

## CHARITIES, CAMPAIGNING AND CRIME

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### A. Introduction

The 2004 revision of the Charity Commission's guidance on political activities and campaigning<sup>2</sup> was intended to demonstrate a less prohibitive approach to charitable campaigning, following recommendations made by the Cabinet Office's Strategy Unit that it should be 'less cautionary'.<sup>3</sup> Evaluations of the success of the guidance in achieving this aim tend to focus on its explanation of restrictions on political campaigning based on charitable status,<sup>4</sup> and its merits on this front are a matter of ongoing discussion within the sector.<sup>5</sup>

Aside from constraints which are imposed on the basis of charitable status, numerous legal constraints are applicable to various types of campaigning activity.<sup>6</sup> One area of campaigning activity which attracts numerous legal restrictions is

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<sup>2</sup> Charity Commission, *Campaigning and Political Activities by Charities* (CC9), 2004.

<sup>3</sup> Cabinet Office Strategy Unit, *Private Action, Public Benefit*, 2002.

<sup>4</sup> See, for example, survey on the effectiveness of CC9 conducted by nfpSynergy for the Sheila McKechnie Foundation and People & Planet, May 2006. Available from [www.nfpsynergy.net](http://www.nfpsynergy.net) by request.

<sup>5</sup> For example, see *Third Sector* magazine, 5th May 2004, p.2.

<sup>6</sup> Examples of areas which are excluded from the focus of this article include broadcasting, defamation and electoral law.

campaigning through demonstrations<sup>7</sup> or direct action.<sup>8</sup> It is notable that many of the particular legal provisions which constrain this area are more restrictive than those imposed by charity law, both in terms of the actions they restrict and in terms of the criminal liability resulting from their contravention.

The criminal nature of the above restrictions obviously means that the direct consequences of their contravention fall on individuals. Whilst this is obviously undesirable for individuals themselves, the commission of criminal offences by individuals acting as representatives of a charity may additionally result in negative repercussions for the charity itself.<sup>9</sup>

The potential repercussions of such activities for charities, coupled with the recent increases in the number and scope of offences which criminalize certain forms of protest, results in the need for charities to approach protest activities with great caution and full awareness of their implications. However, despite these developments, the current version of Charity Commission guidance CC9<sup>10</sup> contains minimal coverage of these offences and their potential consequences. At the same time, campaigning by charities is in the limelight and is being publicly encouraged from several quarters, most noticeably by the new third sector minister Ed Miliband.<sup>11</sup> This leaves the question of legitimate protest by charities and other voluntary organizations in a somewhat confused state.

In the light of the above developments, the main purpose of this article is to map some of the current legal influences on the abilities and inclinations of charities to engage in demonstrations or direct action. The initial aim is to consider some of the circumstances in which campaigning activities by charities in the form of 'demonstrations' or 'direct action' may attract criminal liability if charities fail to ensure their representatives restrict their activities. The focus is four broad 'direct action' campaigning methods. The first method discussed is public demonstrations, which for reasons explained below, will be examined in terms of both non-peaceful and peaceful protests. The second method addressed is invading private

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7 Defined as 'a public meeting or march protesting against something or expressing views on a political issue', *Oxford Dictionary of English*, 2003.

8 Defined as 'the use of strikes, demonstrations, or other public forms of protest rather than negotiation to achieve one's demands', *Oxford Dictionary of English*, 2003.

9 Whilst the discussion here is limited to the effects on registered charities of the commission of criminal offences by individuals, it should be noted that some of the effects may also be applicable to non-charitable voluntary sector organisations.

10 Charity Commission, *Campaigning and Political Activities by Charities (CC9)*, 2004.

11 For example, addressing the Britain's Most Admired Charity Awards ceremony, as reported in *Third Sector* magazine, 6th December 2006.

property. This will necessarily focus on offences relating to trespassory assemblies, aggravated trespass,<sup>12</sup> and trespass on designated sites. The third campaigning method discussed is the targeting of specific individuals or groups for pressure or persuasion. This will focus on offences relating to harassment and interference with the contractual relationships of certain organizations. The final method discussed is campaigning publications or speeches, which may (rarely) attract liability for terrorism-related offences or offences related to racial and religious hatred.<sup>13</sup> Whilst some of the more confrontational campaigning activities covered by these offences are unlikely to be engaged in by representatives of registered charities, given the need of such organizations to protect their public image, they remain a possibility, and are thus discussed alongside more benign activities.

It is notable that whilst the criminalization of the more confrontational and aggressive campaigning techniques covered here is easy to justify, some offences criminalize arguably legitimate campaigning activities. In some instances, the relevant legislation does this intentionally. In others, it is capable of being used in ways perverse to apparent Parliamentary intention. For this reason, any discussion of the impact of such laws must acknowledge the effect of this arguable encroachment on legitimate campaigning activities. Whilst a detailed discussion of human rights law is outside the scope of this article, current criticisms leveled at the provisions considered often make reference to human rights principles. These criticisms are discussed where relevant.

The second aim of the article is to discuss the potential repercussions for charitable bodies of the commission of such criminal offences by their representatives. The final aim is to draw conclusions on the overall effects of the provisions discussed – particularly the recent developments – on the abilities and inclinations of charities to engage in demonstrations and direct action. The dangers of currently conflicting messages on charitable campaigning activities are also considered, as are potential future developments.

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12 This offence could also be categorized under the campaigning third method discussed in this article, that of targeting individuals, groups or organisations, but for clarity will be discussed in relation to its trespassory element.

13 As the focus of the article is criminal liability, the potential for civil claims for defamation resulting from publications or speeches will not be addressed here. Violent and destructive offences of more general application (such as criminal damage and offences against the person) are also outside the remit of this piece, as are possible defences to the various offences considered.

## **B. Public demonstrations**

Whilst campaigning which is violent and destructive should obviously not be planned or conducted by charities, it is possible for participants in initially peaceful protests (including representatives of charities) to be implicated in crimes against public order where the nature of an assembly changes. An example of such a scenario is the anti-capitalist protest in London in May 2000,<sup>14</sup> which began peacefully but ended in injuries to police, damage to a fast-food restaurant and defacement of war memorials. For this reason, both offences which may be committed by those who find themselves involved in violent and non-peaceful protests and offences committable through peaceful demonstrations will be discussed in turn below.

### *Violent and non-peaceful public demonstrations*

Violent<sup>15</sup> and non-peaceful forms of protest have long attracted criminal liability for any of a range of public order offences contained in the Public Order Act (POA) 1986. Offences (and their penalties) range in seriousness from riot,<sup>16</sup> through violent disorder,<sup>17</sup> affray,<sup>18</sup> causing fear or provocation of

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<sup>14</sup> *The Guardian*, 2nd May 2000.

<sup>15</sup> As defined by Public Order Act 1986, s.8. References to section numbers below are to the POA 1986 unless otherwise stated.

<sup>16</sup> Under s.1, the offence of riot is committed by each of the persons involved where twelve or more persons who are present together use or threaten unlawful violence for a common purpose, and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.

<sup>17</sup> Under s.2, the offence of violent disorder is committed by each of the persons involved where three or more persons who are present together use or threaten unlawful violence and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for their personal safety.

