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Liberty's Second Reading Briefing on the Police Reform and Social Responsibility Bill in the House of Commons

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Introduction

1. The Police Reform and Social Responsibility Bill is the first criminal justice Bill brought forward by the Coalition Government. Liberty is principally concerned with Parts 1, 3 and 4. Part 1, which forms the bulk of the Bill, is concerned with the fundamental reform of police force accountability. The proposals contained therein implement a Conservative pre-election pledge to scrap Police Authorities and replace them with directly elected individuals who will be charged with overseeing local police forces and holding Chief Constables to account.¹ Police force accountability is crucial to the protection of rights and freedoms in the UK. Indeed since Liberty's formation in 1934 to monitor the policing of protests, police accountability has been at the core of our work. We therefore recognise the sheer scale of the reforms proposed and below we set out our grave concerns about this new model for police accountability. Part 2 is concerned with licensing powers and authorities. Part 3 concerns protest in Parliament Square and repeals sections 132-137 of the *Serious Organised Crime and Police Act 2005*, replacing them with restrictions on protest in Parliament Square Garden. Part 4 proposes reform to the right of private prosecution in relation to offences alleged to have taken place overseas where universal jurisdiction can be asserted. Part 5 contains some technical clauses on the Bill.

Part 1 - Police Reform

Police and Crime Commissioners

2. Part 1 of the Bill proposes to abolish Police Authorities and replace them with directly elected "Police and Crime Commissioners" (PCCs) for each police force outside London.² In London, the Metropolitan Police Authority is to be replaced with the "Mayor's Office for Policing and Crime".³ Both of these newly created offices will be directly elected by the public for a four year term, with a maximum of two terms, starting in 2012. Elections are to be held on the same day as local elections and under clause 53 the Electoral Commission is charged with raising public awareness about the election and how to vote in it. The PCC is to be returned on a simple majority unless there are three or more candidates.⁴

¹ Conservative Party Manifesto 2010, at page 57. Available at: http://media.conservatives.s3.amazonaws.com/manifesto/cpmanifesto2010_lowres.pdf.

² Clause 1.

³ Clause 3.

⁴ Clause 57(2).

3. The PCC is responsible for securing the maintenance of the police force,⁵ ensuring that the police force is efficient and effective,⁶ holding the Chief Constable to account for the exercise of their functions and the functions of persons under the Chief Constable's direction and control⁷ as well as their exercise of a range of other statutory duties.⁸ The PCC is also responsible for hiring and firing the Chief Constable and the Chief Constable must consult the relevant PCC before appointing deputy chief constables and assistant chief constables. The PCC may call upon the Chief Constable to resign or retire and if he or she does so, the Chief Constable must retire or resign. The PCC will also set the area policing plan and budget. Schedule 1 deals with ancillary matters related to PCCs including remuneration, staff and powers. PCCs must appoint a person to be head of his or her staff and may appoint other staff.

Police and Crime Plan

4. Clauses 5 and 6 require that the PCC (and in London, the Mayor's office) issue and publish a Police and Crime Plan which he or she can vary at any time. Before issuing the Police and Crime Plan, the PCC must have regard to the strategic policing requirement issued by the Secretary of State and consult the Chief Constable and the Police and Crime Panel (see below). Clause 7 sets out what should be included in a Police and Crime Plan. This includes: police and crime objectives (including the policing of the area, crime and disorder reduction in that area and the discharge of the force's national and international functions); the policing which the chief officer is to provide; the financial and other resources which the PCC is to provide to the Chief Constable; the means by which the Chief Constable will report to the PCC; and the means by which the Chief Constable's performance in providing policing will be measured.⁹ Clause 7(4) reserves the right of the Secretary of State to give guidance to PCCs about the matters to be dealt with in the Police and Crime Plans and clause 7(5) requires a PCC to have regard to that guidance.

⁵ Clause 1(6)(a).

⁶ Clause 1(6)(b).

⁷ Clause 1(7).

⁸ Clause 1(8).

⁹ Clause 7.

Police and Crime Panel

5. Chapter 4 deals with the creation and functions of 'Police and Crime Panels'. Clause 28 requires local authorities to establish a Police and Crime Panel. In London the equivalent functions are to be discharged by a committee of the London Assembly. Elsewhere the panel will be a committee of the participating local authority or a committee of participating local authorities where the police force area straddles authority boundaries.¹⁰ Panels will consist of 10 members appointed from among relevant local authority members as well as two co-opted members.¹¹ It is proposed that as far as reasonably practicable the local authority members should represent the political make-up of the local authority or the local authorities taken together. The Panel must also seek to co-opt members that have the skills, knowledge and experience necessary for the Police and Crime Panel to discharge its functions effectively.

6. The Panels are required to review or scrutinise decisions made or other action taken by the PCC and make reports or recommendations to the PCC on the discharge of their functions.¹² They are required to review the draft Police and Crime Plan and make a report or recommendations on the draft plan to the PCC.¹³ The PCC is required only to have regard to any report or recommendations made by the Panel, and to publish a response. There is no requirement to seek or ensure the agreement of the Police and Crime Panel before a Police and Crime Plan is issued or varied.

7. The Panel must arrange for a public meeting after it is sent an annual report.¹⁴ At the public meeting questions can be asked of the PCC and the PCC and members of the PCC's staff can be required to attend before the Panel at any time (at reasonable notice) to answer questions.¹⁵ Clause 13 governs the information that must be made available to a Police and Crime Panel. Subsection (1) states that a PCC 'must provide the relevant Police and Crime Panel with any information which the panel may reasonably require in order to carry out its functions'. This provision is

¹⁰ Schedule 6, paragraph 2.

¹¹ Schedule 6, paragraph 3.

¹² Clause 28(5).

¹³ Clause 28 (2).

¹⁴ Clause 28(3).

¹⁵ Clause 29.

however undermined quite significantly by the exceptions listed in subsection 13(2) which allow information not to be disclosed in the interests of national security etc. with apparently no prospect of challenge or oversight.

8. Schedule 8 governs the role of the Police and Crime Panel in the appointment, suspension and removal of senior officers. The only decision in which the Panel has any real say is in the appointment of the Chief Constable. The Panel must consider a proposed appointment at a confirmation hearing and make a recommendation as to whether the candidate is to be appointed. The Panel has the power of veto over a proposed appointment provided that three quarters of the total membership of the Panel agrees. The procedure to be followed if a proposed appointment is vetoed is left to secondary legislation. As for the suspension of a Chief Constable, the PCC is required only to notify the panel. When removing a Chief Constable, the PCC must provide the Chief Constable with a written explanation of the grounds, following which the Chief Constable may make written representations to the PCC. While the PCC is required to notify the Police and Crime Panel of the removal, the Panel has no meaningful power over a PCC's decision to remove a Chief Constable.

