

**ADVISORY GROUP ON CAMPAIGNING
AND THE VOLUNTARY SECTOR**

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ABOUT THIS REPORT

This Report is the product of an Advisory Group, inspired by Ian Leggett of People & Planet and the work of many campaigners. Its goal was specifically to look at legal restrictions on campaigning. Bates Wells & Braithwaite solicitors have provided Secretariat Services to the Advisory Group. The Advisory Group first met on 22nd February 2007 and conducted its work through four working groups which reported on 5th April 2007. (The Advisory Group's Terms of Reference are in Appendix 1 to this Report.)

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INTRODUCTION BY BARONESS HELENA KENNEDY, QC

There is a growing crisis at the heart of democratic accountability. The public's disengagement from organised politics has gathered pace as they have lost faith in the more traditional forms of political engagement. From the Power Inquiry to the investigations of the Hansard Society the picture is the same; we are less likely to vote in elections, engage in party political activity, trust politicians of any persuasion and continue to drift away from active political affiliation by joining a political party.¹

However, politics and civic engagement has not gone away. While the decline in "formal" political activity has waned we have become more active within our communities and in participating in campaigning activity. From campaigns to improve school meals to protecting the environment, from improving local health services to Make Poverty History more and more people are shunning political parties for single issue causes working to effect change in their local communities. In fact people are now more likely to have signed a petition, boycotted a product, or contacted an elected representative than ever before.

The voluntary sector has become the natural home for much of this activity. Some charity memberships far outstrip those of political parties and for many they form the legitimate voice for the disadvantaged, giving clout and leverage in the political system where none would exist otherwise. Trust in charities far outstrips the confidence placed in political parties. It is therefore little wonder that the Government is now looking to the sector to harness its ability to articulate the voice of citizens who no longer rely on the party monoliths to articulate their hopes and aspirations or protect their interests. Most notably campaigning by charities across a broad spectrum of issues at local and national level has energised and provoked public debate in a way that has left traditional politics in their slipstream.

More recently this has led the newly formed Office of the Third Sector to actively promote an enhanced role for the voluntary sector, not just in service provision, but as the "voice" of a disenfranchised citizenry that needs to be empowered to talk directly to Government. *"It is massively in the interest of politicians to champion your campaigning role, ...not by picking causes but by supporting your right and ability to campaign and by opening up to government your voice."*²

However, to flourish in this role we need a legislative framework and guidance that recognises the unique role that the sector is playing in articulating peoples' views and promoting political debate. The introduction of the new Charities Act 2006 has done much to bring charity law up to date. The new public benefit test (due to come into force in 2008) has the capacity to put developments in charitable activity and a broader definition of charities aims onto a sounder footing.

Yet areas of the law remain inadequate in supporting the growth in citizen advocacy through charities. Campaigning in the 21st century takes place in a minefield of confusion, obstruction and outdated interpretations of the law. When restrictions on the ability of charities to engage in political campaigning, substantially curtail their contribution to civil society, charity law and regulation is clearly in need of change. When organisations applying for charitable status under the human rights purpose of the Charities Act 2006 are told they are "too political", the legal framework is lagging woefully behind modern social realities and needs to change.

¹ *Power to the People*, Power Inquiry, 2006, *Survey of public trust and confidence in charities*, Opinion Leader Research for the Charity Commission, November 2005, Ipsos MORI for An audit of political engagement 3 (2006)

² Ed Milband, Minister for the Third Sector
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The tightrope walked by registered charities in their campaigning work is exceeded by the blanket exclusion civil society organisations face when they try to campaign in other areas of British public life. The 2003 Communications Act bans “social advocacy” organisations from advertising on TV and radio. BP and Tesco can reach millions through the broadcast media but Amnesty and Greenpeace cannot. Campaigning organisations need to be able to get their message across and the public should be entitled to make up their own minds. Again the rules need to change.

Further with a spate of new legislation, the government has inadvertently restricted the right of charities and NGOs to protest and demonstrate. Campaigning cannot freely happen in a climate of uncertainty and some voluntary organisations are hesitating before embarking on an email campaign or protest for fear they may be served with an injunction for harassment, breach of which would lead to criminal liability.

Together these restrictions are stifling the growth of the very activity the Government has been so keen to acknowledge as valuable and wishes to promote. It was our concern that charities should be able to continue to develop the crucial role they play in campaigning and political dialogue, enriching our democracy and encouraging the development of community resilience and participation.

This report was deliberated on and produced by some of the leading representatives working in the field of charity campaigning, advocacy and law firms working in the field. We were unanimous in identifying the steps that need to be taken to secure a better underpinning for charities campaigning activities:

1. We need a clear and unequivocal framework to support and enable campaigning by charities.
2. We need an end to the unreasonable stifling of not-for-profits restricted access to broadcast media. The public have the right to hear all the arguments-not just those of the powerful.
3. We need to remove the unintended consequences of recent criminal legislation that threaten to restrict legitimate protest.

If we want to foster the emergence of an engaged citizenry through campaigning and political action then we need to ensure that a new framework of confidence is created for charities that can help facilitate a climate where the vibrant dissatisfaction of campaigners can enrich our democratic culture. The steps we have outlined in the report would go a long way to securing these aims.

EXECUTIVE SUMMARY

Section 1: Charity Law

- 1.1 Section One of the Report examines how charity law constrains engagement with the political process. Historically charity was closely connected to politics. In the nineteenth century, many charities with political objects were set up before restrictions began to be introduced by the Courts.
- 1.2 Charities and voluntary organisations today play a vital role in involving disenfranchised communities in the democratic process. Many non-voters participate in charities, community groups or campaigning organisations.
- 1.3 Legal restrictions on campaigning by charities rest on 20th century case law which established that charities may not have political objects. Political campaigning is defined as not only furthering the interests of a political party but includes campaigning to change the law or policies of national and local government at home or overseas.
- 1.4 Charity Commission guidance, CC9 was revised in 2004 to be less cautionary with further clarification in Q and As published in April 2007. Under existing case law, political activities are permitted by charities only if these remain ancillary and do not become the long term dominant means of carrying out charitable purposes. But concern over what constitutes “ancillary” and “dominant” means that charities are frequently inhibited in how freely they can campaign. According to research, some charities believe that spending more than a fifth of their income on campaigning may exceed what is lawful.
- 1.5 These arbitrary restrictions do not exist for other charitable activities. A charity can quite lawfully spend all of its resources on delivering public services, but a charity that spends all of its resources on political campaigning may be in breach of the law.
- 1.6 The Charities Act 2006 deliberately codifies several charitable purposes that are inherently political, such as the prevention of poverty, the advancement of human rights, citizenship and animal welfare. The dominant/ancillary rule is particularly difficult to sustain in the context of these purposes. Some human rights organisations attempting to register as charities are facing difficulties because they are viewed as being too “political” by the Charity Commission.
- 1.7 The Charity Commission now has a statutory public benefit objective and has to assess the public benefit of contentious organisations. The Commission could assess the public benefit of political campaigning.

Section 2 – Protest Law

- 1.8 Section Two examines criminal restrictions on voluntary sector campaigning. Legislation introduced over the past decade such as the Serious Organised Crime and Police Act (SOCPA), 2005, the Terrorism Act 2000, and the Protection from Harassment Act 1997 has all affected the work of campaigners.
- 1.9 The legislation has directly restricted the right to protest or campaign but also had a “chilling effect” by deterring groups from taking actions which may be deemed criminal.

- 1.10 Activities previously regarded as an integral part of campaigning may be criminalised by the new legislation. For example, sending an email to several directors of a company or claiming an employee's company is destroying the environment may infringe the Protection from Harassment Act 1997.
- 1.11 These restrictions are impacting on a wide range of campaigners and organisations, most of which are entirely peaceful and non-violent in their methods and aims. As examples, restrictions on demonstrating and on campaigning activity have been imposed on Friends of the Earth, whilst a village community group is now faced with criminal sanctions for campaigning to save their local lake.

Section 3 – Broadcast Law

- 1.12 Section Three of the report looks at the effect on campaigning organisations of the ban on political advertising in the 2003 Communications Act. The Act outlaws advertising by “political bodies” and adverts “directed towards a political end” from the broadcast media.
- 1.13 The definition of “political” includes social advocacy aimed at influencing public opinion on matters of “public controversy” in the UK. Non-political adverts by organisations defined as political by the Act are also banned.
- 1.14 The Communications Act has had a censoring effect on the voluntary sector. An Amnesty International radio advert about Rwanda was banned because Amnesty is categorised by the Act as political. Make Poverty History's “One Click” campaign was also excluded from television and radio.
- 1.15 The Act permits companies to broadcast one-sided advertisements about their corporate social responsibility credentials but does not allow NGOs to respond.

2. Recommendations

The Advisory Group makes the following recommendations.

Section 1 - Charity Law

- 2.1 Charities should be able to engage in political campaigning in furtherance of their charitable purposes as long as they do not support political parties. In particular:
 - 2.1.1 Charity trustees should be free to decide to engage exclusively in political campaigning in furtherance of their charitable purposes.
 - 2.1.2 A charity should not have limits placed on the resources that can be committed to political campaigning activities.
- 2.2 The Advisory Group believes a change in the interpretation of the law to remove the “dominant and ancillary rule” would be of public benefit, where the purposes are otherwise charitable.
- 2.3 The Charity Commission has in the past interpreted court judgments on political activities by charities in a rigid way, although they have shown a more flexible approach recently. We would welcome a continuation of this approach by the Charity Commission.

- 2.4 The Advisory Group believe that recommendations 2.1-2.3 above do not amount to a “throw the door open” approach, but are a carefully considered set of proposals that build on the foundations of the Charities Act 2006 and create the enabling environment that best advances the interests of charities and civil society.

Section 2 - Protest Law

- 2.5 Parliamentarians should support the new Public Demonstrations (Repeals) Bill which calls for the repeal of those parts of the Serious Organised Crime and Police Act 2005 that impose disproportionate restrictions on protest and demonstrations, in particular the provisions prohibiting unauthorised demonstrations in the vicinity of Parliament.
- 2.6 Whilst recognising the effectiveness of the Human Rights Act 1998 to restrict arbitrary interferences with the right to protest, the Advisory Group calls upon the Commission for Equality and Human Rights to take up the active promotion of peaceful protest; both as part of its duty to promote the rights of freedom of expression and assembly, and its duty to support the participation of all in society.
- 2.7 S. 44 of the Terrorism Act 2000, which allows for individuals to be stopped and searched by a police officer without reasonable suspicion, should be re-drafted. In particular the time and geographical locale of any designated area should be restricted. Further guidance should be issued on the use of the powers under the section to ensure its use is aimed at preventing terrorism, rather than restricting peaceful protest.
- 2.8 Policing procedures and codes of practice should be amended to ensure that, in the discharge of their powers, police officers positively respect freedom of expression and assembly, and accord due weight to the legitimate rights of individuals to protest peacefully in public.

Section 3 - Broadcast Law

- 2.9 The Communications Act 2003 currently imposes an unreasonable prohibition on advertising by charities and NGOs. Ofcom and the BACC should immediately recognise that registered charities are not permitted to have a political purpose and apply a rebuttable presumption that charities are not political bodies.
- 2.10 The ban in the Communications Act 2003 on all advertising by “political” organisations should be repealed.
- 2.11 A new legislative framework should permit in principle non-political advertising by NGOs and charities.
- 2.12 The definition of political in s.321 (3) b-f of the Communications Act 2003 should be amended so as to permit the broadcast of social advocacy advertisements on radio and television but restrict the broadcast of advertising for political parties.
- 2.13 A new regulatory framework for broadcast media advertising should be imposed in which any “political” (excluding party political) advertising by NGOs should state that it contains political content and represents the opinion of the advertiser and should state the source of funding for the advertisement. Consideration should be given to a moratorium on all political and social advocacy advertising in the broadcast media during local and national election periods.

1. CHARITY LAW AND CAMPAIGNING

Introduction

Beginning in 1917, twentieth century charity law established a strict demarcation between charities and political engagement. Political objects could not be charitable because the Court had no way of judging whether a proposed change in the law was for the public benefit. Despite the introduction of more permissive Charity Commission guidelines in 1995 and further relaxations since, the campaigning impulses of charities are still inhibited by an unduly restrictive legal framework. Accordingly, charities are required to police themselves to ensure political activities do not predominate. Whilst we do not advocate charities engaging in party politics, we believe this separation of charities from politics is artificial and damaging. Historically charities were much freer to be political. With the passing of the Charities Act 2006 and the codifying of charitable purposes such as the prevention of poverty and advancement of human rights and citizenship, we believe the current framework no longer works. Below we set out the case for reform.

1.1 Historical Perspective

- 1.1.1 Charities have a long tradition of engaging in campaigning activities and are uniquely placed to advocate for legislative or policy change and give expression to the ‘voice’ of diverse (and often under-represented) groups in society. It is our view that the current restrictions on the ability of charities to campaign, need to be revisited and that the hitherto accepted underlying legal framework can be reinterpreted in the light of the Charities Act 2006.
- 1.1.2 In England and Wales, charities and their legal structure were founded in an overtly political climate and their goals and activities have always overlapped with the political sphere. Peter Luxton in ‘The Law of Charities’¹ explains that in the nineteenth century, there was a much more relaxed attitude to political objects. For example, the Courts, when determining charitable status, did not distinguish between those trusts that had political purposes and those which did not. For example, in *Russell v. Jackson*² a trust to educate children in the doctrines of socialism was held to be charitable.
- 1.1.3 There are a number of examples of charities with political objects that were set up before the Courts began to introduce restrictions with directly political purposes that might in today’s climate find it difficult to register. For example, the Lord’s Day Observance Society and Anti-Slavery International whose objects include ‘the elimination of slavery, the slave trade and all forms of unlawful forced labour and unlawful deprivation of freedom’.

1.2 Civil Society: Democratic Deficit

- 1.2.1 Today, more than ever, it is vitally important that charities are able to lobby for change and carry out political campaigning work. The disengagement of

¹ ‘The Law of Charities’ - Peter Luxton - Oxford University Press 2001: 7.14 – 7.17

² *Russell v. Jackson* (1852)

the public with political parties and traditional methods of participation has been well documented, as has the rise in membership of single issue campaigning organisations and voluntary activities.

- 1.2.2 As Stuart Etherington has argued in his 2007 Cass Lecture entitled ‘The Future of Civil Society’³: the “growing gap between formal politics and people’s concerns has fuelled concerns about a democratic deficit”. For example, forty years ago 44% of electors said they identified ‘very strongly’ with a particular party; in 2001 only 14% said the same. At the same time the number of people willing to vote at elections, particularly local elections has also fallen: for example, in the local government elections of 2000 only 28% of the electorate voted. At the 2005 general election 17 million registered voters did not vote. However, 37% of people who told the Power Commission that they did not vote in general elections were members of, or active in a charity, community group, public body or campaigning organisation.
- 1.2.3 It is interesting to note that some NGOs now have a membership greater than any of the political parties in Britain and trust and confidence in charities far exceeds that of politicians and political parties. It is thus the case that many charities and voluntary organisations can facilitate engagement in the democratic process, including the advocacy of disenfranchised communities, much more easily than the traditional political process.
- 1.2.4 The example of Make Poverty History illustrates the different strands of modern civil society action. During the campaign over 500,000 people contacted the Prime Minister and over 800,000 activists campaigned online through the website alone. Eight million people in the UK wore a white band and, on the biggest public demonstration on global poverty the UK has seen, a quarter of a million people marched in Edinburgh. In addition 375 MPs were lobbied in a single day in the largest ever mass lobby of Parliament and over 750,000 people in the UK cast a Vote for Trade Justice to show their support for change.

1.3 Public Service Delivery and Campaigning

- 1.3.1 Notwithstanding this growing trend of civic action and engagement, charity campaigning is not universally welcomed. The recent Civitas Report: ‘Who Cares? How State Funding and Political Activities Change Charity’⁴ suggested a re-classification of charities in respect of both campaigning and public service delivery. The Report drew a distinction between independent charities (who receive less than 30% of their income from the state); state-funded charities (who receive between 30 and 70% of their income from the state) and statutory agencies (who receive 70% or more of their income from the state). At the same time the Report stated that “it is a cause for concern that so many charities both funded and not funded by government, have

³ Cass Lecture 2007: The future of Civil Society – Stuart Etherington (www.ncvo.org.uk)

⁴ ‘Who Cares? How State Funding and Political Activism Change Charity’ – Civitas 2006

become so active in lobbying and campaigning along political lines.” The Report suggested four distinct categories of campaigning organisations:

- Lobbying and campaigning organisations – including politically aligned and motivated groups – that are not charities.
- Charities that do not lobby and campaign.
- Organisations that are divided into a charities arm and a campaigning area.
- Lobbying and campaigning coalitions that represent charities but are not charities themselves.