<sup>18</sup> Under s.3, the offence of affray is committed by using or threatening unlawful violence towards another, where conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety. Relevant conduct of two or more persons is taken together for the purposes of the offence. Words alone cannot amount to affray. For the purposes of the offences in ss. 1-3, no person of 'reasonable firmness' need either be, or be likely to be present at the scene (ss. 1(4), 2(3), 3(4)). This raises the difficult questions of how a person 'of reasonable firmness' should be defined, and of how (in the event that no such person is present) the court should make the hypothetical assessment of their reaction.

violence<sup>19</sup> to causing harassment, alarm or distress.<sup>20</sup> These offences are long-established, and there is little to criticize in the present context, other than the possibility that – particularly given the increases in general police powers discussed below – they may be used to control protest itself rather than the violence or disorder that they are intended to prevent. In addition to increases in specific police powers, the police have common law powers to take reasonable steps (including arrest) to stop an actual or imminent breach of the peace.<sup>21</sup> The wide potential use of these powers in the context of protests is illustrated by the case of *R (Laporte) v Chief Constable of Gloucestershire Constabulary*,<sup>22</sup> in which the police, relying on their powers to prevent an imminent breach of the peace, intercepted coach passengers travelling from London to Gloucestershire to attend a protest demonstration. Whilst the House of Lords held that the police had acted unlawfully in the circumstances, the case illustrates that drawing the line between protest which unacceptably infringes the rights of others, and protest which causes an acceptable level of inconvenience to others as the price for protestors' freedom of expression is inevitably difficult.

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19 Under s.4, the offence of causing fear or provocation of violence is committed where a person uses towards another person threatening, abusive or insulting words or behaviour, or distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting. The offence is committed either: where the above action is performed with intent to cause that person to believe that immediate unlawful violence will be used against him or another; or where the person is likely to believe that such violence will be used against him or another; or to provoke the immediate use of unlawful violence by that person or another; or if the person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

20 Under s.5, it is an offence to use threatening, abusive or insulting words or behaviour, or disorderly behaviour, or displaying any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby. A new section 4A was inserted into the Public Order Act 1986 by the Criminal Justice and Public Order Act 1994, making it an offence for a person, with intent to cause another person harassment, alarm or distress, to use threatening, abusive or insulting words or behaviour, or disorderly behaviour, or to display any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress. Whilst these two offences appear very similar, there are differences in both the *actus reus* and the *mens rea*. The section 5 offence requires that harassment, alarm or distress must be *likely* to result, whereas the section 4A offence requires that these outcomes must *actually* have been caused. The section 4A offence also requires intention to cause the harassment, alarm or distress.

21 Whilst the case law provides little clear authority on what constitutes such a breach, see *R v Howell* [1982] QB 416 at 427 per Watkins LJ for the following currently accepted definition: '... there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance'.

22 (2006) Times, 14th December, [2006] All ER (D) 172 (Dec).

A more controversial development in the context of violent or destructive protests is the potential use of offences aimed at terrorist activities. The Terrorism Act 2000<sup>23</sup> defines 'terrorism' as: 'the use or threat of action where the use or threat is designed to influence the government or an international governmental organization or to intimidate the public or a section of the public, where the use or threat is made for the purpose of advancing a political, religious or ideological cause'. The 'action' referred to must also either: involve serious violence against a person or serious damage to property; endanger the life of a person other than the life of the person committing the action; create a serious risk to the health or safety of the public or a section of the public; or be designed to seriously interfere with or seriously disrupt an electronic system.<sup>24</sup>

The broad range of conditions set out above and the extension of the definition to religious or ideological causes could quite clearly cover a variety of protest activities at which the Act was not directed, such as the initially-peaceful anti-capitalist demonstrations discussed earlier. Moving away from public demonstrations temporarily in order to illustrate the wide-reaching nature of the definition, Stone<sup>25</sup> provides the example of an animal welfare group 'hack[ing] into the DEFRA web site to replace the Department's material with messages protesting about the treatment of farm animals and government policy'. Stone identifies that such activity may fall within the definition of terrorism, and argues that whilst it should undoubtedly be criminalized, 'the Computer Misuse Act 1990 would surely provide a more appropriate approach than the Terrorism Act 2000'. The point to be made here is that the potential use of terrorism-related offences should be a particularly important consideration for charities, given the great importance afforded to the protection of their individual and collective reputation<sup>26</sup> and the potentially devastating effect of being publicly associated with 'terrorism' rather than with other types of offence. The broader implications for charities of the importance afforded to the protection of reputation will be discussed further below.

### *Peaceful public demonstrations*

Violent and destructive protests aside, many charities engage in peaceful public demonstrations in furtherance of their charitable objects. A notable recent example

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<sup>23</sup> S.1(1), (as amended by the Terrorism Act 2006, s.34(a)). A previous definition was contained in the Prevention of Terrorism (Temporary Provisions) Act 1989, s.20.

<sup>24</sup> S.1(2).

<sup>25</sup> *Civil Liberties and Human Rights* (6th edn) Oxford University Press, 2006, p.213.

<sup>26</sup> See, for example, Charity Commission, *Campaigning and Political Activities by Charities* (CC9), 2004. paras. 26, 28-30, 37, 39.

of this was the ‘Make Poverty History’ mass procession in Edinburgh in July 2005, which was visibly attended by many charities.<sup>27</sup> Nevertheless, charity representatives who organize or participate in peaceful demonstrations can potentially find themselves criminally liable for offences relating to the organization and conduct of processions and assemblies.

The POA 1986<sup>28</sup> provides that organizers of most public processions must provide advance written notice of the proposal to hold a procession which is intended to either demonstrate support for or opposition to the views or actions of any person or body of persons, to publicize a cause or campaign, or to mark or commemorate an event.<sup>29</sup> The notice must specify the date when it is intended to hold the procession, the time when it is intended to start, its proposed route, and the name and address of the organizer(s).<sup>30</sup> It must be delivered to a police station in the police area in which it is proposed the procession will start,<sup>31</sup> usually six days before the event.<sup>32</sup>

An organizer of a public procession who either fails to satisfy the notice requirements, or fails to ensure the procession adheres to the date, time and route specified in the notice will be guilty of an offence.<sup>33</sup> However, it is a defence for the organizer to prove that he did not know of, and neither suspected nor had reason to suspect the failure to satisfy the requirements or the difference in date, time or route.<sup>34</sup> Where there has been a difference in date, time or route, it is also a defence for the organizer to prove that this arose from circumstances beyond his control, or from something done with the agreement or by the direction of a police officer.<sup>35</sup>

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27 *The Guardian*, 2nd July 2005.

28 S.11(1).

29 Exceptions under s.11(2) are where a procession is customarily held in the area or is a funeral procession.

30 S.11(3).

31 S.11(4).

32 S.11(5) and (6).

33 S.11(7). Under s.11(10), they will be liable on summary conviction to a fine not exceeding level 3 on the standard scale.

34 S.11(8).

35 S. 11(9).

The POA 1986 further allows senior police officers to impose conditions on public processions in certain circumstances.<sup>36</sup> An organizer of a public procession who knowingly fails to comply with such conditions will be guilty of an offence, although it is a defence for him to prove that the failure arose from circumstances beyond his control.<sup>37</sup> An identical offence exists in relation to participants in such a procession,<sup>38</sup> although a person guilty of this offence is liable for a lesser penalty.<sup>39</sup> A chief police officer may also apply to the council of a district for an order prohibiting all or a particular class of public processions for a specified period not exceeding 3 months, if he reasonably believes that the powers under section 12 (discussed above) will not be sufficient to prevent public processions from resulting in serious public disorder.<sup>40</sup> It is also an offence to organize,<sup>41</sup> participate

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<sup>36</sup> S.12(1). The circumstances are if they reasonably believe that it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or that the purpose of the persons organizing it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do.

