



CRIMINAL BAR ASSOCIATION
Response
To
Ministry of Justice Paper
entitled
“Arrest Warrants – Universal Jurisdiction”

INTRODUCTION

1. The Criminal Bar Association represents the 3,600 or so employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts; ensuring that those who are guilty are convicted and those who are not are acquitted.
2. The Ministry of Justice issued its paper *Arrest Warrants – Universal Jurisdiction* on 17th March 2010. It is understood that this is not a formal consultation but an invitation to express views on the proposals contained in the Paper. The consultation period ends on 6th April 2010.
3. The Paper invites responses to three proposed options to “limit the availability of arrest warrants in respect of universal jurisdiction offences”.¹ The options are: -
 - i) *To require the Attorney General’s consent to the prosecution to have been notified before an arrest warrant could be issued in respect of universal jurisdiction offences.*

¹ Page 3, under ‘Possible Solutions’

ii) *To prohibit the issue of an arrest warrant on the application of a private prosecutor in respect of universal jurisdiction offences, while leaving the summons route available.*

iii) *To restrict to the Crown Prosecution Service (CPS) the right to initiate proceedings in respect of universal jurisdiction offences.*

EXECUTIVE SUMMARY

4. This response sets out the circumstances in which this review and its proposals came about and examines the arguments for and against the proposal.
5. We set out to briefly examine the historical background to private prosecutions and the courts' attempts to balance the competing interests of private prosecutors and the State's overall responsibility for criminal justice.
6. We also consider the extent to which there is a right or power on the part of private citizens to prosecute for grave crimes and the judicial oversight of the issue of arrest warrants.
7. We come to the conclusion that there are no compelling reasons in law why this right should be removed; any reasons in favour of its abolition are, on the Government's own case, political and therefore outside the ambit of the Association's consideration

BACKGROUND

8. In a letter accompanying the Paper the Ministry of Justice makes clear why a limitation is sought:

"It is open to any private citizen to secure the arrest, on far less evidence than would be required for the Crown Prosecution Service to bring a charge or for a jury properly to convict, of foreign visitors on suspicion of certain very grave offences (such as war crimes under the Geneva Conventions Act 1957) which can be tried in England and Wales even if they were committed overseas.

The Government is concerned that this might have implications for this country's relations with other states."

9. The immediate reason for the Government's concern was the issue of an arrest warrant in December 2009 in respect of Tzipi Livni, the Israeli opposition politician and former Foreign Minister, for alleged war crimes in connection with Israeli military action in Gaza in 2008. This resulted in the cancellation of her visit to this country and declarations by various members of the Government, including the

Prime Minister, that the law should be changed. Among others, the Foreign Secretary David Miliband said on 15th December, after a meeting with the Israeli ambassador that the law allowing judges to issue arrest warrants against foreign dignitaries, without any prior knowledge or advice by a prosecutor, must be reviewed and reformed. He added, "Israel is a strategic partner and a close friend of the United Kingdom. We are determined to protect and develop these ties. Israeli leaders – like leaders from other countries – must be able to visit and have a proper dialogue with the British government."²

10. The purpose of setting these proposals in this context is to acknowledge that there is a significant political background to the proposal and, some have said, the proposals are improperly politically motivated; to ignore this background is unrealistic, and this response seeks to address the proposals from a legal point of view but in the light of the conflicting arguments that have been publicly aired.

LEGAL FRAMEWORK

11. By virtue of section 1 of the Magistrates' Courts Act 1980
 - (1) On an information being laid before a justice of the peace that a person has, or is suspected of having, committed an offence, the justice may issue–
 - (a) a summons directed to that person requiring him to appear before a magistrates' court to answer the information, or
 - (b) a warrant to arrest that person and bring him before a magistrates' court.
 - (2) No warrant shall be issued under this section unless the information is in writing
14. Although a prosecution for, among many other offences, war crimes can only be instituted with the consent of the Attorney General, the issuing of a warrant is not the institution of proceedings, and the power to issue one, whether or not the Attorney-general's consent has been obtained for a prosecution, is expressly preserved by section 25 of the Prosecution of Offences Act 1985. The rationale appears to be that there may be circumstances where a person is suspected of a grave crime and their arrest is a matter of urgency. To have to wait for papers to be prepared and submitted to a Law Officer, and then for

² Quoted in Haaretz and elsewhere, 19th December 2009

a decision to be made about a prosecution could result in the suspect being able to avoid arrest.