1.3.2 We view the Civitas re-classifications as effectively “damning charities if they do” (i.e. engage in political campaigning even though this demonstrates independence from the state) or “damning charities if they do not” (i.e. provide services at the expense of an advocacy role). If the Civitas model is to be followed, charities would be pushed into a tiny area of traditional paternalistic or benevolent assistance, which denies the diverse and multifaceted roles the charity sector can play.

1.3.3 Our view is that both public service delivery and political campaigning are perfectly legitimate means of a charity fulfilling its charitable objectives. However, at present, whilst the trustees of a charity can make a reasonable and prudent decision to use all of the charity’s resources to provide public services under contract to the state, a charity is not free to make a reasoned decision to spend all of its resources, long term, on political campaigning.

1.3.4 It is interesting to compare the two types of activities. Service delivery which fails to achieve full cost recovery, is effectively subsidising state services and minimising the potential taxation burden. This is not viewed as political, yet it clearly influences Government policy – if the charities did not do this, taxes might have to rise. However, campaigning to change law or policy to change the burden of state responsibility and service provision or to seek full cost recovery is held to be political. This is contrary to common sense and, as we show, has inhibiting consequences for the voluntary bodies seeking to contribute (as the government itself advocates) to the development of law and public policy.

1.4 Intertwining of Politics and Charity

1.4.1 The debate that Civitas has re-ignited raises the central question as to whether charity and politics are “different things”. We suggest they are not and never have been. The key areas that charities are involved in such as education, health and environment criss-cross into the political. As Government now spends 44% of GDP compared with approximately 5% in 1900, it inevitably means more activity is “political”. This is backed up by the Performance and Innovation Unit (2001) which argued in its paper ‘Campaigning and Political Activities of Charities and Voluntary

Organisations⁵ that to restrict charities' ability to advocate change might be to fail to make best use of their knowledge and expertise in tackling social problems. It went on to say that: "If, as a society, we believe in the benefit of charitable purposes such as education, religion and so on, we should enable them, and the frameworks needed to support them, to be advocated freely."

1.4.2 In a submission to the Performance and Innovation Unit Report, Dr Eleanor Burt of the University of St Andrews put it as follows: "Real difficulties arise when those who seek to regulate charities attempt to impose absolute boundaries around two such difficult to define concepts. By intention or default, whether it suits our purposes or not, areas such as peoples' health, education, employment, the environment are increasingly the stuff of politics. These self-same areas, however, also sit within the heartlands of charitable activity."

1.4.3 The intertwining of charity and politics is even more the case under the Charities Act 2006, the relevant provisions of which come into force in 2008. For example, the Group views the prevention of poverty and the advancement of citizenship, human rights and conflict resolution as being inherently political. The causes of, solutions to, and the very substance of much of the problems charities address are necessarily political. As long ago as 1979, Brian Walker, then director of Oxfam stated that providing clean water to drink, or water to irrigate crops and water the cattle, whilst being humanitarian, could have political implications. For example, "whoever owned the watering place is now disadvantaged. Normally that means, the landlord, the money lender or the local political power boss. The political power structure has been disturbed – with a measure of justice flowing towards the poor and away from the power base of the rich and the powerful and hence profoundly political."⁶ In a more up to date version of this, War on Want use the slogan "Poverty is Political"

1.5 Legal Restrictions on Charities and Campaigning

1.5.1 So what are the legal barriers to campaigning? The nub of the restriction on charities and campaigning is the prohibition on charitable purposes being political. The current view is summarised in paragraph E5 of the current Charity Commission consultation on draft Public Benefit guidance⁷ as follows:-

1.5.2 "Charity law draws a distinction between political purposes and political activities. Charities cannot undertake political purposes because neither the courts nor the Charity Commission is in a position to judge whether a political purpose is or is not for the benefit of the public. However, a charity can undertake political activities and campaigning as a way of carrying out its charitable purposes, provided that:

⁵ 'Campaigning and Political Activities of Charities and Voluntary Organisations' - Performance and Innovation Unit - December 2001

⁶ B.W. Walker: "Charities and Politics" The Friend, November 1979

⁷ www.charitycommission.gov.uk

- It is not the dominant means by which the charity carries out its charitable purposes; and
- There is a reasonable expectation that the extent to which the political activities will further the charity’s purposes justifies the resources the charity commits to those activities.”

1.5.3 A political purpose is defined by the Charity Commission as “any purpose 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”. The definition derives from the McGovern case: see 1.5.6 below.

1.5.4 The first judge to state that charities may not have political objects was Lord Parker in 1917. He stated in *Bowman v The Secular Society* that:⁸

“A trust for the attainment of a political object is not charitable since the Court has no way of judging whether a proposed change in the law will or will not be for the public benefit”.

1.5.5 Lord Parker went on to say that the judiciary had “always refused to recognise such objects as charitable”. However, other than an obscure case in 1828 where the judge held that a trust to distribute literature advocating the supremacy of the Pope over secular authority was not charitable, it is our view that Lord Parker considerably overstated the position.

1.5.6 The judgment, in the *Bowman* case (1917), has cast a shadow over the development of guidelines on political activities and campaigning by charities. It formed the basis of the McGovern case⁹ in which the court upheld in 1981 the refusal of the Charity Commission to register a trust set up by Amnesty International as a charity. The Commission’s guidance, issued first in Commission Annual Reports and subsequently as CC9, reflected the Amnesty case judgment. Subsequent revisions, up to and including the present revision of CC9, take the view that charities cannot have political objects as the settled legal basis for guidance on what activities charities may undertake in a political context. The liberalisation of the guidelines which has progressively occurred in the quarter century since the Amnesty case has depended on distinguishing the activities of a charity from its purposes.

1.5.7 The influence of the McGovern judgment is extensive because it encapsulates the legal view that a political purpose cannot be charitable. Slade J defined political purposes as:

“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 the 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

⁸*Bowman v Secular Society Ltd* [1917] AC 406

⁹*McGovern v A-G* [1982] Ch 321

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.”¹⁰

- 1.5.8 The first version of Charity Commission Guidance CC9 which reflected the case law set out above was very inhibiting. By the time of the Strategy Unit review of charity law in 2002 the restraints of the revised CC9 had come to seem unduly ‘cautionary’. The 2004 version of CC9 reflects the Charity Commission’s response, aiming to put greater emphasis on ‘the campaigning and other non-party political activities that charities can undertake’ and also to include a section on risk factors to be taken into account. The resulting guidance substitutes emphasis on propriety and reputational risks for the previous emphasis on the need for a reasoned case and responsible expression. But the legal basis for the view that charities cannot have political objects is reaffirmed.

1.6 Does the Legal Justification that the Court and the Charity Commission cannot judge the public benefit of a political purpose make sense?

Summary

The stated legal reason that a charity cannot engage long term in political campaigning is that this would amount to a political purpose and neither the Court nor the Commission can judge the public benefit of a political purpose. The justification for a charity to engage in ancillary political campaigning is that in this case, the Commission does not have to judge its public benefit, simply whether its activities are reasonably furthering its purposes. This paragraph puts forward the Advisory Group’s view that (1) the Court and Commission could judge the public benefit of political campaigning and a proposed change in the law; (2) the test for both a charity’s purposes and activities should be the same test, i.e. whether they both reasonably further the interests of the beneficiaries and (3) the legal justifications are not a credible rationale for the restrictions on political campaigning and the dominant and ancillary rule.

- 1.6.1 Whilst the Group can understand that there may be public policy considerations (whether valid or not) that underpin the restrictions on charities and campaigning, the legal justification is unconvincing and contradictory. Like many academic commentators over the last thirty years, we are sceptical that the stated legal reason is the real reason.
- 1.6.2 As set out in paragraph 1.5.2 the legal justification is that charities cannot undertake political purposes because the Court is not in a position to judge whether a political purpose is or is not for the benefit of the public. This links in with the constitutional doctrine of the separation of powers between the executive and the legislature. Consequently, the Court would be usurping the sovereign powers of Parliament, if it made judgments on changing the law or policy.
- 1.6.3 Building on the McGovern case, the Commission distinguishes between political purposes and activities. As regards the former, it says that it is not

¹⁰McGovern v A-G [1982] Ch 321

in a position to judge their public benefit. As regards activities, it states that where these are ancillary, the Charity Commission merely has to assess whether the trustees could have reasonably formed the view that the political activities justify the resources that have been spent. If political activities dominate then it may need to be considered whether the organization should ever have been registered as a charity, or whether it was in fact established for non-charitable political purposes.

- 1.6.4 Looking first at whether the Courts can judge the public benefit of a political purpose, commentators have questioned the assumption that this lies outside the Court's expertise. For example, the Performance and Innovation Unit paper argued that judges face similar difficulties with evidence and criteria when judging the public benefit of any purpose, not just changes in the law. It went on to say: "one could argue that activities and purposes involving changes in the law, should be subject to the same standards of proof and reasoned argument to determine public benefit, as are any other policy purposes. Consequently there might be cases where the balance of evidence and argument concerning the public benefit of an uncontroversial change in the law is actually more clear-cut, than the evidence around whether a controversial policy proposal which makes no reference to the law would be publicly beneficial."
- 1.6.5 Some have argued that the rationale that the Courts cannot determine the public benefit of political purposes is "a strain on credulity"¹¹. Perry ⁶ ¹² argues in the Demos paper - "Restricting the freedom of speech of charities: do the rationales stand up?" that: "Many judges spend much of their lives doing little else but assessing the public benefit of things put before them. To believe that their professional ability deserts them in the face of a putative charity with a campaign to run, is surely naïve."
- 1.6.6 In any event, regardless of academic discussions as to whether the Courts can make this assessment or not, a contradiction lies at the heart of the case law that is relied upon to justify the restrictions on charity campaigning. In the House of Lords case: *National Anti-Vivisection Society -v -Inland Rev Comrs*¹³, the Court took the view that the Society was not charitable because even though abolishing vivisection would help laboratory animals and thus morally elevate humanity, this benefit was far outweighed by the damage caused to humans by the loss to medical science and research. In other words, far from the Court not being able to make an assessment on public benefit, it did just that and ruled that the Society's charitable status would be a detriment to public benefit. It is interesting that this case is cited by the Charity Commission in its draft Consultation paper on public benefit, in the same paper that also states that the Court is not able to judge the public benefit of political purposes.
- 1.6.7 We can look next at the Commission's distinction between political purposes (and its contention that like the Court it cannot assess public

¹¹ Sheridan, L.A. 1973 'Charity versus Politics' 2, *Anglo-American Law Review*

¹² Restricting the freedom of speech of charities: do the rationales stand up. Demos (undated).

¹³ *National Anti-Vivisection Society v IRC* [1948] AC 31

benefit) and ancillary political activities where the Commission posits a lower test. We can understand why the Commission should make this distinction as it is the stated position of the Courts. However, it is important to consider its validity. Whilst superficially the distinction between purposes and activities seems a workable demarcation, the more one starts to unpick this distinction, the more strained and artificial it becomes.

- 1.6.8 As regards whether the Commission can assess the public benefit of political purposes, the Commission has to make all sorts of difficult decisions in the fields of education, health and human rights. This is even more so under the Charities Act 2006. For the first time the Commission has a statutory objective to promote awareness and understanding of the public benefit requirement and to issue guidance in respect thereof. Parliament has declined to define public benefit which puts the Commission into difficult territory where it is almost impossible to avoid the political arena.
- 1.6.9 For example, under the 2006 Act, the presumption of public benefit has been removed for education (as well as poverty and religious) charities. Whilst there are some who say that removing the presumption changes nothing, there are others who question why Parliament would have removed the presumption, if the status quo was intended to prevail. In any event, as part of the consultation process, the Commission will be required to evaluate conflicting evidence in relation to a number of contentious charities including charities that charge high fees such as independent schools. One group states that independent schools are exclusively charitable because education in and of itself is charitable, regardless of whether those on low income benefit. Another group asserts that providing bursaries to those on low income is a means of independent schools providing public benefit, whilst a third argues that bursaries to academically gifted children are a disbenefit, because they rob the state schools of their social and intellectual capital.
- 1.6.10 The Commission would no doubt argue that weighing up the public benefit of independent schools, is a different exercise to assessing whether political purposes are charitable, on the basis that it can decide on controversial issues as long as they do not encroach on law and Government policy. However, this does seem a weak argument. Surely, whether fee-charging educational charities have sufficient public benefit, in the light of the removal of the presumption, does encroach on government policy in respect of education? The Commission's weighing up of evidence on this hotly contested and deeply political issue, does seem to indicate that it could undertake a similar exercise in relation to political campaigning.
- 1.6.11 The next issue to address is the distinction the Commission makes between purposes (which are subject to an objective test) and ancillary political activities where the Commission merely has to judge whether the trustees have reasonably formed the view that the activities further the purposes. The logic of this argument is that if the political activities dominate then the political activities are deemed to morph into the real purpose of the organisation and political purposes cannot be charitable. The distinction between purposes and activities when looked at in the context of political

campaigning does become something of an artificial construct. In reality, at the registration stage, the Commission always looks at the activities of the applicant and passes judgment as to whether there is private or public benefit. One might ask – assuming that the purposes have been worded correctly from a technical and legal point of view - how else is public benefit going to be assessed? In addition, notwithstanding various Court judgements that the determination of public benefit is a “question of fact” to be tested “by means of evidence cognisable by the Court”, public benefit is hardly an objective matter of fact in the usual sense; rather it is a value judgement. One way of defining public benefit would be to say that it is a value judgement as to generally accepted views on the nature and usefulness of what an organisation aims to achieve. However, the definition of public benefit can hardly be considered the same as an objective, value free “fact.”

- 1.6.12 It might therefore be the case, that the proper test for public benefit should be a lesser test, closer to the one for activities, namely whether the trustees can reasonably argue that their purposes achieve public benefit. Bringing the test for purposes and activities together would address the artificiality of the present divisions where the law allows a charity whose purpose is to prevent poverty to engage in activities which seek, for example, to tackle civil conflict if the trustees believe that this is the best way of achieving their purpose, but not if it is elevated to being the charity’s purpose. This lesser test is also a sounder explanation for the existence of charitable purposes which are conflicting or competing. For example, an animal welfare charity motivated by the suffering of animals and a charity set up to relieve health advancing arguments as to the necessity of experiments on animals for medical research. (Please see paragraph 1.14 as to the extent to which it is permissible for animal welfare charities to campaign in respect of vivisection.)
- 1.6.13 Bringing the public benefit test for purposes and activities closer into line, would also be compatible with the argument that the Commission does not have to decide whether a proposed change in the law or policy is of merit but whether the *advocacy* of the argument is of merit. This means that the Commission is not itself deciding questions of political priority, resources and compensation but the public benefit of the campaign demand being advocated. As the Performance and Innovation Unit paper stated: “From this viewpoint, advocacy of a range of opinions would itself be valuable and beneficial to the community, as the best means of promoting democracy and determining the truth”. From this perspective, it is the public debate which determines its merit in civil society. This must also be in line with the charitable purpose of advancing citizenship – an active and confident citizenry will wish to air their “voice” and contribute to the democratic debate. A test of this sort might also make it easier to access the views and voice of hard to reach communities. It would also ensure that debates do not get pushed into extreme or fringe groups. (Again, please see paragraph 1.14 for the effect of not allowing a full debate on vivisection in the charity sector).

