

CHARITIES, GRANTS AND CAMPAIGNING

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In 2006 the Woburn Place Collaborative was established as a forum for grant makers and foundations concerned to more effectively promote social justice, sustainable development, human rights and democracy.² This is but one manifestation of a wider movement to encourage foundations and grant making charities to be more innovative and pro-active in relation to social questions.³ New philanthropists are guided⁴ to set up foundations to research and advocate for social change in addition to the more traditional approaches⁵ to social problems. One particular way in which foundations and grant making charities seek to carry out this more innovative role is by funding the campaigns of other groups and organisations for social change.⁶

Encouragement to foundations and grant making charities to become involved with funding campaigns needs to be tempered with care, however, as there are a number of potential legal constraints⁷ on such funding. Foundations, like any other charities,

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² See Leat D, *Just Change. Strategies for Increasing Philanthropic Impact*. (2007) and http://philanthropy.carnegieuktrust.org/our_work/woburn_place_collaborative

³ See Anheier H, Leat D, *From Charity to Creativity. Philanthropic Foundations in the 21st Century* (2002); Anheier H, Daly S, *The Politics of Foundations* (2007). This is not to say that foundations have not brought about social change in the past – see Breeze B (for the Association of Charitable Foundations), *UK Philanthropy's Greatest Achievements* (2006).

⁴ See Institute of Philanthropy, *Annual Report 2007*, pp.5, 7.

⁵ i.e. providing immediate help to those in need or disadvantaged either directly or by funding service providing charities.

⁶ See, for example, Davies JS, 'The Foundation as a Political Actor: The Case of the Joseph Rowntree Charitable Trust' [2004] *Political Quarterly* 275; Leat D, *Just Change. Strategies for Increasing Philanthropic Impact*, p. 88 (Charity Projects and Disability Rights).

⁷ The legal constraints are considered in relation to charitable trusts as the majority of grant making charities take the form of a trust.

must remain within their charitable objects but funding campaigns raises the possibility of funding being found to have been used for non-charitable political purposes. In that situation, the grant maker may be liable to all the consequences which flow from breach of trust and, if funding campaigns has become a major use of funds, potential loss of charitable status. There are also adverse tax implications if there is expenditure for non-charitable purposes.

The law, in fact, forces foundations and grant making charities to think carefully about the implications of funding charities that campaign both externally as to reputation and internally as to governance. The present climate of transparency requires charities to report not only on grant making policy and recipients but also to assess and report risks.

It is the purpose of this article to consider those legal constraints, in the light of the supposedly more liberal approach to campaigning by charities,⁸ and to try to assess if they unduly inhibit the funding of campaigning by charities.

Foundations and campaigning

A foundation or grant making charity can have power to campaign, or to fund others to campaign, and can exercise that power without being in breach of trust or endangering its charitable status.⁹ There are two limitations, however, which must be observed by a grant making charity if it decides to fund a campaign being carried out by another organisation. First, the purpose of the campaign must not be outside the objects of the grant making charity, even if the purpose of the campaign is a charitable one.¹⁰ A charity with objects to provide grants to schools for sports equipment has no power to fund a campaign for an increase in affordable housing. Secondly, charitable funds cannot be used for non-charitable purposes. In the context of campaigning, the most relevant non-charitable purposes are political ones. The fact that a grant recipient is found to have a non-charitable political purpose does not automatically mean that the grant making charity will be in breach of trust or have endangered its charitable status. A careful distinction has to be drawn between the objects of the grant making charity and those of the recipient of the grant. If the grant is made in pursuance of the grant maker's own charitable objects, it may be a legitimate exercise of its power to fund campaigns; the non-charitable

⁸ See Cabinet Office, *The future role of the third sector in social and economic regeneration* (2007); Charity Commission, CC9, *Speaking Out – Guidance on Campaigning and Political Activity by Charities* (2008) para C2.

⁹ See *Yorkshire Agricultural Society v IRC* [1928] 1 KB 611; *Re Hood* [1931] 1 Ch 240; *Re Inman* [1965] VR 238; *McGovern v Att.-Gen.* [1982] Ch 321, 340; *Att.-Gen. v Ross* [1986] 1 WLR 252, 263.

¹⁰ *Att.-Gen. v Brandreth* (1842) 1 Y & C Ch Cas 200; *Baldry v Feintuck* [1972] 1 WLR 552, 558.

purpose of the recipient is not automatically imputed to the grant maker. Thus a grant making charity will be in breach of trust if the purpose of the campaign is unconnected with its own objects and, it is submitted, this is more likely if the purpose of the campaign is a non-charitable political one. A grant making charity will also be in breach of trust if there is more than incidental exercise of the power to fund campaigns. If a grant making charity becomes heavily involved in funding campaigns there is a danger that those activities will be used to construe its purposes as political and non-charitable, thus endangering its charitable status.

