

CHARITIES, POLITICS AND FREEDOM OF SPEECH

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Introduction

The Human Rights Act 1998 received Royal Assent in November 1998. When it comes into force, it will incorporate the European Convention on Human Rights and all its jurisprudence into domestic law. This piece will refer to recent cases that raise human rights issues concerning the restrictions governing the involvement of charities in the political process. In particular, it will focus on Article 10 of the European Convention on Human Rights, which provides that:

- (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

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Charities and Political Campaign Activity

The starting point for consideration is the limitations that are placed on charities in their political campaign activity. The prohibition on charities having political purposes ("a trust for the attainment of political objects has always been invalid"²) does not mean that charities are precluded from all political activity. Charities, increasingly wanting to engage in high profile debating and campaigning on issues of political interest, must take refuge in the dichotomy between political activities, which may be allowable, and political purposes, which are never permissible. By following this path, charities may undertake certain activities of a political nature as a means of achieving their charitable purposes, without falling foul of the rules. They can, therefore, contribute to public discussion, as long as it is on a basis which reflects their experience and it is in line with their objects. As is so often the case in charity law, there is no clear line of demarcation between what is and what is not allowed.

The 'rules' that do exist are gleaned from a study of the relevant case law. However, there is in fact very little case law on this subject, so that there is rarely direct guidance from the courts on the line to be drawn between activities by charities in a political context in pursuance of their objects which are permissible and those which encroach too far into the sphere of politics. Most of the decided cases dealing with charities and politics are concerned specifically with the objects rather than the activities of a charity.

There has often been confusion as to what activities are permissible for a charity, and, in some cases, there has been concern that charities have gone too far in engaging in political activities. Two recent examples, both concerning charities undertaking humanitarian work, provide evidence to support the view that often charities are forced into the political arena, through no direct action of their own.

First, it was reported, in October 1998,³ that the European Community Humanitarian Office (ECHO) in Brussels had threatened to curtail all humanitarian aid to the fundamentalist Taleban regime in Afghanistan. To implement its humanitarian aid programmes, ECHO works in partnership with non-governmental organisations (NGOs), the specialised agencies of the United Nations, and international bodies such as the International Committee of the Red Cross. The co-operation is formalised in a Framework Partnership Agreement and in 1997 over 170 NGOs had

² *Bowman v Secular Society Ltd* [1917] AC 406, at p.442 *per* Lord Parker. Discussed *post*.

³ *The Times*, 30th October 1998.

signed an agreement with the European Commission.⁴ They include large and small organisations, specialist and generalist, based in Member States and in third countries. ECHO has been a key donor of assistance to the humanitarian operations in Afghanistan. The Brussels move is seen as a political sanction against the Taleban because of its discriminatory treatment of Afghan women, forced to conform to strict Islamic dress codes and banned from work or school, and its refusal to work towards a negotiated settlement of civil war.⁵ The result is that the activities of around thirty agencies, including the charity, Sandy Gall's Afghanistan Appeal, founded by the former ITN broadcaster to help Afghan children crippled by disease and land-mines, may be put on hold. The reason for this is that the European Commission is withdrawing funding from these charities' projects in Afghanistan, rather than that it is attempting directly to prevent these charities from operating in their chosen area. However, the net effect may not be very different. This will deprive charities active in Afghanistan, including Sandy Gall's Afghanistan Appeal, which had funded around 70 field workers and support staff, of an important income stream. The public announcement may also damage the charity's credibility in the eyes of potential donors.

Secondly, in November 1998, it was reported⁶ that supporters of a charity, Iran Aid, were in dispute with the Charity Commission, in their attempt to protect the confidentiality of the charity's files. The charity was set up in 1983 to aid the victims of persecution in Iran by channelling humanitarian aid through a necessarily secret distribution network to the families of those who had been executed or imprisoned. The charity is viewed by the Iranian government as a front group for the MKO (Mojahedin-e Khalq Organisation) terrorists who call for the violent overthrow of the Iranian government. Anyone connected with the charity in Iran is classified as a *mohareb*, or dissident, liable to amputation, stoning or hanging. The charity has been the cause of concern to the Charity Commission before - in September 1996, it was prevented from fund-raising, following numerous complaints about its emotive methods.⁷ It was claimed that the collectors, many of whom were themselves Iranian refugees, used what many found to be intimidating and threatening methods to procure donations from members of the public. In March 1998, the Charity Commission received a further complaint that Iran Aid's money was being used for non-charitable purposes. The Charity Commission then instituted

4 *ECHO, Our Partners in the Field*, 1997, Brussels: European Commission.

