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Liberty's Second Reading briefing on the Police Reform and Social Responsibility Bill in the House of Lords (Part 3, Protest; Part 4, Arrest Warrants)

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Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

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Contact

Isabella Sankey

Director of Policy

Direct Line 020 7378 5254

Email: bellas@liberty-human-rights.org.uk

Rachel Robinson

Policy Officer

Direct Line: 020 7378 3659

Email: rachelr@liberty-human-rights.org.uk

Sophie Farthing

Policy Officer

Direct Line 020 7378 3654

Email: sophief@liberty-human-rights.org.uk

Introduction & Summary

1. If enacted, the Police and Social Responsibility Bill will introduce significant changes to policing and police and prosecutorial powers. Part 1 of the Bill proposes wholesale reform of policing in the United Kingdom with the introduction of directly elected Police and Crime Commissioners. We have detailed our significant concerns about these proposals in our briefing for Second Reading.¹ This briefing outlines our concerns in relation to Parts 3 and 4 of the Bill. Part 3 concerns protest in Parliament Square, repealing sections 132 to 138 of the *Serious Organised Crime and Police Act 2005* but replacing them with overly restrictive provisions targeting protest in Parliament Square. Clause 154 of Part 4 proposes to reform the right of private prosecution in relation to offences alleged to have taken place overseas where universal jurisdiction can be asserted.

Part 3 - Parliament Square Garden and Surrounding Area

Repeal of SOCPA 2005 provisions

2. Clause 142 of the Bill repeals sections 132 to 138 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 as they were being enacted,² 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

3. 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

¹ See Liberty's Second Reading Briefing on Part 1 of the Police Reform and Social Responsibility Bill in the House of Lords (April 2011), available at <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-second-reading-briefing-on-part-1-of-the-police-reform-bill-april-.pdf>

² 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>

the Coalition's *Programme for Government* pledges,³ the effect of clauses 142 to 150 is to re-enact certain restrictions albeit for a more tightly defined area.

4. Clause 143 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 144 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 or 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.⁴ Clause 146 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 144. A constable has the 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.

5. 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 5.⁵ 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*

³ See page 11 of *The Coalition: Our Programme for Government* available at: http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf.

⁴ Clause 145.

⁵ Clause 144(8).

*may in particular require the person not to enter Parliament Square for a period specified in the order.*⁶ There are no limits on the breadth of such an order.

6. Clause 148 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 148(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

7. 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, 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.

8. Sections 132 to 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

⁶ Clause 147(1).

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*”.⁷

9. Of course, the right to peaceful protest is not absolute. First, Articles 10 and 11 of the *Human Rights Act*⁸ 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.⁹

10. However as with the original SOCPA provisions, the 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 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

⁷ See page 11 of *The Coalition: Our Programme for Government* available at: http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf.

⁸ 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).

⁹ Articles 10(2) and 11(2).

Brian Haw to be included within its scope resulting in the subsequent removal of a large part of his peaceful protest.

11. 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 who might fail to comply with a direction not to be in possession of tents and sleeping equipment in Parliament Square. The provisions are of particular concern given homeless people are likely to be simultaneously and directly targeted by a draft byelaw currently being proposed by Westminster City Council, which will criminalise rough sleeping in a designated area of Victoria just down the road from the Square,¹⁰ 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, the provisions in this Bill demonstrate 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 148 exemplifies the controlling nature of these provisions.

12. 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.

¹⁰ See Liberty's response to Westminster City Council's consultation to ban soup runs and rough sleeping in a designated area of Westminster, available at <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-response-to-westminster-council-byelaw-consultation-march-2011-.pdf>.

13. 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.

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 assembly¹¹ may be held; its maximum duration; or the maximum number of persons who may constitute it.¹² 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.¹³ 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 offence¹⁴. The repeal of section 132(6) of SOCPA under clause 142 will mean that section 14 of the *Public Order Act 1986* will again apply to the Square.¹⁵ Clause 142(2) states that section 14, which allows for conditions to be imposed on public assemblies, will apply to assemblies which have started or were being organised before the Act comes into force.

¹¹ 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*.

¹² Section 14(1) Public Order Act (1986).

¹³ Ibid.

¹⁴ Section 11, Public Order Act (1986).

¹⁵ Section 132(6) of SOCPA provided “*Section 14 of the Public Order Act 1986 (imposition of conditions on public assemblies) does not apply in relation to a public assembly which is also a demonstration in a public place in the designated area.*”

14. Given these 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 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.

15. A prominent 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 on 29th April 2011.¹⁶ It is understood that the Government was keen to clear Parliament Square of protests in time to welcome foreign dignitaries to London.¹⁷ Given the timing of this Bill it clearly will not provide the legal solution Government seeks to create. Indeed in light of failed attempts to legally remove the protesters there have been reports that the Government is applying pressure on the Metropolitan police behind the scenes to ensure *“Parliament Square is in a fit and proper state for the royal wedding”*¹⁸

16. The Royal Wedding justification shows that the intention of these particular provisions is aesthetic, rather than an intention to remove a serious threat to public order or prevent criminal behaviour. Given this justification, the interference with the right to peaceful protest as proposed under this part of the Bill is clearly disproportionate. Are we to understand that parliamentarians have an objection to someone standing in Parliament Square with a sleeping bag – an objection that would, had this legislation been passed, have applied to the Prime Minister in his youth, when he slept out to see the Royal Wedding?