A grant making charity seeking to become involved with funding campaigns has, therefore, to ask itself three questions. First, is the purpose of the campaign within the objects of the grant making charity? Secondly, will the campaign sought to be funded be held to be a non-charitable political purpose of the grant recipient? Thirdly, if the grant recipient does have a non-charitable political purpose, will funding that purpose amount to breach of trust for the grant maker or endanger its charitable status? In relation to the first question, there may be scope for considerable debate as to the linkage between the objects of the grant giving charity and the purpose of the campaign, for example, in the area of improvement of public health and reduction in poverty,¹¹ but the basic law is clear. Unfortunately, that cannot be said in relation to the second question as the following discussion of political purposes and activities shows.

Political purposes and activities

The basic rule that a trust for a political purpose is not charitable is easy to state but has proved both controversial and difficult of application. It is not the purpose of this article to rehearse all the arguments as to the ambit and legitimacy of the rule.¹² What is important in the context of this article are the complexities and inconsistencies in the law which make it difficult for a grant giving charity to know if they are funding a non-charitable political purpose if they support a campaign. Similarly, that part of the rule which determines that a trust to support a particular political party is non-charitable¹³ is of limited relevance. The second part of the rule,

11 See The Liverpool City-region Health is Wealth Commission, Final Report, *Health is Wealth* (2008).

12 For criticism of the rule see, inter alia, Forder C., 'Too Political to be Charitable, [1984] Conv 263; Weiss F. 'Quot-Homines Tot Sententiae or Universal Human Rights A Propos *McGovern v The Attorney General*', (1983) 46 MLR 383; Dunn A, 'Charity Law as a Political Option for the Poor, (1999) 50 NILQ 298; Chesterman M, 'Foundations of Charity Law in the New Welfare State' (1999) 62 MLR 333.

13 *Bonor Law Memorial Trust v IRC* (1933) 17 TC 508; *Re Hopkinson* [1949] 1 All ER 346; cf. *Russell v Jackson* (1852) 10 Hare 204.

that a trust to change the law¹⁴ or government policy either in this country or abroad is political¹⁵ is of greater relevance. There are six areas of uncertainty which can lead to difficulties for a grant making charity trying to assess if they are funding a non-charitable political purpose: first, what is political changes over time; secondly, what amounts to a change in law or policy is debatable; thirdly, seeking a change in the law may be implicit in otherwise charitable purposes; fourthly, the extent to which activities can be used to determine purposes; fifthly, the circumstances in which an educational purpose becomes political or non-charitable; and, finally, the extent of ancillary objects and incidental purposes.

Change over time

The law as to charitable purposes is not static¹⁶ and no more so than in relation to the borderline between charitable purposes and non-charitable political purposes. A trust to change the law is not charitable.¹⁷ As laws are enacted, purposes which were political and non-charitable become charitable. Thus the promotion of good race relations was held to be political and non-charitable in 1949¹⁸ but was accepted as a charitable purpose after the passing of the Race Relations Act 1976.¹⁹ The distinction ought to be an easy one to make but uncertainty is caused by the courts' apparent willingness, in certain circumstances, to pre-empt the actual change in the law. In Australia, it has been held that a purpose seeking to change the law in a direction in which the law is already going, particularly if reinforced by treaty obligations, should be charitable.²⁰

"Change" in the law or policy

It is said to be political, and not charitable, to seek 'a change' in the law.²¹ The word 'change', however, in this context is somewhat elastic. Whilst it is charitable to seek

¹⁴ *Bowman v Secular Society Ltd* [1917] AC 406; *National Anti-Vivisection Society v IRC* [1948] AC 31.

¹⁵ *McGovern v Att.-Gen.* [1982] Ch 321.

¹⁶ *Scottish Burial Reform and Cremation Society v Glasgow Corp* [1968] AC 138, 154.

¹⁷ *Bowan v Secular Society Ltd* [1917] AC 406.

¹⁸ *Re Strakosch* [1949] Ch 529.

¹⁹ [1983] Ch Com Rep pp 10-11.

²⁰ *Public Trustee v Att.-Gen. of New South Wales* (1997) 42 NSWLR 600 and see Santow GFK, 'Charity in its Political Voice – a Tinkling Cymbal or a Sounding Brass' (1999) 18 Aus Bar Rev 225.

