation of the issues drawn to their attention. CC47 describes this policy:[294]

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[291] See *War on Want. Report of an Inquiry submitted to the Commissioners 15th February 1991*, HMSO; *Oxfam. Report of an Inquiry submitted to the Charity Commissioners 8th April 1991*, HMSO.

[292] Under s.8 Charities Act 1993, see below.

[293] Charity Commission, *Complaints about Charities*, (CC47) TSO (2003), para.6.

"All complaints will be evaluated objectively and open-mindedly in order to decide whether there is an issue for us to take up. This may involve gathering more evidence.

The officer conducting the evaluation will take a view on the information provided, the extent of any risk to the charity and apply the criteria described in the third and fourth sections of this booklet to decide whether the Commission should look into it further".

If the Commission decides on the basis of an evaluation that a formal inquiry is required, it has the power under Section 8 Charities Act 1993[295] to either conduct an inquiry itself or appoint a person to conduct one.[296] Section 8(3) provides the person conducting such an inquiry with powers to direct any person to provide and verify by statutory declaration relevant accounts and statements, written answers to questions, and copies of relevant documents in his custody or under his control. It also provides powers to direct any person to attend at a specified time and place and give evidence or produce any of the above documents. The Commission now has additional powers during a Section 8 inquiry to obtain a warrant (in certain circumstances) to enter premises and seize documents.[297]

The Charity Commission has various remedial powers following the above process. If, following the institution of a Section 8 inquiry, the Commission is satisfied that there has been any misconduct or mismanagement in the administration of a charity,[298] or that it is necessary or desirable to act to protect the charity's property or secure its proper application,[299] it has a number of powers. It can suspend certain individuals from their office or employment pending consideration of their

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[294] *Op cit.*, paras.32 -33.

[295] As amended by the Charities Act 2006.

[296] S.8(2).

[297] S.31A Charities Act 1993, inserted by s.26 Charities Act 2006.

[298] S.18(1)(a) Charities Act 1993.

[299] *Ibid.* s.18(1)(b).

removal,[300] appoint additional trustees,[301] vest charity property in the official custodian,[302] order persons holding property on behalf of the charity not to part with it without Commission approval,[303] order debtors of the charity not to make payments to the charity without Commission approval,[304] restrict the charity's financial transactions,[305] and appoint an interim manager for the charity.[306] If, following the institution of a section 8 inquiry, the Commission is satisfied *both* that there has been any misconduct or mismanagement in the administration of a charity,[307] and that it is necessary or desirable to act to protect the charity's property or secure its proper application,[308] it has more extensive powers. In these circumstances it can remove certain persons from their office or employment if they have been responsible for or privy to the misconduct or mismanagement, or have contributed to or facilitated it.[309] It can also establish a scheme for the administration of the charity.[310]

The Commission also has new relevant powers under the Charities Act 2006. Section 19 of the 2006 Act inserts a new Section 18A into the Charities Act 1993. This allows the Commission, where it has made orders relating to suspension[311] or removal[312] of individuals from office or employment, to make further respective orders relating to suspension[313] or termination[314] of their membership of the charity,

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[300] *Ibid.* s.18(1)(i). Relevant individuals include trustees, charity trustees, officers, agents or employees of the charity.

[301] *Ibid.* s.18(1)(ii).

[302] *Ibid.* s.18(1)(iii).

[303] *Ibid.* s.18(1)(iv).

[304] *Ibid.* s.18(1)(v).

[305] *Ibid.* s.18(1)(vi).

[306] *Ibid.* s.18(1)(vii).

[307] *Ibid.* s.18(2)(a).

[308] *Ibid.* s.18(2)(b).

[309] *Ibid.* s.18(2)(i). Relevant individuals include trustees, charity trustees, officers, agents or employees of the charity.

[310] *Ibid.* s.18(2)(ii).

[311] *Ibid.* s.18(1).

[312] *Ibid.* s.18(2).

[313] *Ibid.* s.18A(2).

[314] *Ibid.* s.18A(3).

if relevant. Section 20 of the 2006 Act inserts a new Section 19A into the Charities Act 1993. This empowers the Commission, in specified circumstances,[315] to give directions to certain individuals to take specified action that the Commission considers to be expedient in the interests of the charity.[316] Finally, Section 21 of the 2006 Act inserts a new section 19B into the Charities Act 1993, which provides the Commission with powers to direct application of charity property[317] in specified circumstances.[318]

4.2.2 Legal proceedings by the Attorney-General, the Commission, and other persons

The Attorney-General, as representative of the Crown and acting *ex officio*, may bring charity proceedings in the High Court if there has been or there is a threat of a charity's property being applied in breach of trust. This often takes place following a reference from the Charity Commission.[319]

Under Section 32 Charities Act 1993,[320] the Commission may also, with the agreement of the Attorney-General,[321] conduct charity proceedings[322] in the High Court in the same way as the Attorney-General.[323]

Section 33(1) Charities Act 1993 enables charity proceedings to be taken with reference to a charity either by the charity itself, by any of the charity trustees, or by

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[315] Under s.19A(1) Charities Act 1993, the circumstances are the same as those specified in s.18(1)(a) or (b) of the 1993 Act, discussed above.

[316] *Ibid.* s.19A(2). Relevant individuals are charity trustees, trustees for the charity, officers or employees of the charity, or (if a body corporate) the charity itself.

[317] *Ibid.* s.19B(2).

[318] *Ibid.* s.19B(1). The specified circumstances are where the Commission is satisfied (a) that a person or persons in possession or control of any property held by or on trust for a charity is or are unwilling to apply it properly for the purposes of the charity, and (b) that it is necessary or desirable to make an order under the section for the purpose of securing a proper application of that property for the purposes of the charity.

[319] *Ibid.* s.33(7).

[320] As amended by the Charities Act 2006.

[321] Subs.(5).

[322] Defined by s.33(8) as proceedings in any court in England or Wales brought under the court's jurisdiction with respect to charities, or brought under the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes.

[323] With the exception of the power of the Attorney General under s.63(1) of the Act to present a petition for the winding up of a charity. (s.32(2)).

any person interested in the charity,[324] or any two or more inhabitants of the area of the charity if it is a local charity. Such proceedings must be authorised by order of the Charity Commission.[325] However, the Commission cannot authorise them if the case can be dealt with under the other powers (discussed above) that the Act confers.[326]

In the case of unincorporated charities, the High Court, in its jurisdiction over trusts, can apply a range of equitable remedies, discussed below. However, the jurisdiction of the High Court with regards to charitable corporations is theoretically problematic. Some guidance can be taken from the courts' willingness to view charitable companies as 'in the position of a trustee of its funds or at least in an analogous position'.[327] The latter view was supported and developed by Slade J:[328]

> "In my judgement the so-called rule that the court's jurisdiction to intervene in the affairs of a charity depends on the existence of a trust, means no more than this: the court has no jurisdiction to intervene unless there has been placed on the holder of the assets in question a legally binding restriction, arising either by way of trust in the strict traditional sense or, in the case of a corporate body, under the terms of its constitution, which obliges him or it to apply the assets in question for exclusively charitable purposes; for the jurisdiction of the court necessarily depends on the existence of a person or body who is subject to such obligation and against whom the court can act in personam so far as necessary for the purposes of enforcement".

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[324] The courts have refused to provide a clear definition of a person "interested" in a charity: see *Re Hampton Fuel Allotment Charity* [1989] Ch 484 at 493 per Nicholls J: "a person generally needs to have an interest materially greater than or different from that possessed by ordinary members of the public ...". The judge held this to include a person who funds or finances a charity, but not where this is merely a modest contribution. See Chapter Seven, Section 2.3.2 for the potential implications of this definition for charities undertaking campaigning. For more detailed discussion of the decision see P. Luxton, *The Law of Charities*, OUP (2001), para.13.27 *et seq.*; J. Warburton, *Tudor on Charities*, (9th Edn.) Sweet & Maxwell (2003), para.10-031 *et seq.*

[325] S.33(2) Charities Act 1993, as amended by the Charities Act 2006. Under s.33(5), the proceedings may still be authorised by a High Court judge after the Commission has refused permission.

[326] S.33(3) Charities Act 1993, as amended by the Charities Act 2006.

[327] *Von Ernst et Cie SA v Inland Revenue Commissioners* [1980] 1 WLR 468 at 475 per Buckley LJ.

[328] *Liverpool and District Hospital for Diseases of the Heart v Attorney-General* [1981] Ch 193, on the question of the courts' *cy-pres* jurisdiction.

It thus appears that the courts are prepared to assert their jurisdiction over charitable assets regardless of legal structure.

Possible remedies include the removal of a trustee or trustees,[329] injunction against proscribed activities,[330] or the appointment of a receiver and manager.[331] In addition, the trustees may be ordered to account, although the High Court has jurisdiction to relieve trustees from personal liability, and is generally lenient to charity trustees who have acted honestly and have caused loss to the charity through mistake.[332] The Charity Commission also now has a power to make orders to relieve trustees from liability for breach of trust or duty, if it considers that the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust or duty.[333]

5.0 General sector perspectives on law and guidance

This section considers recent views emanating from the charity sector relating both to the law on charities and politics, to Charity Commission guidance CC9, and to the Commission's recently published supplementary guidance.

5.1 Calls for reform to law on campaigning

The increasing interest in political campaigning within the charity sector[334] coupled with a substantial body of academic criticism of this complex area of law has inevitably brought calls for reform. An Advisory Group on Campaigning and the Voluntary Sector chaired by Baroness Helena Kennedy QC reported in May 2007. The report covers both the charity law restrictions on campaigning addressed in this chapter and wider domestic legislation with an effect on campaigning. The latter is addressed in Chapter Three of this thesis.

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[329] The original jurisdiction of the Court of Chancery to remove charity trustees (*Letterstedt v Broers* (1844) 9 App Cas 371, 386 PC) is now exercised by the Chancery Division of the High Court.

[330] See *Baldry v Feintuck* [1972] 1 WLR 552.

[331] See *Attorney-General v Schonfield* [1980] WLR 1182.

[332] Trustee Act 1925, s.61.

[333] Charities Act 1993, s.73D, inserted by Charities Act 2006, s.38.

[334] Noted in Chapter One, Section 1.0.

Whilst the Group's analysis of some aspects of existing law and guidance on political objects and activities differs from the analysis in this thesis, the Group's suggestions for reform are considered further in Chapter Seven.

5.2 Perspectives on Charity Commission guidance CC9

The sector's views on CC9 are decidedly mixed. An article published in *Voluntary Sector* magazine[335] soon after the Commission guidelines on political activity were revised in 2004[336] reported the views of several charities. Oxfam's policy director, who felt that the new Charity Commission guidance on campaigning would make planning campaigns easier as the previous guidance had been too complex, commented:[337]

> "... we've been contacted in the past by small charities who were worried that local campaigning would be too controversial to do, ... The guidance made it look more complicated than it actually was. Hopefully the new guidelines will make it easier".

The RSPCA welcomed the emphasis on the role of trustees in risk management, which it felt would give the charity "greater freedom to choose" how it carried out its campaigns.[338]

However, the article also reported less optimistic views of the revisions. NCVO, whilst welcoming the guidance, thought that it could "'still be interpreted as over-cautionary – it's not drafted as clearly as it could be to get the positive message across about the freedom to campaign".[339]

Further evidence of the shortcomings of the guidance was produced by an online survey of charities in May 2006, commissioned by the charity People & Planet and

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[335] D. Adams, 'Campaign Trail', *Voluntary Sector* magazine, July 2004, pp.14-16.

[336] Charity Commission, *Campaigning and Political Activities by Charities*, (CC9) TSO (2004).

[337] D. Adams, *op cit.*, p.16.

[338] *Op. cit.*, p.15.

[339] *Loc. cit.*

the Sheila McKechnie Foundation and conducted by nfpSynergy.[340] The survey found that only fifty-two per cent of the respondents (which numbered one hundred and one) were aware that the guidance had been re-written. Eighty per cent of respondents said that the revised guidelines had either made no difference at all or nearly no difference at all to their campaigning activities. Only seven organisations felt that the revised guidance had improved the climate for campaigning.

The Sheila McKechnie Foundation has since taken a negative stance on CC9, stating on its website:[341]

> "The guidance is unhelpful to smaller campaigning organisations. The greater part of the voluntary sector is made up of smaller organisations, many of whom undertake campaigning work. CC9 says that campaigning must be an 'ancillary' activity and not be the predominant area of a charity's work. For many smaller voluntary organisations that have substantial campaigning activities this requirement is an obstacle because they have small budgets. This provision in the guidance also seems to send out the wider message that campaigning is something that is in some way undesirable and must therefore be limited in terms of expenditure and activity".

The results of the nfpSynergy survey led to the publication by the Charity Commission of supplementary guidance on campaigning. The content of this was considered at Section 3.3 above.

The supplementary guidance was itself the subject of criticism from within the sector soon after its publication. *Third Sector* magazine[342] reported calls by the business manager at Action on Smoking and Health for the Charity Commission to "completely re-write the CC9 guidelines as a matter of urgency", as the

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[340] Available online at www.nfpsynergy.net.

[341] www.sheilamckechnie.org.uk/getinvolved/Updates.htm [17/07/2006].

[342] 11 April 2007, p.3.

supplementary guidance still did not adequately address the differences between the different types of campaigning.

Further criticisms of both CC9 and the supplementary guidance are contained in the May 2007 report of the Advisory Group on Campaigning and the Voluntary Sector, considered in Section 5.1 above. The recommendations for reform contained in the Advisory Group's report are considered in Chapter Seven.

6.0 Charities' perceptions of the existing law on political objects and activities

Section 6.1 examines the awareness and understanding of the law regarding charities and politics demonstrated by charities in the study. Sections 6.2 and 6.3 examine the charities' use of Commission guidance and their perceptions of its usefulness, whilst Sections 6.4 and 6.5 consider their perceptions of the consequences of contravening the law and their strategies for compliance. Section 6.6 considers the overall effect of the above on charities' campaigning activities.

6.1 Awareness and understanding of law regarding charities and politics

Lack of knowledge

Whilst a small number of the charity representatives in the study had a clear understanding of the basic principles of the law on political objects and activities, the majority were unaware of the boundaries of acceptable political activity. This lack of awareness ranged from knowledge that the rules existed but lack of understanding of the details, to complete disregard.

> *We would refer to them if we were about to do something that we thought was not going to be OK (Charity C).*

> *I guess I don't know very much about the case law, it all seems to be around .... Yes, I've just been very confused by it all in general, the basic thing is avoiding the word political, I think (Charity K).*

> *... surprisingly poor levels of understanding about the law and guidance even amongst staff, never mind trustees where I am sure it will be much lower* (Charity P).

Emphasis on objects rather than political rules

Whilst there were exceptions to charities' lack of awareness of the rules regarding politics, those charities in the study which were unaware of the boundaries of the rules tended to evaluate the legitimacy of their activities purely on the basis of whether the activities fitted with their charitable objects (and the strategic aims and objectives stemming from those objects).

> *We focus on if the campaign fits with our objectives, our overall aims and objectives, and then fits in with our strategic planning, and we would consider anything that we became involved in carefully ...* (Charity J).

> *I think as long as the objective met our key core aims, then obviously we would sit and consider it* (Charity L).

Some charities extended this consideration for their objects to consideration for their supporters' views:

> *I've been thinking that I should probably take a bit more notice ... I suppose I'm more guided by whether I feel that it's in the interests of what we're trying to do, I suppose I use my own conscience. I'm very conscious of the fact that we get donations, £5 and £10 from people saying I'm sorry it can't be more, and that does stay in my mind, very much, if I was talking to that person, how would they feel about this...I'm quite aware of whether I would be embarrassed to tell those people how we spent the money, but I suppose that's not a very professional approach* (Charity D).

Although some of the charities discussed in the previous point substituted adherence to objects for consideration of the rules on politics, the charities which *did* have a good working knowledge of the rules on politics still emphasised the

fundamental role that adhering to their charitable objects played in campaigning activity decisions:

> *When Britain and America and went to war we never came out and condemned it, because that is the right decision for the political system to make. We may not be happy about the war, but it's not for us to criticise the war, it's for us now to see what the humanitarian fallout of the war is, because we are first second and third a humanitarian agency, and while many of us individually might not be comfortable with the war, we as an organisation could not and should not speak against the war, and we had a very big problem with that, one of our senior staff members resigned over it* (Charity G).

A representative of a larger, more knowledgeable charity, which advised other charities on occasions, commented on how important carefully drafted objects were to enabling and legitimising campaigning activity:

> *... I've had conversations with a local environmental charity whose concerns were that their objects were educational but their planned activities were to run a series of public events with speakers promoting a "green" agenda so in part I think the question is that some trustees don't put enough thought into drafting their objects before registering and only once registered do they realise that they should have been broader or differently worded* (Charity O).

An issue related to the study participants' focus on their objects and their decisions to achieve these objects through campaigning is their rejection of the possible dual organisational structure adopted by some organisations. Whilst investigation of the practice of creating separate bodies for charitable and campaigning functions is generally outside the remit of this thesis,[343] the theoretical possibility of this dual organisational structure was relevant to the charities in the study in the sense that

[343] As identified in Chapter One, Section 2.1.

they had all made the decision *not* to adopt it. In placing emphasis on adhering to and achieving their objects, the participants were confident that campaigning was the best way to achieve their objects. This led them to conduct their campaigning within the charity, regardless of the uncertain boundaries of the law on political objects and activities and of their poor knowledge of it.

Several charities in the study commented on the reasons why they had made the decision to undertake their campaigning work as part of their charitable activities rather than creating a separate organisation. The most common reason was that attempting to achieve change on particular issues was an integral part of their mission:

> *We have always viewed our campaigning as an integral part of our response to poverty and to our programme of direct intervention. The policy analysis and prescriptions arise from our experience and that of our beneficiaries. So there is a question of authenticity of voice and legitimacy of action. We're not just a think tank* (Charity O).

> *It's integral to our mandate and our way of working. There's no way we could explain to people that we're just a fire-fighting organisation rather than tackling the root causes* (Charity G).

However, Charity G also identified that campaigning within the charity had to be carefully balanced with continued emphasis on other activities:

> *My problem is that a lot of people love the campaigning side of it and would not like to look into the traditional relief and development, one reason is because it's fashionable and second of course, to be honest, doing something on campaigning might have a bigger impact than doing something on the ground. So that is why we control how much money we put into campaigning, because we don't want to be a campaigning organisation, we want to be an organisation that campaigns* (Charity G).

The above statement also illustrates an interesting contrast between the positive attitudes of supporters and staff towards campaigning, and the attitudes of funders, "conservative" trustees, the Charity Commission and wider society perceived by a number of the research participants.[344]

In addition to the relationship with the charity's mission identified by Charity O above, the representative of Charity O stated that the administrative complexity of the two structures would be a problem, as would financing the non-charitable side of the organisation. This latter point is related to the difficulty in funding campaigning work in general, discussed in Chapter Five.[345]

Lack of awareness of rules on politics: provisos

The level awareness of the rules on politics amongst charities in the study varied according to a number of factors. The most common factors which appeared to cause this variation are discussed below.

Size

First, the larger charities in the study had consistently greater awareness and understanding of the rules than smaller charities. However, this leads to the interesting situation that larger and more knowledgeable charities may actually choose to ignore the guidance, as they are aware of the current low levels of enforcement by the Charity Commission. This will be discussed below in the section on the consequences of contravening the rules on politics.

Service provision / campaigning: proportion of resources

Second, charities which devoted a significant proportion of their overall resources to their campaigning work understandably had a greater level of awareness of the rules on politics:

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[344] As discussed in Chapter Five, Section 2.0.

[345] *Ibid.*

where you are a big organisation or even just an organisation that primarily exists for the provision of services, there isn't the same emphasis on being concerned about the political activity stuff (Charity A).

... it hasn't been an issue for us, I mean we did have a quick look obviously to check out what its impact would be on us, but the bits in the law that have an impact on us are much more around fundraising, not about that, because we're not part of the political ... we're not at the end where it's much harder to determine what's a charity and what's a political campaign (Charity F).

"Political" v "political"

Third, most of the charities in the study had a greater level of understanding of the need to avoid "Political" (i.e. party political) activity than they had of the rules surrounding "political" activities. They were particularly confident in the area of the rules around campaigning during election periods.

I think the only places where for a charity that's primarily service provision it begins to bite are around election periods, everyone's very, very careful during election periods to the point of almost going into purdah like the civil servants do, and in terms of endorsing political stances of a particular party (Charity A).

For us the issues are much more about sort of credibility, so therefore for example, we're not allowed by law to get into bed with one party and the question there is how do you manage that even when particularly when you've got one party that's relatively open to the voluntary sector, so we think about that in terms of our activities ... (Charity F).

I am not the best person to answer this overall, as questions on our charitable status vis-a-vis political campaigning would need to be resolved at a more senior level. However: during the period of a general election campaign we have to be very careful not to say anything which could be

interpreted as criticising or favouring any one party. While it is acceptable to criticise the Government most of the time, criticising a party that is currently fighting an election is not the same thing at all (Charity N).

... it's quite clearly within a democracy acceptable to inform practice, policy and legislation, it's ok to lobby for to change, to improve society, that's quite alright, it's only if I start aligning myself with a political party that there would be an issue (Charity C).

Even where charities have an understanding of the regulation of political activities beyond party politics, there appears to be widespread feeling that defining "politics" in the wider sense is difficult, and that as an integral part of achieving a charity's objectives, treating it differently from the other legitimate activities of the organisation creates an artificial distinction:

... it's certainly stated explicitly somewhere in here I think [members handbook] that we don't have any political or religious affiliations, and it's very important I think for us organisationally to stay pure, not least because there are - the Charity Commission are very clear about this - there are rules and regulations about 'political with a big p' campaigning but it could be argued that what we do day in day out is 'political with a small p', single issues ... single issue politics, we want to see better mental health services, and that's why we exist as an organisation. I mean, I'm looking for some wood to touch, I don't think we've run into trouble with that in the past and we're certainly very mindful of going that bit too far ... (Charity B)

We're not allowed by law to get into traditional what you call narrow sense political campaigning or party politics, but it's very difficult as all campaigning cannot be apolitical, because we're trying to influence the political system and political leaders in the wider sense of the word (Charity G).

Criticisms of the rationales underlying the law relating to charities and politics are considered further in Chapter Seven.[346]

Controversiality

Fourth, there was a greater consideration of the rules within charities which were campaigning on controversial issues:

> *if you look at the number of complaints against Charity G to the Charity Commission in the last five years, more than any one issue it is around what we say or do on [controversial issue] so we have to be very sensitive and very careful. Every time, the Charity Commission has come on our side, every time. We have to make sure that we are within the law, we are within the spirit of the law ... I remember talking to the Charity Commission one time, and ... I said you know the law, we know the law ... but I think it's also good for us to have those checks and balances, and so we are sensitive not just to what the Charity Commission would say, but not to be seen as anti-[specific religion]. Also in our other campaigning we don't want to be seen as anti-World Bank or anti-IMF or anti-companies, what we want to do is obviously work in the interests of the poor, and very easily our people will be seen as propaganda* (Charity G).

Concern amongst charities over controversy can be linked to some extent to the case law on political activities, and to the judicial attitudes to campaigning on controversial issues discussed earlier in this chapter. Whilst most charities will not have direct knowledge of the case law, it has been interpreted by the Commission guidance on campaigning, which is the main source of the law for many charities.

However, the above quote demonstrates that charities' concern over controversy within campaigns is often less to do with possible legal ramifications than it is to do with the potential damage to a charity's reputation and public image of taking an unpopular or controversial line in a campaign.

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[346] Section 3.2.

Concern over reputation is in part a concern over potential loss of public support and income. This is discussed in Chapter Five,[347] which examines non-legal influences on campaigning.

However, charities' concerns over their reputations are also an issue of regulation. This is because the Charity Commission places great emphasis in its campaigning guidance on risk to reputation and the management of this risk by charities. Risk management is a legal requirement for larger charities, and is encouraged as a matter of good practice in smaller charities.[348]

It is arguable that many of the charities in the study mirrored the Charity Commission's concern over reputational risk, and displayed a relative lack of concern for the potential legal consequences of political activity. This raises the question of whether these charities have adopted this prioritization from the Commission's guidance, or whether the guidance accurately reflects the existing reality of the situations and risks that charities faced. This question, and the validity of the Commission's view of the risks of campaigning are considered further in Chapter Six.

6.2 Use of Charity Commission guidance on campaigning

Awareness and use of Charity Commission guidance varied between the charities, and, as expected, correlated with their awareness of relevant law. Whilst there was a general attitude that Commission guidance should be complied with, not many charities made a formal attempt to put them into practice. Many charities said that they would only refer to the guidance if they felt that they were in danger of stepping outside the boundaries. This indicates that they felt that they had a basic grasp of where those boundaries were, despite not referring to any written explanation of them.

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[347] Section 2.2.

[348] See Chapter Six, Section 2.2.1 for legal and regulatory requirements in relation to risk management.

Well we've got the campaigning guidelines from the Charity Commission which I think I glanced at once, but to be honest it's not been an issue for us (Charity F).

I think we just refer to it when we know we're sticking our head above the parapet (Charity K).

> *I think if someone questioned ... where it would come up ... so if I was in a small charity and I went to my board of trustees and said 'OK, well I think we should go after X', and they said 'Oh, we're not sure', and one of the things they said to me was, 'We think it might fall foul of, you know, kind of prohibitions on political activity', I'd read it then, but I think unless people have ever had it said to them ...* (Charity A).

6.3 Clarity and usefulness of the guidance (if used)

There were mixed views amongst those charities which used the Charity Commission guidance on campaigning on how helpful it was. However, some felt it was an essential part of their operations:

> *It's compulsory reading for staff, compulsory reading for board members. I have a handbook for members and new senior managers and it's one of the things that is there, it's compulsory. The Charity Commission produces some very good material* (Charity G).

Those who used the guidance expressed generally positive views about the updated version in terms of its clarity and the amount of freedom given, and about the Commission's overall approach:

> *I think it's better, I mean there's always shades of grey, but I think it's better, because it allows us much more* (Charity G).

> *There are fewer standards now for campaigns by charities in the Charity Commission's guidelines than there used to be. They used to have*

compliance standards around communications we could send supporters and supporters could send politicians, but these have been dropped (Charity O).

However, there was still a feeling that improvements need to be made:

The latest version is I think, still overly complex but is another huge leap in the Commission's approach (Charity O).

By others, the Commission's approach was criticised:

... in advance of the 2005 election the Charity Commission published this extremely annoying piece of guidance I think prompted by the heightened involvement of development issues in the 2005 election, they produced this rather unnecessary guidance ... [we] wrote a letter saying well, one: why have you suddenly published this when you already have guidance that sets out what we know ... what it said was that you couldn't effectively compare our policies with the different parties' manifestos. And we said well this has been a standard campaigning tool for years, we know that we're not meant to advocate for one particular party, but we are allowed to compare our policies with the different parties, and there was some annoyance around that, and I think the Commission felt like it had got a bit looser and letting people do stuff and had to show it was still a tough regulator (Charity K).

6.4 Perceptions of consequences of contravening law and guidance

Perceptions of the legal consequences of acting outside of the boundaries of the law on political objects and activities varied between charities the study. For the majority of charities in the study, awareness of the potential consequences of contravening the rules matched the level of general awareness of the law. One major charity, whilst aware of the law and potential consequences, felt that the actual possibility of enforcement were remote:

... this is an unenforced area of law. I mean if there were any likelihood whatsoever that Charity A doing a campaign on something completely you know ... if there was any likelihood of any charity that was operating within even spitting distance of a reasonable set of charitable purposes getting prosecuted or even being significantly told off, I think it would be different but in reality this is not an area of law that is enforced for the vast majority of charities (Charity A).

This supports the contention that an emphasis by the Commission on ensuring charities are registered with valid objects may currently be a substitute for strict enforcement of the rules on politics. However, if this is the case, the question is raised of the potential consequences for charities in the event that the current approach to enforcement changes in the future.

It should be noted that the major charity quoted above acknowledged that most smaller charities were unaware of the current lack of enforcement:

> *I think smaller charities you'd get a very different kind of feeling from ... They think they're going to have their heads cut off ...* (Charity A).

This view was shared by the representative of another major charity, who had experience in advising smaller charities:

> *... a limited number of small charities who thought that any critical comment of a political body would get them into trouble ... This is a highly specialised area; the concepts are alien to most people (although usually easily grasped once explained)* (Charity O).

6.5 Strategies for compliance with the law

The charities in the study which had low levels of awareness of the law obviously had no strategies to comply with it. Many relied, as discussed above, on adhering to their charitable objects.

Whilst use of the Charity Commission guidance (discussed above) is itself a strategy for compliance with the law, some of the larger charities had formalised strategies for compliance with the law which utilised wider sources than the Commission guidance:

> *... we have a full-time staff member not only on this issue but on many other issues, they look at libel issues, look at copyright issues, look at a whole lot of legal issues, we have an in-house and external consultants ... we also check with the Charity Commission sometimes and we also check with our sister organisations which may come under the same umbrella* (Charity G).

> *We've done a huge amount of lobbying around both the law and the way the Commission interpret case law so we've looked at most of the relevant cases. I worked directly with the Cabinet Office team looking at the legal framework which led to the Charities Act and the expansion of charitable purposes so we've quite a lot of in-house knowledge ... We've also taken advice from our lawyers over the years and looked at international examples* (Charity O).

6.6 Effects of understanding of law and guidance on campaigning activity

A number of charities in the study were not constrained in their campaigning activities by the law regarding politics or Charity Commission guidance, for a variety of reasons.

Many of the unaffected charities were those which only engaged in a very small amount of campaigning in comparison to their levels of service provision, and did not have controversial subject matter or tactics, and were therefore not concerned that they could be in breach of the rules:

> *I can't say I really noticed because we will have carried on ... we would have done a paper that would have gone to the relevant people in the organisation and we just carry on as normal because we sit well within the guidelines, we're not sort of pushing the boundaries at all* (Charity E).

> *... it hasn't been an issue for us, I mean we did have a quick look obviously to check out what its impact would be on us, but the bits in the law that have an impact on us are much more around fundraising, not about that, because we're not part of the political, we're not at the end where it's much harder to determine what's a charity and what's a political campaign* (Charity F).

Whilst such charities were generally predominantly focused on service-provision because of reasons ostensibly unrelated to the rules regarding politics, the question is raised of whether the low levels of engagement in campaigning are at least in part caused by the prevailing attitudes against such activities. Many charities devote only a tiny proportion of resources to campaigning, even whilst acknowledging that tackling the root causes of the particular issues enshrined in their objects would be far more effective than just "fire-fighting". The reasons for this lack of engagement in campaigning are discussed in Chapter Five, which considers non-legal influences on campaigning.

A number of charities, because of their low levels of awareness of the law and guidance, did not constrain their activities. Conversely, however, some of the larger charities which had advised smaller ones noted that this lack of awareness could have the opposite effect, causing them to avoid campaigning for fear of contravening rules that they did not have full understanding of (see earlier discussion of consequences of contravening rules).

One charity identified that the rules on politics can be used as an excuse not to campaign within charities which are quite conservative by nature:

> *I think it does sometimes get mobilised internally in organisations as a way of saying you can't do certain things, but that's not to do with reality, it's more to do with organisational conservatism* (Charity A).

However, it could be argued that charities with "conservative" trustees are actually more likely to be "scared off" from campaigning by the law regarding politics.[349]

Whilst the charities in the study were asked if their understanding of the law constrained their campaigning activity, only one charity specifically identified that charities had a legal obligation to constrain their campaigning activities:

> *You might be a campaigning not-for-profit company, but the rule on ancillary activities means that it is almost impossible to be a campaigning charity. Do charities restrict their own activities - yes, they are formally required to do so by virtue of the ancillary activity rule* (Charity P).

However, Charity P also identified that there were low levels of awareness of this within charities generally, and therefore that:

> *... their decisions about whether or not to campaign and how to campaign or the extent of campaigning could not be informed by an understanding of the law* (Charity P).

The representative identified that in his experience, there were many charities which:

> *are 'reluctant' to campaign, or that they think it is dubious or quite simply that charity law makes it hard for them* (Charity P).

One charity saw itself as a campaigning organisation, despite being a registered charity:

> *The organisation's actually 40 years old, from its earliest days, and right from the outset it was a campaigning organisation, so the structure that was put in place was a sort of forum from which to campaign* (Charity E).

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[349] See Chapter Five, Section 2.2.1.4.

A number of the charities in the study which did constrain their activity because of the rules on politics also accepted that constraints on their activities were a necessary part of charitable status:

> *We have altered the way we've done stuff, but I can't say we've thought that was a bad thing, particularly around political lobbying around general election time, but that's fine, you know that's just the rules .. I don't think that's wrong* (Charity E)

> *... if we don't want to have the restriction of charity law then don't be a charity* (Charity K).

One charity which would have been prepared to constrain its campaigning activities based on Charity Commission advice decided not to alter their planned course, despite the Commission's negative view of their proposals. This was because they found the Commission's advice to be unclear:

> *It was just a matter of saying 'oh let's check', and then afterwards to be honest we felt we really didn't know much more, I mean we came out of it quite 'well I don't really know what they want us to do so we're just going to go ahead'* (Charity K).

The same charity also felt that the complying with the rules was something of an artificial process:

> *... you can see what you're meant to be doing when you read it, you can, you sort of, and I have to talk to colleagues in REF 33 about what it means, and there's a certain way of arguing, you have to use a certain type of sentence to set your [objectives] and then it works, but all that bit feels like log-frame analysis or some sort of tool like that, it's, or the language that people write funding applications with, it's a self-contained code that you can learn to speak in, but I'm not sure what it refers to or what it reflects* (Charity K).

7.0 Conclusion

Political objects: law and guidance

Section 2.1 considered the rule against political objects in isolation from questions of political activities. This is most relevant to new organisations wishing to register as charities. In addition to problems with the underlying rationales of the rule (considered in Chapter Seven[350]), this section identified that the rule suffers from a number of operational difficulties and inconsistencies. Difficulties such as those relating to the changing status of particular purposes over time are due to the nature of political matters. Difficulties relating to "ancillary" purposes and the distinction between ends and means have developed in wider charity law. However, the latter difficulty is itself exacerbated by the fundamental inconsistencies in the development of the political objects rule.

The major inconsistency of the rule against politics is in the development of the definition of the term "political", which suffers greatly from the effects of the conflation of charitable ends and means. The "changes in the law" aspect of the rule, whilst comprehensible when applied to objects which explicitly call for changes in the law, becomes confusing when extended to implicit intentions and difficulties over the role of a charity's means in imputing such intentions.

At its worst, the conflation of charitable ends and means has resulted in an over-extension of the political objects rule. The extension of the rule against political objects to swaying public opinion on (controversial) social issues has removed the element of changing the law etc, and thus applied the rule to situations unrelated to its original rationales.

This confirms Study Proposition 1, which states that existing law on charities and political objects is too complex to enable charities to predict whether and for what reasons objects will be held to be political and charitable status will be denied.

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[350] Section 3.1.1.

In the light of the complexities and inconsistencies of the law relating to political objects considered in Section 2.1, Section 3.2 examined how Charity Commission guidance approaches the task of explaining it. The section identified that political objects were not the main focus of the guidance, despite being relevant to both existing and potential charities. It also noted that the definition of "political objects" contained in the guidance was not comprehensive, as it did not include the more complex and problematic aspects of the definition. Section 3.2 thus confirms Study Proposition 2, which states that Charity Commission guidance focuses on political activities rather than objects, and does not effectively explain the boundaries between political and non-political objects.

Political activities: law and guidance

Section 2.2 considered the rules relating to political activities. These are relevant both to existing and potential charities, as they can be applied in relation to existing or proposed activities.

Whilst it is acceptable for charities to undertake political activities in furtherance of their objects, this is constrained by the fact that activities can be used to construe objects or determine charitable status. Thus, if political activities are considered to be too extensive by the Commission or the courts, charitable status may be at risk. Confusion over this rule is caused by the fact that the courts and the Commission will look at activities in all circumstances, although authority for the correct approach is contradictory. In addition, both the courts and the Commission tend to conflate the questions of construction of objects and determining charitable status.

In addition, it is unclear what substantive characteristics of political activities, such as their specific nature and extent, will taint a charity's objects to the point where charitable status is at risk. Given that the basis upon which activities should be referred to is confused, and that the rationales underlying all the rules on politics are problematic, it is difficult to see how the substantive limits of the rule can be determined.

Section 2.2 thus confirmed Study Proposition 4, which states that existing law relating to political activities by charities is too complex to enable charities to determine the boundaries of acceptable activity or predict consequences of activity with any certainty. It also confirms Study Proposition 5, which states that the confusion of the boundaries between the rules on political objects and the rules on political activity exacerbates the problems caused by the complexity of the law on political objects.

In the light of the complexities and inconsistencies of the law relating to political activities considered in Section 2.2, Section 3.3 examined how Charity Commission guidance approaches the task of explaining it. It focuses particularly on the problematic assertion in CC9 that political activities must not be the "dominant" means by which a charity achieves its objects. In light of this, and of the general criticisms of the guidance made in Section 3.1, the discussion confirms Study Proposition 6, which states that Charity Commission guidance is not sufficiently clear in explaining the boundaries between acceptable and unacceptable political activities.

Empirical analysis: perceptions of law, guidance and consequences; effects on campaigning

The study found a general lack of awareness of the substance of the law and Charity Commission guidance relating to political objects and activities, even in general terms. However, larger charities and those dealing with controversial issues displayed a greater awareness of the relevant law than smaller charities, which tended to rely on adherence to their objects as an assurance of the legitimacy of their activities, rather than developing an awareness of specific legal constraints. Several charities also expressed negative views regarding the validity of the rules surrounding charities and politics.

In terms of perceptions of consequences, compliance, and self-constraint of political activities, the charities again displayed different tendencies depending upon size, although they were polarised even within size categories.

The larger charities which were aware of the law and Commission guidance could be divided into two groups. One group extended their awareness to careful compliance in order to avoid potential legal consequences. The second were aware of the potential consequences of contravention, but remained unconcerned. This was either because of low levels of enforcement action by the Commission, or because they felt that their service-delivery orientation meant that legal repercussions from their limited political activity were unlikely.

The (usually smaller) charities which lacked awareness of the law and guidance were generally also unaware of the potential consequences of contravening it, and thus did not attempt to comply with the law. However, evidence emerged from larger charities in the study (which had advised smaller charities) that lack of legal awareness can have the opposite effect, resulting in a disproportionate fear of the consequences of political activity.

The analysis in Section 6.0 related to Study Proposition 3, which contends that the *perception* of the likelihood of objects being held to be political, and the perceived likelihood or severity of the consequences of this may be greater among charities than generally occurs in practice. It also related to Study Proposition 7, which contends that the *perception* of the likely legal consequences of excessive political activity may be greater amongst charities than generally occurs in practice.

The above propositions were not confirmed by the empirical data. The propositions were based on the expectation that lack of understanding of the law would result in a disproportionately high fear of the consequences of contravening it. However, for the particular charities in the study, lack of awareness of the law had the opposite effect of creating lack of concern regarding the consequences. Conversely, awareness of the law often had a similar effect.

The above result can be explained by methodological factors. Given the wider aims of the study in relation to collaboration in campaigning, the sample was limited to charities which engage in political campaigning. A wider study, including charities which avoid political campaigning, would undoubtedly reveal that such avoidance

is motivated in part by fear of the consequences of contravention of law and guidance. This contention is supported by commentary in this area, as considered in Section 5.2 above.

In conclusion, the complexity and inconsistencies of the law relating to political objects and activities are not effectively addressed by Commission guidance. Both the empirical study and external commentary support the contention that levels of understanding and awareness in relation to this area of law are very low among charities in practice. This situation is problematic either where it translates into failure to appreciate the potential consequences of political activity (as demonstrated by some charities in the study), or where it translates into a disproportionate fear of political activity (as demonstrated through some comments in the study and through external commentary).

In addition to the problems relating to political objects and activities, a number of additional issues, both legal and non-legal, may affect charities' abilities and inclinations to engage in campaigning. These will be addressed in the following chapters.

CHAPTER THREE: WIDER LAW AND REGULATION AFFECTING CAMPAIGNING

1.0 Introduction

Chapter Two discussed the operational impact of the law surrounding charities and politics. It also analysed the levels of awareness and understanding of this aspect of charity law displayed by charities in the empirical study. This chapter broadens the above focus by examining some of the wider law and regulation which directly affects campaigning activities. It addresses the following study proposition, identified in Chapter One:

8. Campaigning work is directly governed by several areas of domestic law separate from charity law. Charities that campaign may not be aware of the impact of these areas, and Commission guidance does not draw sufficient attention to them.

Sections 2.0 and 3.0 focus on the first part of the above proposition and examine relevant law. They also consider (either discretely or as part of the general discussion) the consequences for charities of contravening relevant law or regulation.

There are many areas of law which affect campaigning activity to some degree. Examples include defamation, electoral law and health and safety. However, the discussion in this chapter is limited to two areas which have a significant impact on campaigning. These are broadcasting legislation (Section 2.0) and criminal laws relevant to public demonstrations and protests (Section 3.0).

Section 4.0 focuses on the final part of the above study proposition and examines the approach of Charity Commission guidance to the legislation discussed in the chapter.

Section 5.0 completes the examination of the above study proposition by examining the awareness of the law demonstrated by charities in the empirical study. This part of the discussion utilizes data based on the following operational research area:

> c) Charities' perceptions of broader law and regulation which directly applies to campaigning activities, and their strategies for compliance. Their use of any relevant Charity Commission guidance on such external regulation; the clarity and usefulness of the guidance (if used); and the effects (e.g. encouragement or constraint) of guidance on charities' campaigning activities.

Section 6.0 concludes the chapter by returning to the study proposition on which it is based. It summarizes the areas of law identified in the chapter as being relevant to campaigning and the approach of Charity Commission guidance to these areas. It then comments on the study participants' general awareness of and compliance with wider law and regulation affecting campaigning. It also comments on the participants' use of and opinions regarding any relevant Charity Commission guidance. Finally, it comments on the overall impacts of the law and guidance on the campaigning activities of the charities in the study.

It should be noted that whilst this chapter focuses on areas of law which have a detrimental effect on campaigning, several recent legal developments may assist charities in their campaigning activities. These are considered briefly here, prior to the chapter's main discussion.

The Freedom of Information Act 2000

Section 1 of the Freedom of Information Act (FOIA) 2000 provides that any person making a request for information to a public authority is entitled:

> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
> (b) if that is the case, to have that information communicated to him.

The Act is fully retrospective, and it is likely that it will be used by charities to gain access to information on how decisions of public authorities relevant to their campaigns have been reached.[351] However, it should also be noted that there are various exceptions to the entitlements described above. In addition, the Department for Constitutional Affairs has recently closed[352] a consultation on draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007. If introduced, the effect of the Regulations will be to allow a greater number of information requests to be rejected on the basis of cost by changing the way in which cost is determined. This may reduce the usefulness of the process for charities and other campaigners.[353]

Full Protective Costs Orders and Judicial Review

In January 2005, the Court of Appeal granted the first full protective costs order (PCO) to an NGO in the case of *R (on the application of Corner House Research) v Secretary of State for Trade and Industry*.[354] The case concerned an application for judicial review, made by the NGO Corner House, of rules to reduce corruption in British companies operating in the developing world, made by the Export Credit Guarantee Department (ECGD).[355]

In its judgement handed down on 1st March 2005, the Court of Appeal gave guidance on the exercise of the exceptional jurisdiction to make a PCO. It advised that such orders might be made at any stage of proceedings, provided that the court was satisfied as to a number of conditions. These included: that the issues raised were of general public importance; that public interest required that those issues should be resolved; and that the claimant had no private interest in the outcome of the case. It also advised that the court should have regard to the financial resources

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[351] A charity that has already declared its intention to use the Act for campaigning purposes is the British Union for the abolition of Vivisection (BUAV), as reported in a review of the FOIA 2000, *Third Sector* magazine, 16 February 2005, pp.29-30.

[352] 21 June 2007. The report of the consultation had not been published when this thesis was submitted.

[353] For comment on the detail of the draft Regulations, see 'Submission to the DCA on Freedom of Information', *Report of the Advisory Group on Campaigning and the Voluntary Sector* (2007), Appendix 4.

[354] [2005] EWCA Civ 192.

[355] A branch of the Department for Trade and Industry.

of the claimant and the respondent, and to the amount of costs that were likely to be involved, and to the likelihood that if the order were not made, the claimant would probably discontinue the proceedings and would be acting reasonably in so doing. The merits of a PCO application would also be enhanced if those acting for the claimant were doing so pro bono.

Whilst a protective costs order limiting the claimant's costs to £25,000 had previously been granted[356] in a case challenging the legality of the British invasion of Iraq,[357] the possibility of full protective costs orders is likely to increase the ability of charities and other campaigning organisations to challenge decisions of public authorities.[358] Coupled with the growing popularity of such tactics within the sector and the apparent increasing willingness of courts to accept applications for judicial review from charities and NGOs,[359] this may prove to be an important campaign tool.

Although the above developments are positive, the remainder of this chapter arguably demonstrates that they are greatly outweighed by existing law and recent changes which have a detrimental or limiting effect on campaigning by charities and other voluntary organisations.

2.0 Broadcasting legislation

Section 2.1 provides a brief descriptive overview of the relevant structures of broadcasting law and regulation, prior to the main discussion of how this area of law is relevant to charitable campaigning. Section 2.2 examines rules relating to

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[356] [2002] All ER (D) 48 (Dec).

[357] *R (Campaign for Nuclear Disarmament) v Prime Minister of the United Kingdom and Others* (2002) Times, 27 December 2002.

[358] This beneficial effect was demonstrated close to the submission date of this thesis by the High Court's decision to award a full Protective Costs Order (PCO) in favour of the BUAV in its application for judicial review of the Home Office's implementation of the Animal (Scientific Procedures) Act 1986. (BUAV's application was allowed: see *R (on the application of British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2007] All ER (D) 452 (Jul)). The Chief Executive of BUAV was reported as stating that for a campaign group with limited resources, the decision to proceed with the judicial review was made "much easier" by the PCO (*Third Sector* magazine, 18 July 2007, p.11).

[359] As reported in *Third Sector* magazine, 2 May 2007, p.16.

charities generally, whilst Section 2.3 considers rules which are specifically relevant to charities that undertake campaigning, and includes a discussion of the development of the definition of "political" in broadcasting case law.

2.1 Legal and regulatory structure

2.1.1 British Broadcasting Corporation (BBC)

The BBC operates on the basis of its Royal Charter, which defines its purposes and constitution. A new Royal Charter[360] was granted on 19th September 2006 and took effect for most practical purposes on 1st January 2007.[361]

Article 49 of the new BBC Charter provides for an accompanying "Framework" Agreement (hereafter 'the Agreement'). The agreement[362] between the BBC and the Government details, among other matters, the BBC's public obligations and editorial independence, and takes effect in the same way as the Charter.[363]

Under the Communications Act 2003, the BBC is subject to regulation by the broadcasting regulator, the Office of Communications (Ofcom).[364] Under Section 198(1), Ofcom's regulatory powers in relation to the BBC are defined by the BBC Charter and Agreement, and by the provisions of the 2003 Act and Part Five of the Broadcasting Act 1996. In furtherance of its regulation of the BBC, Section 198(3)

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[360] Department for Culture, Media and Sport, *Royal Charter for the Continuance of the British Broadcasting Corporation* (Cm. 6925). The previous Charter (Cm 3248) (1996) ran from 1st May 1996 until 31st December 2006.

