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## Electoral Law and the Internet

Some Issues Considered

by Chris Ballinger and

Stephen Coleman

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## HANSARD SOCIETY

Hansard Society  
[hansard@hansard.lse.ac.uk](mailto:hansard@hansard.lse.ac.uk)  
[www.hansardsociety.org.uk](http://www.hansardsociety.org.uk)

St Philips Building North  
LSE  
Sheffield Street  
London WC2A 2EX

Tel: (020) 7955 7459  
Fax: (020) 7955 7452

7 Hanover Street  
London W1S 1YD

Tel: (020) 7491 0051  
Fax: (020) 7629 8287

# **Electoral Law and the Internet: Some Issues Considered**

## **Introduction**

The 2001 general election will be the first in the UK in which the internet will be a significant part of the political communication environment. While it is unclear whether the internet will have a profound effect upon campaigning, it is quite clear that its use will present new problems for electoral regulation. The internet is a famously anarchic, unregulated medium - elections are necessarily rule-governed events which must be administered with a constant view to fairness, transparency and stability.

The arrival of online campaigning in the UK could result in regulatory uncertainties and legal conflicts, as happened in the 2000 US elections. The Hansard Society, through its e-democracy programme, has considered these potential problems and this report addresses them. This is not a set of legal guidelines for online campaigners, nor is it presented with any intention of offering legal advice to candidates or agents. It is hoped that the key issues, risks and potential areas of legal dispute are set out for more informed public discussion.

## **MPs and the approaching election**

Upon the moment of the dissolution of Parliament, Members of Parliament lose their seats. They become either parliamentary candidates or, if not standing for election, ordinary citizens. The change from MP to member of the general public has two principal results: MPs and their staff are prohibited from using parliamentary facilities and MPs may not describe themselves (or be described by others) as being an MP. Indeed, no candidate may present inaccurate information about himself or herself during the election campaign.

The loss of access to parliamentary facilities has three main consequences for MPs and their staff:

- First, they are not entitled to use their parliamentary e-mail addresses for the duration of the election campaign. However, this would lead to unfair inconvenience for MPs - many of whom continue their constituency duties throughout the campaign - and for their constituents. Since the House of Commons forwards letters and parcels to MPs at their constituency addresses during a general election campaign, it would seem to follow that e-mail should likewise be forwarded to an alternative e-mail address for the duration of the campaign. Upon re-election, MPs' e-mail accounts would be fully reinstated.
- Secondly, MPs may not use publicly funded websites to promote their candidatures. Many MPs use their Office Costs Allowance (OCA) to fund the equipment and staff necessary to create their website, and the money necessary to host and to update those sites. Since the OCA is public money - provided to assist MPs with their parliamentary duties - it should not be used to promote a strong party message or to assist in the re-election of an MP, since this would unfairly disadvantage a challenger at an election.

It is clear that MPs should be liable for the cost of transferring websites to a private server (if necessary) and converting their content to conform to the restrictions imposed by electoral law - but it is not clear whether the copying and conversion of publicly funded information is permissible. If the copyright of such information remains with Parliament, then such copying would not be permissible without the agreement of Parliament. If the copyright resides with the MPs themselves, then Parliament may consider whether, in future, the MP may be required to repay some of the OCA if OCA-funded material is used during an election campaign. On balance, it is likely that MPs will be able to use OCA-funded material on an election website, so long as the primary intention when using OCA money to acquire the data was to assist the MP in his or her parliamentary duties.

- Thirdly, it must be presumed that links to ex-MPs' websites from the House of Commons website will be withdrawn. However, given that many MPs continue with their constituency duties during the campaign, would removal of links to MPs' websites from the House of Commons web pages be against the immediate interests of constituents? There is a case for altering the links to a generic page that explains that MPs cease to be MPs during a general election campaign.