²¹ *Bowman v Secular Society Ltd* [1917] AC 406, 442; *McGovern v Att.-Gen.* [1982] Ch 321, 340.

to enforce the law,²² it has been held to be political, and not charitable, to seek to maintain the existing law.²³ In New Zealand, an organisation with an object of opposition to a change in statutory provisions in relation to abortion has been held to be political and not charitable.²⁴ In contrast, however, it has been suggested that to encourage debate of an issue could be a charitable purpose even though the outcome of the debate could lead to a change in the law.²⁵

Implicit political purposes

A purpose is clearly political and non-charitable if the only way of achieving that purpose is by a change in the law.²⁶ It is irrelevant that the purpose does not spell out explicitly that a change is sought.²⁷ The problem for a grant giving charity faced with an otherwise actual or potential charitable purpose is that the courts have been inconsistent in determining whether a purpose is implicitly political where a change in the law is merely one means of attaining that purpose.²⁸ Thus the courts have, on occasion, held that even though seeking to change the law was merely one of the means of attaining a purpose, that could be sufficient reason to determine that the purpose was political and non-charitable.²⁹ A similar problem arises where a change in government policy is a means of attaining the purpose. Again, if the only means of attaining the purpose is by a change in government policy either in this country or abroad the purpose will be political and non-charitable even if such a means is not spelt out explicitly.³⁰ The courts, however, are not consistent. In this country a trust to contribute to the formation of informed international public opinion and to the promotion of greater co-operation in Europe and the West in general was held to be

22 *Re Herrick* (1918) 52 ILT 213; (1994) 2 Ch Com Dec p. 5 *et seq* (Public Concern at Work)

23 *Re Hopkinson* [1949] 1 All ER 343, 350; *Re Koepler's Will Trusts* [1984] 2 All ER 111, 124.

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

25 *Re Collier (Deceased)* [1998] 1 NZLR 81; Chesterman M 'Foundations of Charity Law in the New Welfare State' (1999) 62 MLR 333, 349.

26 *National Anti-Vivisection Society v IRC* [1945] AC 31.

27 See *Animal Defence and Anti-Vivisection Society v IRC* (1950) 66 (pt 2) TLR 1091.

28 Compare the speeches of Lord Porter at p. 55 and Lord Simons at p. 62 in *National Anti-Vivisection Society v IRC* [1945] AC 31 and see Luxton P., *the Law of Charities* (2001) p. 222 *et seq* and Atkinson K., *Charities and Collaborative Campaigning: Law, Regulation and Practice* (2007) unpublished PhD thesis, University of Liverpool; and see below for the courts' failure to distinguish ancillary objects and incidental powers.

29 See *Re Strakosch* [1949] Ch 529; *Buxton v Public Trustee* [1962] 41 TC 235.

30 *McGovern v Att.-Gen.* [1982] Ch 321, 340.

charitable and not to involve seeking a change in government policy.³¹ In New Zealand, by comparison, a gift to the League of Nations Union in New Zealand was held to be non-charitable as it implicitly had the purpose of inducing the central executive authority to act in a particular way in foreign relations.³²

Relevance of activities to determine purposes

A grant making charity would expect to be able to determine if the purposes of an organisation it was seeking to fund were charitable by reading carefully the purposes set out in the governing instrument. Unfortunately, the courts, from time to time, consider activities, as well as the governing instrument, when determining charitable status which can result in apparently charitable purposes being held to be political and non-charitable. To add to the difficulties, the circumstances in which the courts will look at activities are not without controversy and not entirely consistent.³³ The courts will look at the activities of an organisation when the words in the governing instrument are ambiguous, equivocal, doubtful or contradictory.³⁴ Thus the court looked at the factual matrix surrounding the execution of the trust deed of Amnesty International in coming to the conclusion that many of the purposes were political and non-charitable.³⁵ The court will also look at activities if the purposes are clearly set out but there is doubt as to whether the purposes are charitable.³⁶ *Southwood v Att.-Gen.*³⁷ concerned a trust for 'the education of the public in the subject of militarism and disarmament'. The Court of Appeal confirmed that it was permissible to look at the activities of the promoters and held that the trust was political and non-charitable.

Educational purposes

There is a particular problem where an organisation has educational purposes. The courts make a distinction between charitable education about social issues and non-charitable propaganda. The grounds for the distinction, however, vary. Sometimes a purpose is designated non-charitable because the education is found not to be balanced and, sometimes, because the purpose is found to be political. Thus, in *Re*

31 *Re Koeppler's Will Trusts* [1986] Ch 423.

32 *Re Wilkinson (Deceased)* [1941] NZLR 1065,

33 See Warburton J., *Tudor on Charities* 9th ed (2003), p. 186 *et seq.* The Charity Commission consistently seek information about the activities of organisations applying for registration, see *CC Application for Registration as a Charity Pt C*.

34 *McGovern v. Att.-Gen.* [1982] Ch 321, 349.

35 *Ibid.*

36 *Att.-Gen. v Ross* [1986] 1 WLR 252, 263.

37 [2000] WTLR 1199.