[361] Article 2(1). The Charter technically came into force on the day following the day on which it was granted, but its effect was modified by a transitional period granted under Article 2(2) of the Charter and detailed in the Schedule to the Charter.

[362] Department for Culture, Media and Sport, *Broadcasting. An Agreement Between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation*, (Cm. 6872) HMSO, 30th June 2006. The agreement accompanying the previous Charter (*Broadcasting : copy of the agreement dated 25th day of January 1996 between Her Majesty's Secretary of State for National Heritage and the British Broadcasting Corporation / HMSO*, (Cm. 3152) HMSO (31st January 1996)) ran from 1st May 1996 to 31st December 2006.

[363] For most practical purposes, from the 1st January 2007 (Article 3(1) of the Agreement), but subject to a transitional period (Article 3(2) of the Agreement).

[364] Prior to the Communications Act 2003, the last BBC Charter subjected the BBC to a level of regulation by Ofcom's predecessor broadcasting regulators. The transferral of broadcasting regulation to Ofcom and the new regulatory powers in relation to the BBC it was granted by the Communications Act 2003 were reflected in an amendment to the existing agreement between the BBC and the Government. (Department for Culture, Media and Sport, *Amendment dated 4th December 2003 to the Agreement of 25th Day of January 1996 (as amended) Between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation*, (Cm. 6075) (December 2003)).

provides Ofcom with a power to impose penalties on the BBC for contravention of relevant regulatory provision. Such penalties cannot exceed £250,000.[365]

The BBC's programming is thus now governed by both Ofcom's Broadcasting Standards Code and by its own Editorial Guidelines made under the Charter and Agreement. A new version of the BBC Editorial Guidelines (formerly Producers' Guidelines) was published on 23rd June 2005. The content of the Guidelines in relation to charities in general and to political campaigning specifically will be examined respectively in Sections 2.2.1 and 2.3.1 below.

2.1.2 Independent Television and Radio

2.1.2.1 Generally

In December 2003, the responsibilities of the Independent Television Commission, the Radio Authority, the Radiocommunications Agency and the Broadcasting Standards Commission were transferred to the new regulator Ofcom (Office of Communications) by The Communications Act 2003.[366] Ofcom's principal duties under the Act,[367] are (a) to further the interests of citizens in relation to communications matters; and (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition. The Act[368] also requires Ofcom to set (and from time to time review and revise) codes covering standards in programmes, sponsorship and fairness and privacy for the content of television and radio services licensed under the Broadcasting Acts 1990 and 1996. Pursuant to this, Ofcom's Broadcasting Code came into force on 25th July 2005. The codes of the legacy regulators remained in force until this date, and still apply to content broadcast before this date.

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[365] S.198(5).

[366] S.2.

[367] S.3(1).

[368] S.319.

2.1.2.2 Advertising

From 1st November 2004, Ofcom contracted-out its advertising standards codes function to the Broadcast Committee of Advertising Practice Limited (BCAP).[369] This function is exercised in consultation with and with the agreement of Ofcom. BCAP has adopted edited versions of the former Independent Television Commission and Radio Authority Codes, which are now respectively titled the BCAP Television Advertising Standards Code and the BCAP Radio Advertising Standards Code. BCAP has also produced a code on non-broadcast advertising. The codes are based on the general principles that advertisements should be legal, decent, honest and truthful.

Ofcom has also contracted-out its powers of handling and resolving complaints about breaches of the BCAP Codes and the relevant provisions of The Control of Misleading Advertisements Regulations[370] to the Advertising Standards Authority (ASA) (Broadcast) Limited.[371] The ASA investigates and rules on complaints relating to potential breaches of the Codes. Ofcom retains statutory responsibility for enforcement of the codes (and legacy codes where applicable). It also retains standards-setting functions for a number of matters, including political advertising, discussed below.[372]

It should also be noted that television advertising specifically is subject to the European 'Television Without Frontiers' Directive,[373] which aims to ensure the free movement of broadcasting services and to preserve a number of public interest objectives.

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[369] Contracting Out (Functions Relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004 (SI 2004/1975).

[370] SI 1988/915.

[371] Contracting Out (Functions Relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004 (SI 2004/1975).

[372] Section 2.3.

[373] 89/552/EEC, and subsequent revisions.

2.2 Charities generally

2.2.1 British Broadcasting Corporation

The BBC is prohibited under the Agreement[374] from using (without the approval of the Secretary of State) licence fee money for the purposes of a television, radio or online service which is wholly or partly funded by advertisements, subscription, sponsorship, pay-per-view system or any other alternative means of finance. Thus, the regulation of advertising described above is of no relevance. However, as part of its remit as a public service broadcaster, the BBC does broadcast charity appeals.

The Corporation's Charity Appeals Policy[375] states that BBC broadcast appeals should "reflect the diverse range of work being done by the charitable sector". Part 2 of the Appeals Policy explains that the Producers' Guidelines[376] set out the scope of charity broadcast appeals. Apart from these provisions, programmes should not endorse particular charities or make any appeal for funds. Appendix A3 of the Appeals Policy specifies the general criteria for regular broadcast appeals. Specific rules relating to charities involved in political activities are discussed below.[377]

2.2.2 Independent Television and Radio

All charities must comply with general controls relevant to all advertisers.[378] They must also take account of specific rules relating to charity appeals. Rule 10.13 of Ofcom's Broadcasting Code states that charity appeals that are broadcast free of charge are allowed in programmes provided that the broadcaster has taken reasonable steps to satisfy itself that:

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[374] Clause 75(2)(b) of the Agreement (Cm. 6872). A similar provision was contained in Clause 10.1(b) of the previous agreement (Cm. 3152).

[375] Available from www.bbc.co.uk/info/policies/charities/.

[376] Since 23/06/05 'Editorial Guidelines'.

[377] Section 2.3.1.

[378] See Ofcom Broadcasting Code and BCAP Codes. It should be noted that prior to 1989, there was a total ban on broadcast advertising by charities: see D. Morris, 'Broadcast advertising by charities', [1990] 54 *Conv* 106 for background.

> "the organisation concerned can produce satisfactory evidence of charitable status, or, in the case of an emergency appeal, that a responsible public fund has been set up to deal with it; and
> the organisation concerned is not prohibited from advertising on the relevant medium".

Section 11 of the BCAP Television Code provides detailed guidance in this area. It covers such matters as misrepresentation of the nature of the body or the use to which any donations will be put; the necessity of showing charitable status; the prohibition on addressing fundraising messages to children; ethical responsibility (which covers the use of material which may distress or arouse strong emotions); the prohibition on including comparisons with other charities or similar organizations; and links to charities in commercial advertisements. The general charity sections in the BCAP Radio[379] and Non-broadcast[380] Codes cover substantially similar areas.

As standards codes relating to charity appeals are directed particularly towards fundraising and towards the protection of charities which are linked to commercial advertising campaigns, they will not be discussed further.[381] Of greater significance is the prohibition on political advertising on television or radio, considered next.

2.3 Charities that campaign

2.3.1 British Broadcasting Corporation

Appendix A4 of the BBC Appeals Policy states that among other things, it is required that:

> "f) Where a charity is involved in political activities or campaign work on an issue of current public or political controversy, the BBC and the Appeals

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[379] Section Three, Part Two.

[380] Rule 37. However, unlike the broadcasting codes, the non-broadcast code has is based purely on a system of self-regulation, and this rule is not backed up by specific legislation. There is no ban on political advertising in the non-broadcast code, which is not considered further in this thesis.

[381] See further BCAP codes at www.asa.org.uk.

Advisory Committee need to be satisfied that an appeal can be framed within the BBC's requirements for due impartiality in programming (published in the BBC Producers' Guidelines online at www.bbc.co.uk). This applies particularly where the charity lobbies or campaigns on an issue that has become a matter of current public controversy or political debate and/or the charity has a high media profile in arguing on one side of the debate.

Where BBC impartiality requirements may be jeopardised, an application may be rejected or the Committee may propose that the appeal should focus on significant work(s) undertaken by the charity that falls outside its lobbying or campaigning activities (this may be agreed in consultation with the agency concerned). In the latter case, the charity will be required to spend the money raised as restricted funds for use in the work(s) specified in the broadcast appeal".

This policy is consistent with both the BBC's detailed duties of impartiality and with the general prohibition on political broadcast advertising. The latter will be discussed in the next section.

2.3.2 Independent Television and Radio

Sections 319(2)(g) and 321(2) of the Communications Act 2003 prohibit political advertising on television or radio.[382] For the purposes of Ofcom's duty under Section 319 of the Act to publish a standards code which enforces this ban (discussed below), Section 321(2) defines "political" advertising as:

"(a) an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature;

(b) an advertisement which is directed towards a political end; or

(c) an advertisement which has a connection with an industrial dispute".

[382] This prohibition was also contained in s.8 (for television broadcasting) and s.92 (for radio broadcasting) of the Broadcasting Act 1990.

For the purposes of comparison with charity law, it should be noted that whilst charity law allows organisations with charitable objects to undertake political activities in furtherance of those objects, the broadcasting prohibition is much broader, extending to any advertisements directed towards a political end, even if they are promoting an organisation which is not political within the definition of the Act.

A substantially similar provision to Section 321(2) Communications Act was contained in the Broadcasting Act 1990.[383] However, whereas the earlier Act did not expand on the definition of "political", Section 321(3) Communications Act defines "objects of a political nature" and "political ends" as including:

> "(a) influencing the outcome of elections or referendums, whether in the United Kingdom or elsewhere;
> (b) bringing about changes of the law in the whole or a part of the United Kingdom or elsewhere, or otherwise influencing the legislative process in any country or territory;
> (c) influencing the policies or decisions of local, regional or national governments, whether in the United Kingdom or elsewhere;
> (d) influencing the policies or decisions of persons on whom public functions are conferred by or under the law of the United Kingdom or of a country or territory outside the United Kingdom;
> (e) influencing the policies or decisions of persons on whom functions are conferred by or under international agreements;
> (f) influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy;
> (g) promoting the interests of a party or other group of persons organised, in the United Kingdom or elsewhere, for political ends".

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[383] S.92(2)(a).

Ofcom's statutory obligation to set a standards code[384] includes a specific obligation to enforce the above prohibition on political advertising.[385] The setting of standards and the investigation of complaints in relation to political advertising have not been contracted out to BCAP and the ASA and remain matters for Ofcom. However, the rules relating to political advertising are contained in the BCAP Codes rather than Ofcom's Broadcasting Code.[386] The statutory prohibition is summarized in Section Four of the BCAP Television Code and Rule 15 of the Radio Advertising Code.[387]

Both BCAP codes elaborate on the definition of "political". The Notes to Section 4 of the Television Code state that:

> "(1) The purpose of this prohibition is to prevent well-funded organizations from using the power of television advertising to distort the balance of political debate. The rule reflects the statutory ban on 'political' advertising on television in the Broadcasting Act 1990.
>
> (2) The term 'political' here is used in a wider sense than 'party political'. The rule prevents, for example, issue campaigning for the purpose of influencing legislation or executive action by legislatures either at home or abroad. Where there is a risk that advertising could breach this rule, prospective advertisers should seek guidance from licensees before developing specific proposals".

Rule 15 of the Radio Code states that:

> "... Ofcom will determine whether an ad or a proposed ad is 'political'. The term 'political' here is used in a wider sense than 'party political'. The prohibition includes, for example, issue campaigning for the purposes of

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[384] Discussed above at Section 2.1.2.1.

[385] S.319(2)(g).

[386] An explanation of the division of functions is contained in Note 3 to Rule 4 of the Television BCAP code.

[387] Made under the Broadcasting Act 1990, s.92.

influencing legislation or executive action by local, or national (including foreign) governments.

Particular care is required where advertising mentions any government, political party, political movement or state-specific abuse, so as not to break the spirit of these rules, which are intended to prohibit lobbying or electioneering on politically controversial or partisan issues".

It is important to note that the above definitions of "political" are broader than the definition of the term developed through charity law in two senses. First, whereas charity law denies charitable status to "political" organisations but allows (limited) political activities, the broadcasting prohibition applies equally to organisations classed as "political" and political advertising by non-political organisations. Second, the definition contained in the Communications Act 2003 explicitly encompass a range of activities (in particular "influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy") some of which are grey areas in charity law.[388] This definition was preceded by a broad judicial approach to interpretation of the definition contained in the Broadcasting Act 1990, discussed next.

2.3.3 The development of the "political" ban in broadcasting law

As discussed in the previous section, the Broadcasting Act 1990 did not expand on the scope of the terms "body whose objects are wholly or mainly of a political nature" or "directed towards a political end".[389] These terms were considered by the Court of Appeal in the case of *R v Radio Authority ex parte Bull*.[390] The case concerned Amnesty International (British Section) (hereafter "A.I.B.S."), an unincorporated association (without charitable status) affiliated to the human rights

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[388] These "grey areas" are considered at Chapter Two, Section 2.1.5.

[389] However, Rule 8, Practice Note (a) of the Independent Television Commission's Code of Advertising Standards and Practice (made pursuant to s.9 of the Act) gave further guidance, stating that: "the term political is used here in a wider sense than party political. The prohibition precludes, for example, issue campaigning for the purposes of influencing legislation or executive action by central or local government". See also Radio Authority Code of Advertising Standards and Practice and Programme Sponsorship Rule 28 and Appendix 5.

[390] [1998] QB 294.

awareness organisation Amnesty International. A.I.B.S. wished to broadcast advertisements on commercial radio publicizing the plight of victims of human rights violations in Rwanda and Burundi. At the time, the Radio Authority had responsibility under the Broadcasting Act 1990 for regulating radio services, and thus had a duty to ensure to the best of its ability that advertisements were not inserted contrary to the ban in Section 92(2)(a) of the Act (and in the Radio Authority Advertising Code made pursuant to that section). The Radio Authority was of the opinion that whilst A.I.B.S. had some non-political objects, some of its objects were political because they involved campaigning to change the policies of various governments. It decided that the latter objects were sufficient to make A.I.B.S. a body "mainly of a political nature", and banned the broadcast of the advertisements.

A.I.B.S. applied for judicial review of the Radio Authority's decision, on the grounds that the Authority misinterpreted and misapplied Section 92 of the Broadcasting Act 1990. In the Divisional Court,[391] Kennedy LJ and McCullough J dismissed the application, and held that the Radio Authority had not misinterpreted or misapplied the relevant provision and that its decision was not unreasonable. On application by A.I.B.S. to the Court of Appeal, Lord Woolf MR and Aldous and Brooke LJJ dismissed the appeal, affirming the decision of the Divisional Court that the Authority had not misinterpreted or misapplied the relevant provision, and that the court would only interfere if the decision was manifestly unreasonable.

Whilst the *Bull* case did not involve a registered charity, the implications for charities were illustrated by requests from charities for clarification of the Broadcasting Act 1990 following the decision. A survey by the charity the Media Trust following the decision found that three quarters of the largest fifteen charities wanted clarification of the Act.[392] The judicial definitions of the terms "objects", "wholly or mainly" and "political" reached in the *Bull* case will be discussed in turn.

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[391] [1996] QB 169.

[392] See 'Charities: Political Silence', *The Guardian*, 19th July 1995.

2.3.3.1 "Objects"

Prior to the *Bull* case, the Radio Authority's final decision stated that:[393]

> "[t]he authority considered the objects of A.I.B.S., as opposed to its methods, but was of the view that the two may not always easily be separated. Where objects could only be achieved by campaigning to change the policies of governments, the authority considered them to be political".

In the Court of Appeal, Lord Woolf MR supported the Radio Authority's (and the Divisional Court's) view, stating that a body's objects:[394]

> "... are not necessarily the technical objects of an incorporated body. None the less where the body has formally set out its objects as has A.I.B.S., I would expect the authority to decide, at any rate in the first instance, whether the body's objects fall within the subsection by doing no more than examine the statement of its objects. Where however there is doubt as to whether the formal statement reflects the true position or it is not possible to determine the position by merely looking at the objects the authority is quite entitled to examine any other material which is available. If there are no formal objects then obviously it is necessary to look at what other material there is available in order to determine what its objects are. In doing so the authority has to decide the purpose for which the body exists, recognising that a body may exist for more than one purpose".

The above reasoning mirrors the reasoning in charity cases, discussed in Chapter Two.[395] It is thus subject to the same criticisms. As A.I.B.S. solicitors had argued in an earlier letter:[396]

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[393] 7 October 1994.

[394] [1998] QB 294 at 305.

[395] Section 2.2.1.

[396] In a letter to the Radio Authority dated 12 August 1994, considered by Lord Woolf MR, [1998] QB 294 at 303.

"... the fact that the promotion of Amnesty's objects may 'involve campaigning in order to influence the policies of governments' does not make Amnesty into a body whose *objects* are wholly or mainly of a political nature. Once you accept, as we think you must, that the objects are not wholly or mainly of a political nature, this conclusion cannot be altered by the *means* which Amnesty adopts to achieve those objects. The authority is directed to pay regard only to the objects, and it is wrong to extend the prohibition beyond that consideration".

The judicial response thus fails to clarify the distinction between objects and activities and the circumstances and ways in which the latter can be used to determine the former. Just as the *Bull* case mirrored the reasoning in charity cases, it also mirrors some of their problems.[397]

2.3.3.2 "Wholly or mainly"

The determination of the scope of the above words is a problem closely related to the determination of what constitutes "objects", and is a task made more difficult by existing lack of clarity in the latter term. In the Court of Appeal, Lord Woolf MR stated that:[398]

> "the issue is not whether the restriction ... is justifiable but how the restriction should be construed having regard to its blanket or discriminative effect in relation to a political body. In view of this the ambiguous words 'wholly or mainly' should be construed restrictively. By that I mean they should be construed in a way in which limits the application of the restriction to bodies whose objects are substantially or primarily political. This corresponds with the *Shorter Oxford English Dictionary's* meaning of 'mainly' as being 'for the most part, chiefly or principally'. Certainly a body to fall within the provision must be at least midway between the two percentages I have identified, i.e. more than 75 per cent. This approach to

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[397] See Chapter Two, Section 2.2.1 for consideration of this particular problem.

[398] [1998] QB 294 at 306.

> the interpretation of a provision which impedes freedom of communication corresponds with the general approach of the courts of this country, the European Court of Human Rights and many Commonwealth courts in this area".

However, as Feldman and Stevens observe, whilst Lord Woolf's construction:[399]

> "... gives proper weight to the rights guaranteed under the European Convention on Human Rights, [it] ... makes it hard to see how the Court could uphold the decision of the Authority that Amnesty was a "wholly or mainly" political body. Only half the objectives of AIBS were political in nature, and the Charity Commissioners had accepted that none of the objects of AIBSCT [the related charitable trust] was political ... accepted that some 70 per cent of the annual budget of AIBS was attributed to its non-political objects, including some 30 per cent "spent directly on behalf of the AIBSCT".

Feldman and Stevens conclude that the Radio Authority must either have misinterpreted the statute or have failed to take account of relevant matters, particularly the balance between the different activities of A.I.B.S.

The decision of the Court to uphold the Radio Authority's decision in these circumstances can be explained by the fact that the Court, whilst recognising that there were some flaws in the Authority's reasoning, held that as the Authority was a lay body with an obligation only to apply the law to the best of its ability, its decision was not unreasonable. Whilst this judicial interpretation is open to criticisms,[400] an exploration of them is outside the focus of this chapter.

The material points in this context are the unpredictability of how either "objects" or "wholly or mainly" will be construed by regulatory authorities or the courts, and

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[399] D.J. Feldman & J. Stevens, 'Broadcasting advertisements by bodies with political objects, judicial review, and the influence of charities law', [1997] *PL* 615.

[400] See D.J. Feldman & J. Stevens, *op. cit.*, for more detail.

the parallel criticisms that can be drawn with charity law reasoning, discussed in Chapter Two.[401]

2.3.3.3 "Political"

The consideration given in the *Bull* case to the scope of the term "political" is of greatest relevance in the context of this thesis, as the definition adopted has a far-reaching impact on charities' (and other campaigners') abilities to utilise broadcast media to further their campaigns.

Whilst the charity law definition of "political"[402] was referred to in the *Bull* case,[403] the decision appeared to expand significantly the definition in the context of broadcasting to encompass a broader class of organisations. The definition of "political" given by McCullough J in the Divisional Court and upheld by the Court of Appeal was that of "pertaining to policy or government".[404] He continued:[405]

> "[Counsel] submits that an object cannot be of a political nature merely because it is an object which could be achieved by legislation. I agree. There is nothing in the thinking underlying *McGovern's case* or *Cheng's case*. which goes so far; nor do I see any indication of this in the Act of 1990. There is no restriction on the topics about which Parliament could legislate. But once a matter has become the subject of government policy, or once the need for legislation about it is advocated, particularly if the matter has become contentious, then, as it seems to me, it is open to the body entrusted with the application of section 92 to treat it as 'political'".

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[401] Section 2.1.

[402] Specifically that espoused in *McGovern v Attorney-General* [1982] Ch 321.

[403] [1998] QB 294 at 306.

[404] [1996] QB 169 at 188.

[405] [1996] QB 169 at 191. The consideration of "Cheng's case" in the extract refers to *Cheng v Governor of Pentonville Prison* [1973] AC 931. That case concerned the definition of an offence "of a political character" under s.3(1) Extradition Act 1870, and will not be considered further here.

A strong criticism of this definition was presented by A.I.B.S. prior to the case. The A.I.B.S. solicitors had argued that:[406]

> "[t]he issues which we have identified above are humanitarian and, in our view, non-political. Like many other such issues, certain aspects of them may be linked to government policy: for example, homelessness, poverty, famine, education. It is unduly restrictive to regard as political any object upon which government policy impinges".

This criticism was not adequately addressed by the Radio Authority or the courts. The question is thus raised of whether such a broad prohibition was intended when the broadcast legislation was drafted. This is a particularly pertinent question given, as identified by Dunn, that it:[407]

> "... could have potentially wide reaching consequences, not least because a majority of charities, whilst not procuring change in government policy, nevertheless are concerned with politically sensitive areas which pertain to government policy, such as housing, education and welfare. If one takes McCullough J's view of 'political' to its natural limits, it could embrace all those activities falling short of procuring a change in policy, the everyday work of charities".

The Communications Act 2003 attempted to provide the clarification needed following the *Bull* case, by including examples of types of political objects, as discussed in Section 2.3.2 above. However, this clarification does not negate fundamental criticisms of the ban, some of which are considered above.[408] The intensity of this criticism has been renewed following a decision by Ofcom to ban a television advertisement submitted by the Make Poverty History (MPH) coalition. The advertisement, broadcast on 31st March 2005, featured a different celebrity

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[406] In a letter to the Radio Authority dated 12 August 1994, considered by Lord Woolf MR, [1998] QB 294 at 303.

[407] A. Dunn, 'Charity law – a political scandal?' [1996] 2 *Web JCLI.*

[408] See also *Report of Advisory Group on Campaigning and the Voluntary Sector*, (2007), Chapter Three.

clicking their fingers every three seconds to symbolise the death of a child from poverty. Whilst the advertisement had been cleared by the Broadcast Advertising Clearance Centre[409] (BACC), decisions of the BACC do not bind Ofcom. Ofcom banned the advertisement[410] on the basis that MPH was a body with "wholly or mainly political objects", and that the advertisement was "directed to a political end" under Section 321 Communications Act 2003.

Ofcom's reasoning as to whether the coalition was a "body" is not particularly contentious, but the implications it holds for campaigning coalitions are discussed in Chapter Four. In the present context, the relevant aspect of Ofcom's reasoning is the question of whether the objects of the coalition made it "wholly or mainly" a political body. Ofcom employed reasoning similar to that employed by the Radio Authority in the *Bull* case, discussed above. Ofcom's decision quotes from three "question-and-answers" on the MPH website, despite the fact that there were seventeen such questions in total. As Lawrence Simanowitz identifies:[411]

> "[t]he answer to question two explains that the purpose of getting involved is 'making a difference to the millions of people around the world who live in devastating poverty'. Political intervention is clearly seen as one means to an end and the campaign has other clear means including the improved delivery of aid. While Make Poverty History seeks to relieve poverty in part by political campaigning there is a strong case to be made that it is not a body whose underlying objects are wholly or mainly political".

The reasoning of Ofcom regarding its decision that the advertisement was "directed towards a political end" hinged on the fact that the advertisement, whilst not overtly political in itself, directed viewers to a website which it decided was

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[409] See http://www.bacc.org.uk/bacc, which describes BACC and its remit as: "a specialist body responsible for the pre-transmission examination and clearance of television advertisements. All advertisements being transmitted as a national television campaign on UK terrestrial and satellite channels should be submitted to the BACC for approval. The BACC is funded by commercial broadcasters who pay a quarterly copy clearance fee".

[410] Ofcom Broadcast Bulletin 43, 12 September 2005, pp.4-14, Standards cases. In Breach. Make Poverty History. *Various broadcasters, March 31 2005, 19.58 and other times.*

[411] L. Simanowitz, 'A political decision', *Charity Finance*, November 2004, p.46.

"fundamentally about supporting the lobbying and campaigning objectives of Make Poverty History". This conclusion is questionable, given the judicial interpretation of the reasons behind the ban on broadcasting. In the *Bull* case, Kennedy LJ in the Divisional Court acknowledged (referring to the arguments of counsel for the Radio Authority)[412] that freedom of speech should be weighed against "... the right of listeners to the radio not to be bombarded with information which they may not wish to receive".

Kennedy LJ went on to justify the limitation on freedom of speech by contrasting the unique qualities of broadcast (specifically radio) advertising to the qualities of print advertising:[413]

> "[w]hen an advertisement is on a hoarding or in a newspaper the reader can decide at a glance how much, if any, of it he wishes to read. If it is inserted into a radio programme which he wants to hear he has no similar way of curtailing it. The medium is intrusive. That is why it is powerful".

If the analysis of the reasoning behind the legislation put forward by Kennedy LJ is correct, it is hard to see how an advertisement which is not overtly political in itself, but which is inviting viewers to voluntarily access a website, should be treated as conveying a "political" message more intrusively than print media could do so. (Indeed, it could be argued that such a method is less intrusive than conveying the "political" message via a hoarding or newspaper.) It is arguable that exactly the same advertisement would have been accepted if it had been broadcast by a registered charity and had directed viewers to a charity's website with a minority of its pages devoted to campaigning. It is thus difficult to see how identical advertisements can differ in their level of "intrusiveness" based on the content of websites which they invite (but do not force) viewers to access.[414]

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[412] [1996] QB 169 at 182.

[413] *Ibid.*

[414] A related argument is put forward by the *Report of the Advisory Group on Campaigning and the Voluntary Sector* (2007), para.3.3.6. The report points out that arguments relating to the "pervasive" nature of the television medium (and thus the need for special restrictions) are outdated, given that today's "media literate"

In the event, the MPH coalition did not challenge Ofcom's decision, despite the high level of public and media interest in the decision. However, the campaigning group Animal Defenders International (ADI) has pursued a challenge to the ban on political advertising in the High Court,[415] seeking a declaration of incompatibility[416] with Article 10 of the European Convention on Human Rights.[417] The case was supported by the RSPCA and Amnesty International, which have also had advertisements rejected.

The *ADI* case relied on the Swiss case of *VGT Verein Gegen Tierfabriken v Switzerland*,[418] a Swiss-registered animal protection association, challenged a similar Swiss law prohibiting political broadcasting. In that case, the ECHR unanimously held that the law violated Article 10. In its decision, the court noted the reasons behind the ban adduced by the Swiss Federal Council and Federal Court. These included that the ban prevented "financially strong groups from obtaining a competitive advantage in politics", and "served to ensure ... the independence of the broadcaster; to spare the political process from undue commercial influence; to provide for a certain equality of opportunity between the different forces of society; and to support the press, which remained free to publish political advertisements".[419] However, the ECHR held that the margin of appreciation that the Swiss authorities had was reduced in the circumstances given that it was "not ... purely commercial interests" at stake, but "participation in a

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audience are "educated in advertising by way of sms and internet and product placement in drama". It concludes that: "the public is not at risk from straightforward advertising on matters of controversy".

[415] *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2006] EWHC 3069 (Admin).

[416] Under s.4 of the Human Rights Act 1998.

[417] 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[418] (2002) 34 EHRR 4.

[419] *Ibid.* para.H18.

debate affecting the general interest".[420] The Court thus found that the prohibition, which applied only to certain media, did not appear to be a sufficiently pressing need to justify the interference with the applicant's freedom of expression. The Swiss authorities have since lifted the ban.

Whilst the Divisional Court in the *ADI* case rejected ADI's claim, it granted leave to appeal to the House of Lords. At the time of submission of this thesis, the appeal has not yet been heard.

The ban on political broadcasting prevented a declaration of compatibility with the Human Rights Act 1998 being made for the Communications Act 2003.[421] It appears likely that if the *ADI* case reaches the European Court of Human Rights, the current ban will be declared to be an unnecessary infringement of ADI's right to freedom of expression. However, reform must be approached with caution, for the reasons stated by Kennedy LJ (*obiter*) in the *Bull* case:[422]

> "It is worth recognising that something which may appear to be an unnecessary restriction upon a good cause could also usefully restrain something manifestly less worthy".

Reform of the law in this area will need to take this into account. This may prove to be a difficult task. However, despite such warnings, the arguments for such reform are increasing. As Munro identifies,[423] any justification for the ban may have been further negated in light of the "somewhat widened range of charitable purposes" under the Charities Act 2006.[424] Munro argues that:[425]

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[420] *Ibid.* para.H21.

[421] See Explanatory Notes to the Communications Act 2003.

[422] [1996] QB 169 at 187. See also N. Cohen, 'Political advertising would be a step too far on British television', *The Observer*, Sunday July 30, 2006, and, for alternative view, T. Allen, 'Remove the charity gag', *The Guardian*, Monday November 7, 2005.

[423] C. Munro, 'Time up for the ban?', (2007) 157 *NLJ* 886.

[424] The implications of the 2006 Act for the charity law definition of "political" were considered in Chapter Two, Section 2.1.5.2.

[425] *Op. cit.*

> "... it is worth questioning whether or not, if the sphere of political has effectively been narrowed for one legal purpose [i.e. charity law], it can or should be sustained at its present width for another, arguably less appropriate, one".

The potential for reform of broadcasting law is considered in Chapter Seven.[426]

To summarize, the ban on "political" advertising under the Broadcasting Act 1990 was interpreted broadly in the *Bull* case. The Communications Act 2003 has provided a more comprehensive but similarly broad definition, which is the subject of a current challenge.

The ban has been strictly interpreted by Ofcom, as demonstrated by the Make Poverty History decision. The fact that MPH ensured its advertisement was cleared by BACC illustrates that charities involved in campaign advertising still face considerable uncertainty in this area, despite the detailed definition of "political" contained in the 2003 Act. The perceptions of this uncertainty expressed by participants in the empirical study are explored in Section 5.0 of this chapter.

The uncertainty apparent in the advertising rules arguably stems from conceptual difficulties inherent in the broadness of the definition. As well as philosophical considerations relating to the desirability of participation in democratic debate, a result of the definition is that as the remit of government policy expands, the ability to campaign against it contracts.

It should be noted that responsibility for ensuring compliance with broadcasting regulations (and thus any punitive sanctions) fall on broadcasters themselves. However, the consequences for a charity of, for example, the banning of its advertisement may result in financial loss, both of the cost of making the advertisement and of potential revenue stemming from it. Where an advertisement is controversial or shocking, a ban may also result in negative publicity for a

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[426] Section 3.2.

charity. On this last point, however, it can be argued that a ban may sometimes have the opposite effect, both in terms of publicity and in terms of public sympathy for the cause involved. This certainly appears to have occurred following the banning of the Make Poverty History "click" advertisement in 2005.[427]

3.0 Demonstrations and protest activities: criminal offences and police powers

Charities that participate in campaigning activities such as public protests, processions or assemblies, or those which attempt to directly pressurize or persuade organisations or individuals must ensure that participants acting on their behalf in organising or participating in such activities do not commit any of a variety of criminal offences.

This section considers the circumstances in which campaigning activities by charities in the form of "demonstrations" or "direct action" may attract criminal liability if charities fail to ensure their representatives restrict their activities.[428] The focus is four broad "direct action" campaigning methods. Section 3.1 considers public demonstrations, which for reasons explained below, will be examined in terms of both non-peaceful and peaceful protests. Section 3.2 considers the invasion of private property. This will necessarily focus on offences relating to trespassory assemblies, aggravated trespass,[429] and trespass on designated sites. Section 3.3 considers the targeting of specific individuals or groups for pressure or persuasion, focusing on offences relating to harassment and interference with the contractual relationships of certain organizations. Section 3.4 discusses campaigning publications or speeches, which may (rarely) attract liability for terrorism-related offences or offences related to racial and religious hatred. Whilst some of the more confrontational campaigning activities covered by these offences are unlikely to be engaged in by registered charities, given the need of such organizations to protect

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[427] Considered at Section 2.3.3.3 above.

[428] However, it excludes detailed consideration of the criminal law relating to incitement.

[429] This offence could also be categorized under Section 3.3 of this chapter (targeting of specific individuals or groups), but for clarity will be discussed in relation to its trespassory element within Section 3.2.

their public image, they remain a possibility, and are thus discussed alongside more benign activities.

It is notable that whilst the criminalization of the more confrontational and aggressive campaigning techniques covered here is easy to justify, some offences which cover more benign activities criminalize arguably legitimate campaigning activities. In some instances, the relevant legislation does this intentionally. In others, it is capable of being used in ways perverse to apparent Parliamentary intention. For this reason, any discussion of the impact of such laws must acknowledge the effect of this arguable encroachment on legitimate campaigning activities. Current criticisms levelled at the provisions in this respect are thus discussed where relevant.

The police have specific (and expanding) powers in relation to some of the areas discussed above. Police powers are governed mainly by the Police and Criminal Evidence Act (PACE) 1984. Among other matters, this covers criminal evidence, police powers to stop, search, arrest, detain and interrogate members of the public, police duties, and the rights of persons in detention. The Criminal Justice and Public Order Act (CJPOA) 1994 and the Serious Organised Crime and Police Act (SOCPA) 2005 have both significantly extended police powers, and extensions relevant in this context will be discussed in the relevant sections below, prior to a consideration of the general impact of police powers on protest activities (Section 3.5).

The direct consequences of the commission of criminal offences – which may include fines or imprisonment or both – obviously fall on the individuals committing them. Whilst this is obviously undesirable for individuals themselves, where such individuals are acting as representatives of a charity, there may be additional negative repercussions for the charity itself and for its trustees. These are considered in Section 3.6.

3.1 Public demonstrations

Whilst campaigning which is violent and destructive should obviously not be planned or conducted by charities, it is possible for participants in initially peaceful protests (including representatives of charities) to be implicated in crimes against public order where the nature of an assembly changes. An example of such a scenario is the anti-capitalist protest in London in May 2000,[430] which began peacefully but ended in injuries to police, damage to a fast-food restaurant and defacement of war memorials. For this reason, both offences which may be committed by those involved in violent and non-peaceful protests and offences committable through peaceful demonstrations will be discussed in turn below. It should be noted in the broader context of this thesis that this possibility has particular relevance for participation in collaborative campaigns, over which individual charities may have reduced control.[431]

3.1.1 Violent and non-peaceful public demonstrations

Violent[432] and non-peaceful forms of protest have long attracted criminal liability for any of a range of public order offences contained in the Public Order Act (POA) 1986. Offences (and their penalties) range in seriousness from riot,[433] through violent disorder,[434] affray,[435] causing fear or provocation of violence[436] to causing harassment, alarm or distress.[437] These offences are long-established, and there is little to criticize in the present context, other than the possibility that – particularly

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[430] *The Guardian*, 2nd May 2000.

[431] See Chapter Five, Section 3.2.2.1 for discussion of potential loss of control of campaigning coalitions.

[432] As defined by Public Order Act (POA) 1986, s.8. The content of the statutory provisions referred to and the specific criminal penalties for each offence are generally omitted from the footnotes, but are included in K. Atkinson, 'Charities, Campaigning and Crime', [2007] 10 *CL&PR* 63.

[433] S.1 POA 1986.

[434] *Ibid.* s.2.

[435] *Ibid.* s.3.

[436] *Ibid.* s.4.

[437] *Ibid.* s.5. Note also that a new section 4A was inserted into the POA 1986 by the Criminal Justice and Public Order Act 1994, making it an offence for a person, with intent to cause another person harassment, alarm or distress, to use threatening, abusive or insulting words or behaviour, or disorderly behaviour, or to display any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress. Whilst the s.5 and s.4A offences appear very similar, there are differences in both the *actus reus* and the *mens rea*. The section 5 offence requires that harassment, alarm or distress must be *likely* to result, whereas the section 4A offence requires that these outcomes must *actually* have been caused. The section 4A offence also requires intention to cause the harassment, alarm or distress.

given the increases in general police powers discussed at Section 3.5 below – they may be used to control protest itself rather than the violence or disorder that they are intended to prevent.

In addition to increases in statutory police powers, the police have common law powers to take reasonable steps (including arrest) to stop an actual or imminent breach of the peace.[438] The wide potential use of these powers in the context of protests is illustrated by the case of *R (Laporte) v Chief Constable of Gloucestershire Constabulary*,[439] in which the police, relying on their powers to prevent an imminent breach of the peace, intercepted coach passengers travelling from London to Gloucestershire to attend a protest demonstration. Whilst the House of Lords held that the police had acted unlawfully in the circumstances, the case illustrates that drawing the line between protest which unacceptably infringes the rights of others, and protest which causes an acceptable level of inconvenience to others as the price for protestors' freedom of expression is inevitably difficult.

A more controversial development in the context of violent or destructive protests is the potential use of offences aimed at terrorist activities. The Terrorism Act 2000[440] defines "terrorism" as:

> "the use or threat of action where the use or threat is designed to influence the government or an international governmental organization or to intimidate the public or a section of the public, where the use or threat is made for the purpose of advancing a political, religious or ideological cause".

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[438] Whilst the case law provides little clear authority on what constitutes such a breach, see *R v Howell* [1982] QB 416 at 427 per Watkins LJ for the following currently accepted definition: "... there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance". See R. Stone, *Civil Liberties and Human Rights*, (6th Edn.) OUP (2006), pp.93, 272 for further discussion.

[439] [2006] UKHL 55.

[440] S.1(1), (as amended by the Terrorism Act 2006, s.34(a)). A previous definition was contained in the Prevention of Terrorism (Temporary Provisions) Act 1989, s.20.

The "action" referred to must also either: involve serious violence against a person or serious damage to property; endanger the life of a person other than the life of the person committing the action; create a serious risk to the health or safety of the public or a section of the public; or be designed to seriously interfere with or seriously disrupt an electronic system.[441]

The broad range of conditions set out above and the extension of the definition to religious or ideological causes could quite clearly cover a variety of protest activities at which the Act was not directed, such as the initially-peaceful anti-capitalist demonstrations discussed earlier. Moving away from public demonstrations temporarily in order to illustrate the wide-reaching nature of the definition, Stone[442] provides the example of an animal welfare group "hack[ing] into the DEFRA web site to replace the Department's material with messages protesting about the treatment of farm animals and government policy". Stone identifies that such activity may fall within the definition of terrorism, and argues that whilst it should undoubtedly be criminalized, "the Computer Misuse Act 1990 would surely provide a more appropriate approach than the Terrorism Act 2000". The point to be made here is that the potential use of terrorism-related offences should be a particularly important consideration for charities, given the great importance afforded to the protection of their individual and collective reputation[443] and the potentially devastating effect of being publicly associated with "terrorism" rather than with other types of offence. The broader implications for charities of the importance afforded to the protection of reputation are discussed further below.[444]

3.1.2 Peaceful public demonstrations

Violent and destructive protests aside, many charities engage in peaceful public demonstrations in furtherance of their charitable objects. A notable recent example of this was the 'Make Poverty History' mass procession in Edinburgh in July 2005,

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[441] *Ibid.* s.1(2).

[442] *Op. cit.*, OUP (2006), p.213.

[443] See, for example, Charity Commission, *Campaigning and Political Activities by Charities* (CC9) TSO (2004), paras.26, 28-30, 37, 39.

[444] Section 3.6.

which was visibly attended by many charities.[445] Nevertheless, charity representatives who organize or participate in peaceful demonstrations can potentially find themselves criminally liable for offences relating to the organization and conduct of processions and assemblies.

The POA 1986[446] provides that organizers of most public processions must provide advance written notice of the proposal to hold a procession which is intended to either demonstrate support for or opposition to the views or actions of any person or body of persons, to publicize a cause or campaign, or to mark or commemorate an event.[447] The notice must specify the date when it is intended to hold the procession, the time when it is intended to start, its proposed route, and the name and address of the organizer(s).[448] It must be delivered to a police station in the police area in which it is proposed the procession will start,[449] usually six days before the event.[450]

An organizer of a public procession who either fails to satisfy the notice requirements, or fails to ensure the procession adheres to the date, time and route specified in the notice will be guilty of an offence.[451] However, it is a defence for the organizer to prove that he did not know of, and neither suspected nor had reason to suspect the failure to satisfy the requirements or the difference in date, time or route.[452] Where there has been a difference in date, time or route, it is also a defence for the organizer to prove that this arose from circumstances beyond his control, or from something done with the agreement or by the direction of a police officer.[453]

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[445] *The Guardian*, 2 July 2005.

[446] *Ibid.* s.11(1).

[447] Exceptions under s.11(2) are where a procession is customarily held in the area or is a funeral procession.

[448] *Ibid.* s.11(3).

[449] *Ibid.* s.11(4).

[450] *Ibid.* s.11(5) and (6).

[451] *Ibid.* s.11(7).

[452] *Ibid.* s.11(8).

[453] *Ibid.* s. 11(9).

The POA 1986 further allows senior police officers to impose conditions on public processions in certain circumstances.[454] An organizer of a public procession who knowingly fails to comply with such conditions will be guilty of an offence, although it is a defence for him to prove that the failure arose from circumstances beyond his control.[455] An identical offence exists in relation to participants in such a procession,[456] although a person guilty of this offence is liable for a lesser penalty.[457] A chief police officer may also apply to the council of a district for an order prohibiting all or a particular class of public processions for a specified period not exceeding 3 months, if he reasonably believes that the powers under section 12 (discussed above) will not be sufficient to prevent public processions from resulting in serious public disorder.[458] It is also an offence to organize,[459] participate in,[460] or incite another to participate in[461] a public procession whilst knowing it is prohibited.

With regard to the position of charities, it could be considered unlikely that a peaceful demonstration organized by a charity would attract the imposition of conditions or bans by the police on the grounds of serious public disorder. Nevertheless, charities must avoid assuming that because their planned demonstrations are peaceful, they are also legal. Even if conditions or bans are not imposed, contravention of the advance notice requirement may result in prosecution. Whilst use of the statutory defences discussed above may be possible,

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[454] *Ibid.* s.12(1). The circumstances are if they reasonably believe that it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or that the purpose of the persons organizing it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do.

[455] *Ibid.* s.12(4).

[456] *Ibid.* s.12(5). Additionally, under s.12(6), an offence is committed by a person who incites another to commit an offence under subsection (5).

[457] *Ibid.* s.12(9).

[458] *Ibid.* s.13(1). Under subsection (2), a council, on receiving such an application, may with the consent of the Secretary of State make an appropriate order. Subs.(1) does not apply in the City of London or the metropolitan police district, where, under subs.(4), the Commissioner of Police for the City of London or the Commissioner of Police of the Metropolis respectively have powers to apply directly to the Secretary of State for such an order.

[459] *Ibid.* s.13(7).

[460] *Ibid.* s.13 (8).

[461] *Ibid.* s.13(9).

criminal prosecution of a charity's representatives - even prosecution resulting in acquittal – may be problematic for a charity, as discussed later.[462]

With regard to public assemblies,[463] rather than processions,[464] the POA 1986 allows a senior police officer, in certain circumstances, to impose conditions on public assemblies relating to the place at which assemblies may be held, their maximum duration, or the maximum number of persons who may participate.[465] It is an offence to organize[466] or participate in[467] a public assembly and knowingly fail to comply with such a condition, or to incite another to participate in such an assembly,[468] although it is a defence to the first two of these offences to prove that the failure arose from circumstances beyond the defendant's control.

For the purposes of the above provisions, "public assembly" was originally defined[469] as a group of twenty or more persons. However, since the Antisocial Behaviour Act (ASBA) 2003[470] reduced the number of people required to form an "assembly" from twenty to two, the potential restrictions on demonstrations and other public meetings is obviously greatly increased. Further, the ASBA 2003 supplements the provisions relating to processions and assemblies with specific police powers, enabling them to order dispersal of groups if participants do not comply with Section 11 of the POA 1986, in certain conditions.[471] In respect of charities, those which are unaware of these provisions and the recent changes to them may not consider that two representatives staging a peaceful protest in a

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[462] Section 3.6.

[463] Defined by s.16 of the Act.

[464] Processions are not defined in the Act.

[465] POA 1986 s.14(1). The specified circumstances are that he reasonably believes that it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or that the purpose of the persons organising the assembly is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do.

[466] *Ibid.* s.14(4).

[467] *Ibid.* s .14(5).

[468] *Ibid.* s 14(6).

[469] *Ibid.* s.16.

[470] S.57.

[471] *Ibid.* s.30. The use of these powers of dispersal against protestors was considered to be lawful by the Court of Appeal in *R (Singh) v Chief Constable of West Midlands Police* [2006] EWCA Civ 1118.

public place may attract criminal penalties, with the attendant consequences, discussed below,[472] for both the representatives and the charity itself.

Of greater concern for charities is the fact that the scope of criminal liability for public demonstrations has broadened in recent years to cover a number of specific activities and to increase police control. The most controversial example of this is contained in the Serious Organised Crime and Police Act (SOCPA) 2005,[473] which enables the Home Secretary to designate an area in which demonstrations can be restricted, within a 1km radius of Parliament Square.[474] It is an offence to organize,[475] participate in,[476] or carry on[477] a demonstration[478] in the above designated area if authorization[479] has not been given when the demonstration starts.[480] The wording of the provision deliberately includes an existing one-person demonstration, and it is widely accepted that this was aimed at Mr Brian Haw, a lone protestor who has maintained a presence outside Parliament since 2001 in protest against British foreign policy in Iraq.[481]

The particular provisions of the SOCPA 2005 referred to above have been widely criticized on a number of bases. These include the retrospective criminalization of Mr Haw[482] and the reasons for imposing the restrictions,[483] which some

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[472] At Section 3.6.

[473] Ss.132-138. The intention of Prime Minister Gordon Brown to reform this part of SOCPA 2005 was announced close to the time of submission of this thesis: see HM Government, *The Governance of Britain*, (Cm 7170) (July 2007), paras.164-166. Potential reforms are addressed further in Chapter Seven, Section 3.2.