Underlying these three issues is the question of when the election campaign starts. MPs have their parliamentary facilities withdrawn at the dissolution of Parliament, even though the 'near term' (or de facto) general election campaign may have already been ongoing for weeks or months before this date. Whilst there will never be a withdrawal of services during the near-term campaign, a grey period is prorogation -the time during which the election has been announced, but during which Parliament is still sitting and election expenses are not being accumulated.

Current electoral law states that election expenses are those expenses which relate to a campaign, whenever they are incurred, and then care must be taken not to 'trigger' expenses. However, under the Political Parties, Elections and Referendums Act 2000, people become parliamentary candidates at the moment of dissolution (section 135), although election expenses may still be incurred before the start of the campaign itself (section 134). These two sections of the 2000 Act, which amend section 118 of the 1983 Representation of the People Act, do not come into effect until July 1, 2001 and so would not apply to a May 2001 general election, which would be conducted according to the previous rules concerning election expenses.

That MPs cease to be MPs upon the dissolution of Parliament has two effects with relation to websites:

- First, MPs, upon becoming candidates, must remove all references to 'MP' from websites which they control. This task is quite simple, although in some cases it will be time consuming. MPs would be justified in retaining reference to 'MP' in any archived files, press releases, or newspaper articles on their websites if the references to their being an MP were correct at the time at which these pieces were written. However, all other references to being an MP must be removed. This process is neither technically difficult nor expensive, but the most practicable method of achieving the conversion of an MP's website to a candidate's website is to run two separate sites in parallel.

- Less simple is the removal of 'MP' from website addresses (Universal Resource Locators - URLs). Of the 106 MPs who have websites linked from the House of Commons list of Members, 40 (37.7 %) have some form of 'MP' in their URL. Such URLs appear prima facie to breach the requirement of MPs not to describe themselves as MPs during the election campaign. Whilst it is not technically difficult to set up an alternative URL and to copy the website content over to the new location, the complete disablement of the old URL would have the potential severely to inconvenience the MP. If a ruling were made that a site containing 'MP' in its URL was not permissible during the election campaign, one way to accommodate this would be for the original site to contain a 'redirect' page - explaining that the 'MP' site has had to be shut down during the election.

The status of privately run websites with regard to electoral law is not clear. A number of privately run sites - such as <http://www.the-commons.com> - give links to MPs' websites. Are these links to be disabled during the election campaign? If not, must they be amended to include the URLs of all of the candidates in each constituency?

## **Campaigning Online**

### *Expenditure*

Election expenditure is restricted for good reasons: so that wealthy parties are not unduly favoured, and to reduce the need for fundraising by the political parties. The rules on election expenditure were altered by the Political Parties, Elections and Referendums Act 2000 and maximum expenditure during a general election campaign is approximately £15 million for a political party, and the maximum expenditure during a parliamentary by-election is £100,000 per candidate.<sup>ii</sup> The maximum expenditure for a candidate at the constituency level is £5,483 plus 6.2p per elector in county constituencies and 4.6p per elector in borough constituencies.

Following the decision of the European Court of Human Rights in *Bowman*,<sup>iii</sup> the permitted expenditure of a third party at the constituency level - previously £5 - has been raised to £500. Given the low costs associated with the distribution of material by e-mail and on websites, coupled with the one hundred fold increase in the amount that private citizens may spend in promoting a candidate, the potential scope for individual activists having an impact upon the forthcoming general election campaign is greater than ever.

The internet raises four difficult areas with regard to calculating expenditure during general election campaigns:

- Costing e-mails.
- Costing websites.
- The local/national divide in expenditure.
- The cost of acquiring e-mail databases.

The marginal cost of sending an e-mail is very small: a number of e-mails can be sent for the cost of a local telephone call. Since many activists - and even constituency offices - currently access the internet through a telephone dial-up connection, the cost of connecting to an internet service provider (ISP) in order to send e-mail is negligible, and can be dealt with in the same ways as telephone calls have been accounted for in past election expense returns.