*Bushnell (Deceased)*³⁸ a trust for ‘the advancement and propagation of Socialised Medicine’ was held to be non-charitable as the trust sought to promote the founder’s own theory rather than educate the public so that they could choose for themselves.³⁹ In *Re Hopkinson (Deceased)*,⁴⁰ by comparison, a trust for the advancement of adult education with particular reference to a Memorandum of the Labour Party was held to be non-charitable as a political trust. The distinction may not be easy but an educational purpose can be charitable even if it is about political issues provided a balanced approach is taken.⁴¹

Being aware of the problems which can arise from funding campaigns directly, some grant making charities elect to fund instead programmes of research intended to provide the necessary evidence to support campaigns.⁴² This approach has judicial support. Hoffman J. in *Webb v O’Doherty*⁴³, decided before the advancement of human rights was an established charitable purpose, accepted that research into the observance of human rights could be charitable even though an incidental effect of publication of the research was to provide material for people campaigning against human rights abuse. Research, however, as a well accepted charitable purpose under the head of the advancement of education⁴⁴ is subject to the problems outlined above. If the research is found to have been conducted in a biased and unbalanced way there is a danger that the funded purpose will be found to be political and non-charitable.⁴⁵

Ancillary objects and incidental powers

There are three problems associated with ancillary objects and incidental powers for a grant making charity seeking to determine if it will be funding a non-charitable purpose. First, the courts fail to differentiate clearly between objects and powers when considering if an organisation’s purposes are political. Secondly, there is

³⁸ [1975] 1 All ER 721.

³⁹ *Ibid*, 729.

⁴⁰ [1949] 1 All ER 346.

⁴¹ See *Att.-Gen. v Ross* [1986] 1 WLR 252; *Re Koeppler’s Will Trusts* [1986] Ch 423, reversing Peter Gibson J at first instance who found that the trust was political and non-charitable, [1984] Ch 243.

⁴² See Davies JS ‘The Foundation as a Political Actor: The Case of the Joseph Rowntree Charitable Trust’ [2004] Political Quarterly 275.

⁴³ [1991] Times February 11.

⁴⁴ *Re Hopkins Will Trusts* [1965] Ch 669; *Re Besterman’s Will Trusts* unreported January 21 1980 referred to in *McGovern v Att.-Gen.* [1984] Ch 327, 352-353.

⁴⁵ See Charity Commission, Inquiry Report, *The Smith Institute* (2008).

difficulty in determining when a political object is merely ancillary as opposed to being a main object and, thirdly, there is confusion over the permissible extent of incidental powers.

In several cases, when seeking to determine whether an organisation was non-charitable because it could become involved with seeking a change in the law, the courts have considered the same activity, for example watching and advising on legislation, as both a separate object and a means of attaining the main object of the organisation.⁴⁶ In other words, there is confusion between ends and the means to that end.⁴⁷ There can also be similar confusion as to the grounds on which a case was decided. In *Re Hood*⁴⁸ the reference in the trust deed to taking steps to promote temperance was regarded by Lord Hanworth MR and Lawrence LJ as a means to achieving the main object but by Romer LJ as a second object. Slade J., however, in *McGovern v Att.-Gen.*⁴⁹ considered the case in the context of incidental powers.

Where an organisation has, in addition to its main object, an ancillary object to seek changes in the law or policy, there is a problem in determining whether such an additional object will indeed be held to be ancillary or whether it will be held to be a main object. If the latter, the organisation will be rendered non-charitable because of the existence of a political purpose. The difficulty was recognised by Goulding J in *Re Bushnell*⁵⁰ when, after accepting that some political object was not fatal to a primary object that was clearly charitable in law, said that a test was easier to state than apply.

The fact that an organisation has power to use political means to further its main purposes which are charitable does not render the organisation non-charitable.⁵¹ Thus it is perfectly acceptable for a society for the prevention of cruelty to animals to have power to seek amendments to laws dealing with specific animals or activities.⁵² The difficulty lies in determining when the exercise of the power ceases to be incidental. If there is too great an exercise of the power, there is the danger that

⁴⁶ See *Yorkshire Agricultural Society v IRC* [1928] 1 KB 611, 632; *National Anti-Vivisection Society v IRC* [1948] AC 31, 76.

⁴⁷ See Dunn A, 'Charity Law as a Political Option for the Poor' (1999) 50 NILQ 298, 306; Forder CJ, 'Too Political to be Charitable' [1984] Conv 263, 269-271.

⁴⁸ [1931] 1 Ch 240.

⁴⁹ [1982] Ch 321, 340.

⁵⁰ [1975] 1 All ER 721, 729. See also *Att.-Gen. v Ross* [1986] 1 WLR 252.

⁵¹ *McGovern v Att.-Gen.* [1982] Ch 321, 340 and see *Webb v O'Doherty* [1991] Times February 11.