[474] *Ibid.* s.138.

[475] *Ibid.* s.132(1)(a).

[476] *Ibid.* s.132(1)(b).

[477] *Ibid.* s.132(1)(c).

[478] Under s.132(3) SOCPA, the offences under s.132(1) do not apply to public processions covered by ss.11, 12 or 13 of the Public Order Act 1986, discussed above. Certain lawful trade union conduct is also excluded under subs.(4).

[479] Under s.134(2) SOCPA. Obtaining authorization will require demonstrators to provide notice containing particular details, prescribed in s.133.

[480] But it is a defence, under s.132(2) SOCPA, for the accused to show that he reasonably believed authorization had been given.

[481] See *Third Report of the House of Commons Select Committee on Procedure*, House of Commons Papers, Session 2002-03, 855; *Third Sector* magazine, 31 January 2007.

[482] See *R (Haw) v Secretary of State for the Home Department and Commissioner of Police of the Metropolis* [2006] EWCA Civ 532.

commentators feel place the (arguably questionable) "aesthetic and environmental" value of Parliament Square above the freedom of expression of individuals. The prescribed notice period required to gain authorization, which is usually six days but is at least 24 hours,[484] has also been criticized by the Sheila McKechnie Foundation for preventing campaigns from mobilizing at short notice, in response for example to a news, parliamentary or procedural development.[485] Additionally, the failure to define "demonstration" in the Act has been criticised on the basis that the types of activity requiring prior authorisation are uncertain.[486]

The Commissioner of the Metropolitan Police is obliged under the SOCPA 2005 to authorize such demonstrations,[487] if the notice requirements contained in Section 133 are complied with,[488] but has powers, in specified circumstances,[489] to place a variety of conditions on them. These include limitations on place, time, duration, number of participants, size of placards and noise levels.[490] It is an offence for an organizer or participant to knowingly fail to comply with such conditions or contravene the particulars of the demonstration set out in the authorization.[491] The Act also creates several additional powers for senior police officers present at such demonstrations to vary or impose additional conditions,[492] and creates an offence of not complying with such conditions.[493] Additionally, using or permitting the use of

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[483] See *Third Report of the House of Commons Select Committee on Procedure*, House of Commons Papers, Session 2002-03, 855.

[484] S.133(2) SOCPA.

[485] http://www.sheilamckechnie.org.uk/showSubSub.php?id=26&page=2&last=60.

[486] See *Report of the Advisory Group on Campaigning and the Voluntary Sector* (2007), para.2.2.8. The report also contains numerous anecdotal examples of the use of the powers considered in this section against peaceful protestors.

[487] S.134(2) SOCPA.

[488] *Ibid.* s.134(1).

[489] *Ibid.* s.134(3).

[490] *Ibid.* s.134(4).

[491] *Ibid.* s.134(7). It is a defence, under s.134(8), to show that this arose from circumstances beyond the defendant's control, or from something done with the agreement, or by the direction, of a police officer.

[492] *Ibid.* s.135.

[493] *Ibid.* s.135(3). It is a defence, under s.135(4), to show that this arose from circumstances beyond the defendant's control.

loudspeakers in the above zone, is an offence.[494] Liberty quite justifiably argues that the combination of all these provisions will effectively neuter any demonstration.[495]

Conditions may only be placed on demonstrations if the Commissioner reasonably believes the conditions to be necessary to prevent one of a variety of outcomes, including "hindrance to any person wishing to enter or leave the palace of Westminster".[496] Liberty argues that in practice, most demonstrations will be covered by this. The organization also raises questions relating to the practicability of conforming to certain types of conditions, arguing that: "if the organizers of a demonstration are informed that only 500 people will attend and they believe that over 1000 will arrive, they are likely to cancel as otherwise they will commit an offence".[497] For charities, this raises the issue of potential criminal liability of their representatives. The wider ramifications of this are discussed below. Additionally, a scenario such as that described above raises questions for charities regarding the best use of their funds. Such a demonstration will involve the use of charitable funds for an activity which has a low likelihood of achieving the changes that are its aim, and which may have conditions imposed upon it which reduce its impact. At the same time, it runs a significant risk of either being cancelled due to difficulties in complying with conditions, or, if it goes ahead, of resulting in criminal prosecution of charity employees or volunteers. In any assessment of risks,[498] which charities – depending on their size - are either obliged or encouraged to undertake, the prospects for such an event would look decidedly bleak.

3.2 Invasion of private property

The controls over public assemblies discussed above were extended to cover certain types of assemblies on private property by the Criminal Justice and Public Order

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[494] Under s.137 SOCPA. Exceptions are specified in s.137(2) and (3).

[495] *Serious Organised Crime and Police Bill: Liberty's briefing for the Second Reading in the House of Lords*, (2006), para.38. This is the most comprehensive critique of the Serious Organised Crime and Police Act 2005, and will thus be referred to throughout this section. It is available at http://www.liberty-human-rights.org.uk/pdfs/policy06/soc-2nd-reading-lords.pdf.

[496] S.134(3)(a) SOCPA.

[497] *Serious Organised Crime and Police Bill: Liberty's briefing for the Second Reading in the House of Lords*, (2006), para.38.

[498] The requirements for charities to undertake risk management are considered in Chapter Six.

Act (CJPOA) 1994,[499] which added new Sections 14A, B and C to the POA 1986. These provisions enable a chief officer of police to apply to the council of the district[500] for an order prohibiting the holding of all relevant assemblies[501] in the district or a part of it for a specified period,[502] if he reasonably believes that certain outcomes may result from such an assembly.[503] Offences in relation to the above include organizing,[504] participating in[505] and inciting another to participate in[506] such assemblies. Further provisions enable police officers to direct persons not to proceed in the direction of the assembly,[507] and create an offence of knowingly failing to comply with such a direction.[508]

The CJPOA 1994 also creates the offence of aggravated trespass,[509] committed if a person trespasses on land and either intimidates people with the intention of deterring them from lawful activity, or obstructs lawful activity, or disrupts lawful activity. Senior police officers may remove persons they reasonably believe to be committing or participating in aggravated trespass,[510] and it is an offence not to comply or to return within 3 months.[511] This area of law may be of particular

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[499] Ss. 70, 71.

[500] Separate provision is made for the City of London and the Metropolitan Police District by POA 1986, s.14A(3),(4).

[501] Specified by s.14A(1)(a) POA 1986 as those assemblies which a chief officer of police reasonably believes are intended to be held in any district at a place on land to which the public has no right of access or only a limited right of access, where they are likely to be held without the permission of the occupier of the land or to conduct themselves in such a way as to exceed the limits of any permission or the limits of the public's right of access.

[502] But, by virtue of s.14A(6) POA 1986, not exceeding four days or in an area exceeding an area represented by a circle with a radius of 5 miles from a specified centre.

[503] Under, s.14A(1)(b) POA 1986, specified outcomes are serious disruption to the life of the community, or where the land, or a building or monument on it, is of historical, architectural, archaeological or scientific importance, significant damage to the land, building or monument.

[504] *Ibid.* s.14B(1).

[505] *Ibid.* s.14B(2).

[506] *Ibid.* s.14B(3).

[507] *Ibid.* s.14C(1), (2).

[508] *Ibid.* s.14C(3).

[509] S.68(1) CJPOA 1994.

[510] *Ibid.* s.69(1).

[511] *Ibid.* s.69(3) (as amended by the Criminal Justice Act 2003, s.280(2), (3), sch.26, para.45(1), (8)). Under subs.(4), it is a defence for the accused to show either that he was not trespassing on the land, or that he had a reasonable excuse for failing to leave the land as soon as practicable or, as the case may be, for again entering the land as a trespasser.

relevance to charities involved in campaigning, as it was targeted specifically at people who are interrupting such activities as the construction of controversial roads. As an illustration of this deliberate targeting of particular protest activities through legislation and the general increase in the level of constraint, the ASBA 2003[512] extended the above provision to cover trespass in buildings as well as in the open air. This was aimed specifically at the activities of "animal rights" activists who invade the building of a targeted company. Further laws targeted at such activists are discussed in Section 3.3.

Further offences related to trespass are created by Sections 128 to 131 of the SOCPA 2005, which cover trespass on designated sites,[513] in particular royal residences. These provisions allow the Secretary of State to designate a site if it is either Crown land, or belongs to the Monarch or heir to the throne, or if he believes it is appropriate for designation on grounds of national security. Liberty raises concerns that all these provisions allow the Government to criminalize trespass, arguing that:[514]

> "... there is no attempt to define what constitutes 'national security' and no threshold for the Secretary of State to satisfy [This] allows designation to take place without any consequent justification of why the Secretary of State believed it was appropriate".

Whilst the condition that the Attorney-General has to agree to proceedings was welcomed by Liberty, it was not enough to assuage their concerns in relation to the implications for protest activities:[515]

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[512] S.59 ASBA 2003.

[513] S.12 Terrorism Act 2006 extends the coverage of s.128 to include nuclear sites. Current designated sites are listed in the Serious Organised Crime and Police Act 2005 (Designated Sites) Order 2005 (SI 2005/3447), sch.

[514] *Serious Organised Crime and Police Bill: Liberty's briefing for the Second Reading in the House of Lords*, (2006), para.34.

[515] *Op. cit.*, para.35.

"... a number of protests in recent times, such as those opposing the war in Iraq or the criminalization of hunting with hounds could be described in some way as raising 'national security' interests. With no need for justification these powers can be utilized on a purely subjective belief. Whether or not there is a consequent prosecution the police will still be allowed to arrest and detain. We believe that the creation of this offence is evidence of a trend towards marginalization and criminalization of legitimate protest".

The offences discussed above blur the boundaries between legal and illegal protest, and make it difficult to determine whether an offence has been or is likely to be committed. Charities, as discussed throughout this section, have a particular need to avoid their representatives attracting criminal liability, and are arguably likely to overly restrict their activities and avoid even approaching the boundaries of illegality in relation to the above poorly defined offences.

3.3 Targeting specific individuals, groups or organizations

3.3.1 Harassment

Under the Protection from Harassment Act (PHA) 1997, either pursuing a course of conduct which amounts to harassment of another,[516] or pursuing a course of conduct which amounts to harassment of two or more persons[517] is an offence.[518] It is also an offence to pursue a course of conduct which causes another to fear, on at least two occasions, that violence will be used against him.[519] These offences were originally aimed at "stalking", but, worryingly for charities, have the capacity to be

[516] Which the defendant knows or ought to know amounts to harassment of the other (s.1 PHA 1997).

[517] Which the defendant knows or ought to know involves harassment of those persons, and by which he intends to persuade any person (whether or not one of those mentioned) either not to do something that he is entitled or required to do, or to do something that he is not under any obligation to do (s.1A PHA 1997, inserted by the SOCPA 2005, s.125(2)(c)).

[518] Under s.2(1) PHA 1997. In addition to criminal penalties specified under s.2(2), s.3 and s.3A (inserted by the SOCPA 2005 s.125(1), (5)) cover civil remedies, and create offences in relation to the contravention of injunctions protecting persons from harassment.

[519] Under s.4 PHA, such conduct is an offence to if the perpetrator knows or ought to know that his course of conduct will cause the other person such fear on each occasion. In addition to criminal penalties specified under s.4(4), restraining orders may be made under s.5 in relation to further conduct which amounts to offences under ss. 2 or 4 of the Act. Further powers for the police to give directions to such persons to leave the relevant area and not to return to it within a period of up to three months, and additional related offences, were added to the Act by the SOCPA 2005, s.127.

applied to a wider range of activities. The Sheila McKechnie Foundation have pointed out that they could cover email campaigns or pickets that urge consumer boycotts or persuade an organization - either corporate or public – to change a policy or a decision.[520]

The potential for offences relating to harassment to be used to constrain campaigning was increased further with the enactment of the Criminal Justice and Police Act (CJPA) 2001, which contained provisions enabling the police to give directions to stop the harassment of a person in his home,[521] and made it an offence to knowingly fail to comply with such a direction.[522] In addition to the above offences of contravening police directions, amendments to CJPA 2001[523] inserted by the SOCPA 2005[524] made harassment of a person in his home an offence in its own right. These provisions could clearly be applied to protest activities such as standing outside a person's home with a sign displaying distressing pictures relevant to a campaign.

3.3.2 Protection of contractual relationships of certain organizations

The SOCPA 2005 also creates offences in relation to interferences with the contractual relationships of animal research organizations[525] with the intention of harming them,[526] and in relation to the intimidation of persons connected with such organizations.[527] These offences are clearly aimed at protest activities, and have

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[520] www.sheilamckechnie.org.uk/showSubSub.php?id=26&page=2&last=60 [06/08/07].

[521] Under s.42(1) CJPA 2001, a constable can give directions to a person engaging in relevant conduct in the vicinity of a person's home, where he reasonably believes that the resident is likely to suffer harassment, alarm or distress. The term "vicinity" is not defined in the Act.

[522] Under s.42(7) CJPA 2001, as amended by the Criminal Justice Act 2003, s.280(2),(3), Sch 26 para.56(1),(3).

[523] A new s.42A.

[524] S.126(1).

[525] As defined in s.148 SOCPA. Relevant organisations can include individuals. S.149 provides the Secretary of State with powers to extend the application of the sections to other types of organisation in certain circumstances.

[526] S.145 SOCPA.

[527] *Ibid.* s.146.

been criticized by Liberty on the basis that they criminalize tortious acts and legitimate economic protest.[528]

3.4 Publications or speeches

3.4.1 Terrorism-related offences

Whilst unlikely to apply to the majority of campaigns by charities, offences created by the Terrorism Act 2006 are relevant in this context in terms of their potential discouragement of discussion and debate surrounding sensitive topics. The Act makes it an offence to encourage terrorism[529] or disseminate terrorist publications.[530] Given the vague definition of "encouragement", which includes the even more vaguely-defined act of "glorification",[531] it appears that concerns over self-censorship of participation in legitimate debate may be justifiable.

3.4.2 Offences relating to racial and religious hatred

Similar concerns for legitimate debate as those raised for terrorism-related offences apply to offences in this category, particularly given the recent extensions to their scope. By virtue of the Racial and Religious Hatred Act (RRHA) 2006, existing racial hatred offences under Part 3 of the POA 1986 were extended to cover offences in relation to religious hatred. This concept is identified by Liberty as "broad and vague", and further criticized by the organization in the strong terms that:[532]

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[528] *Serious Organised Crime and Police Bill: Liberty's briefing for the Second Reading in the House of Lords*, (2006), paras.44 – 46.

[529] Under s.1(2) Terrorism Act 2006, by publishing or causing another to publish a statement, with intention or recklessness as to the effect of encouraging or inducing terrorism, that is likely to be understood by some or all of the members of the public to whom it is published to be direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences.

[530] Under s.2(1) Terrorism Act 2006, through acts specified in subs.(2), with intention or recklessness as to the effect of encouraging, inducing or assisting terrorism. S.3 covers application of s.2 to publication on the internet.

[531] S.1(3), S.2(4) Terrorism Act 2006.

[532] *Serious Organised Crime and Police Bill: Liberty's briefing for the Second Reading in the House of Lords*, (2006), para.30.

> "criminalizing even the most unpalatable, illiberal and offensive speech should be approached with grave caution in a democracy. Free speech is far more precious than protection from being offended".

Widespread concerns of this nature were, to an extent, reflected in the inclusion of a specific limitation provision in the RRHA 2006. The limitation prevents the Act from being applied in a way which:[533]

> "prohibits or restricts discussion, criticism or expression of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system".

This limitation is likely to greatly reduce the number of potential prosecutions and thus the potential risks for charities and other campaigners of inadvertently committing such offences.

3.5 General Police Powers

Aside from the range of offences and specific police powers relevant to protest activities, it should be noted that there have been concurrent increases in general police powers, the potential effect of which must also be considered.

Police powers are governed mainly by the Police and Criminal Evidence Act (PACE) 1984.[534] Among other matters, this covers criminal evidence, police powers to stop, search, arrest, detain and interrogate members of the public, police duties, and the rights of persons in detention. Various amendments to this Act have

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[533] Public Order Act 1986, s.29J, inserted by the RRHA 2006, s.1, sch.

[534] The powers of the police and other relevant authorities to apply for (civil) Anti-Social Behaviour Orders (ASBOs) is noted here but not discussed further. Under the Crime and Disorder Act (CDA) 1998, s.1 (as amended), a relevant authority can apply for an ASBO where a person has "acted ... in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and that such an order is necessary to protect relevant persons from further anti-social acts by him". Whilst ASBOs are civil orders, breach of their conditions is a criminal offence by virtue of s.1(10) CDA 1998.

increased police powers in a number of ways. In this context, the most relevant extensions are contained in the SOCPA 2005 and the Terrorism Act 2000.

The SOCPA 2005 increases police powers of arrest under the PACE 1984 to effectively make all offences arrestable,[535] where a constable has reasonable grounds for believing that arrest is "necessary".[536] Grounds of necessity include[537] enabling "the prompt and effective investigation of the offence or of the conduct of the person in question",[538] and preventing "prosecution for the offence from being hindered by the disappearance of the person in question".[539] These particular grounds of necessity have been extensively criticised for being unnecessarily wide. In its response to legislative proposals, the Bar Council stated that "a police officer could justify an arrest as being necessary in almost every conceivable circumstance".[540] The Law Society made similar criticisms in its response.[541] The human rights organization Liberty considered the proposed solution "unacceptable and disproportionate to the problem identified",[542] and highlighted the dangers of the provision by, among other things, reference to the extensive use made by the police of the Terrorism Act 2000, which has already extended their powers to stop individuals and conduct searches.

The Terrorism Act 2000, in addition to police powers to stop and search based upon suspicion of terrorism,[543] enables a senior police officer of a specified rank, for a limited period of up to 28 days,[544] to authorize the stopping and searching of

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[535] PACE 1984, s.24, substituted by the SOCPA 2005, s.110(1).

[536] SOCPA 2005, s.110(4).

[537] *Ibid.* s.110(5).

[538] *Ibid.* s.110(5)(e).

[539] *Ibid.* s.110(5)(f).

[540] *Response from the Law Reform Committee of the Bar Council to the Home Office Consultation Paper "Policing: Modernising Police Powers to Meet Community Needs"*, (2004), para.2.1.4.(vii).

[541] *Law Society Response to Policing: Modernising Police Powers to Meet Community Needs*, (2004), para.17.

[542] *Serious Organised Crime and Police Bill: Liberty's briefing for the Second Reading in the House of Lords*, (2006), para.15.

[543] S.43 Terrorism Act 2000. "Terrorism" is defined by s.1 of the Act.

[544] *Ibid.* s.46(2).

vehicles and their drivers and passengers,[545] and of pedestrians and anything carried by them.[546] The officer must believe that it is expedient to issue such an authorization in order to prevent acts of terrorism.[547] Such authorizations must be notified to the Home Secretary, who has the power to cancel them or shorten the period of their operation.[548]

Following the attacks on the London Transport system in February 2001, the Home Secretary used his powers under Section 44 of the Terrorism Act to designate the entire Metropolitan Police District as such an area from the date that the provisions came into force.[549] Whilst the designations are in force for a maximum of 28 days, they were renewed repeatedly by the Home Secretary from February 2001 until September 2003. As mentioned above, this use of the power has been strongly criticized by Liberty on a number of grounds.[550] Whilst the use of statutory powers to designate the area at risk of terrorist attack may or may not have been justified in the above circumstances, some specific instances in which the power has been used by the police clearly departs from the intentions of the legislation. One example of its use for activities unrelated to terrorism which is highly relevant in the present context is the case of *R (Gillan) v Commissioner of Police for the Metropolis*,[551] which concerned an application for judicial review of the use of the power. The application followed the stop and search of two separate individuals who were both making their way (one as a participant and one as a journalist) to a demonstration outside an international arms fair in East London. Whilst the House of Lords determined that the issues were not appropriate for consideration in a judicial review action, it is worth noting the Court of Appeal's concern at the apparently

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[545] *Ibid.* s.44(1).

[546] *Ibid.* s.44(2).

[547] *Ibid.* s.44(3). Additional powers to authorize stop and search are contained in the CJPOA 1994, s.60, as amended. These powers operate where a senior police officer reasonably believes either that incidents involving serious violence may take place and the authorisation is expedient to prevent their occurrence; or that persons are carrying dangerous instruments or offensive weapons without good reason.

[548] *Ibid.* s.46(5),(6).

[549] 19th Feb 2001: Terrorism Act 2000 (Commencement No 3) Order 2001 (SI 2001/421), Art 2.

[550] *Serious Organised Crime and Police Bill: Liberty's briefing for the Second Reading in the House of Lords*, (2006).

[551] [2004] EWCA Civ 1067, [2005] UKHL 12.

ineffective briefing of the police regarding the correct use of the powers for matters relating to terrorism only.[552] In the light of cases such as this, Liberty's concerns regarding the potential misuse of the much broader powers introduced by the SOCPA 2005 appear justified, and should be shared by charities and other organizations involved in protest activity.

3.6 Consequences of the commission of criminal offences by charity representatives

It is clear from the above discussion that the range of offences which may be committed through organization of and participation in protest activities is broad, and includes many offences which may be committed without intention or even awareness on the part of the protestor. As discussed, aside from the public order and terrorism offences which may be committed if a demonstration turns violent or aggressive, there are a plethora of obstacles to conducting effective and legal protests. There are requirements relating to advance notice, and the potential for imposition of conditions which both reduce the effectiveness of a protest and may be difficult to adhere to. There is the possibility of the imposition of bans on particular demonstrations, with the resulting waste of charitable time and money. In addition, there is the criminalization of tortious acts, and the unclear definitions contained in a number of offences. Nevertheless, despite these barriers and uncertainties, some charities and their representatives will undoubtedly view campaigning in the forms discussed to be vital to the achievement of their objects, and will be prepared to risk the consequences considered below.

As noted throughout this piece, the consequences for individuals directly involved in criminal activity may include fines or imprisonment or both, at varying levels. However, where individuals are acting as representatives of charities, there can also be wider implications for a charity and its trustees.

First, a charity or its trustees, as employers,[553] may be vicariously liable for any concurrent civil actions resulting from the tortious actions of their employees whilst

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[552] [2004] EWCA Civ 1067, paras.52-56.

[553] The employer will be the charity itself in the case of charitable companies (and in future, Charitable Incorporated Organisations), but will be the trustees in case of unincorporated charities. However, the latter

they are acting within the course of their employment, even where they have not specifically authorised the tortious acts. In recent years, the courts have given the term "course of employment" a wide scope.[554]

Second, the activities considered here may constitute breach of trust (in the case of an unincorporated charity) or *ultra vires* activity (in the case of a charitable company, and in future a Charitable Incorporated Organisation) If so, the trustees may be personally liable to the charity for any financial losses it has sustained as a result. Legal action against charity trustees for breach of trust was considered in Chapter Two.[555]

Third is the less quantifiable but potentially more serious consequence of potential damage to the reputation of the charity arising from the criminal activities of its representatives. Damage to a charity's reputation and standing in the eyes of its supporters and donors arising from any type of negative publicity can have disastrous financial consequences, and should not be underestimated. The potential for this type of negative publicity may be further increased by the extension of police powers of arrest to all offences, conferred by the SOCPA 2005 amendments to the PACE 1984 discussed earlier.[556]

In addition to legal liability and negative publicity, the commission of criminal offences by representatives of a charity can result in more specific regulatory consequences. The Charity Commission has powers under Section 8 Charities Act 1993 (CA 1993) to initiate inquiries into charities' affairs. Chapter Two[557] identified that these powers may be used in the case of actual or threatened breach of trust. In

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will be indemnified out of charitable funds for losses incurred through liability for any damages, providing they are not personally at fault: see *Benett v Wyndham* (1862) 4 De GF & J 259.

[554] See *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, which concerned sexual abuse of school boarding house residents by the house warden. On appeal, the House of Lords held that there was sufficient connection between the work that the warden had been employed to do and the acts of abuse committed for the abuse to be regarded as having been committed within the scope of the warden's employment. The managers of the school were accordingly held to be vicariously liable for the acts of their employee.

[555] Section 4.2.2.

[556] Section 3.5 of this chapter.

[557] Section 4.0.

the present context of criminal offences, it is relevant to note that the Commission will use its Section 8 powers where it considers:[558]

> "there is a serious risk of significant harm or abuse to the charity, its assets, beneficiaries or reputation; where the use of [its] powers of intervention is necessary to protect them; and where this represents a proportionate response to the issues in the case".

The Commission's definition of "harm" includes[559] "serious damage to the reputation of a charity or charities generally". Circumstances in which the Commission would perceive serious risk of harm are specifically identified as including:[560] "presence of criminality"; "risk of the charity being brought into serious disrepute, for example through association with public disorder or links to terrorist organisations"; and "the charity undertaking improper political activities".

The powers of the Charity Commission during Section 8 inquiries and its remedial powers following such inquiries are considered in Chapter Two.[561]

To conclude this section, it is worth noting that the SOCPA 2005 provisions in relation to protests near Parliament have already resulted in a number of well-publicized prosecutions of peaceful protestors. These have included two individuals arrested at the cenotaph on Whitehall for reading out the names of UK soldiers and civilians killed in the war on Iraq; a man arrested for displaying a placard near Downing Street containing a quote from George Orwell;[562] and a man arrested for doing an impersonation of Charlie Chaplin outside Parliament.[563]

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[558] Charity Commission, *Complaints about Charities*, (CC47) TSO (2003), para.6.

[559] *Op. cit.*, para.8.

[560] *Op. cit.*, para.9.

[561] Section 4.2.1.

[562] "In a time of universal deceit, telling the truth is a revolutionary act", reported in *The Independent*, Thursday 19 October 2006.

[563] His statement to the court concluded: "In truth, one of the first things to go under a dictatorship is a good sense of humour", reported in *The Independent*, Thursday 19 October 2006.

Whilst the above cases did not involve individuals acting on behalf of charities, the publicity surrounding them is particularly pertinent to charities. Given the far-reaching repercussions of criminality and its inevitable publicity for organizations with charitable status, this example serves to reinforce the contention that those charities with a developed awareness of the array of criminal offences which they are in danger of committing through previously legitimate protest activities are likely to be deterred from engaging in such protest activities.

The deterrent effect of the legislation considered in this section may remain regardless of how unreasonable the restrictions appear and regardless of whether the campaign methods in question appear justified in furtherance of a charity's objects. The possibility that "the air of uncertainty is leading people to think twice about getting involved in protesting activity" was recently confirmed in a statement from the Chief Executive of the Sheila McKechnie Foundation.[564]

Whilst the "air of uncertainty" may in part help to explain the somewhat surprising lack of early reaction across the sector to such drastically increased curbs on protest activity,[565] criticisms of this area of law from within the sector are increasing.[566] Potential for reform of the laws discussed here are considered in Chapter Seven[567] of this thesis.

Whilst there is obvious awareness amongst some charities of restrictive legislative provisions, with a resulting cautious approach, the unwary may still be in danger of unwittingly engaging in illegal activities. This danger is particularly pertinent for offences such as those related to harassment,[568] which are not ostensibly aimed at protest activities, but which can and have been used by the police to restrict them.

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[564] Reported in *Third Sector* magazine, 1st November 2006, p.17.

[565] See *Third Sector* magazine, 1st November 2006, p.19, which reported that initial calls for a cross-sector response to the SOCPA 2005 (see *Third Sector* magazine, 17 Aug 2005, p.10) had failed to come to fruition.

[566] Most notably with the publication of the *Report of the Advisory Group on Campaigning and the Voluntary Sector* (2007).

[567] Section 3.2.

[568] See discussion of the Protection from Harassment Act 1997 and the Criminal Justice and Police Act 2001, Section 3.3.1 above.

Such offences will not be obvious to those without access to expert legal advice. Whilst a number of defences are available, wider negative repercussions may, for a charity, result from the mere prosecution of its representatives, regardless of actual convictions. This danger is further exacerbated by the omission of appropriately detailed warnings in the Charity Commission guidance on political activities, considered next.

4.0 Charity Commission guidance on other relevant legislation

The Charity Commission has produced specific guidance on electoral law, one area of wider law relevant to campaigning but not considered further in this thesis. Guidance entitled *Charities and Elections*,[569] intended to be supplementary to CC9, was issued by the Charity Commission in April 2005. The guidance advises that a charity may advocate a particular policy if it can reasonably be expected to further the purposes of the charity, even if that policy is advocated by a particular political party. However, it must take rigorous steps to ensure that the independence of its views from the political party is clear. A charity should avoid explicitly comparing their views with those of election parties or candidates.

Despite issuing guidance relating to elections, the Commission has not specifically addressed the important areas of law considered in this chapter in any detail, either within CC9 or as supplementary guidance.[570] Despite the potential for the legislation considered above to result in individual criminal liability and wider consequences for charities, the Commission's guidance includes only minimal coverage of such legislation. References to broader legal issues in the current version of CC9[571] are limited. Paragraphs 17 and 18 warn respectively that charities must be aware of and comply with the "general law" and "legal and regulatory requirements which have general application". Paragraph 21 advises on the need for

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[569] The guidance is not part of the numbered series of Commission publications. See http://www.charity-commission.gov.uk/supportingcharities/elections.asp.

[570] Although the supplementary guidance *Campaigning and political activities by charities – some questions and answers* issued in April 2007 does include a list (para.14) of relevant other legislation considered in this chapter.

[571] Charity Commission, *Campaigning and Political Activities by Charities*, (CC9) TSO (2004).

specialist legal advice if there are doubts over the legality of novel campaign techniques. Finally, Paragraphs 40 and 41 warn of the control problems inherent in demonstrations and rallies and the potential for commission of public order offences. Importantly, this is the only direct reference made in CC9 to the potential criminal liability inherent in demonstrations, despite the wide and complex range of offences discussed in Section 3.0.

Whilst it can be argued that the guidance cannot cover all relevant legal matters in detail, it has been criticized for not achieving the correct balance in this respect, particularly in relation to demonstrations and direct action. The Director of campaigns and policy at War on Want has been quoted by *Third Sector* magazine as stating:

> "[t]hey seem to have taken two steps forward and one step back ... demonstrations are an integral part of campaigns. Many charities use confrontational methods to gain people's attention. In this crowded world of communications and media, you need to do that. I'm not sure the Charity Commission is completely conversant with this".[572]

The omission is surprising given the fact that laws restricting "protest" activities are numerous, complex, more constraining than charity law, and impose criminal liability. It is particularly surprising given the Commission's current focus on risk management,[573] and - particularly in the context of campaigning - its emphasis on risk to reputation. This issue will be returned to in Chapter Six.

The Commission's future approach to the contradiction between increasingly restrictive legislation relating to protests and the increasing popularity of charity campaigning work with politicians and the general public may be determined partly by its new statutory objective[574] to increase public trust and confidence in charities.

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[572] *Third Sector* magazine, 5 May 2004, p.2.

[573] See, for example, Charity Commission, *op. cit.*, (CC9) TSO (2004), paras.25-31.

[574] Charities Act 1993, s.1B, inserted by Charities Act 2006, s.7.

5.0 Charities' perceptions of other relevant law and regulation which affects campaigning activity

5.1 Identified areas of law and strategies for compliance

Only a small number of charities (generally the larger charities which used the Commission guidance and had in-house legal advisors) positively identified other areas of law with an impact on campaigning. They included regulation of advertising and broadcasting, defamation, data protection, public order, health and safety, and the Serious Organised Crime and Police Act 2005. Some charities were aware of a broad range of relevant areas:

> *The other area is Ofcom and the Advertising Standards Agency and those .... Charitable campaigning ... political activities .... There's some stuff around regulation coming out of anti-terrorist regulation, but it's not ... it's restrictive in general, it's more related to financial matters, and I don't think it necessarily restricts campaigning activities. So those are the main areas* (Charity K).

> *In the UK there are general laws and regulations which influence campaigning from libel laws to regulations around advertising, broadcasting, marketing (data protection), public order, even the Serious Organised Crime and Police Act might apply given the way it tightens up laws on harassment* (Charity O).

> *Well a very simple one is like we did last week or when we have volunteering, if something happens to volunteers when they come to something. Let me give you an example, in [year] we had 70,000 people in [city] for the [campaign]. There were Charity G volunteers, one car coming to [campaign] had an accident, and there were Charity G people there, some people thought that we should also be liable. That's an extreme example of liability. When you're using volunteers you've got to be careful* (Charity G).

The Chief Executive of one larger organisation viewed the burden of compliance with so many areas of law as falling particularly on the larger and more complex organisations:

> *... the problem is when you start a complex organisation with many offices ... that's why I have an in-house law person and HR personnel etc. which law do you come under? What does staff come under, or fraud come under, there are so many different kinds of issues. I don't even know sometimes what the answers are. We have offices and staff overseas and we all have to look at our obligations. Our staff in our Nairobi office are on British pensions, and we were told they come under local law, but we discovered there isn't a Kenyan law that covers it ... that's what happens to charities now, it has become very complex to run big charities. I've run smaller charities too and it's much easier* (Charity G).

Whilst larger organisations may indeed have a greater regulatory burden, they are arguably like to possess both greater financial resources and a higher level of staff expertise with which to meet this burden.

5.2 Strategies for compliance and use / usefulness of relevant guidance

As only the (larger) charities, which had in-house legal expertise identified the above areas of law as relevant to campaigning, it is clear that compliance was achieved through the use of these advisors:

> *... and also we read the professional press and attend different sorts of events and so on, so we try and keep up to date with changes ... And I suppose having a specific function that does certain aspects of the campaigning, I mean there's a level of expertise* (Charity H).

The fact that only the larger charities demonstrated any awareness of the broader potential legal implications of their campaigning activity supports the above contention that advice on such matters should be included in Commission guidance.

However, this should be qualified by the fact that inclusion of such advice would be of little use to charities which do not actively refer to the guidance.[575]

5.3 The effects of relevant law and guidance on charities' campaigning

Given the formalised compliance strategies of the charities which identified the relevant areas of law, it is clear that these charities did constrain their activities on this basis:

> *And we have a full-time staff member not only on this issue but on many other issues, they look at libel issues, look at copyright issues, look at a whole lot of legal issues, we have an in-house and external consultants because we cannot make a mistake* (Charity G).

> *Charity law, and also liaison with police to ensure compliance with public order and disturbance laws. Police rules have sometimes altered the details of our planned activities* (Charity M – mass mobilisation).

> *On the campaigning side of it is to make sure who is the spokesperson, how far he or she can speak on our behalf. You can either attack a company or write a report which is not properly researched and not accurate and then get into libel law, you know for attacking a company. So we have to be very sure who, what rights and responsibilities individuals and members have, who can do media work and under what criteria our name will be used if we are going to be party to it* (Charity G)

> *... the ASA stuff has been more restrictive ...The definition of political that they employ is even more restrictive than that of the Charity Commission, it'd actually be an interesting step forward for them to use the Charity Commission's definition* ... (Charity K).

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[575] The lack of guidance use by some of the study participant charities was considered in Chapter Two, Section 6.2.

However, it is worth noting that Charity K's representative, whilst critical of the interpretation of the term by regulatory bodies, approached the issue with caution:

> *I'm a little confused about the ethical benefit of completely abolishing all restrictions ...would be opening up basically broadcasting space to the forces of the right, with much more money from corporate interests and so on* (Charity K).

The above mirrors the arguments presented by Kennedy LJ (*obiter*) in the *Bull* case,[576] discussed above in Section 2.3.3.

6.0 Conclusion

The legal consequences of campaigning activities discussed throughout this chapter are potentially serious, for charities, for their trustees and for employees. Particularly notable are the restrictive broadcasting laws, the enforcement of which can result in great financial loss to charities, and the expanding laws governing public protests, which can result in criminal liability for participating individuals. Contravention of either of the above can also result in damage to a charity's reputation and a variety of regulatory consequences.[577]

The potential repercussions of such activities for charities and their representatives result in the need for charities to approach protest activities with great caution and full awareness of their implications. However, despite these developments, the current version of Charity Commission guidance CC9[578] contains minimal coverage of these areas and their potential consequences. At the same time, campaigning by charities is in the limelight and has been publicly encouraged from several quarters, most noticeably by Ed Miliband,[579] Minister for the Third Sector until shortly

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[576] [1995] 4 All ER 491 at 496. See also N. Cohen, 'Political advertising would be a step too far on British television', *The Observer*, Sunday July 30, 2006.

[577] Considered above at Section 3.6.

[578] Charity Commission, *Campaigning and Political Activities by Charities*, (CC9) TSO (2004).

[579] For example, addressing the Britain's Most Admired Charity Awards ceremony, as reported in *Third Sector* magazine, 6 December 2006.

before this thesis was submitted.[580] This leaves the question of legitimate protest by charities and other voluntary organizations in a somewhat confused state, and increases the need for clear and comprehensive guidance.

Whilst the areas of law discussed are likely to be relevant to only a small part of overall charity campaigning activity, it is important that charities planning campaigns are aware of the potential consequences of all their activities. Nevertheless, only a few charities in the empirical study demonstrated such awareness, and these tended to be the larger charities with access to professional legal advice. This reflects the trends identified in Chapter Two[581] in relation to the participants' awareness of the law relating to political objects and activities.

With regards to the study participants' use of relevant Charity Commission guidance and their assessment of its usefulness, it must be noted that the guidance only includes limited coverage of the wider legislation discussed here. This lack of coverage, as well as attracting criticism, also pre-empts questions regarding the usefulness of the guidance in this respect. However, this conclusion should be qualified by the study's conclusions regarding the low levels of usage of the guidance. If the low usage levels in the study are indicative of general usage, increasing the coverage of wider laws in the guidance would obviously have a limited effect upon charities' awareness of such laws.

Finally, those charities in the study which were aware of wider relevant laws had actively sought to become informed of them, and constrained their activities accordingly. Conclusions regarding the overall effects of such laws on their campaigning activity must obviously be limited given the general lack of awareness among study participants. This lack of awareness will be re-addressed, in relation to the study in its entirety, in Chapter Seven.

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[580] Now replaced by Phil Hope.

[581] Section 6.1.

CHAPTER FOUR: LEGAL CONSIDERATIONS IN COLLABORATIVE CAMPAIGNING

1.0 Introduction

Chapters Two and Three considered the legal issues arising from campaigning work, discussing charity law and wider domestic law respectively. This chapter narrows the focus to consider the legal issues which may arise where collaboration is adopted as the working method through which a charity approaches its campaigning activities. It thus addresses the following study propositions identified in Chapter One:

10. Whilst there are few direct legal constraints on collaborative working arrangements, such arrangements must comply with general charity law requirements. Combining collaborative working with political campaigning may also create unique legal issues. Thus, the various possible collaborative campaigning arrangements have different legal implications, some of which charities undertaking them may not be aware.

11. Available Charity Commission publications on collaborative working are not detailed enough to fully inform charities undertaking this method of working of its implications.

In furtherance of the above propositions, the chapter analyses law, regulation and Charity Commission guidance relevant to collaborative campaigning. Section 2.0 forms the basis for the subsequent sections by comprising a preliminary discussion of the general duties and powers of trustees and the standards of care they must apply in their decisions.

Sections 3.0, 4.0 and 5.0 apply the principles discussed in Section 2.0 to an analysis of various legal issues which have particular relevance to collaborative working in the context of campaigning. These are: trustees' powers to collaborate (Section 3.0); the compatibility of coalition aims with charities' objects (and trustee independence

in deciding how to achieve them) (Section 4.0); and possible levels of formality in collaborative working (Section 5.0).

Each of the above three sections begins by identifying relevant law and relevant Charity Commission guidance. Each section then explores charities' perceptions of the law and Commission guidance, using data from the empirical study. The data used in this chapter is based on the following operational research area:

e) Charities' awareness of how collaborative working arrangements are affected by general charity law requirements; their use of relevant Charity Commission publications on collaborative working; their perceptions of the clarity and usefulness of the guidance (if used); the effects of the law (if they are aware of it) and the guidance (if used) on their collaborative campaigning practices.

Section 6.0 concludes the chapter by returning to the study propositions identified above. It summarizes the specific implications of the legal issues identified for charities campaigning in coalitions, noting the interlinked nature of the legal issues presented and how this factor exacerbates potential legal consequences for charities and their trustees. It then summarizes the coverage of the above issues contained in relevant Charity Commission publications. Finally, the section draws conclusions on the awareness of the law and the use of Charity Commission publications displayed by charities in the study; on how useful those that used the publications found them, (noting the impact of the Commission guidance focus on risk management), and on the overall effect the law and guidance had on the activities of the charities in the study.

2.0 Charity trustees: general duties, powers and standards of care

2.1 Unincorporated charities

The primary duty of trustees of unincorporated charities, and that of most relevance to this discussion, is to carry out the trust in accordance with the trust instrument.[582]

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[582] *Duke on Charitable Uses*, 1676, p.116.

Trustees are obliged to use charitable funds for the specific purposes laid down in the governing document and no other.[583] They must use any powers they are given by their governing document in accordance with the terms of the trust.[584] Any discretionary powers, whether derived from the governing document or from statute, must be exercised in accordance with this primary duty, and with fair consideration of the subject.[585]

Whilst the Trustee Act 2000 now imposes a statutory duty and standard of care upon trustees of unincorporated charities in certain prescribed circumstances,[586] the standard of most relevance to this discussion derives from Equity. In exercising their powers, trustees must use the same level of care and skill as a prudent person of business would exercise in dealing with that person's own private affairs.[587] Failure to do so may amount to breach of trust. The potential consequences of breach of trust for trustees and charities were considered in Chapter Two.[588]

2.2 Charitable companies

Whilst directors of charitable companies are not strictly trustees, they fall within the definition of "charity trustees" under Section 97(1) Charities Act 1993. The Act thus confers upon them certain specific duties and powers which will not be considered further here. Of more relevance are their general duties and powers under company law.

By virtue of the Companies Act 2006, company directors must act in a way they consider, in good faith, will be the most likely to promote the success of the company for the benefit of its members as a whole.[589] They have a duty to act in accordance with the company's constitution and must only exercise their powers for

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[583] *Att-Gen v Brandreth* (1842) 1 Y & C Ch Cas 200, 6 Jur 31.

[584] *Re Hay's Settlement Trusts* [1981] 3 All ER 786. For unincorporated associations see *Woodford v Smith* [1970] 1 All ER 1091n.

[585] *Re Beloved Wilks' Charity* (1851) 3 Mac & G 440.

[586] For discussion see P. Luxton, *The Law of Charities*, OUP (2001), para.9.78.

[587] *Speight v Gaunt* (1883) 9 App Cas 1.

[588] Section 4.0.

[589] Companies Act 2006, s.172.

the purposes for which they are conferred.[590] Amongst other duties, they must exercise independent judgement[591] and reasonable care, skill and diligence.[592] This is defined as the care, skill and diligence that would be exercised by a reasonably diligent person with (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and (b) the general knowledge, skill and experience that the director has.[593] Existing common law consequences of breach of duty by company directors are preserved.[594]

Whilst there is no specific authority for the application of a higher standard of care where a company is charitable, it has in the past been judicially stated that whilst not trustees, those controlling corporations may be held to be in the same fiduciary position as trustees:[595]

> "It is plain that those persons are as much in a fiduciary position as trustees in regard to any acts which are done respecting the corporation and its property ... Therefore it seems to me plain that they are, to all intents and purposes, bound by the rules which affect trustees".

Thus it appears that the courts have in the past been prepared to treat directors of charitable companies as subject to the same duties and standard of care as trustees of charitable trusts.

The courts' approach to their jurisdiction over charitable companies was considered in Chapter Two.[596]

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[590] *Ibid.* s.171.

[591] *Ibid.* s.173.

[592] *Ibid.* s.174(1).

[593] *Ibid.* s.174(2).

[594] *Ibid.* s.178. See Section 5.1.1.2 below.

[595] *Re French Protestant Hospital* [1951] 1 Ch 567, per Danckwerts J at 570.

[596] Section 4.2.2.

2.3 Charitable Incorporated Organisations

In future, charity trustees of charities with the new legal form of Charitable Incorporated Organisation (CIO)[597] will have the statutory powers, duties and standards of care contained in the new Schedule 5B of the Charities Act 1993.[598]

Subject to anything in its constitution, a CIO has power to do anything which is calculated to further its purposes or is conducive or incidental to doing so.[599] For the purpose of managing the affairs of the charity, a CIO's charity trustees may exercise all the powers of the CIO.[600]

Charity trustees of a CIO must exercise their powers and perform their functions in the way they decide, in good faith, would be most likely to further the purposes of the CIO.[601] The general standard of care and skill required in exercising the above powers and duties is that each charity trustee must exercise such care and skill as is reasonable in the circumstances, having regard in particular to any special knowledge or experience that her has or holds himself out as having. If he acts as a charity trustee in the course of a business or profession, regard should be had to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.[602]

3.0 Powers to collaborate

3.1 Legal considerations

Trustees who enter into collaborative working arrangements without the necessary powers to do so may be in breach of trust. The potential consequences of this were considered in Chapter Two.[603]

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[597] Created by the Charities Act 2006, s.34, sch.7.

[598] Inserted by Charities Act 2006, sch.7, para.2.

[599] Charities Act 1993 (as amended), sch.5B, para.1(1).

[600] *Ibid.* para.1(2).

[601] *Ibid.* para.9.

[602] *Ibid.* para.10(1).

[603] Section 4.0.

3.1.1 Express powers to work collaboratively

Before engaging in collaborative working arrangements, charity trustees must ensure they have appropriate powers to do so. This is rarely problematic. Charities may have express powers in their governing documents to work jointly with other organisations. It is possible for such powers to enable joint working with any type of organisation. Model governing documents produced by both the Charity Commission[604] and the Charity Law Association[605] include such powers.

3.1.2 Express powers to act in the interests of the charity

Charities may also have broader express powers to undertake any activities in the interests of the charity. If the Charity Commission's model governing documents are adopted, the power will be to "do any other lawful thing that is necessary or desirable for the achievement of the objects".[606] This could obviously include working either with other charities or with other types of organisation.

3.1.3 Implied powers under s.78(2)(b) Charities Act 1993

If such powers do not exist, a charity's trustees may be able to use implied powers under s.78(2)(b) Charities Act 1993, which allows them to "make arrangements ... with another charity for co-ordinating their activities and those of ... the other charity", where it appears to them "likely to promote or make more effective the work of the charity". This implied power is limited to joint working with other charities, excluding collaboration with other types of organisation.

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[604] The relevant powers in GD2, *Charitable Trusts: Model Trust Deed* (August 2006) are: 5. (v) to co-operate with other charities, voluntary bodies and statutory authorities and to exchange information and advice with them; (vi) to establish or support any charitable trusts, associations or institutions formed for any of the charitable purposes included in the objects; (vii) to acquire, merge with or enter into any partnership or joint venture arrangement with any other Charity formed for any of the objects. The wording is identical in GD1, *Model Memorandum and Articles of Association for a Charitable Company* (August 2006) and in GD3, *Charitable Associations: Model Constitution* (August 2006).