9. Clause 30 governs the power to suspend a PCC. A Police and Crime Panel may suspend the relevant PCC if it appears that (a) the PCC has been charged with an offence¹⁶ and (b) the offence is one which carries a maximum term of imprisonment exceeding two years.¹⁷ The suspension of the PCC ceases to have effect (a) if the charge is dropped; (b) the PCC is acquitted of the offence; (c) the PCC is convicted but is not disqualified by virtue of clause 67; or (d) the Police and Crime Panel terminate the suspension.¹⁸ There is therefore a high threshold for suspension. As regards the further regulation of the conduct of the PCC, this is left to secondary legislation. Specifically, clause 31 reserves the right of the Secretary of State to make provision by regulation for the making and handling of complaints about the conduct of a PCC, recording of alleged criminal offences and corruption and the way in which these issues are investigated.

¹⁶ Either in the UK, the Channel Islands or the Isle of Man.

¹⁷ Clause 30 (1).

¹⁸ Clause 30(2).

Background

10. The abolition of Police Authorities and their replacement with a directly elected politician is apparently driven by the perception that UK policing has become too far removed from the needs and concerns of local communities; that there is a local accountability deficit in the way that we are policed. Liberty whole-heartedly agrees with the Government that police need to be locally accountable. We also have huge sympathy with Government concerns over the number of central targets, circulars, guidance etc issued to police forces in recent years. As we outline below, policing in the UK has become increasingly centralised. We have consistently warned that unnecessary targets along with accompanying bureaucracy can undermine community engagement and damage the efficiency of the police. There is no doubt that over this period local forces have been diverted away from visible community policing in pursuit of centralised targets and other directives.

11. We do, however, have huge concerns over the proposal to scrap Police Authorities in favour of directly elected PCCs. As we detail below, we consider that this reform will politicise operational decision-making and place too much power in one place - dangerously undermining the independence of UK policing in the process. Given the current accountability structure in place, we also question whether this kind of radical structural reform is indeed necessary at all.

12. From the parish constables whose authority derived from the common law to the police forces of today, created and governed by statute, the police force has been mandated to provide security and accountability for the people who have consented to be governed and protected by it. The vision of Home Secretary Peel, who in the 1800s formulated the revolutionary foundation on which today's police force is based, was to have 'policing by consent' by police officers restrained and reinforced by the principles of non-partisanship and accountability to the rule of law, not to Government.¹⁹ This doctrine of independent constabulary was first enshrined in the *Metropolitan Police Act* of 1829 which created an independent office of police and, with associated regulation, insulated the new police force from direct government

¹⁹ For a detailed discussion of Liberty's view of the importance of independent policing see the Police Foundation John Harris Memorial Lecture (2 July 2008) A thinning blue line? Police independence and the rule of law, delivered by Liberty's Director available at <http://www.liberty-human-rights.org.uk/publications/pdfs/police-foundation-lecture.pdf>.

control.²⁰ These bedrock principles of consent and operational independence, closely tied to our strong democratic conventions of the separation of powers and accountability of the governors to the governed, have remained constant. Even as new pressures and threats have emerged in tumultuous times and even where, often as a result, these core principles have been infringed or threatened, the British Government, its people and the police force have always returned to Peel's vision of police independence, accountability and the rule of law.

13. The UK police force is actually made up of a number of local regional police forces and the Metropolitan Police Force, the latter being the police force for Greater London. In regional forces the most senior police officer is the Chief Constable; and in London it is the Commissioner for the Metropolitan Police. Senior police officers are currently appointed by the Senior Appointments Panel, the membership of which includes members appointed by the Home Secretary and representative members from the Association of Chief Police Officers (ACPO) and the Association of Police Authorities (APA).²¹ Attached to and accountable for each Chief Constable and the Commissioner for Metropolitan Police is a Police Authority. Police Authorities are statutory bodies which were first created as part of the major reform of policing in 1964,²² and which are now governed by the *Police Act 1996*. The authorities have a number of functions in relation to the Chief Constable and the area police force, outlined in further detail below. The police force as a whole is reviewed by Her Majesty's Inspectorate of Constabulary (HMIC), which is also provided for in the *Police Act 1996*.²³ The Home Secretary and the Minister for Police are responsible for policing policy and initiating legislation and regulation which governs the police force.

14. As law and order has moved up the political agenda, so too the pressures on the modern police service and its independence have increased. Broadly, the approach of the last Government to policing matters was 'top down' and included a plethora of legislation and new initiatives which both extended the powers of the

²⁰ Ibid. The *Metropolitan Police Act 1829* is available at <http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=Metropolitan+Police+Act&Year=1829&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&activeTextDocId=1032003>.

²¹ Sections 53B and 53C of the *Police Act 1996*, as amended by the *Policing and Crime Act 2009* and which came into force on 1 September 2010 (SI 2010/999, art 4).

²² See para 2.3 of the consultation paper, *Policing in the 21st century*, *ibid*.

²³ Section 54 and Schedule 4A of the *Police Act 1996*.

police and brought the police under greater executive control. Liberty believes that both of these outcomes have worked to undermine the nexus between police and community that this Bill apparently seeks to remedy. Creative and broadly defined police powers also bring the raised expectations of a criminal justice system that might cure all of society's ills including fear, crime, nuisance and irritation, let alone the substance abuse, truancy and other social problems lurking below the surface. To complete this vicious cycle, raised and unrealistic expectations inevitably lead to public dissatisfaction in police performance. Over-broad and onerous policing powers combined with raised expectations about the role of the police have undoubtedly fuelled the idea – real or imagined – that police are not sufficiently accountable to the communities they serve.

15. More worryingly still, the quid pro quo for the higher profile of law and greater police powers, was increased political interference. Indeed over the past decade, politicians have increasingly interfered in operational policing matters. One way in which the previous Government exerted control over policing was the imposition of police performance indicators or targets which affect how police forces use their resources. In 2007, this 'target-driven culture' led to severe criticism by the Police Federation of England and Wales. The Federation complained that targets had distorted police priorities by requiring police to focus on easily measurable results, diverting attention from serious crime and local needs.²⁴ Sometimes the coercion was tangible. In May 2005, for example, it emerged that police officers in Manchester could lose their jobs if they failed to meet targets of at least four arrests a month.²⁵ Central Government has also increased its powers to censure 'underperforming' Chief Constables. The *Police Reform Act 2002* created powers for the Home Secretary to call for a Chief Police Officer's suspension (earlier plans to allow the Home Secretary a direct power to sack having been abandoned). The *Police and Justice Act 2006* increased the powers for the Home Secretary to intervene in 'failing police forces', gave the power to intervene on the Home Secretary's own initiative, without the objective assessment of HMIC; enabled the Home Secretary to give remedial directions directly to a chief police officer, rather than to the Police Authority; and enabled the Home Secretary to give remedial directions to a Police Authority

²⁴ The Police Federation and Association of Chief Police Officers have called for a Royal Commission for a fundamental review of how policing is organised and delivered. As outlined at para's 3 to 5 in the House of Commons Home Affairs Committee *Policing in the 21st Century, Seventh Report of Session 2007-2008* (HC 364-I) (30 October 2008) (London: TSO). Available at:

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmhaff/364/364i.pdf>.