1.7 Breadth of the definition of Political Campaigning and the Difficulties this Causes

- 1.7.1 Before we look at how the dominant and ancillary rule is defined and the problems that it causes, it is worth unpicking the difficulties caused by the astonishingly broad definition of what is political arising from the McGovern case- see paragraph 1.5.7. Whilst we can understand that it includes furthering the interests of a political party, it makes no distinction between seeking to change or even oppose changes to the laws of this or a foreign country. It also includes seeking to change government policy or changing the decision of governmental authorities and the same test applies in this country and abroad.
- 1.7.2 We first need to address the anomaly that campaigning in support of the law is not viewed as political campaigning. This is obviously because the current law is regarded as being for the public benefit. But it is instructive to think about what this might mean in practice. For example, one charity wants to change the law on abortion and bring down the qualifying period to ten weeks. Another charity wants to retain the current law as it is. The activities of the charity that seeks to change the law are likely to be seen as political campaigning, whilst parallel campaigning tactics used by the charity, which accepts the status quo can be justified as being charitable. Hence prior to the ban on fox hunting it would have been legitimate for charities to campaign on the basis of the law as it was. This creates inconsistencies and would not be easily understood by the public.
- 1.7.3 In respect of the restrictions on political campaigning to change policy, there is an argument to say that seeking to change law and policy are very different things and perhaps should be distinguished in some way. It would seem beneficial in terms of debates on policy that charities (which represent a diversity of voices) can play as wide a role as possible. For example, in the discussions around public services, it is important that charities do not face artificial barriers. Charities often have a deeper engagement with citizens and communities and a more holistic approach than the statutory services. Because they understand the needs of people and listen carefully to their preferences, it is natural and indeed right that charities should contribute fully role in respect of policy debates. One can question why seeking to reverse government policy on public services (or any other policy for that matter) should be defined as political campaigning.
- 1.7.4 As with the definition of seeking to change the law, there are anomalies with the fact that campaigning to ensure that the Government sticks to its policy is not viewed as political campaigning. For example, if a charity runs a ‘campaign’ to ensure that the government complies with its stated policy commitment to provide access to treatment for all people with HIV by 2010, then this is not political campaigning. The net result is that provided a charity is working on issues that are in support of stated government policy, it can campaign as much as it likes. This runs counter to the fact that it is important for the sector to remain independent of Government. Interestingly, the definition of political purposes is silent on whether seeking to persuade government to introduce a policy in the first place is political.

Accordingly, taking the HIV example again, it is hard to know whether prior to 2005 the campaign for universal access for treatment (before it was government policy) was political campaigning or not.

- 1.7.5 Then of course, there are plenty of places where law and policy meet. For the last two years a number of charities have been campaigning for a Climate Bill, which would be defined as political campaigning. Last year that campaign was won and a draft Bill is working its way through Parliament. The charities that are continuing to work on this are not seeking to change the law of the country; government itself has already decided to do introduce a Bill. But charities are participating in the public consultation on the Climate Bill and in meetings with government and MP's. Does this mean that these charities are engaged in political campaigning? On the basis of the current definition of political purposes, it seems not. However, it's not difficult to see why many trustees would be nervous and uncertain.
- 1.7.6 Finally under this section, one needs to address whether the definition of political campaigning should be the same in this country and abroad. The constitutional argument that political purposes cannot be charitable due to the separation of powers between the sovereignty of Parliament and the political neutrality of the judiciary, is not relevant in respect of foreign jurisdictions. The fact that the laws of another country are deemed (unless there are highly exceptional circumstances) to be for the public benefit of that country, causes great difficulties for human rights charities. The argument raised in the McGovern case (see paragraph 1.5.7) was that the Courts lack sufficient knowledge or understanding of the circumstances in foreign countries. However, is this the case in all circumstances? For example, if a charity monitors human rights in Zimbabwe or Burma, or supports those whose rights may have been infringed, this is not political campaigning. On the other hand, if a charity seeks legal changes to embed the observance of human rights in the law in Zimbabwe or Burma, this is political campaigning and cannot be a dominant activity of the charity. Paragraph 1.13 further explains the anomalies that this restriction causes for human rights charities.

1.8 How is the Dominant and Ancillary Rule Defined?

- 1.8.1 It is settled that a charity may spend all of its resources on campaigning, which is limited to public awareness raising and education on a particular issue. However, in respect of political campaigning which can only be ancillary (the Commission sometimes uses the term 'incidental') it is vital that there is clarity about what constitutes dominant political activity. Charity Commission guidance CC9, does not satisfactorily define what is meant by dominant. Paragraph 23 says: "What is dominant is a question of scope and degree upon which trustees must make a judgment. In making this judgment 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".
- 1.8.2 The Q and A's published by the Charity Commission in April 2007, acknowledge that there has been confusion about the dominant and ancillary

rule. The Group view the Q and A's as a huge leap forward, in that they unequivocally endorse the right of charities to campaign and are much less risk focused and cautionary than the language of CC9. It is also helpful that the Commission has acknowledged that there *may* be circumstances in which for a period of time, a charity can lawfully devote all of its resources to political campaigning. Nonetheless, the Q and A's do not precisely define dominant or ancillary activity. The Commission states: " We did not intend by them that political activities could only be a very small part of a charity's work. Rather, we were making the point that the activities may only be a means of carrying out the work of the charity which (under the charity's governing document) the trustees were free to adopt or not adopt, from time to time, as they saw fit".

- 1.8.3 The underlying legal and policy formulation, however, remains the same as the answer to Q3 indicates when the Commission states 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". In paragraph 1.11 below we set out why, in our view, there could be legal grounds for a further liberalization and some space for the Commission to move into.

1.9 Difficulties faced by Charities in Respect of the Dominant/Ancillary Test

- 1.9.1 The Group acknowledges that the dominant and ancillary rule gives charities much more flexibility than the total ban on social advocacy broadcasting on T.V and radio under the Communications Act 2003 – see section 3 of this Report. The Group also believes that some of the lack of clarity concerning the dominant and ancillary rule, may be ameliorated by an education and awareness programme in the charity sector, disseminating the recent Q and As from the Charity Commission and by giving confidence to trustees that they can be more political than they have perhaps understood the case to be.
- 1.9.2 In addition to the need for an education or dissemination programme, we are also aware that the Commission is due to revise CC9 later this year. We would request that the new version sets out in much more detail, clarification concerning any differences between seeking to change law, policy and the jurisdiction in which the work is carried out, as well as greater clarification concerning the period of time and resources that can be spent. Nonetheless, whilst welcoming important clarifications, we believe that the fundamental and underlying legal framework does need to be addressed and that piecemeal reform is not enough. The dominant and ancillary rule does create huge inconsistencies and uncertainty for charities. In particular, trustees remain concerned that expenditure on political activity, does not leave the charity open to criticism that it has crossed an ill-defined threshold into a dominant level of expenditure. Grant giving trusts with competing applications, find it easy to reject applications for political campaigns, for fear of crossing the ancillary line.

- 1.9.3 Given the lack of clarity as to this key distinction, it is therefore not surprising that the charity sector has widely varying interpretations of what dominant and ancillary means. A recent survey¹⁴ conducted by the Shelia McKechnie Foundation and People and Planet found that 45% believed that the ancillary requirement meant they could only devote 11-20% of their resources to campaigning, whereas 25% said they interpreted the guidelines as meaning that 20-30% of their resources could be devoted to this work. Some charities are, therefore, concerned, at any given time that their levels of expenditure or activity might be in breach of Charity Commission guidelines.
- 1.9.4 So what are the problems the rule causes and how serious is the effect on campaigning? The first way in which the rule causes difficulties is before a charity comes into existence, as it deters fledgling organizations from seeking registration and/or makes established campaigning groups nervous of applying for charitable status. Whilst we acknowledge that some campaigning organizations for reasons of autonomy and independence, will positively choose to remain outside the charity fold, there are others that would like to enter its gates. Again, whilst making no claims that the charity sector has a monopoly on effective campaigning, the discipline of being a charity and the good governance requirements, may enhance the contribution that campaigning groups can make to civil society.
- 1.9.5 It is worth exploring a little bit more the issues the test throws up upon registration. Let us suppose that an established prevention of poverty charity seeks to campaign in respect of debt relief. It may decide, reasonably and prudently, that this is such an important campaign, that having considered all other options, it would be desirable to focus its attention on this. The Charity Commission has confirmed in Q3 of the Q and As that this may be allowable for “the time being”. Whilst this provides some comfort to the trustees it does not assist upon registration. The Charity Commission in respect of its current interpretation, would almost certainly have difficulty registering a charity whose activities “for the time being” relate solely and exclusively to campaigning regarding debt relief and make a finding that its purposes were political. We set out in paragraph 1.12 why there may be more scope, in the future, for a charity of this kind under the prevention of poverty head.
- 1.9.6 Another difficulty is that the dominant and ancillary rule leads to overly bureaucratic and convoluted groups structures of non charitable campaigning entities sitting alongside sister charitable trusts. This is often highly artificial and a waste of costs in terms of maintaining two entities, two sets of accounts, minutes of meetings and is not understood by the public. We accept that separate companies are also used by charities for taxable trading. However, conceptually there is a more easily understood rationale for separating charitable operational delivery from Christmas cards and charity merchandise, than there is for separating education, ideas and campaigns.

¹⁴ www.peopleandplanet.org

- 1.9.7 The ancillary rule acts as a restraint on campaigning and means that both grant-giving trusts and operational charities will be reluctant to increase their investment in or support of campaigning because of anxieties that it will increase their exposure to risks. The result is not compatible with charities having the confidence to play a full role in the formulation of public policy that the Government says it would like them to play. It also creates the likelihood that staff and trustees' decisions about resource allocation to campaigning will be based not on their judgment about its cost-effectiveness or likely impact in enhancing the objects of the charity, but will be guided by their concern to ensure that such expenditure does not leave the charity open to criticism, that it has crossed an ill-defined threshold into a dominant level of expenditure.
- 1.9.8 One can also question (see paragraph 24 of CC9) whether there is in fact a breach of trust if the dominant/ancillary rule is breached. Subject to the terms of the charity's constitution, if it is lawful to spend 40% of the charity's resources on political activities, why might it not be lawful to spend all of a charity's resources, not just for a period of time, but exclusively and long term? The operation of the dominant and ancillary rule leads to an illogical situation in which a charity might potentially be in breach, not by what it is doing, but by what it is not doing.
- 1.9.9 For example, two organisations might be campaigning on climate change. One, organisation A, has an exclusive focus on this work and in particular on encouraging its supporters to persuade local authorities, MPs and national government to modify public policy, practice and the law in ways that will reduce greenhouse gas emissions. In conducting this work organisation A allocates a total spend of £300,000, which is 60% of its total income. The other organisation, B, is a very large organisation and supports humanitarian relief work overseas as well as public policy work in the UK. It allocates £900,000 to its climate change public policy work in the UK, but this is just 1% of its total global spend of £90 million.
- 1.9.10 Under the current rules organisation A may fall foul of the ancillary rule because the level of its expenditure is clearly not 'ancillary'. Organisation B spends three times as much on supporting exactly the same kind of work in the UK – but because it spends much more money on other work overseas, it is judged to be complying with the guidance. The outcome is that organisation A is vulnerable to criticism and investigation – not because the work it is doing in the UK is any different to the work of organisation B, but because organisation B is 'protected' by other work it is doing in other countries. This outcome is surely illogical and means that campaigning charities are made vulnerable not by what they do, or the actual amount of resources they allocate to a piece of work, but by what they do not do.
- 1.9.11 Another fundamental problem arises in respect of service delivery and campaigning to change law or policy to affect the level of state provision. A comparison of two charities best illustrates this. Charity A trustees, arrive at a reasonable and prudent decision, to devote all of the charity's resources to service delivery. Provided that in doing so, the trustees have followed best practice in relation to their decision making process (and in particular any

decision not to achieve full cost recovery) this decision does not put the trustees at risk. On the other hand Charity B trustees form the view, that taking into account all relevant factors (including the service provision by Charity A) that the needs of its beneficiaries will be best met by campaigning long term for a change in law or policy to increase or modify the level of service provision. It is anomalous that Charity A (which may also be relieving the direct tax burden) is acting lawfully but Charity B may not be viewed as so doing.

1.10 Case For Reform: Disallow party political purposes, but remove restrictions on political activities (except for those which are party-political)

- 1.10.1 Due to the inherent difficulties set out in 1.9 above, we believe that charities should be able to engage in political campaigning (i.e. seeking to advocate or oppose a change in the law or public policy) without limit provided that they are excluded from party political activity. Given that the Advisory Group's proposals do involve a substantive change, it is worth exploring the extent to which there may be legitimate public policy reasons for the dominant/ancillary rule and the "implicit purpose" construction, which holds that a charity carrying out dominant political campaigning activities may be found to have non charitable purposes.
- 1.10.2 One of the most important perceived public policy reasons for the restriction, is that liberalisation would lead to a politicisation of the charity brand and would damage trust, goodwill and confidence in the sector. Indeed it might be argued that the reason that trust and confidence is so high in the sector is precisely because charity is not perceived to be a political animal. Charity, the argument progresses, is richer and deeper than single issue campaigning. At the root of this argument is the need to protect donors, who do not wish their donations to be used for political campaigning but for field work or service delivery.
- 1.10.3 Whilst this argument might have had some merit when political parties were stronger, it is much weaker in the light of the overwhelming evidence that the voluntary sector has become the natural home for a huge swathe of civic action, whether locally or nationally. Many donors will wish their donations to be used for political campaigning, otherwise they would stop giving to particular organisations. As long ago as 1991 the Times leader commented, in response to the Oxfam Charity Commission Inquiry that there should not be greater regulation because: "... in the end, the market itself will regulate charitable involvement in politics...If members of the public disapprove of Oxfam campaigning for sanctions against South Africa or warning against the return of Pol Pot in Cambodia, they will offer their money elsewhere." Insofar as the public do not have sufficient information about the activities of bodies to which they donate, this could be dealt with by more and better information and improved donor choice.
- 1.10.4 Another justification for the restriction is that the ancillary rule means that a charity's political campaigning is grounded in its operational activity: in other words, that its heart or essence is something other than political. Accordingly, when a charity steps forward to engage in political

campaigning, it speaks from its non-political heart with a greater legitimacy and credibility. That is why, the argument develops, the test of what is ancillary is judged by reference to each particular organisation and why it is fair that an organisation with a high turnover can spend proportionately more on political campaigning than another which is much smaller.

- 1.10.5 Whilst the argument in 1.10.4 above is superficially attractive, it is very paternalistic. It also does not take into account the fact that the trustees of all charities have duties and responsibilities to act prudently, and to ensure that they can demonstrate on reasonable grounds, that the activities of the charity are advancing the interests of their beneficiaries. The argument fails to recognise the diversity of the sector and the fact that charities are not uniform in size, shape or activities. The advantage of campaigning organisations, is that unlike charities that receive most of their income from the state, they are more likely to be independent in voice. One could argue that it is this independence, which is the bedrock of the trust that the public have in charity sector as a whole, and that campaigning organisations exemplify this. The point of this argument is not to prescribe one type of charity as being better than another, but simply to say that there is room for many types of charities. The key is not whether a charity is exclusively a service delivery or campaigning entity (or a religious or sports charity or any other kind) but whether its trustees have decided upon reasonable grounds, the manner in which the interests of its beneficiaries are best served.
- 1.10.6 The other inherent flaw in the argument that a charity should have a non-political heart or essence, is that it does not take in to account that fact that some charitable purposes are more political than others, For example, as the case study in paragraph 1.12 indicates, it is hard to see how prevention of poverty can properly be addressed without entering substantively into the political arena. The same is true of advancing human rights. For these types of charities, engagement with or criticism of governments is a means to fulfilling its charitable ends, not the end in itself. The case study in paragraph 1.13 indicates why human rights charities find the ancillary rule particularly difficult.
- 1.10.7 Another rationale for the dominant and ancillary rule is that it acts as a barrier to a whole host of unsavoury organisations gaining charitable status – the sorts of organisations that many would recoil from. It may also be said to protect charities from becoming fronts for political organisations or using charitable funds to advance political parties or candidates. As regards the latter, this can be addressed by the Group’s unanimous agreement that charities should continue to be prohibited from party political campaigning. The relaxation would not lead to a whole host of political party think tanks gaining charitable status. Indeed, the Commission would be able to continue to look behind educational material, to ensure that it is not propaganda for a political party.
- 1.10.8 Of course it would be of great concern if the liberalisation of the rule led to unpropitious organisations gaining charitable status. However, one needs to remember that a prospective organisation would still need to register under one of the charitable heads and in addition to prove public benefit. The

Commission might say that this is not of much use, because even if the organisation stated its aims as say, promotion of health, its real purpose as evidenced by its activities, would be political. We adduce our arguments in section 1.6 as to the flaws in this approach. In addition, an organisation would be subject to all the usual due diligence tests on expenditure. It should also be noted that there is generic legislation that restricts unpalatable activities such as The Race Relations Act; the Advertising Standards Authority Code of Practice; The Representation of the Peoples Acts and the Political Parties, Elections and Referendum Act 2001. The kinds of organisations that sought to break race and equality laws could not be for the public benefit.