[605] The relevant clauses in the Charity Law Association (CLA) *Model Trust Deed for a Charitable Trust* (2nd Edn.) are: 3.4 To co-operate with other bodies; 3.5 To support, administer or set up other charities. The wording is identical in the CLA's *Model Memorandum and Articles of Association for a Charitable Company* (2nd Edn.) and *Model Constitution for a Charitable Unincorporated Association* (2nd Edn.).

3.1.4 Powers of amendment

If a charity has neither express nor implied powers to work collaboratively, its governing document may contain a power of amendment. This may enable its trustees to amend the document by adding additional powers to undertake such activities as collaborative working.

If the governing document contains no such powers, trustees of unincorporated charities may in future be able to modify existing powers to enable collaborative working, using the statutory power of amendment contained in the new Section 74D Charities Act 1993.[607]

Prior to the enactment of the Charities Act 2006, charitable companies had to obtain the written consent of the Charity Commission in order to amend any governing document provisions which directed or restricted the manner in which the property of the company could be used or applied.[608] This requirement has been relaxed by the Charities Act 2006.[609] By virtue of the new Section 64(2) of the 1993 Act, only "regulated alterations" require such consent. "Regulated alterations"[610] do not include the creation of the types of powers considered here. Thus, charitable companies with powers of amendment in their governing documents will be able to use them to create powers to collaborate following the procedures specified in the governing document, but without needing to obtain consent from the Charity Commission.

3.1.5 Authority from the Charity Commission

In the event that a charity has neither express nor implied powers to work collaboratively, nor appropriate powers of amendment, the Charity Commission may create an order under Section 26(1) Charities Act 1993, which states that:

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[606] GD2, *Charitable Trusts: Model Trust Deed* (August 2006), para.5 (x). The wording is similar in GD1, *Model Memorandum and Articles of Association for a Charitable Company* (August 2006) and in GD3, *Charitable Associations: Model Constitution* (August 2006).

[607] Inserted by Charities Act 2006, s.42.

[608] Charities Act 1993, s.64(2)(b).

[609] S.31(1), (2), which amends s.64 of the 1993 Act.

[610] Defined by the new s.64(2A).

"...where it appears to the Commissioners that any action proposed or contemplated in the administration of a charity is expedient in the interests of the charity, they may by order sanction that action, whether or not it would otherwise be within the powers exercisable by the charity trustees in the administration of the charity; and anything done under the authority of such an order shall be deemed to be properly done in the exercise of those powers".

It is thus possible for a Section 26 order to be used specifically to sanction joint working with organisations which are not charities.[611] However, it should be noted that the Charity Commission's policy on the use of Section 26 orders changed in 2001. The 2001 version of OG1 A1 stated that the Commission could use orders to provide general powers as well as to authorize specific transactions.[612] Furthermore, the guidance stated that it would apply this policy proactively, and that the Commission would "generally seek to provide a power of amendment ... instead of, or as well as, the specific authority for a transaction".[613] Thus, providing the arrangement satisfied the Section 26 criteria described above, charities seeking authority to work jointly with non-charitable organisations after 2001 were thus likely to find they were granted powers to amend their governing documents rather than simply being granted permission to adopt their chosen working arrangements.

The updated version of the guidance released in February 2007 retains the first statement (that the Commission can use orders to provide general powers).[614] However, the statement in the earlier version relating to the proactive application of this policy has been removed. It is thus no longer clear whether or not this proactive approach is Commission policy.

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[611] The "action proposed or contemplated in the administration of a charity" in Section 26(1) Charities Act 1993 (and thus the Commission's powers to create orders under the section) have been given a broad interpretation by the courts: see *Seray-Wurie v Charity Commissioners for England and Wales and another* [2006] EWHC 3181 (Ch), [2007] 3 All ER 60.

[612] OG 1 A1 (2001), para.3.1.

[613] OG1 A1 (2001), para.4.3.

[614] OG 1 A1 (2007), para.3.1.

Implications for campaigning charities

The "political disqualification" rule, discussed in Chapter Two, means that many campaigning organizations are not charities. This may increase the likelihood that charities which form campaigning alliances will be collaborating with non-charitable organizations. As the implied powers under Section 78(2)(b) are limited to working with other charities, charities without express powers covering collaboration with non-charitable organisations (and which do not have appropriate powers of amendment) are more likely to have to rely on Section 26 authorization from the Charity Commission. In this situation, they will be dependent on the Commission's assessment of whether such activity is in the interests of the charity.

This raises the issue of the criteria involved in satisfying the Commission that the proposed arrangement "is expedient in the interests of the charity",[615] and of the Commission's general attitude to collaborations between charities and non-charities.

3.2 Approach of the Charity Commission

3.2.1 Generally

The Charity Commission has adopted an encouraging attitude towards collaborative working in recent years. Following the publication of research report *Collaborative Working and Mergers* (RS4) in April 2003, the Charity Commission published guidance *Collaborative Working and Mergers: An Introduction* (CC34) in June 2006. The guidance defines and distinguishes the concepts of collaborative working and mergers, and aims to identify issues and factors which should be taken into account by trustees considering merger or collaboration.

In terms of content, the guidance places slightly more emphasis on the process of merger. Section C discusses collaborations and partnerships, Section D discusses mergers, and Section E discusses due diligence. The latter involves investigation of other charities in advance of merger in order to expose potential risks or liabilities. Whilst it is relevant largely only to mergers, it is relevant (in principle, if not in

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[615] Charities Act 1993, s.26.

name) to collaborative working where the latter is undertaken on a contractual or high risk basis. Relevant principles are considered here within the general discussion of risk management throughout this chapter and Chapter Six.

Whilst CC34 does explain the various sources of power to collaborate, it does not explain the possible legal consequences of collaborative working undertaken without appropriate powers.[616] The guidance places greater emphasis on risks than on the specific legal consequences of breach of trust.[617] This issue will be returned to in Chapter Six.

3.2.2 Approach to collaborations with non-charities

The general definition of "collaboration" contained in Commission guidance CC34 appears to restrict the term to joint working with other charities. This appears not to be deliberate, as the acceptability of working with other types of organisation is acknowledged later in the guidance[618] and in other Commission publications such as the most recent version of CC9, which acknowledges the general acceptability of campaigning alliances between charities and non-charitable organizations:[619]

> "There may be some issues which generate interest and support from a range of different bodies, not all of them charitable, and sometimes alliances will consist of representatives from a number of charities, non-charitable organizations, individuals and perhaps representatives of a political party".

Whilst there appears to be some vagueness of definition and interchangeable use of terms in this area of Commission guidance, the evidence suggests that the Commission will not necessarily view Section 26 requests for authorization to work with non-charities in a negative light. However, the guidance does not elaborate on how they will determine what is expedient in the interests of the charity. Nor does it

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[616] Considered at Section 3.1. above.

[617] Considered in Chapter Two, Section 4.0.

[618] Such as in Section C5, which refers to "Charities and other organisations" working collaboratively.

[619] *Op. cit.*, para.45.

detail the Commission's policy of using Section 26 orders to grant powers of amendment rather than to authorize specific transactions.[620]

3.3 Empirical study

3.3.1 Generally

Prior to the discussion of the empirical results relating to powers, it should be noted that the study was conducted before the Charity Commission's guidance on collaborative working (CC34) was published in June 2006. Representatives of charities in the study were asked whether they had referred to RS4, the existing Commission research report on collaborative working. Most of the charity representatives who participated in the study were unsure as to whether or not they had seen the document. Two of the participants positively indicated that they had not seen RS4:

> *No, we just get on and do it* (Charity F).

> *I haven't looked at that, no* (Charity E).

However, one of the participants had read the report and stated that it was instrumental in their charity's collaboration ventures:

> *I have seen it, and in fairness to it, it is very good ... I think it gave me confidence to continue doing it, certainly reading the document didn't put me off but perhaps if I was the Chief Executive of another major organisation, I might have stopped and thought ... but no, if anything it was encouraging to see that if need be there was an organization that could be there to offer advice as well, and that's how I would view the Charity Commission* (Charity L).

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[620] Discussed at Section 3.1.5 above.

It should be noted that the fact that the report was not official guidance and focused on presenting research findings as well as providing advice may have had a negative effect on how many charities referred to it.

3.3.2 Powers

Three of the study participants were aware of the source of their trustees' powers to collaborate:

> *It's in our powers, and also we know it's good for us, it's one of the basic principles of Charity G, we have a values and principles document, working with others is one of the values of Charity G* (Charity G).

> *... they come from, and I know where they are in, our Memorandum and Articles of Association ...there's a specific one to collaborate and amalgamate* (Charity H).

> *Our objects specifically mention whether working with others or alone* (Charity O).

However, of the remaining thirteen participants, one had no awareness of the source of their trustees' powers:

> *I don't know!* (Charity C).

Three participants thought that collaborative working required no specific powers. The comments of Charity F are illustrative of all three responses:

> *I don't think there's anything in our governing document, it's fairly recently updated. Our charitable scheme dates back to 1935, then we updated it a couple of years ago, well last year, and I don't think there's anything in there about collaboration, there might be but I don't think there is ... I imagine there is, I surely don't think we're acting ultra vires in what we're doing* (Charity F).

The remaining nine were unsure whether their trustees had any powers, or whether they were needed. One participant demonstrated a lack of awareness of the importance of adhering to the terms of the governing document, as opposed to additional strategy documents:

> *I think they're implied in our governing document but it's also a key objective in our strategy* (Charity E).

Whilst it is possible that the trustees of some of the charities in the study had a greater awareness of their powers to work collaboratively than the executive representatives interviewed, the evidence is that trustees are often less well-informed than paid employees, and rely on the latter for information. Whilst this situation is not ideal, its negative effects may be mitigated by executive staff who recognise the duties of their trustees. Several participants indicated that they ensured their trustee boards were well-informed:

> *... they are ultimately responsible and they need to know. So yes we had a session on the training of trustees and we have a whole issue around these things and we give them all these publications and they have a whole pile ... It is critical. I want to be accountable to my trustees and the trustees must be accountable to the supporters and they must understand what their role is ... so they get a folder, and then we just keep adding more sheets to it, so any policy that's passed it's put in here, anything that comes from the Charity Commission, this handbook contains it all* (Charity G).

> *... our trustees, I mean we have a rolling programme of training, get-togethers, discussions for our trustees each year, and it's implicit in everything we do* (Charity B).

Further, a number felt that they ensured that their trustees made decisions where appropriate:

... the board only meets six times in a year and between we have to make a quick response, we can't get the board to clear every policy statement or every press release, and generally I think we have to have confidence enough ... It's for us as Directors to first use [risk management guidance] and then report to the trustees, when we have calculated the risk. And it's their job to challenge us, and they should not hesitate in that (Charity G).

Everything that I can I put before them, but obviously deadlines on consultations dictate how I approach it. So for example if there's time I send these out in advance and we discuss them at board meetings, if I can't meet that timetable, I'll send them out as a draft asking them to get back to me and give me comments (Organisation I).

Three participants emphasized that they adhered carefully to their trustees' directions:[621]

... first off we wouldn't do it without the express permission of our trustees. And secondly they'd have to look at it very closely and be comfortable that whatever we were supporting was actually within our broad aims (Charity B)

... of course, the trustees, I'm completely honourable to the trustees, if they wanted to put the brake on anything then we'd put the brake on it (Charity D).

... in terms of ... the internal opus of the organisations, we have a really clear strategy that has five major campaigns that we all focus on, and the trustees are very clear that that's our role and staff are right behind that (Charity E).

[621] The combined effect on campaigning activity of this careful adherence to trustee directions and possible "conservative" tendencies within trustee boards (discussed in Chapter Five, Section 2.2.1.4) should be noted.

Nevertheless, the study demonstrated limitations to the above efforts of executive staff to carefully delineate trustees' duties from their own. Whilst there is evidence of an increase in the activity and involvement of trustee boards, catalysed by their increased professionalism,[622] this transformation was revealed to be a slow process. Several charities identified limitations in how far training and informing their current trustee boards could ensure an ideal climate for proactive decision-making on campaigning issues by trustees:

> *... some of the people are very nice people who are trustees, but they don't understand what it is. I think the staff do because we're paid employees of the charity, I think the trustees often don't understand what we can do and what we can't do* (Charity G).

> *I don't think they know the detail of what we do. They approve things like the campaigning document, things at a wider level, there's a general understanding of some things but not everything ... there are campaigning issues that they are aware of and rubber stamp it* (Charity J).

The above problems may provide some reasons for the apparent practice within some charities of decisions to work collaboratively being taken by executive staff themselves. This occurred even within one charity in which trustees were kept well-informed:

> *... usually we work with responsible people ... We don't get permission from our board* (Charity G).

This is legally problematic. Whilst trustees may delegate particular tasks to agents, including the carrying out of decisions the trustees have taken,[623] the delegable functions set out in Section 11(3) of the Act do not include decision-making itself. Even where functions are legitimately delegated, trustees retain responsibility for

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[622] Discussed in Chapter Five, Section 2.2.1.2.

[623] Under Trustee Act 2000, s.11.

supervising agents carrying out their decisions, and must keep under review the arrangements under which such agents act and how they are being carried out.[624]

If such situations are common, it is likely that many charities are involved in collaborative working arrangements without their trustees ensuring that their governing document permits them to do so. Given the existence noted above[625] of governing documents with clauses allowing any activity which furthers the interests of the charity, the number of trustees who are *in practice* acting outside of their powers by working collaboratively is likely to be small. A more pressing issue is thus the *exercise* of such powers. If, as the data indirectly suggests, some charity trustees are unaware or unclear over the existence of or need for powers to collaborate, they cannot be properly exercising these powers.[626]

If trustees are not properly exercising their powers, they are unlikely to have considered important matters such as whether coalition partners' objects are compatible with their own, and whether they are using the most appropriate type of collaboration agreement. These are discussed individually next. The combined implications will be discussed at the end of the chapter.

4.0 Compatibility of charitable objects with aims and activities of coalition

It is necessary to precede this discussion by distinguishing it from the pervading topic of the thesis – that of political campaigning. This section does not relate to the situation discussed in Chapter Two, in which a charity's objects can be construed as political by reference to its collaborative activities with political bodies. It relates instead to the situation where, regardless of the political or otherwise nature of the charity's activities, the trustees are in breach of trust because the activities undertaken fall outside of the objects of the charity in terms of subject matter. This may occur in a collaborative situation where trustees in effect delegate decisions

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[624] *Ibid.* s.22.

[625] See Section 3.1.2 above.

[626] In the manner considered in Section 2.1 above.

over the direction of a campaign to collaboration partners, and thus fail to make independent decisions regarding the use of their charity's funds in furtherance of its own specific objects. The potential consequences of this were considered in Chapter Two.[627]

4.1 Legal considerations

There have been several cases in which charities involved in campaigning coalitions have been held to be acting outside their objects. In *Baldry v Feintuck*,[628] Brightman J granted an injunction to restrain the application of a student union's funds to its involvement in a campaign (entered into on the basis of its members' views) regarding free school milk. Involvement in the campaign was held to be outside the union's objects. This decision was supported in the case of *Webb v O'Doherty and Others*,[629] where participation in a campaign against the Gulf War was held to be outside the objects of a student union.

It is important to note that the distinction between objects and activities is frequently blurred, and that the circumstances and ways in which activities can be used to construe objects are unclear. This was discussed in depth in Chapter Two.[630]

4.2 Approach of the Charity Commission

The Commission advises that whilst there are few legal barriers to collaboration between charities, they will become involved where there are "legal or constitutional issues to be addressed", giving the example of "incompatible purposes between charities".[631] The Charity Commission's updated version of CC9 acknowledges that such alliances can in themselves be acceptable, but qualifies this with a warning that charities must be careful to dissociate themselves where the activities of any alliance move too far from their own objects. It once again

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[627] Section 4.0.

[628] [1972] 2 All ER 81.

[629] *The Times*, 11 February 1991.

[630] Section 2.2.1.

[631] Section C3.

identifies risk management as the mechanism through which this should be monitored:

> "... if some of the political activities that an alliance is engaging in do not fit with a charity's own charitable purposes, the charity will need to consider how best to manage any risks to its reputation, and its work. There may also be times when a charity is not able to support an alliance on a particular issue, but does not want to damage its relations with the alliance and, again, the charity will need to consider the best means of managing this risk".

CC34 states that the Commission's advice should be sought if there is a question over compatibility of purposes. However, as noted in the previous section, emphasis is not placed on the potential legal consequences of applying charitable funds outside of the charity's own objects.

4.3 Empirical study

The potential legal problems of acting with charities with different purposes were recognised by one of the larger charities in the study:[632]

> *... the charity law question is how charities with distinctly different purposes can campaign together on areas of mutual interest. Charity O was once a member of the [coalition] in the mid 1990s which included a very wide variety of organisations ... so what rules should apply to this type of coalition? Whose interests are being promoted? ... It is a fundamental basic of charity law that trustees must apply resources they hold to the furtherance of the charity's purposes. The Commission give trustees a great deal of leeway but expect them to be able to justify any of the expenditure if challenged whether the expenditure is a programme intervention or a campaign. ... unlike a non-charity we have to justify our campaigns on their contribution to [area of benefit]. If there are too many links in the*

[632] See Chapter Two, Section 2.2.1.

chain between the policy change prescribed and the impact on [area of benefit] then we are potentially in trouble (Charity O).

An exacerbating factor which is relevant to the compatibility of objects in campaigning coalitions (whether they are charity/charity or charity/non-charity coalitions) is the increasingly interrelated nature of many social issues. This may result in charities wishing to join alliances and campaign on issues which they feel are related to their objects in a broad sense, and will contribute to their aims in the long-term, but which could be interpreted as acting outside of their charitable objects if the latter are construed narrowly. An example is the increasing convergence between social and environmental issues as links between environmental degradation, poverty and other problems are increasingly recognised.[633] In the empirical study, Charity G provided a clear illustration of the current convergence of some campaigning issues:

There are different ways to expose the scandal of poverty, to contribute to its eradication and to challenge structures and systems of keeping the poor excluded and marginalised. But if the scandal of poverty is as we've just seen, even recently in America that even if there are natural disasters, it is the poor who suffer the most, the black and the poor people of New Orleans suffered, it's true in Africa and elsewhere, so yes we have been responding to a big challenge for us, and people assume we should respond ... so in doing this coming five year plan we recognised in the last two years that we ought to get more involved in environmental issues, because it is also a development issue, it is an issue of the poor countries, especially as global warming takes place and flooding takes place, it's usually the very poor who suffer (Charity G).

Charity O also recognised that apart from the legal considerations, strategic considerations and the views of a charity's supporters must also be considered when entering broad-issue campaigning coalitions:

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[633] For an example of the increasing recognition of this convergence, see: "Darfur conflict heralds era of wars triggered by climate change, UN report warns", *The Guardian*, Saturday June 23, 2007.

> *There are issues around coalitions anyway: who do you best associate with in order to maximise impact? ... Environmental concerns may link both Charity O and [coalition partner] but would Charity O donors accept that some of the donation goes towards a campaign which includes an element which is essentially [different issue]?* (Charity O).

These issues correspond to the Charity Commission's view of the particular risks of campaigning, namely risk to achievement of objects and risk to reputation. These will be discussed further in Chapter Six.[634]

Despite the potential problems surrounding compatibility of objects, a general finding of the empirical study[635] was that even where participating charities were unaware or ill-informed about the processes of decision-making, they consistently demonstrated an overriding focus on and adherence to their objects. This trend may mitigate the effect of compatibility issues.

5.0 Degrees of formality in collaborative working

In this section, a general overview of relevant law, Charity Commission guidance and the findings of the empirical study will be followed by more detailed discussions of the relationship between the three for various types of collaboration agreement.

5.1 General legal considerations

In exercising their duty of care,[636] trustees should ensure that any collaboration is conducted through an arrangement which best furthers and protects the interests of the charity. Such arrangements can be conducted with varying degrees of formality. At their most formal, independent organisations can be set up to separate the collaborative working element from the continuing activities of each charity in the

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[634] Section 3.2.

[635] Discussed in Chapter Two, Section 6.1.

[636] See Section 2.0 above.

arrangement. Alternatively, written agreements with varying degrees of detail can be used. Informal agreements are also a possibility. Trustees should carefully consider the legal status of any agreement and in particular whether it creates contractual liabilities. The remainder of Section 5.1 considers both the nature and impact of such liabilities and wider legal implications of collaboration arrangements. The ways in which collaborations can give rise to such liabilities (either through formal documents or through the formation of unincorporated associations), are considered at Section 5.4.2.1 below.

5.1.1 Liabilities in contract

5.1.1.1 Unincorporated charities

As unincorporated charities have no legal personality, charity trustees contract on behalf of the charity personally. If acting within the terms of the trust, they will be entitled to indemnity from charity funds,[637] unless the trust instrument contains provisions to the contrary.[638] It follows that if a trustee enters into a contract in breach of trust, he will be liable to third parties to fulfil the terms of the contract, and will be entitled to no indemnity from charity funds. It should be noted that even if trustees act within the terms of the trust and are entitled to indemnity, they will still be personally liable for sums owing on a contract which exceed the value of the charity's assets, unless the terms of the contract limit the extent of the liability.[639]

5.1.1.2 Charitable companies

Charitable companies can contract on their own behalf. However, the effect of Section 65(1) of the Charities Act 1993 is that where the directors of a charitable company enter the charity into a contract in breach of their warranty of authority, the contract will be void and unenforceable, except by a person who gives full consideration in money or money's worth in relation to the contract, and who does not know that the act is not permitted by the company's memorandum or is beyond the powers of the directors; or who does not know that the company is a charity.

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[637] *Re Grimthorpe* [1958] Ch 615 at 623 per Danckwerts J.

[638] *Re German Mining Co., ex. p. Chippendale* (1854) 4 De GM & G 19 at 52.

[639] *Re Robinson's Settlement* [1912] 1 Ch 717 at 729.

The directors may be liable in damages for breach of warranty of authority in respect of the void contract.[640]

5.1.1.3 Charitable Incorporated Organisations (CIOs)

Liabilities to third parties of CIOs are similar to those of charitable companies. They are set out in paragraphs 5 to 8 of the new Schedule 5B to the Charities Act 1993.[641]

It is outside the scope of this thesis to explore these potential liabilities in depth. However, the potential expense of litigation or settlement (either for the charity or for the trustee personally) should be acknowledged, as should the potential for damage to a charity's reputation of involvement in legal proceedings.

5.1.2 Wider legal implications

The level of formality of a collaboration agreement and the resulting status of a coalition as a separate entity may also have wider legal implications than trustees are initially aware of. A recent example is that of a decision by the broadcasting regulator, Ofcom, to ban a television advertisement of the Make Poverty History (MPH) coalition.[642]

Section 321(2) Communications Act 2003 prohibits political advertising on television or radio.[643] It defines "political" advertising as:

> "(a) an advertisement which is inserted by or on behalf of a body whose objects are wholly or mainly of a political nature;
> (b) an advertisement which is directed towards a political end; or
> (c) an advertisement which has a connection with an industrial dispute".

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[640] *Firbank's Executors v Humphreys* (1886) 18 QBD 54.

[641] Inserted by Charities Act 2006, sch.7, para.2.

[642] Ofcom Broadcast Bulletin 43, 12 September 2005, pp.4-14, Standards cases. In Breach. Make Poverty History. *Various broadcasters, March 31 2005, 19.58 and other times.*

[643] This prohibition was also contained in s.8 (for television broadcasting) and s.92 (for radio broadcasting) of the Broadcasting Act 1990.

One of the questions explored by Ofcom was therefore whether MPH was a "body". On this matter, the report reads:[644]

> "MPH describes itself on its website variously as 'an assembly', 'a coalition', and 'a campaign'. The coalition or assembly consists of 'members' that range from 'charities, campaigns, trade unions, faith groups and celebrities'. The affiliated 'BOND' website (a network of more than 290 UK based voluntary organisations working in international development and development education), indicates that MPH is not led by one organisation or individual, but rather 'the mobilisation consists of an Assembly of members, a number of working groups, and a Coordination Team'. Whilst this is evidently not a normal corporate structure we note that 'body' is defined in the Act (Section 405) as follows:
>
> > "'body' (without more) means any body or association of persons, whether corporate or unincorporated, including a firm".
>
> In light of this definition and the information available on the website referred to above, we have concluded that MPH is a 'body' for the purposes of the Act".

The outcome of the decision was not in the event affected by the finding that the MPH coalition was a "body", as the ban on political advertisements under Section 321(2) Communications Act 2003 applies to advertisements "directed towards a political end", regardless of the nature of the body inserting them. However, the contradiction between the perception of the members of the coalition and that of the broadcast regulator reflects the finding in the empirical study that coalition members' perceptions of themselves as remaining entirely legally distinct from one another can differ markedly from the stance taken by those making regulatory decisions and applying legal definitions.

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[644] *Op. cit.*, p.7.

5.2 General approach of the Charity Commission

In discussing appropriate levels of formality in collaboration agreements, CC34 once again focuses on risk management:[645]

> "Whatever the size and complexity of the proposed arrangement, trustees should assess the risks involved to ensure that these have been sufficiently addressed".

For reasons relating to this focus on risk, the guidance appears to favour formal (rather than informal) collaboration arrangements:[646]

> "In all collaborations charities should consider what would happen if one of the parties was suddenly unable to meet its obligations. It is important to consider whether the remaining party or parties would be able to continue in the working arrangement. Should anything go wrong, issues of liability can have wider implications for the charities involved, with repercussions for their assets and reputation. *For these reasons it is important to have a clear formal agreement proportionate to the potential risks*" (emphasis added).

It continues:[647]

> "Formal contracts may mitigate some risks, mainly legal, and if they are drawn up carefully they may also protect charities from risks to their assets and reputation".

Whilst warning that charities ensure they can meet any obligations under contracts, and advising that formal contracts may help to mitigate some risks, the guidance does not provide advice on when an agreement will be legally binding. In the absence of any Commission guidance addressing the issue of contracts outside of

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[645] Charity Commission, *Collaborative Working and Mergers*, (CC34) TSO (2006), Section C2.

[646] *Op. cit.*, Section C3.

[647] *Op. cit.*, Section C6.

the service delivery context,[648] is arguable that CC34 should highlight the issue. The Commission's 1991 Inquiry Report on the charity War on Want[649] recommended:[650]

> "... that the Commissioners issue guidance to draw to the attention of those charities wishing to establish consortia in the future the basic requirements set out below:
>
> 1. The need to define at the earliest possible stage the precise legal status of the consortium ...".

In the light of this recommendation, the omission of such advice from CC34 is particularly pertinent.

5.3 General empirical study trends

It is logical to expect that charities with clear risk management strategies and a high level of legal awareness would be more likely to work through formal agreements. The study's finding that some large, professionalized charities had extremely informal collaboration arrangements for their campaigning activities was therefore unexpected. This contrary finding can be qualified to some extent by the fact that one of the large charities discussed above was moving towards increasing formalisation:

> *I did have a conversation with one of our consultants and he mentioned it, the whole thing about what are the different models of alliances and right up to merger and takeover and we were looking at what were the future options for the charity sector, and looking at examples of where there have been mergers either in age charities or cancer charities ... so yes we've*

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[648] Service delivery contracts are covered in *Charities and Public Service Delivery – An Introduction and Overview*, (CC37) TSO (2007). This guidance replaces CC37 *Charities and Contracts*, which also focused on service delivery.

[649] Charity Commissioners for England and Wales, *War on Want. Report of an Inquiry submitted to the Commissioners 15th February 1991*, HMSO.

[650] Para.2.22(ii).

looked at some different examples ... we ourselves are looking at strategic partnerships with three or four bigger charities or three or four smaller charities in a big way and I think we will have to have formal agreements, short of merger ... they're exploring that, three charities in the UK context and one overseas, partly because again it's the next step of our ways of working, not just collaboratively but actually having a written formal agreement which will [allow] us to do certain things together, short of merger (Charity G).

Such changes in working methods are predictable given the increase in the amount of publicity surrounding collaborative working at the present time.[651]

5.4 Specific types of collaboration agreement

5.4.1 Separate coalition organisations

5.4.1.1 Legal considerations

Trustees will need to ensure that they have the necessary powers in their governing document to use charitable funds to establish a separate organisation. Charities adopting Charity Commission model governing documents will have a power "to establish or support any charitable trusts, associations or institutions formed for any of the charitable purposes included in the objects". Governing documents not containing such a power may contain, as discussed earlier, a power to perform any other lawful activity in the interests of the charity. In the absence of such powers, the trustees can apply to the Charity Commission for the creation of an Order to sanction the activity under Section 26(1) Charities Act 1993.[652]

5.4.1.2 Approach of the Charity Commission

CC34, whilst identifying this coalition structure and providing a brief case study on a coalition formed as an organisation separate from its constituent charities, provides minimal discussion in the area.

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[651] See Chapter One, Section 1.0.

[652] See Section 3.1.5 above for discussion.

5.4.1.3 Empirical study

Three of the charities in the study were involved in this type of arrangement.[653] In all three cases, the coalition body was also a registered charity. The representative of one such coalition charity had found the charitable status of the coalition body unproblematic:

> *All charities have to be aware of our charitable objects and of UK charity law. However, we have not found that this necessitated our using the non-charitable company* (Charity M).

Charity F was involved in a coalition which took the form of a separate charity and noted that the advantage of this was that:

> *People become members because it's a formal charity* (Charity F).

However, the representative's further comments indicated that having a coalition body with charitable status might be administratively too complicated:

> *We're going to have to review the governance of [coalition charity] ...we're going to have to decide whether having it as a charity is too much hassle* (Charity F).

Given the relative sizes of these two organisations, it appears that administrative complexity was an issue for both the large and small charities in the study.

The only organisation participating in the study which did not have charitable status was a coalition body in the form of a limited company, set up by several registered charities. The trustees had not sought registration because of trustee wariness of the Charity Commission and their view that the procedures involved would be complex:

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[653] It should be noted that some study participant charities were involved in more than one coalition, and used more than one type of collaboration agreement.

We're a limited liability company but we were never registered as a charity because we've got the major charities like [charity] and [charity], they were concerned that the Charity Commission would think they were up to something... it became a company with limited liability in 1996 and the first director retired and when I took over in 1998 all of the basics with regard to company and charitable status was all sorted out. My understanding is that they just felt it was safer not to go for charitable status ... it was because of the fear of the Charity Commission would wonder why four charities were setting up another charity, so they thought there was no need to get into that, because not having charitable status was not going to stop us doing what they wanted us to do ... I see the logic of that, and the reason I see the logic of it is that in my previous career I'd been involved in establishing other trusts and how complicated it can get ... I'm now trustee of a foundation ... and certainly the feeling of fellow trustees who've been on it a lot longer than I have is that they are extremely wary of the Charity Commission, not because they're doing anything wrong, but because they want to do certain things, and it's difficult (Organisation I).

The representative of Organisation I stated that the disadvantages of not having charitable status were that:

> *... occasionally I think the main one is grant applications, we have made grant applications and sometimes I've not been able to do it in my own name so we'll do it in the name of [member charity]* (Organisation I).

Avoidance of registration because of wariness of the Commission raises questions not only of charities' perceptions of the Charity Commission, but in this instance, of the trustees' awareness of their duty to apply to the Charity Commission for the charity to be registered[654] unless it falls within the new Section 3A(2) of the 1993 Act.[655]

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[654] Charities Act 1993, s.3B(1)(a), inserted by Charities Act 2006, s.9. The trustees must also supply the Commission with relevant documents and information under s.3B(1)(b).

[655] Inserted by Charities Act 2006, s.9.

5.4.2 Formal written agreements

5.4.2.1 Legal considerations

Written agreements can be known by a number of names, including contracts, memoranda of understanding, collaborative working or joint working agreements, and (outside of the campaigning context) service level agreements. Whilst some charities may intend to create contracts when producing written agreements, trustees need to be aware that regardless of the name given to such documents,[656] they can be entering a legally binding agreement.

Even in the absence of a formal document, charities entering a campaigning coalition may – possibly unwittingly – be forming an unincorporated association. This was defined judicially by Lawton LJ in *Conservative and Unionist Central Office v Burrell* as:[657]

> "... two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and on what terms and which can be joined or left at will".

The term was similarly defined (*obiter*) by Slade LJ in *Re Koeppler's Will Trust*[658] as: "an association of persons bound together by identifiable rules and having an identifiable membership".

Regardless of the purposes of the association and even if there is no benefit to the members, the relationship between members of unincorporated associations is contractual.[659] This contractual status creates duties towards other members, and can also create liabilities for individual member charities to outside parties, for

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[656] The legal status of such agreements (and charities' lack of awareness of this status) was explored in D. Morris, *Charities and the Contract Culture: Partners or Contractors? Law and Practice in Conflict*, Charity Law Unit, University of Liverpool (1999).

[657] [1982] 2 All ER 1 at 4.

[658] [1986] Ch 423 at 431-2.

[659] *Re Bucks. Constabulary Widows' and Orphans' Fund Friendly Society (No 2)* [1979] 1 All ER 623 at 629.

example in contract or tort. Such liabilities may not be indemnified by the association if they are outside its constitution. Contractual liabilities were considered at Section 5.1.1 above.

The consequences of tortious acts by charity representatives were considered in Chapter Three,[660] in the context of protest activities.

5.4.2.2 Approach of the Charity Commission

CC34 identifies contracts, service level agreements and memoranda of understanding as examples of formal collaborative arrangements.[661] It expands upon the factors that trustees must consider when entering them:

> "Agreements should be sufficiently robust to protect each party's interests and take account of the risks, but not so burdensome as to hold back innovation or incur unreasonable administration costs".

The guidance does not, however, warn that such agreements may have contractual status regardless of the name given to them, and focuses its discussion on the concept of risk.[662]

5.4.2.3 Empirical study

Memoranda of understanding were a form of written agreement between campaigning coalition partners used by four charities in the empirical study. The memoranda tended to specify the agreed campaign issues and focus on the procedural aspects of the campaign, including specific responsibilities and duties of each partner:

> *We do try to set out terms in letters of agreement. This is often about practical issues around management committee structures for large scale*

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[660] Section 3.6.

[661] *Op. cit.*, Section C6.

[662] As considered generally throughout this thesis and specifically in Chapter Six.

> *campaigns such as [coalition] through to who funds what, who controls personal data as well as boundaries of the campaign, agreeing sign-off procedures for campaign material, use of name and logo* (Charity O).

This helped to alleviate some of the problems of working in groups explored in Chapter Five (Section 3.2.2.2):

> *They are useful in alerting partners to where the boundaries of joint work are.* (Charity O).

This level of formality was prompted in one coalition by the actions of its large, lead member concerning the financing of the coalition's activities:

> *... that came out of some interesting history because when [coalition] started off, it was chiefly a [large lead charity] brand, if you like, which was dominated by [large lead charity] and of course they wanted to bring other people in to give it extra weight, and then they were incurring costs around the campaigning and the events they organised and printing and things and then they said 'Please will you all contribute towards this' and we'd say 'Well hold on, this hasn't been planned and agreed and delivered co-operatively, you're just landing us with this,' and I took quite a strong stance with them and said that's not the way to manage things, that we do need to manage this whole initiative as a much more genuinely collaborative campaign and make a plan and agree our commitments to it upfront, and that's what happened, just at a much later time. We had a year or two of this funny situation where people were quite unhappy about it* (Charity H).

None of the charity representatives identified the agreements in question as legally binding:

> *There isn't a legal responsibility but there is an agreement associated with it that several of the organisations that can afford to will put in so much a*

> *year, it might be in kind or it might be against particular campaigns that they then manage and deliver themselves, but there will be a contribution of a certain magnitude* (Charity H).

As illustrated by these statements, coalition partners may be unaware of the legally binding nature of their agreements. Whilst this lack of awareness tends to be mutual and the likelihood of recourse to legal remedies is thus low, it is nevertheless a cause for concern in terms of the trustees' duty of care, discussed above.[663]

It appears likely from the empirical study that in some cases, charity employees are unknowingly entering into contractual relationships on behalf of their charities, without knowing whether trustees have appropriate powers to do so, and/or without trustees properly using their powers to authorize the activity.

5.4.3 Informal arrangements

5.4.3.1 Legal considerations

Collaboration arrangements considered to be "informal" by those involved can range from those undertaken purely through discussion and negotiation, to those involving some form of written document. The latter can arguably be distinguished from the formal written agreements discussed in the previous section by their content: rather than agreeing responsibilities, they tend to take the form of more general "Terms of Reference" specifying broad objectives and procedures. However, as discussed previously, a coalition with identifiable rules and an identifiable membership will, as an unincorporated association, create a contractual relationship. Given the broad variation in the content and form of such documents and the general lack of awareness amongst charities of the potential legal implications of their collaboration agreements, it is difficult to determine the dividing line between those which create "identifiable rules" and those which do not. This is an area which would benefit from further research.

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[663] Section 2.0.

5.4.3.2 Approach of the Charity Commission

Despite favouring formal agreements, CC34 does acknowledge that informal collaboration arrangements are sometimes preferable, stating that they:[664]

> "... will usually be more appropriate where the collaboration involves low risk activities ... However, even for such informal collaborations the arrangements and procedures should be clearly set out in writing to avoid any confusion".

No further guidance is given on appropriate content or form for written procedures.

5.4.3.3 Empirical study

Informal arrangements with written procedures

Seven charities in the study used informal agreements, backed up, as CC34 describes, with Terms of Reference detailing their general objectives and procedures. The following discussion focuses on the practical benefits and drawbacks of such arrangements.

Charity J's representative preferred to have clear terms of reference within coalitions, and felt that this form of agreement was useful to them as a smaller partner in a broad coalition, as it could clarify objectives without involving prohibitively onerous responsibilities:

> *... just so that it's clear that we're all working together and we do what we can with our limitations of what our objectives are ... I think because probably we're not seen as such a big player, therefore we don't get into that this is what you will do and this is what I will do, I'm quite sure if you were talking to [large charity] ... because they would be big players ... whereas nobody expects [us] to do a specific bit, it's just what can you do.* (Charity J).

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[664] Section C6.

One small charity felt that clearer objectives for the coalition they were involved in would assist with achievement of aims and with creating a greater impact:

> *... what I would like to think we can achieve further from this one is what is the outcome going to be? And we've got some heavyweight people sat around that table and I haven't seen maybe because I'm new to the forum, but what I would like to see is and I will suggest it at the next meeting is let's have some clear objectives that we set ourselves for 2006 ... what do we want to achieve next year, the government already know, because this is nothing new, it's just a different voice saying the same things ... I think from that it needs some clear objectives and milestones* ... (Charity L).

One charity, whilst having such terms in place, found that their use was only necessary as a last resort:

> *the only area that is difficult or contentious is about sign-off for anything that goes kind of out of the consortium which is why there is quite a detailed and quite a strictly adhered to sign-off process. I think historically there has been slightly more formalised statements about I guess how decision-making gets done in the consortium, but they're not used, it works by consensus basically ... mostly it works through consensus and when we need to we can go back to 'OK, well this was the original agreement so either we need to re-negotiate the original agreement or you need to get in line,' basically.* (Charity A).

This was explained by the charity representative as being partially because of the controversial subject matter of the particular campaign:

> *I think it's more contentious in other consortia but because [issue] is so very ... so very embattled, people that work in it tend to be incredibly committed, so there's, you know ... it's that kind of consensus working and 'everyone helping out' seems to just function* (Charity A)

Another reason given was the fact that the campaign coalition was comprised of charities in a narrow sub-sector of the voluntary sector:

> *So if it's a set of organisations with which you've got an already established set of relationships you'd probably do it very, very differently than if you were forging new relationships and I think what that means in practice is that collaborations which exist inside the sector tend to be slightly more informal that collaborations which cross sectors. So I think that would be the kind of main influence on kind of approach* (Charity A).[665]

Whilst proactively adopted terms of reference seemed to be popular, one charity found them to be less useful when they were adopted in order to remedy a specific problem:

> *The [coalition] did adopt some ground rules to try to overcome allegations of unilateral action. They have been only partially effective* (Charity N).

To another charity, the existing terms of reference were seen as a somewhat meaningless exercise:

> *I struggle with collaboration, with most of the people that we work with, because what seems to happen is that they get us all together and say 'so what shall we all do' and then they all, the flipcharts come out, and we go through the same process, because everyone wants to be equal and fair, and so the same terms of reference come out of whatever you do, because what are you going to do? So they're always the same, you might as well pick another one up and all sign that, really* (Charity C).

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[665] This view is interesting when compared to the view expressed by Charity E that broad-based coalitions involving different angles can increase the impact of a campaign (see Chapter Five, Section 3.2.1.2 for consideration). If both these contentions are broadly applicable, charities may need to strike balance between an advantage in relationships and an advantage in impact.

Informal arrangements without written procedures

Whilst most types of campaigning would not be described by many as "low risk" activities, four charities in the study were involved in very informal campaigning coalitions. Two of these were also involved in the more formal types of coalitions discussed previously. Two, however, acted with other organisations purely through a process of negotiation, without any of the procedures set out in writing. Charities taking this approach included some larger, more professionalized charities. The representative of one such charity acknowledged that an informal approach could cause problems:

> *On the whole, we just kind of go with it, and of course that's fine until you run into problems and then you wish you'd been a bit more formal ... things like the [coalition], we didn't spell out what the expectations were on the chair in terms of collaborative working between him, the other members of the commission and the organisations, because usually the way to do it in the voluntary sector is just to get on with it and it'll be alright, it turned out to be a bit more problematic than that, and there were those issues that had to be managed and challenges that had to be overcome as it were, it was alright, but it was quite hard work at times, which made me think afterwards that actually we should have been a bit more formal ... that's about how you manage important figures within a collaborative campaign, there were loads of issues before between the organisations* (Charity F).

Despite this, the same representative still felt that the informal approach was better overall because of the level of flexibility it allowed, and felt that formal agreements involved unnecessary complications:

> *I don't think there's any formal agreements around that ... I don't think there is, we try to avoid all that, it just makes life more complicated, there have been cases where Charity F has lent its bank account as it were in order to receive money. On the whole those sorts of arrangements don't prove problematic in terms of their, you know when you're just trying to work a bit better with other organisations* (Charity F).

One large charity felt that addressing collaborations through the risk management procedure could decrease the risks of informal collaboration:

> *we are doing some work on trying to find out what does it mean being involved, for instance does it mean ... does it mean having any liabilities, does it mean any risk management ...at the request of our committees we had to do a study to examine the implications of risk. So we went through every organisation, what legal entity, what is its structure, how long, are we a partner member, are we on the board, who's the contact, do we fund them, who else is linked with it, to make sure that we were absolutely clear, and the board is also clear ... So we actually went through this to assure the board that we had actually taken on board both the sense of 'is it a strategy?'. but also the sense of risk* ... (Charity G).

The same organisation felt that choosing partner organisations carefully also decreased the risks, but interestingly, despite the apparently good communications with their board identified above, the representative stated that:

> *... usually we work with responsible people ...but once we know that the organisations are there, there's no need for a formal agreement ... We don't get permission from our board* (Charity G).

This final statement[666] illustrates the arguments relating to the exercise of trustee powers repeated throughout this chapter.

6.0 Conclusion

The issues which may arise in collaborative campaigning discussed in this chapter, in particular the potential incompatibility of objects and the potential contractual nature of collaboration agreements, need not necessarily be problematic if charity trustees and employees are well-informed regarding their roles and powers and

[666] Also referred to (in part) in Section 3.3.2 above.

understand the legal implications of their actions. However, the chapter has shown that when combined with a lack of proper exercise of trustee powers, the issues can exacerbate one another and create wider implications.

If a charity joins a coalition which meets the definition of an unincorporated association without the trustees either possessing powers to do so or properly exercising any powers they do have, the trustees will not only be in breach of trust for that action, but will also be in breach of trust for entering into contractual relations (with other members of the association, but also with any third parties the association has contracted with). Trustees will be in a similar position if their charity joins a coalition the remit of which is outside its charitable objects, or if they do not either possess appropriate powers or have not properly exercised existing powers. As noted throughout this chapter, trustees who act in breach of trust will be liable to their charities for any losses incurred, and will be personally liable without indemnity from their charities for any contracts with third parties.

Commission guidance CC34 contains a number of examples of legal and terminological vagueness. Its definition of "collaboration" appears to restrict the term to joint working with other charities. This restriction appears not to be deliberate, and is not reflected in the rest of the guidance. It explains the various sources of power to collaborate, but does not explain the possible legal consequences of collaborative working undertaken without appropriate powers. It states that the Commission's advice should be sought if there is a question over compatibility of purpose, but emphasis is not placed on the potential legal consequences of applying charitable funds outside of the charity's own objects. It identifies contracts, service level agreements and memoranda of understanding as examples of formal collaborative arrangements, but does not warn that such agreements may have contractual status regardless of the name given to them. Despite favouring formal agreements, the guidance acknowledges that informal collaboration arrangements are sometimes preferable. However, it provides no further guidance is given on appropriate content or form for written procedures.

Many of the charities in the study demonstrated a lack of awareness of the need for trustee powers to collaborate, whether their trustees possessed such powers, and the need for trustees to exercise their powers properly by taking appropriate decisions regarding collaboration themselves. Many also had no awareness of the potential contractual nature of their collaboration agreements. If the trends demonstrated in the study are widespread among charities, they are a cause for concern. A more encouraging indication was that whilst there was only limited acknowledgement of the problems of compatibility of objects within coalitions, the high levels of adherence to objects discussed in Chapter Two may mitigate the lack of overt awareness.

With regards to the study participants' use of relevant Charity Commission guidance and their assessment of its usefulness, the low levels of use somewhat invalidate questions regarding usefulness. However, it must be noted that Commission guidance on collaborative working, CC34, was published after the completion of the study. The classification of the previous relevant publication as a research report may have had a negative effect on the number of charities referring to it. However, the trends on guidance use identified in Chapters Two and Three indicate that the lack of usage of Commission guidance is a general trend. This raises questions as to why more charities do not use the guidance. Whilst this could be a subject of further detailed research, the Commission's focus on risk management to the exclusion of other matters may be a contributory factor, if the process is not seen as valuable within charities. The Commission's focus on risk management will be discussed further in Chapter Six.

Finally, as concluded in Chapter Three, the overall effects of the legal issues discussed here on charities' campaigning activities are limited, given the general lack of awareness of them among study participants. This lack of awareness will be re-addressed, in relation to the study in its entirety, in Chapter Seven.

CHAPTER FIVE: DO THE ADVANTAGES AND DISADVANTAGES OF COLLABORATIVE WORKING TEND TO ALLEVIATE OR EXACERBATE THE NON-LEGAL DIFFICULTIES OF CAMPAIGNING?

1.0 Introduction

Chapters Two, Three and Four have collectively considered the legal and regulatory issues faced by charities in campaigning activities and in collaborative approaches to such activities. This chapter moves away from legal constraints to consider three related issues. First, it considers potential non-legal constraints on charities' campaigning activities. Second, it considers the advantages and disadvantages of collaborative approaches to campaigning. Finally, it considers how the advantages and disadvantages of collaboration can affect campaigning.

The above questions are considered through three of the study propositions identified in Chapter One. The first proposition, addressed in Section 2.0 of this chapter, is:

> 9. Charities engaged in political campaigning may perceive non-legal constraints on their campaigning work, stemming from both internal and external sources.

