

Election advertising

There has been little time to fill gaps in electoral law identified in the 2015 General Election and 2016 EU referendum. Nevertheless, the law does 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.



Rupert Earle
Partner
T: 020 7551 7609
r.earle@bwbllp.com

Rupert is a partner with more than 20 years of experience in media, public/regulatory and advertising law. Rupert has advised the media and politicians (including MPs) of all parties and none, on political stories for many years. He has defended defamation actions brought by former Conservative Party treasurers Lord Ashcroft and Peter Cruddas and acted for journalist Jon Ungeod-Thomas in the 2009 freedom of information case which exposed the MPs expenses scandal.



Andrew Wheelhouse
Paralegal
T: 020 7551 7617
a.wheelhouse@bwbllp.com

Andrew assists the Media Disputes team in all aspects of their work, particularly research in a variety of areas of media law including defamation, freedom of information, data protection and advertising law.

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 departments spend substantial sums on advertising, but government advertising is not subject to expenditure limits. 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 or (in respect of accuracy) the Board of the UK Statistics Authority.

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 8 June 2017 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 or undertake campaigning activity, and failure to do so may result in fines. 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

Election legislation 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, if printed or in a newspaper or periodical, include the name and address of the printer, promoter and any person on whose behalf the material is being published. Notwithstanding concerns in previous campaigns, this requirement has still not been extended expressly to other media (eg online videos), although the Commission takes the view that it applies to websites and electronic material and social media.

Of course the general law should not be forgotten. 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).

Biased broadcasting

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.

Beyond that, 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 ads of a public service nature, for example to promote tax self-assessment, healthy eating or road safety. But Ofcom held to be unlawful the broadcast on Bangla TV and other channels in 2012 of an advertisement in Bengali by Lutfur Rahman, the Mayor of Tower Hamlets, 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. Payments made by the Mayor to TV channels for favourable coverage were later found to constitute bribery, and were one of the grounds on which his election as Mayor was set aside by the High Court in 2015.

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.

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. That aside, 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 ICO imposed a monetary penalty of £30,000 on Telegraph Media Group in 2015 for sending out an unsolicited 'letter from the editor' to subscribers' email addresses as part of the editorial bulletin on the morning of the 2015 General Election urging readers to vote Conservative.

Political parties may carry out market research, but there may be a fine line between that and marketing. 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, and other more general legal restrictions (e.g. defamation), voters may be disinclined to vote for a party perceived as being responsible for misleading or gratuitously offensive advertising.