

Election advertising

The next general election is due to take place on 7 May 2015. How does the law seek to reconcile the desire to increase political participation with the need to protect privacy and prevent parties and candidates simply spending and spinning their way into power?



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Rupert Earle and Andrew Wheelhouse explain the restrictions on election advertising

Overspending

It is important to distinguish between government advertising and party political advertising. Government advertising is not subject to expenditure limits. In the year before the last election the Central Office of Information ('COI') spent £237 million on paid-for advertising space and digital marketing. The coalition abolished the COI (its advertising functions being taken over by the Cabinet Office) and promised to cut back on such advertising, although individual departments still spend substantial sums. By convention, expressed in the Ministerial Code, the Civil Service Code and Cabinet Office guidelines, government publicity must be objective, informative and non-party political, and in the run-up to an election should not compete with parliamentary candidates for the attention of the public. If government advertising did become overtly party-political it might be caught by the expenditure restrictions set out below, or be subject to scrutiny by the Parliamentary and Health Service Ombudsman.

The Political Parties, Elections and Referendums Act 2000 ('PPERA') and Representation of the People Act 1983 regulate what can be spent by political parties (nationally) by the candidate, the election agent or the agent's appointees (at constituency level), and by third parties (including UK residents, charities, companies and trade unions) in connection with promoting or procuring electoral success for a party or candidate in the regulated period prior to an election. A party contesting all 650 seats in the UK on 7 May 2015 could theoretically spend up to £19.5 million by way of campaign expenditure for election purposes during the regulated period. In the constituency, a candidate's expenditure is capped depending on the number of registered voters and whether the constituency is urban or rural (an average bracket is £12,000 to £15,000). Expenditure includes expenditure on advertising, but in social media there may be little correlation between the cost of the ad and its impact. The requirements are overseen by the Electoral Commission, with which parties must

register if they wish to contest seats. As discussed in the article on page 4, there are further expenditure limits for registered and unregistered third parties. Editorial matter in newspapers and periodicals is not caught by these restrictions (unless paid for).

It is an offence to pay an elector for displaying election advertisements, unless it is part of their normal business.

Confusion marketing

In 2010 Unilever secured an injunction to prevent Nick Griffin (as a representative of the British National Party – 'the BNP') and the BNP's webmaster from featuring prominently a jar of Marmite with the slogan 'Love Britain Vote BNP' in the BNP party's political election broadcast. The judge dismissed a claim for infringement of a registered trade mark (the fundraising element of the broadcast being insufficient to make the use of the mark in the course of trade), but held that Unilever were more likely than not to succeed in a claim for infringement of copyright (in the label) and passing off (Unilever as sponsoring or endorsing the BNP).

Election legislation also has specific provisions to prevent confusion, for example by disguising one party's advertising to look like another's, as the Liberal Democrats did in 1990 when preparing a mock Labour leaflet in the Tower Hamlets local election. Further distribution of the leaflet was stopped, although the challengers failed to overturn the results because they could not show that anyone had been deceived.

Any election material (material that can reasonably be regarded as intended to promote or procure electoral success at an election for a party or candidate) must include the name and address of the printer, promoter and any person on whose behalf the material is being published. This requirement may be extended to other media (e.g. online videos), but no such regulations have yet been introduced.

Biased broadcasting

Advertising of a political nature or directed towards a political end is prohibited on television and radio

by the Communications Act 2003. 'Political' is very broadly defined, and an attempt by Animal Defenders International to have it declared to be a disproportionately wide restriction on freedom of expression failed in the European Court of Human Rights. The court found that the UK had acted within the margin of appreciation afforded to national authorities to 'mould its own democratic vision': in this case, the desire to protect democratic debate and process from distortion by powerful financial groups, which allowing access to TV advertising might afford.

There is an exception for adverts of a public service nature, for example to promote tax self-assessment, healthy eating or road safety. Ofcom found a 2009 campaign concerning CO2 emissions by the Department of Energy and Climate Change ('Act on CO2') to be of a public service nature. On the other hand, Ofcom held to be unlawful the broadcast of an advertisement in Bengali by the mayor of Tower Hamlets in 2012 featuring the mayor prominently, including in the cab of a mechanical digger and inspecting a flat, accompanied by claims to be bringing homes up to a better standard. The purpose was to portray the mayor in a positive light rather than to inform and educate the public.

In addition, free party political broadcasts must be offered by the main UK broadcasters. In general elections broadcasts are offered to each of the main parties and to registered parties contesting one sixth or more of the seats up for election. Such broadcasts must not contain offensive or harmful material.

As far as editorial content is concerned, an obligation of due impartiality on matters of political controversy and public policy is placed on all broadcasters, policed by Ofcom and the BBC Trust.

Intrusive campaigning

Political parties and candidates have the right to send a freepost mailing to all those on the full electoral register, regardless of the recipients' wishes. Beyond that, the Information Commissioner's Office ('ICO') treats political campaigning addressed to individuals in the same way as any other form of direct marketing, regulated by the Data Protection Act 1998 and Privacy and Electronic Communication

(EC Directive) Regulations 2003 ('PECR'). National parties, constituency associations and local associations may all (if different legal entities) need to notify the ICO that they are processing personal data. Opt out requests (including by registration with the Telephone Preference Service) must be respected, and campaigning by email or text to individual subscribers should only be to those who have consented to that form of contact by that organisation.

The Better Together campaign had to sign an undertaking to the ICO to comply with PECR after sending 300,000 text messages to individuals in Scotland in early 2013 asking them how they intended to vote without checking that they had given consent to be contacted.

It will be unfair and unlawful to use information collected for one purpose (e.g. petitions, case work, online surveys) for a different purpose unless the individual is made clearly aware of that at the time of collection. Information about a person's political opinions is treated as being particularly sensitive, and explicit consent must be obtained from the voter to retain and use it.

Misleading content

There is no prohibition on non-broadcast political advertising. The Advertising Standards Authority does not seek to regulate non-broadcast advertising, the principal function of which is to influence voters in an election or referendum, although it does regulate government advertising. But in addition to the restrictions outlined above, there is the risk of an action for defamation (see separate article on page 13), and voters may be disinclined to vote for a party perceived as being responsible for misleading or gratuitously offensive advertising.