The discussion of specific non-legal constraints apparent from the empirical data (Section 2.2) is preceded by a brief consideration of the policy environment in relation to campaigning and its effects on the sector as a whole (Section 2.1). Whilst the examples of non-legal constraints emerging from the empirical study generally do not relate directly to the voluntary sector policy environment, it is important to briefly explore government policy as the background against which the identified constraints operate. Section 2.3 draws together the issues considered in Sections 2.1 and 2.2.

The second study proposition considered in this chapter (addressed in Section 3.0) is:

12. Aside from the legal issues involved, collaborative campaigning may involve certain advantages and disadvantages.

Section 3.1 provides a brief preliminary discussion of how the policy environment relates to the practice of collaborative working and of trends in sector views of collaboration. Section 3.2 considers some of the advantages and disadvantages of collaborative campaigning, using data from the empirical study. Section 3.3 draws together the issues considered in Sections 3.1 and 3.2.

The third study proposition considered in this chapter (addressed in Section 4.0) is:

13. The above advantages and disadvantages of collaboration may alleviate or exacerbate any existing constraints on campaigning.

Section 4.0 considers the question of whether the benefits and detractors of collaboration identified in Section 3.0 tend to alleviate or exacerbate the existing constraints on campaigning identified in Section 2.2.

As in preceding chapters, this chapter includes consideration of relevant commentary and guidance from external sources where these support, contradict or elaborate upon the findings of the empirical data. However, an important divergence from the approach of previous chapters should be noted. Chapters Two, Three and Four included specific consideration of the usefulness of Charity Commission guidance in assisting charities to deal with the legal and regulatory issues arising from campaigning and collaboration. The propositions on which this chapter is based do not explicitly include such evaluation of Commission guidance, for the reason that the predominant purpose of the guidance is to advise on legal and regulatory issues.

Notwithstanding the above limitation, the Commission's guidance is of some relevance to this chapter, as charities will have to consider non-legal issues as part of their risk management process. Risk management is either a regulatory

requirement or recommended practice for charities,[667] and (as noted in preceding chapters) is a pervading theme of Charity Commission guidance. Therefore, this chapter draws attention to issues arising in the empirical data which are also emphasized in Commission guidance as being relevant to the process of risk management. Section 4.0 thus includes brief conclusions on the role and usefulness of Commission guidance, although these are more limited than those contained in previous chapters. This precedes a more detailed discussion in Chapter Six of several discrete study propositions relating to the risk management process.

2.0 Non-legal influences on campaigning activity and their impacts

2.1 Government policy relevant to campaigning by charities

Section 2.1.1 considers New Labour's early stance on the role of the voluntary sector and its relationship with government. Section 2.1.2 considers, through examination of various initiatives, the strong emphasis the government has placed in practice on the role of the voluntary sector in public service delivery. Section 2.1.3 considers the likely effects of the above emphasis on service delivery on the sector's campaigning role. Section 2.1.4 considers the efficacy of Government initiatives which, despite the above emphasis on service delivery, have promoted the sector's campaigning role.

2.1.1 New Labour's early rhetoric

Labour's 1997 policy document *Building the Future Together* introduced the vision of "partnership" between government and the voluntary sector, whilst recognising the need to balance this with the sector's continuing independence:[668]

> "Partnership with the voluntary sector is central to Labour's policy of achieving social cohesion in a one-nation society ... The need to balance support for voluntary organisations with respect for their independence has been recognised ... This includes the right to campaign for principles which are set out in their charitable objects".

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[667] Depending on the size of the charity. See Chapter Six, Section 2.2 for discussion.

[668] The Labour Party, (1997), p.1.

The necessity and importance of retaining independence and the right to campaign was thus acknowledged at an early stage. It can be argued, however, that recent government voluntary sector initiatives, whilst recognising the sector's role in dissent and its right to campaign, have failed to direct resources appropriately. These initiatives, discussed next, have largely concentrated resources on New Labour's main voluntary sector policy focus of service provision.

2.1.2 The voluntary sector and public service delivery

2.1.2.1 The Treasury Cross-cutting Review and the Futurebuilders Fund

The Treasury's 2002 Review[669] illustrated the policy focus on the service-delivery side of the sector. The Review's overall objective was to:[670]

> "... explore how central and local government can work more effectively with the sector to deliver high quality services, so that where the sector wishes to engage in service delivery, it is able to do so effectively".

The £125 million Futurebuilders fund launched in 2004[671] as part of the Government's response to the *Cross-Cutting Review* was specifically intended to increase and improve the sector's role in public service delivery in England.[672] This clear focus demonstrates the Government's priorities and arguably denotes an instrumental approach to the sector which moves away from the "partnership" and "social cohesion" rhetoric contained in Labour's 1997 policy statement.

2.1.2.2 Further initiatives with a service-delivery focus

The Government's commitment to developing and expanding the role of the sector in public service delivery is evident from a number of policy documents published since the Cross-cutting review. In February 2005, the findings of the Treasury's

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[669] HM Treasury, *The Role of the Voluntary and Community Sector in Public Service Delivery. A Cross Cutting Review*, TSO (2002).

[670] *Op. cit.*, p.5.

[671] An additional £90m for the fund was announced by the Home Secretary in March 2005.

[672] See www.futurebuilders-england.org.uk/content/About.aspx [29/06/07].

2004 voluntary and community sector review were launched.[673] They included the report *Working Together, Better Together*, which suggests ways to press for progress in particular service areas. The review also included a review of how the sector could realise its full potential in its contribution to public services, and *Effective Local Partnerships*, which explored the development of Local Compacts and their use in contracting arrangements. In December 2006, the Office of the Third Sector[674] published the report *Partnership in Public Services: an Action Plan for Third Sector Involvement* alongside the Chancellor's pre-budget report.[675] The 2007 budget statement itself further extended the role of Futurebuilders[676] and re-affirmed the Government's commitment to the public service delivery role of the sector.[677]

It is outside the remit of this thesis to explore the fundamental debate over the appropriate role of charities in public service delivery or the problems they face in doing so.[678] In the context of this chapter, the material point regarding the Government's policy emphasis on service delivery is its potentially negative effects on the sector's campaigning activities.

2.1.3 Effect of service-delivery focus on charities' campaigning work

One negative impact of the above policy focus is obvious: the overriding promotion of one particular function of the sector is likely to be detrimental to other functions. It may be detrimental both in terms of the availability of resources for other functions and in terms of the influence it will have on sector and public opinion as to which functions are the most appropriate for the sector to fulfil.

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[673] See www.hm-treasury.gov.uk/spending_review/spend_ccr/spend_ccr_voluntary/ccr_voluntary_2004.cfm [19/07/07].

[674] A department of the Cabinet Office created in May 2006.

[675] http://www.cabinetoffice.gov.uk/third_sector/news/news_releases/061206.asp [28/06/07].

[676] HM Treasury, *Budget 2007: Economic and Fiscal Strategy Report*, Chapter Five, para.5.79.

[677] *Op. cit.*, para.5.82.

[678] For analysis of legal issues, see D. Morris, *Charities and the Contract Culture: Partners or Contractors? Law and Practice in Conflict*, Charity Law Unit, University of Liverpool (1999).

Whilst the above effects are difficult to quantify, two problems with the sector's role in service delivery have arguably been more directly detrimental to its campaigning function. One problem is the implications of service delivery for the sector's independence from government and ability to criticise it. This is considered at Section 2.1.3.2 below. The second problem is the issue of full cost recovery. Current difficulties for charities of recovering full costs for service provision contracts are likely to exacerbate the problem identified above: that fewer resources will be available for campaigning activities.

2.1.3.1 Exacerbation of above impacts by problems with full cost recovery

One of the major concerns identified by the 2002 *Cross-cutting Review* was that:[679]

> "There is a strong view within the VCS that funders are often unwilling to finance [overhead] costs and a common perception by funders that other sources of finance are already being used for this purpose".

The Review also identified that:[680]

> "... there is no reason why service providers should not include the relevant portion of overhead costs within their bids for service contracts. These are part of the total costs of delivering a service. To do this, the VCS needs to be able to apportion overhead costs effectively. But there is no reason why service funders should be opposed in principle to the inclusion of relevant overhead costs in bids".

The Review set a target that in central Government, the price for contracts would reflect the full cost of the service, including the legitimate portion of overhead costs. The Implementation Plan stated that this would be implemented by April 2006.[681] Various initiatives over the last few years have aimed to achieve this. The Treasury

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[679] *Op. cit.*, para.6.3.

[680] *Op. cit.*, para.6.4.

[681] *Op. cit.*, Appendix B, para.13.

issued *Guidance to Funders* in August 2003 and updated it in May 2006. The update, *Improving financial relationships with the third sector: Guidance to funders and purchasers*,[682] placed increased emphasis on full cost recovery in response to the National Audit Office Report *Home Office: Working with the Third Sector*,[683] which had noted little progress on the issue.

Despite attempts to change funding practices, it appears that the problem has not been resolved. In 2006, the Charity Commission conducted a survey of all registered charities in relation to their involvement in public service delivery, its impact on them and their likely future involvement in it.[684] A key finding of the report was the major problem faced by charities involved in public service delivery in obtaining full cost recovery. Only twelve per cent of the survey respondents reported that they obtained full cost recovery in all cases.[685] In addition, the National Audit Office Review *Office of the Third Sector – Implementation of Full Cost Recovery*[686] reported that whilst the issue of full cost recovery has remained high on the Government's agenda since 2002, the sector still believes that problems persist. The Report provides a variety of evidence from the sector in support of this assertion, and makes further recommendations in order to improve implementation of the practice.

Whilst it appears that pressure to implement better funding practices remains unabated, the material point in the present context is that failure to implement full cost recovery to date is likely to have materially damaged the ability of public service providing charities to fund other areas of activity such as campaigning. This is in addition to the other effects on charities' resource allocation of the Government's emphasis on service provision. The resource issues faced by study participants in their campaigning work are considered in Section 2.2.

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[682] TSO (2006). Available from www.hm-treasury.gov.uk.

[683] *Report by the Comptroller and Auditor General*, House of Commons Papers, Session 2005-2006, 75 TSO (2006).

[684] Charity Commission, *Stand and Deliver. The future for charities providing public services*, TSO (2007).

[685] *Op. cit.*, p.3.

[686] TSO (2007).

2.1.3.2 Negative impact on independence

Prioritisation of the service delivery role of the sector may have had a negative impact on organisations' independence, through pressure not to criticise Government departments which are providing funding. Whether such pressure is actual or perceived is a matter of some debate. Former Charity Commissioner Julia Unwin, author of *Speaking Truth to Power*[687] noted that there is widespread concern amongst third sector organizations, who "frequently perceive a pressure to be silent". This finding has been reinforced in 2007 by a survey[688] commissioned by Compact Voice,[689] which found that sixty-nine per cent of Compact Voice members in receipt of local authority funding feared that campaigning would affect their future funding.

However, Unwin's 2000 report also claimed that this concern is a matter of the sector's perception, rather than the reality of government partnerships:[690]

> "... in fact, the evidence suggests otherwise. Organisations that censor themselves, for whatever reason, are failing to articulate the experience of their members, service users or beneficiaries. In the long run, the self-censorship that fears reprisals and seeks to pre-empt them is as dangerous for the freedom of the sector as the abuse of position by the powerful seeking to silence dissent".

The *Speaking Truth to Power* report[691] further links the two issues considered here: the issue of sector independence from government and the issue of the detrimental effect of the service provision focus on the level of resources available for campaigning:[692]

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[687] *Speaking Truth to Power. A discussion paper on the voluntary sector's relationship with Government*, The Baring Foundation (2000).

[688] *Stronger Independence, Stronger Relationships, Better Outcomes* (4 July 2007), reported in *Third Sector* magazine, 4 July 2007, p.4.

[689] Compact Voice "represents the voluntary and community sector in England on taking the Compact forward": see www.compactvoice.org.uk. The Compact itself is considered below at Section 2.1.4.2.

[690] *Third Sector* magazine, 8 December 2004, p.2.

[691] *Op. cit.*

[692] *Op. cit.*, p.5.

> "... this role in the delivery of programmes places particular pressures on voluntary organisations. At a strategic level, many organisations feel that their energy is being focused on implementation and consequently, they were unable to give sufficient time to influencing future policy, developing new ideas and planning for the future. Others believe that their autonomy is constrained. Indeed, they noted that it is the Government that now scrutinises and challenges their work in implementing programmes and that it has become difficult for some voluntary organisations to draw attention to inadequacies in programmes which they themselves are helping to manage".

The extent to which the above issues were reflected in the empirical study data is considered in Section 2.2. below.

2.1.4 Initiatives which encourage the sector's campaigning role

Despite the problems considered above, there are a number of existing Government initiatives with a potentially positive effect on the sector's campaigning role and independence. These initiatives either involve specific sector investment or facilitate dissent from government policy.

2.1.4.1 The Strategy Unit Report

The Government's review of the voluntary sector legislative and regulatory framework *Private Action, Public Benefit*[693] had potentially positive implications for charities involved in campaigning. Apart from the recommended legislative measures, some of which formed the basis of the Charities Act 2006, the report contained some specific non-legislative measures relating to the Charity Commission's regulation of campaigning.

The report acknowledged the commitment made by the government under the Compact to support the sector's right to campaign, and stated that:[694]

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[693] Cabinet Office (Strategy Unit), *Private Action, Public Benefit: A Review of Charities and the Wider Not-for-Profit Sector*, TSO (2002).

[694] *Op. cit.*, Chapter 3, 'Developing the sector's potential', para.3.14.

> "Charities and other not-for-profit organisations of all kinds should have the confidence to be truly independent and to have a dissenting voice, whilst still being supported, encouraged, and valued by Government".

In relation to registered charities specifically, the report identified the need to reinforce the existence of this right through "reassurance in the regulatory guidance given to charities that they are free to undertake a range of campaigning activities".[695] Recommendations directed at the Charity Commission were provided to this effect. Their adoption by the Charity Commission was considered in Chapter Two.[696]

2.1.4.2 The Compact

The national "Compact" agreement was formed in 1998 to address the imbalances and issues arising from the contract culture, and has been backed up by the creation of five codes of practice (funding, consultation, volunteering, community groups and black and minority ethnic groups) since its launch. Local Compact agreements are also being developed countrywide. One of the main focuses of the Compact is recognition of voluntary sector independence and the ability to campaign against government policy regardless of other partnership or financial arrangements. However, problems with its implementation and effectiveness have been abundant. Apart from a lack of political will, particularly at local level, and the absence of central government funding for its implementation, the Compact has no legal basis, and thus widely seen as toothless.

Chapter Seven of the *Cross-cutting Review*[697] identifies a number of problems with the Compact. Whilst the Review found "a remarkable consensus that the Compact was, on the whole, 'a good thing'," and that there was "little support for its abolition or wholesale replacement", it also identified three main criticisms. These were: "lack of awareness", "poor implementation" and "limited scope".[698]

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[695] *Op. cit.*, p.45.

[696] Section 3.0.

[697] HM Treasury, TSO (2002).

[698] *Op. cit.*, p.29.

To address some of the Compact's difficulties, the *Strengthening Partnerships: Next Steps for the Compact* consultation was launched in 2005. The consultation document proposed a model for strengthening the Compact in the form of "Compact Plus". This was intended to operate on an "opt-in" basis, but with stricter enforceability and penalties for breaches. Responses to the consultation appeared to be largely supportive of the proposals.[699] The responses to the consultation were used to inform the business plan and the Compact Action Plan created by the new Compact Commission.[700] Evidence of the impact of these recent initiatives in improving the efficacy of the Compact is awaited.[701]

2.1.4.3 ChangeUp

The second Government initiative with positive potential for campaigning was the £80 million ChangeUp fund, launched in 2004 to improve the sector's infrastructure. The ChangeUp framework was another part of the Government's response to the Treasury's 2002 *Cross-cutting Review*, with the overall aim that:[702]

> "... by 2014 the needs of frontline voluntary and community organisations will be met by support which is available nationwide; structured for maximum efficiency; offering excellent provision; accessible to all; truly reflecting and promoting diversity; sustainably funded".

ChangeUp's five key focus areas are: Performance Improvement; Workforce Development and Leadership; ICT; Governance; Recruiting and Developing Volunteers; and Financing Voluntary and Community Sector Activity. These have

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[699] *Strengthening Partnerships - Consultation on Compact Plus. Analysis of Findings. Research Study Conducted for the Home Office Active Community Unit*, MORI (2005). For criticisms of proposals, see for example, 'Compact "fails to make its case to state funders"', *Third Sector* magazine, 27 April 2005.

[700] Established in 2007. See www.thecompact.org.uk. The Compact Commissioner, John Stoker, was appointed in 2006, but has since resigned.

[701] For comment, see 'Has the compact finally come of age?' *The Guardian* Wednesday April 18, 2007.

[702] See www.changeup.org.uk/overview/introduction.asp.

been developed largely through national "hubs," the creation of which was announced in June 2004.[703]

Whilst ChangeUp reflects to an extent the *Cross-cutting Review*'s reflection of the Government's emphasis on the sector's service delivery role, it should have an effect on the whole sector – including organisations which campaign - in terms of their ability to fulfil their aims.

In March 2005, the addition of £70 million to the fund was announced by the Cabinet Office,[704] together with the creation of the Capacitybuilders agency. This sector-led agency was launched in April 2006, and now has responsibility for managing the ChangeUp fund. The agency's statement of its "vision" is:[705]

> "... to create an independent, innovative, flexible, responsive and sustainable voluntary and community sector, which achieves its full potential in:
>
> - service delivery;
> - policy analysis;
> - community development; and
> - campaigning".

The inclusion of campaigning in the above statement illustrates the increase in the attention paid to the sector's campaigning role, even since the launch of ChangeUp.

Despite these apparently positive developments for the sector's campaigning role, there have been a number of problems with ChangeUp and Capacitybuilders. In addition to debates surrounding the leadership of the ChangeUp hubs, the board of Capacitybuilders announced at the end of 2006 that the ChangeUp hubs would be

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[703] An additional £16.5m funding for the hubs was confirmed by the Home Office in August 2005.

[704] Home Office, *Developing Capacity: Next Steps for ChangeUp*, TSO (2005).

[705] www.capacitybuilders.org.uk/about/vision/default.asp [29/06/07].

abolished in 2008 and replaced by contractors.[706] The Capacitybuilders strategy document *Destination 2014* has also met with severe criticism from within the sector.[707]

2.1.4.4 The review of the future role of the third sector in social and economic regeneration

As part of the 2007 Comprehensive Spending Review, the above third sector review (announced in Budget 2006) has been conducted jointly by the Cabinet Office's Office of the Third Sector and the Treasury's Charity and Third Sector Finance Unit. The Review's interim report[708] announced that work would continue on five key themes, one of which was "enabling voice and campaigning." The review's final report[709] was published in July 2007, shortly before this thesis was submitted. Chapter Two of the final report contains detailed proposals relating to enabling voice and campaigning, which encompasses consideration of relevant law, regulation, guidance, policy and practice. Specific aspects of the report are considered in Chapter Seven. In the present context, the material point is that the report is evidence that the overriding service-delivery focus of government voluntary sector policy in recent years may be in the process of being reversed.

2.2 Empirical study

The study proposition addressed in this section is considered through an analysis of the empirical data relating to non-legal constraints on charities' campaigning activity. As in previous chapters, the empirical data is based upon operational research areas which translate the exploratory research propositions into concrete categories of data, capable of forming the basis of specific interview questions.[710] The empirical data used in this section is based on the following operational research area:

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[706] Reported by *Third Sector* magazine, 24 January 2007, p.12.

[707] *Op. cit.*

[708] HM Treasury / Cabinet Office, *The future role of the third sector in economic and social regeneration: interim report*, TSO (2006). See also HM Treasury / Cabinet Office, *Consultation feedback on the future role of the third sector in social and economic regeneration*, TSO (2007).

[709] HM Treasury / Cabinet Office, *The future role of the third sector in economic and social regeneration: final report*, (Cm 7189) TSO (2007).

[710] See Chapter One, Section 4.3.4 and Appendix I to the thesis.

f) Charities' perceptions of non-legal influences on their campaigning activities, both internal and external to the organisation.

It should be noted that the factors identified here as being influential on campaigning activities are broad thematic influences emerging from the empirical study as common to several participants. Whilst there undoubtedly exists a wide, complex and interdependent range of influences, it is outside the remit of this thesis to engage in such a detailed analysis. This is better addressed through existing non-legal literature which focuses solely on campaigning practice.[711]

2.2.1 Internal Issues

Relevant internal factors emerging from the empirical data included concerns over charities' reputations, existing expertise within charities, and the allocation of resources between a charity's functions (which is itself influenced by a number of sub-factors). These are discussed in turn below.

2.2.1.1 Reputation

Consideration of the impact of campaigning in general (or of a specific campaign) on a charity's public standing and reputation may have a significant effect on campaigning decisions. This is particularly the case where the subject matter is considered by the charity to be controversial:

> *Consideration of the whole charity really, [there] was one extreme view that needed to be dealt with, and I put forward the arguments against it ... I think that we'd have got lots of publicity but I think we would have lost support in the general public, I think it is incredibly extreme ... It would damage the reputation* (Charity J).

Concerns over reputation can be considered to be in effect concerns over funding, as damage to reputation can translate into withdrawal of external financial support. Funding is considered in more depth in Section 2.2.2.2 below. On a more

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[711] See, for example, T. Kingham & J. Coe, *The Good Campaigns Guide for the Voluntary Sector*, NCVO (2005); M. Lattimer, *The Campaigning Handbook*, DSC (2000).

fundamental level, concerns over reputation may also in part be symptomatic of a perceived "bias" against campaigning as a valid function of charities, considered throughout this thesis.

Together with risk to achievement of objects, Charity Commission guidance CC9 identifies "risk to reputation" as "likely to require special consideration" for charities conducting campaigning activities.[712] The emphasis placed by the guidance on the potential risk to reputation is illustrated by the fact that it refers to either risk to reputation (or related concepts such as risk of alienating supporters, rousing strong emotions or losing public support) no less than twelve times.[713] As noted in Section 1.0 above, this emphasis will be considered further in Chapter Six.

2.2.1.2 Existing expertise of staff and trustees

The existing expertise of either staff or trustees within a charity is an important consideration in decisions over whether to undertake campaigning on an issue in furtherance of a charity's objects. The importance to successful campaigning work of well-structured, skilled and professional boards was reinforced by a number of charities in the study:

> *... by about when I came in '98 we recognised that we didn't have the right governance structure and it was too big and cumbersome ... but we needed - and charity law and the Charity Commission was expecting us to have - a very strong governance body, so this year, the Chair and myself and the old board, we have spent three years trying to have a consultation process ... we need professional people on the board and we need a smaller board and I think people understood that but it needed a lot of consultation because we are owned by [members] and we have to take them all on board with us, so we found, the legal thing was only part of this process of having a smaller board, a more professional and competent board, a board that would be responsible* ... (Charity G).

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[712] Para. 28.

[713] *Op. cit.* (CC9), paras.26, 27, 28, 29, 30, 37, 39, 44, 47, 63, 65, 66.

... our Council's probably stronger in a way than it was and it's got at least one person on it who's got quite a sophisticated approach to communication in a way with media and so on so probably a bit more of a modern approach, really. (Charity H).

... we have in our governance that the trustees have to move on every three years - I mean now we've got a fantastic group of trustees, I really have got superb trustees, and everyone's pushing in the same direction, they're professional people from a professional environment, we've got someone who's [a service user] himself with a good job so he comes from both angles, I've got a PR and marketing person, and those are the people who are really starting to push the charity forward (Charity L).

Even where the existing activities of the charity have resulted in trustees or employees gaining highly specialist and detailed knowledge of an issue, the skills to conduct or oversee a campaign based on that knowledge may not be present:

... we shouldn't campaign on something we don't have the expertise or experience ... there are practical choices we make rather than policy choices (Charity G).

The current predominance within the sector of service delivery as a means of achieving charitable objects,[714] and the perceived "bias" against campaigning as a valid function of charities may have exacerbated this problem.

Where the necessary expertise to conduct campaigns is not present within a charity, but the trustees feel that initiating a campaign on an issue is essential and have not been deterred from it by this,[715] they may wish to employ additional staff with the necessary skills, or re-train existing staff. The issue then becomes one of resources:

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[714] Encouraged by Government policy: see Section 2.1 above.

[715] The issue of trustee attitudes towards campaigning is considered further at Section 2.2.1.4 below.

> *... the biggest constraint by far is funding, then the skills in staff to do it ... (though that could also be seen as a consequence of inadequate funding)* (Charity P).

The above problem of resources can be viewed both in terms of the allocation of existing resources, (which is an internal issue, and is discussed next), and to obtaining additional funding for the campaigning work (which is an external issue, and is discussed in Section 2.2.2.3 below). As identified below, these issues may both link again to the perceived societal bias against campaigning, and to related issues of reputation management considered above.

2.2.1.3 Resource allocation: pragmatic influences

In decisions over resource allocation, charities must take into account the Charity's Commissions statement in CC9 that charities must not devote a high proportion of their resources to political campaigning.[716] Aside from consideration of the charity regulator's standpoint, discussed in Chapter Two,[717] decisions over the allocation of a charity's resources to campaigning activities will in part depend upon pragmatic considerations, and will relate to the specific issues faced at any given time in the pursuit of the charity's objects. An example of this is the emergence of proposed legislation detrimental to the charity's beneficiaries, which results in the trustees deciding that a campaign against the proposed legislation should become a priority for the charity in furtherance of its objects. Nevertheless, even where trustees view a campaign as important for the achievement of their charity's objects, decisions over the allocation of limited resources will often have a significant negative effect on campaigning activity:

> *I think a lot of it is to do really with capacity and resources. I think we're fairly clear on what we can and can't do, and we're pretty clear about what we should and should not be doing, but I would say this, wouldn't I, you know, if we had more resources and we had greater capacity there'd be*

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[716] *Op. cit.* (CC9), paras.22-24.

[717] Section 3.3.

more issues that we could take on in greater depth, and you know, be even more determined in our advocacy (Charity B).

Too many ambitions and not enough money really, that's what it comes down to because I mean there's lots and lots that we can do, I mean there are various target audiences and various issues, and not enough money to pay for people's time and the direct costs that are involved with campaigning, and I suppose there's the issue about even if you did have all that money you couldn't do everything at once, so working out the strategies and the plans to do it, and being patient to wait for it to happen, because it's not a quick thing (Charity H).

The allocation of resources to campaigning is likely to be affected further by the difficulties, compared with other activities, of demonstrating the outcomes of campaigning work. This issue is examined in Section 2.2.2.3 below, in relation to the problem of obtaining external funding.

Apart from affecting decisions over *whether* to campaign, concerns over limited resources also influence charities' decisions regarding the *types* of campaign that they are prepared to conduct:

... in order to raise public awareness and influence or change public attitudes, you need a lot of money, and therefore we have lost money ... we have run a major multi-million pound campaign, we ran a very big one which was very successful, but again you need a couple of million quid to do it, and we spent a lot of money on advertising, and really unless you're going to commit that sort of resource or can access that sort of resource, it's actually jolly difficult to do that sort of hearts and minds, reaching out to the public ... (Charity F).

The geographical location of the charity may also have an impact on the allocation of resources to campaigning:

... because of geographically where we are, we can't be trogging down to Westminster every five minutes because of the resource implications for that, so I think we've been very selective in our campaigning, but certainly this year our trustees identified at our Annual General Meeting last November that we really should be doing more of it, you know, which I think is absolutely the right move, and if we say we're about giving service users a voice, then there's no point hiding in corners, you know, we have to go public with things (Charity B).

Further pragmatic considerations include the activities of other charities working in the same field, and difficulties in acquiring external funding for campaigning activities. These issues are external to the charity, and are discussed in Section 2.2.2 below.

2.2.1.4 Resource allocation: trustees' attitudes towards campaigning

The pragmatic issues considered above may also be influenced by trustees' more fundamental attitudes towards the appropriateness of campaigning.

In terms of the view of campaigning held by trustees, several charity representatives in the study felt that their trustees were supportive of campaigning and actively encouraged it:

Our trustees identified at our Annual General Meeting last November that we really should be doing more campaigning, which I think is absolutely the right move (Charity B).

... the person who set up Charity D ... she is one of the trustees ... she was involved in the campaigning and she is very keen. So it wasn't just me that is keen on doing it, it was her suggestion as well, and certainly there's support from the trustees for that sort of activity (Charity D).

With our trustees, I think we're very lucky in this organisation, they're very supportive trustees who really have got far too many things to worry about

to worry very much about our campaigning and lobbying, I mean obviously it's important that they see that we're working apolitically and working on a cross-party basis which we do, but again there are issues for us about .... Our chair would like us to do more parliamentary work, but at the moment the decision we've taken is not to do that but to put more money into lobbying in other ways, but it would be nice to be able to do that .... (Charity F).

However, several charities also identified the existence of conservative tendencies within trustee boards, often within other charities with which they were familiar:

> *But [trustee conservatism] is a real issue for other organisations I know ...* (Charity F).

Nevertheless, in a further reflection of wider trends,[718] the attitudes of trustees in one charity were changing:

Up to now the mood of our Council has generally been to behave quite well and not to do things that are controversial and would embarrass people, so away from direct action and even kind of quite an aggressive stance on campaigning. I think they would have been a bit unhappy about that. But I would say the tide's turning a bit, because they're more interested now ... it wasn't because they felt that we shouldn't do it but it was more that we're the sort of organization that can reach a negotiated agreement about things, and I suppose they've seen that that's actually not worked over the years, so they're getting more angry about it (Charity H).

Attitudes towards campaigning can be affected by trustees' views of its importance in relation to other activities within the charity. As identified above,[719] service delivery as a means of achieving charitable objects is predominant within the sector,

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[718] Considered in Chapter One, Section 1.0 and Chapter Seven, Sections 3.0 and 4.0.

[719] Section 2.1.2.

encouraged by Government voluntary sector policy. This emphasis appears to be, for some organisations, based on fundamental attitudes rather than on purely pragmatic decisions:

> *The issues are much more about finances, the big issue in Charity F at the moment is about because we're such a big service provider, but because the world that we provide services in is changing, obviously we're a very service-driven organisation, and if you're working on the services side what you like to see is everything the whole organisation is doing supporting that activity, so for example, part of my job and my colleagues is to interpret the outside world and understand what it means for our services and to help our colleagues understand that too, and so if you're doing too much of that you're not doing much direct influencing change, and that's one tension, about how our time is spent* (Charity F).

> *another tension is that, for example, we might spot a really good political opportunity to make a difference on an issue and maybe it isn't actually what [beneficiaries'] services' big priority is at the moment, that's an issue* (Charity F).

The ongoing debate over the appropriate role of charities in campaigning is considered further in Chapter Seven.

2.2.2 External issues

Influential external factors emerging from the empirical data include the activities and expertise of other charities working in a charity's field of operation; problems with obtaining external funding; and pressure against "dissenting" activity from external sources, particularly a charity's existing funders. These are considered in turn below.

2.2.2.1 Activities and expertise of other charities working in same field

Charities working within a particular field may find it expedient to monitor the activities of other charities working within that field:

... what we do often is try to find out, and we're doing this exercise now, we're trying to look at what other people are campaigning on, and what is [other charity's] agenda for the next four or five years, what is [second charity's] agenda, any synergies in terms of issues or in terms of capacity or in terms of you know policy, we can't all do the policy work ... (Charity G).

If a charity identifies an important campaign issue, but is aware that another organisation has the necessary expertise and is initiating a relevant campaign, the charity's decisions and planned activities are obviously likely to be affected. In these circumstances, the charity has several options. First, it may choose to avoid campaigning on the issue, for a number of reasons. Duplication of activity between charities can raise questions relating to the best use of the charity's resources, particularly if an existing campaign is run by an organisation with a greater level of campaigning expertise than the charity itself has. This can in turn lead to negative publicity and damage to the charity's reputation. Second, the charity may choose to continue to initiate its campaign. Despite the above potential drawbacks, it may need to compete with others in terms of public profile. The benefits of campaigning in terms of publicity may, in some circumstances, be deemed to outweigh the potential drawbacks:

> *... then of course there's an element of competition around profile or fundraising, all those dynamics have to be dealt with* (Charity G).

A third option for a charity in this situation is to pursue a collaborative arrangement to the campaign with other interested charities. As noted in Section 1.0 above, this possibility and its impacts are considered in Section 3.0 below.

The relative size of a charity to its competitors/potential partners can have an impact on its choices over whether to withdraw, compete or collaborate in the campaigning arena. One small charity in the empirical study, in recognition of the monopoly position of a large charity in its field, was moving away from campaigning entirely because of the larger charity's decision to focus its resources on sole campaigning:

> *I'd rather leave it to the big boys, so to speak. I mean in the sector we're in, [large charity] are very much going down the road of campaigning and lobbying, that's where they want to be seen, so really I think we'd rather let them, they've got the name, they've got the sort of power behind them so to speak* (Charity L).

When queried over a statement in their last annual report which detailed an intention to increase the charity's focus on campaigning, Charity L's representative stated:

> *That was before [larger charity] stood up and said they were going to move away from [beneficiary] services and concentrate more on lobbying, but you have made a very valid point there because we're just in the process of doing our annual report for this year and I think that's certainly something we'll have to explain ... Again purely they've got the resources and they've got the name, and in my opinion when you speak to Joe Public and say out of three or four charities in the [specific issue] sector, who would you know, chances are they'd come up with [Large Charity 1] and [Large Charity 2]* (Charity L).

2.2.2.2 Funding issues

Study participants tended to hold the opinion that campaigning work is viewed unfavourably by a variety of potential funders, included general donors, grant-making foundations, and government departments. These are considered in turn.

General donors

A charity's donors may view its campaigning activity negatively, for several reasons. One relates to the possible societal "bias" against campaigning discussed throughout this thesis. However, the main reason identified by Charity H was the difficulty in both achieving and demonstrating concrete timescales and outcomes from campaigning work:

> *... campaigning is something which some people might not be happy about a charity putting money into, they like to see money going to direct services, don't they, and they might not realise that actually campaigning is good in the long term, they might want to see short term effects* ... (Charity H).

Funding by grant-making trusts

Participants in the study expressed very definite opinions regarding the lack of availability of this source of finance for campaigning work:

> *... the constraints will be the same for every charity you speak to, you can raise funds for projects which are restricted funds, and you can only deliver what that funding allows you to do. Mostly what we try to do is to develop projects that are around types of campaigning and collaboration, but you have to do what they fund you to do, that's the problem, we can't as a charity just say we really need to do a UK wide big campaign on [issue], but nobody would fund it and we don't have those sorts of unrestricted funds that we could put towards it* ... (Charity E).

The main reason given for this was the inherently "conservative" nature of many of these foundations:

> *Lots of trusts are very conservative in who they will fund and who they won't fund, a lot of them want to do something very tangible, they like to see a playgroup, a community hall, twenty five children going on holiday, they find it harder to understand a piece of law being changed, a regulation being amended, they don't understand the outputs really* (Charity E).

Further, some charities viewed grant-making foundations as party to the societal "bias" against the campaigning function of charities identified earlier:

> *... many trusts or foundations will not fund campaigning or advocacy work ... once again reflecting the history of the sector as providing care and service but not seeing its role as addressing the root causes of the problem*

> *to which they are responding ... I know from experience that all the major campaigning organisations are fishing in the same small funding pond ... when what we need to do is enlarge the pond by changing attitudes towards campaigning and its legitimacy* (Charity P).

It is arguable, however, that the reluctance of grant-making charities to fund campaigning work may be explicable partly through their concerns over grant-receiving charities' adherence to political activities law, and about the possibility of campaigning activities falling outside charities' objects.[720] Given that such concerns were identified in Chapter Two as being present within campaigning charities, it is plausible that grant-making charities will share them. This is an area which requires further investigation:

> *... it is not only the operational charities (the service providers if you like) you should be looking at; it's also the charitable foundations. If they were to embrace campaigning not only as a legitimate activity but also as a cost-effective way of achieving impact and delivering public benefit it would do much to stimulate change in the sector* (Charity P).

This is supported by the Sheila McKechnie Foundation:[721]

> "There are [also] wider ramifications of the uncertain attitude adopted by the Charity Commission towards this activity. Many funders may be further discouraged from supporting campaigning activity as a consequence of the Commission's ambivalence".

Aside from the legal issues relating to politics, attitudes of funders may also be affected by regulatory requirements for reporting outcomes, which can be problematic for campaigning work. This issue (together with the related issue of

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[720] It should be noted that in the event of breach of trust, funders may be eligible to bring charity proceedings against charities they have funded under s.33 Charities Act 1993; see Chapter Two, Section 4.2.2 for discussion.

[721] http://www.sheilamckechnie.org.uk/getinvolved/Updates.htm [17/07/2006].

funders "filtering down" reporting requirements) is considered in the next section.[722]

Despite the above negative issues in relation to funders' attitudes, there is evidence that attitudes among grant-making trusts are changing. In November 2004, the Carnegie United Kingdom Trust announced a shift of focus from "reactive, short-term grant giving to supporting programmes that will make a real and sustained difference in people's lives". This entailed the Trust replacing its grant programme after March 2005 in order to "step up its investment in independent national inquiries, complemented by supporting larger scale action-research designed to influence public policy and deliver longer-term change …".[723]

An additional issue, identified by Charity H, was that some funders will not fund service provision in areas which they think should be government-funded. At the same time, they refuse to fund campaigning work which, for example, highlight areas of need, and, through pressure, may result in increased government funding of service delivery. Therefore, the attitudes of some grant-making foundations to campaigning may be exacerbating some of the defects of government policy on funding service provision. Whilst the issue of government-funding for service delivery is outside of the remit of this thesis, government policy on funding campaigning is considered next.

Funding by government departments

Funding from several government departments specifically excludes campaigning work.[724] The apparent incompatibility between government funding and campaigning work can have a huge impact on the feasibility of such work:

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[722] Section 2.2.2.3.

[723] www.carnegieuktrust.org.uk/news_and_events/all_change [26/07/2005]. Also reported in *Third Sector* magazine, *Trusts learn a lesson from neocons*, 6 April 2005.

[724] See *Third Sector* magazine, 'Government accused of thwarting charity "voice"', 24 August 2006, which reports criticisms of government funding policy made by the Director of charity People & Planet, Ian Leggett. Mr Leggett identifies the specific exclusions of funding for political campaigning contained in the funding guidelines for both the Development Awareness Fund (Department for International Development) and the Climate Challenge Fund (Department for Environment, Food and Rural Affairs).

> *... you just can't get funding for campaigning, they don't fund it, and one big argument is to say look, if funders are interested in maximising impact, if it's all about that, then changing legislation and changing the fundamental way the world is structured is going to maximise impact, that's far bigger than sort of service delivery, but there are massive issues around perhaps campaigning should never be funded by institutional government sources ... but it's generally true that yes, essentially, if you want to campaign you have to get the money together yourself* (Charity K).

> *The funding issue is critical because lots of statutory funding, which is critical to survival for many organisations, specifically exclude activities that involve campaigning or lobbying* (Charity P).

This raises the question of whether the two *should* be incompatible. A detailed analysis of government funding policy is outside the remit of this thesis. However, the important point to note within this context is the conflict between messages from central government supporting campaigning by charities,[725] whilst funding policies discriminate against it as a valid charitable activity.

2.2.2.3 External issues of impact reporting

This difficulty in demonstrating the outcomes of campaigning may have implications for a charity's reporting requirements. SORP 2005 states[726] that a charity's Trustees' Annual Report should, among other things:

> "... contain information that enables the reader to understand and assess the achievements of the charity and its subsidiary undertakings in the year. It should provide a review of its performance against objectives that have been set. The report is likely to provide both qualitative and quantitative information that helps explain achievement and performance. It will often

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[725] See Chapter One, Section 1.0 and Section 2.1 of this chapter.

[726] Charity Commission, *Accounting and Reporting by Charities: Statement of Recommended Practice 2005*, TSO (2005), para.53.

be helpful to identify any indicators, milestones and benchmarks against which the achievement of objectives is assessed by the charity".

The empirical study revealed that some charities found it difficult to demonstrate the "performance achieved against objectives set" of campaigning activity, as compared to some other activities:

> *I have been told that [the SORP requirements] are getting a bit harder, a bit longer ... well that's good then because we're having to account for everything, but that's always been a problem with the whole concept of impact analysis that when it's intangible social impact, how do you analyse it, but I think because they're having to account for more of their activities, as it were, the more nebulous ones, like a change in the law, fundamental ones, are, they're finding it harder to justify it* (Charity K).

It is thus possible that the increased need to show impacts discourages some charities from initiating activities for which outcomes are difficult to demonstrate. It should be noted, however, that general impact reporting can also be used by charities to enhance their campaigning (and other) activities. A number of charities have recently used impact reports to generate positive publicity.[727]

Paragraph 54 of SORP 2005 states that:

> "Charities that are not subject to a statutory audit requirement may limit their disclosures within this section to providing a summary of the main achievements of the charity during the year. The additional disclosures of this section are encouraged as a matter of good practice".

One small charity which fell below the statutory audit requirement found that its funders "filtered down" the requirement to them and other small charities:

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[727] For example, see RNID at www.rnid.org.uk/about/impact [06/08/07].

> *... for example the REF 14 Trust have been ensuring that everything is in place and ... what will happen is that you have to show impact .... They've always been for impact ... so it's not new, really ... but I think [the new SORP] ... it's made them think more; in a more focused way about that now ... they are forced now, when they give a grant ... to look at what the expected impact should be, so that's included in the contractual arrangements with whoever is the grantee. That's what's happening. And it isn't just happening to us, it's happening to others as well. I'm even hearing that the bigger charities are saying that it's causing delays ... it's like a cascade, because our income's less than £100k a year, we're not actually required to comply with SORP, but our funders are ... the evidence from around us is that it is causing delays as people try to comply with SORP, funders try to comply with SORP. I know there are delays even within the Big Lottery* (Charity C).

It should be noted that whilst the problem of funders "filtering down" reporting requirements to funded charities may cause difficulties in general, the fact that many funders will not fund campaigning work in any event may negate the effects of this in the present context and is in itself a more significant issue. The implications of the approach of such funders to campaigning are considered next.

2.2.3 Pressure not to dissent

An issue linked to difficulties in obtaining funding but discrete from it is that charities which do receive funding from external sources may perceive pressure not to engage in public dissent against the policies or activities of the funder.

2.2.3.1 Pressure from government departments

Pressure, either implied or explicit, from government departments which were also charity funders was recognized as a very real potential influence on campaigning activities, although all the charities in the study which identified this pressure emphasized their strategies for avoiding losing their independence:

It's real [pressure] in my experience. It's also not just pressure, they can coat it with all kinds of other things, but it's human nature, it's to do with people, what you say, and how you relate and what you are ... I think I would be naïve to imagine that there is no implied pressure. As long as we can handle it and keep our independence (Charity G).

we have a new Chief Executive in Charity F who is quite interested in ... one of the things she wants to be is independent, and I think what she's now confronting are the issues about, not so much about the nature of our campaigning and our lobbying, it's more about what you do and what don't you do when you are such a big organisation which has so much money coming in from local government and to some extent central government and want to get more of it, how do you balance those things off, you want to be independent and to be vocal and to speak out clearly and deliver your services on one hand, but not to bite the hand that feeds you on the other, so there are some issues on that that have to be worked through, but she's smart, I'm sure it will all work out fine, but it's definitely something to be dealt with there's no doubt about that (Charity F).

The fact that many charities are so close to being dependent on government funding for their major activities[728] reinforces concerns about sector independence.[729] One charity representative, whilst acknowledging the experience of pressure from government, stated that it was possible to achieve a balance:

... it's a real issue and 'people in the know' know that, I know organisations that have been hauled in by government departments, and told to shut up ... It's a very real issue, absolutely, it's not just a myth. I know another organisation not a million miles away from here that was perceived to be [too critical] ... the central government funding for [area of work] just went like that. So it is real. But to be honest I should perhaps have said that I just

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[728] See findings of Charity Commission, *Stand and Deliver. The Future for charities providing public services* TSO (February 2007).

[729] Considered in Section 2.1.3.2 above.

stopped in April being a part-time advisor to the [government body], so what I was doing on the cases was writing government papers and then being rung up by journalists in my Charity F role and criticising them, which is quite good fun really because I know all sides of the argument, so you know, some of these boundaries are much more fluid than they may appear. And the trick is how you manage them and you do it in a way that retains your own integrity and doesn't at all compromise the interests of the charity (Charity F).

... the risk, the danger for us is that we're co-opted around the Government's agenda ... there's an issue about how do we retain our professional integrity about the services we run, how do we achieve more coverage for those services because we think they're a good thing, but at the same time how do we not be so overtly critical of government that actually we annoy them. And so getting that balance right and doing it in a way that meets our service needs and our charitable needs, that's taken quite a lot of thought about how we position ourselves (Charity F).

However, the same representative still felt that the current government is more open to campaigning than previous governments:

... since Labour came into power in 1997, if you want to influence change in England then by far the easiest way to do it is to actually access ministers, advisors, officials, because they've been much more open to that than the previous Conservative government (Charity F).

Another major charity agreed with this viewpoint, challenging the notion discussed earlier that there is still a societal bias against campaigning by charities:

And certainly in many respects it's easier. I mean there's a whole paradigm shift in the public arena of charities especially with the new charities law, but also what's happening since the time John Major because he challenged the charities and put the charities against the Conservative Government, I

think it is now understood and accepted for charities to campaign, twenty years ago it was considered, many of us started companies, the [campaigning organisation] was created by the development charities so that they could do campaigning. Now, it's understood it's normal and routine for charities to challenge, as long as they do it relative to their objects (Charity G).

One charity, whilst indicating that some pressure was real, acknowledged that there was also a danger of self-censorship:

> ... *and I mean sure Big Lottery Fund or DfID might give you money to campaign but then you might impose a kind of censorship upon yourself even if the money was given freely, and that's a big argument* (Charity K).

The element of self-censorship has been viewed by some commentators as of greater significance than it was viewed by charities in the study, to the extent of denying any real pressure from government departments.[730] It is submitted that the reality is more likely to be at neither of these extremes, and that both real pressure and self-censorship are responsible for constraining campaigning activity. This point further reinforces the pervading theme of negative attitudes towards campaigning by charities.

2.2.3.2 Pressure from sister organisations

Moral pressure from a charity's "sister" organisations can greatly influence campaigning activity:

> *Where I think the conflict comes is in families of organisations. For instance I was talking to an organisation in Britain yesterday who has very close links with a big organisation, who are part in America. Now the Americans are looking into trade justice, and the Americans don't want to change certain things in food aid or in policies around subsidies for farmers, so*

[730] See Section 2.1.3.2 above.

> *they said 'We can't get our American counterpart on board, we can't come public because the American organisation is bigger and it's part of our family'. So there are times and I know this happened with [another charity], when they couldn't say too much against the Iraq war because the counterparts in America were putting pressure on them, so there are times when you belong to a network ... I'm certain being part of alliances that are what I call family alliances such as [International Charity Group 1] or [International Charity Group 2] have their limits and pressures. Because if it's just British organisations, no other international dimensions, then I think it might be easier, but all of us, including us, we're all part of international alliances ... so I think perspectives differ in different countries in terms of both the political analysis and also the understanding of campaigning* (Charity G).

