

Campaigning by charities: an election year refresher

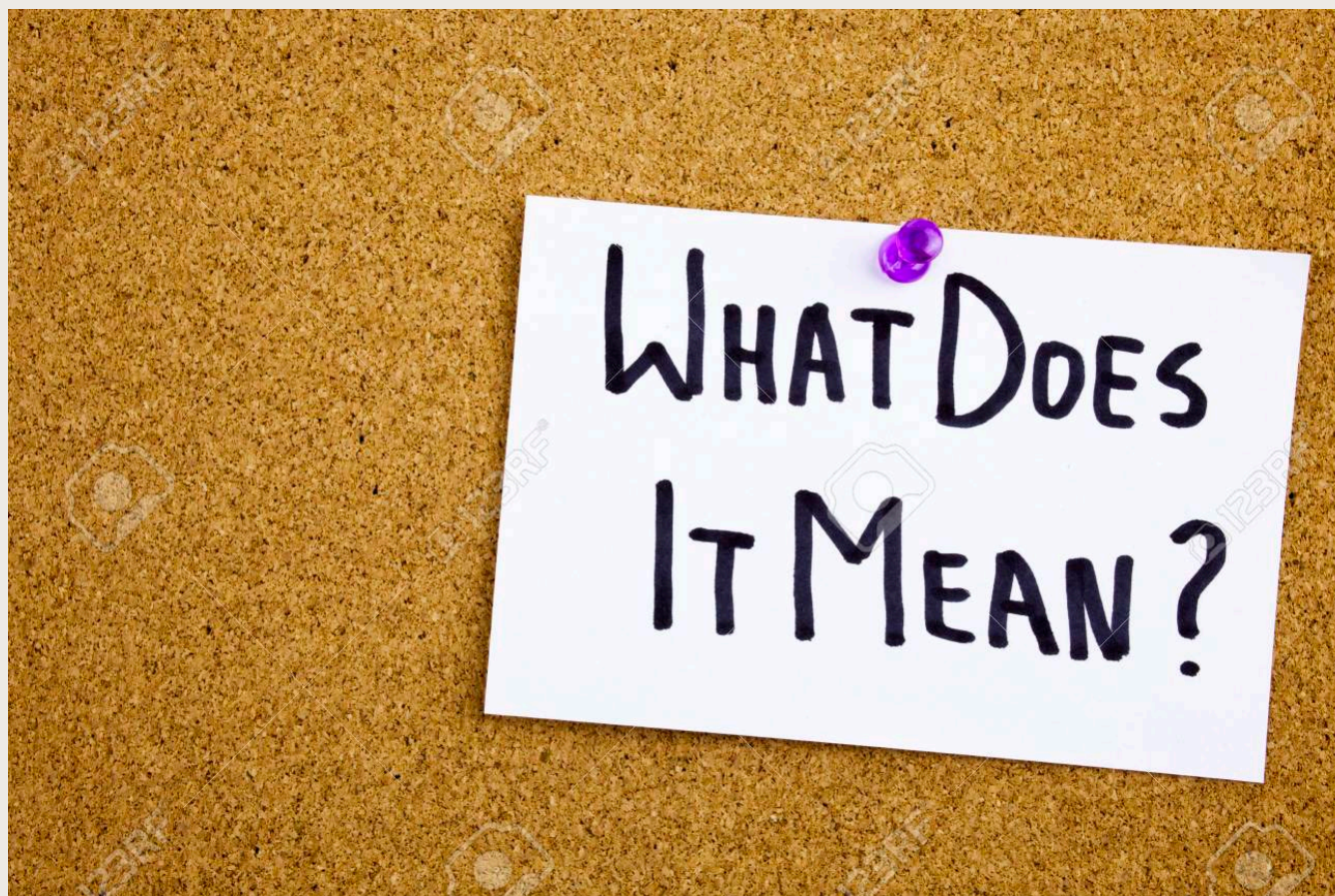
Amber Turner
27th March 2024



Agenda

1. Campaigning generally
2. Elections
3. Top tips

Campaigning and political activity



Campaigning

- Increasing public awareness or education
- Encouraging compliance with existing laws and policies