<sup>37</sup> S.12(4). Under s.12(8), (as amended by the Criminal Justice Act 2003, s.280(2), (3), Sch 26, para 37(1), (2)(a)), a person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding 51 weeks or a fine not exceeding level 4 on the standard scale, or both.

<sup>38</sup> S.12(5). Additionally, under s.12(6), an offence is committed by a person who incites another to commit an offence under subsection (5). Under subsection (10), (as amended by the Criminal Justice Act 2003, s.280(2), (3), Sch 26, para 37(1), (2)(b)), such a person is liable on summary conviction to imprisonment for a term not exceeding 51 weeks, or a fine not exceeding level 4 on the standard scale or both.

<sup>39</sup> On summary conviction, to a fine not exceeding level 3 on the standard scale (s.12(9)).

<sup>40</sup> S.13(1). Under subsection (2), a council, on receiving such an application, may with the consent of the Secretary of State make an appropriate order. Subsection (1) does not apply in the City of London or the metropolitan police district, where, under subsection (4), the Commissioner of Police for the City of London or the Commissioner of Police of the Metropolis respectively have powers to apply directly to the Secretary of State for such an order.

<sup>41</sup> S.13(7). Under subsection (11), (as amended the Criminal Justice Act 2003, s. 280(2), (3), Sch 26, para 37(1), (3)(a)), a person guilty of this offence is liable on summary conviction to imprisonment for a term not exceeding 51 weeks or a fine not exceeding level 4 on the standard scale, or both.

in,<sup>42</sup> or incite another to participate in<sup>43</sup> a public procession whilst knowing it is prohibited. With regard to the position of charities, it could be considered unlikely that a peaceful demonstration organized by a charity would attract the imposition of conditions or bans by the police on the grounds of serious public disorder. Nevertheless, charities must avoid assuming that because their planned demonstrations are peaceful, they are also legal. Even if conditions or bans are not imposed, contravention of the advance notice requirement may result in prosecution. Whilst use of the statutory defences discussed above may be possible, criminal prosecution of a charity's representatives - even prosecution resulting in acquittal - may be problematic for a charity, as discussed later.

With regard to public assemblies,<sup>44</sup> rather than processions,<sup>45</sup> the POA 1986 allows a senior police officer, in certain circumstances, to impose conditions on public assemblies relating to the place at which assemblies may be held, their maximum duration, or the maximum number of persons who may participate.<sup>46</sup> It is an offence to organize<sup>47</sup> or participate in<sup>48</sup> a public assembly and knowingly fail to comply with such a condition, or to incite another to participate in such an

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42 S.13(8). Under subsection (12), a person guilty of this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

43 S.13(9). Under subsection (13), (as amended by the Criminal Justice Act 2003, s.280(2), (3), Sch 26 ,para 37(1), (3)(b)), a person guilty of this offence is liable on summary conviction to imprisonment for a term not exceeding 51 weeks, or a fine not exceeding level 4 on the standard scale, or both.

44 Defined by s.16 of the Act.

45 Processions are not defined in the Act.

46 S.14(1). The specified circumstances are that he reasonably believes that it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or that the purpose of the persons organising the assembly is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do.

47 S.14(4). Under subsection (8), (as amended by the Criminal Justice Act 2003, s.280(2), (3), Sch 26, para 37(1), (4)(a)), a person guilty of this offence is liable on summary conviction to imprisonment for a term not exceeding 51 weeks or a fine not exceeding level 4 on the standard scale, or both.

48 S.14(5). Under subsection (9), a person guilty of this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

assembly,<sup>49</sup> although it is a defence to the first two of these offences to prove that the failure arose from circumstances beyond the defendant's control.

For the purposes of the above provisions, 'public assembly' was originally defined<sup>50</sup> as a group of twenty or more persons. However, since the Antisocial Behaviour Act (ASBA) 2003<sup>51</sup> reduced the number of people required to form an "assembly" from twenty to two, the potential restrictions on demonstrations and other public meetings is obviously greatly increased. Further, the ASBA 2003 supplements the provisions relating to processions and assemblies with specific police powers, enabling them to order dispersal of groups if participants do not comply with section 11 of the POA 1986, in certain conditions.<sup>52</sup> In respect of charities, those which are unaware of these provisions and the recent changes to them may not consider that two representatives staging a peaceful protest in a public place may attract criminal penalties, with the attendant consequences, discussed below, for both the representatives and the charity itself.

Of greater concern for charities is the fact that the scope of criminal liability for public demonstrations has broadened in recent years to cover a number of specific activities and to increase police control. The most controversial example of this is contained in the Serious Organised Crime and Police Act (SOCPA) 2005,<sup>53</sup> which enables the Home Secretary to designate an area in which demonstrations can be restricted, within a 1km radius of Parliament Square.<sup>54</sup> It is an offence to

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49 S.14(6). Under subsection (10), (as amended by the Criminal Justice Act 2003, s.280(2), (3), Sch 26, para 37(1), (4)(b)), a person guilty of this offence is liable on summary conviction to imprisonment for a term not exceeding 51 weeks or a fine not exceeding level 4 on the standard scale, or both.

50 By Public Order Act 1986, s.16.

51 S.57 ASBA.

52 S.30 ASBA. Where a relevant officer has reasonable grounds for believing that any member(s) of the public have been or are likely to be intimidated, harassed, alarmed or distressed as a result of the presence or behaviour of groups of two or more persons in public places, and that anti-social behaviour is a significant and persistent problem in the relevant locality, the relevant officer may give an authorization conferring powers on a constable in uniform for a specified period not exceeding 6 months. This will enable a constable to give directions requiring the persons in the group to disperse, requiring persons whose place of residence is not within the relevant locality to leave it, or prohibiting persons whose place of residence is not within the relevant locality from returning to it for up to 24 hours.

53 Ss. 132-138 SOCPA.

54 S.138 SOCPA.

organize,<sup>55</sup> participate in,<sup>56</sup> or carry on<sup>57</sup> a demonstration<sup>58</sup> in the above designated area if authorization<sup>59</sup> has not been given when the demonstration starts.<sup>60</sup> The wording of the provision deliberately includes an existing one-person demonstration, and it is widely accepted that this was aimed at Mr Brian Haw, a lone protestor who has maintained a presence outside Parliament since 2001 in protest against British foreign policy in Iraq.<sup>61</sup>

The particular provisions of the SOCPA 2005 referred to above have been widely criticized on a number of bases. These include the retrospective criminalization of Mr Haw<sup>62</sup> and the reasons for imposing the restrictions,<sup>63</sup> which some commentators feel place the (arguably questionable) ‘aesthetic and environmental’ value of Parliament Square above the freedom of expression of individuals. The prescribed notice period required to gain authorization, which is usually six days

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55 S.132(1)(a) SOCPA. Under s.136(1) a person guilty of this offence is liable on summary conviction to imprisonment for a term not exceeding 51 weeks, to a fine not exceeding level 4 on the standard scale, or to both. Incitement to this offence is also an offence under s.136(4), liable on summary conviction to imprisonment for a term not exceeding 51 weeks, to a fine not exceeding level 4 on the standard scale, or to both.

56 Section 132(1)(b) SOCPA. Under s.136(2) a person guilty of this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale. Incitement to this offence is also an offence under s.136(4), liable on summary conviction to imprisonment for a term not exceeding 51 weeks, to a fine not exceeding level 4 on the standard scale, or to both.