- 1.10.9 At this juncture we come back to the freedom of expression argument and the importance in civil society of ideas being aired rather than picking and choosing causes. Provided that it can demonstrate on reasonable grounds that it is advancing a charitable purpose, there is nothing inherently wrong in a charity campaigning to, say, repeal equality legislation or the UK's adoption of human rights law or freedom of information law. For example, a charity set up to advance health might seek to promote marriage on the grounds that there is research to show that married people are healthier and live longer. This charity might argue that equality legislation undermines marriage. Provided that it could make a reasoned and well informed case as to why its objects were being advanced and the interests of its beneficiaries promoted, and provided that in its operational activity it observed the law (i.e. it did not discriminate against women) then we cannot see why this should be objectionable.
- 1.10.10 The final argument as to why charities should not enjoy greater liberalisation, is that accepting restrictions on political campaigning is the price to be paid for tax reliefs. If charities are happy to take the "Crown's shilling" then they must live by the rules and accept the limitations that this brings. The proponents of this viewpoint argue that the rules on charities and political campaigning are not a barrier to freedom of expression, as there is nothing to stop campaigning groups constituting themselves as non charitable not-for profits. This argument, as Perri 6¹⁵ has shown, does not always stand up to scrutiny. Tax reliefs are granted to a very large range of persons, businesses and organisations and yet no one suggests that in consequence they should be constrained in their campaign activities. Campaigning is an intrinsic element of our freedom of expression, a fundamental right that goes to the very heart of the kind of society we want, and cannot be reasonably limited on the basis of taxation. In addition, many campaigning organisations represent the disenfranchised and those whose voice is seldom heard. They are not wealthy organisations with large surpluses or endowments. Given the resistance of grant making trusts to fund such activities, many campaigning groups find it difficult to access funding, let alone make a profit.

¹⁵ Restricting the freedom of speech of charities: do the rationales stand up? Demos (undated).

1.11 Way Forward

- 1.11.1 The next question is whether there is some flexibility for relaxation of the dominant/ ancillary rule without either a new Court judgment or primary legislation. The Charity Commission may feel that its hands are tied by two House of Lords Judgements (*Bowman v Secular Society*: (albeit 1917); *National Anti-Vivisection Society* (1948)) and a Court of Appeal case involving whether the promotion of peace was charitable (*Southwood 2000*)¹⁶. (It should be noted that the latter is an unsatisfactory case as the plaintiffs did not have legal representation.)
- 1.11.2 Charity is and always has been, at the heart of ‘politics’ in the very wide sense understood by the law. The Group believes that the Charities Act 2006 opens up some space for the Commission to move into. Whilst the Act itself does not address explicitly the extent to which charities can be political, it does put charitable purposes on a statutory footing. In our view a number of these charitable purposes such as the prevention of poverty, the advancement of human rights and citizenship are inherently political. We also view the advancement of animal welfare – especially in the light of the Animal Welfare Act 2006 - as giving a greater scope for political campaigning, than the charitable purpose of preventing cruelty to animals.
- 1.11.3 We accept that there is debate as the extent to which the Charities Act 2006 simply sets out in statute the existing law. However, we are mindful, firstly of the breadth of drafting of charitable purposes in the Act and secondly that charity law is evolutionary. Whilst we accept that the Commission will have to continue to apply principles derived from Court judgments, this includes the power to keep the law moving as new social needs arise. In respect of the latter, it must be appropriate for the Commission to have in mind, changes in political behaviour, including modern trends of voter disengagement. Charities are now one of the key means of civic engagement in the political and democratic process. The fact that forty years ago, 44% of electors identified very strongly with a particular political party, compared to 14% in 2001, must mean that new social needs have arisen for different forms of political expression.
- 1.11.4 To illustrate the manner in which the dominant and ancillary rule can be re-interpreted in the light of the Charities Act 2006, we set out 3 case studies in relation to the prevention of poverty, the advancement of human rights and the advancement of animal welfare. The relevant provisions of the 2006 Act come into force in 2008.

1.12 Prevention of Poverty (Bond Case Study)

- 1.12.1 The fact that under the Charities Act 2006, it is explicitly enshrined that charities can prevent as well as relieve poverty, does it seem to us, require poverty charities to be more political. To put this in context, the first version (early 1990s) of Charity Commission guidance CC9, stated that ‘seeking to

¹⁶ *Bowman v Secular Society Ltd* [1917] AC 406; *McGovern v A-G* [1982] Ch 321; and *Southwood and another v Attorney General* [2000] All ER (D) 886

influence or remedy those causes of poverty which lie in the social, economic and political structures of countries and communities’ was impermissible. It was partly the work done to correct this guidance over the last decade or so that led to the inclusion of “prevention of poverty” in the 2006 Act. It is our contention that whilst the ‘prevention of poverty’ head shifts the dominant/ancillary rule for existing charities, it will also allow a greater range of poverty charities to be established. For example, in paragraph 1.9.5, we refer to an organisation set up to campaign exclusively in respect of debt relief. In the light of the fact that charities can devote all of their resources to preventing poverty, it is difficult to see how the political purposes rule could prevent the registration of such an organisation.

1.12.2 It may be useful to rehearse why poverty charities engage in political campaigning. They do so because their trustees:

- identify that their programme work will be more effective if certain constraints such as poor governance, debt and trade regimes are lifted. The political activity therefore allows the non-political activity to function more effectively. This is why some charities campaign on HIV/AIDS, Economic Partnership Agreements and climate change as subjects that need campaigns – because these are all developments with the potential to undo the gains that these charities’ project work will achieve;
- analyse how to use their resources most effectively in order to achieve their charitable aims, and identify that for example a change in the trade regime will contribute to the relief of poverty more than the project work on which these resources might otherwise be spent;
- campaign because their beneficiaries ask them too. A recent sector-wide consultation conducted for BOND, the umbrella body, concluded that, “the quality of an NGO’s work is primarily determined by the quality of its relationships with its intended beneficiaries”¹⁷. Most international development charities work with partners on the ground and, to differing extents base their policy and priorities for work in the UK on what these partners, and through them beneficiary groups, identify as the core challenges to the relief and prevention of poverty.

¹⁷ Keystone and AccountAbility (2006): *A BOND Approach to Quality in Non-Governmental Organisations: Putting Beneficiaries First*
<<http://www.bond.org.uk/futures/standards/reports.htm>>

Bond Case Study

Bond (British Overseas NGOs for Development) is the UK's broadest network of voluntary organisations working in international development, with over 300 members. Founded in June 1993, BOND aims to improve the UK's contribution to international development by promoting the exchange of experience, ideas and information.

Many BOND members engage in political campaigning, and many more share the analysis that brought us together under the Make Poverty History banner, that the causes and solutions to poverty are political. Whether or not they campaign themselves, most BOND members agree that political change – and the campaigning that generates it – is fundamental to the prevention and relief of poverty. Of numerous examples, just three are presented below.

A charity for the relief of poverty through healthcare may campaign for the intellectual property regime to be changed, because it is concerned that its ability to relieve poverty is restricted by international patents on drugs to treat HIV/AIDS.

An organisation campaigning primarily for the respect of labour rights in the garment industry (this organisation would fit under both the human rights and poverty relief heads) may identify that it can make little progress until the Chinese government ratifies and implements the ILO core conventions on freedom of association and collective bargaining. This might become its dominant activity.

A charity whose main beneficiaries are farmers' groups in Africa may be asked by its beneficiary groups to campaign for a change to global, regional and bilateral trading agreements on agriculture. Without this change, its beneficiaries may argue, improvements to their livelihoods will remain marginal.

1.13 Advancement of human rights (English PEN Case Study)

1.13.1 The Charities Act 2006 allows charities set up to advance human rights, conflict resolution or reconciliation to be charitable. In fact, the promotion of human rights was accepted as a charitable purpose in 2004. Hitherto, such issues were regarded as essentially political in charity law terms. The basis for the Commission's decision is in fact essentially a constructive application of the inherited principles of charity law, in particular the fact that, following the incorporation of the European Convention of Human Rights into the UK law in the Human Rights Act 1998, promoting human rights is in effect promoting the law. The development in 2004 depended on this interpretation, domestically and internationally (citing the fact that human rights are, however expressed, basic to "the law of virtually all countries").

1.13.2 Whilst the recognition of human rights as charitable in 2004 and the 2006 Act appears to be a significant step forward, some human rights organisations are finding difficulty in registering as a charity. This is due to the Commission's preliminary findings that they are political organisations. The question is whether by making the advancement of human rights a charitable purpose in the 2006 Act, Parliament was simply codifying what already existed or signifying a change in the law. The Advisory Group believes that Parliament intended to change the law. This is evidenced not only from what appears in the Act, but the other steps the legislature has taken in the last 10-15 years to "advance" human rights. This relates to both changes in domestic law and

policy, but also internationally in foreign and development policy. If the legislature has clearly stated a change in policy on the charitable status of human rights than it has done so knowingly. By applying the restrictions of case law (which we believe are weak in any event) to the advancement of human rights, the Commission will arguably frustrate the will of Parliament.

- 1.13.3 In our view, the fundamental point is that the promotion of human rights is inevitably bound up with legal and public policy issues. In any country, legal issues are an outcome of the political process. A charity established to promote human rights has to confront and deal with legal issues and therefore, be involved with politics and with governments. The one goes with the other. Engagement with governments in the political arena is the other side of the human rights coin. It is also worth emphasising that the advancement of human rights involves upholding international humanitarian law as enshrined in a range of Conventions and instruments. This is very different from seeking to change the law for narrow interests as in the *Bowman v. Secular Society* case (see paragraph 1.5.4) or the *National Anti Vivisection Society* case (see paragraph 1.14). It is also worth emphasising that international humanitarian law as a corpus of legal obligations, binding on a huge number of sovereign states has expanded greatly in the quarter century since the *McGovern* case (see paragraph 1.5.7) with the result that Mr Justice Slade's judgment has to be viewed in this changed context.
- 1.13.4 Parliament has resolved that the advancement of human rights is a charitable purpose. Advancement means to forward, to progress. This is a dynamic, not a static concept. It is difficult to see how a charity established to advance human rights, can only engage with state players on an ancillary basis. The problem lies with treating engagement with states or governments about human rights as the end or purpose of a human rights charity. In the case of a charity advancing human rights, engagement with, or criticism of governments is a means to fulfilling its charitable ends, not the end in itself. Indeed, it is an inevitable part of the charitable purpose.
- 1.13.5 The case of *English Pen* which is attempting to register as a charity is illustrative of the difficulties facing some human rights charities. *English Pen* is the founding centre of an international writers' organisation which seeks to promote literature as a means of greater understanding between cultures. The application was filed in July 2006 but the Charity Commission are, as yet, unable to accede to its request to be registered. The question plaguing the trustees of *English Pen*, is what would it mean to promote human rights without engaging in more than an ancillary way in political campaigning?

English PEN case study

One aspect of English PEN's work is the promotion of the human rights of citizens who have been prevented from expressing themselves peacefully, in accordance with Article 19 of the Universal Declaration of Human Rights (1948): 'Everyone has the right to freedom of opinion and expression [...] regardless of frontiers.' Despite their obligations under this and subsequent international treaties, many states place severe restrictions on the right to freedom of expression. English PEN campaigns where the evidence shows that its beneficiaries' rights have been unduly constrained (generally through imprisonment). Such persecution by the state has a clear chilling impact on the freedom of expression of all citizens in the country concerned. However, the Charity Commission is at present unable to accept English PEN's application for charitable status on the grounds that the organisation's campaigns on behalf of writers in prison are political in nature. The Commission stated in March 2007 that: 'The campaigns appear to relate to all infringements or restrictions of the liberty of writers in respect of freedom of expression whether or not such restriction may be lawful in accordance with the law of the country concerned.' The human rights of the world's citizens are founded in international standards, not the laws of individual countries. Many of the world's nations remain in contravention of international human rights standards as set out in the UDHR and subsequent treaties. This does not mean that these standards – described in the preamble to the UDHR as the 'equal and inalienable rights of all members of the human family' – are therefore redundant. The UDHR states that 'every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.' If charities are to be allowed to engage effectively in the 'promotion of human rights', as promised in the 2006 Act, they will finally be able to play a crucial role in this ongoing international endeavour. English PEN's Trustees fear that if charities are to be prevented from campaigning against human rights abuses by countries which are in contravention of their treaty obligations, then there can be no effective promotion of human rights in the terms of the Act.

1.14 Advancement of Animal Welfare (RSPCA Case Study)

- 1.14.1 In relation to animal charities the generally accepted position has been that the "pursuit of animal rights" is not in itself a charitable cause. What has been viewed as charitable is acts of kindness, which mankind could be expected as a matter of humanity to seek to address. The prevention of cruelty and suffering is the most obvious, as is the want of reasonable care in the case of domesticated animals.
- 1.14.2 In the National Anti-Vivisection Society case, the Court found that the moral benefit arising from the total abolition of vivisection was far outweighed by a corresponding detriment to medical science and accordingly such a purpose was held not to be charitable. Although animal charities are established for different purposes to those considered in the National Anti-Vivisection Society case, they are unable to actively advance the moral argument that testing on animals for medical research (as opposed to say, cosmetics) is wrong.
- 1.14.3 It is perhaps not surprising then that in some instances this debate has been pushed into fringe or extreme groups. There has been a vacuum in the ability of charities – who are additionally subject to the strictures of good governance, transparency and accountability - to make this case. Surely there

must be public benefit in this debate being brought back into the tent of mainstream civil society?

- 1.14.4 In our view, when the relevant section of the Charities Act 2006 comes into force in 2008, it will be permissible for animal charities actively to challenge vivisection generally, as opposed to only in the cases where there is a suitable alternative. The Act does not refer to the prevention of cruelty to animals, it posits a different definition: namely the advancement of animal welfare. This purpose must extend beyond eradicating cruelty. The purpose also has to be construed in the light of the Animal Welfare Act 2006 which defines the scope of the duty to ensure animal welfare. We set out below a case study of the RSPCA's experience of campaigning in this area.

RSPCA Case Study

It is inevitable that a charity like the RSPCA, with purposes to promote kindness and to prevent or suppress cruelty to animals, will wish to engage in public debate about the suffering inflicted on animals used in experiments. The Charity Commission has advised that, in light of the National Anti-Vivisection Society¹⁸ case, it is not open to the RSPCA to campaign for the total abolition of animal experiments. Whilst accepting the RSPCA could seek to identify alternatives to animal use or suggest improvements in the welfare of the animals involved, the Charity Commission considers the RSPCA can actively campaign against animal experiments **only** in cases where it can show there is a suitable alternative. This seems to impose a direct public benefit requirement on the RSPCA's campaigning activity.

It is difficult to reconcile this approach with case law that establishes that charitable status is not endangered merely because a charity seeks to further its purposes by carrying out an activity which would not, if it stood alone, be charitable.

1.15 Conclusion

The Group is unanimous in its view that:

- 1.15.1 *Charities should be able to engage in political campaigning in furtherance of their charitable purposes as long as they do not support political parties. In particular:*

- *Charity trustees should be free to decide to engage exclusively in political campaigning in furtherance of their charitable purposes.*
- *A charity should not have limits placed on the resources that can be committed to political campaigning activities.*

- 1.15.2 *The Group believes a change in the interpretation of the law to remove the "dominant and ancillary rule" would be of public benefit, where the purposes are otherwise charitable.*

- 1.15.3 *The Charity Commission has in the past interpreted court judgments on political activities by charities in a rigid way, although they have shown a*

¹⁸ National Anti-Vivisection Society v IRC [1948] AC 31

more flexible approach recently. We would welcome a continuation of this approach by the Charity Commission.