⁵² *National Anti-Vivisection Society v IRC* [1948] AC 31, 76; *Yorkshire Agricultural Society v IRC* [1928] 1 KB 611, 632.

the grant making charity will find that it is funding an organisation with, not merely an incidental power to use political means, but a non-charitable political purpose. The danger is heightened when it is recollected that the court may have regard to the activities of an organisation when determining whether its purposes are charitable.⁵³

The Charity Commission have recently reissued their guidance on political activities by charities⁵⁴ after concerns were expressed that the previous guidance was too restrictive.⁵⁵ The guidance now states that a charity may focus all its resources on political activity for a period.⁵⁶ Whilst the guidance is surrounding by caveats as to looking at the activity in the overall life of the charity, there is the potential for a charity to be lured into exercising powers in a way which are more than incidental with the potential consequence outlined above. This creates a particular difficulty for a grant making charity funding several charities involved in the same campaign. The donee charities may all have a similar incidental power to use political means but unknown to the grant making charity one may be devoting more of its time and resources to political activity leading to the risk that, in relation to one donee charity only, the grant making charity could be funding a non-charitable political purpose.

The potential for a grant making charity to become involved with funding a non-charitable political purpose means that the consequences of funding such a purpose need to be considered.

Breach of trust

If the purpose of a campaign funded by a grant making charity, whether charitable or non-charitable political, is clearly outwith the objects of the grant making charity, the trustees will be in breach of trust with the consequences discussed below. If the funded campaign is in pursuance of the grant making charity's objects but is held to be a non-charitable political purpose, the position is not so clear cut. On the one hand, the funding may be a legitimate exercise of an incidental power to campaign or use other political means to further its own charitable objects. On the other hand, the funding may be of such magnitude that it can no longer be regarded as the exercise of an *incidental* power. In that situation the trustees of the grant making

⁵³ See the text at fns 32 -36 above and *English Pen* [2008] Ch Com Dec July 21.

⁵⁴ CC9, *Speaking Out – Guidance on Campaigning and Political Activities by Charities* (2008)

⁵⁵ Following statements in Cabinet Office (Strategy Unit) *Private Action, Public Benefit* (2002) p. 46, the Charity Commission reissued CC9 in 2004 and, following further concerns, issued a revised version in 2008 – see CC9, *Speaking Out – Guidance on Campaigning and Political Activities by Charities* (2008), Section A.

⁵⁶ CC9, Section D8.

charity will not be exercising the power correctly in the interests of the objects of the charity but excessively and in breach of trust.⁵⁷

The charity law consequences for a grant making charity which uses part of its funds in breach of trust are two fold: first, regulatory action by the Charity Commission and, secondly, action in respect of the breach of trust by the Attorney General and others.

In theory, where there has been payment in breach of trust, the Charity Commission can institute an inquiry under section 8 of the Charities Act 1993. If the Commission are satisfied that there has been either misconduct or mismanagement in the administration of the charity or that it is desirable to protect and secure a proper application of the charity property⁵⁸ it may exercise its temporary and protective powers under section 18, for example, by suspending a trustee⁵⁹ or by appointing an interim manager.⁶⁰ In practice, the Charity Commission now takes a risk based approach to compliance⁶¹ and is unlikely to use its statutory powers of intervention unless there is a significant financial loss or potential damage to the reputation of an individual charity or the wider charitable sector.⁶² The latter factor, of course, is likely to be affected by the particular campaign or campaigns which have been funded. This approach to regulation is reinforced by the statutory duty placed on the Charity Commission by the Charities Act 2006 to have regard to the principles of best regulatory practice, including that of proportionality.⁶³ On balance, therefore, the Charity Commission's response to a grant making charity funding a campaign in breach of trust is likely to be advice and support rather than regulatory intervention.⁶⁴

Where a grant making charity is in breach of trust by funding a campaign, action may be taken in court by the Attorney General. In the case of a series of grants, the

⁵⁷ See *Webb v O'Doherty* [1991] Times February 11.

⁵⁸ Charities Act 1993, s. 18(1).

⁵⁹ Charities Act 1993, s. 18(1)(i).

⁶⁰ Charities Act 1993, s. 18(1)(vii).

⁶¹ See Charity Commission, *The Charity Commission and Regulation* (2003); Charity Commission, *Discussion paper on the Charity Commission's Risk and Proportionality Framework* (2008).

⁶² Charity Commission, *Discussion paper on the Charity Commission's Risk and Proportionality Framework* (2008), para 4.

⁶³ Charities Act 1993, s. 1D(2) 4 inserted by Charities Act 2006, s. 6.

⁶⁴ See Charity Commission, *Annual Report 2007-08*, p. 5.