57 S.132(1)(c) SOCPA. Under s.136(2) a person guilty of this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale. Incitement to this offence is also an offence under s.136(4), liable on summary conviction to imprisonment for a term not exceeding 51 weeks, to a fine not exceeding level 4 on the standard scale, or to both.

58 Under s.132(3) SOCPA, the offences under s.132(1) do not apply to public processions covered by ss. 11, 12 or 13 of the Public Order Act 1986, discussed above. Certain lawful trade union conduct is also excluded under subsection (4).

59 Under s.134(2) SOCPA. Obtaining authorization will require demonstrators to provide notice containing particular details, prescribed in s.133.

60 But it is a defence, under s.132(2) SOCPA, for the accused to show that he reasonably believed authorization had been given.

61 See Third Report of the House of Commons Select Committee on Procedure, 2002-3 Session (HC 855) and “For as long as it takes”, Brian Haw, *Third Sector* magazine, 31 January 2007.

62 See *R (Haw) v Secretary of State for the Home Department and Commissioner of Police of the Metropolis* [2006] EWCA Civ 532, [2006] Police Law Reports 79.

63 See Third Report of the House of Commons Select Committee on Procedure, 2002-3 Session (HC 855).

but is at least 24 hours,<sup>64</sup> has also been criticized by the Sheila McKechnie Foundation for preventing campaigns from mobilizing at short notice, in response for example to a news, parliamentary or procedural development.<sup>65</sup>

The Commissioner of the Metropolitan Police is obliged under the SOCPA 2005 to authorize such demonstrations,<sup>66</sup> if the notice requirements contained in section 133 are complied with,<sup>67</sup> but has powers, in specified circumstances,<sup>68</sup> to place a variety of conditions on them. These include limitations on place, time, duration, number of participants, size of placards and noise levels.<sup>69</sup> It is an offence for an organizer or participant to knowingly fail to comply with such conditions or contravene the particulars of the demonstration set out in the authorization.<sup>70</sup> The Act also creates several additional powers for senior police officers present at such demonstrations to vary or impose additional conditions,<sup>71</sup> and creates an offence of not complying with such conditions.<sup>72</sup> Additionally, using or permitting the use of

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64 S.133(2) SOCPA.

65 <http://www.sheilamckechnie.org.uk/showSubSub.php?id=26&page=2&last=60>.

66 S.134(2) SOCPA.

67 S.134(1) SOCPA.

68 S.134(3) SOCPA.

69 S.134(4) SOCPA.

70 S.134(7) SOCPA. It is a defence, under s.134(8), to show that this arose from circumstances beyond the defendant's control, or from something done with the agreement, or by the direction, of a police officer. Under s.136(3), a person guilty of this offence is liable on summary conviction (a) if the offence was in relation to his capacity as organiser of the demonstration, to imprisonment for a term not exceeding 51 weeks, to a fine not exceeding level 4 on the standard scale, or to both, (b) otherwise, to a fine not exceeding level 3 on the standard scale. Under s.136(4), a person guilty of incitement to this offence is liable on summary conviction to imprisonment for a term not exceeding 51 weeks, to a fine not exceeding level 4 on the standard scale, or to both.

71 S.135 SOCPA.

72 S.135(3) SOCPA. It is a defence, under s.135(4), to show that this arose from circumstances beyond the defendant's control. Under s.136(3), person guilty of this offence is liable on summary conviction (a) if the offence was in relation to his capacity as organiser of the demonstration, to imprisonment for a term not exceeding 51 weeks, to a fine not exceeding level 4 on the standard scale, or to both, (b) otherwise, to a fine not exceeding level 3 on the standard scale. Under s.136(4), a person guilty of incitement to this offence is liable on summary conviction to imprisonment for a term not exceeding 51 weeks, to a fine not exceeding level 4 on the standard scale, or to both.

loudspeakers in the above zone, is an offence.<sup>73</sup> Liberty quite justifiably argues that the combination of all these provisions will effectively neuter any demonstration.<sup>74</sup>

Conditions may only be placed on demonstrations if the Commissioner reasonably believes the conditions to be necessary to prevent one of a variety of outcomes, including ‘hindrance to any person wishing to enter or leave the palace of Westminster’.<sup>75</sup> Liberty argues that in practice, most demonstrations will be covered by this. The organization also raises questions relating to the practicability of conforming to certain types of conditions, arguing that: ‘if the organizers of a demonstration are informed that only 500 people will attend and they believe that over 1000 will arrive, they are likely to cancel as otherwise they will commit an offence’.<sup>76</sup> For charities, this raises the issue of potential criminal liability of their representatives, and the wider ramifications of this are discussed below. Additionally, a scenario such as that described above raises questions for charities regarding the best use of their funds. Such a demonstration will involve the use of charitable funds for an activity which has a low likelihood of achieving the changes that are its aim, and which may have conditions imposed upon it which reduce its impact. At the same time, it runs a significant risk of either being cancelled due to difficulties in complying with conditions, or, if it goes ahead, of resulting in criminal prosecution of charity employees or volunteers. In any assessment of risks, which charities – depending on their size – are either obliged<sup>77</sup> or encouraged<sup>78</sup> to undertake, the prospects for such an event would look decidedly bleak.

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73 Under s.137 SOCPA. Exceptions are specified in s.137(2), (3). Subsection (4) states that a person who commits this offence is liable on summary conviction to (a) a fine not exceeding level 5 on the standard scale, together with (b) a further fine not exceeding £50 for each day on which the offence continues after the conviction.

74 *Serious Organised Crime and Police Bill: Liberty’s briefing for the Second Reading in the House of Lords*, March 2005, para. 38. This is the most comprehensive critique of the Serious Organised Crime and Police Act 2005, and will thus be referred to throughout this article. It is available at <http://www.liberty-human-rights.org.uk/pdfs/policy06/soc-2nd-reading-lords.pdf>.

75 S.134(3)(a) SOCPA.

76 *Serious Organised Crime and Police Bill: Liberty’s briefing for the Second Reading in the House of Lords*, March 2005, para. 38.

77 The Charities (Accounts and Reports) Regulations 2000 (SI No. 2868) place a legal obligation on trustees of charities with a gross income of over £250,000 to include in their Annual Report a statement as to whether the charity trustees have given consideration to the major risks to which the charity is exposed and systems designed to mitigate that risk.

78 See, generally, Charity Commission, *Risk Management and Charities* (RS4), 2001.

### C. Invasion of private property

The controls over public assemblies discussed above were extended to cover certain types of assemblies on private property by the Criminal Justice and Public Order Act (CJPOA) 1994,<sup>79</sup> which added new sections 14A, B and C to the POA 1986. These provisions enable a chief officer of police to apply to the council of the district<sup>80</sup> for an order prohibiting the holding of all relevant assemblies<sup>81</sup> in the district or a part of it for a specified period,<sup>82</sup> if he reasonably believes that certain outcomes may result from such an assembly.<sup>83</sup> Offences in relation to the above include organizing,<sup>84</sup> participating in<sup>85</sup> and inciting another to participate in<sup>86</sup> such assemblies. Further provisions enable police officers to direct persons not to proceed in the direction of the assembly,<sup>87</sup> and create an offence of knowingly failing to comply with such a direction.<sup>88</sup>

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79 Ss. 70 and 71 CJPOA.