N.B. fundraising “campaigns” are not being considered

Political campaigning and activity

*Activities designed to **change or influence policies or decisions taken by governments and public bodies** (including overseas), and national or local organisations including **regulators and NHS Trusts***

The Commission

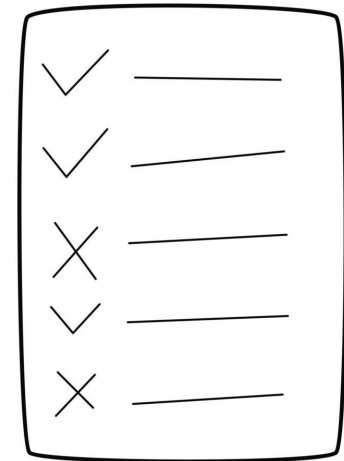
*"...charities are free to campaign,
and... they can expect the
commission's support if they
decide to do so"*

(CC9)

First things first

Check the governing documents:

- Is there a specific power? Not necessary, but helpful
- Are there any restrictions?
- Know and understand your purposes



Purposes

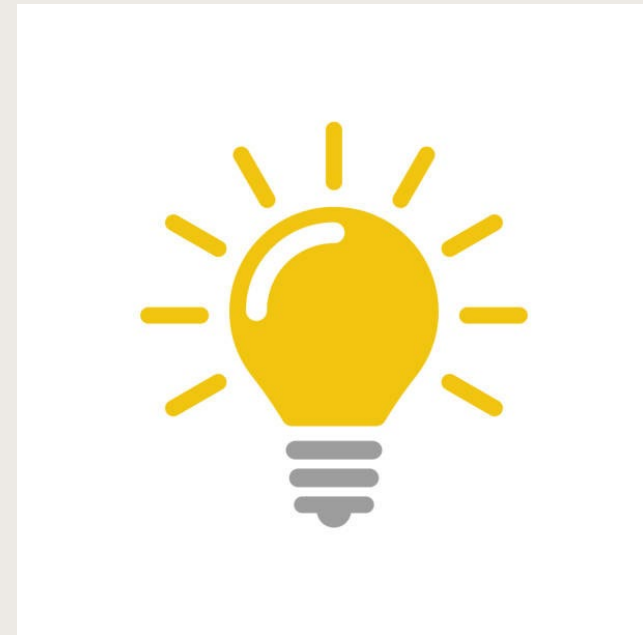
- Political campaigning and activity must only be undertaken by a charity *“in the context of supporting the delivery of its charitable purposes”*
- An organisation will not be charitable if its purposes are political*

The key question

Trustees must ask themselves whether there is a reasonable expectation that political activity will support the charity's purposes



Support policies, not parties



Engaging with political parties

- Independence is crucial
- “...supporting a political party is not an acceptable form of political activity for a charity”
- Consider engaging with multiple parties to maintain neutrality

Variety is the spice of charitable life

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

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During an election period, the need for impartiality and balance is intensified, and charities must take particular care when undertaking any activities in the political arena.

(CC9)

When is the election period?

- Period between the announcement of an election and the date on which it is held
- National and local elections are covered



The guiding principles

*“The guiding principle of charity law in terms of elections is that **charities must be, and must be seen to be, independent from party politics.**”*

*“The key point is that whilst charities can attempt to influence public opinion on a particular issue if it furthers or supports their purposes, **they must leave it to the electorate to make their own decisions about how to vote.**”*

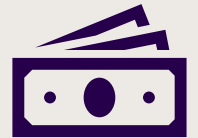
Charities, Elections and Referendums guidance