²⁵ BBC, "Low arrests police 'facing sack'", 17 May 2005.

where it is believed the Police Authority itself is failing.²⁶ Liberty believes that politicians' increased power to interfere in operational policing has undermined the current structure for local police accountability. It also widens the scope for pressure to be placed on the police to use the broad discretionary powers that they are increasingly given in a way which will meet a political agenda rather than the wider needs of policing in a particular community and context.

16. The Government has recently said that policing, which relies not only on consent but also on the active cooperation of the people, is not performing because "*the bond between the police and local people is not strong enough*".²⁷ Policing by consent, and engagement between the police and the community must however not be confused with direct community involvement in *operational decision-making*. This is the mistake we believe this Bill makes. As has been outlined above, many of the current arrangements have been in place for less than ten years. Liberty does not believe that these proposals will solve the problems that the Government has identified. We also believe that better solutions could be provided within the policing structure which already exists.

Current Framework

17. Police chiefs and their forces are currently held accountable to the public by Police Authorities, which were first introduced in the 1960s²⁸ to replace the Watch Communities and Standing Joint Committees that had been in place since the 1800s. When first introduced two thirds of the Authority was made up of elected members of county or borough councils, and the other third magistrates. In 1994 independent members were introduced.²⁹ A Police Authority is now made up of 17 members, nine of which are local council members, and eight of which are independent members.³⁰ The council appointing members to the Police Authority must ensure that the appointees: represent the views of a wide range of people in the area; include people with the relevant skills, knowledge or experience; will promote diversity in the force and authority; and have sufficient time to contribute to its work.³¹ The independent

²⁶ Section 40 of the *Police Act 1996* as amended by the *Police Reform Act 2006*.

²⁷ At para 1.9, *Policing in the 21st Century* consultation paper, *ibid*.

²⁸ Introduced by the *Police Act 1964*.

²⁹ By the *Police and Magistrates' Court Act 1994*.

³⁰ Regulation 6 of the *Police Authority Regulations 2008*.

³¹ Regulation 8A of the *Police Authority Regulations 2008*.

members are appointed by the Police Authority after a shortlist of applicants is prepared by a selection panel, vetted by the Home Office.³²

18. Police Authorities largely exercise the same functions as those now due to be transferred to the PCC. They have a broad remit of securing an efficient and effective police force for the area, and they must hold the chief officer of that force to account in the exercise of his or her functions and those under his or her command.³³ The Authority is charged with issuing a policing plan setting out the Authority's objectives for the policing of its area on a short and long term basis.³⁴ In determining the objectives for the area the Authority must consult the chief officer, who must submit a draft plan to the Authority,³⁵ and consider the views of the community.³⁶ At the end of each financial year the Police Authority is required to issue a report for the public on the matters relating to policing in that area for the preceding year, known as a 'local policing summary'.³⁷ Police Authorities are also responsible for appointing the Chief Constable, subject to the approval of the Home Secretary, and can also call on them to resign.³⁸ Chief Constables are required to submit to the Police Authority a general report on policing on an annual basis.³⁹

19. Community involvement is statutorily entrenched at the strategic level of policing through the commitment of Police Authorities to take into account community views. When discharging its functions, every Police Authority is under a statutory duty to take into account the views of the people in the Authority's area about policing in their community.⁴⁰ Police Authorities are also required by statute to make arrangements for obtaining the views of local people on matters concerning policing of their area and obtaining co-operation in preventing crime.⁴¹ The views obtained must encompass a wide range of people with particular focus on those aged under 21 or over 65 and from people from diverse backgrounds including marginalised groups and those of disadvantaged socio-economic status.⁴² The Authority must also ensure that it obtains a sufficient number and range of views so that it does not act

³² Regulations 9 and 10 and Part 3 of the *Police Authority Regulations 2008*.

³³ Section 6 of the *Police Act 1996*.

³⁴ Section 6ZB of the *Police Act 1996*, inserted by the *Police and Justice Act 2006*.

³⁵ Section 6ZB(4) *Police Act 1996*.

³⁶ As set out in 6ZB and s 96 of the *Police Act 1996*.

³⁷ Section 8A of the *Police Act 1996*.

³⁸ Section 11 of the *Police Act 1996*.

³⁹ Section 22 of the *Police Act 1996*.

⁴⁰ Section 6(2)(aa) of the *Police Act 1996*, introduced by the *Policing and Crime Act 2009*.

⁴¹ Section 96 of the *Police Act 1996*.

⁴² Regulation 2(a) of the *Police Authority (Community Engagement and Membership) Regulations 2010*.

on the basis of an unduly limited or unrepresentative sample.⁴³ The Police Authority must also take into account whether the public in the area has confidence in the police force and whether the public considers that their views are being taken into account.⁴⁴ These duties (due to be largely re-enacted and re-assigned to the PCC in the current Bill) already give local communities the ability to significantly impact on local policing issues. Local councillors are also under a duty to respond to a 'community call for action' from anybody living or working in the area which they represent on a matter concerning crime and disorder (including anti-social behaviour and behaviour adversely affecting the environment) or substance abuse in that area. The ward councillor's response must indicate what (if any) action he or she proposes to take to resolve the matter.⁴⁵

Problems with current proposals

20. The political independence of the police is as important in a democracy as the political independence of the courts. Political parties come in and out of power but those responsible for delivering public services, like the police, remain in post regardless of the ebb and flow of political opinion. It is, therefore, vital that the police maintain their political independence. This is what allows every individual in a community to feel protected by the police regardless of their race, religion or political affiliation. If the way a police force operates is overseen by someone who is politically motivated, as an elected PCC will inevitably and necessarily be, maintaining the independence of the police from politics will become increasingly difficult. This is hardly remedied by the plan for Police and Crime Panels to be made up almost exclusively of members of the Local Authority. If the police become too closely associated with any one political party it is inevitable that faith in the police will be damaged. The police must win the trust of us all, not just people of a particular political persuasion.

21. It is difficult to see how the Government's promise of maintaining operational independence marries up with the full range of decisions and powers the PCC will have sole responsibility for. In reality, many of the functions that are due to be exercised by the PCC (and are currently exercised by the Police Authority) have the

⁴³ Regulation 2(b) of the *Police Authority (Community Engagement and Membership) Regulations 2010*.