80 Separate provision is made for the City of London and the Metropolitan Police District by ss.(3), (4).

81 Under s.14A(1)(a), assemblies covered are those which a chief officer of police reasonably believes are intended to be held in any district at a place on land to which the public has no right of access or only a limited right of access, where they are likely to be held without the permission of the occupier of the land or to conduct themselves in such a way as to exceed the limits of any permission or the limits of the public's right of access.

82 But, by virtue of subsection (6), not exceeding 4 days or in an area exceeding an area represented by a circle with a radius of 5 miles from a specified centre.

83 Under, s.14A(1)(b), specified outcomes are serious disruption to the life of the community, or where the land, or a building or monument on it, is of historical, architectural, archaeological or scientific importance, significant damage to the land, building or monument.

84 S.14B(1). Under subsection (5), (as amended by the Criminal Justice Act 2003, s 280(2), (3), Sch 26, para. 37(1), (5)(a)), a person guilty of this offence is liable on summary conviction to imprisonment for a term not exceeding 51 weeks or a fine not exceeding level 4 on the standard scale or both.

85 S.14B(2). Under subsection (6), a person guilty of this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

86 S.14B(3). Under subsection (7), (as amended by the Criminal Justice Act 2003, s 280(2), (3), Sch 26, para. 37(1), (5)(b)), a person guilty of this offence is liable on summary conviction to imprisonment for a term not exceeding 51 weeks or a fine not exceeding level 4 on the standard scale or both.

87 S.14C(1), (2).

88 S.14C(3). Under subsection (5), a person guilty of this offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

The CJPOA 1994 also creates the offence of aggravated trespass,<sup>89</sup> committed if a person trespasses on land and either intimidates people with the intention of deterring them from lawful activity, or obstructs lawful activity, or disrupts lawful activity. Senior police officers may remove persons they reasonably believe to be committing or participating in aggravated trespass,<sup>90</sup> and it is an offence not to comply or to return within 3 months.<sup>91</sup> This area of law may be of particular relevance to charities involved in campaigning, as it was targeted specifically at people who are interrupting such activities as the construction of controversial roads. As an illustration of this deliberate targeting of particular protest activities through legislation and the general increase in the level of constraint, the ASBA 2003<sup>92</sup> extended the above provision to cover trespass in buildings as well as in the open air. This was aimed specifically at the activities of ‘animal rights’ activists who invade the building of a targeted company. Further laws targeted at such activists are discussed in the next section.

Further offences related to trespass are created by sections 128 to 131 of the SOCPA 2005, which cover trespass on designated sites, in particular royal residences. These provisions allow the Secretary of State to designate a site if it is either Crown land, or belongs to the Monarch or heir to the throne, or if he believes it is appropriate for designation on grounds of national security. Liberty raises concerns that all these provisions allow the Government to criminalize trespass, arguing that:<sup>93</sup>

*there is no attempt to define what constitutes ‘national security’ and no threshold for the Secretary of State to satisfy [This] allows designation to take place without any consequent justification of why the Secretary of*

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<sup>89</sup> S.68(1) CJPOA. Under subsection (3), (as amended by the Criminal Justice Act 2003, s 280(2), (3), Sch 26, para. 45(1), (7)), a person guilty of this offence is liable on summary conviction to imprisonment for a term not exceeding 51 weeks or a fine not exceeding level 4 on the standard scale, or both.

<sup>90</sup> S.69(1) CJPOA.

<sup>91</sup> Under s.69(3) CJPOA, (as amended by the Criminal Justice Act 2003, s 280(2), (3), Sch 26, para. 45(1), (8)). A person guilty of this offence is liable on summary conviction to imprisonment for a term not exceeding 51 weeks or a fine not exceeding level 4 on the standard scale, or both. However, under subsection (4) it is a defence for the accused to show either that he was not trespassing on the land, or that he had a reasonable excuse for failing to leave the land as soon as practicable or, as the case may be, for again entering the land as a trespasser.

<sup>92</sup> S.59 ASBA.

<sup>93</sup> *Serious Organised Crime and Police Bill: Liberty’s briefing for the Second Reading in the House of Lords*, March 2005, para. 34.

*State believed it was appropriate.*

Whilst the condition that the Attorney-General has to agree to proceedings was welcomed by Liberty, it was not enough to assuage their concerns in relation to the implications for protest activities:<sup>94</sup>

*... a number of protests in recent times, such as those opposing the war in Iraq or the criminalization of hunting with hounds could be described in some way as raising 'national security' interests. With no need for justification these powers can be utilized on a purely subjective belief. Whether or not there is a consequent prosecution the police will still be allowed to arrest and detain. We believe that the creation of this offence is evidence of a trend towards marginalization and criminalization of legitimate protest.*

The offences discussed above blur the boundaries between legal and illegal protest, and make it difficult to determine whether an offence has been or is likely to be committed. Charities, as discussed throughout this article, have a particular need to avoid their representatives attracting criminal liability, and are arguably likely to overly restrict their activities and avoid even approaching the boundaries of illegality in relation to the above poorly defined offences.

#### **D. Targeting specific individuals, groups or organizations**

##### *Harassment*

Under the Protection from Harassment Act (PHA) 1997, either pursuing a course of conduct which amounts to harassment of another,<sup>95</sup> or pursuing a course of conduct which amounts to harassment of two or more persons<sup>96</sup> is an offence.<sup>97</sup> It

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<sup>94</sup> Ibid. para. 35.

<sup>95</sup> Which the defendant knows or ought to know amounts to harassment of the other (s.1 PHA).

<sup>96</sup> Which the defendant knows or ought to know involves harassment of those persons, and by which he intends to persuade any person (whether or not one of those mentioned) either not to do something that he is entitled or required to do, or to do something that he is not under any obligation to do (s.1A PHA, inserted by the SOCPA 2005, s.125(2)(c)).

<sup>97</sup> Under s.2(1) PHA. Under s.2(2), a person guilty of such offence is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both. Additionally, s.3 and s.3A (inserted by the SOCPA 2005 s.125(1), (5)) cover civil remedies, and create offences in relation to the contravention of injunctions protecting persons from harassment.

is also an offence to pursue a course of conduct which causes another to fear, on at least two occasions, that violence will be used against him.<sup>98</sup> These offences were originally aimed at ‘stalking’, but, worryingly for charities, have the capacity to be applied to a wider range of activities. The Sheila McKechnie Foundation have pointed out that they could cover email campaigns or pickets that urge consumer boycotts or persuade an organization - either corporate or public – to change a policy or a decision.<sup>99</sup>

The potential for offences relating to harassment to be used to constrain campaigning was increased further with the enactment of the Criminal Justice and Police Act (CJPA) 2001, which contained provisions enabling the police to give directions to stop the harassment of a person in his home,<sup>100</sup> and made it an offence to knowingly fail to comply with such a direction.<sup>101</sup> In addition to the above offences of contravening police directions, amendments to CJPA 2001 inserted by the SOCPA 2005 made harassment of a person in his home an offence in its own right.<sup>102</sup> These provisions could clearly be applied to protest activities such as standing outside a person’s home with a sign displaying distressing pictures relevant to a campaign.

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98 Under s.4 PHA, such conduct is an offence to if the perpetrator knows or ought to know that his course of conduct will cause the other person such fear on each occasion. Under subsection (4), a person guilty of this offence is liable either on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both; or on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both. Additionally, under s.5, restraining orders may be made in relation to further conduct which amounts to offences under ss. 2 or 4 of the Act. Further powers for the police to give directions to such persons to leave the relevant area and not to return to it within a period of up to three months, and additional related offences, were added to the Act by the SOCPA, s.127.

