

# "Ultra vires": what it says, what it doesn't say and how to beat it

## An Education Not for Sale briefing

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## Introduction

The "ultra vires" provisions of charities law, and their impact on the activities of student unions, are a big issue for student activists. This is because student campaigners of all sorts are regularly told by their student union officers that particular proposals to the SU are ultra vires and cannot be carried out.

More often than not, these pronouncements display a remarkable degree of ignorance about what the law actually says. In many cases, in addition, the words "ultra vires" are deliberately used as a scare tactic by right-wing SU officers, relying on the fact that most people don't know in much detail what they mean and will be discouraged from pursuing their proposal. Cutting through this confusion is therefore of real importance to the student left.

This guide seeks to set out in basic terms what the law says and what it doesn't; explain how in most cases it is relatively easy to get round ultra vires perfectly legally, providing some suggestions for doing so; and put the case for campaigning for changes to the law so that students alone and not the government can determine how our unions' money is spent. We intend it as a contribution to rebuilding the culture of political campaigning that we need in the student movement.

## Ultra what?

All student unions are charities. Under the 1993 Charities Act they are "exempt charities", which means that they do not have to register with the Charity Commissioners in the way that eg Oxfam or Cafod do.

However, SUs are like other charities in two important senses. Firstly, they qualify for a variety of financial advantages, most importantly exemption from various taxes. And secondly, what they can spend their funds on is strictly limited by law. Expenditure which goes outside an SU's aims as a charity is "beyond its powers" or (in legal Latin) *ultra vires*.

What does this mean specifically? This is how the Department for Education and Employment's "Guidance on Student Unions" put it in 1995: "As a broad general rule, expenditure of union funds is likely to be permitted only if it furthers the interests of the students in a way that assists in the educational aims of the university or college...The circumstances in which funds and facilities can be used for campaigning (either on local or national issues) are very limited. The first requirement is that the issue must affect present and future members of the union as students." Hence the phrase "students as students".

This guidance cites as examples of campaigns which would fulfil this requirement local issues such as better street lighting near campus, more public transport at night and nursery places for students' children; and national issues such as student fees, loans and grants. Examples of ultra vires campaigning on national issues which it gives include industrial disputes, general campaigning on environmental issues and the treatment of political prisoners in foreign countries.

A key point: the law regards SUs as necessarily educational charities linked to a particular educational institution. The result is that "if a students' union is charity, its objects (as set out in its constitution) normally cannot be changed so as to make them non-charitable, even by a unanimous vote of the union". What this means is that SUs cannot normally reformulate their objectives in order to be able spend money on whatever they want (see below).

Two things to note:

1. Whether or not the campaign which an SU wishes to support is a charity has *absolutely nothing* to do with whether it is ultra vires to spend money on it. "The fact that a students' union is a charity does not mean, of itself, that donations can be made to other charities. "An SU *can* donate to a non-charitable, highly political campaign that falls within its own charitable remit (eg on education funding); but cannot donate to a totally non-political charity that falls outside it. This is important to note because some SU officers seem, or claim, to believe that its illegal to spend money on any political campaign, but non-political charitable donations are fine.
2. NUS is not a charity and is therefore not subject to ultra vires.

## **What this means in practice**

Exactly where and how the law applies is slightly more complicated. Only a very small number of cases pertaining to ultra vires have come to court, and the evidence they provide is somewhat contradictory (see Appendix 1). However, a number of basic principles are fairly clear.

See Appendix 1 for a detailed exposition of the case law on this issue.

The most widely cited case is *Attorney General v Ross* (1985), in which the SU at North London Polytechnic (later University of North London, now part of London Met) was taken to court for voting to change the charitable objectives laid out in its constitution so that it could affiliate to whatever it liked (and, specifically, War on Want). The judge in that case upheld the prohibition on SUs doing this, forcing NLPSU to back down, but also qualified the law in a number of ways. The most important one was to state that student unions can engage in certain political activities if they tend to further the education of its membership.

Other case law, as well as statements from the Attorney General and the Charity Commissioners, has clarified things further. To summarise the basic situation with regard to ultra vires provision:

- A union *may* affiliate to NUS and to NUS Areas etc.
- A union *may* provide funds, facilities etc to political clubs as long as the amount is "reasonable".
- A union *may* campaign on political issues which affect students as students, such as student hardship (eg by affiliating to the old Campaign for Free Education or now to ENS).