⁴⁴ Regulation 3 of the *Police Authority (Community Engagement and Membership) Regulations 2010*.

⁴⁵ Section 19 of the *Police and Justice Act 2006*.

potential to influence police operations – be it budget-setting or strategic police planning.⁴⁶ This is particularly the case given that it is proposed that PCC's will have the absolute power to remove Chief Constables. At the moment the sensitive fault line between police accountability and the preservation of operational independence is mediated between Chief Constables, multidisciplinary Police Authorities and a system of important checks and balances.

22. Further, the local election process for a directly elected PCC will most likely be fraught with difficulty. The sensitive parameters of the PCC's role and the importance of operational independence may well be drowned out as candidates seek popular election on local law and order issues. In the political heat of a local election campaign, expectations about what a directly-elected PCC can achieve for local law or order may well be raised to dangerously unrealistic levels. Just as politically partisan national discourse around law and order has undermined trust and confidence in policing, so too will local rhetoric from those who may have no experience or understanding of police work.

23. Once in post, Liberty sees a very real risk that someone who has been popularly elected will be reluctant to make an unpopular but perhaps necessary decision. For example, a PCC is most likely going to make visibility among the electorate their focus. While visibility is undoubtedly a crucial part of policing and public confidence in policing, there is a real risk that, for example, anti-social behaviour will be prioritised over and above the large proportion of work that police do which may be less visible but which is nonetheless key to crime prevention or detection such as serious organised crime, terrorism etc. If an elected PCC wishes to ensure a happy electorate then the logical conclusion may be to divert funds from these 'behind the scenes' decisions to frontline visible policing. This may be the best way to be re-elected, but it may not be the best way to keep the community safe from the perspective of the experienced senior police chief. These concerns were recently raised before the Home Affairs Committee by the current Metropolitan Commissioner, Sir Paul Stephenson, who stated that whatever arrangements are put in place *"we must ensure that this does not become just talking about popular visibility issues"*.⁴⁷ Similarly, one could envisage, for example, a Chief Constable wanting to spend some of his or her budget on a marginalized group within the community. This could be restricted or knocked back by a PCC conscious that this

⁴⁶ See para's 2.32 to 2.38 of the Policing in the 21st century consultation paper, *ibid*.

⁴⁷ Uncorrected evidence to the Home Affairs Committee, 27 July 2010, *ibid*, at Q 80.

may not satisfy the community set to re-elect him or her because, for example, it will mean less visibility in other areas.

24. There is also no guarantee that a PCC will in fact be representative of the whole community they are elected to serve. The Police Minister has said that a Police and Crime Commissioner will need “*a very large number of votes to secure their election*” and consequently will have a strong mandate.⁴⁸ But this assumes that there will be a high turnout at elections, which of course has not been the case for local elections in recent times. Further, the sheer number of individuals that currently serve on a Police Authority allows greater opportunity for membership to be drawn from a diverse field. Far from undermining democratic accountability, the involvement of several individuals from all walks of life provides for an important check on local policing. Concentrating police accountability in the hands of one figure risks excluding those from minority or traditionally under-represented groups. This could well serve to exacerbate tensions in communities which are already fractured, for example, along ethnic or religious lines.

25. Absolute veto for budgets, priorities and the continuance in post of the Chief Constable will rest solely with the PCC. There is no requirement that individuals who stand for election have any particular expertise or experience in policing, in fact there is no criteria for selection whatsoever. There is also no requirement that the PCC be independent of any political party. In fact the Home Office consultation document that preceded the Bill suggests that those with party political affiliation should be encouraged to stand for election. There will be no security clearance required for PCC nominees and the threshold for suspension by the Police and Crime Panel is particularly high. Worryingly, any further guidance as to the conduct of a PCC is being left to secondary regulation.

26. The implications of the proposals in this Bill should not be underestimated. We need only imagine the extreme, but by no means necessarily unlikely or rare, example of a far-right elected PCC. Would such a Commissioner seek to ensure protection for all members of the community under the law? The Home Secretary, when asked in the House of Commons what would happen if a member of the BNP would stand for one of these posts, responded that the BNP has never managed to

⁴⁸ Uncorrected evidence, Home Affairs Committee, *ibid*, at Q 36.

get more than 15% of the vote in one election.⁴⁹ We believe this response is short-sighted. Recent voter-turn out in local elections has been notoriously low and it is easy to imagine that voter turn-out for a directly-elected Commissioner could be even lower. Further, there is no indication that the BNP will not continue to grow in strength – the party may not have won a seat in the last General Election but their overall vote did increase, and there are particular constituencies where the threat of a BNP seat in Parliament was a real one.⁵⁰ We do not believe that the ‘check and balance’ of future elections is sufficient to ensure that once elected a Commissioner does not pursue a divisive agenda, particularly given the proposed four year length of a Commissioner’s term with no mechanism to interrupt that term by, for example, forcing a by-election, or calling on the PCC to step down, unless the PCC has committed a serious criminal offence. A lot can happen in a local community in four years, and the impact on public confidence in their police force in areas where a rogue Commissioner is voted in may be irreversible.

27. It is also now clear that the proposal to replace Police Authorities with PCCs will incur vast expense to the public purse as elections are required to be held every 4 years. Given the context in which this reform is due to take place – including huge cuts to public spending and in particular the policing budget – we would expect to see a more robust and evidence-based case for this planned reform.

28. The community already has ample opportunity to get involved in policing, and the duties to respond to the wishes of the community and incorporate their views into the strategic policing plan already exist. Much of the problem of Police Authorities relates more to accessibility and visibility rather than substantive complaints about the role they play in policing. The Government has itself acknowledged that Police Authorities remain too invisible to the public, the majority of whom don’t know how to get involved or how to influence policing in their community.⁵¹ Scrapping Authorities altogether seems an extreme measure to increase the visibility of local accountability. There are a lot of steps the Government could take which need not involve such radical change but would have the desired effect of restoring public confidence. The Home Affairs Select Committee, for example, concluded in 2008 that a large part of the problem creating lack of public confidence is driven “*by a lack of clear information about local crime and police activity*”. It consequently urged the Government to

⁴⁹ House of Commons *Hansard*, 26 July 2010, at column 732.

⁵⁰ http://news.bbc.co.uk/1/hi/uk_politics/election_2010/8667231.stm.

⁵¹ Para 2.4 of Policing in the 21st Century consultation paper, *ibid*.

consider how to make information about police activity, crime levels and police successes genuinely available to the public, which would in turn be a useful tool to set neighbourhood priorities that genuinely reflect local problems.⁵² The other problem identified by the Committee was the shift of control over performance “*from the centre to the locality*”, with under-resourced Police Authorities which remained relatively unknown to local communities.⁵³ Liberty believes that there is already a structure in place, with appropriate duties to consider community needs and wants, which could be made more visible and accessible to the public. This, in conjunction with the rollback of centralised bureaucracy, could well meet the numerous problems identified by the Government relating to police accountability.