The above experience raises the issue of a charity's independence when working in one form of collaborative structure. However, this particular structure is not the focus of this thesis.[731] Nevertheless, collaboration in the sense examined in this work can raise similar issues of independence and pressure. These are considered in Section 3.0 below.

2.3 Summary of issues considered

This section has examined a number of related issues which, in addition to the legal and regulatory issues considered in previous chapters, affected the study participant charities' decisions over whether and how to campaign on issues they viewed as important to the achievement of their objects. The most notable factors which emerged from the empirical data related to potential damage to reputation and the importance afforded to preserving it; difficulties in funding campaigns; pressure (real or perceived) not to oppose powerful external parties; and balancing campaigning activities with other activities. Underpinning all these factors was the theme of the perception of a general "bias" against campaigning activities by

[731] See Chapter One, Section 3.3.2.3.

charities, and the (related) theme of the predominance of service provision as the favoured method within many charities of achieving their objects.

These underlying themes reflect the policy environment in which charities operate,[732] as most of the issues identified relate directly or indirectly to allocating resources and obtaining funding. The emphasis placed on the sector's service provision role by Government policy is likely to have contributed to these problems.

In the light of the unquantifiable barriers faced by charities in their campaigning work, the next questions to be addressed relate to the ways in which collaborative working can both create advantages in campaigning, and how it can create further problems or compound existing ones.

3.0 Collaborative working in campaigning

3.1 Government policy and sector trends

Whilst the emphasis on service provision and the "contract culture" could, on one level, be expected to increase competition between organisations bidding for contracts, it has also created a drive for increased efficiency. Collaborative working has been one way of achieving this efficiency.

Government voluntary sector policy generally mirrors the favourable view of collaborative working apparent in the sector itself;[733] collaboration is one of the fundamental principles of ChangeUp.[734] Government policy has also recently begun to recognize the potential benefits of collaboration in campaigning. The interim report of the Government's current third sector review stated that:[735]

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[732] Considered in Section 2.1 above.

[733] See Chapter One, Section 1.0.

[734] Home Office, *ChangeUp: Capacity Building and Infrastructure Framework for the Voluntary and Community Sector*, TSO (2004), p.17. The background to ChangeUp was considered above at 2.1.4.3.

[735] HM Treasury / Cabinet Office, *The future role of the third sector in economic and social regeneration: interim report*, TSO (2006), para.3.19.

> "... the consultation has identified a desire among third sector organisations that where they have similar objectives or opinions they should seek to join their voices together in order to more effectively work with Government and campaign for change. It is clear that where this happens the results can change the way individuals and governments think about a particular issue. This joining of voices should not be imposed by Government, but must be built from the bottom up. The consultation has highlighted ongoing work in the third sector to build third sector voice, receiving responses for example from the Community Sector Coalition, and the Third Sector Network, both aiming to bring voices together".

The review's final report re-emphasizes the above point.[736] It should be noted that these review documents were published after the empirical study upon which this thesis is based was conducted. Any impact of changes in Government policy towards campaigning are thus yet to have an effect on the sector's relationship with Government. Nevertheless, the impact of the Government's positive attitude towards collaboration in general is apparent. The study participants' perceptions of the advantages and disadvantages of collaborative working are considered next.

3.2 Empirical study

As identified in Section 1.0 above, the study proposition addressed in this section is considered through an analysis of the empirical data. The empirical data used in this section is based on the following operational research area:

> g) Charities' perceptions of the main advantages, disadvantages, positive and negative outcomes, reasons for entering and reasons for avoiding campaigning coalitions.

It is important to note that it is not the aim of this section (or indeed, thesis) to focus on decisions as to whether collaboration is appropriate or factors needed to make collaborative working arrangements successful. These are subjects on which there is

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[736] HM Treasury / Cabinet Office, *The future role of the third sector in economic and social regeneration: final report*, (Cm 7189) TSO (2007), para.2.4, also noted in Chapter Seven, Section 4.0 of this thesis.

much recent commentary,[737] albeit not usually from a campaigning perspective.[738] Whilst factors relating to success may enter the discussion, the aim here is to consider see how collaboration supports or hinders campaigning effectiveness, rather than to examine good practice in collaboration.

Whilst all the charities in the empirical study used collaborative campaigning as a means of improving their campaigning effectiveness, and thus obviously viewed the practice as generally beneficial,[739] there were circumstances in which they viewed the practice as unhelpful, and many had experienced disadvantages or negative outcomes as a result of collaborations. This section considers the circumstances in which the participant charities viewed collaborative arrangements as the best option, and the circumstances in which they avoided them. It also considers their views of the advantages and disadvantages, and their experiences of the positive and negative outcomes from collaborative arrangements.

3.2.1 Reasons for entering coalitions, advantages and positive outcomes

Positive factors in campaigning coalitions which were identified by participants in the empirical study included protection from negative publicity; tactical advantages and increases in impact and effectiveness; and advantages in relation to the use of resources, as well as several other minor advantages. These are discussed in turn below.

3.2.1.1 Protection of reputation

Several charities in the study cited protection from negative publicity, and the resulting damage to reputation, as a major reason for campaigning within coalitions:

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[737] See, for example: D.C. Wilson, 'The Strategic Challenges of Cooperation and Competition in British Voluntary Organisations: Toward the Next Century,' (1992) *Nonprofit Management and Leadership*, 2(3) 239 at p.251; J. Murray, *The cooperate sector. Evaluating partnership approaches in the voluntary sector*, The Children's Centre Project (2005); S. Ward, *Making Partnerships Work*, The Prince's Trust (2005); Bassac, *Sharing without merging*, (2005); See also NCVO's Collaborative Working Unit, www.ncvo-vol.org.uk/collaborate, which has produced a number of relevant practice-focused publications.

[738] With the exception of S. Shimmin & G. Coles, *Campaigning in Collaboration. A Joint Publication between NCVO's Collaborative Working Unit and Campaigning Effectiveness*, NCVO (2007).

[739] See Appendix III for discussion of effects of study sample composition on results.

Again based on intuition rather than hard evidence, I think organisations like campaigning coalitions because it makes them feel safer and less exposed/nervous (Charity P).

... individual organisations might be a bit embarrassed, might feel a bit unsafe about doing some very controversial campaign on its own, but if it gets together with a group of organisations then it can have more confidence in being more controversial and taking more risks because you're sharing those risks and it's not just you doing it (Charity F).

Protection of reputation was a particularly important reason for collaboration where a charity was campaigning on an issue that the trustees considered to be controversial. Several charities gave controversial subject matter as the main reason for campaigning in collaboration with other organisations:

Protection is probably the reason why - certainly why - we lobby through the [coalition] rather than going out as a sole agency on [issue]. Where you have an issue on which pretty much everything you say is going to be phenomenally unpopular with large swathes ... I mean the whole ... in the case of [issue], with the kind of Commons we've got at the minute it's very heavily whipped and also the left has got an extremely right-wing [issue] policy. Parliamentarians - well in fairness the Lords are pretty good - but the Commons are extremely hostile, public opinion is extremely hostile, it's just the most negative, vile, hostile policy environment on the planet, and if you go out as a sole agency you get picked off (Charity A).

3.2.1.2 Tactics and impact

Charity A identified that sole and collaborative approaches tended to be used for different types of campaigning:

So a lot of the time there's a combination of kind of campaigning more broadly which might be a sole agency; when it comes to parliamentary lobbying, the tendency is to get into groups (Charity A).

Coalition campaigning was considered to be a tactical choice for parliamentary lobbying in particular. This was for three reasons. First was the issue of protection from negative publicity discussed above. Second, as both Charity A and Charity N identified, Parliamentarians often prefer to have a single contact on an issue, rather than a large number of charities contacting them to express similar or identical viewpoints. Third, coalition campaigning allows charities to present a united front:

> *... where people have had meetings that are sole agency or two agencies there's been a very obvious playing off done by advisors and by ministers. When you have a lobbying meeting with advisors or ministers as the consortium - and we limit the amount of people we physically take in for a meeting but we take about six people in, representatives of both sectors - it becomes impossible to do that kind of splitting because you are kind of, as it were, physically representing the unanimity* (Charity A).

> *A major advantage is to be able to present a united front to government or to others whom one wishes to influence. It prevents them from trying to divide and rule, and it often pleases them to think they have only one body to deal with* (Charity N).

This "united front" provided charities with greater impact and credibility, and increased their profile:

> *... all of the impacts that I've witnessed since I've chaired it are quite small because it's such a hideous area, but there have been definite impacts of our work ... and I am absolutely certain that none of them would have happened without the consortium being in place* (Charity A).

> *The first thing is as an organisation we strongly believe in working with others in a collaborative partnership model ... so in campaigning work we took it to its natural conclusion, look at our strategic alliances and partners, who are the people who can have a bigger impact.* (Charity G).

Well the big plus is that you get more weight really, you get more impact basically, if you can get lots of people saying the same thing instead of just you, you're much more likely to be listened to, and you have the resources available to do that (Charity F).

... much more impact, we're quite a small organisation really in terms of our members, our users, so that gives us quite low reach and working with all these other organisations obviously extends our reach .... One of the problems in our sector is that services for [beneficiaries] are fragmented across dozens of charities and public sector organisations, so trying to talk to government is a nightmare because they're talking to different organisations all the time ... so it has much more impact to try and make a common cause and do the work together and talk together (Charity H).

The different angles on a particular issue which are brought to a coalition by each of the charities involved can further increase this impact:

I think that, for example, when I'm in an arena, I can bring in different perspectives from a gendered point of view which may not be there otherwise, other people bring other things to the table (Charity C).

... when we were campaigning to get [legislation] through last year, we built a broad-based coalition because we knew that that was its best chance of success ... you know anyone who could come at it from a slightly different angle so it wasn't us saying it, because if we say it people say 'Well of course you'd say that, it's your job'. So that's one example, and it was to increase its opportunities for success. (Charity E).

And if they are started by reputable well-established organisations they can attract a wide range of others from community and activist groups to very establishment organisations (Charity P).

Most of the charities in the study also cited finance and resources more directly as reasons for campaigning in coalitions. This issue is considered next.

3.2.1.3 Resources

Some charities which participated in the empirical study pooled their resources in furtherance of a particular campaign for reasons of cost-effectiveness. A related (and more common within the study sample) practice was for charities to lend their support to campaigning coalitions led by other charities, but without committing large amounts of resources:

> *One is financial so if an issue is important but not important enough for us to put ... we've actually got quite a small campaigns budget ...so if an issue matters to us but it's not one of our central issues ... and we'd like to be involved but we can't afford to kind of finance the whole thing - we might want to go into consortium work because of that, because actually it allows us to do something without bankrupting us.* (Charity A).

> *The main reason is that Charity L is still a small organization that isn't known to the greater world, whereas an organisation where [large charity] are taking the lead, obviously [large charity] is a household name, they have the resources, they have the press officers, they've just got the resources there to be able to take them forward, plus they've got the name ... so that really gave me confidence in knowing that we were joining a force, a body that would be stopped and listened to* (Charity L).

3.2.1.4 Further advantages of campaigning coalitions

Collaboration can provide opportunities to learn (particularly for smaller charities):[740]

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[740] A range of other benefits to smaller organisations were also identified (in a non-campaigning context) in L.J. Mitchell, and K.A. Drake, *1+1=3. Does size really matter? A scoping study of collaborative working between large and small voluntary and community organisations*, NCVO (2005).

> *... so I might be at the meeting with people whose role it is to be the parliamentary agent for their charity so there's a lot to learn from that for me about what they do and listening to what they do so that's quite an advantage too, to look at what the larger charities do and how they do it and how I can fulfil a similar role on a lesser basis* (Charity J).

Coalition working can also promote better relations generally with other agencies:

> *I think another advantage of joint campaigning is that it does make for better relations with other agencies full stop ... We are pursuing other agendas and keeping aware of what other organisations are doing, and ... other collaborative, more practical joint ventures in terms of the services we're offering that come out of these relations* (Charity D).

Collaborative working was also seen by charities as popular with funders:

> *I know there are things on funding applications, there's always, recently, you need to have some sort of collaboration between organisations ... there is certainly [an emphasis on] looking at joined-up thinking* (Charity D).

This popularity is demonstrated by the Lloyds TSB Foundation for England and Wales, which has implemented the Collaborative Grant-Making Programme. The programme's broad aim is to:[741] "enhance co-ordination, co-operation and collaboration between voluntary organisations ...". In context of this thesis, it should be noted that the Lloyds TSB Foundation has applied this approach explicitly to campaigning organisations (although many funders will not fund campaigning work, as considered in Section 2.2.2.2 above).

An Impact Assessment of the Programme published in January 2005 concluded very clearly that:[742] "the Foundation should continue to promote collaborative

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[741] C. Rochester, & Z. Woods, *Making a Difference Together' Impact Assessment: The Lloyds TSB Foundation for England and Wales*, Collaborative Grant-Making Programme, Lloyds TSB Foundation (2005), p.1.

[742] *Op. cit.*, p.26.

working between voluntary sector organisations through a dedicated grant-making programme".

It should be noted, though, that the "considerably larger amounts of funding"[743] required by such programmes, as well as the "commitment of staff time to assist the development of proposals and provide continuing support to successful applicants"[744] denotes a high level of involvement by funders. This may lead to similar issues of pressure and independence arising as those experienced by government-funded organisations.[745] This advantage, however, is of limited application to collaboration in the context of campaigning, given the difficulties, discussed above,[746] in obtaining external funding for campaigning work.

3.2.2 Reasons for avoiding coalitions, disadvantages and problems

Whilst a number of advantages of campaigning coalitions have been considered above, the charities in the empirical study also experienced a number of disadvantages and negative outcomes, which they felt made them likely to avoid coalitions in particular circumstances in the future. Disadvantages included issues relating to control over reputation, and a range of cultural and procedural problems which can exist either between organisations or between individuals.

3.2.2.1 Risk to reputation

Whilst campaigning through coalitions was identified in the last section as being a method of safeguarding reputation, the empirical study revealed that coalition working can also lead to loss of control over the direction of the campaign[747] and thus an increase in negative publicity, particularly if the coalition is broad-based. One small local charity identified minor damage to its reputation incurred through its participation in a campaigning coalition which was based on issues which were broader than the charity's own campaigning interests:

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[743] *Op. cit.*, p.3.

[744] *Loc. cit.*

[745] See Section 2.2.3.1 above.

[746] At Section 2.2.2.2.

[747] Or over the tactics used: see Chapter Three, Section 3.1.

... there'd been a big debate about [issue] and we were very keen when the [issue] Bill was first published that the government take [issue] seriously and give them some sort of status in law, and we were very keen on that because it's got very great implications ... and we felt we'd got a mandate to do that by our members. Now the collateral damage that we incurred, was because also within the [issue] Bill there were all sorts of references to [separate (controversial) issue] and there was a strong lobby against that particular bit of the Bill. Now we didn't take a position on that at all, but we got caught in the crossfire, because there were very strong views expressed by [separate issue opponents] that anyone who supported the Bill was actually [very negatively viewed and morally controversial], so we got our fingers burnt a little on that. I mean it was, for me, personally, it was more of a nuisance value having to open and read sort of 'Irate of Leamington Spa', because they had a very big letter-writing campaign - it increased our postbag for a bit (Charity B).

In terms of the impact on Charity B's future collaborative campaigning decisions, the representative stated that:

> *We're going to be a bit more careful about signing up to things. I mean, one of the reasons that we got the letters, was that we actually signed up to be an associate member of the [Coalition 1]. By the time we were thinking about signing up to the [Coalition 2], we knew better than to sign up as an associate member* (Charity B).

The issue of the potential for both increased and decreased risk to reputation inherent in collaborative working will be discussed further in Chapter Six.

3.2.2.2 Culture and procedure

Cultural and procedural issues within coalitions were by far the most problematic factors experienced by the charities in the empirical study. Problems for charities in the study ranged from difficulties with group working in general, to differences in

ethos of partner organisations, to issues stemming from the varying sizes of partners. These are considered in turn.

Group working

One specific aspect of this problem was that working with groups of people can be problematic in itself, particularly if the groups are large:

> *The question is who to work with and how many partners. The difficulty with that is that you could end up with a vast number of people who all you ever agree is the lowest common denominator, so you end up with either something you can agree on, or lots of things you debate and debate and debate and cannot agree on, or you can't prioritise and you have an ideological or philosophical difference. So a lot of energy is spent in collaborating* (Charity G).

> *... we tried to work in collaboration with [large charity] and we got to the stage where the high level, the Chief Executive wanted to work and could see the benefit of it, but unfortunately the person in post of that department felt that Charity L were a threat because although they're not delivering the service they didn't want to see Charity L do it because of history which went back five years ago. That made me very cross because then that was all about that person ... That was all about the person, and that was nothing to do with the benefit of the [beneficiaries]* (Charity L).

> *... if they had different objectives to us, different methods that didn't suit the culture of our organisation, if they didn't recognise ...you know they called it a coalition but really they weren't recognising other people's contributions, and we've had experience of that, but we've changed that coalition so that it does now recognise contributions* (Charity E).

This potential problem had translated into actual negative experience for some charities:

...the last thing you want to do is put energy into working with people who don't deliver, and you know that only has to happen to you once or twice and it makes you think very hard about working with them again because we're all quite busy really and there's lots to do and you don't want to be wasting your time ... on the whole, good collaborative working depends on acknowledging the fact that organisations do have their individual priorities and working with them, rather than if you try to pretend they're not there you very quickly run into trouble, so it's about being quite pragmatic really.(Charity F).

This can be particularly difficult where the coalition is international:

I hadn't realised, I thought that we would just have language difficulties, I didn't realise that different countries had such completely different approaches to meetings and agendas and minutes and just sort of procedures in general, just the kind of culture idea of how to work together, and the applications for funding can be terribly detailed and complicated, and working through that stuff when we don't get to meet that often and consider it with an amount of leisure and examine it in detail, and it's always thrown at me in the last minute, you know, we need it by tomorrow, so if you spot anything or if you query it then you're holding up the whole business and it's got to be in on time, so it's nightmarish (Charity D).

A particular problem with working in larger groups is that it can slow down decision-making and actions:

sometimes it feels like it's a bit slow because you've got to get agreements from lots of different people ... I get hassle from our marketing and campaigning people who want to try to get on and do things and have to wait for other people (Charity H).

They're going with the problem and they're raising the issue, but they're not actually backing it up with a solution. And that's what makes me cross, with

a lot of the groups, whether it be campaigning groups or whatever, they're just talking shops and they will sit there and will talk about the same things that have been going on for 25, 50, a hundred years (Charity L).

One disadvantage is that the need to consult with partners can slow you down a lot. Yet going ahead without consulting can lead to complaints (Charity N).

Ethos and attitudes

Sections 2.2.1.4 and 2.2.2.2 above considered conservatism in the attitudes of charity trustees and funding bodies respectively. However, conservatism can also be an issue which pervades the ethos of a whole organisation, and can have implications for a charity's collaborative working arrangements. In particular, the inherent conservatism of some charities within coalitions can be an issue of concern for less conservative partners:

I think it [political activity law] sometimes gets mobilised internally in organisations as a way of saying you can't do certain things, but that's not to do with reality, it's to do with organisational conservatism (Charity A).

I suppose some organisations are a bit more conservative, and probably as a sector we're probably a bit conservative, but even within that frame some are a bit more proactive than others (Charity H).

Some members want to be more aggressive than others (Charity M).

Even the ones we like, sometimes they're too big, or they're ideologically too right wing and we're more left wing (Charity G).

There are always fault lines in campaigning. Many southern- based NGOs have a much more radical agenda and different style of politics so there are all sorts of negotiations behind coalition and consensus building (Charity O).

One charity would not work with particular types of organisation:

> *Direct action organisations. Overtly political or politically affiliated organisations can be problematic although we have campaigned successfully with trade unions* (Charity O).

One charity felt that it was important for charities to accept the differences in each charity's "character", and that many in the sector operated with this in mind:

> *I guess the way I would see it charities have different characters so when you go to a new charity as a campaigner or a policy officer or whatever, you have to kind of learn the character of your charity, you have to learn the kind of person they are, and they are people that do different sorts of things, I think everyone in the sector knows that, so it doesn't feel difficult in the consortium, because everyone knows that [charity] is this kind of person or [charity] is that kind of person, and something like [charity] is, you know, far more politically active* ... (Charity A).

One charity acknowledged that in the past, its style of operation was to be more conservative, but that this was changing:

> *... it wasn't because they felt that we shouldn't do it but it was more that we're the sort of organization that can reach a negotiated agreement about things, and I suppose they've seen that that's actually not worked over the years, so they're getting more angry about it* ... (Charity H).

As well as affecting attitudes to campaigning,[748] trustee conservatism can affect approaches to collaborative working. However, there was evidence that this too was changing:

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[748] As considered in Section 2.2.1.4 above.

I think really it's a new way of thinking. And it's just like anything, I mean your way of thinking, your generation's way of thinking will be totally different to my generation's way of thinking. And when you've got organisations like the big bourgeoisie [several organisations] ... [many people might have been there for a long time] until you start getting in the young blood and the newer way of thinking ... [but things might start changing] because they've got a new Chief Executive at [several organisations] ... the person at [charity] and myself want to work in collaboration and all of a sudden, it's there, but this is the difficulty the Chief Executive at [charity] and the Chief Executive at [charity] have got middle management you can't do that, we've never done that before, we've always done it this way. And how do you change the thinking? (Charity L).

Some charities felt able to mitigate the problems in collaborative working caused by these differences in approach to both campaigning and to collaboration through cultivating strong relationships and by strategic choice of partners:

... it is the personal relationships in the end that make it all flow together. Particularly when things start to go a bit pear-shaped, that's when if you've got a good strong relationship, then you'll be ok ... it requires quite high levels of trust, and you pretty soon work out in our game who you can trust and who you can't, really. It's also fair to say that in our sector some organisations have better reputations for partnership working than others, I wouldn't like to name names, but we are on the whole seen as quite good guys, but there are definitely some others that are ... On the whole it is, more marketing-led organisations (Charity F).

One charity which led a coalition said that specific plans were put in place to achieve a consensus between conservative and radical organisations:

... the coalition [was] partly funded and partly led by quite conservative organisations like [charity] and [charity], their approach is to try and meet

the mainstream, but it was bringing in the more radical ones as well, and everyone really trying to work together (Charity K).

Size

The relative size of coalition partners was the biggest issue in causing cultural and procedural problems. As discussed earlier,[749] some charities perceived an advantage in supporting campaigns without high levels of financial input. However, some larger coalition partners perceived this practice differently, feeling that smaller charities were sometimes getting a "free ride":

it feels like the smaller players are getting advantages but without putting so much in, really, but overall I think it's had much more impact to do it that way (Charity H).

A more widely perceived problem was the potential for unilateral or dominating action by larger partners in large/small coalitions. As well as removing control of the campaign direction from the less powerful partners, monopolization of media profiles surrounding campaigns can significantly affect the latter's fundraising opportunities:

I think the reasons for not going into them ... the main one is about profile, and a charity's ability to fundraise is very important. The unrestricted funds are much more important to a charity than the bulk of its funding, and your unrestricted funds are dependent on your profile, and the more that you do things in partnership with other agencies, the less you get in terms of that and also it becomes dependent upon who spends most money on advertising. In the children's sector, Charity A and [other charity 1] are each easily twice the size of [other charity 2] in terms of the number of services, but [other charity 2] spends an enormous, enormously greater amount on advertising and awareness, this kind of thing, so if you collaborate with

[749] Section 3.2.1.3.

[other charity 2] people will only see the [other charity 2] bit ... (Charity A).

... [large charity] obviously has got a lot of expertise, it's got parliamentary campaigners, it's based in London, it's got more resources if it wants to use them, it will do so sometimes unilaterally, and I wish they would let us know about that, and partly because obviously one way they use them for campaigning is to raise awareness of their organisation and their services and their funding needs, so they don't always take care to brand things as part of the campaign when it's in their interests to make it more predominantly [large charity] (Charity H).

Where I struggle with that is with my fundraising, if we want to go out and seek funds, then people will view it as being a [large charity] campaign and not necessarily an alliance, and I think that was the biggest biggest disadvantage. And we are in the [other coalition] and that's another initiative that I'm working on, but there we've got equal, we are a consortium, and we are working, there isn't one name at the beginning of the document, it is all the agencies involved (Charity L).

They would be far more effective if we could focus on the very thing that we're all here for, but unfortunately as I say it's all related around money, you've got [large charity 1] whose turnover and income exceeds ... and [large charity 2], I mean we're looking at 1.4, I can't remember what their income is, but it's a lot larger than ours, so they have got big budgets that they've got to be funding, but what does upset me is when you see the reserves that [large charity 2] have got in particular, and you think hang on a minute, all these people still out there, and that's when I begin to question well what is this all about, is it genuinely helping the user groups or is this for your own [purposes] (Charity L).

... there's always a problem in the sector because our sector is dominated by the five biggest agencies, which account for approximately half of the

Charity K membership income and expenditure, so there is a division between the very big agencies, the super-club; the kind of biggish ones, and then kind of all the medium sized and small ones, and within the Charity K membership there's an ongoing quite creative tension, and we have a small members' group that tries to advocate for smaller agencies, and general funders wanting to fund fewer and larger grants to big agencies, so that's generally a problem (Charity K).

Where coalition partners are similar in size, there can be competition for profile:

> *The second thing which is [also relevant to campaigning] is the whole issue of media profile, who's name will it be, because it's an indirect way of marketing, there's a lot of which celebrity do you get in, who the celebrity speaks on behalf of* (Charity G).

> *Again it's different for different things, I mean for a change of legislation I think the broad-based coalition is the way to go, in terms of public awareness collaboration can be quite difficult if you have similar charities vying for space if you like, holding their best stories back because they don't want to waste it on collaborative activity, you know slightly undermining the process as well as helping the process* .... (Charity E).

> *... we compete in terms of influence really, and we compete in terms of brand, so in a sense Charity E finds it very congenial on the whole to work in collaboration with other organisations [because its not very] precious about its brand because although we're an enormous organisation and a huge service provider we have a very little known brand in the public domain it's much harder really for the [large charity 1] and [large charity 2], because they're much more precious about their brands, and frankly they're much harder to work with collaboratively, because you know it's much more an important part of what they do and how they do it, they have their ..... they just get out of control with it. And therefore sometimes the best collaborations are the ones between charitable organisations which*

aren't quite so similar, so for example we might do something jointly with a think tank, we might do it with a very specialist charity that's really well known for one thing, if [large charity 2] and Charity E were to work together that's much harder because really there's not a lot between us, we're quite similar really, and that's where you can get those sorts of pressures and tensions (Charity E).

Coalitions between similar-sized charities can also create competition over campaign issues:

> *... a tension that I should have mentioned is the turf wars over issues, so for example in our world some organisations see themselves as very much being in the [middle] of a particular issue and therefore if they bring out a report on that, which pays no attention to what we were doing, we might be a bit fed up about that, and that can be a tension, so it's likely to be those sorts of there might be some sort of squabble and turf wars things like that, but they're not those sorts of tensions because you just know from the start whether it's worth working with somebody or not, and the fact that this is absolutely the bread and butter of how we work, we're working with these other people and other organisations all the time* (Charity F).

However, one charity identified that this can be reduced by increasing the size of the coalition:

> *What we have done with one of our collaborative projects is broaden the base of it, even wider, it used to be just the [issue] charities and we've broadened it now so that it involves nine charities and actually that reduced the competition. So a large coalition reduces the competition* (Charity E).

Overall impact of above problems: a qualification

One charity, whilst identifying all of the above, emphasised that it was not actually a disadvantage, and could actually be advantageous:

I don't think there's anything that I would describe as a disadvantage, there are the irritations that you get with any sort of joint working with a bunch of other people, and you can't all do exactly what you want, and there are also difficulties sometimes when there are large organisations and very small organisations working together because the very large organisations quite reasonably feel that as they're providing all the funding and all the office time and .... And then the small agencies say 'wait a minute I didn't get to agree the text of that release', you know you can see that there might be problems like that. Small agencies feel that big agencies want it all their way, and the big agencies are thinking well we are actually funding it as well, so those are the main procedural difficulties, I wouldn't say that they were in any way anything other than minor difficulties. There's a feeling of being dragged in the wake a bit sometimes, but I wouldn't put it as any more than that, on the other hand without having those resources you can't really do anything other than being dragged in the wake and there are advantages sometimes to being carried along in something which someone who's better resourced is able to do. So I wouldn't want that to be down in any way as a disadvantage, it's just the way it goes (Charity D).

All of the charity representatives who identified these issues also said that the disadvantages did not prevent collaboration from being beneficial, and that the advantages outweighed the disadvantages:

But I think we're by and large solving it, and if I said to you is it all solved no; is it better - yes, in my seven years, and I think everybody knows that it works (Charity G).

However, it should be reiterated that, as discussed in Chapter One,[750] the charities interviewed in this study were all active in campaigning coalitions, and the results are therefore skewed in favour of those that felt campaigning coalitions were

[750] Section 3.0.

beneficial. It is likely that many charities which chose to campaign as sole agencies would feel that coalitions were more problematic than advantageous.

Charity K also pointed out that the organic growth of the organisation and its aims and credibility had considerably helped its members to work together effectively:

> *Charity K has evolved like any organisation, but as a network made up of members. Advocacy is not the issue we did at first, we technically set up in order to basically share funding information because that's what people network for probably first and foremost, and then gradually we took on learning and training stuff, and then in the end we started doing corrective advocacy, and at first, only very carefully on issues that our members could cope with and generally, historically, our members haven't wanted us to advocate collectively on their behalf and we've gradually moved to the point where we can and that was to be predicted from the bigger members, the big agencies, they wouldn't want to subsume their own name within a common network, whereas now they would, they see the value of collective work, and also overall the more kind of conservative operating environment, you know. Ten years ago was a lot more conservative in terms of organisations wanting to sort of really stand up and make a fuss and try and change government policy. Charity K's own political credibility has been built up gradually and slowly and now we're in a much stronger position to be able to say to our members come on let's work together collectively under a common banner and so on* (Charity K).

3.3 Summary of issues considered

Section 3.2 has considered a number of advantages and disadvantages to campaigning through coalitions. The advantages relate mostly to protection of reputation, and to increased efficiency, tactical advantages and impact. These are recognised by Government policy, as considered in Section 3.1. However, the disadvantages relate mostly to loss of control over publicity and thus reputation, and to a range of cultural and procedural problems, notably underpinned by differences in size and ethos of coalition partners. It is important, given the positive view of

collaboration displayed by Government policy, that these potential disadvantages are not ignored.

4.0 Conclusion

The remaining question to be addressed in this chapter is that of how the benefits and detractors of collaboration identified in Section 3.0 tend to alleviate or exacerbate the existing non-legal constraints on campaigning identified in Section 2.2.

Section 2.2.1.1 noted a pervading concern, emerging through the empirical data, over the implications of campaigning work for charities' reputations. It appears from the data discussed in Section 3.0 that collaboration was viewed as protection against damage to reputation (particularly where the campaign issue was considered to be "controversial"), At the same time, collaboration was viewed as having the potential to exacerbate risks to reputation, through loss of control by individual charities over publicity. This was a particular concern where the campaign issue involved was broadly framed, or where there were a large number of coalition partners.

Difficulties surrounding campaigning expertise of staff and trustees were identified in Section 2.2.1.2, and other practical resource allocation issues were identified in Section 2.2.1.3. The impact of trustees' attitudes on the allocation of resources to campaigning work was considered in Section 2.2.1.4. It appears from the data discussed in Section 3.0 that collaborative working can help to counter resource difficulties. This occurred both through the efficiency gained from pooling resources, and potentially through the increased effectiveness gained because of tactical and impact advantages. Nevertheless, the cultural and procedural problems inherent in collaborative working practices may negate these advantages – in particular, the slowness and inefficiency of making decisions in large groups may counteract any efficiency gained through pooling resources.

Section 2.2.2.1 identified that a charity's campaigning activities can be affected by the direction taken by other charities working in the same field, and that such a charity has the option to either duplicate and thus compete over campaigning direction, to avoid a particular campaign issue, or to attempt to work collaboratively. Section 3.0 identified the advantages for smaller charities of participating in campaigns led by larger partners. These included financial savings, opportunities to learn, and overall better relations between agencies. However, Section 3.0 conversely identified that such small charities can also feel dominated by their larger partners, and that animosity can be created by larger partners feeling that smaller charities are getting a "free ride". It also identified that even where charities enter collaborative arrangements, the element of competition is not necessarily eradicated, and competition for public profile can exist even within coalitions.

Section 2.2.2.2 considered the difficulties in acquiring external funding for campaigning activities, whilst Section 2.2.2.3 considered the difficulties in demonstrating the outcomes of campaigning work and the impact that reporting requirements may have on charities' willingness to initiate campaigning activity and on funders' attitudes towards it. Section 3.0 identified that collaborative working methods are increasingly popular with funders. It could be surmised that where funding bodies do not have an explicit stance on campaigning, but merely display a conservative approach towards it, a collaborative arrangement could counter this conservatism and encourage funding of campaigning work. However, the potential for this effect is negated where funding is sought from bodies (such as many government departments and major grant-making foundations) which explicitly exclude funding for campaigning.

As illustrated by the previous four paragraphs, the advantages and disadvantages of collaboration tend to balance and negate one another, making it difficult to draw conclusions as to their overall effect. This need to balance positive and negative factors is reflected in Charity Commission guidance CC9. On the subject of

campaigning alliances, the guidance states that, among other things, charities wishing to participate in such alliances should consider whether:[751]

> "... the risks of participating are outweighed by the benefits. In particular, if some of the political activities that an alliance is engaging in do not fit with a charity's own charitable purposes, the charity will need to consider how best to manage any risks to its reputation, and its work".

Given that the non-legal difficulties discussed in this chapter are relevant to the (often legally required) process of risk management, it is arguable that Commission guidance on campaigning should explore them in at least some depth as part of its legal and regulatory remit, and should shed some light on how charities should fit these non-legal "risks" and "benefits" into any formal analysis undertaken.

Whilst CC9 does tend to reflect charities' concerns over reputation, the focus of CC9 is on a charity's initial decision as to whether campaigning is the best method of achieving its objects. However, many of the barriers to campaigning identified in the empirical study take effect after this decision has been made. Even where a charity's trustees have carefully made the decision that campaigning is the best way of achieving the charity's objects in the circumstances, barriers such as those relating to funding and pressure not to dissent may prevent it putting its chosen methods into practice. In conclusion, therefore, the Commission's focus on making the initial decision as to best use of resources means that most of the problems faced in practice does not fit easily with its analysis. This problem is exacerbated by the fact that some of the problems experienced (such as perceived or real pressure from funders) are unlikely to be acknowledged in the guidance, given that their existence is disputed.

To summarize, the lack of attention paid to practical difficulties in CC9 and the unquantifiable (and sometimes disputed) nature of the difficulties discussed means that the usefulness of the guidance and the process of risk management it prescribes

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[751] Para.44.

may be somewhat negated for charities in practice. The Commission's focus on risk management is considered in more detail in Chapter Six.

With regard to the underlying causes of many of the difficulties considered throughout this chapter, the major theme of "bias" against campaigning has continued to underpin the findings, as it has in previous chapters. The favouring of service delivery by several of the study participants is explicable partly through the legal restrictions on campaigning,[752] but also partly through this perceived "bias"; a phenomenon which is viewed as pervading charities themselves, funders, government and regulators. It is difficult to separate the causes and effects of these perceptions, and to distinguish the effects of perceived bias from the effects of actual bias. This pervading theme will be considered further in Chapter Seven.

CHAPTER SIX: RISK MANAGEMENT

1.0 Introduction

Chapters Two to Five have considered, through a number of study propositions, the uncertainties and barriers faced by charities undertaking collaborative campaigning. They have explored problems stemming from the complex law relating to charities and politics, broader law and regulation and various non-legal influences. A recurring theme within these chapters has been the Charity Commission's emphasis on risk management as a means of addressing the issues faced and the potential problems this approach entails.

The remaining study propositions explored in this chapter build upon this finding, and consider the use of the risk management process in addressing the variety of problems faced in campaigning and collaborative campaigning. The study propositions considered here are:

14. The Charity Commission has increasingly taken a "risk-based" approach to regulation. This has given rise to an emphasis within Commission guidance on risk management. The Commission views both campaigning work and collaborative working as carrying particular risks which need to be identified and managed. These "risks" may or may not equate to the uncertainties and problems involved in these activities as perceived by charities themselves.

15. The process of risk management is not sufficiently sophisticated to cope with the complex combinations of legal, regulatory and practical issues (both positive and negative) and the "risks" experienced by charities undertaking collaborative campaigning work. Thus, Charity Commission guidance is not entirely effective in enabling informed decision-making on the legal and other implications of this work.

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[752] Considered in Chapters Two and Three.

Section 2.0 explores the context to the Commission's risk-based approach. Section 2.1 considers the general policy drivers for the risk-based approach to regulation and how this has been applied to the voluntary sector. Section 2.2 considers the specific legal and regulatory requirements for risk management by charities.

Section 3.0 considers Study Proposition 14 through analysis of Commission guidance and through empirical study data. Section 3.1 provides a brief overview of general Charity Commission guidance on risk management. Sections 3.2 and 3.3 respectively consider campaigning and collaboration, comparing the Charity Commission's risk-based approach with study participants' perceptions of the problems and "risks" they face in these activities. Section 3.4 summarizes these findings.

Section 4.0 considers Study Proposition 15 through analysis of Commission guidance and through the empirical study data. Section 4.1 explores and criticises the Charity Commission's explanation of the risk management process. Section 4.2 compares the Commission's explanation to study participants' perceptions of the process. Section 4.3 summarizes these findings.

Section 5.0 concludes the chapter by summarizing the discussions in the preceding sections and addressing in more detail the main criticisms of the Commission's approach which emerge from the chapter.

2.0 The policy background to the Charity Commission's risk-based approach to regulation

As identified in Section 1.0, this section considers the policy background of the Charity Commission's risk-based approach and gives a brief overview of legal requirements for risk management. As this is a contextual discussion rather than the main focus of the chapter (or thesis), it does not engage in discussion of regulatory theory or detailed analysis of relevant legislation.

2.1 Policy drivers of the risk-based approach

The concept of risk-based regulation is rooted in the deregulatory moves which emerged in government in the 1980s and 1990s. Throughout the 1990s, deregulatory moves (such as the Deregulation and Contracting Out Act 1994 and the creation of the Deregulation Task Office) were accompanied by new management styles within government. These were influenced heavily by private sector management practices, and the adoption of aspects of several corporate governance codes, particularly the Turnbull Report of 1999,[753] introduced the concept of risk management.[754]

The establishment of the Better Regulation Task Force[755] in 1997 marked an increased emphasis on better, rather than necessarily less, regulation, and with this shift the trend towards risk management policies also developed further. This was seen particularly in the 1999 government White Paper *Modernizing Government*,[756] and in the 2002 Cabinet Office Strategy Unit Report *Risk: Improving Government's capability to handle risk and uncertainty*.[757]

The Hampton Review, commissioned in Budget 2004, published its final report, *Reducing administrative burdens: effective inspection and enforcement*,[758] on Budget Day in March 2005. The review covered the inspection and enforcement work of numerous national regulators, standards offices and environmental health offices in England, Scotland and Wales, and considered how to reduce administrative burdens on businesses without compromising effective regulation. The major proposal of the review was the entrenchment of the principles of risk assessment across the regulatory system, which would result in the burden of

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[753] Institute of Chartered Accountants in England and Wales *Internal Control: Guidance for the Directors of Listed Companies Incorporated in the United Kingdom*, (1999).

[754] For a more detailed discussion of the emergence of risk-based regulation, see, for example, B.M. Hutter, *The Attractions of Risk-based Regulation: accounting for the emergence of risk ideas in regulation*, ESRC Centre for Analysis of Risk and Regulation (LSE) (2005).

[755] Now defunct.

[756] Cabinet Office, TSO (1999).

[757] Cabinet Office, TSO (2002).

[758] HM Treasury, TSO (2005).

enforcement being carried by those organisations presenting the highest risks, and low regulation becoming a reward for those with a record of compliance.

Following the publication of the Better Regulation Task Force (BRTF) report *Regulation – Less is More*,[759] also on Budget Day 2005, the Better Regulation Executive (BRE)[760] was established to take forward the Government's better regulation agenda and implement the recommendations of the Hampton Review and the BRTF report. The creation of an independent advisory body, the Better Regulation Commission (BRC),[761] was also announced in the Budget, with a remit to advise government about its regulatory performance and about new regulatory proposals. It also continued the BRTF's role of researching and publishing studies of particular regulatory issues.

Of relevance to the present context is the BRTF report *Better Regulation for Civil Society*.[762] This report warned that excessive administrative burdens were hampering the sector, and made various recommendations, particularly relating to VAT, Charity Commission guidance, and the burdens of quasi-regulation such as contract funding. The report's recommendations were taken forward by the BRE. The Office of the Third Sector has published a response to the civil society report[763] which incorporates Charity Commission responses to the report's recommendations. It also refers to the Charity Commission's proposed simplification plan, which was intended to outline proposals for reducing burdens within the regulatory framework.[764]

A major development in the area of risk-based regulation is the Legislative and Regulatory Reform Act 2006, which contains powers to enable the Hampton Review principles to be implemented through a statutory Regulator's Compliance

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[759] BRTF, TSO (2005). Now available at www.brc.gov.uk/publications/lessismoreentry.aspx [05/07/07].

[760] www.betterregulation.gov.uk.

[761] www.brc.gov.uk.

[762] BRTF, TSO (2005). Now available from www.brc.gov.uk/publications/betregforcivil.aspx [05/07/07].

[763] Cabinet Office (Office of the Third Sector), *'Better Regulation for Civil Society'. The Government's Response*, TSO (2006).

[764] This document was later published as planned: Charity Commission, *Simplification Plan*, TSO (2006).

Code. The Government response to the Hampton Review, *Implementing Hampton: From Enforcement to Compliance*[765] states that[766] the draft Regulator's Compliance code will be consulted on in 2007, enacted in Autumn 2007, and in force by 1 April 2008. The code will mean that regulators such as the Charity Commission will be obliged to have regard to the Hampton principles. The potential implications for collaborative campaigning by charities of this entrenchment of risk-based regulation in Commission practice are considered further in Chapter Seven.[767]

2.2 Legal and regulatory requirements

The Charities (Accounts and Reports) Regulations 2000[768] placed an obligation on trustees of charities with a gross income of over £250,000 to include in their Annual Report a statement regarding whether the charity trustees have given consideration to the major risks to which the charity is exposed and systems designed to mitigate that risk. The *Accounting and Reporting by Charities – Statement of Recommended Practice* (SORP) 2000[769] incorporated this obligation by introducing a requirement that the trustees' Annual Report must contain a statement confirming that:[770]

> "the major risks to which the charity is exposed, as identified by the trustees, have been reviewed and systems have been established to mitigate those risks".

The revised *Statement of Recommended Practice*, SORP 2005,[771] incorporated the requirements of the Charities (Accounts and Reports) Regulations 2005.[772] It applies to charity accounts with an accounting period beginning on or after 1st April 2005. SORP 2005 makes only minor changes to the wording of the SORP 2000 risk

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[765] HM Treasury, TSO (2006).

[766] *Op. cit.*, p.2.

[767] Section 3.5.

[768] SI 2000/2868, revoked by SI 2005/572, reg.13.

[769] Charity Commission, (2000).

[770] *Op. cit.*, para.31(g).

[771] Charity Commission, *Accounting and Reporting by Charities: Statement of Recommended Practice 2005*, TSO (2005).

[772] SI 2005/572.

statement requirement.[773] However, Paragraph 46 of SORP 2005 introduces an exemption from this and several other disclosure requirements for charities with gross income under the audit threshold. Nevertheless, it states that: "the additional disclosures of this section are encouraged as a matter of good practice". This makes risk management relevant to many more charities than those over the audit threshold.

Whilst charities can develop their own tools for risk management, or use externally sourced models, the Charity Commission produced detailed guidance on the subject in 2001.[774] This guidance - and the many references to the process made throughout its other guidance publications - reflects the importance afforded to the process by the Commission. Any charity wishing to operate within the Commission's guidance cannot therefore ignore the need to identify, assess and plan for the risks it faces.

3.0 The Charity Commission's and charities' perceptions of the risks of campaigning and collaboration: a comparison

This section considers both relevant Charity Commission guidance and data from the empirical study. As in previous chapters, the empirical data is based upon operational research areas which translate the exploratory research propositions into concrete categories of data, capable of forming the basis of specific interview questions.[775] The empirical data used in this section is based on the following operational research area:

h) Charities' perceptions of the "risks" involved in collaborative campaigning and their perceptions of the "risks" identified in Charity Commission guidance.

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[773] It is now contained in para.45, and reads: "...systems or *procedures* have been established to *manage* those risks".

[774] Charity Commission, *Charities and Risk Management*, (2001). This guidance is not part of the Commission's official guidance (and contains no paragraph or page numbers). It is available from www.charitycommission.gov.uk/investigations/charrisk.asp#1 [09/07/07].

[775] See Chapter One, Section 3.0.

3.1 The Charity Commission and risk management: generally

The purpose of the Commission's risk management guidance is to:[776]

> "help trustees set a framework which allows them to: identify the major risks that apply to their charity; make decisions about how to respond to the risks they face; and make an appropriate statement regarding risk management in the Annual Report".

In fulfilling this purpose, the guidance explores its interpretation of the concept of risk (as applied to charities) and suggests various strategies for assessing and managing such risk. These areas will be looked at in turn.

3.1.1 The concept of risk

The risk management guidance defines "risk" as:[777]

> "... the uncertainty surrounding events and their outcomes that may have a significant effect, either enhancing or inhibiting: operational performance; achievement of aims and objectives; or meeting expectations of stakeholders".

The guidance defines the "major risks" which must be identified under SORP as:[778]

> "... those risks which have a high likelihood of occurring and would, if they occurred, have a severe impact on operational performance, achievement of aims and objectives, or could damage the reputation of the charity, changing the way trustees, supporters or beneficiaries might deal with the charity".

Somewhat confusingly, the guidance contains separate sections on the "sorts" of risks that need to be considered and the "types" of risk that charities face. The

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[776] Charity Commission, *Charities and Risk Management*, (2001), 'Purpose and scope of this guidance'.

[777] *Op. cit.*, 'Introduction'.

[778] *Op. cit.*, 'Introduction'.

former section seems merely to re-iterate the definition of "major risks" and to outline the structure of the guidance. The section on "types" of risk does, however, contain more concrete information. It provides "one possible classification system" for risk, qualifying its statement with an acknowledgement that given the diversity of the sector and its activities, such a list can never be complete. The "key" areas it identifies are governance risks; operational risks; financial risks; external risks; and compliance with law and regulation.[779] Appendix III to the guidance expands on this classification, giving examples of risks that may fall under each category.