- A union *may* purchase material from any type of external organisation to be used as a basis for education and debate.
- A union *may not* support a political party
- A union *may not* itself campaign on issues which affect students but only as general members of the population, such as the war in Iraq (eg by affiliating to the Stop the War Coalition or United Campaign to Repeal the Anti-Trade Union Laws).
- A union *may not* donate funds to an external organisation or cause if it receives nothing in return.

If this seems complicated, that is because it is. This complexity is one of the reasons why, will now be explained, there are a number of ways of getting round the law.

## Ways round the law

### 1. If you can, ignore it

Except in cases of major struggles, there is no point in disregarding the legal situation facing your SU. Equally, however, it is *very unlikely* that an SU will be prosecuted even if it makes a blatantly ultra vires payment. The number of SUs that have been taken to court under this law can be counted on one hand, despite the fact that defiance of and attempts to get round ultra vires by SUs were until recently very common. None of these cases resulted in any sort of serious repercussions for the SU involved: the money merely had to be refunded (see Appendix 1).

Alongside the tiny number of high profile cases which actually made it to court, there must, over the years, have been many thousands of instances of SUs finding ways round the law and many hundreds of SUs spending (usually small) amounts of money illegally, with no legal consequences whatsoever.

In most cases, particularly today when student confidence is low and willingness to openly defy the law limited, breaking the law in this way will not be the best strategy. Our point is simply that the picture presented by some SU officers, with the Attorney General lurking round every corner eager to pounce on student campaigners, is simply laughable.

### 2. Pay for educational materials

As the DFEE Guidance puts it: "A students' union can affiliate to a campaigning alliance...but the issues on which the alliance is campaigning must be of a kind which the union could campaign for directly itself [followed by a reference back to the examples cited above]...*Otherwise* [emphasis added] a students' union...can only affiliate to particular campaigns or external organisations for the purposes of obtaining educational material or information to assist in the discussion and expression of views."

This is clearly an enormous loophole. Why shouldn't an SU affiliate to a campaign at a given cost and ask it for educational materials in return? The Guidance adds that "any affiliation fee must be reasonable": reasonable, it explains, in relation to any benefit to students which may be expected, and to the financial resources and other commitments of the union. But clearly this is an enormously subjective determination, and certainly provides enough flexibility to make all but very large payments. For instance, while paying a group of strikers £5,000 in return for materials on their dispute might be problematic, paying a campaign £100 or £500 in affiliation in return for materials would not be. The same goes for paying money to "educational" speakers.

This approach is one which many SUs take at the moment, with no difficulties whatsoever.

### **3. Fundraising**

#### i) Collections

DfEE Guidance: "There is, of course, no objection whatsoever to students joining together to collect their own monies for a particular purpose for which union funds cannot be used." And of course an SU can greatly facilitate such collections by collecting funds at its meetings and events, advertising them on its website and in its publications and having sabbaticals and other officers devoting time to organising them.

#### ii) Benefit events

The same principles apply here as apply to 'Rag' events, which most SUs of course organise regularly. We stress this point because, again, there seems to be a widespread belief that 'Rag' fundraising for non-political charities is legally acceptable while different rules somehow apply to raising money for political campaigns. This is a major misconception (see above). In fact, there is nothing other than political will preventing Rag organisers from deciding to raise money for political campaigns and continuing to fundraise with same methods as before.

According to NUS, the following rules apply. Benefits must be specifically organised as such; all adverts for the event must indicate where the money is going; and the proceeds can only be donated after all other costs are deducted. This means, for instance, that if the SU organises a club night every Friday, it can't suddenly decide on Friday afternoon to make it a benefit gig for an ultra vires cause. However, it seems obvious that these requirements do not pose any real difficulties for fundraising. Again, many SUs currently pursue such an approach with no problems whatsoever.