29. Accordingly, instead of radical overhaul, the Government ought to be looking at what can be improved with the structures already in place. This would not risk undermining our robust tradition of police independence and would not involve the massive risk that an elected figure, subject only to abject scrutiny, could damage trust and confidence in policing in the UK in the long term. If the Bill is to proceed, the system of checks and balances on the power of the PCC must be significantly enhanced and the concentration of power diluted to avoid the dangers we have discussed here.

Part 3 - Parliament Square Garden and Surrounding Area

Repeal of SOCPA 2005 provisions

30. Clause 139 of the Bill repeals sections 132 – 139 of the *Serious Organised Crime and Police Act 2005* (SOCPA). These notorious sections introduced collectively oppressive restrictions on the right to protest in the vicinity of Parliament. In particular, sections 132 and 134 criminalise unauthorised demonstrations in the vicinity of Parliament and allow limitations to be placed on the place, time, duration, size and noise levels of any demonstration. Liberty warned against these provisions

⁵² House of Commons *Home Affairs Committee Policing in the 21st Century: Seventh Report of Session 2007-2008* (HC 364-I) (10 November 2008) (London: TSO); at para 46. See also para 49, where the Committee again emphasises the importance of community awareness as a means to improve confidence levels. Available at:

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmhaff/364/364i.pdf>.

⁵³ Home Affairs Committee, *ibid*, at para 46.

as they were being enacted,⁵⁴ and we have litigated and campaigned publicly against them since. We greatly welcome, and are relieved by, their repeal.

Controls on activities in Parliament Square Garden and adjoining pavements

31. While the repeal of the discredited sections of SOCPA is to be welcomed, Liberty is dismayed that instead of seeking to 'restore rights to non-violent protest' as the Coalition's *Programme for Government* pledges,⁵⁵ the effect of clauses 140 – 147 is to re-enact certain restrictions albeit for a more tightly defined area.

32. Clause 140 sets out the new area in which additional restrictions on the right to peaceful protest will apply. The new 'controlled area of Parliament Square' covers the central garden of Parliament Square and the footways that immediately adjoin it. Under clause 141 a constable or an 'authorised officer' (which includes employees of the Greater London Authority (GLA) and Westminster City Council) who has reasonable grounds for believing that a person is doing or is about to do a 'prohibited activity' in this area may direct the person to cease doing that activity/not to start doing that activity. Prohibited activities include:

- operating amplified noise equipment (loudspeakers and loudhailers);
- erecting, keeping erect or using a tent or another structure for the purposes of sleeping or staying in that area for any period;
- placing, keeping or using any sleeping equipment (which includes any sleeping bag, mattress or other similar item) for the purposes of sleeping overnight in that area.

Provisions relating to having a tent or sleeping equipment are intended to have retrospective effect and apply to those whose possession began before the clauses come into force. A direction to desist from doing any of the prohibited activities listed above can last up to 90 days and may be given orally. Clause 143 provides the power for a constable or an authorised officer (including employees of GLA and Westminster City Council) to seize and retain 'prohibited items' (tents, sleeping bags etc) inside the 'controlled area' if it appears to the officer that it is being used in connection with the commission of an offence under clause 141. A constable has the

⁵⁴ See Liberty's Second Reading Briefing on the Serious Organised Crime and Police Bill in the House of Lords available at: <http://www.liberty-human-rights.org.uk/pdfs/policy05/soc-2nd-reading-lords.pdf>

⁵⁵ See page 11 of *The Coalition: Our Programme for Government* available at: http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf.

power to remove these items even outside the 'controlled area'. The constable or 'authorised officer' may use reasonable force in exercising their powers of seizure.

33. Failure to comply with such a direction without reasonable excuse is a criminal offence and is liable on summary conviction to a fine not exceeding level 5.⁵⁶ On conviction a court may make a forfeiture order and may make an order "*as the court considers appropriate for the purpose of preventing the convicted person from engaging in any prohibited activity in the controlled area of Parliament Square and may in particular require the person not to enter Parliament Square for a period specified in the order.*"⁵⁷ There are no limits on the breadth of such an order.

34. Clause 145 creates an application process for those wishing to use amplified noise equipment (i.e. a loudspeaker or loudhailer) in Parliament Square. In order to avoid the risk of committing a criminal offence individuals are able to apply to use amplified noise equipment to the responsible authority (being either the GLA or Westminster City Council). Clause 145(3) allows the responsible authority to determine the form and manner of such applications, specify the information to be provided and require a fee to be made along with the application. On receiving an application the responsible authority must determine the outcome of the application and give notice of their decision within 21 days of receipt. The notice must specify the person authorised to use the loudhailer or loudspeaker, the kind of amplified noise equipment to which the authorisation applies, the period for which the authorisation applies and any conditions to which an authorisation is subject. Authorisation may be withdrawn or varied in writing at any time.

Our concerns about restricting peaceful protest

35. The right to peaceful protest is a direct means of holding the Government to account. Through exercising their right to peaceful protest, people are able to actively assert their membership of a democracy and engage with the democratic process. The UK has a long and proud history of peaceful protest. From the lobbying and petitioning of the early anti-slavery movement, to the Chartist's first public meetings in the 1800s, through to the anti-war march of 2003, Britain has acquired and developed a vital political culture of peaceful protest and dissent. Central to this culture of protest has been the ability of ordinary people to organise, gather,

⁵⁶ Clause 141(8).

⁵⁷ Clause 144(1).

collectively express their grievances, and agitate for reform. Also central to this culture has been the ability of protesters to do this outside the Houses of Parliament.

36. Sections 132-138 of SOCPA have been widely criticised by peaceful protesters, comedians, writers and others who have publicly highlighted the undemocratic and heavy-handed impact of the legislation. Sadly, although narrowing the geographical scope of the restrictions that can be applied and the type of restrictions that can be imposed, the current Bill repeats the same disproportionate and clumsy approach as the SOCPA provisions. It does this for an area which is arguably the most effective location for protest – opposite the main gates to the Palace of Westminster; the principal entrance and exit for Cabinet Ministers, parliamentarians and members of the public alike and the area which is most visible to passing traffic. The unnecessary criminalisation of peaceful dissent goes against the very best traditions of our history. The approach taken in these clauses is particularly surprising given another pledge of the Coalition Government to “*introduce a new mechanism to prevent the proliferation of unnecessary new criminal offences*”.⁵⁸

37. Of course, the right to peaceful protest is not absolute. First, Articles 10 and 11 of the *Human Rights Act*⁵⁹ do not encompass a demonstration where the organisers and participants have violent intentions which result in public disorder. The Articles also expressly permit restrictions which are lawful, which pursue a legitimate aim (such as national security, public safety, the prevention of disorder or crime and protecting the rights and freedoms of others) and which are proportionate to that aim.⁶⁰

38. However as with the original SOCPA provisions, these proposals in this Bill similarly, sinisterly and disproportionately target particular protests and protesters. The focus on tents and sleeping bags reveals, once again, that closing down the ongoing protest of Brian Haw, and others that have recently come and gone from Parliament Square Garden seeking to express their dissent, is a key objective of the Government. When sections 132-138 of SOCPA were introduced, it was widely

⁵⁸ See page 11 of *The Coalition: Our Programme for Government* available at: http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf.