5 See ECHO document 3/SDA D(98) *Note à l'attention de M Della Monica*, 26th November 1998, Brussels.

6 *NGO Finance* November 1998.

7 'Charity Commission, Iran Aid: Charity Commission Halts Fund-raising', 19th September 1996, Press Release 18/96.

an inquiry,⁸ and, since July 1998, Iran Aid has been administered by PricewaterhouseCoopers, appointed by the Charity Commission as receiver and manager.⁹ The Iranian government has since suggested that Iran Aid has been 'closed down by the British Government' as part of its campaign to promote friendly links and trade with Iran. The charity's supporters are suggesting victimisation due to a deal between the Iranian government and the Foreign Office to improve trade, linked to the recent lifting of the *fatwah* on the author Salman Rushdie. The Foreign Office has denied that it had any part in the affair, saying it is entirely a matter for the Charity Commission.

It is arguable that the work of both Sandy Gall's Afghanistan Appeal and Iran Aid is not political, but humanitarian, as are the motives of their donors. Yet, these two incidents show that external factors may intervene, at worst to 'politicise' the charity, and, at best, to leave it to tread a very fine line when it comes to operating in the political sphere.

The Charity Commission Guidelines

Following the Oxfam inquiry,¹⁰ the Charity Commission issued revised guidelines about the extent to which charities may involve themselves in political activities and campaigning. The latest version of these guidelines was produced in February 1997.¹¹ The guidelines cover a range of situations concerned with political activity and political campaigning, providing charities with advice, *inter alia*, upon influencing public opinion; supporting, opposing or promoting legislation; commenting on public issues; providing information; seeking support for government grants; involvement in demonstrations and direct action, and concluding with an examination of penalties.

It is required that any political activity undertaken by trustees must be in furtherance of and ancillary to the charity's stated objects and within its powers. To be ancillary, activities must serve and be subordinate to the charity's purposes. They cannot, therefore, be undertaken as an end in themselves and must not be allowed to dominate the activities by which the charity undertakes to carry out its charitable

⁸ Under Charities Act 1993 s.8.

⁹ Under Charities Act 1993 s.18.

¹⁰ Charity Commission, *OXFAM: Report of an Inquiry*, 1991, London: HMSO.

¹¹ Charity Commission, *Political Activities and Campaigning by Charities*, 1997, Leaflet CC9, London: TSO. See also, Charity Commission, *Political Activities and Campaigning by Local Community Charities*, 1997, Leaflet CC9(a), London: TSO.

purposes directly. The trustees must be able to show that there is a reasonable expectation that the activities will further the purposes of the charity effectively and so benefit the beneficiaries. For example, charities can make political statements, in the sense of seeking changes in the law, either when they are commenting on draft legislation within their field of operations, or when a change in the law would further their objectives. In this way, for example, the RSPCA can support a private members' bill¹² which would ban hunting with dogs without prejudicing its charitable status.¹³

The Charity Commission acknowledges that, provided that it is in pursuance of their primary charitable purpose, charities may properly enter into dialogue with government. Charities may publish the advice or view that they express to ministers. Charities may also seek to inform and educate the public on particular issues which are relevant to them and their purposes, including information about their experience of the needs in their field of activities and the solutions that they advocate. However, they must do so on the basis of a well-founded and reasoned case and their views must be expressed with a proper sense of proportion. The manner and content of any advocacy of or opposition to legislative or policy change must be appropriate to a charitable non-political organisation.