99 <http://www.sheilamckechnie.org.uk/showSubSub.php?id=26&page=2&last=60>.

100 Under s.42(1) CJPA a constable can give directions to a person engaging in relevant conduct in the vicinity of a person’s home, where he reasonably believes that the resident is likely to suffer harassment, alarm or distress.

101 Under s.42(7) CJPA, (as amended by the Criminal Justice Act 2003 s.280(2), (3), Sch 26, para. 56(1), (3)) a person guilty of the offence will be liable, on summary conviction, to imprisonment for a term not exceeding 51 weeks or to a fine not exceeding level 4 on the standard scale, or to both.

102 New s.42A of the CJPA 2001, inserted by the SOCPA 2005, s.126(1).

*Protection of contractual relationships of certain organizations*

The SOCPA 2005 also creates offences in relation to interferences with the contractual relationships of animal research organizations<sup>103</sup> with the intention of harming them,<sup>104</sup> and in relation to the intimidation of persons connected with such organizations.<sup>105</sup> These offences are clearly aimed at protest activities, and have been criticized by Liberty on the basis that they criminalize tortious acts and legitimate economic protest.<sup>106</sup>

**E. Publications or speeches***Terrorism-related offences*

Whilst unlikely to apply to the majority of campaigns by charities, offences created by the Terrorism Act 2006 (TA 2006) are relevant in this context in terms of their potential discouragement of discussion and debate surrounding sensitive topics. The Act makes it an offence to encourage terrorism<sup>107</sup> or disseminate terrorist

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<sup>103</sup> As defined in s.148 SOCPA. Relevant organisations can include individuals. S.149 provides the Secretary of State with powers to extend the application of the sections to other types of organisation in certain circumstances.

<sup>104</sup> S.145 SOCPA.

<sup>105</sup> S.146 SOCPA. Under s.147, a person guilty of an offence under s.145 or s.146 is liable either on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both; on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both.

<sup>106</sup> *Serious Organised Crime and Police Bill: Liberty's briefing for the Second Reading in the House of Lords*, March 2005, paras. 44 – 46.

<sup>107</sup> Under s.1(2) TA 2006, by publishing or causing another to publish a statement, with intention or recklessness as to the effect of encouraging or inducing terrorism, that is likely to be understood by some or all of the members of the public to whom it is published to be direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences. A person guilty of an offence under this section will be liable, under subsection (7), either on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both; or on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both. On summary conviction in Scotland or Northern Ireland, a person will be liable to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both.

publications.<sup>108</sup> Given the vague definition of ‘encouragement’, which includes the even more vaguely-defined act of ‘glorification’,<sup>109</sup> it appears that concerns over self-censorship of participation in legitimate debate may be justifiable.

### *Offences relating to racial and religious hatred*

Similar concerns for legitimate debate as those raised for terrorism-related offences apply to offences in this category, particularly given the recent extensions to their scope. By virtue of the Racial and Religious Hatred Act 2006, existing racial hatred offences under Part 3 of the POA 1986 were extended to cover offences in relation to religious hatred. This concept is identified by Liberty as ‘broad and vague’, and further criticized by the organization in the strong terms that:<sup>110</sup> ‘criminalizing even the most unpalatable, illiberal and offensive speech should be approached with grave caution in a democracy. Free speech is far more precious than protection from being offended.’ Widespread concerns of this nature were, to an extent, reflected in the inclusion of a specific limitation provision in the 2006 Act. This limitation is intended to prevent the Act from being applied in a way which ‘prohibits or restricts discussion, criticism or expression of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system’.<sup>111</sup> This is likely to greatly reduce the number of potential prosecutions and thus the potential risks for charities and other campaigners of inadvertently committing such offences.

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<sup>108</sup> Under s.2(1) TA 2006, through acts specified in subsection (2), with intention or recklessness as to the effect of encouraging, inducing or assisting terrorism. S.3 covers application of s.2 to publication on the internet. A person guilty of an offence under this section will be liable, under subsection (11), either on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both; or on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both. On summary conviction in Scotland or Northern Ireland, a person will be liable to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both.

<sup>109</sup> S.1(3), S.2(4) TA 2006.

<sup>110</sup> *Serious Organised Crime and Police Bill: Liberty’s briefing for the Second Reading in the House of Lords*, March 2005, para. 30.

<sup>111</sup> POA 1986, s.29J, inserted by Racial and Religious Hatred Act 2006, s.1, sch.

## F. General Police Powers

Aside from the range of offences and specific police powers relevant to protest activities, it should be noted that there have been concurrent increases in general police powers, the potential effect of which must also be considered.

Police powers are governed mainly by the Police and Criminal Evidence Act (PACE) 1984. Among other matters, this covers criminal evidence, police powers to stop, search, arrest, detain and interrogate members of the public, police duties, and the rights of persons in detention. Various amendments to this Act have increased police powers in a number of ways. In this context, the most relevant extensions are contained in the SOCPA 2005 and the Terrorism Act 2000.

The SOCPA 2005 increases police powers of arrest under the PACE 1984 to effectively make all offences arrestable,<sup>112</sup> where a constable has reasonable grounds for believing that arrest is ‘necessary’.<sup>113</sup> Grounds of necessity include<sup>114</sup> enabling ‘the prompt and effective investigation of the offence or of the conduct of the person in question’,<sup>115</sup> and preventing ‘prosecution for the offence from being hindered by the disappearance of the person in question’.<sup>116</sup> These particular grounds of necessity have been extensively criticised for being unnecessarily wide.

In its response to legislative proposals, the Bar Council stated that ‘a police officer could justify an arrest as being necessary in almost every conceivable circumstance’.<sup>117</sup> The Law Society made similar criticisms in its response.<sup>118</sup> The human rights organization Liberty considered the proposed solution ‘unacceptable and disproportionate to the problem identified’,<sup>119</sup> and highlighted the dangers of

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112 PACE 1984, s.24, substituted by the SOCPA 2005, s.110(1).

113 S.110(4) SOCPA.

114 S.110(5) SOCPA.

115 S.110(5)(e) SOCPA.

116 S.110(5)(f) SOCPA.

117 *Response from the Law Reform Committee of the Bar Council to the Home Office Consultation Paper “Policing: Modernising Police Powers to Meet Community Needs”,* October 2004, para. 2.1.4.(vii).

118 *Law Society Response to Policing: Modernising Police Powers to Meet Community Needs,* October 2004, para. 17.

119 *Serious Organised Crime and Police Bill: Liberty’s briefing for the Second Reading in the House of Lords,* March 2005, para. 15.

the provision by, among other things, reference to the extensive use made by the police of the Terrorism Act 2000 (TA 2000), which has already extended their powers to stop individuals and conduct searches.