3.1.2 Strategies for assessing and managing risk

The majority of the guidance focuses on the *process* of risk management. As well as outlining the role of trustees in the process, it identifies the "core" elements of a risk management process common to the different models of risk management available. These core elements are:[780]

> "- Establishing risk policy
> - Identifying risks and controls
> - Assessing risk
> - Evaluating what action needs to be taken
> - Periodic monitoring and assessment".

The remainder of the guidance elaborates on the considerations to be made in each of the key areas identified. It also provides several appendices, which helpfully outline the reporting of risk management in the Trustees' Annual Report, provide an example format of a risk register, and, as mentioned above, give examples of potential risk areas and their possible impact and mitigation.

The application of the principles outlined above to the specific contexts of campaigning and collaborative working are considered next.

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[779] *Op. cit.*, 'What types of risk to charities face?'.

[780] *Op. cit.*, 'A process for identifying and managing risk'.

3.2 Risk management and campaigning

3.2.1 The Charity Commission's view

The Commission's guidance on campaigning[781] emphasizes two particular areas of risk for charities that campaign. These are "achievement of objects" and "reputation".[782]

Paragraph 29 of CC9 elaborates on the risk to "achievement of objects":

> "A charity cannot campaign on an issue which is unrelated to its purposes, even if the trustees or beneficiaries may regard the issue as interesting or important".

This raises the question of what should be considered as "related" to a charity's purposes. Given the increasingly interrelated nature of many issues,[783] trustees may feel that a particular campaign contributes to the furtherance of their objects either in the long term or as part of a broad perspective. Such activity could, however, be construed as legally outside of their purposes.

Paragraph 30 of CC9 elaborates on the risk to "reputation":[784]

> "Many types of campaigning and political activities could – if they are not properly managed – damage the charity's reputation, or compromise the charity's independence … An important part of managing risk will include the need to consider whether the charity is meeting good practice standards, for example meeting the ASA Code … Trustees will need to consider how the charity's campaigning or political activities will, or might, be perceived by the public and by their supporters and, if necessary, put in place arrangements to ensure that the charity's reputation is protected".

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[781] Charity Commission, *Campaigning and Political Activities by Charities*, (CC9) TSO (2004).

[782] *Op. cit.* (CC9), para.28.

[783] See Chapter Four, Section 4.3.

[784] The ASA (Advertising Standards Authority) Codes referred to in the extract are considered in Chapter Three, Section 2.3.2 of this thesis.

Several examples of particular "risks" falling broadly into the above two categories are referred to in the subsequent paragraphs of CC9. These include the potential risk to a charity's reputation from using emotive materials in campaigns,[785] and from participating in direct action events such as demonstrations and rallies,[786] which, given that they are not under the charity's control, carry the risk of damage to reputation through the actions of other participants.

3.2.2 Charities' perceptions and their relationships with Commission perceptions

3.2.2.1 Risk to reputation

Three charities in the study agreed with the Commission's perception that risk to reputation is highly significant in campaigning work. Charity G's view is illustrative of the views of all three participants:

> *... we cannot make a mistake, the one good thing a charity has its name and reputation, if you spoil that once, it takes a long time to recover. Something that happened 25 years ago, people still talk about in Charity G as if it happened last year, it was even wrong, when it happened and people reported it 25 years ago, they misunderstood what Charity G was doing, but the fact is, people still talk about it in the new generation. So I'm very keen, of course there'll always be people talking about us and against us, but it is very, very important, as long as it's publicly possible, to protect our image and name and reputation and we can't afford to make a mistake* (Charity G).

However, in contradiction to the views expressed above, the majority of charities in the study perceived risk to reputation as much less significant than the Charity Commission perceived it to be:

> *I think the thing is with political campaigning ... the problem with the Charity Commission ... is that its whole approach is based on risk analysis, it identifies campaigning and political campaigning as the biggest risk to an organisation's*

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[785] *Op. cit.*, para.37.

[786] *Op. cit.*, para.40.

credibility, but I don't see any reason why that should be the case. Campaigning and the loss of credibility of a failed campaign is just one risk among many, and there are much bigger issues that affect credibility ... I believe, yes, the Charity Commission does over-emphasize the risks of campaigning, and it's considered a risky activity and they consider it crazy and wrong to basically advocate politically to change the law (Charity K).

Charity K also felt that the risk to reputation was less significant than other risks:

> *... a lot of our risk stuff is based around I think our members taking part in our activities .... So if Charity K organises an event [which loses credibility] and we lose all our members, I think a lot of our risk is based about being a membership organisation, rather than our role in lobbying the government.*

The view that the risk to reputation inherent in campaigning is over-emphasized was supported by a more service-delivery oriented charity than Charity K. Charity A faced significant risks to its reputation, but largely not through its campaigning work:

> *To my knowledge, we do reputation risk management and there are in fact policies around reputation risk, and they can sometimes address campaigning issues, they can be used to address campaigning issues, but it's primarily used to address the fact that ... [beneficiaries] take us to court ... I think the sad truth is that you have to do something so unbelievably extreme to get any attention, never mind damage your reputation, it's just extraordinary, really, and I do think that is very different for a smaller charity, also because they're vulnerable, they're very, you know, their work is very exposed, but yes, for us, we've got six thousand staff and ten of them do campaigning* (Charity A).

Several charities expressed views on the reasons behind the Commission's perceptions. One large charity summarized a perceived level of preoccupation with risk to reputation:

The latest version is I think, still overly complex but is another huge leap in the Commission's approach. The Guidelines of the mid 1990s first acknowledged that charities could mobilise public opinion behind a campaign but set constraints on the approaches we could take. Prior to this latest version the Commission admitted that there was no legal basis for much of what had gone before but the guidance still shows a level of concern about campaigning and reputational risk. They are still concerned that bad campaigning will alienate public support and confidence in charities (Charity O).

Charity K took a more extreme stance, perceiving a bias against campaigning within the Charity Commission:

> *... my perspective on what the Charity Commission were saying when we approached them before COALITION 14, particularly we wanted them to help us draft some sort of guidance for organisations on joining the coalition and their worries about it being charitable and so on, and they said 'oh we can't possibly do that' ... and then they just winged at us about risk management, and I suspect that .... it's quite frothy opinions not always backed up - sure by the kind of language of risk analysis and financial safety -, but not by an actual body of law. So particularly in this conversation at one point it laid absolutely transparent and bare ... we were talking about [a public assembly] and they basically said 'well that's very dangerous, you've got to think about the risks, who's going to be responsible, what if someone dies?' And I said 'well, that's not the point, you know, we have freedom to associate in this country, people gather.' ... And they said: 'that march called by the REF 34, that was very well organised, that's the kind of thing we have in mind'. So ostensibly they viewed the REF 34 march by default in itself as being non-violent and good, and the COALITION 14 [event], although far less violent than the REF 34 one in the end, as bad and kind of aggressive, I mean it was just pure right wing prejudice* (Charity K).

3.2.2.2 Risk to achievement of objects

Whilst none of the charities in the study explicitly identified significant levels of risk to the achievement of their objects, a number of them identified such "risks" indirectly. As discussed in Chapter Four (Section 4.3), several charities identified campaigning coalition problems which related to their objects in a broad (or arguably tenuous) sense. As discussed in Chapter Five (Section 2.2.2.3), several charities had difficulties with reporting the impact of campaigning in relation to their objects. These problems equate, in effect, to risks both to reputation and to achievement of objects. The fact that the charities did not perceive these issues as "risks" raises questions, not about the reality of the issues faced, but about the conceptual framework of "risk" through which charities are being asked to interpret the issues.

3.2.3 The " risks" of campaigning work

Those charity representatives who shared the Commission's view that campaigning involves high levels of risk to reputation tended to be those who found the Commission's guidance useful and used it proactively. However, those who perceived that the level of risk is over-emphasized tended to be those who placed less weight on the Commission guidance. This raises a "chicken and egg" question: did those who took the guidance seriously identify high levels of risk to reputation *because* they used and accepted the views in the guidance, or did they use the guidance because they had previously identified such risk? The answer to this is unclear.

Whilst there was disagreement over the level of risk to reputation, many charities did agree that it was significant. There was a higher level of agreement over the level of risk to achievement of objects. Whilst the aims of campaigning, if achieved, can arguably have a greater impact than providing services in the same area, the time scale and likelihood of success is highly dependent on external factors, and is difficult to predict.

3.3 Risk management and collaborative working

3.3.1 Charity Commission perceptions

The Charity Commission's guidance *Collaborative Working and Mergers: An Introduction* (CC34)[787] contains several general references to the importance of risk management, and emphasises that trustees "should properly assess the likely risks as well as the potential benefits".[788]

CC34 also refers to a more specific application of the risk management principle. As discussed in Chapter Four,[789] the focus on risk appears to result in the Commission favouring formal (rather than informal) collaboration arrangements, stating that it is "important to have clear formal agreements proportionate to the potential risks".[790] Whilst the guidance does acknowledge that "informal collaboration will usually be more appropriate where the collaboration involves low risk activities",[791] it confirms the Commission's viewpoint by continuing:

> "Formal arrangements enable charity trustees to better identify and manage risks. Formal contracts may mitigate some risks, *mainly legal*, and if they are drawn up carefully they may also protect charities from risks to their assets and reputation" (emphasis added).

Not only does the guidance fail to specify what legal risks it is referring to, but it does not acknowledge that formal agreements create more legal liabilities, as discussed in Chapter Four (Section 5.4.2.1). An additional criticism is that the guidance appears to subsume legal compliance into the risk management framework. It is arguable that legal compliance should be a basic matter for clear guidance, not another risk to be mitigated along with numerous others. This will be discussed further in Section 5.0.

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[787] TSO (2006).

[788] *Op. cit.*, Section C3.

[789] Section 5.2.

[790] *Op. cit.*, Section C3.

[791] *Op. cit.*, Section C6.

3.3.2 Charities' perceptions and their relationships with Commission perceptions

In the empirical study, only Charity G identified specific risks faced in collaborative working:

> *So yes, there are lots of there are many reputational risks for us, there are risks for us in collaboration with somebody, not just in relief and development, but also in advocacy, because we collaborate in advocacy, and we got somebody ... they wrote a report which indirectly we funded, we funded them for their work, not for the report, and then they put on the report 'sponsored by Charity G' which was not [accurate], their work was sponsored by us. That report was against a company ... that company wanted to take us to court, wanted to attack us, and we unfortunately had to ... we had to be very strict with the charity, we said you know we gave you money for your work, we gave you money for the report, what about our name, and they had to look at the quality of the report ... it's incredibly difficult for us, we have to be very careful in authorship agreements ... if you do anything, how do you use our name* (Charity G).

Thus, with one exception, the empirical study participants failed to identify any legal risks for collaborative working. This appears to contradict the Commission's view of the potential risks inherent in the practice. It is unclear how far this failure to identify risks stemmed from the positive publicity given to collaborative working in recent years,[792] which may have led charities to focus on its benefits rather than its risks, and how far it stemmed from the participants' general lack of awareness and use of the risk management process, considered in Section 4.0 below.

Despite there only being one charity in the study which had identified specific risks of collaboration, it can be argued that the same "chicken and egg" question considered above could apply. For Charity G, it is notable that the particular risk of collaboration considered – a "legal risk" in Commission parlance - was identified

[792] See Chapter One, Section 1.0.

retrospectively following the threatened realisation of this risk. This may have been a contributory factor in the charity taking the process of risk management seriously.

3.4 Issues arising

The empirical study data was largely inconclusive with regards to Study Proposition 14. Participants were divided on their perceptions of the "risks" of campaigning and collaboration and opinions were often quite general.

A striking finding was the almost universal failure among study participants to identify any legal issues as risks. The one charity which did identify a legal risk had done so retrospectively, following threatened legal action for defamation. There was no evidence that the study participants perceived the potential legal consequences of some of their actions as "risks" to be mitigated through knowledge of the law and compliance with it. This finding is not surprising given the lack of awareness of relevant legal issues displayed by the study participants, as identified in Chapters Two to Five. This lack of legal awareness - and the contribution that the Commission's focus on risk management may have made to it - is considered further in Section 5.0 below.

4.0 Risk management: an appropriate tool?

This section considers both relevant Charity Commission guidance and data from the empirical study. As in previous chapters, the empirical data is based upon operational research areas which translate the exploratory research propositions into concrete categories of data, capable of forming the basis of specific interview questions.[793] The empirical data used in this section is based on the following operational research area:

i) Charities' views on the usefulness of the process of risk management in coping with the complex issues arising from collaborative campaigning discussed throughout the preceding chapters.

[793] See Chapter One, Section 3.0.

4.1 Campaigning and collaboration: the Charity Commission's view

CC9 briefly outlines the considerations a charity should make as part of its risk assessment regarding campaigning activity. These are:[794]

> "the benefits of engaging in a particular campaign; ways of approaching the campaign; the risks attached to the campaign, and how these might best be managed; the strategy for delivering the campaign; and, how best to evaluate the campaign's success and impact".

Whilst these considerations do not appear to fit directly into the risk assessment models contained in the Commission's separate risk management guidance, they may nevertheless be a useful approach to planning and assessing individual campaigns.

It is apparent that the Commission has made clear attempts to clarify the concept of risk and recommend strategies for its management (both generally and in the specific context of campaigning). Nevertheless, these attempts may be negated where complex working arrangements exist. Whilst such arrangements may make the process of risk management more problematic, the Commission does not give additional risk management guidance to trustees in such circumstances, stating merely that "trustees of large, complex charities may need to explore the risk more fully than the outline given here".[795]

Collaborative working is one example of how complex arrangements may cause problems and contradictions within the risk management process. In addition to the guidance given in CC34, the Commission's specific guidance on risk management states that:[796]

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[794] TSO (2004), para.35.

[795] Charity Commission, *Charities and Risk Management*, (2001), available from www.charitycommission.gov.uk/investigations/charrisk.asp [09/07/07].

[796] *Op cit.*

> "Where the charity conducts certain of its activities through branches, subsidiary companies or joint ventures, although legally these may constitute separate entities, they may also give rise to risks that may directly or indirectly impact on the charity".

However, it is notable that a later section of the risk management guidance which deals with how trustees should evaluate what action needs to be taken on risks, one of the possible actions suggested to mitigate the potential consequences of risks is:[797] "... the risk could be shared with others (e.g. a joint venture project)".

This advice seems to create a circular effect, in which collaborative working increases risk in one area, whilst simultaneously mitigating it in another. Determining the potential levels and types of risk and deciding which should take precedence in this situation appears to be a daunting task for trustees to undertake.

A further example of the contradictory effects of viewing complex collaborative arrangements through a risk management framework is the Commission's advice that the risks of collaborative working can be mitigated through the use of formal agreements. As discussed in Chapter Four, Commission guidance CC34 advises that:[798]

> "Formal contracts may mitigate some risks, mainly legal, and if they are drawn up carefully they may also protect charities from risks to their assets and reputation".

Apart from the conceptual criticism that the above approach subsumes legal issues into the risk management framework,[799] the approach fails to acknowledge that whilst formal agreements can indeed mitigate some types of risk, they can also create others. In particular, they can create the potential contractual liabilities

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[797] *Op cit.*

[798] *Op cit.*, Section C6.

[799] Discussed in Section 5.0 below.

discussed in Chapter Four, of which many charities in the study were unaware. Further a less quantifiable risk which may be caused by formal agreements is risk to achievement of objects. This is because rigidly defined campaigning agreements may result in the loss of vital campaigning flexibility.

The above complexities may be exacerbated by the existence of both advantages and disadvantages of collaboration in campaigning. As concluded in Chapter Five, these advantages and disadvantages may balance one another. In the case of cultural and procedural issues, the problems experienced may be balanced against the increased impact and other advantages of group working. In the case of reputation protection, one of the major concerns of many charities in the study, the advantages and disadvantages appear to be almost contradictory: the same working practice appears to have the potential to both shield a charity from negative publicity and, at the same time, to remove its control over its own reputation. Whilst the particular balance of positives and negatives will be different for every charity, placing the issue of reputation in a risk management framework may be confusing and problematic for charity trustees.

The process of risk management becomes even more complex – possibly prohibitively so - when several of the above factors are combined. Even if a charity manages to comply with the SORP requirements, fully engages with the process of risk assessment and produces a compliance statement, the process may not be enough to fulfil the wider purposes of the exercise. As the Commission's risk management guidance identifies:[800]

> "Risk management should therefore not be seen purely as a compliance issue or as being solely focused on the prevention of disaster. The process will enable trustees to focus on the mitigation of risks that would prevent the charity achieving its strategic objectives. In doing so, charities will be able to take opportunities and develop with an understanding of the risks faced,

[800] *Op cit.*

and with confidence that reasonable steps have been taken to mitigate them".

It is questionable whether the process of risk management is sufficient to provide campaigning charities with this confidence.

To conclude the above discussion, it is arguable that the risk-focused Commission guidance is not entirely effective in enabling informed and realistic decision-making by charities on their potential activities. However, the findings of the empirical study did not universally support the specific theoretical criticisms outlined above. The views of participants were split regarding the usefulness and appropriateness of the risk management process. The lack of awareness among study participants of the specific legal issues identified earlier had the result that the views expressed on this subject tended to be backed by general reasoning rather than the specific criticisms explored above.

4.2 Charities' views on the risk management process

Several charities had positive views of the risk management process. In particular, two charities had implemented it prior to it becoming compulsory, and had adapted existing models to their own requirements:

> *... partly we were aware that it was coming up anyway, but also we found it was a useful tool, because rather than just being challenged by our council on an ad hoc basis it was much better to look systematically and address issues and have plans in place, so it's part of the business planning package, really ... What we do is we have a tool based on a mixture of a Charity Commission and an ACEVO model of looking at risk so every month the directors came in, senior managers, we do the risk analysis and decide if anything's changed, if anything needs to be added or can come off, so at the moment I don't think there's anything particular about campaigning on it, I mean there could be, you know, next month things could change* (Charity H).

Risk management is now considered de rigueur and best practice within the corporate sector and has now filtered down into the third sector so it was a practice within the larger NGOs long before the Commission recommended it (Charity O).

One charity identified that it had found risk management to be a useful management tool:

It's great for the trustees. I mean there's a big document that sits behind it for senior staff but for trustees we know that if something's there they need to worry, and if we want to move these stars around, we have to ask their permission to do that, there has to be a board decision, and so last night, they got one, that was the earlier one, and I was moving some of the stars up .... it's a great tool, a great management tool ... ... it's absolutely integrated into our work, the senior management team do a very detailed annual risk matrix, we then report back to every finance and resources committee, we report back to every single board meeting and it goes to every single senior management team meeting (Charity E).

The point made by Charity E above illustrates the potential of the risk management process to alleviate some of the problems caused by trustee conservatism identified by some charities in the study.[801] Charity E's risk management matrix, referred to in the above extract, is contained in Appendix II of this thesis. Charity E's representative wished it to be noted that the matrix was merely a visual representation of a more detailed report:

... The thing to say about the risk management one is that's just the report to trustees, there is a proper word document that sits behind it, that describes what the risk is and how we've actually mitigated it, it's a work plan for senior management (Charity E).

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[801] See Chapter Five, Section 2.2.1.4.

This further illustrates both an example of good trustee/executive relationships, and the problems of trustee expertise considered in Chapter Five.[802]

Despite the positive views outlined above, the majority of charities in the study viewed risk management as irrelevant to the issues they faced in their collaborative campaigning work:

[Coalition] is formally constituted with a Board and in that sense any risk management we do is part of our formal deliberations. For specific events - such as the launch - there will be a formal risk assessment procedure conducted by staff but this is essentially a health and safety based exercise, not the kind I think you're thinking about. In the Board's consideration of strategy and tactics we have not done a formal risk analysis exercise in the sense of identifying major threats. This is where the assumptions that underpin the CC's guidance don't easily fit with the reality of managing a coalition in which our collective position is negotiated and a consensus reached in a manner that enables all Board members to be able to go back to their respective organisations and say this is what we will do and this is why we're doing it. In that sense CC9 might be the backcloth for these negotiations but at the front of our minds are 'can my organisation sign up to this?' rather than 'is the proposed course of action compatible with CC9?' (Charity P).

Well to be absolutely honest the risk is that it is a bit of a tick-box exercise, I mean the bits that I take a very active view of it in are our services, and it's a huge issue because we're a very large business really, social business, and so we have a devolved management structure, and obviously they have their own, projects have their own risk strategy, regions have theirs and we have a corporate one as well ... you don't want the best to be the enemy of the good, and people were getting all hung about whether about certain details really and really I think what matters in the voluntary sector is that

[802] Section 2.2.1.2.

you are being a bit alert to [the big issues] the elephant in the room sort of thing, which is in our case I think primarily the reputational risk of actually doing something that's irresponsible, overplaying our hand, sometimes you can get caught out anyway and it's not your fault, but to at least try to ensure that doesn't happen, it can happen in very easy ways though, ... to be honest I don't spend a huge amount of time thinking about it, partly because ... I just have done it for so long and I have good experienced people around me that I think we do, we do think how to manage that stuff instinctively really ... (Charity F).

[The Charity Commission] sounded more like a load of insurers ... The voluntary sector is based around values and it's based not on risk but on possibility, and I just don't think risk you can't put moral imperative within a risk framework, it's a financial tool (Charity K).

The representative of Charity F felt that the usefulness of the process could be improved if it was approached realistically:

where we're at in the organisation is recognising that we need to be specific on what we're doing, so rather than ask people to have thirty risks that they're thinking about ... let's give them three or four things that we need to do next year ... one of my colleagues said just two hours ago in this meeting you know, rather than having thirty risks which I can manage in each region, he was saying we need to be thinking about what are the two or three things we really want to get right this year, so you know we're learning all the time I think about what really works in practice as opposed to what looks good on a piece of paper. ... It's got to be realistic and not ... again, it's really important it's not just seen as an objective exercise, otherwise it's a waste of time (Charity F).

4.3 Summary of issues considered

As in Section 3.0, data on the usefulness of the risk management process to the study participants was general in nature and divided in terms of the opinions expressed. It was therefore somewhat inconclusive.

In light of this inconclusive data, the criticisms of Commission guidance made in Section 4.1 above, whilst arguably theoretically valid, cannot be applied where the risk management process is not fully employed. Thus, a charity cannot experience difficulty in balancing and mitigating complex combinations of legal, regulatory and operational risks (as Study Proposition 15 hypothesises) unless they are aware of the range of "risks" facing them. Chapters Two to Five and Section 3.0 of this chapter have demonstrated that the majority of charities in the study were either not aware of the "risks" – in particular legal "risks" – facing them, or did not perceive the risk management process to be relevant to the difficulties they faced. This lack of awareness - and the contribution that the Commission's focus on risk management may have made to it - is considered further in Section 5.0 below.

5.0 Conclusion

Whilst some charities in the study found the process of risk management useful, many saw it as a paper exercise, inadequate to deal with the complexity of collaborative campaigning arrangements and the flexible, informal human relationships they require to succeed. Some charities also felt that the perceived risks to reputation were overemphasized, and were a result of an inherent "bias" against the campaigning function of charities within society. The above views may help to explain the generally dismissive attitude towards Charity Commission guidance displayed by study participants and noted in Chapters Two to Five.

The most important finding of the empirical study was the failure of participants to identify legal issues as being relevant to the risk management process.[803] This

[803] Considered at Section 3.4 above.

mirrors the general lack of awareness of relevant law displayed by many of the charities in the study and identified repeatedly in Chapters Two to Five.

As discussed in preceding chapters and throughout this chapter, Commission guidance tends to treat legal issues as one set of risks among many. This tendency is criticised in its own right below. With regards to the charities in the empirical study, it would be easy to blame the Commission's emphasis on risk for the lack of awareness of the law displayed by many participants. However, the finding that many of them did not use Commission guidance at all could be argued to negate this criticism, as their failure to refer to the guidance meant that they did not have the opportunity to be disadvantaged by the lack of legal information. Conversely, some of the reasons behind this low level of usage – that the guidance is perceived as somewhat irrelevant – can potentially be attributed to the emphasis on risk. This relationship between the causes and effects of negative attitudes towards Commission guidance appears to be complex, and the somewhat circular hypothesising it produces warrants more detailed investigation than can be undertaken in this study.

Despite the low levels of guidance usage displayed by some charities in the study, criticisms of the Commission's risk-focused approach are valid from the perspective of those charities which use it and which wish to comply with the law.

At a conceptual level, it can be argued that legal issues should be treated within Commission guidance as a matter with which compliance should be a fundamental consideration before other variables are considered. On a pragmatic level, the practice of treating the law as a "risk" may have exacerbated the tendency within Commission guidance to provide general risk management advice to the exclusion of providing clear legal advice. Three examples of this practice applied to the context of collaborative campaigning have become apparent through the analysis contained in this thesis.

First, CC34 states that formal agreements can mitigate some "mainly legal" risks of collaboration, but does not identify what these risks are or – more importantly, that

such agreements can create risks of their own.

Second, CC9 does not cover in any detail the range of legal provisions outside of charity law which charities engaging in campaigning activities may contravene.

Third, CC9 oversimplifies the complex and open-ended law relating to political objects and activities. This final example illustrates the problems of subsuming legal compliance into a risk management framework. The process of risk management allows charities to both identify risks and plan to avoid risks, but cannot enable avoidance of risks which are beyond the control of the charity. It is contended that charities cannot mitigate the risk of contravening the law where the rationale and boundaries of the law are unclear.

Whilst the wider areas of law considered in Chapter Three may (arguably unduly) restrict campaigning activity, the boundaries of unacceptable activity are at least relatively clear, and measures can be put in place to avoid it. In contrast, the law surrounding political purposes and activities (considered in Chapter Two) is not clear enough to provide an acceptable level of legal certainty. As a result, the risk management process cannot remove the risk of non-compliance or allow for mitigation of that risk – it merely draws attention to it. This puts charities in a difficult situation and arguably compromises the usefulness of risk management.

The only option for charities which do not have access to professional legal advice but which wish to mitigate the risk of contravening the law on politics is to be over-cautious and not approach the boundaries of acceptable activity.[804] This could arguably restrict valid participation in democratic public debate and move charities' activities away from those which are ideal to achieve their aims. Whilst it is accepted that providing comprehensive advice within Commission guidance is impossible when the law itself is unclear, it is contented that this is no excuse for failing to provide detailed advice in as comprehensive a manner as possible.

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[804] The issue of self-constraint was addressed in the context of the law relating to political objects and activities in Chapter Two, Section 6.6.

CHAPTER SEVEN: CONCLUSION

1.0 Introduction

The main aims of this thesis, as noted in Chapter One,[805] are to examine the problems (both legal and non-legal) which arise for charities in their campaigning activity and to explore the benefits and problems of approaching campaigning through the working method of collaboration. In particular, the thesis seeks to explore whether the benefits and problems of collaborative working tend to alleviate or exacerbate the existing difficulties of campaigning work. The preceding chapters have addressed the above aims in detail, drawing conclusions which link their doctrinal and literature-based elements with the core themes arising from the empirical study.

This chapter concludes the thesis. In furtherance of the grounded theory approach,[806] Section 2.0 of this chapter links the conclusions reached in Chapters Two to Six with the study's substantive theory.

An additional aim of the thesis noted in Chapter One[807] was to suggest potential directions for reform which may help to address the problems identified. It is outside the remit of the thesis to give detailed consideration to the substance of possible reforms. However, Section 3.0 of this chapter builds upon the final empirical conclusions and substantive theory considered in Section 2.0, reconsidering the central study propositions in the context of potential broad directions for reform. The section also includes consideration of any current plans for reform and ongoing legal challenges.

Finally, Section 4.0 draws conclusions on the current state of collaborative campaigning by charities, noting the implications of the present situation for sector practice and considering how the area is likely to develop in the near future.

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[805] Section 1.0.

[806] Explored in Chapter One, Section 4.0.

[807] Section 1.0.

2.0 Conclusions and substantive theory

2.1 Campaigning

The doctrinal elements of Chapters Two and Three explored the range of laws affecting campaigning by charities, raising criticisms of the operational impact of these laws where relevant. Chapter Two concluded that charity law relating to political objects and activities is complex, sometimes irrational and lacks clear boundaries. It also concluded that Charity Commission guidance CC9 does not explain the law relating to politics clearly, focusing instead on risk management. The consequences of subsuming these complex legal issues into a risk management framework were considered in Chapter Six.

Chapter Three concluded that there are a broad range of legal restrictions which indirectly affect campaigning. It noted that the effect on peaceful campaigning is sometimes unintentional. It also concluded that given the consequences of these restrictions, some of which involve criminal liability, Charity Commission guidance CC9 pays them surprisingly little attention. Chapter Six noted that CC9's focus on risk management rather than explanation of the law may have contributed to this lack of coverage.

Despite the theoretically complex legal problems considered in these chapters, one of the main themes emerging from the empirical study was **low levels of awareness of legal issues.** This was coupled with **great emphasis on adherence to objects,** which it was felt some charities used as a panacea for legal compliance and thus as a substitute for awareness of specific legal restrictions.

The above lack of awareness of legal issues contrasted with the participants' greater concerns with non-legal obstacles in campaigning work (considered in Section 2.0 of Chapter Five). The main concerns can be categorised as relating to **potential damage to reputation** from campaigning; **difficulties with funding** campaigning (both in internal resource allocation and in obtaining external funding); and **relationships with external parties** in the form of (actual or perceived) pressure not to dissent exerted by various sources.

The above campaigning themes (and the factors which caused variation in them) will be considered further in the context of the study's substantive theory following identification of the main themes relating to collaboration.

2.2 Collaboration

The doctrinal element of Chapter Four explored the range of legal issues relevant to collaborative working by charities. These included trustees' powers to collaborate; the compatibility of coalition aims with charities' objects; and possible levels of formality of collaborative arrangements. It concluded that these issues need not necessarily be problematic if charity trustees and employees are well-informed regarding their roles and powers and understand the legal implications of their actions. However, when combined with a lack of proper exercise of trustee powers, the issues can exacerbate one another and result in a range of legal consequences for trustees and for their charities. The chapter also concluded that Charity Commission CC34 is somewhat legally and terminologically vague, and that it favours formal agreements whilst failing to provide adequate warning of the additional legal implications they create. Chapter Six expanded upon these criticisms of CC34, noting that the emphasis on risk results in legal issues being referred to generally as "legal risks" and being subsumed into a risk management framework, rather than each legal issue and its potential consequences being clearly identified.

The main themes emerging from the empirical element of Chapter Four mirror those in Chapters Two and Three. The study participants generally demonstrated **low levels of awareness of legal issues**. Notably, awareness levels of legal issues relevant to collaboration were even lower than awareness levels of legal issues relevant to campaigning. Whilst participants were not generally aware of the detail of campaigning law, they were at least aware that legal compliance was an issue. By contrast, many participants displayed no awareness that collaboration could have any legal implications. Again, the lack of awareness of the law was coupled with great **emphasis on adherence to objects** as a means of justifying any chosen activity.

In another reflection of the empirical themes emerging from Chapters Two and Three, the above lack of awareness of legal issues contrasted with the participants' greater concerns with the non-legal issues of collaboration. Section 3.0 of Chapter Five considered both positive and negative non-legal issues in collaboration. The main themes emerging from this part of the empirical data again reflected the major concerns identified for campaigning.

This mirroring of campaigning concerns in collaboration themes is not surprising given that collaboration is a working method adopted to attempt to alleviate some of the problems of the chosen activity of campaigning. However, it transpired that collaboration created difficulties of its own in the same areas that it had the potential to alleviate the problems of campaigning. Collaboration was used to protect against campaigning concerns over **reputation**, but the practice was also viewed as having the potential to damage reputation, through loss of control by individual charities over publicity. Further advantages related to **resources and funding issues** (such as the efficiency gained from pooling resources and the popularity amongst funding bodies of collaboration) and to **relationships with external parties** (including with those being lobbied, through the increased impact and credibility of having a "united front"). However, these advantages were noted to be negated (but on balance, not extinguished) by the plethora of cultural and procedural problems (mostly resource and relationship based) inherent in collaborative working practices.

2.3 Collaborative campaigning and the study's substantive theory

2.3.1 The study's main themes and its core category

As identified in the preceding two sections, several major themes emerged from the empirical study as underpinning the all the detailed findings and sub-themes. The **low levels of awareness of legal issues** and corresponding **emphasis on adherence to objects** demonstrated a lack of concern with the law amongst many of the participants, who demonstrated overriding concerns with non-legal issues of campaigning which can all be categorised under the themes of **reputation protection, resource and funding issues** and **relationships with external parties.** These same three non-legal themes were mirrored both in the findings relating to

how collaboration can alleviate the problems of campaigning, and relating to how it can exacerbate them.

Whilst the above themes underpinned the data, their presence was not universal amongst participants. Several "influential" characteristics of the participant charities (identified in Chapter One, Section 4.3.5.2) tended to determine whether the themes identified above applied to any particular charity. These themes were the **charity's size** relative to other charities working in same field; the **level of focus on campaigning** in relation to other activities; the **perceived level of "conservatism"** within an organisation or its trustee board; and **the perceived level of controversy** surrounding a specific campaign issue.

The above major study themes – both findings and influential factors – all relate to a further fundamental theme, which arose on numerous occasions (both explicitly and implicitly) throughout the doctrinal, literature-based and empirical aspects of the study. This theme is the **perception of a pervasive bias within society against campaigning as a legitimate charitable function**. This bias was perceived by a number of study participants as pervading not just the law, but government policy, regulators and the general public:

> *... the bias against campaigning, against direct action, against demonstration and [specifically] an organisation's involvement in mainstream legitimate activities are the centre of cultural and political life, that bias against [these things] is not just an issue of charity law* (Charity K).

> *... the dominant model ... is that charities exist to provide services and care, but they should not be political ... and campaigning is widely seen to be a political activity. Personally I think that is where confusion comes in because I see campaigning as an expression of ... our rights in a democracy. [We must] begin to see campaigning as a right, rooted in our value base as a democratic society, and not as 'dodgy activity' carried out by those whose primary duty is to care for others.* (Charity P)

This perceived bias against campaigning by charities underpins the range of non-legal problems identified for collaborative campaigning. Charities' (and the Charity Commission's) concern for reputation appears to be far more prominent than for any other charitable activity. Internal resource issues are largely the result of charities being predominantly geared towards the more "mainstream" and acceptable charitable activity of service delivery. Difficulties in obtaining external funding for campaigning are the result of refusal by many funders to fund any campaigning, despite a degree of campaigning in furtherance of charitable purposes being legally acceptable. Pressure not to dissent, exerted by various external parties, is arguably an exploitation of an underlying view that dissent is a subversive activity.

The "influential" factors in the study (i.e. those which caused variation in the findings) also illustrate shades of this perceived bias. In particular, the issues of trustee conservatism and the exacerbation of campaigning problems where issues are controversial illustrate the difficulties that charities face in reconciling the increasingly prominent campaigning role of the sector with more widely accepted, "mainstream" charitable activities. With regard to size, larger charities and those with an embedded campaigning function still experience these problems, but, unsurprisingly, appear to have the ability to counteract them more effectively.

2.3.2 The relationship between the law, the non-legal issues identified in the study and the perceived bias against campaigning

As noted above, many of the study participants displayed an apparent lack of concern with legal issues, which did not tend to affect their day-to-day decisions relating to campaigning activities. This is obviously cause for grave concern given the severe legal consequences which may result from this disregard. However, in the present context of the perceived bias against campaigning, the law has an additional relevance. Despite the study participants' concern with non-legal issues rather than legal ones, the law is clearly linked to the participants' direct experience of obstacles to campaigning through its role in creating the perceived bias against campaigning.

First, the current law relating to charities and politics is likely to be a major contributory factor to any underlying bias against campaigning as a legitimate charitable activity. The early development of the rule in *Bowman v Secular Society*[808] and *National Anti-Vivisection Society*,[809] is likely to have been a key factor in initiating negative attitudes.[810] The continuing development of the rule[811] is likely to have been a factor in exacerbating these negative attitudes.

Second, the law on charities and politics may be a direct cause of funders' refusal to fund campaigning, identified by study participants as a major barrier to undertaking it. However, it is difficult to determine whether the law's influence on funders is limited to funders' attempting to comply with a complex area of law, or whether the rules against politics influence their more fundamental attitudes towards campaigning as somehow subversive. Given the fact that some funders place a blanket ban on funding campaigning, despite the legal acceptability of political activities in furtherance of charitable objects, it could be argued that the latter possibility is more likely. This issue was identified in Chapter Five[812] as requiring further investigation.

Whatever the specific effects of the law on charities and politics, the combination of the law on politics, negative attitudes of funders towards campaigning and the service-provision emphasis apparent in government policy in recent years are likely to have contributed significantly to the practical problems experienced by charities in campaigning. These factors have influenced the structure of the sector, thus reducing its capacity to engage in campaigning. This reduced capacity may have had a further effect on views of campaigning as a "fringe" activity.

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[808] [1917] AC 406.

[809] [1948] AC 31.

[810] This seems particularly plausible given the fact (considered in Section 3.1 below) that charity and politics do not appear to have been viewed as so strictly incompatible in the nineteenth century as they are today.

[811] *McGovern v Attorney-General* [1982] Ch 321, and see Chapter Two, Section 2.1 generally.

[812] Section 2.2.2.2.

It should also be noted that the relationship between the law and funders' attitudes has the potential to manifest itself in actual legal action against charities. Despite observations made in the empirical study by Charity *A that the law regarding* charities and politics is rarely enforced,[813] charities are unlikely to be aware that charity proceedings in the High Court can, under Section 33(1) Charities Act 1993, be taken with reference to a charity either by the charity itself, by any of the charity trustees, or by any person interested in the charity. As noted in Chapter Two,[814] "person[s] interested" can include a charity's funders. Charities that engage in campaigning of a type or to an extent which does not fit with any conservative attitudes held by their funders may thus face more severe consequences than withdrawal of funding, even if the funding they receive is directed to other areas of work than their campaigning activity.

2.3.3 Summary

The perception of a pervasive bias against campaigning activity as a legitimate function of charities underpins both the problems faced by charities in campaigning and their attempts to solve these problems through collaborative working.

Whilst the study participants tended not to prioritise (or often even acknowledge) the legal issues they faced, focusing instead on practical issues which were apparent on an everyday basis, the law is nevertheless of fundamental importance to their practice and to their difficulties. This is partially because of the potentially severe legal consequences of uninformed campaigning activity and collaborative working practices. In addition, the relationship between the law and the societal bias against campaigning underpins many of the non-legal problems the study participants experienced.

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[813] Chapter Two, Section 6.4.

[814] Section 4.2.2.

3.0 Potential reforms of law, regulation, guidance and policy

Given the link identified above between the law, the perceived pervasive bias against campaigning and the non-legal problems faced by charities in their campaigning and collaborative campaigning activity, the consideration of potential reforms in the next section takes a holistic view of potential reforms, including consideration of changes to law, regulation, Commission guidance and government policy.

3.1 Charity law: political objects and activities

3.1.1 Law

1. Existing law relating to charities and political objects is too complex to enable charities that campaign to predict whether and for what reasons their objects will be held to be political and charitable status will be denied.

4. Existing law relating to political activities by charities is too complex to enable charities to determine the boundaries of acceptable activity or predict consequences of activity with any certainty.

5. The confusion of the boundaries between the rules on political objects and the rules on political activity exacerbates the problems caused by the complexity of the law on political objects.

As noted in Section 2.1 above, Chapter Two concluded that charity law relating to political objects and activities is complex, sometimes irrational and lacks clear boundaries. Chapter One[815] identified that a comprehensive body of academic commentary on the topic of charities and politics has accrued over the last few decades.[816] Rather than reiterating the detail of previous research, Chapter Two adhered to the socio-legal remit of the thesis and focused on criticisms of the operational impact of the rules. Nevertheless, a number of criticisms of the

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[815] Section 1.0.

[816] See footnotes to Chapter Two for works referenced and bibliography to the thesis for works considered.

development and reasoning behind the rules are relevant to the topic of potential reforms, and will thus be summarised briefly here.

A point often made by critics of the rule against politics is that it is a relatively recent historical development.[817] In his dissenting judgement in the *National Anti-Vivisection Society* case,[818] Lord Porter expressed the view that:[819]

> "... it is curious how scanty the authority is for the proposition that political purposes are not charitable, and the only case quoted by Lord Parker in Bowman's case, viz.: De Themmines v. De Bonneval,[820] turned upon public policy not upon what, apart from that question, is or is not a charity".

The rule did not exist in its current form in the nineteenth century, during which the promotion of a particular political ideology by an organization was not generally seen as incompatible with charitable status. Thus, a trust to educate children in the doctrines of socialism was held to be charitable in *Russell v Jackson.*[821] In *Re Scowcroft*[822] a trust to maintain a reading room in a Conservative Club for "the furtherance of Conservative principles and religious and mental improvement and to be kept free from all intoxicants and dancing" was held to be charitable.[823] It is unlikely that the objects in the above cases would be held to be charitable today.

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[817] For more detailed discussion of the historical development of the rule, see, for example, P. Luxton, *The Law of Charities*, OUP (2001), p.225 *et. seq.*; M.J. Smith, *Charities and Politics*, (LLM thesis) University of Liverpool (2006), Chapter Two.

[818] [1948] AC 31.

[819] *Ibid.* at 54.

[820] (1828) 5 Russ 288: the case concerned a trust to assist in the printing and promotion of a treatise expounding the doctrine of the absolute supremacy of the Pope in ecclesiastical matters. The trust was held void as being contrary to the policy of the law.

[821] (1852) 10 Hare 204. However, Picarda (H. Picarda, *The Law and Practice Relating to Charities*, (3rd Edn.) Butterworths (1999), p.169) notes that socialism may not have been seen as a political doctrine at the time anyway, unlike today when "socialism is clearly identified as a political creed and not as some kind of philosophy."

[822] [1898] 2 Ch 638.

[823] However, as discussed below in the context of the "ancillary" principle (Chapter Two, Section 2.1.2), this ruling has been criticised.

The pertinent point to be drawn from this in the present context is that the rule is not set in stone. This lends weight to arguments that politics (in its wider, non-party sense) is not fundamentally incompatible with charitable status and thus to arguments in favour of reform, considered below.

If the rule against politics is a relatively recent judicial invention, the question of the reasons for its development is raised. Two main rationales for the rule against politics were expressed in the *Bowman v Secular Society*[824] and *National Anti-Vivisection Society*[825] cases and refined in the *McGovern*[826] case. These were that first, the courts will ordinarily not be able to determine the public benefit of political objects as a matter of evidence. Second, even where the courts feel able to make such a judgement, they will decline to do so, on the basis that to do so would allow the law to stultify itself and cause encroachment on the function of the legislature by the judiciary, with numerous undesirable consequences for both the rule of law and public confidence in the judiciary.

These rationales can be criticised on a number of bases. An obvious criticism of the first "unable to determine public benefit" rationale is its potential for contradictory application. This was demonstrated in the *National Anti-Vivisection Society*[827] case, in which a majority of the House of Lords decided that the public benefit of the Society's objects could not be determined, but gave the failure of the objects on public benefit grounds as the second reason for the decision.

A second criticism of the first rationale is apparent in Lord Porter's dissenting judgement in the case, in which His Lordship disagreed with the majority view that determining the public benefit of potential charities should be a matter of weighing opposing evidence.[828] Of relevance here is His Lordship's ensuing dicta that if the

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[824] [1917] AC 406.

[825] [1948] AC 31.

[826] [1982] Ch 321.

[827] [1948] AC 31.

[828] Lord Porter found it: "difficult to accept the view that once an object has been held to be included in the class of charities, it is then for the court to hear the evidence of witnesses on the one side and on the other as to whether it is in fact beneficial" (*Ibid.* at 59).

majority view *was* accepted as to the use of evidence, there was no reason to limit the application of those principles:[829]

> "... if the argument be that the tribunal is to make up its mind on the evidence called before it, I cannot see where it can stop short of determining the matter on the ordinary principles upon which courts act in deciding upon a conflict of evidence".

This throws considerable doubt on the validity of the "unable to determine public benefit" rationale, which is already severely discredited by the courts' habit of determining it whilst saying they cannot do so.

The second rationale, that of "usurping the function of the legislature", has also been widely criticised. It has been suggested this rationale could be dismissed if the courts took the view that *advocacy* of any change in the law (or policy etc.) was itself inherently beneficial to the community, in that it promotes debate and free speech and thus the functioning of democracy. Such an approach would avoid the judiciary needing to comment on the public benefit of any particular change in the law, and would negate any concerns regarding either the respective functions of the judiciary and the legislature, or regarding the public's perception of judicial impartiality.

In the New Zealand case of *Re Collier*,[830] Hammond J took this argument a step further, arguing that judges should not avoid commenting on political issues or promoting their debate:[831]

> "Is it really inappropriate for a Judge to recognize an issue as thoroughly worthy of public debate, even though the outcome of that debate might be to lead to a change in the law? After all, it is commonplace for Judges to make

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[829] *Ibid.*

[830] [1998] 1 NZLR 81.

[831] *Ibid.* at 89-90.

> suggestions themselves for changes in the law today, whether in judgements or extra-curially ... And we do, after all, live in an age which enjoys the supposed benefits of [freedom of thought, conscience, religion and expression]. Should not the benefits be real in all respects, including the law of charities?".

This observation is arguably a convincing refutation of the second rationale for the rule against politics. This raises the question of whether the *realization* of the "supposed benefits" of the various fundamental freedoms referred to by Hammond J is possible through a legal challenge to the political disqualification rule. Moffat[832] provides convincing arguments against the compatibility of the rules and their rationales with human rights principles. He also provides a comprehensive exploration of the possible grounds for legal challenge to the rules under Articles 10 or 14 of the Convention. The likelihood of this or other potential challenges being realized will be addressed following consideration of recent calls for reform of the law.

As noted in Chapter Two,[833] the Strategy Unit report of 2002 recommended that no legislative changes should be made in relation to charities and politics, relying instead on improvements to the Charity Commission's guidance.[834] However, the increasing interest in campaigning within the charity sector[835] coupled with criticisms of the revised Commission guidance CC9[836] have inevitably brought calls for change, culminating in the May 2007 *Report of Advisory Group on Campaigning and the Voluntary Sector*. On the subject of charity law relating to political objects and activities, the report focuses on reform of the rules relating to political activities rather than objects. It places particular emphasis on the need for charities to be able to engage freely in political campaigning in furtherance of their charitable purposes. It also concludes that the scope of charitable purposes has been

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[832] G. Moffat, 'Charity, Politics and the Human Rights Act 1998: Chasing a Red Herring?' (2001) *IJNL* 4(1).

[833] Section 3.1.

[834] Strategy Unit of the Cabinet Office, *Private Action, Public Benefit*, TSO (2002), p.46.

[835] Noted in Chapter One, Section 1.0.

[836] Considered in Chapter Two, Section 3.0 and in Section 3.1.2 below.

broadened by the Charities Act 2006 to include some purposes which it views as inherently political.[837] As considered in Chapter Two,[838] this is supported by Munro's observations.[839] Whilst acknowledging that the Charity Commission is bound by case law precedents, the Advisory Group's report relies upon the Charity Commission to interpret the law more liberally in future.