*In short: if you want your SU to raise large amounts of money for a political campaign which is not directly student-related, organising a benefit gig is an easy, fun and straightforwardly legal way to do it.*

### **4. Donate money from commercial revenue**

For the same reason that donating profits from benefit events is permissible, it may be possible to donate funds from an SU's commercial revenue, if as is often the case the union has a legally separate commercial wing. It would also be necessary, again as in the case of benefits, to find a way of advertising where the money was going, eg posters in the SU shop explaining that profits from a given item are being donated to given campaign. This is probably the most complicated and difficult way of getting round the law.

### **5. Clubs and societies**

In Attorney General v Ross, the judge reaffirmed that SUs can fund clubs and societies even if the purpose of these societies is explicitly political:

"I can see nothing the matter with an educational charity, in the furtherance of its educational purposes, encouraging students to develop their political awareness or to acquire knowledge of, and to debate, and to form views on political issues. If the form of the encouragement includes provision of facilities for a students Labour Club, or Conservative Club, or any other political Club, I can see nothing in that which is necessarily inconsistent with the furtherance of educational purposes."

If a club or society is not funded by the SU, or has a stream of revenue separate from its allocation by the SU, then its expenditure is not subject (or at least can avoid being subject) to

ultra vires. In other words, it is not affected by the limitations described in this document. However, even when they funded by are an SU and therefore subject to the law, clubs and societies can still affiliate to a relevant external organisation. Thus Labour Clubs can affiliate to the National Organisation of Labour Students, which is part of the Labour Party.

Moreover, this in turn opens up all kinds of possibilities - not only because the "relevant" external organisation can spend the money received on whatever it likes, but because the definition of "relevant" is (like the "reasonableness" of an affiliation fee) very problematic. Labour Clubs, presumably, can affiliate not only to NOLS and the Labour Party, but also to Labour Against the War, the Labour Campaign for Lesbian and Gay Rights, John McDonnell 4 Leader and so on...

Lastly, despite the fact that some limits are supposed to apply to clubs and societies, the majority operate with an almost unlimited degree of freedom of expenditure as regards ultra vires. Thus People & Planet groups, even when they are funded by their SU, freely continue to campaign on climate change, trade justice and whatever else, and it is unheard of for them to be challenged on the basis of ultra vires.

## **Conclusion**

Even in the majority of cases where it is impossible or undesirable to defy the law head on, there are many different ways of safely spending money on a campaign which would normally be ultra vires. Most SUs already do so selectively, seeking almost by reflex and without comment to get round the law in cases which their leading officers find politically desirable, while insisting that it presents insurmountable obstacle in cases which they do not. We hope the information outlined above will help student activists expose this contradiction, while cutting through the confusion which allows it to continue.

## **Change the law to free our student unions!**

Education Not for Sale also believes that the student movement should campaign for changes to the law to end the restrictions which ultra vires places on student union activity. We believe that the law as it stands is undemocratic, subordinating SUs as democratic, representative bodies of students to the state in order to prevent them from acting as campaigning organisations which can effectively represent their members' interests.

There is a clear analogy with the anti-trade union laws (for instance the laws banning solidarity strikes, political strike and large-scale picket lines) which were introduced by the Thatcher and Major governments and have been maintained, in all but inessential details, by New Labour. These laws abolish effective trade union independence in order to prevent effective workers' action in defence of democratic and social rights. They play a similar role in the labour movement to that which ultra vires plays in the student movement, not only directly preventing action but creating a culture of self-limitation and apathy exploited by leaders who do not want to lead.

ENS rejects the idea that SUs should only campaign on "student issues". In the first place, it is very difficult to disentangle "student" and "non-student" issues: even education funding, for instance, poses big questions about the way society prioritises and allocates resources. Secondly, students' immediate lives are very heavily affected by all sorts of issues that are not unique to them as students, for instance the quality of the NHS and access to abortion. And lastly, we believe that it is right for students to be active on broader questions of social justice, even if these have no immediate and direct affect on their lives. Was it wrong, for instance, for the student movement to campaign against the apartheid regime in South Africa? If not, why shouldn't our SUs campaign on other issues of concern to their members today?

Those who support the law as it is sometimes ask why SU leaders should not be accountable for the decisions they make. Wouldn't getting rid of legal limitations on SU expenditure allow officers to act in a totally unaccountable way, wasting money on things their members don't want, and even corruptly spending it on themselves? The question for us, though, is *accountable to whom?* It should be for students, not the government, to exercise control over the decisions made by their SUs in their name; and it should be for students and their representatives alone to decide what their unions' money is spent on. Government control of our student unions may pose as promoting accountability, but it actually does the opposite by robbing students of control over their own organisations and promoting a culture where officers can refuse to carry out a democratic decision with the claim that it is ultra vires.