Political Activity and Freedom of Speech

The ability to participate in free political debate at election time is an essential ingredient of the democratic process. Indeed, an election campaign might seem the ideal opportunity for charities to speak out on major social issues. Yet, the Charity Commission guidelines include in the examples of the kinds of activities in which, in its view, charities should *not* engage, the following:

- A charity must not provide supporters or members of the public with material specifically designed to underpin a party political campaign or for or against a government or particular Members of Parliament;¹⁴
- A charity must not issue material which supports or opposes a particular political party or the government;¹⁵

12 Wild Mammals (Hunting with Dogs) Bill, withdrawn 2nd July 1998.

13 *Third Sector*, 22nd January 1998.

14 Charity Commission, 'Political Activities and Campaigning by Charities', 1997, Leaflet CC9, London: TSO, para.46.

15 *Ibid*, para.47.

- A charity must not undertake research for another body where it is clear that body intends to use the research for party political or propagandist purposes;¹⁶
- A charity must not support a political party;¹⁷ and,
- A charity must not seek to persuade members of the public to vote for or against a candidate or for or against a political party.¹⁸

So, charities must neither support a political party, nor seek to persuade members of the public to vote for or against a candidate or for or against a political party. It might be asked, why, at the point when the public are most engaged by political issues, should there be such tight limits on freedom of expression? However, it is not just charities that have been 'muzzled' at election time.

A recent decision of the European Court of Human Rights,¹⁹ concerned with the general restriction on campaigning during election times,²⁰ may ultimately help charities as well. It certainly brings to the fore the human rights dimension to the rule that limits charities in their political campaign activities.

In *Bowman v UK*,²¹ the European Court of Human Rights had to consider a challenge, based on Article 10 of the European Convention on Human Rights, to the £5 expenditure limit on issuing publications with the aim of promoting or procuring the election of a candidate during the six weeks prior to an election, imposed on a third party by section 75 of the Representation of the People Act 1983. Mrs Bowman was the executive director of the non-charitable Society for the Protection of the Unborn Child (SPUC), an organisation with about 50,000 members which is opposed to abortion and human embryo experimentation. In the period immediately prior to the 1992 General Election, Mrs Bowman arranged for the distribution in the constituency of Halifax, West Yorkshire, of 25,000 leaflets at a cost of £10,000. On

¹⁶ *Ibid*, para.54.

¹⁷ *Ibid*, para.41. 'Political party' includes any local, national or European political grouping (para.8).

¹⁸ *Ibid*, para.50.

¹⁹ *Bowman v UK* (1998) 26 EHRR 1.

²⁰ Representation of the People Act 1983 s.75.

²¹ (1998) 26 EHRR 1.

one side of the leaflet there was printed a series of 'facts'²² about the stages by which the human embryo develops in the womb; on the other side of the leaflet were printed the views of the three major party candidates who were contesting the Halifax seat on the issues of abortion and experimentation. Mrs Bowman was later charged with an offence under section 75 of the 1983 Act. The case was subsequently dropped as the summons had been issued outside the twelve month time limit.²³ The proceedings were nonetheless reported in the press and Mrs Bowman had been convicted and fined for similar offences during the 1979 Ilford North by-election and the European Parliament elections in 1982.

The initial application to the European Commission on Human Rights was brought jointly by Mrs Bowman and SPUC. Both applicants complained that the prosecution brought against Mrs Bowman violated their rights to freedom of expression under Article 10 of the Convention. In December 1995, the Commission declared the application admissible insofar as it concerned the complaint by Mrs Bowman under Article 10. However, finding that SPUC could not itself claim to be a victim by virtue of Mrs Bowman's prosecution, it declared the remainder of the application inadmissible.²⁴ In its report of 12th September 1996,²⁵ the Commission expressed the view that there had been a violation of Article 10.