Policies and publications

- Continue campaigning and advocating the charity's policies, but ensure independence from parties advocating the same policies
- Don't compare the charity's policies to those of a political party (favourably or otherwise)
- Manifestos: a charity can have its own but must refuse requests to feature in a party's

Parties and candidates

- Must not support or oppose a party or candidate, even if balancing it out
- Must not donate funds, or assist with an individual or party's campaign in a non-financial way
- If holding debates, try to incorporate a wide range of views
- Manage conflicts



Facilities

- Some charities (e.g. schools) may be required to make premises available for meetings for free
- Otherwise, meetings should be treated as normal commercial hires

Electoral law considerations

- Does the charity need to register with the Electoral Commission as a non-party campaigner?

Local government law considerations

- Does the charity receive local authority funding?

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Do:

- ✓ Be guided by the charity's purposes
- ✓ Make sure staff and volunteers are aware of the restrictions
- ✓ Look at CC9 and the Charities, Elections and Referendums guidance

Don't:

- X Be party political
- X Be exploited!
- X Forget the usual rules of campaigning and political activity during an election period

Radcliffe
Chambers

Ex gratia payments

Matthew Mills

27th March 2024



Our topics

1. What is and is not an ex gratia payment
2. When are ex gratia payments allowed
3. How trustees can obtain approval of an ex gratia payment
4. The upcoming changes in the law

1. What is and is not an ex gratia payment



What is an ex gratia payment?

- An ex gratia payment is one which the trustees:
 1. Believe they are under a *moral* obligation to make;
 2. Are not under a *legal* obligation to make; and
 3. Cannot justify as being in the interests of the charity
- A moral obligation is one which is imposed by conscience or honour: *Trustees of the Presbyterian Church in Ireland v AG [2011] NICh 4*, at [20] per Deeny J
- Covers payments, transfers of assets, and waivers

What is not an ex gratia payment?

1. Voluntary payments authorised by governing document
2. Voluntary payments in the interests of the charity or "*good for business*"
3. Payments to settle existing or threatened litigation

See generally: <https://www.gov.uk/guidance/accepting-refusing-and-returning-donations-to-your-charity>

An upper or lower limit?

There is no upper or lower financial limit

But:

1. In practice, the Charity Commission is unlikely to challenge payments of £1,000 or less
2. Small and inexpensive items are unlikely to be ex gratia payments (e.g. flowers or chocolates)

2. When can an ex gratia payment be made?



The leading case

Re Snowden and Re Henderson [1970] Ch 700

1. The Attorney General has the power to authorise ex gratia payments by charities
2. But *"it is... a power which is not to be exercised lightly or on slender grounds but only in cases where it can be fairly said that if the charity were an individual it would be morally wrong of him to refuse to make the payment"*
3. Distinguish:
 - a) When the donor / testator never intended the charity to receive such a large gift
 - b) The donor's / testator's family believe the gift is not morally justified

Relevant factors

1. The stronger the evidence of intention, the better the case for an ex gratia payment
2. Whether the claimant has a good claim against a third party (e.g. professional negligence, Inheritance Act, proprietary estoppel)
3. The position of the charity (e.g. cash flow and tax)
4. Different trustees and charities will have different views on whether a moral obligation has arisen
5. Trustees are under no legal duty to ask for authorisation
6. It may be possible to make a partial payment

Examples

- Most cases concern wills
- Examples of ex gratia payments outside of the wills context:
 1. Donor makes a gift to charity mistakenly believing they can afford it
 2. Donor was unwell or emotionally distressed and miscalculated the amount of the gift

Examples

- *CC7: Ex gratia payments by charities – case studies*
 1. All of the examples concerns wills
 2. 60% of the examples involve testator dying before they could sign a will or signing an informal (invalid) 'will'
 3. Payments ranged from £1,052 to £248,000
 4. Average payment was £46,500
 5. Payment sometimes calculated by reference to the value of an asset (e.g. property, car, shares)