- 1.15.4 The Group views the revocation of the dominant/ancillary rule as evolutionary. Pursuant to this we argue that in assessing a charity's purpose the Commission should apply the same test as it does to charities' activities, namely whether the charity has the power to undertake them and its trustees can reasonably demonstrate that they further that purpose. We do not believe that our proposal would lead to the registration of huge numbers of additional charities. However, it would allow a number of human rights organisations to register and it would free all charities from the trade-off (and an uncertain one at that) between obtaining charitable status, at the cost of staying the right side of an ill-defined boundary as to what constitutes dominant political activity.
- 1.15.5 Revocation of the dominant/ancillary rule would also mean that charities no longer have to use artificial means to regulate their political activity: for example, by setting up subsidiary arms' length companies or by campaigning organisations merging with service delivery charities, to ensure that political activity is below the ancillary threshold.
- 1.15.6 We see no reason why this proposal should damage the charity brand on the basis that taxpayer's money is being used to subsidise political causes. On the contrary, charities will be free to make an unfettered contribution to civil society and the democratic process. Given the decline in representative democracy, this will be beneficial to society as a whole.
- 1.15.7 Moreover, it is not our contention that charities should become fronts for political parties, nor that charities should be able to engage in party politics. An organisation registered as a charity would have to qualify under one of the existing heads of charity in the Charities Act 2006: for example, poverty, education, arts and culture, sport, etc. In addition, the trustees would still be subject to all the usual due diligence tests on expenditure as well as trustees' overall duties and liabilities.
- 1.15.8 The Advisory Group believes that its recommendations do not amount to a "throw the door open" approach, but are a carefully considered set of proposals that build on the foundations of the Charities Act 2006 and create the enabling environment that best advances the interests of charities and civil society

2. CRIMINAL RESTRICTIONS ON CAMPAIGNING AND THE VOLUNTARY SECTOR

Introduction

UK charities, NGOs and campaigning organisations have a proud history of non-violent protest from the Suffragettes to the peace movement and Make Poverty History. But the current Labour government, building on legislation passed by the last Conservative administration, has placed unprecedented restrictions on the abilities of campaigning organisations to peacefully protest. Unauthorised demonstrations near Parliament are now banned, while harassment and terrorism legislation has been used against protesters. We examine the full range of the new restrictions on protest and show how campaigners have been affected, either directly by being physically stopped from protesting or indirectly, by being deterred from trying to. We look at ways to protect the right to protest.

In the past decade there have been numerous changes made to the criminal law which have had a direct effect on campaigning groups. The most notable is the coming into force of the Serious Organised Crime and Police Act 2005 [SOCPA]. Some of these legislative changes have been triggered by specific events, such as protests by animal rights groups, and appear to be directed toward the campaigning sector. Others have taken place in the context of attempts by the New Labour government to meet the challenges of terrorism or “anti-social” behaviour.

These legislative changes have had a twofold effect. They have directly limited the ability of groups to campaign or protest through the imposition of restrictions. Worryingly, they have also had a “chilling effect”. Campaigning groups, voluntary and non-governmental organisations have limited their actions as they are unsure whether, if carried out, they would be deemed as criminal. The legislative changes have taken place notwithstanding that the right to peaceful protest has long been accepted as part of the UK’s legal and moral framework and is protected by Articles 10 and 11 of the European Convention on Human Rights ECHR, as incorporated by the Human Rights Act 1998 [HRA]¹⁹.

¹⁹ Article 10 ECHR ‘Freedom of Expression’ provides: ‘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 a public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema. 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 the maintaining of the authority and impartiality of the judiciary.’

Article 11 ECHR ‘Freedom of Assembly and Association’ provides: ‘1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or the police or other administration of the State.’

This section is divided into two parts. The first sets out specific examples and case studies of how groups have been affected by the key legislative provisions relevant to campaigning groups. In the second part, we provide some suggestions and ideas on how the criminal law can be amended or reformed to assist groups to legitimately campaign.

2.1 Criminal Restrictions

2.1.1 There are a number of different legislative provisions or regimes affecting the right to campaign or protest. Some of the relevant legislation predates the New Labour government (for example, the Public Order Act 1986 and the Criminal Justice and Public Order Act 1994). More recent legislation has placed express restrictions upon the exercise of the right to peaceful protest: for example ss. 132-138 SOCPA, which require persons wishing to demonstrate in the vicinity of Parliament to give notice to the police and to abide by conditions imposed upon their demonstration by the police. Other legislation, whilst not directed solely at protests, grants very broad powers to the police which makes it easy for them to be used against protestors: for example, stop and search powers without the need for reasonable suspicion, as provided for by s. 44 of the Terrorism Act 2000. Further, there has been the introduction of legislation which, whilst intended to control the criminal behaviour of a minority of protestors, because broadly drafted, has had a “chilling effect” upon peaceful protestors.

2.1.2 A Summary of the key criminal restrictions is set out in Appendix 2.

2.2 Case studies

2.2.1 This section sets out examples, some based on anecdotal evidence, of how the provisions outlined in Appendix 2 have impacted upon campaigning organisations and their ability to organise and undertake protests.

Public Order Act 1986 [POA]

2.2.2 There are concerns that the Police have used their powers under s. 14 POA to impose very strict conditions on assemblies which can severely undermine the efficacy of any demonstration. There is anecdotal evidence that the police will seek to impose conditions even where the demonstration is not likely to cause any significant disruption or disorder.

2.2.3 In March 2005, Friends of the Earth were involved in a demonstration in Derby coinciding with the G8 summit of finance ministers. The police imposed very restrictive conditions on any demonstrators, restricting them to an enclosure in the city centre away from the summit. Protestors outside that enclosure were arrested.

2.2.4 The law as drafted is not disproportionate but in some instances individual police officers making decisions on whether to impose conditions err too much on the side of caution and do not pay sufficient regard to the importance of upholding the right to protest.

2.2.5 There is also concern over s. 11 POA. The police had sought to require the participants in the Critical Mass Cycle Ride in London to provide notification as required by s. 11. The rides had no organizers and were spontaneous events with no fixed route. Therefore, there was no one capable of giving notification. Friends of the Earth judicially reviewed the Metropolitan Police, with the High Court holding that the riders did not need to give notification as the event was a customarily held procession (exempt under s. 11(2) POA).²⁰

The Serious Organised Crime and Police Act 2005 [SOCPA].

2.2.6 In respect of demonstrations near Parliament, on 25 October 2005, Milan Rai was arrested and charged with organising a demonstration in the vicinity of Parliament, contrary to s.132 SOCPA. This was for reading the names of the soldiers who died in the Iraq war in front of the Cenotaph. Mr Rai was found guilty and fined £500.00.

2.2.7 Furthermore, the Advisory Group has obtained evidence that several people who wanted to organise lone demonstrations in Parliament Square have sought authorization from the police but were not able to demonstrate because the police did not process their applications in time. This was despite the fact that they had submitted their applications to a police station more than seven days in advance.

2.2.8 The SOCPA provisions fail to provide a clear definition of what constitutes a “demonstration”. The result is that it remains uncertain what action would require prior authorisation. This uncertainty is highlighted by the suggestion that has been made on a popular website that wearing a comic relief “red nose” in the designated area may amount to a ‘demonstration’ and therefore be unlawful unless prior authorisation was sought.²¹

2.2.9 In respect of ss.126 and 127 SOCPA, which make it an offence to cause harassment of a person in their home and give the police power to issue directions to stay away from a person’s home, the Advisory Group was contacted by an animal rights group that was protesting against a farm that reared animals to be used in research. The farm was also a dwelling. The small group of demonstrators (four elderly ladies) were demonstrating on the public highway, over 500 metres away from the entrance to the farm, in a place where they could not be seen or heard by the residents of that dwelling. Nonetheless, the police told that they were in the ‘vicinity’ of the dwelling and directed them to leave the area and not to return.

2.2.10 The same protesters have also been stopped from demonstrating outside the commercial premises of a company that provides animals for use in experiments, on the grounds that some of the factory workers lived approximately a mile away from the factory and therefore the protesters were ‘in the vicinity of’ their dwellings.²² There is no defence of reasonableness to this offence. Accordingly, thus far, it has been difficult to successfully raise an

²⁰ *Kay v Metropolitan Police Commissioner* [2006] All ER (D) 304. The case went on appeal to the Court of Appeal but judgment is yet to be handed down.

²¹ See <http://parliamentprotest.org.uk>

²² The company providing the animals was Bantim and King.

argument that the police should balance the right of free speech and assembly of the protesters with the rights of residents.

Protection from Harassment Act 1997 [PHA]

2.2.11 The restrictive effect of provisions under this piece of legislation has been highlighted by the “Radley Lakes Protests”. These protests took place in January and February of this year and concerned lakes which are in land owned by the power generating company NPower. Npower wished to drain the lake and use it to dispose of ash from their Didcot coal burning power station. The residents of the village of Radley and other local people objected and organised a series of peaceful protests. Npower applied to court for an injunction under the PHA.

2.2.12 On 14 February 2007, the court granted an injunction. This binds anyone given notice of the injunction and makes it a criminal offence to:

- Take photographs and videos of the company employees, thereby preventing the reporting of the destruction of the lakes by Npower. An accredited press photographer was served with the injunction and prevented from taking photographs.
- Demonstrate in Npower’s land – this includes the access road into the lakes, and the paths around the lakes.
- Demonstrate within 5 metres of Npower staff. So if a demonstrator on a public highway is approached by Npower security, he or she must stop demonstrating or is guilty of an offence.
- Set up camps within a 2-kilometre radius of the lake – this includes land outside Npower’s control.

2.2.13 As a result of the injunction, local people are unable to exercise their right to protest over an issue that will affect their lives and their community and the local press are unable to properly report on an important news story affecting their region.

Environmental Protection Act 1990 [EPA]

2.2.14 Friends of the Earth has informed the Advisory Group that their local groups are finding that local councils are ignoring the exemption for persons distributing on behalf of charities or for political or religious purposes, and that council officials are prohibiting them from handing out leaflets in the designated areas.

Powers to stop and search

2.2.15 In August 2006, the Camp for Climate Action set up a protest camp outside the Drax power station in Yorkshire. The camp was part of a peaceful demonstration to highlight the dangers of climate change. The whole area was

given a s.60 Criminal Justice and Public Order Act 1994 [CJPOA] authorisation and the police used the powers under the authorisation to search everyone who went in and out of the camp. Campers were searched several times each day and cars were required to empty all their contents before being allowed in the camp. No weapons were found, though campers had their cooking utensils, such as forks and Swiss army knives confiscated. The campers report that they were made to feel very intimidated and that families and children who were peacefully engaged in the Climate Camp were treated like criminals.

2.2.16 In respect of s. 44 of the Terrorism Act 2000 [TA], the problems with the use of this provision were well highlighted by the events at the 2005 Labour party conference. Walter Wolfgang, an 82-year-old party member shouted “nonsense” during the Prime Minister’s speech. He was ejected and police, purporting to be using their powers to stop and search under s. 44 TA, detained him outside the building where the conference was taking place. Liberty subsequently helped Mr Wolfgang obtain an apology from the police and a change in their policy, which included changes to officers’ training on the use of their s. 44 powers.

2.3 Suggestions of a way forward

2.3.1 The regime of criminal legislation relevant to campaigning and protesting is couched in imprecise terms and definitions which, practically, has had the impact of extending police powers on the ground, but without sufficient safeguards in place to protect the right to demonstrate/protest. The effect has been to directly and indirectly restrict the activities of charities and campaigning organisations.

2.3.2 As such, it is the Advisory Group’s recommendation that Parliament revisit a number of the legislative provisions set out above. The Group supports the efforts of Baroness Miller of Chilthorne Domer who has put forward a bill for consideration in the House of Lords – “The Public Demonstrations (Repeals) Bill.” The Bill calls for the repeal of the offences of trespassing on a designated site, of demonstrating without authorisation in the vicinity of Parliament²³ and the revocation of the associated Orders.²⁴

2.3.3 The Advisory Group is particularly concerned with use of the powers of stop and search under S. 44 TA. This section allows Chief Officers to authorise police officers to use stop and search powers without the need for reasonable suspicion in a particular area. The only requirement is that the Chief Officer considers it expedient to do so for the purposes of prevention of terrorism.

2.3.4 This very broad discretion can lead and has led to the use of these powers to intimidate and disrupt peaceful protests. The only safeguard that is in place for preventing the arbitrary exercise of the power to stop and search is the ability of the individual to challenge, by way of a civil claim, the unlawful exercise of

²³ ss.128-131 and 132-138 SOCPA and s. 12 TA

²⁴ The Serious Organised Crime and Police Act 2005 (Designated Sites) Order 2005 (SI 2005/3447) and the Serious Organised Crime and Police Act 2005 (Designated Area) Order 2005 (SI 2005/1537)

the power. However, such *post facto* challenges should be seen as a last resort and the Advisory Group considers that a more satisfactory solution would be to control the exercise of this power more tightly by limiting the circumstances in which it can be discharged.

- 2.3.5 The Advisory Group therefore recommends that the Terrorism Act 2000 be amended to enable better oversight over the granting of authorisation under Section 44(1) and (2). Further, the section should include tighter limitations on both the duration in which such authorisations can be in place and the area over which they can be imposed.
- 2.3.6 The Advisory Group recognises the important role that the courts can play in ensuring that individual's rights under the ECHR are guaranteed and that arbitrary interferences with the right to protest are restricted.
- 2.3.7 The Courts have an express obligation, under s. 3 HRA, to read and give effect to legislation in a way which is compatible with the Convention "so far as it is possible to do so". As the case studies indicate, much of the recent legislation restricting the right to protest is drafted in very broad, sometimes ambiguous terms, and has the potential to significantly restrict individual's Convention rights. As such, there is significant scope for Courts to discharge their obligations under s. 3 HRA in a way which narrows the terms of the legislation whilst still achieving the legitimate aim sought by Parliament when enacting it.
- 2.3.8 Such an approach by the Courts also promotes the principle of legality - the notion that the particular law or legal provision must be sufficiently certain and allow a person, in advance of it being tested, to understand what action would involve it being broken. The way in which the laws are drafted can create uncertainty and means campaigners genuinely are not able to predict whether or not a particular campaign activity would constitute a criminal offence.
- 2.3.9 But the Advisory Group also recognises that the protection of the right to protest should not be left solely to legislators and the Courts. The right of free expression and free assembly are key provisions of the ECHR and are central ingredients to the proper functioning of a democracy. In addition, peaceful protest is an effective way by which groups who may be marginalised or excluded from the normal political channels can participate in the democratic process and have their voice heard.
- 2.3.10 The newly created Commission for Equality and Human Rights has been charged with promoting human rights, reducing inequality and strengthening good relations between people. The promotion of the right to peaceful protest should therefore be a very important part of the work the Commission does. This does not just mean defending the rights of individuals to protest peacefully, but the active promotion of peaceful protest as an activity beneficial to society and as a legitimate component of active, engaged, citizenship in a democracy.

- 2.3.11 The organisations that form part of the Advisory Group would seek to support the Commission in its work of promoting the right of peaceful protest.
- 2.3.12 Finally, the Advisory Group is of the view that changes can be made to the Police and Criminal Evidence Act (1984) Codes of Practice – “A” on stop and search and “G” on arrest. It is felt such changes could be implemented relatively quickly and would have a positive effect in limiting unnecessary restrictions on the right to protest.
- 2.3.13 In respect of Code A the Advisory Group recommends that the following paragraph be inserted:

“When exercising a power of stop and search a police officer must be particularly mindful of the importance of the rights of freedom of expression and freedom of assembly under Articles 10 and 11 ECHR. Stop and search powers must never be used in order to prevent, hinder or dissuade a person from taking part in a lawful demonstration/protest. When policing a demonstration or protest, officers should be aware that excessive use of stop and search powers may dissuade law-abiding protestors from taking part and should consider in each case whether the criteria for the exercise of the relevant power are made out and whether the stop and search is proportionate.”

- 2.3.14 In respect of Code G, this explicitly structures the police constable’s decision-making in human rights terms. G1.2 states “The right to liberty is a key principle of the HRA. The exercise of the power of arrest represents an obvious and significant interference with that right”. G1.3 further provides:

“The use of the power must be fully justified and officers exercising the powers should consider if the necessary objectives can be met by other, less intrusive means. Arrest must never be used simply because it can be used. Absence of justification for exercising the powers of arrest may lead to challenges should the case proceed to court. When the power of arrest is exercised it is essential that it is exercised in a non-discriminatory and proportionate manner.’

- 2.3.15 However, this formulation fails to emphasise the importance of the ECHR rights to freedom of expression and freedom of assembly. The Advisory Group would recommend the insertion of the following additional paragraph into Code G:

“In exercising his powers of detention, a police officer must have regard to the importance of the Convention rights to freedom of expression and freedom assembly. In particular, the exercise of powers must not be used for the purposes of preventing, hindering, or obstructing a peaceful protest.