That's why ENS campaigns, and fights for NUS to campaign (see Appendix 2), for changes to the law so that SUs can control their own affairs - and why we try to inform activists about the reality of the law so that we can contribute to its defeat by making it unworkable.

- The Department for Education and Employment's Guidance on Student Unions can be read at: <http://www.admin.ox.ac.uk/proctors/info/pam/appd.shtml>

## **Appendix 1: Ultra vires case law**

(By Mike Rowley, Ruskin College, Oxford.)

Student unions are generally considered in the law of England and Wales to be educational charities - it is not possible to be more precise than this. Charity law in England and Wales consists mainly of case law, and is frankly chaotic. Even the new Charities Act does little to resolve the problems. It contains increased regulation of "exempt charities" (such as SUs) in its Schedule 5. The Charity Commission may now use some of the powers contained in the 1993 Act in respect even of exempt charities, including: order a name change; inspect documents; and investigate the charity when the "principal regulator" under the new Act asks it to do so (for SUs this will probably mean the Department of Education, but this is not yet settled). Additionally, the Attorney-General may apply to the High Court for an order to the Charity Commission to exercise its powers (though this is exceedingly unlikely to happen).

The Education Act 1994 (through the original draft of which the Tory government, until it was defeated by a mass campaign, aimed to massively weaken SUs and NUS through the introduction of opt-in membership), is often said to state that all SUs are covered by charity law. In fact, it only provides that university and college managements must inform SUs every year of "any restrictions imposed on the activities of the union by the law relating to charities". It does not state what such restrictions might be. This is because nobody really knows!

The leading case on Student Union funds is ATTORNEY-GENERAL -V- ROSS (1985) (see reference 1), involving North London Polytechnic SU. The Attorney-General, one of whose functions is to enforce charity law by bringing court cases, brought the case to stop the SU giving money to political campaigning organisations, something the SU constitution specifically said it could do (this is the only time the Attorney-General has ever taken such action against an SU).

Unfortunately for a leading case, the judgement in Ross contradicts itself. This is due at least partly to the form the legal argument took. Counsel for the defendant, the SU President, argued that the Attorney-General had no jurisdiction in the case because the funds of the SU were not charitable. The argument was that the SU constitution said it could spend money on non-charitable objects, and all funds held on charitable trusts must be spent on charitable objects. In other words, the SU's lawyer used the same argument that right-wing "students as students" people make against spending money on campaigning.

The judge, Scott J, rejected this argument. He said (reference 2) that "The non charitable activities which the Union is, under its Constitution, authorised to carry on and has carried on are, in my

judgement, as a matter of degree no more than ancillary means by which the charitable purpose may be pursued." This confirms previous cases on non-charitable purposes which use terms such as "incidental", "subsidiary" and "subsidiary". In *LONDON HOSPITAL MEDICAL COLLEGE -V- INLAND REVENUE COMMISSIONERS* (1976) (reference 3) the college SU was held to be charitable even though one of its stated objects was non-charitable, because the "predominant" object was charitable. (In this case the issue was the SU's tax liability.)

Unfortunately, the judge in Ross, having established this principle, then proceeded to contradict himself. He said that the SU could not spend the money it wished to, because it was a charity, and the "trustees" of its charitable funds (usually, the SU sabs) were personally liable for any such expenditure. Of course, were this second argument correct then the SU would indeed not be a charity, the Attorney-General would have had no jurisdiction and the case would have had to be dismissed. Whether Scott J contradicted himself deliberately in order to avoid this outcome is of course unclear.

The other two cases were brought for explicitly political reasons by members of the student unions involved - the only people, apart from the Attorney-General, who can bring a case under charity law. In *WEBB -V- O'DOHERTY* (1991) [4] the judge, Hoffmann J, purported to follow Ross - though in fact he followed the actual decision in that case, which sets no legal precedent, and not the judge's reason for deciding ("ratio decidendi") which does.