The Terrorism Act 2000, in addition to police powers to stop and search based upon suspicion of terrorism,<sup>120</sup> enables a senior police officer of a specified rank, for a limited period of up to 28 days,<sup>121</sup> to authorize the stopping and searching of vehicles and their drivers and passengers,<sup>122</sup> and of pedestrians and anything carried by them.<sup>123</sup> The officer must believe that it is expedient to issue such an authorization in order to prevent acts of terrorism.<sup>124</sup> Such authorizations must be notified to the Home Secretary, who has the power to cancel them or shorten the period of their operation.<sup>125</sup>

Following the attacks on the London Transport system in February 2001, the Home Secretary used his powers under section 44 of the Terrorism Act to designate the entire Metropolitan Police District as such an area from the date that the provisions came into force.<sup>126</sup> Whilst the designations are in force for a maximum of 28 days, they were renewed repeatedly by the Home Secretary from February 2001 until September 2003. As mentioned above, this use of the power has been strongly criticized by Liberty on a number of grounds.<sup>127</sup> Whilst the use of statutory powers to designate the area at risk of terrorist attack may or may not have been justified in the above circumstances, some specific instances in which the power has been used by the police clearly departs from the intentions of the legislation. One example of its use for activities unrelated to terrorism which is highly relevant in the present context is the case of *R (Gillan) v Commissioner of Police for the Metropolis*,<sup>128</sup> which concerned an application for judicial review of

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120 S.43 TA 2000.

121 S.46(2) TA 2000.

122 S.44(1) TA 2000.

123 S.44(2) TA 2000.

124 S.44(3) TA 2000.

125 S.46(5), (6) TA 2000.

126 19th Feb 2001: Terrorism Act 2000 (Commencement No 3) Order 2001 SI 2001/421, art 2.

127 *Serious Organised Crime and Police Bill: Liberty's briefing for the Second Reading in the House of Lords*, March 2005.

128 [2004] EWCA Civ 1067, [2005] UKHL 12.

the use of the power. The application followed the stop and search of two separate individuals who were both making their way (one as a participant and one as a journalist) to a demonstration outside an international arms fair in East London. Whilst the House of Lords determined that the issues were not appropriate for consideration in a judicial review action, it is worth noting the Court of Appeal's concern at the apparently ineffective briefing of the police regarding the correct use of the powers for matters relating to terrorism only.<sup>129</sup> In the light of cases such as this, Liberty's concerns regarding the potential misuse of the much broader powers introduced by the SOCPA 2005 appear justified, and should be shared by charities and other organizations involved in protest activity.

### **G. Consequences for individuals and charities**

It is clear from the above discussion that the range of offences which may be committed through organization of and participation in protest activities is broad, and includes many offences which may be committed without intention or even awareness on the part of the protestor. As discussed, aside from the public order and terrorism offences which may be committed if a demonstration turns violent or aggressive, there are a plethora of obstacles to conducting effective and legal protests. There are requirements relating to advance notice, and the potential for imposition of conditions which both reduce the effectiveness of a protest and may be difficult to adhere to. There is the possibility of the imposition of bans on particular demonstrations, with the resulting waste of charitable time and money. In addition, there is the criminalization of tortious acts, and the unclear definitions contained in a number of offences. Nevertheless, despite these barriers and uncertainties, some charities and their representatives will undoubtedly view campaigning in the forms discussed to be vital to the achievement of their objects, and will be prepared to risk the consequences considered below.

As noted throughout this piece, the consequences for individuals directly involved in criminal activity may include fines or imprisonment or both, at varying levels. However, where individuals are acting as representatives of charities, there can also be wider implications for a charity and its trustees. First, a charity or its trustees, as employers, may be vicariously liable for any concurrent civil actions resulting from the tortious actions of their employees whilst they are acting within the course of their employment.<sup>130</sup> Second, the activities considered here may constitute breach of trust (in the case of an unincorporated charity) or *ultra vires* activity (in the case of a charitable company). If so, the trustees may be personally liable to the charity for any financial losses it has sustained as a result. Third is the

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<sup>129</sup> [2004] EWCA Civ 1067, paras. 52-56.

<sup>130</sup> See *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215.

less quantifiable but potentially more serious consequence of potential damage to the reputation of the charity arising from the criminal activities of its representatives. Damage to a charity's reputation and standing in the eyes of its supporters and donors arising from any type of negative publicity can have disastrous financial consequences, and should not be underestimated. The potential for this type of negative publicity may be further increased by the extension of police powers of arrest to all offences, conferred by the SOCPA 2005 amendments to the PACE 1984 discussed earlier.

In addition to legal liability and negative publicity, the commission of criminal offences by representatives of a charity can result in more specific regulatory consequences. The Charity Commission has powers under section 8 Charities Act 1993 (CA 1993) to initiate inquiries into charities' affairs. The Commission will only use these powers where it considers 'there is a serious risk of significant harm or abuse to the charity, its assets, beneficiaries or reputation; where the use of [its] powers of intervention is necessary to protect them; and where this represents a proportionate response to the issues in the case'.<sup>131</sup> The Commission's definition of 'harm' includes 'serious damage to the reputation of a charity or charities generally'.<sup>132</sup> Presence of 'criminality', 'risk of the charity being brought into serious disrepute, for example through association with public disorder or links to terrorist organisations', and 'the charity undertaking improper political activities' are all specifically identified as circumstances in which the Commission would perceive serious risk of harm.<sup>133</sup>

The Charity Commission has various remedial powers following the above process. If, following the institution of a section 8 inquiry, the Commission is satisfied that there has been any misconduct or mismanagement in the administration of a charity,<sup>134</sup> or that it is necessary or desirable to act to protect the charity's property or secure its proper application,<sup>135</sup> it has a number of powers. It can suspend certain individuals from their office or employment pending consideration of their removal,<sup>136</sup> appoint additional trustees,<sup>137</sup> vest

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<sup>131</sup> Charity Commission, *Complaints about Charities* (CC47), 2003, para. 6.

<sup>132</sup> *Ibid.*, para. 8.

<sup>133</sup> *Ibid.*, para. 9.

<sup>134</sup> S.18(1)(a) CA 1993

<sup>135</sup> S.18(1)(b) CA 1993.

<sup>136</sup> S.18(1)(i) CA 1993. Relevant individuals include trustees, charity trustees, officers, agents or employees of the charity.

<sup>137</sup> S.18(1)(ii) CA 1993.

charity property in the official custodian,<sup>138</sup> order persons holding property on behalf of the charity not to part with it without Commission approval,<sup>139</sup> order debtors of the charity not to make payments to the charity without Commission approval,<sup>140</sup> restrict the charity's financial transactions,<sup>141</sup> and appoint a receiver and manager for the charity.<sup>142</sup> If, following the institution of a section 8 inquiry, the Commission is satisfied *both* that there has been any misconduct or mismanagement in the administration of a charity,<sup>143</sup> and that it is necessary or desirable to act to protect the charity's property or secure its proper application,<sup>144</sup> it has more extensive powers. In these circumstances it can remove certain persons from their office or employment if they have been responsible for or privy to the misconduct or mismanagement, or have contributed to or facilitated it.<sup>145</sup> It can also establish a scheme for the administration of the charity.<sup>146</sup> It should be noted that the Commission also has certain powers to institute legal proceedings with reference to charities or the property or affairs of charities in the High Court.<sup>147</sup>

The Commission also has new relevant powers under the Charities Act 2006.<sup>148</sup> Section 19 of the 2006 Act inserts a new section 18A into the Charities Act 1993. This allows the Commission, where it has made orders relating to suspension<sup>149</sup> or removal<sup>150</sup> of individuals from office or employment, to make further respective

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138 S.18(1)(iii) CA 1993.

139 S.18(1)(iv) CA 1993.

140 S.18(1)(v) CA 1993.

141 S.18(1)(vi) CA 1993.

142 S.18(1)(vii) CA 1993.

143 S.18(2)(a) CA 1993.

144 S.18(2)(b) CA 1993.

145 S.18(2)(i) CA 1993. Relevant individuals include trustees, charity trustees, officers, agents or employees of the charity.