The European Court of Human Rights, agreeing with the Commission, then held,²⁶ by fourteen votes to six, that there had been a violation of Article 10.²⁷ The £5 limit on third party expenditure was equivalent to a total ban and constituted an unjustifiable restriction on Mrs Bowman's right to freedom of expression. The majority acknowledged that the statutory restriction on expenditure contained in section 75 of the 1983 Act pursued the legitimate aim of protecting the rights of others, namely, the candidates for election and the electorate in Halifax. The majority had then to consider whether the restriction of freedom of expression was one which was 'necessary in a democratic society' and satisfied one of the interests

22 See, Millns, S and Sheldon, S, 'Delivering Democracy to Abortion Politics': *Bowman v UK* [1999] *Feminist Legal Studies*. Forthcoming.

23 Representation of the People Act 1983 s.176.

24 21 EHRR CD 79.

25 22 EHRR CD 13.

26 *Bowman v UK* (1998) 26 EHRR 1.

27 This was the first judgment to go against the UK since the Labour Government came into power in May 1997.

specified in Article 10(2) of the Convention. At this point, the majority made reference to the free election principle enshrined in Article 3 of the First Protocol to the Convention.²⁸ The judges observed that there may be circumstances in which the right to freedom of expression and the right to enjoy a free election may come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the 'free expression of the opinion of the people in the choice of the legislature'. In striking the balance between these two rights each State had a 'margin of appreciation', meaning thereby that each State is (within reasonable limits) entitled to adopt the solution which best suits its circumstances and traditions. However, the majority concluded that, because the restriction in section 75 was set as low as £5, in practical terms it operated as a total barrier on Mrs Bowman publishing information with a view to influencing the voters of Halifax in favour of an anti-abortion candidate. It was, therefore, out of proportion to the legitimate aim it sought to achieve. The restriction cut down Mrs Bowman's freedom of expression during the critical period when the minds of the voters were focused on their choice of representative.

The immediate effect of *Bowman* is that it is necessary for the United Kingdom legislature to amend section 75 of the 1983 Act so as to raise the limit on expenditure above £5.²⁹ The government asked Lord Neill's Committee on Standards in Public Life to examine the issue of electoral funding as part of its wider review of the funding of political parties. The Committee published its report in October 1998,³⁰ and recommended, *inter alia*, for consideration by the government that the amended figure to be inserted in section 75 should be of the order of £500. The Committee believes that this will provide an allowance sufficient to cover, for example, the production and distribution of a leaflet throughout a constituency or the publication of an advertisement in a local newspaper.

The Committee acknowledges that there is, of course, the problem that, if one third party can come into a constituency and spend up to £500 in seeking to secure the

28 This states: 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'

29 In the subsequent election of the Northern Ireland Assembly, the government raised the limit to £100 in New Northern Ireland Assembly (Elections) Order 1998, SI 1998 1287, Art.3, Sched.1.

30 Committee on Standards in Public Life, *5th Report of the Committee on Standards in Public Life. The Funding of Political Parties in the United Kingdom*, Vol. 1: Report, 1998, Cm. 4057-I. TSO: London.

defeat of a candidate, then a second third party or a third or fourth could do likewise. Cumulatively they could spend a significant proportion of the candidate's own spending limit of around £8,000, and, as was argued in *Bowman*, could force that candidate to devote part of his or her limited resources to rebutting the attacks made by the third parties. The Committee concluded that a judgment has to be made as to what is a reasonable limit to impose on a third party bearing in mind that the figure selected may well be the subject of challenge in the European Court of Human Rights, or, when the Human Rights Act 1998 comes into force, in the domestic courts.

Charities Coping with the Current Regime

Different charities interpret the current electioneering laws, together with the general restrictions on charities and political campaign activities, in different ways. The reactions of three different charities during the 1997 UK General Election campaign period provide evidence of the variety of experiences.³¹ First, Shelter, frustrated at the fact that homelessness was not on the agenda in the 1997 election, decided to call a halt to political campaigning during the election. Secondly, NCH Action for Children, which launched its House Our Youth 2000 campaign just before the election was called, distributed posters for people to put in their windows, saying: 'My policy is to support House Our Youth 2000; What's yours?' The charity considered that because the campaign was launched before the election was called, the posters were part of a campaign, and not against the law. Thirdly, reflecting a middle ground, Age Concern decided that unless its views were sought by journalists during the election campaign, it would stay quiet. Before the 1997 General Election, a spokesperson for Age Concern commented:³²

"If we are asked for a comment on a Labour Party candidate's support for an end to age discrimination, we would have to say something vague, like: 'We are pleased to get support for these proposals which we put forward.'"