THE OPPOSING ARGUMENTS

22. No attempt is here made to address fully the complexities and subtleties of the opposing views but, broadly speaking, they may be summarised as follows.
23. In favour of reform of the current law, it is said that it is anomalous in the context of international relations that although a prosecution requires the consent of the Attorney-General, a person may be arrested even if consent has not been sought or given. There are wider public interest considerations to be taken into account in considering whether to consent to a prosecution and these are not matters that a magistrate can consider when asked to issue an arrest warrant.
24. The argument against the proposed change is that the granting of a warrant is a judicial act carried out in accordance with proper legal principles. If a warrant is granted, it is argued, the requirement to obtain the consent of the Attorney to the formal institution of such proceedings after arrest highlights that the power of the Attorney General, a government minister, to intervene in cases is an anomaly in an independent justice system.
25. The power of the Attorney-General's control over criminal prosecution is quasi judicial. Yet he is also a political figure responsive to political pressures. The granting of the warrant operates to shine the spotlight where it should be directed so that a decision not to prosecute is accurately identified as a political one, and not based upon purely legal grounds.
26. The utilitarian argument in favour of the proposed change is obvious, but it is precisely this emphasis on *realpolitik* that lies at the heart of opposition to the change. What then is the real extent of the independence of the justice system, not just in the resolution of issues relating to breaches of the criminal law, but in the institution of proceedings? To what degree do any of the proposals significantly increase the power of the State to control how criminal proceedings are instituted, rather than how, once they have begun, how they are resolved.?

27. Of course one answer to that question is that if the State can prevent proceedings ever taking place then the State has absolute control.

THE POWER TO INSTITUTE PRIVATE PROSECUTIONS

28. Historically all prosecutions in England were private prosecutions. The vast majority now are instituted by public authorities, principally the Crown Prosecution Service. However the right to institute a private prosecution is retained in the Prosecution of Offences Act 1985, section 6 (1). During the debate on the Bill Lord Simon of Glaisdale described that the principle upon which that right was founded was the general: -

"fundamental constitutional principle of individual liberty based on the rule of law"

29. Almost invariably a private prosecutor will have a personal interest in the outcome of a case. That will be either an individual who seeks to use the criminal courts in a private dispute with other individuals, or in a case such as brought by the RSPCA, an interest group dedicated to suppressing certain forms of criminal behaviour. To say that such persons have a personal interest does not assume any lack of integrity or bad faith on their part.
30. There is high authority that a private prosecution is a valuable safeguard against misbehaviour by official prosecuting authorities (Gouriet v Post Office Workers [1978] AC 435 , at 497 H to 498 B, per Lord Diplock). Lord Wilberforce notably also observed that "such a right provided a constitutional safeguard against "capricious, corrupt, or biased failure, or refusal" by the prosecuting authorities and "inertia or partiality on the part of the authority".
31. More recently however the House of Lords expressed greater scepticism about private prosecutions in Jones v Whalley [2006] UKHL 41, [2007] 1 AC 63. Notably in that case Lord Rodger of Earlsferry said:

"24 Nowadays public prosecutions are the rule. So, usually, the court will be concerned to prevent its process being misused by a public prosecutor. But, in times gone by, when private prosecutions were the rule, the court must have had the power to guard against the corresponding danger of its process being misused by a private prosecutor."

32. Lord Bingham said

“16 A crime is an offence against the good order of the state. It is for the state by its appropriate agencies to investigate alleged crimes and decide whether offenders should be prosecuted. In times past, with no public prosecution service and ill-organised means of enforcing the law, the prosecution of offenders necessarily depended on the involvement of private individuals, but that is no longer so. The surviving right of private prosecution is of questionable value, and can be exercised in a way damaging to the public interest.”