2.4 Conclusion

- 2.4.1 In this section the Advisory Group has hoped to show that the regime of criminal provisions impacting upon the right to carry out legitimate protest is extensive. As the case-law and examples given highlight, the criminal law’s

effect is twofold: it has directly prevented or led to demonstrations being closed down, and it has left campaigners/charities/NGOs unclear as to what is permissible and fearful to engage in their common law and Convention right to protest. It is the Advisory Group's view that a number of positive changes can be made to ameliorate this situation. These include not only (necessary) changes to the law but also other practical changes which could be implemented relatively swiftly. It is hoped that by implementing these suggested changes that charities and other NGOs will more easily be able to campaign for and champion the issues in which they believe, and in turn, make the society in which we reside a richer environment.

3. THE COMMUNICATIONS ACT 2003 – ISSUES AFFECTING CAMPAIGNING ORGANISATIONS AND PROPOSALS FOR REFORM

Introduction

“Political” advertising in the broadcast media is prohibited by the Communications Act 2003. Charities and NGOs deemed by Ofcom to be engaging in “social advocacy” are banned from the airwaves. In addition, a strictly non-political advert from an organisation deemed to be political, such as Amnesty International, would be banned. The effect of the ban became apparent when television and radio were famously not allowed to broadcast the Make Poverty History ‘one click’ campaign advertisement in 2005. In this section, we look at how the voluntary sector’s advocacy work is hampered by the Act, a far more draconian set of regulations than the Charity Commission’s rules on political campaigning by charities. We examine the contradictions of the current system which permits propaganda by companies but outlaws any attempt to respond by NGOs.

This section is concerned with the ban on political advertising in the broadcast media contained in ss. 310 and 321 (2)-(3) of the Communications Act 2003 [CA]. The Act has the effect of prohibiting most social advocacy advertising on television and radio in the United Kingdom. The CA bans advertising by “political” bodies and advertisements “directed towards a political end”. ‘Political’ is so broadly drafted in the Act and so broadly implemented that campaign organisations and charities are not permitted to broadcast advertisements which seek to influence public opinion on matters of controversy in the UK. This inhibits severely the ability of charities and other not-for-profit organisations to campaign effectively for changes which are intended to benefit their beneficiaries. This section argues that amending the legislation to allow “social advocacy” advertising would not only be compatible with the overall objective of the legislation (not to allow political advertising to distort the democratic process), but would redress a current imbalance whereby freedom of commercial expression is more highly protected than political expression, allow charities and not-for-profit groups to promote change and may also increase interest in the democratic process by allowing a broader range of views to be aired in the broadcast media

The ban is stricter than that operating in any other jurisdiction in Europe or other common law jurisdiction, and cannot be seen as compatible with other policy goals to encourage a vibrant and politically engaged third sector or with the principles of democratic free expression. The Government has recognised the importance of encouraging legitimate campaigning activities in the Human Rights Act 1998 [HRA] and, to a limited extent, in guidance to charities. The ban in the CA is anomalous, detrimental to the interests of charities and other NGOs and those they seek to represent and serve and is and arguably in breach of Article 10 of the European Convention on Human Rights [ECHR] which safeguards freedom of expression in member states. It is difficult to see how such restrictive provisions are consistent with the needs of a mature democracy where commercial freedom of speech is protected, advertisements are distinguished from factual programming and where information is freely available in other media.

3.1 The legislative framework.

- 3.1.1 Ss.310(2) g and 321(2)-(3) CA contain a ban on paid political advertising in the broadcast media. The ban does not affect internet, cinema, sms, telephone, billboard or newspaper advertising (where political advertising is permitted) or

party political broadcasts and party election broadcasts (as major political parties are entitled to free advertising subject to strict control and regulation). The ban applies to both the content of each proposed advertisement and to the status of the body seeking to broadcast the advertisement. So an advertisement by any body, including a commercial body, is prohibited if its content is directed towards a political end (s.321(2)(b) CA) and, whatever its content, an advertisement will be banned if commissioned by a body whose objects are wholly or mainly of a political nature. ‘Political’ is extremely widely defined by the Act and includes the following categories of activity:

Party-politics and electoral-influence (s.321(3)(a) CA).

- (i) There is a ban on broadcast advertising: (a) on political parties, who are required to register and then permitted to take advantage of PPB/PEBs; and (b) at an election time, on third parties seeking electoral-influence.

Law/policy change.

- (ii) The Act prohibits any advertisement which seeks to influence law reform, the legislative process, or a governmental decision or policy (s.321(3)(b)-(c) CA). But it also prohibits on status grounds any advertisement, however non-political, inserted by or on behalf of a body wholly or mainly having those objects. And it extends to influencing the policy or decision of “any public authority” or body acting under “international agreements” (s.321(3)(d)-(e) CA).

Social-advocacy.

- (iii) Any advertisement directed towards “influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy” (s.321(3)(f) CA) is banned as is any purely commercial advertisement by a body having such influence as a main object.
- (iv) The main harm that the ban seeks to prevent is that wealthy organisations will use expensive paid-for advertising to promote a political party or set of political beliefs and so distort political debate and the political process itself. This is, we believe, a desirable policy objective. However, the nature of the legislation is such that it includes “social advocacy” advertisements in the definition of “political” advertisements, so inadvertently impacting on the democratic process in an entirely different way.

3.2 The effect of the ban

- 3.2.1 The elements of the ban which are most difficult to reconcile with the legitimate activities of campaigning organisations and with freedom of expression principles are the parts of the ban prohibiting advertisements seeking to effect law and policy change and social advocacy advertising (see paragraph 3.1.1 (ii) and (iii) above). These provisions broaden the application of the ban way beyond party political and electoral activity to cover legitimate campaigning activities by organisations including charities. Their effect on campaigning is as follows:

- 3.2.2 The ban applies to organisations whose main aim is to influence public opinion on a matter of controversy. That includes organisations like Amnesty International, animal welfare organisations, and other single issue groups such as Make Poverty History or the Countryside Alliance. Amnesty International UK's radio advertisement about the Rwandan tragedy was banned because of Amnesty's status as a 'political' entity, not because of the content of the advertisement.
- 3.2.3 The ban also applies to individual advertisements, affecting, for example, registered charities wishing to broadcast an advertisement on a matter of controversy as part of a specific campaign. Examples are the Make Poverty History One Click campaign commissioned by a coalition of charities and NGOs which was banned on television and radio as a result of the Communications Act provisions, or the RSPCA broiler chicken advertisement, banned because of its 'political' content, or Oxfam's "Make Trade Fair" campaign which could not be mentioned on television advertising for a free Coldplay CD to be given away with the Guardian.
- 3.2.4 Section 1 of this Report sets out the manner in which charities are entitled to campaign. As we have seen (paragraph 1.5 of Section 1) charities can campaign to oppose a change in the law or public policy, providing it is not the dominant activity of the charity. However, the definition of political in the Communications Act is very much wider. Guidance from the Charity Commission CC9 permits charities working in areas which rouse strong emotions to use campaigning methods including advertising. Providing content standards are met, such campaigning can be an effective means of furthering the charity's purpose. The law and guidance for charities seeking to employ political campaigning methods in furtherance of their purposes is "unduly restrictive" (introduction s.1). However, (as paragraph 1.9.1 of section 1 also points out) the CA provisions are more restrictive still. What is acceptable activity for a charity or campaigning organisation is banned by the Communications Act from being seen on television or heard on the radio.
- 3.2.5 Examples: a charity whose objects are non-political (RNID for example) could campaign for a change in discrimination law which included advertisements, but any such advertisements would be banned from TV and radio. The RSPCA's campaign to secure a ban on hunting with dogs was permitted by the Charity Commission but the accompanying advertising in other media was not permitted to be broadcast. Or a Green NGO (Friends of the Earth for example) could campaign on climate change but would be prohibited from selling any product on a commercial radio station in support of that campaign. The Make Poverty History one click campaign referred to above could not be broadcast on television because of the ban, but could be broadcast on the internet despite the fact that there are no "distinguishability" requirements in that medium.

3.3 Other consequences –

Debate on matters of public importance

3.3.1 The purpose of the ban is said to be to protect public debate and the electoral process from distortion by wealthy operators. However, at present, many charities and NGOs are prevented from responding to television advertising in the same media as commercial organisations. So, BP is permitted to broadcast vanity advertising about its green credentials, but green campaigners are not entitled to commission, pay for and broadcast advertisements to inform the public of the other side of the argument. Similarly, McDonald's can advertise its chicken burgers using chickens illustratively, but animal welfare organisations cannot participate in the debate by advertising information about the living conditions of those chickens.

The status ban

3.3.2 This means that social advocacy organisations, including registered charities, may not advertise a commercial product, even one completely unrelated to its campaigning work. So a non-charitable NGO which campaigns on a controversial matter is not permitted to sell any product at all using television or radio advertising. This is intended to prevent organisations from using broadcast advertising to build up revenues unfairly. But given the expense of television advertising, and the strict controls on party political funding and election spending, this caution is inconsistent with the importance of political free expression.

The definition of political

3.3.3 Most legitimate objections to allowing political advertising apply solely to electoral and party political advertising. This was evident from the consultation period prior to the enactment of the Bill. Contributions from the Electoral Commission, the influential Neill Committee on Standards in Public life and others, used the term “political advertising” in its narrower sense. Many of the concerns about the ill effects of political advertising (allowing wealthy organs to dominate the democratic process for example) do not apply to social advocacy advertising, or at least not in a way which is not outweighed by the importance of free expression in a democracy.

Other jurisdictions

3.3.4 The UK system is the most draconian in Europe and much more restrictive than the systems in the US, Canada, South Africa, Australia and New Zealand. Most countries rely on a ban on paid party political advertising and a wider ban to operate during elections. Some also restrict political content in advertisements, but none bans advertising by social advocacy groups on both content and status grounds. Many jurisdictions make a distinction between political in the sense of party/electoral which is banned, and the expression of opinion on matters of controversy which is encouraged.

Liberalisation of other restrictions – e.g. gambling advertising

3.3.5 The Government has recently announced that restrictions on the advertising of gambling are to be lifted. The Council of Europe has reached the final stages of amendments to the Television without Frontiers Directive which will allow very much more advertising in Europe and for advertisements to be broadcast in new ways, including product placement, split screen advertising etc. It is seen to be healthy to encourage commercial advertising where free speech is extremely well protected. It is anomalous that free speech on controversial matters does not have the same protection.

Other means of advertising

3.3.6 It has always been argued in the past that television is a peculiarly pervasive medium and that as a result, special restrictions need apply. That may have been the case at one time, but we are increasingly a media literate audience educated in advertising by way of sms and internet and product placement in drama. The public is not at risk from straightforward advertising on matters of controversy. It was also argued that television as a more expensive medium excluded smaller political organisations. However, with the proliferation of smaller cable and satellite channels, there are markets to suit every budget, just as there are paper advertising opportunities for all from local freesheets to full pages in the Mail on Sunday.

Loss of other benefits

3.3.7 Campaign groups are, as a result of the ban, unable to benefit from interactive television payment schemes, premium phone lines etc. What is more, advertising on the smaller special interest satellite and cable television channels is cheaper and provides an ideal campaign means for NGO charity and campaign groups – animal channels for animal welfare groups, channels specialising in foreign holidays for NGOs or charities dealing with human rights abuses abroad for example.

3.4 Dangers of change?

Influence on the democratic system

3.4.1 The main harm that the ban seeks to prevent is that wealthy organisations will use expensive paid for advertising to promote a political party or set of political beliefs and so distort political debate and the political process itself. Of course this ignores two crucial factors. One, that the market is very sophisticated and any advertising, providing it is clear that it is advertising and the source of the advertisement, is treated with suspicion, particularly when it concerns ideas rather than products. Secondly, as noted above, not all broadcast advertising is expensive. There is a widely varied market and even smaller organisations would have the opportunity to use the new opportunities to reach their target audience.

Effect on regulation

3.4.2 The Government appears to have concerns that a change in the definition of political in the CA would be difficult to regulate and would cause Ofcom and legislators serious problems. However, there are already workable definitions of political which are used to control election spending and electoral activities without difficulty (see the Political Parties, Elections and Referendums Act 2000 for example). Every regulator has difficult cases at the margins and the UK has many effective systems of regulation in which regulators have to make hard decisions. Furthermore, there are numerous workable and effective systems currently operating in other democracies which do not appear to cause insuperable problems to regulators – see paragraph 3.5.2 below

Effect on smaller organisations

3.4.3 There is concern that the debate will become controlled by wealthy organisations so that one organisation could flood the airwaves with its opinions at the expense of the opinions of smaller or less wealthy organisations. This is a legitimate concern but not insuperable. The situation for smaller organisations would be only marginally different than the present situation, where wealthy organisations can afford billboard or underground station campaigns or to take out advertisements in national newspapers or cinemas across the country. Such advertisements reach a wider audience than television and, in the case of cinema advertising, is a similar medium to television.

3.5 Proposals for reform

3.5.1 The Advisory Group wishes to see the repeal of ss.310(2) g and 321(2)-(3) CA and its replacement by a new legislative regime which recognises the value of advertising communications in the broadcast media by charities and NGOs, whilst continuing to protect the public from distortion of the political system and democratic process by wealthy groups or political parties. There are a number of ways to achieve a workable system.

The international example

3.5.2 The Advisory Group has not identified any jurisdiction operating a system as draconian as the UK; in particular, other countries which ban “social advocacy” advertising do so only on content basis and do not consider the nature of the organisation. There are a number of other jurisdictions which appear to provide balanced, workable and Article 10 ECHR compliant systems. The following are examples:

Italy

(i) The relevant rules state - Article 46 (Social advertising): “The rules of this Code apply to any advertising message aimed at raising the awareness of the public as to issues of social relevance, whether specific or general, or which directly or indirectly solicit donations of any kind for the purpose of achieving objectives of a social nature. Such messages must clearly identify both the

author and the beneficiary of the appeal, and set out the social objectives being sought. The promoters of the said message may freely express their opinions on the issue at hand, but there must be a clear indication that the opinions being expressed are those of the promoters, and are not based on fact. In any case such messages shall not: a) unduly exploit human suffering by offending human dignity, or use shock tactics that might generate unwarranted panic, fear or distress; b) generate feelings of guilt or responsibility upon persons who decide not to support the appeal; c) exaggerate the degree or nature of the social issue which the appeal is targeting; d) overestimate the specific or potential value of contributions to the initiative; e) solicit donations from minors. The above rules also apply to commercial advertising featuring references to social causes.”

New Zealand

- (ii) The rules prohibit broadcast advertising by political parties but specifically recognise the importance of advocacy advertising as follows: “Advocacy Advertising: Expression of opinion in advocacy advertising is an essential and desirable part of the functioning of a democratic society. Therefore such opinions may be robust. However, opinion should be clearly distinguishable from factual information. The identity of an advertiser in matters of public interest or political issue should be clear”.

Denmark

- (iii) Legislation contained a ban on broadcast advertising by political parties, employers organisations and trade unions. An amendment was passed in 2003 to include a ban on the expression of political opinions in paid for advertising. However, this amendment never entered into force as it was considered incompatible with Article 10 ECHR. A new amendment now prohibits advertising by political parties, employers organisations and trade unions as before but now also covers political movements and elected members or candidates for political assemblies. Advertisements for political opinions are permitted except from the moment an election period is announced until the elections have been held (with a maximum period of 3 months). This specific prohibition is considered to be in accordance with Article 10.

South Africa

- (iv) Broadcast advertising is governed by the Advertising Standards Authority of South Africa – Code of Practice which covers advertising in all media. Under ss 2.2 and 2.3 of the code, advertising which expresses an opinion on a matter of controversy involving issues in the realm of public policy and practice is regulated so that it is clear who is advertising what (s.2.4). Commercial advertising of products in aid of charities or “good causes” are also acceptable providing the amount of the donation to be made and other details are made clear (s.4). Advertising by political parties is not permitted.

The importance of content regulation

3.5.3 The Ofcom Code and International standards require advertisements not to offend political or religious beliefs or to cause widespread offence for other reasons. This standard would, of course, need to be rigorously enforced to prevent offensive negative campaigning. The current regime which requires advertisements to be legal, decent, honest and truthful would deal with most content objections, for example, objections to the Pro Life advertisement which showed pictures of aborted fetuses.