The Effect of the *Bowman* Decision on Charities

What are the implications of the *Bowman* judgment as regards the general restrictions placed on charities in their political activity? Would the European Court of Human Rights, or a domestic court after the Human Rights Act 1998 comes into

³¹ *The Observer*, 27th April 1997.

³² *The Observer*, 27th April 1997.

force, strike down a Charity Commission ruling restricting a charity's political campaign activity, on the ground that it constituted an infringement of the right to freedom of expression, enshrined in Article 10 of the Convention? The question is one of law which may one day have to be authoritatively answered by a court, and definitive answers cannot be given at this stage. It is suggested that there would be powerful arguments for upholding the Charity Commission's current practice, as laid down in their guidance leaflet.³³ The language of Article 10 of the Convention is quite different from the free speech right laid down in the First Amendment to the United States Constitution, which has been given an absolutist interpretation.³⁴ As the majority judgment in *Bowman* emphasises, what is, on the face of it, an objectionable fetter on freedom of expression under Article 10(1) of the Convention, may be justifiable on the facts by reference to the more flexible standards introduced by Article 10(2). For example, the free election principle introduced by the First Protocol to the Convention may allow a Contracting State, utilising its margin of appreciation, to impose reasonable restrictions on freedom of expression.

In relation to election campaigns, a State may legitimately take the view that it needs to protect voters from being subjected to overwhelming propaganda by a charitable organisation which has superior financial advantage due to its tax efficient status.³⁵ There are indications in the *Bowman* judgment, that the European Court of Human Rights would be sympathetic to the 'level playing field' argument. In the joint partly dissenting opinion of Judges Loizou, Baka and Jambrek (who held that the spending limit was not disproportionate) it was stated:

"There can be no doubt that limits on election campaign spending maintain equality of arms as between candidates, a most important principle in democratic societies and in the electoral process."³⁶

It is suggested that this 'equality of arms' argument could be used to prevent

33 Charity Commission, 'Political Activities and Campaigning by Charities', 1997, Leaflet CC9, London: TSO.

34 See, for example, the leading case of *Buckley v Valeo* 424 US 1 (1976) which successfully challenged the limitations in the Federal Election Campaigns Act 1971 on election campaign expenditure.

35 The key elements include, in defined circumstances, exemptions for charities from: income tax (Income and Corporation Taxes Act 1988 ss.505 and 506); corporation tax (Income and Corporation Taxes Act 1988 s.9(4)); capital gains tax (Chargeable Gains Act 1992 ss.256(1) and 257); and stamp duty (Finance Act 1982 s.129). Tax incentives are also offered to charitable donors.

36 *Bowman v UK* (1998) 26 EHRR 1, at p.23.

charities engaging fully in the political process. However, a recent critic of the argument that charities' political activities should be restricted because they receive public monies and that there is no way of knowing which campaigns taxpayers support and which they do not, answered:³⁷

“This argument does not bear scrutiny. Commercial enterprises receive subsidies from the Treasury, and these same enterprises are free to engage in the political process whether or not taxpayers support the views expressed, or the ways in which they are expressed.”

Charities and Political Purposes

The slightly less controversial rule that charities cannot have a political purpose may be open to challenge once ‘human rights’ jurisprudence becomes enshrined in our courts, due to the incorporation of the Convention. The most commonly stated rationale for the general rule in English law that a charity cannot have a political purpose is that English judges are unable to determine whether or not a political purpose would be for the public benefit. As Lord Parker said in *Bowman v Secular Society Ltd.*:³⁸

“[A] trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.”

Slade J went further in the case of *McGovern v A-G*,³⁹ which determined that

³⁷ Birt, E, ‘Charities and Political Activity: Time to Re-think the Rules’ [1998] *The Political Quarterly* 23, at p.27.