Websites tend to be inexpensive to maintain, although they can be expensive to set up because of the labour involved. It is unclear how much - if any - of the costs of setting up a website ought to be included in an election return. In one view, web pages, once created, remain in perpetuity, and so the cost per unit of time used is infinitesimally small. Hence, only the cost of updating the website for the election campaign - including the removal of any references to an incumbent being an MP - should be declared. Another view would suggest that a percentage of the site development costs should be included, and that if a site is intended solely for the election then all the costs should be included in the candidate's election expenses return. It is likely that expenditure on e-mails and the internet at the constituency level will be caught under sections 75 and 76 of the Representation of the People Act 1983, and thence included as part of the candidate's expenditure.

The internet does not respect constituency boundaries - nor does it necessarily respect the difference between local and national campaigning. Are national party websites which, by obtaining information on their visitors and setting cookies, provide tailored, local content for the web surfer, truly national? Or should the cost of the development of this site be counted against the election expenses of the candidates in the constituencies to which the information refers?

Calculating the cost of e-mail databases is a problem for UK election candidates. Databases of e-mail addresses can cost several thousand pounds to obtain - outside of the budget of an individual candidate. The costs of donating an e-mail database are nil. Does a value need to be attached to these donations for the purpose of election expenditure? Also, if donation of e-mail addresses to political parties of candidates occurs, questions of data protection law will arise.

E-mail is unlikely to be a central campaign tool in the forthcoming general election, and political considerations - such as negative reaction from voters who are 'cold e-mailed' - may remove temptations to use databases of e-mail addresses. Nevertheless, these issues will increase in importance over subsequent elections.

### ***Broadcasting or publishing?***

One of the central issues relating to the impact of electoral law on the use of the internet is the status of the internet as a medium of communication. The convergence of traditional telecommunications, electronic media, and information technology, coupled with the resultant emergence of new forms of communication, has meant that the legal regulations that apply to old forms of media are not relevant to the new forms of communication. The invention of the most common form of distributing information via the internet - the World Wide Web - post-dates the principal controls on broadcasting during general election campaigns, as contained within the Broadcasting Act 1990. The convergence between forms of electronic media has led to uncertainty as to how the laws apply to the internet.

During an election campaign, broadcasters are subject to draconian controls on their output. Publishers of election literature have fewer controls but must include an imprint on their publications. It is common parlance to speak of 'publishing' documents on websites, and also to speak of listening to or viewing 'webcasts' across the internet. However, the question of whether the internet is a medium of publication or of broadcasting - or, indeed, either - remains questionable.

The 'broadcasting' use of the internet has two aspects: live 'webcasting', and the availability to view archives of pre-recorded audio or video files. It seems clear that webcasts are not 'broadcast' in the traditional, wireless sense of the term. However, is the piping of live videos into people's homes via their computers akin to cable television broadcasting? The Cable and Broadcasting Act 1984 refers to a service which:

'consists wholly or mainly in the sending by any person, by means of a telecommunication system (whether run by him or by any other person), of sounds or visual images or both ... for reception, otherwise than by wireless telegraphy, at two or more places in the United Kingdom, whether they are so sent for simultaneous reception or at different times in response to requests made by different users of the service; or for reception, by whatever means, at a place in the United Kingdom for the purpose of their being presented there either to members of the public or to any group of persons.'

The references in the 1984 Act to sending by sounds or visual images 'for reception otherwise than by wireless telegraphy' suggests that webcasts are covered by cable television regulations. However, if this were so, then all webcasters - from any country - would have to submit to regulation in the UK or run the risk of having their service blocked. Clearly, de facto regulation of webcasts through existing legislation is not practicable.