Avoiding democratic distortion

3.5.4 The anxiety is that we will inadvertently replicate the US system in which electoral and party political advertising is permitted. However, as most other jurisdictions allow some form of ‘political’ advertising, a system which allows social advocacy advertising but prevents party political and electoral advertising is clearly possible. Some suggestions are: a total moratorium on all advertisements with political content (as currently defined) during national or local election periods and for the three months before a general election; spending limitations on political television and radio advertising as currently applicable to election spending by political parties; a redefinition of ‘political’ to expressly exclude registered charities who are already regulated by the Charity Commission (although this last proposal may not go far enough to satisfy the requirements of Article 10 ECHR).

Distinguishability

3.5.5 So that viewers may make an informed choice, it would be important not only to ensure that ‘political’ advertisements are clearly distinguished from programming, but also to clarify the body behind the advertisement. Advertising by any ‘political’ organisation, or which contains any ‘political’ content would have to state that it represents the opinion of the advertiser and state the name of the body responsible for commissioning and funding the advertisement. For example, advertisements about the cruelty or otherwise of hunting which form part of a political debate between the League against Cruel Sports and the Countryside Alliance, could then be understood as such by viewers.

Method of change

3.5.6 At present the Government has been unable to certify the CA as compatible with the ECHR because of the ban on political advertising. This is a step it is required to take under s.19 HRA and it is the first and only time that the Joint Committee on Human Rights has been unable to certify legislation. The Committee recognised that the case of VgT v Switzerland, a case on almost identical facts, meant that the provision in the CA was unlikely to survive a challenge in the European Court of Human Rights. Nevertheless, the legislation was passed. It is now under challenge by Animal Defenders International whose appeal will be heard by the House of Lords this year. If successful, 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.

- 3.6 See Appendix 3 of this Report for a summary of the regulatory framework for broadcast media and non-broadcast advertising.

APPENDIX 1
Terms of Reference

Advisory Group on Campaigning and the Voluntary Sector: Terms of Reference

1. Secretariat support is to be provided by Bates Wells and Braithwaite (BWB) to the group.
2. Members of the Advisory Group are to be invited from a broad cross-section of voluntary sector organisations, and individual legal experts.
3. The Advisory Group will look at campaigning issues in England and Wales.
4. It will meet at least once in plenary or “summit” and can continue its work through email contact. Practical arrangements for the Advisory Group’s working methods and its agenda are to be agreed by the Advisory Group itself. It may for example choose to form 1 or more smaller working group(s) to develop the report with the final report being approved by the whole Advisory Group, either by e-mail or in a second “summit” meeting.
5. The Advisory Group is asked to:
 - (a) Advise on the reform of the legal and regulatory framework in respect of campaigning to minimise the barriers for individuals and voluntary organisations who seek to campaign looking in particular at :
 - i. Charity law and Charity Commission guidance CC9.
 - ii. Restrictions on media advertising contained, inter alia, in the Communications Act 2003.
 - iii. Criminal or civil restrictions on demonstrating, freedom of expression and assembly.
 - iv. Restrictions on using Freedom of Information as a campaign tool. [The Advisory Group submitted a response to the DCA Consultation on the draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007. See Appendix 4]
 - (b) The Report produced by the Advisory Group will make recommendations for legislative and regulatory change and is intended to influence the Charity Commission as well as the Office of the Third Sector and Treasury review of the role of the sector.
6. The Advisory Group will meet by the end of February 2007 and report by April 20th 2007. [The Group agreed a later date of 23rd May.] The Group will agree key messages to be used in media work.
7. The final terms of reference were agreed by the Advisory Group itself at its initial meeting in London on 22nd February 2007.

Chair: **Baroness Helena Kennedy QC**

Secretariat: **Bates Wells and Braithwaite, Solicitors.**

APPENDIX 2

A Summary of the key criminal restrictions on campaigning

1. Harassment offences

- 1.1 The Protection from Harassment Act 1997 [PHA] describes itself as an Act “to make provision for protecting persons from harassment and similar conduct”. It was passed for the purpose of dealing with the phenomenon of “stalking”. In *Tuppen v Microsoft Corporation Ltd*¹, it was stated that:

“The legislative intention is to be found in a consultation paper issued in July 1996, jointly by the Home Office and the Lord Chancellor’s department, entitled “Stalking: The Solutions”, which was referred to at the committee stage of the Bill. It is clear that the bill, which became the PHA, was designed to replace what were regarded as the inadequate provisions of s.4(a), (5) of the Prevention of Offences Act 1851.

Extending the scope of existing offences to this extent may in some circumstances lead to behaviour falling foul of the criminal law which perhaps should not do so. Therefore the Government proposes further that the concept of persistence should be introduced into the formation of the new offences.”

- 1.2 There is no definition of harassment, although s. 7(2) PHA provides that references to harassing a person include alarming or causing the person distress. It has been held that the prohibitions on harassment imposed by the PHA and by the common law do not breach the exercise of the rights of free speech and association under Articles 10 and 11 of the European Convention on Human Rights [ECHR].²

- 1.3 The PHA provides that:

“1(1) A person must not pursue a course of conduct

- (a) which amounts to harassment of another, and
- (b) which he knows or ought to know amounts to harassment of the other.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of another.

(3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows –

- (a) that it was pursued for the purpose of preventing or detecting crime,
- (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
- (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.”

¹ *Tuppen v Microsoft Corporation Ltd.*, The Times, 15 November 2000, QBD, Douglas Brown J.

² *Silverton & Ors v Paul Gravett & Otrs* [2001] LTL 31/10/2001 (unreported elsewhere).

- 1.4 A “person” subject to harassment does not include corporations.³ The test for whether the person accused of conducting the harassment knew it was harassment (s. 1(2)) PHA is entirely objective. Those who aid, abet, counsel or procure the offence of harassment or embark upon a joint enterprise to commit the offence will also be guilty of the offence.
- 1.5 A “course of conduct” means at least two or more acts/incidents. The fewer the incidents and the greater the separation in time, the less likely that they could be described as a course of conduct.⁴ The victim of the harassment can claim a civil injunction. Significantly, however, it is a *criminal offence* to breach the injunction without reasonable excuse (s. 3(6)) PHA. Such injunctions have been used against animal rights activists (see, for example, *University of Oxford & Others v Broughton & Others*⁵) as well as anti-weapons protestors (see *EDO and another v Campaign to Smash EDO*⁶). A court has the power to issue a warrant for arrest where there are reasonable grounds for believing that the person subject to the injunction has broken it. (s. 3(3) and (5)). The offence provided for by s. 1(1) PHA is enhanced in s. 4 PHA, for instances where harassment involves the threat of violence.
- 1.6 S.125 SOCPA amended the PHA by inserting a new s. 1(1A) PHA which extends the ambit of the offence of harassment. The extended offence includes “*conduct on one occasion which involves the harassment of two or more persons and by which it is intended to persuade any person (whether or not this person is one of the “harassed” persons) not to do something he is entitled or required to do.*” Like the ‘simple’ offence under s. (1), s. 1(1A) PHA provides a defence on the basis that the course of conduct was “reasonable”.
- 1.7 The effect of s. 1(1A) PHA on campaigning activities can be wide ranging. For example, if a single email is sent to several directors of a company, or if a person stands outside a factory and shouts once at more than one employee, in an attempt to persuade them to do or not to do something, and if alarm or distress is caused, (i.e. because the protestor voicing their opinion states that the employee’s company is destroying the environment) *prima facie*, the activity would be caught by s. 1(1A).
- 1.8 S. 42 of the Criminal Justice and Police Act 2001 [CJPA] provides a police power to issue a direction for a person to move away from another’s home if the person, being outside the other’s home, is there to persuade the resident to do or not do something which they are entitled to do. S. 126 SOCPA amended s. 42 CJPA by adding a new offence (s. 42A CJPA). This provides that a person can be guilty of an offence of harassment of another at (or in the “vicinity” of) their home if they are there to persuade the resident to do or not do something which they are entitled to do. No defence of reasonableness provided.
- 1.9 Significantly, ss. 42 and 42A CJPA apply whether the person is making representations to the resident or another individual, who may or may not use the premises as his dwelling (ss.(42(1)(b) and 42A(1)(b)) CJPA. Thus, if a person was to stand in the public highway outside commercial or public premises, and in the vicinity of those premises there were some dwellings, and his protest resulted in a person who resided in one of the dwellings feeling “harassed”, the protestor would be committing an offence under s. 42(A) CJPA.

³ *Daiichi Pharmaceuticals UK Ltd v Stop Huntingdon Animal Cruelty* [2004] 1 WLR 1503, QBD

⁴ *Lau v DPP* [2000] 1 FLR 799, DC

⁵ [2006] EWHC 1233 QB

⁶ [2006] EWHC 598 QB

1.10 There is no definition of “vicinity” in the CJPA. As a result, a police officer can direct a group of protesters outside a building to move away, for example, because somewhere within an unspecified radius of that building there are some dwellings and the residents of those dwellings may be experiencing a degree of alarm or distress. This gives the police a very broad power and puts protesters at risk of committing a criminal offence despite a lack of intention on their part.

2. Trespass

2.1 S. 68 of the Criminal Justice and Public Order 1994 [CJPO] provides for the offence of aggravated trespass. The section states:

“(1) A person commits the offence of aggravated trespass if he trespasses on land and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land, does there anything which is intended by him to have the effect -

- (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity,
- (b) of obstructing that activity, or
- (c) of disrupting that activity.”

2.2 There are three elements to the offence: 1) trespass by a person on land, be it indoors or outdoors; 2) the person’s action is related to a lawful act being carried out or about to be carried out by people on the land; 3) the trespasser has an intention to have one of the three effects provided for in subsections (a), (b) or (c). Whether the act referred to in (2) above is lawful, is defined by s. 68(2) CJPO which provides that: “*Activity on any occasion on the part of a person or persons on land is ‘lawful’ for the purpose of this section if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land.*”

2.3 In *R v Jones*⁷ the House of Lords considered the case of protesters, some of whom were charged with aggravated trespass, who had gone on to military sites and interfered with activity there, which was being conducted in preparation for action in the Gulf and Iraq. The protesters raised a defence on the grounds that they were legally justified in the action they undertook because they wished to prevent the UK committing the crime of aggression, as recognised in public international law. Action in prevention of a crime is legally permissible under S.3 of the Criminal Law Act 1967. Furthermore, the protesters contended that the UK military was not committing a “lawful” act within the meaning of s. 68(2) CJPO and therefore they were not caught for the offence in s. 68(1) CJPO.

2.4 The House of Lords rejected the protesters’ defence, holding that the crime of aggression in international law was not a crime in the domestic law of England and Wales and therefore the protesters could not rely upon s. 3 of the Criminal Law Act 1967. Furthermore, the word “offence” in s. 68(2) CJPO had to be understood as meaning an offence under UK domestic criminal law. The UK military had not committed an offence on the land within the meaning of s. 68(2) CJPO, therefore their activity was lawful and the protesters were caught by s. 68(1) CJPO.

2.5 S.128 SOCPA makes it a criminal offence to trespass on a protected site. A person does so if he/she “enters, or is on, any protected site in England and Wales or

⁷ [2006] UKHL 16

Northern Ireland as a trespasser.” Sites *designated* by the Secretary of State are “protected.” According to s. 128(2) SOCPA, a designated site is a site specified or described, in any way, in an order made by the Secretary of State, and designated for the purposes of s. 128 by the order. The land designated must be comprised in Crown land *or* comprised in land belonging to the Queen in her private capacity or the heir to the Throne in his private capacity *or* it must appear to the Secretary of State that it is appropriate to designate the site in the interests of national security (s. 128(3)) SOCPA.

- 2.6 Significantly, therefore, under these provisions the Secretary of State can designate any site on the grounds of “national security” as one where simple trespass becomes a criminal offence.
- 2.7 The current designated sites are listed in a schedule to the Serious Organised Crime and Police Act 2005 (Designated Sites) Order 2005.⁸ They include a number of RAF and Naval bases. By way of s. 12 of the Terrorism Act 2006, a “protected” site under s. 128 of SOCPA was extended to cover nuclear sites.
- 2.8 S.128(4) SOCPA provides for a defence to the offence of trespass on a protected site if the person charged can prove that he did not know, and had no reasonable cause to suspect, that the site in relation to which the offence is alleged to have been committed, was a protected site.

3. Demonstrations near Parliament

- 3.1 Ss.132 to 138 SOCPA impose restrictions on the ability to demonstrate near Parliament. These sections were largely introduced to deal with Brian Haw’s long-term demonstration in Parliament Square against the UK’s policy in Iraq. The then Secretary of State, David Blunkett, explained that the introduction of the law was intended to enable “people, including protestors, to be able to go about their business, and for people coming to our capital city to be able to enjoy the environment surrounding the Palace of Westminster.”⁹
- 3.2 The Court of Appeal considered ss.132 to 138 SOCPA in *R (Haw) v Secretary of State for the Home Department*¹⁰. In that case, it was held that Brian Haw’s demonstration, located on the pavement to Parliament Square since June 2001, was regulated by the act, notwithstanding that his demonstration began before SOCPA’s commencement.
- 3.3 S. 132 SOCPA makes it an offence to organise a demonstration, take part in it or carry on a demonstration near Parliament, if authorisation has not been given under s. 134(2) SOCPA. Authorisation is given by the Commissioner of the Metropolitan Police. Significantly, s. 133 SOCPA states that a person seeking authorisation for a demonstration must give written notice to the Commissioner not less than 6 clear days before the day on which the demonstration is due to start (subsection 2(a)), but if that is ‘not reasonably practicable’, ‘in any event not less than 24 hours before the demonstration is due to start.’ It appears, therefore, that on a plain reading of this section, SOCPA would prohibit spontaneous demonstration near Parliament – one organised and carried out within a 24-hour period - where the seeking of authorisation would not be possible.

⁸ SI 2005/3446

⁹ Hansard, House of Commons, 7 December 2004 Column 1059

¹⁰ [2006] EWCA Civ 532

- 3.4 S. 134 SOCPA provides that the criteria to be applied by the Commissioner in his “reasonable opinion” in authorising demonstrations and the attaching of conditions include: “hindrance to the proper operation of Parliament”, “hindrance to any person wishing to enter or leave Parliament” and “disruption to the life of the community”.
- 3.5 The use of the word ‘disruption’ leaves wide open the use of the powers under ss. 132 to 138 SOCPA. Furthermore, the conditions that can be imposed are very broad: the place where the demonstration may, or may not, be carried on, the times at which it may be carried on, the period during which it may be carried on, the number of persons who may take part in it, the number and size of banners or placards used and the maximum permissible noise levels. This is a much broader power than the ability to impose conditions under s. 14 of the Public Order Act 1986 [POA] (see below), which only allows conditions on the number of persons and the location of and duration of the assembly.
- 3.6 An amendment to require serious disruption was specifically rejected by the government in the Lords. There remains concern that the powers will be used arbitrarily since “the concept of disruption is vague; any large-scale protest will inevitably cause some disruption.”¹¹
- 3.7 In *Blum and others v Secretary of State for the Home Department*¹² the High Court held that these sections of SOCPA, requiring authorisation, were compatible with Articles 10 and 11 ECHR. Once that had been established, it was not legitimate for protestors to argue before the courts that, in their individual cases, it had to be considered whether prosecution or criminal sanction for their actions, taking place without authorisation, constituted an infringement of Articles 10 and 11. The court held that once an authorisation procedure was Article 11 compliant, Parliament was entitled to impose sanctions where authorisation had not been obtained.

4. Public Order Act 1986

- 4.1 The POA regulates moving demonstrations – or “processions” – as opposed to static assemblies. S. 11 POA provides that advance notice must be given for demonstrations unless it is not reasonably practicable to give it. The notice must specify the date when it is intended to hold the procession, the time when it is intended to start it, its proposed route, and the name and address of the person (or of one of the persons) proposing to organise it. The notice must be delivered to a police station. Where the demonstration is held, each of the persons organising will be guilty of an offence if the requirements as to notice had not been satisfied, or the details (i.e. date, time and route) differed to that specified in the notice. It is a defence, however, for the accused to prove that he did not know of or suspect of the failure to satisfy the requirements or of the differences. It is also a defence for the accused to prove that the differences arose from circumstances beyond his control or from something done with the agreement of a police officer or by his direction.
- 4.2 S. 14 POA allows the police to impose restrictions on a demonstration if a senior officer “reasonably believes” that it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or the purpose of the persons organising 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

¹¹ JUSTICE, Serious Organised Crime and Police Bill Parts 3-6 (not including cl. 124); Briefing for House of Lords Second Reading (March 2005), para 54

¹² [2006] EWHC 3209 (Admin)

do. The senior police officer may give directions and impose conditions such as the demonstration's maximum duration and the maximum number of persons who may constitute it.