⁵⁹ The right to freedom of peaceful assembly and to freedom of association with others is protected by Article 11 of the European Convention on Human Rights (ECHR) as incorporated by the *Human Rights Act 1998* (HRA).

⁶⁰ Articles 10(2) and 11(2).

believed that the principal aim behind the Act was to remove or down-size the 24 hour peaceful vigil of Brian Haw, whose highly publicised protest against the UK's invasion of Iraq became an embarrassing thorn in the Government's side. Indeed when initially introduced, the Serious Organised Crime & Police Bill contained the power for a senior police officer to remove someone for "*spoiling the visual aspect or otherwise spoiling the enjoyment by members of the public*" of the area. While this specific provision was eventually removed, the final wording of the Act did allow for Brian Haw to be included within its scope resulting in the subsequent removal of a large part of his peaceful protest.

39. The purpose of these clauses is to prevent protests for any extended period (and specifically overnight) in Parliament Square and to continue to place restrictions on the level of noise that protesters can make when they are near Parliament. The clauses will, of course, not only effect protesters but homeless people and others that might fail to comply with a direction not to be in possession of tents and sleeping equipment in Parliament Square. Criminalising the unauthorised use of a loudspeaker, or the possession of a tent or a sleeping bag is highly prescriptive. As with the SOCPA provisions, it demonstrates a desire on the part of Government to 'manage' protest and to determine what type of period, methods, noise levels etc are acceptable. The bureaucratic and paternalistic application process for the use of a loudhailer in Parliament Square Garden created in clause 145 exemplifies the controlling nature of these provisions.

40. Further, the mechanism for criminalisation is highly problematic. First, the direction not to be in possession of the tent/sleeping bag/loudspeaker effectively acts as an on-the-spot injunction, breach of which is criminal. There is no requirement for possession of a loudspeaker, tent and sleeping bag to be causing or be likely to cause crime or disorder, restrictions on the rights of others to express themselves, or even to 'spoil the visual aspect'. Instead possession of the items alone leads to a direction being made, and failure to obey such a direction without reasonable excuse is a criminal offence. That a direction can be given orally is likely to cause problems in practice. It is easy to imagine how someone to whom a direction is given may not realise that a direction has been made or fully understand the consequence of the direction and non-compliance with it. The order that can be made on conviction is left dangerously broad.

41. Liberty is also concerned that the type of overbroad policing power provided (i.e. an on-the-spot oral direction combined with the power of forfeiture) may make public order situations even more difficult for frontline officers. As we have commented before, overbroad and disproportionate use-of-force powers are not necessarily a boon for police but can instead place a heavy and unhelpful burden on the exercise of their professional discretion. We further doubt that the extension of use of force and forfeiture powers to employees of the GLA and Westminster City Council in this context is wise. Liberty has previously warned about granting coercive powers and powers to use reasonable force to those other than law enforcement professionals. We believe that the extension of police-like powers to untrained civilians, police community support officers etc can leave those exercising these powers, and those subjected to them dangerously vulnerable.

42. Of course there already exists a plethora of legislation designed to impose restrictions on protests and demonstrations elsewhere in the country. Under the *Public Order Act 1986* (POA) a senior police officer has the power to impose conditions as to: the place at which an assembly⁶¹ may be held; its maximum duration; or the maximum number of persons who may constitute it.⁶² These conditions may be imposed where a senior police officer reasonably believes that the assembly may result in: serious public disorder; serious damage to property; serious disruption to the life of the community; or that the purpose of the assembly is to coerce by intimidation.⁶³ The third of these: “serious disruption to the life of the community” is vague and potentially confers on the police a large discretion to impose conditions. Further under the POA organisers of public processions must notify the authorities at least six days before the procession is intended, with failure to do so constituting a criminal offence⁶⁴.

43. Given the powers currently on the statute book, the Government has yet to argue convincingly that parliamentarians need additional protections from peaceful protest. It goes almost without saying that protests will commonly have the effect of irritating those they seek to influence and, from time to time, inadvertently inconveniencing those they do not. But when framing restrictions to the right to

⁶¹ An assembly is now defined as consisting of “two or more persons” under section 16 of the POA as amended by the *Anti-Social Behaviour Act 2003*.

⁶² Section 14(1) Public Order Act (1986).

⁶³ *Ibid.*

⁶⁴ Section 11, Public Order Act (1986).

protest, irritation and inconvenience must not be seen as a trump card. While lengthy and noisy protests obviously have the power to cause greater embarrassment to the Executive this is no reason for making possession of loudspeakers and sleeping equipment a criminal act.

44. The only reported justification for the restrictions currently being sought is the Royal Wedding of Prince William and Kate Middleton scheduled to take place in the centre of London in April 2011. It is understood that the Government is keen to clear Parliament Square of protests in time to welcome foreign dignitaries to London. This line of argument is similar to the argument that because Parliament Square is a World Heritage site it should be cleared of protesters to make it more attractive to visiting tourists. While Parliament Square's popularity with tourists is of course something to be celebrated Liberty believes that peaceful dissent – a hard won right that is so linked to the struggle for democracy itself – is exactly the type of activity that our elected representatives shouldn't be ashamed of or wish to tidy away. Further it is precisely the importance, location and symbolism of Parliament Square that means that peaceful protest in its vicinity must be protected. After all, the right to peaceful protest cannot be divorced from the right to do so in locations where protest will be best heard.

Part 4 - Arrest Warrants

45. Clause 151 amends section 1 of the *Magistrates' Courts Act 1980* and proposes new restrictions on the issuing of arrest warrants in private prosecutions. Specifically it proposes that where a private individual lays information before a Magistrate relating to certain offences alleged to have been committed outside the UK, the consent of the Director of Public Prosecutions (DPP) will be required before an arrest warrant is issued. The type of offences for which this new hurdle will need to be cleared include those which capture the gravest of criminal behaviour including war crimes, crimes against humanity and torture.