The nature of the reception of a webcast further distances webcasts from cable television services. Cable operators 'send' (to use the language of the 1984 Act) sound and visual images to their subscribers. The subscribers then decide whether to turn on their television sets and tune in to a particular channel. However, webcasters do not 'send' their sound and images out to users. Instead, in the case of webcasts, viewers, through their computers, contact the webcaster and request permission to copy the webcast data to their machine. The webcast data is then downloaded to the user's computer, either as a single file, or as streaming audio or video. This process is more akin to viewers visiting a video rental store and hiring a video rather than to watching television. Viewers take the information from the webcasters; the webcasters do not, as such, send information to the viewers. On this basis, it can be argued that webcasts are regulated neither by the Broadcasting Act 1990, nor by the Cable and Broadcasting Act 1984.

If information on websites is not broadcast is it published? The issue of imprint causes problems for documents made available on websites. Section 143 of the Political Parties, Elections and Referendums Act 2000 provides that no election material shall be published unless the following are displayed within the material:

- (a) The name and address of the printer of document.
- (b) The name and address of the promoter of the material.
- (c) The name and address of any person on behalf of whom the material is being published (and who is not the promoter).

These details - known as the imprint - are wider than those contained in section 110 of the Representation of the People Act 1983, which they replace. The 1983 regulations referred to the imprint being required on 'any bill, placard or poster having reference to an election or any printed document distributed for the purpose of promoting or procuring the election of a candidate'. The new regulations lay less emphasis on 'printed material' - which does not

include internet-based material - and more on 'election material'; although some specific regulations refer to printed material.

Websites are not 'printed material', although they may be 'published election material'. If so, questions about the imprint arise. It is unclear who is the publisher. Whilst the website manager is responsible for posting the material on the internet, it is arguable that the person who 'causes the material to be published' (i.e. displayed on the user's screen) is the user him- or herself, since it is the user's action in clicking on the relevant link that caused the page to appear.

It is unlikely that the host ISP or the user's ISP has a role in law in publishing that material. If the promoter of the material is the webmaster, then must the imprint appear on every page (as on single-sided leaflets), or must it appear only on the first or last pages (as with published booklets or newspapers)? And is a full name and address required, or is the URL (the 'web address') sufficient? The rationale of the imprint is to enable the reader of the literature and the authorities to identify the source of the material. A URL may suffice for these purposes.

One complication with regard to the imprint arises with websites which refer to candidates in a UK general election, but which are hosted overseas. If a leaflet is printed overseas but distributed in the UK, then the UK's rules on imprint still apply, since these rules cover all documents and posters distributed in the UK during a general election campaign. However, it is unlikely that the UK's rules on imprint are enforceable with regard to material hosted on foreign servers.

Whilst websites are not printed material, pages from websites are often printed by individual web surfers. Indeed, in the USA some political parties encouraged activists to print a number of copies of leaflets downloaded from the party website and to distribute them to local houses. In this case the imprint can potentially cause problems. The printer of the document - the 'person who caused the leaflet to be printed' - is the individual activist who printed the document on his or her computer, but how is his or her name and address to be included on the leaflet? Is the activist also the 'promoter' of the leaflet, or is the 'promoter' the author of the leaflet? And who is the person on whose behalf the material is being published - the author or the candidate? These questions remain unanswered.

### **The public voice online**

A key feature of the internet is its capacity for interactivity - enabling citizens to chat and debate online as well as being recipients of information. Those providing fora for the public to debate election issues - whether on web-based boards, chat rooms or e-mail lists - must be aware of their responsibility for any defamatory messages that are published. Both the host of a forum publishing a defamatory message, as well as the internet service provider (ISP), could be held liable for such content.

Defamation - libel in this sense - can be defined as any statement which 'tends to lower the plaintiff in the estimation of right-thinking members of society generally or cause him to be shunned or avoided'. In the context of an election, this would include any statement about a candidate which damages his or her political reputation. Should print or broadcast media



repeat such libellous statements - even in the context of reporting an online discussion - they might also be accused of perpetuating a libel. Given the short campaign period of a UK election, it will not always be possible for candidates or their agents to counter libellous statements made online before damage has been done. These may equally apply to the 'defamation provisions' in s.106 of the Representation of the People Act, even though this does apply for injunctive relief.