5. Interference with animal research organisations

5.1 S.145 SOCPA makes it an offence for a person (A), with the intention of harming an animal research organisation, to commit an act (or threaten that he or somebody else will do an act) amounting to a criminal offence, or a civil wrong, which causes person (B) to suffer loss or damage, in order to cause one or more of the following:

- a. (B) not to perform a contractual obligation to (C),
- b. (B) to terminate a contract he has with (C); or
- c. (B) not to enter into a contract with (C).

5.2 As one commentator has remarked "*S. 145 blurs the distinction between criminality and legitimate protest.*"¹³ Thus, a criminal offence is committed through the commission of a tort. A protestor who hands out a leaflet, which induces a breach of contract causing loss or damage "of any kind", will be caught by s. 145 SOCPA. The section is clearly aimed at criminalising individuals because of whom they are protesting against rather than merely for how they are protesting.

5.3 Significantly, the Secretary of State can make an order applying these provisions to other persons or organisations, in the same way as they apply to animal research organisations (s. 149 SOCPA).

6. Anti-social behaviour orders (ASBOs)

6.1 This area of legislation under the New Labour government has been one of the most contentious. There has been a whole raft of legislation directed at "anti-social" behaviour including: the Crime and Disorder Act 1998, the Criminal Justice and Police Act 2001, the Police Reform Act 2002, the Anti-Social Behaviour Act 2003 and the Criminal Justice Act 2003. As Manning and Osler note, in the introduction to their guide to the Anti-Social Behaviour Act 2003 [ASBA]¹⁴:

"What is important, however, is that with the government appetite for legislation in the field of anti-social behaviour showing no sign of abating, and in fact showing every sign of becoming even more voracious, regulation and prescription of the conduct of the private individual should not stray beyond the legitimate bounds of dealing with behaviour which can terrorize communities...and into the territory of the regulation of behaviour, not because it is inherently anti-social, but just because someone happens to find it eccentric or distasteful."

6.2 Under s. 1 of the Crime and Disorder Act 1998 [CDA], a relevant authority (the police, a council etc.) 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". Applications for ASBOs are civil and not criminal in nature.¹⁵ S.139 SOCPA enables the Secretary of State to add to the list of relevant authorities that may apply for anti-social behaviour orders.

¹³ Gareth Crossman in "Serious Organised Crime and Police" bill, Liberty's Briefing for the Second Reading in the House of Lords.

¹⁴ Blackstone's guide, OUP, 2003 at 2

¹⁵ *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787

- 6.3 By way of s. 1(5) CDA, a defence to ASBO proceedings is provided in that the court has to “disregard any act of the defendant which he shows was reasonable in the circumstances.” The burden is on the defendant to show this on the balance of probabilities.
- 6.4 The courts can impose an ASBO defining what behaviour or actions cannot be done (s. 1(4) CDA). It has effect for the period specified in the order (which must be at least two years) or until a further order of the court (s. 1(7) CDA). S.1(10) CDA, provides that if, without reasonable excuse, a person does anything that he is prohibited from doing by an ASBO, notwithstanding that an ASBO is a civil remedy, the person commits a criminal offence.
- 6.5 S.30 ASBA provides the police with the power to disperse groups of people of any age, if a constable in uniform, has reasonable grounds for believing that the presence or behaviour of a group of two or more people in a public place in the relevant locality has resulted or is likely to result in any members of the public being intimidated, harassed, alarmed or distressed. The use of the power by a constable in a given area must be authorised by the relevant officer (one of the rank of superintendent or above) in advance, who must have reasonable grounds for believing that: a) any members of the public have been intimidated, harassed, alarmed or distressed as a result of the presence or behaviour of groups of two more persons in public places in any locality in his police area, and b) anti-social behaviour is a significant and persistent problem in the relevant locality.
- 6.6 In *R (Singh) v Chief Constable of West Midlands Police*¹⁶ the Court of Appeal considered a case where the police used s. 30 ASBA to disperse a group that were protesting against a play which was being performed which some Sikhs found offensive. The ground for the authorisation of the use of powers under s. 30 ASBA preceded the incident surrounding the play. The powers had in fact been authorised to deal with an increasing amount of anti-social behaviour in the city centre caused by seasonal revellers, in the run up to Christmas. Notwithstanding this, a police officer at the scene of a group of approximately 30 protestors against the play, gave a direction under s. 30(4)(a) ASBA requiring persons in the group to disperse immediately.
- 6.7 In considering the matter, the Court of Appeal dealt with the issue of whether s. 30 ASBA was intended to be directed at protestors at all. The court held that the dispersal powers applied to protestors and that any interference with a protestor’s Article 10 ECHR rights was justified, in that it was necessary for the prevention of disorder or crime.

7. Terrorism

- 7.1 Section 1 of the Terrorism Act 2000 [TA] provides:

‘(1) In this Act “terrorism” means the use or threat of action where -

- (a) the action falls within subsection (2),
- (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and
- (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

¹⁶ [2006] Civ 1888

(2) Action falls within this subsection if it –

- (a) involves serious violence against a person,
- (b) involves serious damage to property,
- (c) endangers a person’s life, other than that of the person committing the action,
- (d) creates a serious risk to the health or safety of the public or a section of the public, or
- (e) is designed seriously to interfere with or seriously disrupt an electronic system.

7.2 When the Terrorism Bill was moved through Parliament there were significant concerns by MPs as to the breadth of the definition of terrorism. It was feared that the actions of animal rights activists and other protestors would be incorrectly labelled as “terrorism.”. The definition can include conduct such as “crop protestors destroying a warehouse containing GM seeds in circumstances which made clear that their intention was only to destroy the seeds themselves but not to risk any other kind of harm to those involved in GM crops.”¹⁷

7.3 Under s. 44 TA, a senior police officer can authorise police constables or other officers, to stop and search vehicles, passengers and pedestrians, without harbouring individual suspicions about the subject of the search, in a given area for a given period of time if s/he considers it is “expedient” for the prevention of acts of terrorism. The power can only be exercised in order to search for articles of a kind which could be used in connection with terrorism. However, the power can be used whether or not the constable has grounds for believing the person has in his possession such articles.

7.4 These powers were considered by the House of Lords in *R (Gillan) v Commissioner of Police of the Metropolis*.¹⁸ In that case it was decided that the word “expedient” in s. 44 TA should not be interpreted as “necessary”. It was further held that the legislation was not incompatible with the ECHR. There would be no deprivation of liberty under Article 5 ECHR as the stop would be for a very short period of time. There was no breach of Article 8 ECHR and the right to privacy, as the intrusion did not reach a sufficient level of seriousness. Any infringements to Articles 10 and 11 ECHR would be permissible as justified under Articles 10(2) and 11(2) ECHR.

8. Criminal Justice and Public Order Act 1994 [CJPOA]

8.1 Stop and search powers are also provided for under s. 60 CJPOA, which states that if a senior police officer reasonably believes that incidents involving serious violence may take place and that it is expedient to give an authorisation to prevent their occurrence, or that persons are carrying dangerous weapons without good reason, he may give such authorisation. The authorisation then allows for a police constable to stop any person and search him or anything he is carrying for offensive/dangerous weapons, and to stop a vehicle and search it and its driver and passengers for the said items.

¹⁷ E Metcalf, ‘The definition of terrorism in UK law’, *JUSTICE Journal*, vol 3 issue 1 (2006), pp62-84, at p74.

¹⁸ [2006] 2 WLR 537

9. Environmental Protection Act 1990 [EPA]

- 9.1 Schedule 3 EPA empowers a Local Authority to designate an area where anyone who wants to distribute free literature must apply to the council for authorization. The council may refuse authorization or impose conditions if this is necessary to prevent excessive littering. Anyone who distributes leaflets in the designated area without consent commits an offence. There is an exemption for leaflets distributed by or on behalf of a charity or for political or religious purposes.

APPENDIX 3

(A) The Regulatory Framework For Broadcast Media

1. The broadcast media (TV and radio) are regulated by Ofcom (Communications Act 2003 [CA] Part 3) pursuant to: (a) the BBC Charter and Agreement in the case of the BBC; and (b) statutorily-required standards in the case of the independent licensed services. The following are key features in relation to the broadcast media:

Special impartiality requirements

2. The BBC must treat controversial subjects with due accuracy and impartiality in its news services and other programmes dealing with matters of public policy or political or industrial controversy; it must not express its opinion on current affairs or matters of public policy other than broadcasting. The same is true for independent licensed radio services (ss.319(2)(c), 320 CA), except that local radio services owe a lesser duty of no “undue prominence” of any person or body’s viewpoint (s.320(1)(c) CA).

Advertising content standards

3. The BBC carries no advertising. The broadcast media’s independent licensed services (national and local) permit broadcast advertising pursuant to Ofcom’s standards and guidance (ss.319-322 CA). That includes content standards, protecting against misleading, harmful or offensive advertising: s.319(2)(h) CA.

Advertising non-discrimination

4. The broadcast media are also subject to a rule of non-discrimination between advertisers (s.319(2)(k) CA).

Advertising distinguishability

5. Broadcast advertising is subject to a fundamental requirement of distinguishability. Advertisements must be readily distinguishable and kept separate from other parts of the programme service. This requirement dates back to the 1954 Act and is reflected in EC Directive 89/552/EEC Article 10(1).

PPB/PEBs

6. The broadcast media are required to carry Party Political Broadcasts and Party Election Broadcasts, pursuant to Ofcom’s rules (s.333 CA). Ofcom specifies “the political parties on whose behalf party political broadcasts may be made” (s.333(2)(a)), only those parties registered with the Electoral Commission being eligible (2003 Act s.333(3); 2000 Act s.37). PPBs/PEBs are subject to content standards, including as to taste and decency.

TWF Directive

7. The European Television Without Frontiers Directive sets out minimum content standards for advertising and requirements for distinguishability of advertising, the

protection of minors, non discrimination standards and rules as to product placement, length of advertising breaks and the ratio of advertising to factual and other programming. The Directive, as its name suggests, also requires member states to make televisual services freely available across the European Union. The Council of Europe has recently adopted a more liberal text which allows for some product placement by advertisers and the use of new advertising methods on TV.

(B) The Non-Broadcast Advertising Regime

8. The system for regulating non-broadcast advertising does not include a ban on political advertising. This is important because as the old distinction between broadcast and non-broadcast media breaks down with the emergence of new media advertising, it becomes more difficult to justify a ban on TV and radio where there is no ban on the internet and in the cinema. The regime for non-TV and radio media is as follows:
 - (i) There are no special impartiality requirements in the non-broadcast media. Accordingly, journalists are not required to be impartial in their treatment of controversial subjects; leader writers can express an opinion on current affairs or matters of public policy other than broadcasting.
 - (ii) There is no ban on political advertising in the non-broadcast media, including newspapers, the internet, billboards, underground stations and the cinema.
 - (iii) There are advertising content standards. The Advertising Standards Authority's British Code of Advertising (CAP Code) requires that advertisements be legal, decent, honest and truthful. That includes taste and decency, and social responsibility.
 - (iv) There is a "political advertising" exemption to the advertising standards relating only to electoral-influence ads and not to political advertising as defined in the Communications Act.
 - (v) Accordingly, advertisements by campaign organisations in the non-broadcast media may be adjudicated upon pursuant to content standards if a complaint is made.

APPENDIX 4

Submission to DCA on Freedom of Information

The Advisory Group on Campaigning and the Voluntary Sector:

Working party on Freedom of Information

Response to DCA Consultation on the draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007

This response to the DCA's consultation paper comes from a working party set up by the recently formed Advisory Group on Campaigning and the Voluntary Sector. The working party has been set up to consider the issues relating to freedom of information as part of the wider remit of the group to review laws and regulations that govern campaigning by charities and voluntary organisations.

The advisory group is chaired by Helena Kennedy QC. Its membership consists of Amnesty International; Association of Charitable Foundations; Bates, Wells & Braithwaite Solicitors; Bindmans Solicitors; Doughty Street Chambers; NCVO; Justice; Liberty; Oxfam; People and Planet; Richard Fries (ex Chief Charity Commissioner); RNID; RSPCA; and the Sheila McKechnie Foundation. The working party is led by Lawrence Simanowitz, a partner at Bates, Wells & Braithwaite.

As a general point, the working party is concerned at the limited scope of this consultation, and the failure to consult more widely on the underlying presumptions on which it is based. If the revised regulations are brought into effect, we understand that the cost saving will be relatively low – in the region of £10 million (based on figures in the regulatory impact assessment). Yet they could have a significantly chilling effect on transparency of government. Our view is that a broader consultation should be undertaken before implementing these regulations.

Specifically, however, the working party is particularly concerned about two main aspects of the proposals:

1. Draft Regulation 6

This regulation proposes to include, in calculating the costs of complying with a request under the Act, new costs which previously had not been included. These are, the costs of examining the requested information, and the costs of determining whether an exemption applies including costs of consulting other bodies and deciding on the public interest balance for qualified exemptions.

1.1 Comments

- (a) It is noted that there is a de minimis level below which the costs associated with the consultation and/or consideration would not be taken into account (of £100 for central government and £75 for the wider public sector) and there is also a maximum threshold for these additional costs which could be included amounting to £400 for central government and parliament, and £300 for the rest of the public sector. Whilst these financial limits are appreciated they will do little to temper the potentially adverse consequences of the financial limits.

- (b) Whilst government costs incurred on these activities is estimated at £25 per hour, the consultation paper raises a concern with the difficulty in determining how long it should take to read a page and the working party agrees that this is of concern.
- (c) Of greater concern to the working party is that the addition of these elements makes it even more likely that FoI requests will be refused on the basis that the public authority's costs involved in responding to the request will be over the limit of £600/£450. The introduction of these new thresholds will serve to reduce the number of legitimate freedom of information requests, many of which are made, in the wider public interest.
- (d) Further, if the intention of these proposals is to save costs, there are several steps which the government could take which might achieve this without further restricting legitimate freedom of information requests:
- (e) One might be to take stronger steps to seek payment of the costs incurred in meeting a request, particularly for those requests which cost more than £1,000 and amount to more than 45% of the total cost of all requests.
 - Another measure would be to take away the discretion of the public authority and to automatically allow the person making the request to choose, if they wish, to pay the full cost of the government in dealing with the request, where that cost is above the relevant thresholds. This would mean that the public authority would no longer suffer adverse financial consequences from any such request since it could legitimately recover its costs in responding to them.
 - A third measure which could be introduced which would ensure that legitimate freedom of information requests were not excluded by these new proposals would be to require that an application for disclosure under the Act cannot be refused *solely* on grounds of costs where the application is made by a UK registered charity, or is otherwise made in the public interest. The DCA may wish to note that under the Charities Act 2006 charities can now only be established if it shown that they are for the public benefit, and that, furthermore, they are only permitted to act in a way which furthers their charitable purpose. Therefore it can be assumed that any freedom of information requests coming from a charity must be for the public benefit.

2. Draft Regulation 7

The other element of the proposals which the working party raises concern to is the proposal to increase the scope for aggregating of requests under the Act. The proposal is to allow the aggregation of requests which do not relate to the same or similar information.

2.1 Comments

This proposal will mean that legitimate groups will be very restricted in the information which they are able to receive under the Act. It is noted that the regulations do provide that such requests can only be aggregated where it is "reasonable in all the circumstances" to do so and that it is proposed that one of the factors that may be taken into account (but which will not appear on the face of the regulations) is "whether the requester is an individual who is not making the request

in the course of a business or profession”. In a similar way to the proposal discussed in paragraph 1 above we would urge that a factor to take into account should be whether the request is made in the public interest. Indeed we believe that this should be included on the face of the regulation. We are concerned that even this will not sufficiently protect the underlying purpose of the legislation – namely to improve transparency of information – and would therefore suggest that there should be a specific exemption from the power to aggregate where the request comes from a charity or is in the public interest.

We very much hope that the DCA will reconsider its proposed regulations in the light of these submissions.