The case involved an SU which was legally "restrained" from donating to the National Committee to Stop War in the Gulf. Hoffmann J said that "The SU is an educational charity. Its purposes are wholly charitable and its funds can be devoted to charitable purposes only" although those purposes could include "the acquisition of information which may have a political content". The first assertion, if intended to be of general application, is simply wrong in law and contradicted by, among others, the House of Lords' judgment in *Royal College of Surgeons of England -v- National Provincial Bank Ltd*, by which Hoffmann J as a judge of a lower court was bound.

The other possibility is that there was something in the SU's Constitution which defined its funds as wholly charitable or restricted its expenditure. Unfortunately, the case was not fully reported, receiving only a brief notice in the *Times* law section; so we shall never know Hoffmann J's reasons.

Another relevant case is *BALDRY -V- FEINTUCK* (1972), in which Sussex University SU was legally "restrained" from donating to a publicity campaign against the abolition of free milk in schools. However, in terms of precedent this case has been superseded by the later cases (although it is always open to a higher court to follow superseded precedents).

## Conclusion

The legal position on charitable funds remains that some money can be spent on non-charitable objects, so long as such objects are secondary to the charitable objects. The cases on SUs seem to ignore this principle, although Ross also explicitly confirms it. In any case, no case has been brought against an SU for fifteen years, and only three cases have been brought overall. Were another such case to come before the courts, it is quite possible that another Act of Parliament would be required to sort it out. The legal environment has now changed somewhat with such aims as "the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity" now considered charitable (Charities Act 2006, s.2(2)(h)) and it is at least open to doubt whether any case brought against an SU on the grounds in Ross, Webb -v- O'Doherty or Baldry -v- Feintuck would succeed.

## Case references for legal citation

1. *A-G -v- Ross* [1986] 1 WLR 252, [1985] 3 All ER 334
2. *Ibid* at 265, at 345
3. *London Hospital Medical College -v- Inland Revenue Commissioners* [1976] 1 WLR 613, [1976] 2 All ER 113
4. *Times*, 11th February

## **Appendix 2: NUS policy on ultra vires**

Over the years, NUS has built up a fair bit of policy opposing the ultra vires laws; as with many radical NUS policies, however, the problem is that it does nothing about it. As a sample of NUS policy, the following clauses were passed at NUS national conference in March 2006, in the "Strong and active unions" debate as part of a motion entitled "Campaigning and inclusive unions". Most of them came from motions and amendments proposed by ENS supporters. We will be pushing over the next year for NUS to actually do something about this policy.

Conference believes:

6. Students' unions should be run by students. Institutions should not attempt to take them over or remove elected representatives...
21. That there is an urgent need to cut through the confusion which still exist among students movements activist concerning the so-called ultra-vires provisions of charities law.
22. That the law as it stands violates students' democratic rights by in effect allowing the Government to dictate what student unions can and cannot spend money on.
23. That is should be up to union members what their unions spend money on.
24. That since most activists, let alone most students, know very little about the law actually says, it has been known for student union officers to use ultra vires to wriggle out of mandates which they do not want to uphold and oppose policies which they do not like when there is no question of illegality whatsoever.
25. That even in cases where expenditure is ultra vires, there are almost always alternatives and ways to get around the law (e.g. organising benefit gigs, donating funds from commercial revenue, paying for educational materials).
26. Confusion about ultra-vires often deters unions from campaigning.

Conference further believes

4. Unions exist to support student activism beyond curricular activities.
13. That the repressive ultra-vires laws introduced by the Tories in the 1994 Education Act [this is not strictly correct - this text was not produced by ENS] are often narrowly interpreted by those who wish to bully and pressure students' unions, guilds and associations out of campaigning on issues that affect students in our wider context within society.
14. That the 1994 Education Act has often been used to attack liberation campaigns by those who claim that oppression caused by society does not affect "students as students".

Conference resolves

24. To campaign for the reform of charities law to allow student union members to decide what they want to spend money on free of Government interference.
25. To produce a guide for student unions on the lines set out above.
26. To brief CMs on their rights within the existing laws to campaign on political issues to end uncertainty and concern amongst student officers.

### **Disclaimer**

Please note that this pamphlet is a campaigning guide and cannot represent precise legal advice.