³⁸ [1917] AC 406, at p. 442 *per* Lord Parker.

³⁹ [1982] Ch 321

Amnesty International⁴⁰ did not have charitable status, and said:⁴¹

“[E]ven if the evidence suffices to enable [the court] to form a prima facie opinion that a change in the law is desirable, it must still decide the case on the principle that the law is right as it stands, since to do otherwise would usurp the functions of the legislature.”

Such questions are for political debate and parliamentary determination. The judiciary has always felt the need to remain politically neutral. There is an assumption that proposed changes in the law are intrinsically a matter of choice of values and that this choice belongs to the appointed sovereign legislator alone. As early as 1983, this view was being challenged:⁴²

“It may be asked whether the preservation of public confidence in the independence and political impartiality of the judiciary can only be and is only maintained by adherence to the principle ‘that the law is right as it stands’.”

When the Human Rights Act 1998 comes into force, judges will often be considering whether ‘the law is right as it stands’. First, the courts will be directed to interpret all legislation as being consistent with the Convention so far as is possible. Where this is truly impossible, the higher courts will be given a unique competence to declare a provision of an Act of Parliament incompatible with the Convention.⁴³ This will allow Parliament to amend incompatible legislation through a ‘fast-track’ procedure. Secondly, and perhaps more fundamentally, public authorities will be placed under an obligation to act in a way that does not violate Convention rights. Someone whose rights are violated by a public authority will be able to take action and the courts will have wide powers to order relief, including damages.⁴⁴ Judges

⁴⁰ Amnesty seeks the release of prisoners of conscience all over the world. It defends the rights of people regardless of their political beliefs, provided only that they have not used or advocated violence. It works for fair and prompt trials for all political prisoners. It campaigns to abolish the death penalty, torture, and other cruel, inhuman and degrading treatment or punishment. It is concerned to end extra-judicial executions and ‘disappearances’.

⁴¹ [1982] Ch 321, at p.337 *per* Slade J.

⁴² Weiss, F, ‘*Quot Homines Tot Sententi*’ or Universal Human Rights: A Propos *McGovern v The Attorney-General* [1983] MLR 385, at p.390.

⁴³ Human Rights Act 1998 ss.3-5.

⁴⁴ Human Rights Act 1998 ss.6-8.

will thus be called upon to determine whether individuals' fundamental human rights have been infringed by a public authority. This will force the judiciary to be concerned with decisions on the morality of the conduct and not simply its compliance with the bare letter of the law. In the words of the Lord Chancellor, the coming into force of the Human Rights Act 1998 will:⁴⁵

“create a more explicitly moral approach to decisions and decision-making; will promote both a culture where positive rights and liberties become the focus and concern of legislators, administrators and judges alike; and a culture in judicial decision-making where there will be a greater concentration on substance rather than form.”

Even before the coming into force of the Human Rights Act 1998, in 1997, whilst commenting on the unsuccessful application for judicial review⁴⁶ of the decision of the Radio Authority to prohibit Amnesty International from broadcasting its advertisements publicising the plight of the people in Rwanda and Burundi,⁴⁷ Stevens and Feldman strongly criticised the current rules concerning charitable status and political objects:⁴⁸

“Those cases which established that charitable status could not extend to purposes which are political belong to an earlier social era. The fundamental objection to according such status, namely that the law is incapable of judging whether a change in the law or government policy is good or bad, is plainly spurious. In a relativistic age and a mature democracy the law should be able to uphold as charitable objects which are diametrically opposed to each other, provided that they are for the ‘public benefit’ in the view of a sizeable body of adherents.”

In the context of charities, a recognition that the law evolves and changes may explain the suggestion in a recent decision of the Supreme Court of New South

⁴⁵ Lord Chancellor, ‘The Development Of Human Rights In Britain Under An Incorporated Convention On Human Rights’, Tom Sargant Memorial Lecture, 16th December 1997.

⁴⁶ *R v Radio Authority, ex. p. Bull* [1997] 2 All ER 561.

