



Getting local authorities mythbusting by Declan O'Dempsey

Local authorities have a duty not to spend public money on propaganda for a political party. Section 4 of the Local Government Act 1986 provides for a Code of recommended practice as regards publicity. Councils which fail to follow its requirements may find themselves in breach of s 2 of the LGA 1986 and subject to judicial review. Hence councils act with caution in this area. Declan O'Dempsey writes about recent work on the Local Audit and Accountability Bill, which should encourage local authorities to rebut factually inaccurate stories put out by political parties, perhaps even during the election “purdah” period.

Section 2 Local Government Act 1986 provides that a local authority must not publish, or arrange for the publication of, any material which, in whole or in part, appears to be designed to affect public support for a political party. In determining whether material falls within the prohibition regard shall be had to the content and style of the material, the time and other circumstances of publication and the likely effect on those to whom it is directed and, in particular, to the following matters—

(a) whether the material refers to a political party or to persons identified with a political party or promotes or opposes a point of view on a question of political controversy which is identifiable as the view of one political party and not of another;

(b) whether the material is part of a campaign, the effect which the campaign appears to be designed to achieve.

The local authority may not give financial or other assistance to a person for the publication of material which the authority is prohibited by section 2 from publishing themselves. The first step in determining whether section 2 is engaged is to determine whether, on an issue there are identifiable party positions on an issue.

Publicity includes ‘any communication, in whatever form, addressed to the public at large or to a section of the public’ (s. 6(4) of the Local Government Act 1986). Thus the contents of a website, e-mails, text messages as well as direct mailings, newsletters and other forms of publication will be covered. The timing of a publication may be of

significance. Material published on a website is published continuously , so particular care must be taken to have regard to the length of time such material is allowed to remain available on the local authority's website. Other circumstances of the publication will include whether there is a current political debate on an issue. A council will be entitled to respond to particular points made in that debate. It must do so, however in a balanced manner, so that the likely effect on recipients is informative rather than persuasive (see *R v Lewisham London Borough Council, ex parte Shell UK Ltd*[1]) .

The Local Audit and Accountability Bill, currently before parliament, includes a power for the Secretary of State to direct local authorities in England to comply with a s4 LGA 1986 Code the Minister gets the power to direct what steps an authority must take to comply with it, and the time within which the local authority must comply.

Local authorities have had their duty under the Equality Act 2010 s 149 (public sector equality duties) reaffirmed in the 2011 edition of the Code. Nevertheless there has been a real reluctance among local authorities to issue rebuttal information when racial and religious myths have been promulgated by political parties. There has been a distinct lack of confidence to challenge the misinformation.

The danger of this type of directive power is that local authorities will feel even less confident about the scope of their powers to issue publicity on this type of issue. However in the light of a recent probing amendment to the Local Audit and Accountability Bill, local authorities should not have any qualms.

Lord Beecham, supported by Cloisters' expertise in this area, moved an amendment to make clear that the directive power was not to restrict the duty of the local authorities in pursuance of their obligations under section 149 of the Equalities Act 2010 to publish at any time factual material by way of correction or rebuttal of inaccurate statements which promote discrimination, harassment or promotes or constitutes other unlawful acts.

Lord Beecham reflected that reservations are held in the world of community relations and local government that it may not be permissible to make clear that what other people are saying is wrong. The Equality Act 2010 covers: race, gender, age, gender reassignment, sexual orientation, and religion and belief.

Significant misstatements are made around election time particularly which can be calculated to mislead people. Lord Beecham (26 Jun 2013 : Column GC240) was able to ask the Minister to confirm that authorities are able to correct such misstatements. He cited a "ludicrous urban myth is currently developing around the infamous bedroom tax, purporting to say that if you are a Muslim householder, you can describe one of your rooms as a prayer room and that will avoid the bedroom tax. This is complete nonsense but one can see how statements of that kind can cause considerable problems and, in the context of an election, be influential."