17. This line of argument put forward in relation to the Royal Wedding 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. However, peaceful

¹⁶ See statements of the Prime Minister, House of Commons *Hansard*, 24th November 2010 at column 257.

¹⁷ See “Royal wedding planners powerless to evict Parliament Square protesters” *The Guardian* 7th April 2011, available at <http://www.guardian.co.uk/uk/2011/apr/07/royal-wedding-parliament-square>.

¹⁸ According to a report in *The Guardian* on 7th April, *ibid*, statement from a Home Office spokesperson.

dissent – a hard won right that is inherently 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 which 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. We celebrate democracy in the UK, and a key part of democracy is about dissent. Sometimes this can be annoying, sometimes it can be a bit noisy, sometimes a bit messy. But these are not justifications for dragging people away from peaceful assembly or confiscating their sleeping bags.

Part 4 - Arrest Warrants

18. Clause 154 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 clear include those which capture the gravest of criminal behaviour including war crimes, crimes against humanity and torture.

Background

19. 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. Accordingly Liberty supports the amendment tabled in Report stage in the House of Commons which proposed removing clause 154¹⁹ from the Bill.²⁰

20. Reform to the law on this area was consulted on by the previous Government just before the General Election earlier this year.²¹ Following an unsuccessful attempt

¹⁹ At Report stage this was clause 152.

²⁰ As proposed by Ann Clwyd MP (Labour): amendment 2, page 100, line 10, leave out clause 152. See House of Commons *Hansard*, 30 March 2011 at column 452. The amendment was defeated on division of the House, at column 465.

²¹ 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>.

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”.²² 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.²³ More recently the current Foreign Secretary, the Rt Hon William Hague MP, outlined the reasons for the inclusion of this clause in the Bill:

*The logic is that it will still be possible to get an arrest warrant if there is a reasonable chance of prosecution. It makes this country rather ridiculous if people can get an arrest warrant for people from other countries where there is no realistic chance of prosecution. It is therefore important to change that law. The law as it stands has been abused in relation to visitors from several other countries. It was abused, in my view, when there was a threat to the proposed visit of Mrs Livni to the United Kingdom. ...If we want, as we do, to be able to engage in pushing forward the peace process, we need such people to be able to visit the United Kingdom.*²⁴

However contrary to this statement clause 154 is not about increasing the evidential threshold before a warrant is granted. As we outline below, the current procedure for issuing a warrant already requires a Magistrate to be satisfied of certain evidentiary elements before granting the warrant. What this clause proposes to do is change the process *before* a case for a warrant is even put before a Magistrate. 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. This is particularly so when its use in recent years has been extremely rare indeed, with only ten applications made and two granted.²⁵

²² 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>

²³ See Written Ministerial Statement in the House of Commons and House of Lords, *Arrest warrants – universal jurisdiction*, 4 March 2010, available in Hansard.

²⁴ House of Commons *Hansard*, 24th March 2011 at column 1130.

²⁵ See House of Commons *Hansard*, 30th March 2011, at column 454.

21. 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*”.²⁶ 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.

22. 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.²⁷ The requirement for the Attorney-

²⁶ 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.

²⁷ 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).

General's consent, however, does not prevent the issuing of an arrest warrant in the first instance.²⁸

Current procedure for private prosecution

23. 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.²⁹ 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.³⁰ This means that no arrest 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.

24. 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.

25. 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

²⁸ See section 25 of the *Prosecution of Offences Act 1985*.

²⁹ *R v West London Justices ex parte Klahn* [1979] 2 All ER 221 at 223.

³⁰ 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 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).

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.³¹ 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.

26. A Ministry of Justice Note on this issue suggested a number of possible reforms to the current process.³² 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 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

27. 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.³³ 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.³⁴ 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

³¹ See *Scopelight Ltd v Chief of Police for Northumbria* [2009] EWCA Civ 1156 at para 51.

³² 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>.

³³ 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.

³⁴ 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.

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.

28. 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.

29. 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.³⁵ 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.³⁶ A prosecution may for example be taken over where it is so serious that it merits a public rather than a private

³⁵ 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/.

³⁶ The DPP has the discretion to take over prosecution under section 6(2) of the *Prosecution of Offenders Act 1985*.

prosecution and may for example be discontinued where for example it is vexatious, malicious or would interfere with an investigation into another criminal offence.

30. 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.³⁷ 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 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.

31. 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.*³⁸

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

³⁷ 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>

³⁸ Ibid.

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
Sophie Farthing