⁴⁷ See, Morris, D, ‘The Media and the Message: An Evaluation of Advertising by Charities and an Examination of the Regulatory Frameworks’ [1996] 3 *Charity Law & Practice Review* 157.

⁴⁸ Stevens, J and Feldman, D, ‘Broadcasting Advertisements by Bodies with Political Objects, Judicial Review, and the Influence of Charities Law’ [1997] *Public Law* 615, at p.622.

Wales⁴⁹ that a trust may survive in Australia as a charity, where the object is to introduce a new law consistent with the way that the current law is tending. The case concerned the objects of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders. Santow J⁵⁰ drew a distinction between trusts for purposes which are 'contrary to the established policy of the law' which 'automatically fail' and trusts whose object is to 'introduce new law consistent with the way the law is tending' which 'may survive in Australia as charitable'. He suggested⁵¹ that a trust with 'a modest agenda for legislative change' might be charitable where 'the change is to promote anti-discrimination legislation conforming to the trend in legislative policy and reinforced by norms of international law'. The judge referred to the UK, where, he said, there are signs in the area of race relations of greater willingness to allow charitable trusts to have objects directed at the removal of discrimination simply because the law has sufficiently evolved in that direction.⁵²

However, this Australian decision has to be balanced against the more recent English decision in *Southwood v AG*⁵³ which adopted the traditional approach by holding that an organisation, Project on Demilitarisation ('Prodem'), whose purpose was 'the advancement of the education of the public in the subject of militarism and disarmament' was not charitable. Carnwath J held that, once it was ascertained that the trust deed establishing Prodem was ambiguous, the Charity Commission was correct to look at the background material,⁵⁴ including the activities of the promoters of the trust. Whilst not denying that education as to the benefits of peace and as to peaceful methods of resolving international disputes could be charitable, it was held that, looking at the promoters' activities, one of the purposes of Prodem was to challenge the current policies of the Western governments relating to military security, and that this was a political purpose.

49 *Public Trustee v A-G for New South Wales* (1997) 42 NSWLR 600.

50 At pp.607-608.

51 At p.619.

52 See, for example, Charity Commission, *Annual Report* 1983, 1984, London: HMSO, paras 15-20.

53 *The Times*, 26th October 1998.

54 Carnwath J cited *Council of Law Reporting v A-G* [1972] 1 Ch 73 at p.91 and *A-G v Ross* [1986] 1 WLR 252 at p.263 in order to support this view.

Conclusion

There are two restrictions for charities in their relationship with politics. First, and most important, a charity cannot have a political purpose. The *Prodem* case is the most recent example of this rule in operation. Secondly, charities may engage in political activity, but only as an ancillary action in order to support their charitable purposes. This rule is more difficult to apply in practice and is where many charities have erred in the past. Two recent incidents involving English charities and International politics have been examined in order to highlight the potential problems associated with this rule.

The *Bowman* decision in the European Court of Human Rights shows that there are limitations to the restrictions that can be imposed on political action. It has been suggested that charities may attempt to rely on a similar argument in the future to challenge the restrictions placed upon them.

The new thinking to be brought in to English jurisprudence, following the implementation of the Human Rights Act 1998, may lead to judges using different criteria in their decision making in the future. For example, in twenty years' time, the judgment in a case like *Prodem* may involve a consideration of whether, in fact, the 'militarism' of the Western governments *is* in the public's interest or whether it would be for the public benefit, and therefore charitable, to challenge those policies. If a future court were to decide that political purposes *per se* were not a bar to charitable status, would this then mean that any restrictions on existing charities embarking on political activity would also be removed? Whilst the two sets of 'rules' are related, it does not necessarily follow that the lifting of the blanket ban on political purposes would give charities *carte blanche* to engage in the political arena without limitation. The two rules have separate rationales - it may appear easier to remove the total ban on political purposes than to ease up the rules on political activities. However, it has been suggested in this piece that both areas may be open to challenge, with the aid of the Human Rights Act 1998. Further developments are awaited with interest.