146 S.18(2)(ii) CA 1993.

147 S.32 CA 1993.

148 Not in force at time of writing.

149 Under s.18(1) CA 1993.

150 Under s.18(2) CA 1993.

orders relating to suspension<sup>151</sup> or termination<sup>152</sup> of their membership of the charity, if relevant. Section 20 of the 2006 Act inserts a new section 19A into the Charities Act 1993. This empowers the Commission, in specified circumstances,<sup>153</sup> to give directions to certain individuals to take specified action that the Commission considers to be expedient in the interests of the charity.<sup>154</sup> Finally, section 21 of the 2006 Act inserts a new section 19B into the Charities Act 1993, which provides the Commission with powers to direct application of charity property<sup>155</sup> in specified circumstances.<sup>156</sup>

Despite the potential for the legislation considered above to result in individual criminal liability and despite the wider consequences for charities, the Commission's guidance includes only minimal coverage of such legislation.

References to broader legal issues in the current version of CC9<sup>157</sup> are limited. Paragraphs 17 and 18 warn respectively that charities must be aware of and comply with the 'general law' and 'legal and regulatory requirements which have general application'. Paragraph 21 advises on the need for specialist legal advice if there are doubts over the legality of novel campaign techniques. Finally, paragraphs 40 and 41 warn of the control problems inherent in demonstrations and rallies and the potential for commission of public order offences. Importantly, this is the only direct reference made in CC9 to the potential criminal liability inherent in demonstrations, despite the wide and complex range of offences discussed throughout this article. Whilst it can be argued that the guidance cannot cover all relevant legal matters in detail, it has been criticized for not achieving the correct balance in this respect.<sup>158</sup> The omission is surprising, given the Commission's

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<sup>151</sup> S.18A(2) CA 1993.

<sup>152</sup> S.18A(3) CA 1993.

<sup>153</sup> Under s.19A(1) CA 1993, the circumstances are the same as those specified in s.18(1)(a) or (b) of the 1993 Act, discussed above.

<sup>154</sup> S.19A(2) CA 1993. Relevant individuals are charity trustees, trustees for the charity, officers or employees of the charity, or (if a body corporate) the charity itself.

<sup>155</sup> S.19B(2) CA 1993.

<sup>156</sup> S.19B(1) CA 1993. The specified circumstances are where the Commission is satisfied (a) that a person or persons in possession or control of any property held by or on trust for a charity is or are unwilling to apply it properly for the purposes of the charity, and (b) that it is necessary or desirable to make an order under the section for the purpose of securing a proper application of that property for the purposes of the charity.

<sup>157</sup> Charity Commission, Charity Commission, *Campaigning and Political Activities by Charities* (CC9), 2004.

<sup>158</sup> See, for example, *Voluntary Sector* magazine, July 2004 pp. 14-16.

current focus on risk management,<sup>159</sup> and - particularly in the context of campaigning - its emphasis on risk to reputation.

## H. Conclusion

The SOCPA 2005 provisions in relation to protests near Parliament have already resulted in a number of well-publicized prosecutions of peaceful protestors. These have included two individuals arrested at the cenotaph on Whitehall for reading out the names of UK soldiers and civilians killed in the war on Iraq; a man arrested for displaying a placard near Downing Street containing a quote from George Orwell;<sup>160</sup> and a man arrested for doing an impersonation of Charlie Chaplin outside Parliament.<sup>161</sup> Whilst these cases did not involve individuals acting on behalf of charities, the publicity surrounding them is particularly pertinent to charities. Given the far-reaching repercussions of criminality and its inevitable publicity for an organization with charitable status, this example serves to reinforce the contention that those charities with a developed awareness of the array of criminal offences which they are in danger of committing through previously legitimate protest activities are likely to be deterred from engaging in such protest activities. This deterrent effect may remain regardless of how unreasonable the restrictions appear and regardless of whether the methods in question appear justified in furtherance of a charity's objects. The possibility that 'the air of uncertainty is leading people to think twice about getting involved in protesting activity' was recently confirmed in a statement from the Chief Executive of the Sheila McKechnie Foundation.<sup>162</sup> This 'air of uncertainty' may in part help to explain the somewhat surprising lack of sustained reaction and protest within the sector to such drastically increased curbs on protest activity.<sup>163</sup>

Whilst there is obvious awareness amongst some charities of restrictive legislative provisions, with a resulting cautious approach, the unwary may still be in danger

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<sup>159</sup> See, for example, Charity Commission, *Campaigning and Political Activities by Charities* (CC9), 2004, paras. 25-31.

<sup>160</sup> "In a time of universal deceit, telling the truth is a revolutionary act", reported in *The Independent*, Thursday 19th October 2006.

<sup>161</sup> His statement to the court concluded: "In truth, one of the first things to go under a dictatorship is a good sense of humour", reported in *The Independent*, Thursday 19th October 2006.

<sup>162</sup> Reported in *Third Sector* magazine, 1st November 2006, p.17.

<sup>163</sup> See *Third Sector* magazine, 1st November 2006, p.19, which reported that initial calls for a cross-sector response to the SOCPA 2005 (see *Third Sector* magazine, 17th Aug 2005, p.10) had failed to come to fruition.

of unwittingly engaging in illegal activities. This danger is particularly pertinent for offences such as those related to harassment,<sup>164</sup> which are not ostensibly aimed at protest activities, but which can and have been used by the police to restrict them. Such offences will not be obvious to those without access to expert legal advice. Whilst a number of defences are available, wider negative repercussions may, for a charity, result from the mere prosecution of its representatives, regardless of actual convictions. This danger is further exacerbated by the omission of appropriately detailed warnings in the Charity Commission guidance on political activities. In the context of messages from political figures relating to the legitimacy of the campaigning function of charities,<sup>165</sup> which appear to be in direct contradiction to the draconian legislative provisions restricting protest activities, it could be argued that detailed coverage in Commission guidance is more vital now than ever.

Despite this somewhat depressing outlook, the increasing acceptance of charity campaigning activity by the public and within the political sphere may encourage challenges under the Human Rights Act 1998 to some of the recently created offences discussed above. Such increased willingness has already been demonstrated by the campaigning organization Animal Defenders International (ADI). This organization recently instigated a challenge<sup>166</sup> to the longstanding ban on political advertising<sup>167</sup> by seeking a declaration of incompatibility<sup>168</sup> with Article 10 of the European Convention on Human Rights.<sup>169</sup> The support shown for ADI's

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<sup>164</sup> See discussion of the Protection from Harassment Act 1997 and the Criminal Justice and Police Act 2001, above.

<sup>165</sup> See introduction.

<sup>166</sup> *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2006] EWHC 3069 (Admin). The Divisional Court rejected the claim, but granted the claimant leave to appeal to the House of Lords.

<sup>167</sup> Ss. 319(2)(g) and 321(2) Communications Act 2003.

<sup>168</sup> under s.4 of the Human Rights Act 1998.

<sup>169</sup> 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.

case by organizations such as the RSPCA and Amnesty International, which have also had advertisements rejected, further illustrates the current change in attitudes.

Finally, the Commission's approach to the contradiction between increasingly restrictive legislation relating to protests and the increasing popularity of charity campaigning work with politicians and the general public may be determined in part by its new statutory objective<sup>170</sup> to increase public trust and confidence in charities. It will be interesting to observe how these two opposing forces will be balanced; and whether regulatory clampdown – and hopefully more informative guidance – on protest activities will ensue.