The Minister in reply made clear that it is permissible for authorities to publish, “factual material by way of correction or rebuttal of inaccurate statements that promote discrimination, harassment or promotes or constitutes other unlawful acts”, in relation to the characteristics covered by section 149 of the Equality Act 2010.

Such rebuttal would be, not in a party or political sense but in a purely factual sense. Lord Beecham pointed out that authorities have a duty under the Equality Act s 149 have due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

He sought clarification that this duty could permit local authorities to take corrective rebuttal steps (including during election times).

In reply the Minister stated that she would check the position regarding elections, but confirmed that Section 149 of the Equity Act 2010 places a duty on local authorities to tackle discrimination in all the areas that he mentioned. The Minister also confirmed that the 2011 Code of Recommended Practice on Local Authority Publicity, sets out the principles that publicity must be, lawful, cost-effective, objective, even-handed, appropriate, have regard to equality and diversity, and be issued with care during periods of heightened sensitivity. In particular therefore “local authorities may seek to influence the attitudes of local people or public behaviour in relation to matters including race relations, equality, diversity and community matters”.

As to the power of the Secretary of State to make a direction requiring a local authority or group of local authorities to comply with some or all of the publicity code, any direction about compliance with the code would not prevent a local authority from exercising its obligations under Section 149 of the Equality Act. This is because the code makes provision for just this sort of publicity. Therefore a direction to comply with

the code would serve only to put the guidance on a statutory footing.

In relation to referenda paragraph 35 in the 2011 code states:

“It is acceptable to publish material relating to the subject matter of a referendum, for example to correct any factual inaccuracies which have appeared in publicity produced by third parties, so long as this is even-handed and objective and does not support or oppose any of the options which are the subject of the vote”.

Clarification will be given as to whether an election will be treated in the same way and this aspect will be discussed at the next debate on the Bill, as the Minister went away to think about that clarification.

The value of a probing amendment is that what the Minister says can be used to clarify the meaning of the law which is ultimately passed. What emerges from this exchange is that the government does expect local authorities to be rebutting misinformation and it is likely that in due course such rebuttal will be expressly permitted during the election period.

On 15 July, (Lords Hansard col 603) the Minister put on record the government's position:

'The publicity code explicitly provides for a local authority to correct or rebut misinformation, making explicit provision in the sections about objectivity and care during periods of heightened sensitivity. Moreover, it contains provisions about equality and diversity, specifically allowing local authority publicity to seek to influence the attitudes of local people or public behaviour in relation to matters including equality, diversity and community issues.

'During an election period, for example, local authorities may publish factual material. A local authority should take care when issuing publicity and should not be issuing publicity that seeks to influence voters. However, this does not prevent an authority from fulfilling its role in seeking positively to influence people in terms of equality and diversity. Hence if there is disinformation in circulation promoting harassment, a local

authority may take action to correct it at election time or indeed any other time. '

Local authorities which fail to have due regard to the equality objectives in section 149 of the Equality Act 2010 may be subject to judicial review. The government's clarification should remove the fear of local authorities that intervening to influence attitudes during an election period will fall foul of the Code.

Why does this matter? During an election period the temptation for a political party to have a weaker respect for the truth than it usually does increases. Local authorities have sometimes felt that the need to ensure free speech means that they cannot intervene even when the basic factual information on which the statements of far right parties are based is false. There should be no doubt now, I suggest, that local authorities should engage in corrective steps. Moreover if they do not, then there will be those in the community with sufficient interest in such statements, that they may contemplate bringing judicial review proceedings against the local authority to enforce their obligation to have due regard under section 149 Equality Act 2010.

Local activist groups should be prepared to require the officers of the local authority to intervene quickly at such times by issuing objective corrective information, regardless of the fact that it may influence attitudes in these issues. During elections the officers should be contacted directly as it is the duty of the local authority itself rather than the incumbents.

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