3. Obtaining approval for an ex gratia payment



The Charity Commission

- s17 Charities Act 1992, s27 Charities Act 1993, and s106 Charities Act 2011
- Charity trustees should apply to the Commission first
- The Commission must act under the supervision and guidance of the Attorney General: section 106(3)
- In important or difficult cases, the Commission will refer the matter to the Attorney General: section 106(5)(b)

Applying to the Commission

- <https://forms.charitycommission.gov.uk/apply-to-make-a-moral-payment/>
- Application should be made by the charity trustees
- Each charity should submit its own application, but one charity can nominate another to act on its behalf

Applying to the Commission

The application should include:

1. Will, grant of probate & draft will, or explanation of the circumstances leading to a lifetime ex gratia payment
2. Explanation from each charity of why they believe there is a moral obligation
3. Minutes of the trustee meeting which approved the ex gratia payment
4. “Firm” and independent evidence of the donor’s or testator’s intentions
5. Any legal advice given to the trustees

The Commission's decision

- The Commission will ask itself:
 1. Is there a "*convincing case*" for a moral obligation?
 2. Is the decision within the range of decisions that reasonable trustees might take?
- Commission's Legal Senior Management Team will need to consider the application
- If granted, the Commission will make an order
- A refusal cannot (yet) be appealed to the FTT, but trustees can make a fresh application to the Attorney General

The Attorney General

- Apply through the Treasury Solicitor
- Not an appeal; the Attorney General will consider the application afresh
- No guidance online on how the Attorney General decides application, but see *Re Snowden* [1970] Ch 700
- Attorney General can ask the court for directions in exceptional cases

The court

- Only 3 reported cases:
 1. Re Snowden [1970] Ch 700
 2. AG v Trustees of the British Museum [2005] EWHC 1089 (Ch)
 3. Trustees of the Presbyterian Church in Ireland v AG [2011] NICH 4
- This type of claim would be 'charity proceedings' under section 115 Charities Act 2011

4. The future



1. Trustees' powers

Trustees will be allowed to make an ex gratia payment if "*in all the circumstances the charity trustees could reasonably be regarded as being under a moral obligation to take the action*": s331A(3)(c) Charities Act 2011 (not yet in force)

Charity's annual income	Maximum ex gratia payment
Up to £25,000	£1,000
£25,001 to £250,000	£2,500
£250,001 to £1 million	£10,000
More than £1 million	£20,000

1. Trustees' powers

1. No limit on the number of ex gratia payments in a year
2. Possible problems:
 - a) The Commission will be reticent to authorise a small ex gratia payment (so trustees are on their own)
 - b) Could lead to an increase in the number of claims for an ex gratia payment
3. Statutory power can be excluded in the governing document: s331A(4) Charities Act 2011 (not yet in force)

2. Delegation by trustees

1. Current law requires the trustees to believe that the charity has a moral obligation: s106(1)(a) Charities Act 2011
2. New law will ask whether the trustees "*could reasonably be regarded as being under a moral obligation*": section 15 Charities Act 2022 (not yet in force)
3. Current test is subjective, new test is objective

3. Statutory charities

1. It will be possible for charities established or governed by statute or royal charter to make ex gratia payments:
s106(1A) & s331A(5) Charities Act 2011 (not yet in force)
2. Will reverse *AG v Trustees of the British Museum* [2005]
EWHC 1089 (Ch)
3. Unclear how this will apply to legislation passed after 2011

4. Appeals

1. It will be possible to appeal to the FTT the Commission's refusal to authorise an ex gratia payment: s322(2)(ea) Charities Act 2011 (not yet in force)
2. A new, fifth way of approving an ex gratia payment

The image shows the interior of Radcliffe Chambers, a historic building with a high, vaulted ceiling. The ceiling is made of light-colored stone with a complex ribbed structure. The ribs are supported by ornate, carved stone brackets. The floor is made of light-colored stone tiles. The walls are also made of light-colored stone. The overall atmosphere is one of grandeur and historical significance.

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