Background

46. Liberty is disappointed that the Government has proposed restricting such a long-standing and important right, particularly in respect of extremely grave and heinous offences which have historically been so difficult to prosecute. Reform to the law on this area was consulted on by the previous Government just before the

General Election earlier this year.⁶⁵ Following an unsuccessful attempt by private individuals to issue an arrest warrant against the former Foreign Minister of Israel, Tzipi Livni, for alleged war crimes, and subsequent Israeli Ministerial objections, the previous Government announced it was urgently looking into “*ways in which the UK system might be changed in order to avoid this sort of situation arising again*”.⁶⁶ As a direct result of this case the former Secretary of State for Justice, the Rt Hon Jack Straw MP, stated in Parliament on 4 March 2010 that the Government had concluded that there was a case for restricting to the Crown Prosecution Service (CPS) the right to prosecute for universal jurisdiction offences, thereby removing the right of private prosecutions.⁶⁷ While we appreciate the political sensitivities involved, we believe a principle as fundamental and hallowed as the right of private prosecution should not be dispensed with for the sake of political convenience.

47. The ability of a private individual to bring a prosecution for an offence under the law of England and Wales has existed for centuries. Indeed, historically, prosecutions were initially mainly brought by victims or their kin. Over time, with the development of the common law, prosecutions have largely been brought on behalf of the State. However, the right of individual prosecution has remained as an important safeguard against the failure by the State to seek to enforce the criminal law. This right has been recognised by the courts to be “*a valuable constitutional safeguard against inertia or partiality on the part of authority*”.⁶⁸ In the past, private prosecutions have been brought to prosecute sexual offences when the prosecuting authorities have failed to act. Perhaps most famously, the right was also used by a widower of one of the 51 victims of the *Marchioness* disaster in 1989 to bring a prosecution for manslaughter after the CPS had decided to only bring charges against the boat’s owners and employees for ‘failing to keep a proper lookout’. More recently, it has been used in a handful of cases to attempt to bring prosecutions of those suspected of having committed war crimes, genocide, torture or crimes against humanity.

⁶⁵ Arrest Warrants – Universal Jurisdiction Note by the Ministry of Justice (March 2010) is available at: <http://www.justice.gov.uk/publications/docs/arrests-warrants.pdf>.

⁶⁶ See Official Statement by the former Foreign Secretary, the Rt Hon David Miliband MP, 15 December 2009, ‘Response to UK arrest warrant for Tzipi Livni’, available at: <http://www.fco.gov.uk/en/news/latest-news/?view=News&id=21448373>

⁶⁷ See Written Ministerial Statement in the House of Commons and House of Lords, *Arrest warrants – universal jurisdiction*, 4 March 2010, available in Hansard.

⁶⁸ See Lord Wilberforce in *Gouriet v Union of Post Office Workers* [1978] AC 435 at 440. For further exploration of relevant cases we refer to JUSTICE’s response to these proposals: *JUSTICE Response to Ministry of Justice Consultation, Arrest Warrants – Universal Jurisdiction*, March 2010.

48. The principle of universal jurisdiction allows for these gravest of offences to be prosecuted anywhere in the world, regardless of where they were allegedly committed or who allegedly committed the acts. This gives UK courts jurisdiction to prosecute anyone within its jurisdiction for such offences. As such, any person in the UK against whom there is sufficient evidence to suspect they may have committed war crimes and crimes against humanity etc, is liable to arrest and prosecution for the offence. The usual methods of prosecution are available: either the CPS could bring a prosecution or a private individual could apply to a Magistrate to begin a prosecution. However, in most cases involving allegations of war crimes, crimes against humanity and genocide the Attorney-General (AG) needs to give his or her consent before a prosecution can proceed.⁶⁹ The requirement for the Attorney-General's consent, however, does not prevent the issuing of an arrest warrant in the first instance.⁷⁰

Current procedure for private prosecution

49. Private prosecutions require the approval of a Magistrate who can refuse to issue a summons or an arrest warrant. The Magistrate must satisfy him or herself that, at the very least, the offence forms part of UK law and the essential ingredients of the offence are present. The Magistrate must also be satisfied that the offence alleged is not out of time, the court has jurisdiction and the person seeking to prosecute has authority. The Magistrate must also consider all relevant circumstances and ascertain whether the allegation is vexatious.⁷¹ The Director of Public Prosecutions can also decide to take over a private prosecution at any time, and if he or she does so, can then discontinue or withdraw proceedings. In respect of crimes that come under universal jurisdiction, international law makes clear that immunity from prosecution applies to serving heads of state and certain other high-level officials, such as foreign ministers and diplomats.⁷² This means that no arrest

⁶⁹ See section 1(3) of the *Genocide Act 1969*, section 1A(3) of the *Geneva Conventions Act 1957*; section 1(3) of the *War Crimes Act 1991*, section 135 of the *Criminal Justice Act 1988* (in relation to prosecution for torture) and section 53(3) of the *International Criminal Court Act 2001* (but note this only applies to UK nationals or residents if offence committed outside the UK).

⁷⁰ See section 25 of the *Prosecution of Offences Act 1985*.

⁷¹ *R v West London Justices ex parte Klahn* [1979] 2 All ER 221 at 223.

⁷² See *Arrest Warrants case (Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium))* ICJ Rep 2002, which established that Head of State immunity extended to serving Foreign Ministers. See also *R v Bow Street Metropolitan Stipendiary Magistrate, Ex*

warrant can be issued in relation to diplomats or serving high-level officials, and in fact such warrants have been refused on a number of occasions by UK courts, including as recently as September 2009 when an arrest warrant sought against the serving Defence Minister of Israel was refused by a UK court.

50. It is clear then that arrest warrants for private prosecutions are not issued simply as a matter of course, and immunities apply to restrict their use. We are not aware of any case, nor has the previous or current Government produced any examples, where an arrest warrant for an offence using universal jurisdiction has been improperly issued. It is unfortunate that one recent instance where an arrest warrant was not even executed has led to a knee-jerk response which seeks to amend long-standing and fundamental principles.

51. Under international law the UK is under an obligation to either prosecute or extradite those in its jurisdiction that are alleged to have been involved in war crimes and crimes against humanity etc. Therefore, one would hope that the police and the CPS would themselves bring an action to prosecute those within the jurisdiction suspected of having committed such grave offences. However, it may well be unrealistic to expect the police and the CPS, with their limited resources, to focus on prosecuting offences committed outside the UK. It has been recognised by the courts that private prosecutions can quite usefully be commenced by organisations with specialist knowledge of the particular area of the criminal law concerned.⁷³ So, given the UK's obligation under international law to prosecute or extradite for such offences, if the authorities have not taken action, a private prosecution may actually assist the Government in fulfilling its international law obligations.