Attorney General may seek an injunction to restrain further payments.⁶⁵ In other cases, the Attorney General may bring a personal action against the trustees for reimbursement of sums expended in breach of trust.⁶⁶ It cannot be assumed that because the Charity Commission takes no regulatory action in respect of a grant in breach of trust that the Attorney General will similarly decline to intervene. The unfortunate episode of the Coram Foundation's art collection shows that the Attorney General is not bound by the Charity Commission's decisions.⁶⁷ In the past, the Attorney General has sought an injunction to restrain funds being granted for non-charitable political purposes even though it required the charitable status of the grant making body to be proved in the first place.⁶⁸

An action in respect of breach of trust can also be brought by a charity trustee or by any person interested in the charity.⁶⁹ This raises the possibility, where the decision by a grant making charity to fund a charity that campaigns was not unanimous, of the majority of the trustees being the subject of charity proceedings for reimbursement brought at the instance of the dissentient trustees. Whilst the courts have refused to define 'any person interested in the charity',⁷⁰ a major donor is probably within the definition⁷¹ and could similarly bring a claim in the event of a grant being made for non-charitable political purposes.

On two occasions the courts have granted injunctions against the officers of charitable student unions to restrain expenditure on non-charitable political campaigns.⁷² In the first case,⁷³ the campaign was to protest against the government's policy to end free school milk for children and, in the second,⁷⁴ to protest against the Gulf War. In both cases a valid resolution to support the campaigns was passed at a general meeting of the student union and the court

⁶⁵ See *Att.-Gen. v Wright* [1988] 1 WLR 164

⁶⁶ The Charity Commission has a similar power to bring proceedings but must obtain the agreement of the Att.-Gen. before doing so – Charities Act 1993, s. 32.

⁶⁷ See http://hansard.millbanksystems.com/westminster_hall/2001/mar/13/coram-foundation

⁶⁸ *Att.-Gen. v Ross* [1986] 1 WLR 252.

⁶⁹ Charities Act 1993, s. 33(1). The leave of the Charity Commission or the court must be obtained – s. 33(2)(4).

⁷⁰ See Warburton J., *Tudor on Charities* 9th ed, paras 10-031 – 10-032.

⁷¹ See *Re Hampton Fuel Allotment Society* [1989] Ch 484, 493.

⁷² *Baldry v Feintuck* [1972] 2 All ER 81; *Webb v O'Doherty* [1991] Times February 11.

⁷³ *Baldry v Feintuck* [1972] 2 All ER 81.

⁷⁴ *Webb v O'Doherty* [1991] Times February 11.

entertained the action at the instance of a dissentient member of the union without, apparently, raising any question as to the right of the student to bring the action.

Loss of charitable status

If a grant making charity becomes heavily involved in funding campaigns, it is possible that its charitable status may be called into question. If there is consistent excessive use of an incidental power to use political means to achieve its objects, whether by funding campaigns or otherwise, there is a danger that the grant making charity could be found to have, not an incidental power to use political means, but a non-charitable political purpose of seeking to change the law or government policy.⁷⁵ Alternatively, the activity of funding campaigns by other charities may be used as part of the factual matrix to determine whether the main purposes of the charity are charitable or political and non-charitable.⁷⁶

This potential consequence of excessive use of an incidental power to use political means is far more serious than being found to be in breach of trust. Excessive use of an incidental power leading to a breach of trust may be regarded as a quantitative problem; if the grant maker reduces the use of the incidental power there should be no further adverse effects. By comparison, once it is determined that the true purposes are political and non-charitable that determination will not be reversed by simply reducing the use of the incidental power. There has been a qualitative change in the status of the grant maker.

Tax implications

A far more certain consequence, if a grant is made for non-charitable purposes, whether political or not, is loss of exemption from tax on income or gains. Strictly, the individual tax exemptions for charities are only available on income⁷⁷ or gains⁷⁸ used for charitable purposes. Thus, in common with similar reliefs, section 531 of the Income Tax Act 2007, which gives charities relief from income tax on property income, specifically provides that the exemption is only available 'so far as the income is applied to charitable purposes only'.⁷⁹ There is a series of anti-avoidance provisions in sections 539 to 564 of the 2007 Act which restrict charity exemption where income is applied for non-charitable purposes. The effect of the provisions is

⁷⁵ See *Att.-Gen. v Ross* [1986] 1 WLR 252, 263.

⁷⁶ See the text at fn 33 *et seq* above.

⁷⁷ Income Tax Act 2007, ss. 530-537

⁷⁸ Taxation of Chargeable Gains Act 1992, s. 256.