In the light of the flaws in the rationales of the rule against politics, of the poor judicial application of the rule and of its illogical extensions (considered in Chapter Two), it can be argued that reliance on Commission re-interpretations of existing law will not solve existing substantive legal problems or go far enough in countering the ingrained perceptions of charities engaging in politics as an unacceptable activity. These problems can arguably only be solved by comprehensive (but cautious) reform. Whilst it is outside the remit of this thesis to make detailed suggestions as to the nature of such reforms, observations regarding some of the matters that should be taken into account in doing so are outlined here.

It is contended that the only aspect of the rule against political objects and the rules limiting political activity with any validity under the existing rationales for the rule is the prohibition on narrow, party political purposes, and that the prohibition should be limited to this narrow definition.

Despite the above argument in favour of narrowing the definition of political objects, there is a reason unrelated to politics why care would need to be taken to ensure charities did not have primary objects of securing changes in the law. Charities with such limited objects would face a real danger of built-in obsolescence. Whilst this is not problematic in a legal sense, it cannot be healthy in a time in which charities employ large numbers of staff, as it effectively encourages poor performance as a means to long term survival of an organisation. Enforcing broadly defined objects could be achieved at the point of registration.

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[837] *Report of Advisory Group on Campaigning and the Voluntary Sector*, (2007), para.1.4.3.

[838] Section 2.1.5.2.

[839] C. Munro, 'Time up for the ban?' (2007) 157 *NLJ* 886.

An alternative to narrowing the judicial definition of "politics" would be reform of the present "ancillary" rule.[840] This is a major current source of confusion and is problematic to apply because it relies on a difficult distinction between ends and means. Rather than attempting to classify objects as (primary) ends or (ancillary) means, a possible approach would be to consider whether a charity's stated objects would still be coherent and legally charitable if a specific stated object (e.g. of changing a particular law) was not included (or was fulfilled). Only if the coherence of the objects was dependent on, for example, *a change in a particular* law would the objects be considered to be political and non-charitable.

With regards to activities, it is contended here that charity trustees should be free to direct their resources, in any proportion, to any lawful activity which best fulfils their purposes, including political campaigning. Clarification of the courts' and Commission's approach to considering a charity's activities is vital. This is considered further in the context of Commission guidance (Section 3.1.2 below).

Despite the need for comprehensive reform, the approach of the Advisory Report can be considered to be a pragmatic response to current circumstances. Reform of charity law in the near future is unlikely. In light of the recent enactment of major charity legislation, the likelihood of Parliamentary time being devoted to reform of charity law in the near future is low. The final report of the Government's third sector review[841] indicates that the Government has no intentions to review the current law on political objects, stating that: "The Government continues to believe that the law should not allow an organisation with a political purpose to be a charity".[842] It does not comment on the breadth of the current definition of political, which it is argued here is more problematic that the existence of the rule against political objects itself.

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[840] Considered in Chapter Two, Section 2.1.2.

[841] HM Treasury / Cabinet Office, *The future role of the third sector in economic and social regeneration: final report*, (Cm 7189) TSO (2007).

[842] *Op. cit.*, Chapter Two, para.2.3.1.

Judicial reform of the law relating to charities and politics is also unlikely, given the prohibitive cost of pursuing actions in the High Court. However, the fact that a campaigning organisation has recently been prepared to pursue a human rights challenge to the broadcasting ban is evidence that the confidence of the sector in pursuing such actions is increasing. This confidence should be further boosted by the recent willingness of the courts to grant full protective costs orders to campaigning organisations.[843]

3.1.2 Commission guidance

2. Charity Commission guidance focuses on political activities rather than objects, and does not effectively explain the boundaries between political and non-political objects.

6. Charity Commission guidance is not sufficiently clear in explaining the boundaries between acceptable and unacceptable political activities.

3. The *perception* of the likelihood of objects being held to be political (and the perceived likelihood or severity of the consequences of this) may be greater among charities that campaign than generally occurs in practice.

7. The *perception* of the likely legal consequences of excessive political activity may be greater amongst charities than generally occurs in practice.

As noted in Section 2.1 above, Chapter Two concluded that Charity Commission guidance CC9 does not provide a clear explanation of the law relating to politics, instead focusing primarily on risk management. It also concluded that whilst Study Propositions 3 and 7 above were not fully confirmed by the empirical data (in part due to the constitution of the study sample), both the empirical study and external commentary support the contention that levels of understanding and awareness in relation to this area of law are very low among charities. This situation is problematic either whether it translates into failure to appreciate the potential

[843] See Chapter Three, Section 1.0 for discussion.

consequences of political activity (as demonstrated by some charities in the study), or where it translates into a disproportionate fear of political activity (as demonstrated through some comments in the study and through external commentary). In the light of these problems, this section explores potential reforms to Commission guidance.

On the basis of the detailed critical evaluation of Commission guidance CC9 undertaken in Chapter Two,[844] it can be argued that two main alterations to CC9's approach to the rules on politics are necessary (assuming no relevant law reforms take place).

First, CC9 should provide a more detailed explanation of relevant law (relating to both political objects and activities) and should provide references to legal authority where appropriate. This legal element should be kept separate from the risk management element of the guidance and should be given at least equal - if not greater - prominence than risk management. With regard to the latter, the guidance arguably only needs a single explanation of the potential risks of campaigning, supported by reference to the Commission's generic risk management guidance.

It is accepted that the guidance cannot give a fully comprehensive account of an area of law which involves anomalous decisions and poorly defined boundaries. However, the approach of the current version, as discussed in Chapter Two, Section 3.2, ignores the more complex aspects of the definition. Acknowledgement of these problems and basic description of these areas of difficulty should be included in the guidance, allowing charities more scope to determine for themselves how close to the boundaries of acceptable activity their proposed campaigns will take them. Charities are hindered in their decision making (and even in their application of the Commission-recommended risk management process to their activities) if they are not given the clearest possible description of the boundaries between legally acceptable and unacceptable activity.

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[844] Section 3.0.

The second change to the guidance suggested here relates to Paragraph 24 of CC9:

> "Where political activities do begin to dominate the activities of the charity, an issue will arise as to whether the charity trustees are acting outside of their trusts. In exceptional cases this might also lead us to reconsider whether the organisation should ever have been registered as a charity, or whether it was in fact established for non-charitable political purposes".

As discussed in Section 3.3 of Chapter Two, there appears to be no legal basis for the above reference to breach of trust. The guidance should therefore either provide the legal basis for this statement or remove it.

The final report of the Government's third sector review[845] supports criticisms of the above aspect of the guidance. Chapter Two of the report notes continuing concerns with law and guidance surrounding charities and politics, including those expressed by the Advisory Group on Campaigning and the Voluntary Sector.[846] In relation to the rules contained in Paragraph 24 of CC9, the review states:[847]

> "The Commission's guidance explains that political campaigning by a charity acceptable provided that it is not "the dominant means by which a charity carries out its charitable purpose". Its basis for saying this is that, in a case where a charity is being run with political campaigning as its sole or predominant activity, those running the charity might be regarded as having in practice allowed charitable purposes to be supplanted by political purposes as the charity's reasons for existing. That would not be acceptable, since a charity must not have a political purpose. *However, it is surely possible, in a well-run charity, for political activity to be "dominant" within a charity and yet still enable it to further its charitable purpose*" (emphasis added).

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[845] HM Treasury / Cabinet Office, *The future role of the third sector in economic and social regeneration: final report*, (Cm 7189) TSO (2007).

[846] Para.2.27.

[847] Para.2.30.

It continues:[848]

> "... The Government also believes that charities should be, and should feel, free to carry on political activities where those are effective means of pursuing their charitable purposes. Provided that the ultimate purpose remains demonstrably a charitable one the Government can see no objection, legal or other, to a charity pursuing that purpose wholly or mainly through political activities. Those running any charity have to justify its activities. If they can show that political activity, in preference to (or in conjunction with) any other type of activity, is likely to be effective in serving the charitable purpose then they will have succeeded in justifying the political activity".

It thus appears that the Government supports the revision of this problematic aspect of the guidance. The report also states that the Government will:[849] "work with the Charity Commission to update guidance on political activities and campaigning by charities ...". However, it is important to note that the Government's role must be limited to advice, given that, by virtue of Section 6(4) Charities Act 2006, the Commission will not be subject to the direction or control of any Minister of the Crown or other government department. Thus, the attitude of the Charity Commission will be decisive in whether this important aspect of the guidance survives.

The attitude of the Commission appears to be decidedly more conservative. The final report of the Government's third sector review report notes:[850]

> "... As the Charity Commission says, a charity which loses sight of its charitable purpose and allows political activity to take over as the end in itself has gone outside the bounds of what is acceptable for a charity.

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[848] Para.2.31.

[849] Summary, p.17. See also HM Government, *The Governance of Britain*, (Cm 7170) (2007), paras.167-168.

[850] Para.2.31.

> Whether or not that has happened in any individual case is for the Commission, as regulator, to decide".

It is difficult to imagine a similar statement being made with regards to activities such as service delivery. In addition, statements made in the Commission's supplementary guidance[851] may be indicative of the regulator's attitude. The document states that the case law relating to political *objects*:

> "... would not amount to much if it was possible for an organisation to have a charitable purpose but nonetheless to engage solely in political activity. The law is clear and well established on this point and it is not open to the Commission to take a different approach ...".

First, it is contended that the law is anything but clear and well established on this point. Second, as argued above, allowing charities which have considered their options carefully to engage exclusively in political activities in furtherance of their charitable objects does not, in reality, compromise the law prohibiting to political objects.

Nevertheless, whilst the arguments expressed in this thesis, in the report of the Advisory Group on Campaigning and the Voluntary Sector, and in the final report of the Government's recent third sector review tend to refute the Commission's stance, it is the Commission alone which will determine whether this contentious aspect of its guidance survives.

3.2 Charities and campaigning: wider relevant laws and Commission guidance

8. Campaigning work is directly governed by several areas of domestic law separate from charity law. Charities that campaign may not be aware of the impact of these areas, and Commission guidance does not draw sufficient attention to them.

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[851] *Campaigning and political activities by charities – some questions and answers* (April 2007), Section 3.

As stated in Section 2.1 above, Chapter Three concluded that both the current broad prohibition on "political" advertising under the Communications Act 2003 and various criminal laws which (sometimes inadvertently) affect protest activity are unjustifiable.

The broad definition and application of the current prohibition on "political" advertising contained in the Communications Act 2003 is particularly unjustifiable given, as noted by the report of the Advisory Group on Campaigning and the Voluntary Sector, the protection afforded to freedom in commercial advertising[852] and the ability of large corporations to make claims regarding their credentials on politically sensitive matters, whilst campaigning organisations cannot respond.[853]

Whilst it is outside the remit of this thesis to consider the substance of potential reforms in detail, it is worth noting the proposals of the Advisory Group in relation to the adoption of a less draconian system, together with the international examples of workable systems it describes.[854]

With regard to the potential for such reform in the near future, the final report of the Government's third sector review[855] notes[856] the recommendations of the Advisory Report. However, unlike some of the criminal restrictions on protests considered next, the review gives no indication that reform of the Communications Act 2003 will be considered. This may be a deliberate attempt to avoid prejudicing the outcome of the current challenge to the legislation by Animal Defenders International (ADI), considered in Chapter Three.[857] As the report of the Advisory Group on Campaigning and the Voluntary Sector notes, if ADI's appeal is successful:[858]

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[852] *Report of Advisory Group on Campaigning and the Voluntary Sector*, (2007), para.3.3.5.

[853] *Op. cit.*, para.3.3.1.

[854] *Op. cit.*, Section 3.5.

[855] HM Treasury / Cabinet Office, *The future role of the third sector in economic and social regeneration: final report*, (Cm 7189) TSO (2007).

[856] At para.2.27.

[857] Section 2.3.3.3.

[858] Para.3.5.6.

> "... the Department of Culture, Media and Sport will either have to amend the provision and replace it by a compatible definition of political, or the Government will face certain defeat in the European Court. It will then be for the Department, lobby groups and other interested parties to ensure that any new regulations are workable and Article 10 ECHR compliant. The new regulations should protect the position of charities and campaign organisations and the need to ensure, as much as possible, a level playing field in a landscape which does not offend the principles of free expression enshrined in Article 10".

With regard to the current criminal restrictions on various protest activities, there is a more concrete basis for optimism as to potential reforms. The Public Demonstrations (Repeals) Bill, which seeks to amend certain provisions of the Serious Organised Crime and Police Act (SOCPA) 2005 and other legislative restraints on public demonstrations, was debated in the House of Lords in January 2007. A further development occurring close to the submission date of this thesis was the announcement of a Government review[859] of the provisions contained in the SOCPA. It remains to be seen whether the review will also address the often unintentional effect on peaceful campaigning of criminal legislation other than the SOCPA, or the potential misapplication of broad police powers to peaceful campaigning activity (both considered in Chapter Three, Section 4.0).

The sometimes unintentional curtailment of campaigning activities noted above raises another broader point for reform. This relates to the current failure during the legislative drafting process of the potential negative consequences of legislation for legitimate campaigning protest. This is arguably symptomatic of underlying perceptions of protest as a "fringe" activity. Nevertheless, current moves to review criminal restrictions which curtail protestors' rights coupled with a general increase in the levels of attention paid to campaigning may be signs that such legislative oversights may be avoided in future.

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[859] See HM Government, *The Governance of Britain*, (Cm 7170) (2007), paras.164-166.

With regards to Charity Commission guidance CC9, Chapter Two concluded that it contains surprisingly little coverage of wider areas of law affecting campaigning, particularly given that some of them involve criminal liability. Chapter Six noted that the risk management rather than substantive legal focus of CC9 may have contributed to this lack of coverage. The issue of risk management is revisited at Section 3.5 below. The obvious point to be made in the context of reform is that future versions of CC9 should contain more detailed advice in this area. The inclusion of (albeit limited) references to specific laws in the recent supplementary guidance[860] is indicative that the Commission may take steps in this direction when CC9 is revised.

3.3 Collaborative working: law and guidance

10. Whilst there are few direct legal constraints on collaborative working arrangements, such arrangements must comply with general charity law requirements. Combining collaborative working with political campaigning may also create unique legal issues. Thus, the various possible collaborative campaigning arrangements have different legal implications, some of which charities undertaking them may not be aware.

11. Available Charity Commission publications on collaborative working are not detailed enough to fully inform charities undertaking this method of working of its implications.

As stated in Section 2.1 above, Chapter Four concluded that the above legal issues of collaboration need not necessarily be problematic if charity trustees and employees are well-informed regarding their roles and powers and understand the legal implications of their actions. However, when combined with a lack of proper exercise of trustee powers, these issues can exacerbate one another and result in severe legal consequences for charities and their trustees.

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[860] *Campaigning and political activities by charities – some questions and answers* (April 2007).

Given the rise in popularity of collaborative working with the sector, the Commission, umbrella bodies and funders and the plethora of literature that promotes it, charities are in danger of noting only the benefits and not the liabilities of collaborative working. It is thus contended that pro-forma collaboration agreements which spell out the legal liabilities for collaborative arrangements at a range of levels of formality should be developed as soon as possible. These should provide a choice of clauses relating to a range of matters (for example, funding, liability for employees etc.) in order to preserve the flexibility which makes collaboration so useful to many charities. Such tools are urgently needed in order to prevent charities exposing themselves to liabilities of which they are unaware.

Chapter Four also concluded that Charity Commission CC34 is somewhat legally and terminologically vague, and that it favours formal agreements whilst failing to provide adequate warning of the additional legal implications they create. The guidance should be revised in the same manner as CC9, with emphasis placed first and foremost on the legal implications of various types of collaborative working, rather than these implications being subsumed into a general category of "legal risks".

<u>3.4 Collaborative campaigning: non-legal issues</u>

9. Charities engaged in political campaigning may perceive non-legal constraints on their campaigning work, stemming from both internal and external sources.

12. Aside from the legal issues involved, collaborative campaigning may involve certain advantages and disadvantages.

13. The above advantages and disadvantages of collaboration may alleviate or exacerbate any existing constraints on campaigning.

Section 2.3 above found that, based on the analysis in Chapter Five, the overriding concern among the study participants was with the non-legal problems they experienced in campaigning. These issues all related to reputation protection,

resource and funding issues and relationships with external parties. These same three themes were mirrored both in the findings relating to how collaboration can alleviate the problems of campaigning, and in relation to how it can exacerbate them.

The section also found that all the major study themes (and the factors which caused the findings to vary) related to a further fundamental theme of the perception of a pervasive bias within society against campaigning as a legitimate charitable function.

The section concluded that the combination of the law on charities and political objects and activities, negative attitudes of funders towards campaigning and the recent government policy emphasis on the service provision role of the sector are likely to have caused some of the wider problems experienced by charities in campaigning, by influencing the structure of the sector and reducing its capacity to engage in campaigning. This reduced capacity may have had a further effect on views of campaigning as a "fringe" activity. It is contended here that the perception of a pervasive bias against campaigning activity as a legitimate function of charities underpins both the problems faced by charities in campaigning and their attempts to solve these problems through collaborative working.

As noted above, government policy was firmly focused on the sector's service delivery role during the initial stages of this thesis. If the Government's policy focus had remained unaltered, conclusions would have been drawn relating to the need for changes to this policy focus in order to counteract the problems faced in campaigning. However, the final report of the Government's third sector review,[861] the effect of which was also noted in Chapter Five,[862] is evidence that the service-delivery focus may be in the process of being reversed. Evidence of whether the shift towards promoting campaigning is rhetoric or whether it will be translated into real change is awaited.

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[861] HM Treasury / Cabinet Office, *The future role of the third sector in economic and social regeneration: final report*, (Cm 7189) TSO (2007).

[862] Section 2.1.4.4.

3.5 Risk and risk management

14. The Charity Commission has increasingly taken a "risk-based" approach to regulation. This has given rise to an emphasis within Commission guidance on risk management. The Commission views both campaigning work and collaborative working as carrying particular risks which need to be identified and managed. These "risks" may or may not equate to the uncertainties and problems involved in these activities as perceived by charities themselves.

15. The process of risk management is not sufficiently sophisticated to cope with the complex combinations of legal, regulatory and practical issues (both positive and negative) and the "risks" experienced by charities undertaking collaborative campaigning work. Thus, Charity Commission guidance is not entirely effective in enabling informed decision-making on the legal and other implications of this work.

Section 2.3 concluded that charities' (and the Commission's) concern for reputation appears to be far more prominent for campaigning than for any other charitable activity. If there is indeed an actual rather than perceived additional risk that charities will alienate funders, donors and the public and thus damage their reputation through campaigning, it is arguable that this itself is symptomatic of the view of campaigning as a "fringe" activity.

As considered in Chapter Six,[863] a statutory Regulator's Compliance code is expected to be in force by 1 April 2008. The code will mean that regulators such as the Charity Commission will be obliged to have regard to the Hampton principles. This will mean that risk-based regulation is more firmly entrenched.

Whilst there are many obvious benefits to risk-based approaches to regulation, the limitations should also be acknowledged. The National Audit Office report *Supporting Innovation: managing risk in government departments*[864] examined a

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[863] Section 2.1.

[864] *Report by the Comptroller and Auditor General*, House of Commons Papers, Session 1999-2000, 864 TSO (2000).

number of risk management tools and included discussions of their disadvantages. The major problem identified was the tendency for risk-based tools not to recognise the complexity of problems, and thus to over-simplify them.

Risk-based regulation operates on the principle that the heaviest regulatory burdens fall on those organisations deemed to be operating with high levels of risk. The implication for charities that engage in campaigning and collaborative campaigning are that if these activities continue to be viewed by the Charity Commission as carrying high levels of risk, they could be subject to regulatory burdens at a level which is disproportionate to those placed on other activities. Given the existing resource allocation, external funding and other cost issues already faced in campaigning activity, such an additional burden could prove to be a severe deterrent – particular for smaller charities - to engaging in such activity.

Nevertheless, if the current indications that attitudes towards campaigning as an undesirable activity are reversing, perceptions of the risks it carries (particularly those to reputation) may diminish and negate the potential for regulatory clampdown. Looking further ahead, if true acceptance of campaigning as a valid charitable activity is achieved, there may be scope for suggestions such as a self-regulatory or collective peer review system for campaigning[865] to be put into effect.

4.0 Collaborative campaigning: the present and the future

When the topic of this thesis was conceived in 2003, the regulatory, policy and practice landscape for collaborative campaigning was very different than it is in 2007. Campaigning was still considered to be a fringe activity, largely ignored in the policy agenda. Interest in collaborative working practices had not yet become the successor to an overriding interest in mergers.

Whilst this thesis was being researched and written, major changes in the sector's willingness to challenge the status quo have been catalysed by events such as the

[865] Suggested by P. Hilder, J. Caulier-Grice & K. Lalor in *Contentious Citizens. Civil Society's Role in Campaigning for Social Change*, The Young Foundation / Carnegie UK Trust (2007), p.85.

unique Make Poverty History campaign. As a result of the sector's increased confidence to push for change, attitudes of the government and of the Charity Commission have also altered. Good practice centres for both campaigning and collaborative working have been established by umbrella body NCVO.[866] At the time of submission of this thesis, a challenge to the legal prohibition on political advertising for social advocacy bodies is awaiting a House of Lords hearing;[867] the Government has acknowledged[868] (and Prime Minister Gordon Brown has personally endorsed[869]) charities' right to campaign; a Government review of some of the legislative provisions restricting protests has been announced;[870] and further revisions to Commission guidance CC9 are awaited. In addition, plans have been created to introduce capacity building measures specifically aimed at campaigning,[871] and the importance the sector places on collaborative approaches to campaigning have been explicitly acknowledged as part of the Government's policy agenda.[872]

Further reforms, such as to the definition of "political" within charity law and to the powers of the police to restrict legitimate protest, are needed. This may be hindered by the financial difficulties charities face in pursuing legal action. Further challenges to residual negative attitudes, such as those of funders, are also needed. Nevertheless, given the interdependence between attitudes and changes to the legislative and policy environment, current challenges may catalyse the willingness of the sector to push for further and more radical change.

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[866] See NCVO's Campaigning Effective Programme at www.ncvo-vol.org.uk/cc/index.asp and Collaborative Working Unit at www.ncvo-vol.org.uk/collaborativeworkingunit.

[867] See Section 3.2 above.

[868] See Section 3.4 above.

[869] In a speech to sector representatives at Methodist Central Hall on 24th July (see www.number-10.gov.uk/output/Page12600.asp). The Prime Minister stated that: "... the Government will work with the Charity Commission and others to explore ways of enabling voluntary organisations to campaign without compromising their charitable status".

[870] See Section 3.2 above.

[871] HM Treasury / Cabinet Office, *The future role of the third sector in economic and social regeneration: final report*, (Cm 7189) TSO (2007), paras.2.14 - 2.17, 2.24 – 2.25.

[872] *Op. cit.*, para.2.4, which notes that "there is a desire among third sector organisations that where they have similar objectives or opinions, they should seek to join their voices together to more effectively work with Government and campaign for change".

In the light of the current spotlight on both campaigning and collaborative working, charities will need to guard against undertaking campaigning or collaboration because they are fashionable and must ensure that they are truly the best way of achieving their objects. Such informed caution must be promoted through umbrella body training programmes, supported by the Government's intended measures to improve the sector's campaigning capacity. This will help to ensure that poorly conceived and executed practice does not reverse the current positive developments in attitudes towards potentially invaluable charitable activity.

APPENDIX I: OPERATIONAL RESEARCH AREAS FORMING BASIS OF INTERVIEW GUIDE

Campaigning: Law and Guidance

a) Charities' perceptions of the existing law on political objects and activities, including their awareness of it; their strategies for compliance; their perceptions of its complexity and the likelihood or severity of the consequences of contravening it.

b) Charities' use of Charity Commission guidance on campaigning (i.e. CC9 and any other guidance which makes reference to the practice); the clarity and usefulness of the guidance (if used); and the effects (e.g. encouragement or constraint) of charities' understanding of the law and guidance on their campaigning activity.

c) Charities' perceptions of broader law and regulation which directly applies to campaigning activities, and their strategies for compliance. Their use of any relevant Charity Commission guidance on such external regulation; the clarity and usefulness of the guidance (if used); and the effects (e.g. encouragement or constraint) of guidance on charities' campaigning activities.

d) Charities' perceptions of non-legal forms of pressure on their "dissenting" activities, such as from government bodies or corporate funders, and the effect this has on these activities.

Collaborative Campaigning: law and guidance

e) Charities' awareness of how collaborative working arrangements are affected by general charity law requirements; their use of relevant Charity Commission publications on collaborative working; their perceptions of the clarity and usefulness of the guidance (if used); the effects of the law (if

they are aware of it) and the guidance (if used) on their collaborative campaigning practices.

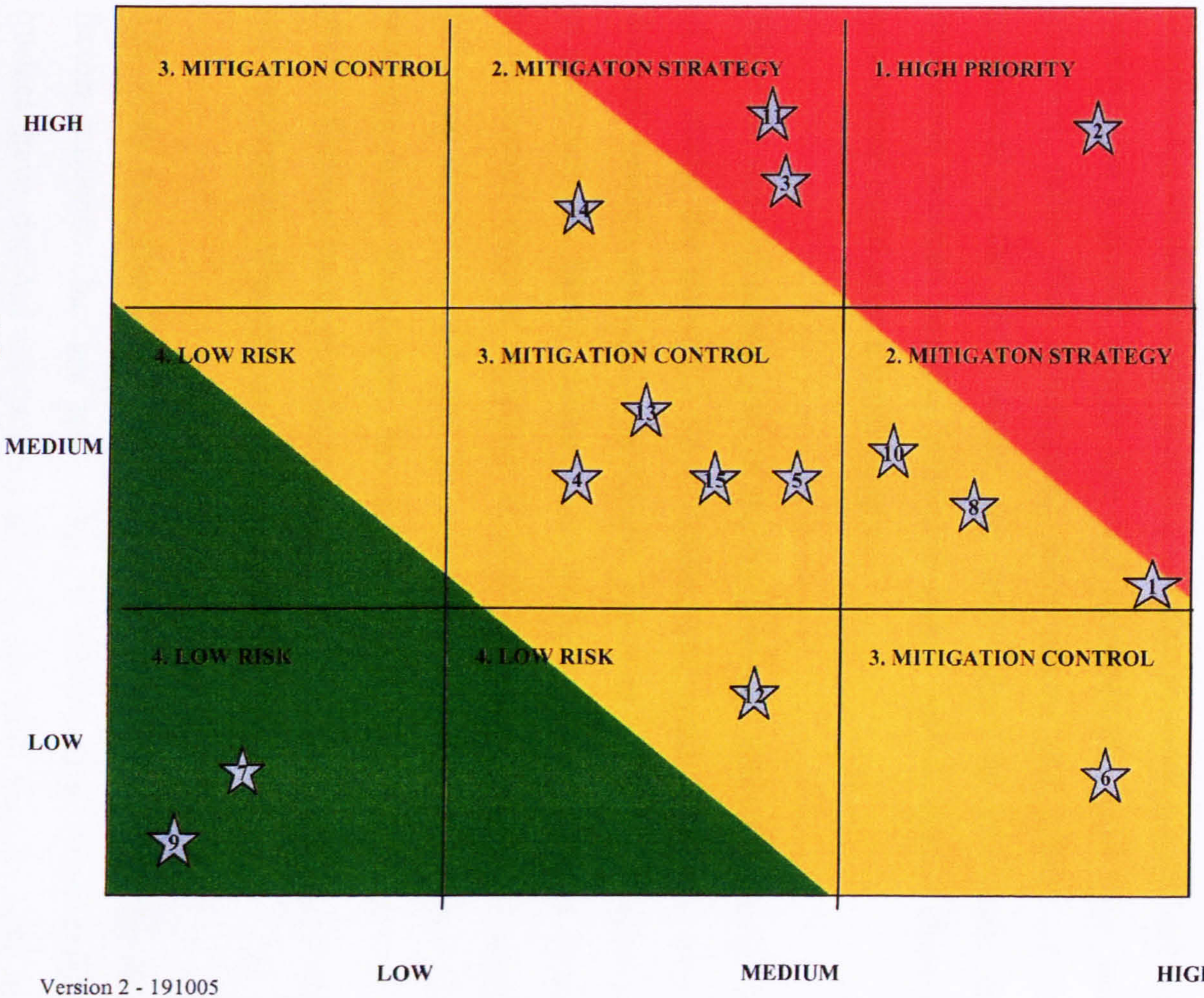
f) Charities' perceptions of non-legal influences on their campaigning activities, both internal and external to the organisation.

g) Charities' perceptions of the main advantages, disadvantages, positive and negative outcomes, reasons for entering and reasons for avoiding campaigning coalitions.

h) Charities' perceptions of the "risks" involved in collaborative campaigning and their perceptions of the "risks" identified in Charity Commission guidance.

i) Charities' views on the usefulness of the process of risk management in coping with the complex issues arising from collaborative campaigning discussed throughout the preceding chapters.

RISK MATRIX AS AT 26 October 2005



1 = Effective Governance
2 = Core Statutory Funding
3 = Income generation
4 = Regulatory Changes
5 = Senior Management
6 = Fire/Disaster
7 = Strategy
8 = Financial Management
9 = Cash handling
10 = IT Systems
11 = Branches
12 = Contracts
13 = Staff resources
14 = Quality
15 = Reputation knowledge

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APPENDIX III: EVALUATION OF RESEARCH DESIGN

The discussion of methodology in Chapter One of Section 4.0 focused on how and why particular methodological decisions were made. This evaluation reflects briefly on how these decisions worked in practice, highlighting areas of difficulty and considering any adverse effect of these on the quality of the findings.

Sample size and constitution

Determining an ideal sample size in qualitative research is a difficult task; it often appears that a greater sample size will automatically yield more useful results. However, rather than investigating strict causes and effects which could be generalized to the wider sector, the study aimed to investigate the complex interaction between possible influential factors and to draw indicative thematic conclusions based upon a small sample.

While the size and constitution of the study sample was adequate for the purposes of the study, the inevitable time, funding and word limitations associated with doctoral research restricted opportunities for more in-depth empirical investigation in some respects. Ideally, deviant cases would have been selected on a wider basis in the second stage of sampling. In addition, there was limited time to conduct follow-up interviews with specific organisations as part of the final (discriminate) sampling stage. Fortunately, the definite pattern and repetition with which the study's findings emerged indicated that the loss of these additional perspectives did not significantly affect the quality of the study's conclusions.

The study was also deliberately limited to exploring whether the law and other factors influence charities' approaches to collaborative campaigning once their trustees have decided that such activity is the best way to fulfil the charity's purposes. This meant that it excluded those organisations which were either too wary of existing law to engage in campaigning, or found collaborative working disadvantageous. Inclusion of such organisations would have provided a useful control sample and perhaps highlighted more acutely the impact of the law on charitable activities and agendas.

Study participants

The most frustrating aspect of the study was the low response rate to requests to participate. Whilst this is to be expected in any study which employs cold contact techniques, it was particularly notable given that the timescale for the study was already tight.

The lack of awareness of the relevant legal framework displayed by many of the study participants sometimes manifested itself as an inability to engage fully with the interview process. This was occasionally frustrating. However, as considered throughout the thesis, this lack of awareness itself became an important finding of the study.

Coding

The process of coding the raw data when investigating such complex phenomena was challenging but was aided significantly by the use of qualitative data analysis software. This was particularly useful given the multiple coding stages inherent in the grounded theory approach (described in Chapter One, Section 4.3.5).

One danger which became apparent during the coding process was that of over-simplification. The grounded theory approach encourages the researcher to subsume emerging themes within other themes and ultimately arrive at "core" themes. This is undoubtedly a useful way of organising data and formulating conclusions. However, it became apparent that it would become easy to begin to view the data purely in terms of simple labels rather than as complex issues. In order to avoid this potential pitfall, the thesis avoids discussing the data purely in terms of the labels used for convenience and organisation during its analysis. For clarity, it considers the data within these themes, but relies on rich description in order to avoid compromising the meaning and complexity of the findings.

BIBLIOGRAPHY

6, P. & Randon, A., *Liberty, Charity and Politics: Non-Profit Law and Freedom of Speech*, Dartmouth (1995)

Adams, D., 'Campaign Trail', *Voluntary Sector*, July 2004, pp.14-16

Allen, T., 'Remove the charity gag', *The Guardian*, Monday November 7, 2005

Atkinson, K., 'Charities, Campaigning and Crime' (2007) 10 *CL&PR* 63

Bar Council, *Response from the Law Reform Committee of the Bar Council to the Home Office Consultation Paper "Policing: Modernising Police Powers to Meet Community Needs"*, (2004)

Bassac, *Sharing without merging*, (2005)

Better Regulation Task Force, *Better Regulation for Civil Society*, TSO (2005)

Better Regulation Task Force, *Regulation – Less is More*, TSO (2005)

Bradshaw, A., 'Sense and Sensibility: Debates and Developments in Socio-Legal Research Methods', in P. A. Thomas (Ed.), *Socio-Legal Studies*, Dartmouth (1997)

Cabinet Office (Office of the Third Sector), 'Better Regulation for Civil Society': The Government's Response, TSO (2006)

Cabinet Office (Office of the Third Sector), Partnership in Public Services: an Action Plan for Third Sector Involvement, TSO (2006)

Cabinet Office (Strategy Unit), *Private Action, Public Benefit: A Review of Charities and the Wider Not-for-Profit Sector*, TSO (2002)

Cabinet Office (Strategy Unit), *Risk: Improving Government's capability to handle risk and uncertainty*, TSO (2002)

Cabinet Office, *Modernizing Government*, TSO (1999)

Charity Commission, Accounting and Reporting by Charities: Statement of Recommended Practice 2000, TSO (2000) (superseded)

Charity Commission, Accounting and Reporting by Charities: Statement of Recommended Practice 2005, TSO (2005)

Charity Commission, *Analysis of the law underpinning charities and public benefit*, TSO (2007)

Charity Commission, *Campaigning and Political Activities by Charities* (CC9), TSO (2004) and (1999) (superseded)

Charity Commission, *Campaigning and political activities by charities – some questions and answers*, (2007)

Charity Commission, *Campaigning and Political Activities by Local Community Charities*, (CC9a) TSO (1997) (superseded)

Charity Commission, *Charitable Associations: Model Constitution* (GD3), (2006)

Charity Commission, *Charitable Trusts: Model Trust Deed* (GD2), (2006)

Charity Commission, *Charities and Elections*, (2005)

Charity Commission, *Charities and Public Service Delivery – An Introduction and Overview* (CC37), TSO (2007)

Charity Commission, *Charities and Risk Management*, (2001)

Charity Commission, *Charities operating overseas: Charities for Fourth Head Purposes* [1993] 1 Ch Com Dec, 17

Charity Commission, *Collaborative Working and Mergers* (CC34), TSO (2006)

Charity Commission, *Collaborative Working and Mergers* (RS4), TSO (2003)

Charity Commission, *Complaints about Charities* (CC47), TSO (2003)

Charity Commission, *Draft Public Benefit Guidance*, TSO (2007)

Charity Commission, *Model Memorandum and Articles of Association for a Charitable Company* (GD1) (2006)

Charity Commission, *Orders under s.26 of the Charities Act 1993* (OG 1 A1), (2001)

Charity Commission, *Oxfam. Report of an Inquiry submitted to the Charity Commissioners 8th April 1991*, HMSO (1991)

Charity Commission, *Registration Application Form* (n.d)

Charity Commission, *Simplification Plan*, TSO (2006)

Charity Commission, *Stand and Deliver: The future for charities providing public services*, TSO (2007)

Charity Commission, *The Essential Trustee: what you need to know* (CC3), TSO (2007)

Charity Commission, *The Promotion of Human Rights* (RR12), TSO (2003) (superseded)

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

Charity Commission, *The Promotion of Racial Harmony* [1983] Ch Com Rep 10-11, paras.15-20

Charity Commission, *War on Want. Report of an Inquiry submitted to the Commissioners 15th February 1991*, HMSO (1991)

Charity Finance magazine (news items): June 2007

Charity Law Association, *Model Constitution for a Charitable Unincorporated Association* (2nd Edn., n.d.)

Charity Law Association, *Model Memorandum and Articles of Association for a Charitable Company* (2nd Edn., n.d.)

Charity Law Association, *Model Trust Deed for a Charitable Trust* (2nd Edn., n.d.)

Charmaz, K., *Constructing Grounded Theory*, Sage (2000)

Cohen, N., 'Political advertising would be a step too far on British television', *The Observer*, Sunday July 30, 2006

Compact Commission, *Compact Action Plan*, TSO (2007)

Compact Voice, *Stronger Independence, Stronger Relationships, Better Outcomes* NCVO (2007)

Denscombe, M., *The Good Research Guide for small-scale social research projects*, (2nd Edn.) OUP (2003)

Department for Culture, Media and Sport, *Amendment dated 4th December 2003 to the Agreement of 25th Day of January 1996 (as amended) Between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation*, (Cm. 6075) TSO (2003)

Department for Culture, Media and Sport, *Broadcasting. An Agreement Between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation*, (Cm. 6872) TSO (2006)

Department for Culture, Media and Sport, *Broadcasting: copy of the Royal Charter for the Continuance of the British Broadcasting Corporation*, (Cm. 6925) TSO (2006)

Department of National Heritage, *Broadcasting: copy of Royal Charter for the continuance of the British Broadcasting Corporation*, (Cm. 3248) HMSO (1996)

Department of National Heritage, *Broadcasting: copy of the agreement dated 25th day of January 1996 between Her Majesty's Secretary of State for National Heritage and the British Broadcasting Corporation*, (Cm. 3152) HMSO (1996) (as amended by Cm. 4797, 3rd July 2000; Cm. 6075, 4th December 2003)

Duke on Charitable Uses, (1676)

Dunn, A., 'Charity law – a political scandal?' [1996] 2 *Web JCLI* (http://webjcli.ncl.ac.uk/1996/issue2/dunn2.html)

Dunn, A., 'Charity Law as a Political Option for the Poor' (1999) 50(3) *NILQ* 298

Feldman, D.J., & Stevens, J., 'Broadcasting advertisements by bodies with political objects, judicial review, and the influence of charities law' [1997] *PL* 615

Flick, U., *An Introduction to Qualitative Research*, (2nd Edn.) Sage (2002)

Forder, C.J., 'Too Political to be Charitable?' [1984] 48 *Conv* 263

Glaser, B. & Strauss, A., *The Discovery of Grounded Theory*, Aldine (1967)

Goulding, C., *Grounded Theory: A Practical Guide for Management, Business and Market Researchers,* Sage (2002)

Griffiths, G., 'The art of the possible' (1996) *NLJ Christmas Appeals Supplement* 30

Hilder, P., Caulier-Grice, J. & Lalor, K., *Contentious Citizens. Civil Society's Role in Campaigning for Social Change*, The Young Foundation / Carnegie UK Trust (2007)

HM Government, *The Governance of Britain*, (Cm 7170) TSO (2007)

HM Treasury (Hampton Review), *Reducing administrative burdens: effective inspection and enforcement*, TSO (2005)

HM Treasury / Cabinet Office *The future role of the third sector in economic and social regeneration: final report*, (Cm. 7189) TSO (2007)

HM Treasury / Cabinet Office, *Consultation feedback on the future role of the third sector in social and economic regeneration*, TSO (2007)

HM Treasury / Cabinet Office, *The future role of the third sector in economic and social regeneration: interim report*, TSO (2006)

HM Treasury, *Budget 2007: Economic and Fiscal Strategy Report*, TSO (2007)

HM Treasury, *Effective Local Partnerships*, TSO (2005)

HM Treasury, *Guidance to Funders*, TSO (2003)

HM Treasury, *Implementing Hampton: From Enforcement to Compliance*, TSO (2006)

HM Treasury, *Improving financial relationships with the third sector: Guidance to funders and purchasers*, TSO (2006)

HM Treasury, *The Role of the Voluntary and Community Sector in Public Service Delivery. A Cross Cutting Review*, TSO (2002)

HM Treasury, *Working Together, Better Together*, TSO (2005)

Home Office (Active Community Unit), *Strengthening Partnerships - Consultation on Compact Plus. Analysis of Findings. Research Study Conducted for the Home Office Active Community Unit*, MORI (2005)

Home Office, *ChangeUp: Capacity Building and Infrastructure Framework for the Voluntary and Community Sector*, TSO (2004)

Home Office, *Compact on Relations between Government and the Voluntary and Community Sector in England*, TSO (1998)

Home Office, *Destination 2014*, TSO (2007)

Home Office, *Developing Capacity: Next Steps for ChangeUp*, TSO (2005)

Hutter, B.M., *The Attractions of Risk-based Regulation: accounting for the emergence of risk ideas in regulation*, ESRC Centre for Analysis of Risk and Regulation (LSE) (2005)

Institute of Chartered Accountants in England and Wales, *Internal Control: Guidance for the Directors of Listed Companies Incorporated in the United Kingdom*, (1999)

Kingham, T. & Coe, J., *The Good Campaigns Guide for the Voluntary Sector*, NCVO (2005)

Labour Party, *Building the Future Together*, (1997)

Lattimer, M. *The Campaigning Handbook*, DSC (2000)

Law Society, *Law Society Response to Policing: Modernising Police Powers to Meet Community Needs*, (2004)

Liberty, *Serious Organised Crime and Police Bill: Liberty's briefing for the Second Reading in the House of Lords*, (2006)

Locke, K., *Grounded Theory in Management Research*, Sage (2001)

Luxton, P., *The Law of Charities*, OUP (2001)

Meuser, M. & Nagel, M., (1991) 'ExpertInneninterviews: vielfach erprobt, wenig bedacht. Ein Beitrag zur qualitativen Methodendiskussion', in D. Garz and K. Kraimer (Eds.), *Qualitativ-empirische Sozialforschung*, Westdeutscher Verlag (1991)

Mitchell, L.J. & Drake, K.A., *1+1=3. Does size really matter? A scoping study of collaborative working between large and small voluntary and community organisations*, NCVO (2005)

Moffat, G., 'Charity, Politics and the Human Rights Act 1998: Chasing a Red Herring?' (2001) *IJNL* 4(1) (www.icnl.org/journal/vol4iss1/moffatprint.htm)

Morris, D., 'Broadcast advertising by charities' [1990] 54 *Conv* 106

Morris, D., *Charities and the Contract Culture: Partners or Contractors? Law and Practice in Conflict*, Charity Law Unit, University of Liverpool (1999)

Munro, C., 'Time up for the ban?' (2007) 157 *NLJ* 886

Murray, J., *The cooperate sector. Evaluating partnership approaches in the voluntary sector*, The Children's Centre Project (2005)

National Audit Office, *Home Office: Working with the Third Sector, Report by the Comptroller and Auditor General* (House of Commons Papers, Session 2005-06, 75) TSO (2006)

National Audit Office, *Office of the Third Sector – Implementation of Full Cost Recovery*, TSO (2007)

National Audit Office, *Supporting Innovation: managing risk in government departments, Report by the Comptroller and Auditor General* (House of Commons Papers, Session 1999-2000, 864) TSO (2000)

Nobles, R., 'Politics, Public Benefit and Charity' (1982) 45 *MLR* 704

Ofcom Broadcast Bulletin 43, 12 September 2005, pp.4-14, Standards cases. In Breach. Make Poverty History. *Various broadcasters, March 31 2005, 19.58 and other times*

Oxford Dictionary of English (2nd Edn.), OUP (2003)

Payne, G. & Payne, J., *Key Concepts in Social Research*, Sage (2004)

Picarda, H., *The Law and Practice Relating to Charities*, (3rd Edn.) Butterworths (1999)

Public Demonstrations (Repeals) Bill (Session 2006-07) as introduced into the House of Lords (House of Lords Bill 12)

Report of Advisory Group on Campaigning and the Voluntary Sector, (chaired by Baroness Helena Kennedy QC) (2007)

Rickett, C.E.F., 'Charity and Politics' (1982) 10 *NZULR* 169

Rickett, C.E.F., 'Politics and cy-pres' (1998) Feb *NZLJ* 55

Rochester, C. & Woods, Z., *Making a Difference Together' Impact Assessment: The Lloyds TSB Foundation for England and Wales*, Collaborative Grant-Making Programme (2005)

Santow, G.F.K., 'Charity in its Political Voice: A Tinkling Cymbal or a Sounding Brass?' [1999] *CLP* 255

Seddon, N., *Who Cares?* Civitas (2007)

Sheridan, L.A. 'The Political Muddle – A Charitable View?' (1977) 18 *Mal LR* 42

Sheridan, L.A. *Keeton & Sheridan's The Modern Law of Charities*, (4th Edn.) Barry Rose (1992)

Sheridan, L.A., 'Charity versus Politics' (1973) 2 *A-ALR* 47

Shimmin, S. & Coles, G., *Campaigning in Collaboration. A Joint Publication between NCVO's Collaborative Working Unit and Campaigning Effectiveness*, NCVO (2007)

Silverman, D. *Doing Qualitative Research*, (2nd Edn.) Sage (2005)

Simanowitz, L. 'A political decision', *Charity Finance*, (November 2004)

Smith, M.J., *Charities and Politics*, (LLM thesis) University of Liverpool (2006)

Swann, S., 'Justifying the Ban on Politics in Charity' in A. Dunn (ed.), *The Voluntary Sector, the State and the Law*, Hart Publishing (2000).

Stone, R., *Civil Liberties and Human Rights*, (6th Edn.) OUP (2006)

Strauss, A.L. & Corbin, J., *Basics of Qualitative Research: Grounded Theory Procedures and Techniques,* Sage (1990)

Strauss, A.L., *Qualitative Analysis for Social Scientists*, Cambridge University Press (1987)

The Guardian (news items): 2 May 2000, 2 July 2005

The Guardian, 'Charities: Political Silence', *The Guardian*, 19 July 1995

The Guardian, 'Darfur conflict heralds era of wars triggered by climate change, UN report warns', *The Guardian*, Saturday June 23, 2007

The Guardian, 'Has the compact finally come of age?' *The Guardian*, Wednesday April 18, 2007

The Independent (news item): 19 October 2006

Third Report of the House of Commons Select Committee on Procedure (House of Commons Papers, Session 2002-03, 855) HMSO (1996)

Third Sector magazine (news items): 5 May 2004, 23 June 2004, 8 December 2004, 16 February 2005, 6 April 2005, 13 April 2005, 27 April 2005, 17 Aug 2005, 24 August 2006, 1 November 2006, 6 December 2006, 24 January 2007, 31 January 2007, 11 April 2007, 2 May 2007, 18 July 2007, 4 July 2007

Unwin, J., *Speaking Truth to Power. A discussion paper on the voluntary sector's relationship with Government*, The Baring Foundation (2000)

Warburton, J., *Tudor on Charities*, (9th Edn.) Sweet & Maxwell (2003)

Ward, S., *Making Partnerships Work*, The Prince's Trust (2005)

Watkin, T.G., [1982] 46 *Conv* 387

Watkin, T.G., 'Where there's a will …' [1985] 49 *Conv* 412

Weiss, F., 'Quot Homines Tot Sententiae or Universal Human Rights: A Propos McGovern v Attorney General', (1983) 46 *MLR* 385

Wilson, D.C., 'The Strategic Challenges of Cooperation and Competition in British Voluntary Organisations: Toward the Next Century,' (1992) *Nonprofit Management and Leadership* 2(3) 239