Online discussions can be regarded as comparable with broadcast phone-in programmes. Callers might make offensive or libellous comments on live broadcasts, but it is the producer's responsibility to prevent, edit or redress such statements. Similarly, those running chat rooms or web fora have an obligation to moderate such spaces responsibly and lawfully. This might include pre-moderation of all messages published, requiring the 'publisher' to read through and approve all content before it is available to the public - or post-moderating messages on the basis of clearly-stated rules to which all participants must sign up before posting messages.

In the recent US elections, e-mail jokes and satirical or spoof websites mushroomed - in some cases candidates' names were registered as web addresses (URLs) by their opponents so as to spoil their online campaigns. It is hard to think of any ways that such conduct can be prevented.

### **Vote trading and tactical voting**

In the recent US elections, a website was established for the sale of votes. This was an attempt to encourage an illegal practice and the site was closed down. The site was then removed to Austria. US courts had no jurisdiction over an Austrian website and it continued in 'business' throughout the campaign. Any attempt to facilitate the sale of votes in a UK election would be illegal - as would be a contract to sell or exchange votes. This may amount to the corrupt practice of bribery (RPA, s.113).

The same would not be true of the use of the web to organise tactical voting in particular constituencies. A UK website is being organised with the intention of urging tactical voting to keep out Conservative candidates. It is encouraging voters to pledge themselves to swap their votes with other tactical voters in different constituencies. In California, a vote-swapping website was closed down. It will be interesting to see whether legal moves are made against the UK tactical voting site.

### **Online advertising**

It is perfectly legal to sell advertising on a website. If candidates or parties buy such space they must declare this in their election expenses. But what if a member of the public decides to set up a website in favour of a particular party or candidate - or to create links from their own site to a candidate's site? Would this constitute a material contribution to the campaign?

The Representation of the People Act prevents the buying of advertising on television and radio and allows parties a number of party election broadcasts (PEBs.) The law does not prevent parties from purchasing advertising on websites owned by the broadcasters; nor does it prevent the streaming of PEBs - in whole or in part - on party, candidate or other websites.

In the USA, a number of people gave personal information about themselves and their views to political websites or mailing lists, only to discover that these were then sold on to third parties. Similarly, ISPs, advertisers, online fundraisers, polling sites and political portals sold lists of their users to parties and candidates. In the UK the sale of such information would be illegal under the Data Protection Act - but it would be difficult to prove that data had been gathered in this way. For example, a candidate who possesses a database of local e-mail addresses might have accumulated these over a period of years but, equally, might have purchased or been given them. Proving the origin of politically valuable data will not be easy.

## **Conclusion**

The internet offers exciting opportunities for campaigning and increasing public participation in the election. With these opportunities come risks and threats. We have attempted in this report to outline the legal issues at stake and would appeal to the parties, internet service providers, journalists and the public to think now about establishing fair and democratic practices for the future use of the new media in UK politics.

**Chris Ballinger** researches politics at The Queen's College, Oxford

**Stephen Coleman** is Director of the Hansard Society's e-democracy programme

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<sup>1</sup>Representation of the People Act 1983, s.118.

<sup>2</sup>Political Parties, Elections and Referendums Act 2000 (Commencement No. 1 and Transitional Provisions) Order 2001. Statutory Instrument 2001 No. 222 (C. 11).  
Published online: <<http://www.legislation.hms0.gov.uk/si/si2001/20010222.htm>>

<sup>3</sup>*Bowman v. United Kingdom* (1998) 26 EHRR 1.

The views expressed in this report are those of the authors and the Hansard Society, as an independent non-party organisation, is neither for nor against. The Society is, however, happy to publish these views and to invite analysis and discussion of them.

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