⁷⁹ Income Tax Act 2007, s. 531(3).

that 'non-charitable expenditure' is treated as if it were taxable income. The provisions are wider than the earlier regime in section 506 of and Schedule 20 to the Taxes Act 1988 which was based on the concept of non-qualifying expenditure. This makes it more certain that a grant making charity will face adverse tax consequences if it funds a non-charitable purpose. Section 543(1)(f) of the 2007 Act specifically provides that expenditure not incurred for charitable purposes is 'non-charitable expenditure'. There is a particular problem if a grant is made to a body outside the United Kingdom as such a grant is deemed to be 'non-charitable expenditure' unless it is both incurred for charitable purposes only and the grantor charity has taken reasonable steps to ensure that the payment will be applied for charitable purposes.⁸⁰

Reporting requirements

Charities are required to produce a statement of accounts each year⁸¹ which consists of a statement of financial activities and a balance sheet,⁸² save that a charity whose income is less than £100,000 in a financial year can elect to produce a simplified receipts and payments account and a statement of assets and liabilities for that year.⁸³ The statement of financial activities must comply with the Statement of Recommended Practice for Accounting and Reporting by Charities issued in 2005 (the SORP).⁸⁴ In addition, all charities are required to produce an annual report⁸⁵ and those with an annual income over £10,000 are obliged to send a copy of that report, together with the accounts, to the Charity Commission.⁸⁶ The annual report and accounts submitted to the Charity Commission are public documents⁸⁷ and a charity must provide a copy of its most recent accounts and annual report to any person who so requests in writing.⁸⁸ In practice, annual accounts and reports submitted to the

⁸⁰ Income Tax Act 2007, s. 547.

⁸¹ Charities Act 1993, s. 42(1).

⁸² The Charities (Accounts and Reports) Regulations 2008, SI 2008/629, reg. 8(3).

⁸³ Charities Act 1993, s. 42(3).

⁸⁴ The Charities (Accounts and Reports) Regulations 2008, SI 2008/629, reg. 8(5). There is no requirement for receipts and payments accounts to comply with the SORP but the model account issued by the Charity Commission has a similar breakdown of income and expenditure – see CC64(a) *Receipts and Payments Accounts*.

⁸⁵ Charities Act 1993, s. 45(1).

⁸⁶ Charities Act 1993, s. 45(3)(4).

⁸⁷ Charities Act 1993, s. 47(1).

⁸⁸ Charities Act 1993, s. 47(2).

Charity Commission are readily available on the Commission's website.⁸⁹ It is the requirements of the 2008 Regulations and the SORP as to the particular matters to be included in the accounts and annual report which are capable of acting as constraints on grant making charities when contemplating funding a charity that campaigns. The two relevant sets of provisions are those which relate to disclosure of information on grants made and those which relate to risk.

The SORP requires the statement of financial activities to show expenditure split into three main activity categories: the costs of generating funds; the costs of charitable activities; and the governance costs.⁹⁰ Costs associated with grant making fall under the second head of activity and the SORP requires that there should be sufficient analysis and explanation of grants made to 'help the reader of the accounts understand how the grants made relate to the objects of the charity and the policy adopted by the trustees in pursuing those objects'.⁹¹ To this end, it is provided that the notes to the accounts should contain details of the total amount of grants made analysed between grants to individuals and grants to institutions and further analysed by nature or the type of activity.⁹² In this context, 'activity' refers to the charity's objectives, for example, social welfare, rather than the specific means, for example, campaigning, by which those objects are to be achieved.⁹³ If a grant to a particular institution is material in the context of grant making further details are required to be given including the name of the institution and total value of the grants.⁹⁴

Grant making charities have voiced concerns for some time about the overall level of regulation. They have contended that grant making charities should be subject to a lighter regime than other charities if philanthropy is not to be discouraged.⁹⁵ The Charities Act 2006⁹⁶ did limit the reporting requirements by inserting section 42(2A) in the 1993 Act. That section provides that any accounting requirements must not require charity trustees to disclose the identities of recipients of grants within the lifetime of the settlor or their spouse or civil partner. This limited relief is unlikely to

⁸⁹ www.charity-commission.gov.uk

⁹⁰ SORP, para. 177

⁹¹ SORP, para. 201

⁹² SORP, para. 203.

⁹³ SORP, para. 204.

⁹⁴ SORP, paras. 206, 207.

⁹⁵ See *Report of the Joint Committee on the Draft Charities Bill* Vol 1, (2004) HL Paper 167-1, HC Paper 660-1. paras. 128-134; Better Regulation Task Force, *Better Regulation for Civil Society* (2005), p. 28

⁹⁶ S. 75(1), Sched. 8 paras. 96, 133(1)(2).

reassure many grant giving charities who are concerned about the light of publicity on grants made to charities that campaign.