52. A Ministry of Justice Note on this issue suggested a number of possible reforms to the current process.⁷⁴ These include: requiring the consent of the Attorney-General for the granting of an arrest warrant; the prohibition of the issuing of an arrest warrant for crimes of universal jurisdiction on application by a private individual; or the restriction of the right to initiate proceedings using universal jurisdiction to the CPS. We are relieved that the Government has chosen not to

Parte Pinochet Ugarte (No 3) [1999] 2 WLR 827. In relation to diplomatic immunity see the *Vienna Convention on Diplomatic Relations 1961*, articles 29, 31(1), 32 and 39(2).

⁷³ See *Scopelight Ltd v Chief of Police for Northumbria* [2009] EWCA Civ 1156 at para 51.

⁷⁴ Arrest Warrants – Universal Jurisdiction Note by the Ministry of Justice (March 2010) is available at: <http://www.justice.gov.uk/publications/docs/arrests-warrants.pdf>.

pursue any of these suggested reforms. We are, however, extremely concerned about what has been proposed in this Bill.

Our concern with the proposals in this Bill

53. This Bill proposes to require the consent of the DPP to a prosecution before a Magistrate can issue an arrest warrant for crimes of universal jurisdiction. This approach appears to be based on the existing requirement for DPP or AG consent before proceedings for certain offences can be instituted.⁷⁵ However for offences where DPP or AG consent is currently required, the consent must be obtained only before proceedings are instituted and not before an arrest warrant is issued.⁷⁶ In contrast, a requirement that the prosecuting authority must consent to the issuing of an arrest warrant is much more onerous. While a requirement for the consent of the DPP is preferable to that of the AG (due to the AG's role as a member of the Executive and the obvious conflict that can result from involvement in the prosecution of individual cases) we believe that in practice it will unjustifiably undermine exercise of the right of private prosecution. For example, it will no doubt prove difficult if not impossible, in cases where the defendant is only passing through the UK or not staying for very long, for DPP consent to be obtained in time to allow for an arrest warrant to be issued and effectively executed. In practice, therefore, these proposed changes risk rendering private prosecution, recognised to be an important part of prosecuting serious crimes in the most complex of political and legal circumstances, ineffective.

54. By their very nature, requirements for consent to prosecution either from the AG or the DPP can undermine the right to private prosecution. The value of the historic right hinges on the ability of individuals to pursue prosecutions where the authorities, for any number of reasons, do not want a prosecution to go ahead. Liberty understands that DPP consent to a prosecution may be necessary where the law intrudes into areas that are particularly sensitive or controversial. However, crimes which attract universal jurisdiction do so exactly because there is international consensus over their gravity.

⁷⁵ For example the institution of prosecutions under section 2 of the Suicide Act (assisting another's suicide) requires the consent of the DPP and the institution of prosecutions for war crimes under the Geneva Conventions Act 1957 or the International Criminal Court Act 2001 requires the consent of the AG.

⁷⁶ Section 25 of the *Prosecution of Offenders Act 1985* provides that there is no requirement for a magistrate to be satisfied that consent of the DPP or AG has been obtained before issuing an arrest warrant.

55. This raises the question as to the potential grounds on which the CPS decide whether or not to consent to a private prosecution for crimes against humanity etc. The requirement for DPP or AG consent for certain prosecutions to be instituted can be premised on a range of factors including the need for a higher evidential threshold to be met, to secure consistency in prosecution, or to enable account to be taken of mitigating factors.⁷⁷ Regarding the evidential threshold, there is no requirement for private prosecutors to satisfy the Code for Crown Prosecutors including the “Full Code Test” that requires the CPS to be satisfied that: (a) there is enough evidence to provide a ‘realistic prospect of conviction’ against the defendant and (b) it must be in the public interest for the CPS to bring the case to court. This said, a private prosecution that fails to satisfy one of the limbs of the Test may be taken over and either continued or discontinued by the DPP.⁷⁸ A prosecution may for example be taken over where it is so serious that it merits a public rather than a private prosecution and may for example be discontinued where for example it is vexatious, malicious or would interfere with an investigation into another criminal offence.

56. If the proposal in this Bill requiring the DPP to consent to the issuing of an arrest warrant for a private prosecution is based on the rationale that a higher evidential threshold should be met before an arrest warrant is issued, there is nothing to stop this threshold being raised. Liberty has previously suggested that if there are concerns that UK law has, or may, lead to problems with arrest warrants being issued too easily, changes to the evidential threshold before an arrest warrant can be issued might be considered.⁷⁹ In addition, we understand that currently the CPS is not automatically notified when an application for an arrest warrant is made by a private individual. Given that the CPS may be able to offer the court important information as to why an arrest warrant should or should not be issued, it may well be practical to require an applicant to notify the CPS when lodging an application for a private prosecution. Indeed, in circumstances when personal immunities may apply the CPS (or Foreign Office) can helpfully assist the court in making relevant submissions. Procedural amendments of this kind could help to address any

⁷⁷ In a memorandum to the 1972 Franks Committee, the Home Office set out five reasons why certain offences require consent. See the CPS website *Consents to Prosecute* available at http://www.cps.gov.uk/legal/a_to_c/consent_to_prosecute/.

⁷⁸ The DPP has the discretion to take over prosecution under section 6(2) of the *Prosecution of Offenders Act 1985*.

⁷⁹ See Liberty’s response to the Government’s proposals on arrest warrants for crimes subject to universal jurisdiction available at: <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-response-to-proposals-on-arrest-warrants.pdf>

concerns about arrest warrants being issued too easily. They would also ensure that the important right of private prosecution for the gravest of offences is not unnecessarily narrowed.

57. Liberty is concerned that the desire to reform this area of law, is not motivated by problems with the arrest warrant issuing process itself, but rather by the effect that the right of private prosecution has on the UK's relations with some other countries. The Ministry of Justice's Note on arrest warrants and universal jurisdiction states:

There is reason to believe that some people, including people with whom the British Government needs to engage in discussion, may not be prepared to visit this country for fear that a private arrest warrant might be sought against them.⁸⁰

The law of personal immunity of serving Heads of State and foreign Ministers and the like, as well as diplomatic immunity, provides ample recognition of the need for those currently serving to be able to travel without fear of prosecution to facilitate international relations. It is clear then that the concern of private prosecution can only arise in relation to people who do not enjoy immunity – that is, those who do not occupy relevant diplomatic or high-level government positions. As such, it is unclear why there would be such a pressing need for the British Government to engage that person in discussion at a diplomatic level within the UK. Of course, anyone against whom there is no evidence of any engagement in activities that could be considered to be war crimes, genocide, torture or crimes against humanity, could have no reason to fear coming to the UK. As already noted, there is a judicial process that must be undertaken before an arrest warrant can be issued which should ensure vexatious or improper applications are unsuccessful. The UK should not be undermining a right of private prosecution which has been in place for centuries, particularly in relation to the most serious and heinous of offences such as torture and crimes against humanity, simply to smooth diplomatic relations.

Isabella Sankey

⁸⁰ Ibid.