If a grant making charity is subject to audit⁹⁷ there is a requirement to report on risks to the charity in the annual report.⁹⁸ In particular, the charity must state whether the trustees have given consideration to the major risks to which the charity is exposed and satisfied themselves that systems or procedures are established in order to manage the risks. The Charity Commission guidance on risk management⁹⁹ seeks to encourage best practice of reporting more detail beyond the bare statement required by the SORP.¹⁰⁰ For example, it is suggested the report describes the trustees' review and consideration of the principle results of risk identification, evaluation and monitoring. One potential risk highlighted is that of activities potentially outside a charity's objects.¹⁰¹ Trustees' attention has been focused on risk by the new requirement for charities with an income over £25,000 a year to declare, as part of the annual return, that there are no serious incidents or other matters which should have been brought to the attention of the Charity Commission, but have not.¹⁰² It is this emphasis on risk and the subsequent need to consider both the potential legal consequences of funding campaigning and the potential effect on the reputation of the charity which can operate as a constraint on such grants.

Conclusion

In her review of the reasons why foundations and grant making charities are reluctant to become involved with social change, Diana Leat cites lack of understanding of the law.¹⁰³ She opines that many foundations fear that promoting social change is against the law but asserts that it is a myth that 'working for change – even campaigning – is prohibited by charity law'. This article has shown that such myth busting is unwise.

It is possible for a foundation or grant making charity to fund a campaign for change in society and remain within the permissible limits of charity law. The change in

⁹⁷ i.e. if its income exceeds £500,000 a year or its income exceeds £100,000 and it has assets of over £2.8m – Charities Act 1993, s. 43(1).

⁹⁸ The Charities (Accounts and Reports) Regulations 2008, SI 2008/629, reg. 40(2)(b)(ii)(ee).

⁹⁹ Charity Commission, *Charities and Risk Management* (2007)

¹⁰⁰ *Ibid.* App 1.

¹⁰¹ *Ibid* App. 2.

¹⁰² Charities Act 1993, s. 48; Charities Annual Return 2007 and see Charity Commission, *Annual Return 2007, Guidance Notes*, p. 13 *et seq.*

¹⁰³ Leat D, *Just Change. Strategies for Increasing Philanthropic Impact* (2007) p. 20.

society sought may not be political in the charity law sense in that it does not involve an amendment of the law or government policy. Alternatively the campaign for a change in the law or government policy may be incidental to the established charitable purposes of the grant recipient. It is equally possible for a foundation or grant making charity to find that it is funding a campaign which is held to be political and non-charitable. The grant making charity is then faced with determining whether the non-charitable political purpose is in pursuance of its own charitable objects and whether funding such a purpose is a legitimate exercise of an incidental power to use political means to support its own charitable objects.¹⁰⁴ The problem is that the determination of both whether the grant recipient has a non-charitable political purpose and whether the grant maker itself is likely to be held to be using funds for a non-charitable political purpose involves the play of too many variables against a background of law which is uncertain. Whether a funded campaign amounts to a non-charitable political purpose depends on both the charitable status of the particular purpose and the way in which the campaign is carried out. The former can involve consideration of activities as well as the governing instrument¹⁰⁵ of the funded organisation and consideration of whether the campaign purpose is ancillary to a main object of the organisation.¹⁰⁶ The latter requires consideration of whether the campaign is conducted in an unbiased way using objective evidence¹⁰⁷ and consideration of whether the campaign has become such a major component of the grant recipient's work that it is no longer incidental to established charitable purposes.¹⁰⁸ Similarly, determination of whether the grant making charity is in breach of trust or in danger of losing its charitable status through funding a non-charitable political purpose involves application of the law of ancillary powers¹⁰⁹ and the law on the use of activities to assess charitable status¹¹⁰ both of which are the subject of controversy.

In contrast, the consequences for a foundation or grant making charity of funding a campaign which causes it to fall the wrong side of charity/political divide are clear in law. There may be doubts as to the extent to which the Charity Commission will intervene where funds are expended in breach of trust,¹¹¹ but the potential for an

¹⁰⁴ See text at fn 50 *et seq.* above.

¹⁰⁵ See the text at fns 32 to 36 above.

¹⁰⁶ See the text at fns 50 to 52 above.

¹⁰⁷ See the text at fns 37 to 44 above.

¹⁰⁸ See the text at fns 50 to 55 above.

¹⁰⁹ See the text at fns 50 to 55 above.

¹¹⁰ See the text at fns 32 to 36 above.

¹¹¹ See the text at fns 60 to 63 above.

action for breach of trust to recover the sums expended is without doubt¹¹² as are the adverse tax implications for funds expended for non-charitable purposes.¹¹³ The risk of loss of charitable status¹¹⁴ is more remote but equally clear. Furthermore, the accounting and reporting rules are designed to make foundations and grant making charities address these risks.¹¹⁵

The movement for foundations and grant making charities to become more innovative and actively involved with social change should not be derailed by the failure of the law to set clear the limits for one important aspect of that movement – funding campaigns.

112 See the text at fns 64 to 73 above.

113 See the text at fns 76 to 79 above.

114 See the text at fns 74 to 75 above.

115 See the text at fns 89 to 101 above.