33. Lord Mance said

“38 The broader issue is one of some importance. It requires some consideration of the general value of any right of private prosecution in modern conditions. It was not raised below or touched on in the appellant's case, and its implications have not been properly explored. They may be more substantial than might appear. Prosecutions brought without police or Crown Prosecution Service involvement are not uncommon. They may be initiated by private bodies such as high street stores, by charities such as the NSPCC and RSPCA, or by private individuals as in the present case.”

34. The debate over the requirement that the Attorney General's consent is required to prosecute in some cases is not new. The issue was considered by the Law Commission in its Report on Consents to Prosecution (LC 255) of 20 October 1998.

35. The Commission addressed the right to bring a private prosecution in paragraphs 5.3 and 5.4 under the heading of “The Fundamental Principle”. It pointed out that it had in its prior consultation paper considered the significance of private prosecutions, and had concluded that “the right to private prosecution was ‘an important one which should not be lightly set aside’” and “should be unrestricted unless some very good reason to the contrary exists”.

36. The Commission went on at paragraphs 5.7 and 5.10 to 5.12 to recite criticisms of the right which it had received in the light of its consultation paper, and concluded at paragraph 5.13:

“We see the force of these points but do not believe that it is appropriate to consider abolishing the right of private prosecution without specific consideration which has neither been sought nor given

in this project. The issues raised on the question of retention of the right of private prosecution are complex and they are not capable of being resolved within the scope of this report”.

37. At paragraph 5.19 the Commission identified two types of harm as likely to result if private prosecutions were instituted in cases failing the tests applied by the Crown Prosecution Service when deciding whether to prosecute, viz the harm resulting (1) from an unsuccessful prosecution of an innocent defendant and (2) from any prosecution, successful or not, which is not in the public interest. But at paragraph 5.22 it recited three factors which, as it concluded in its consultation paper, demonstrated that these potential harms did not undermine the fundamental principle of the right to institute a private prosecution. The factors were:

“(1) There is always a risk that an individual Crown Prosecutor will either misapply the Code or — more likely, given the width of the Code tests — apply a personal interpretation to the tests which, although not wrong, might differ from that of other prosecutors.

(2) The Code itself may, in the eyes of some, fail to achieve a proper balance between the rights of the defendant and the interests of the community.

(3) It should not be assumed that if it is wrong to bring a public prosecution then it is also wrong to bring a private prosecution. If, for example, a case is turned down by the CPS because it fails the evidential sufficiency test, but only just; if the private prosecutor knows that the defendant is guilty (because, say, he or she was the victim and can identify the offender); and if the case is a serious one, then a private prosecution might be thought desirable.”

38. In the circumstances, the Commission made no suggestion that the right of private prosecution be abolished, but proposed a reformed regime for requiring consent of the Attorney General or Director of Public Prosecutions in the case of certain offences.
39. One class of offences that the Commission concluded should require the Attorney General’s consent were offences which would be regarded as involving some “international element” if they

- a) are related to the international obligations of the State;
- b) involve measures that were introduced to combat international terrorism;
- c) involve measures introducing response to international conflict; or
- d) have a bearing on international relations.

40. However, no consideration was given to the consequences of retaining the power of an individual to obtain an arrest warrant in such cases. The Commission did quote the response of Longmore J who did "not see why consent should be needed at all in this category" explaining that "the State in the person of the Attorney-General can always decide to offer no evidence but, in this particular category, it is important that that should be done openly with public explanation after the prosecution has started rather than behind closed doors before it begins" the Commission observing that they could see the force of this point.
41. It appears therefore that hitherto both the courts and the Law Commission have concluded that the right to bring private prosecutions is a valuable constitutional safeguard but that it should be circumscribed by giving the State, in the person of a Law Officer, the power to apply a public interest test in certain circumstances.
42. There are conflicting interests to be considered; the need, in a free society, to allow individuals to hold the State to account, as against the desirability of preventing individuals being able to act against the public interest.
43. Where does the balance lie in cases of alleged grave crimes of universal jurisdiction where the State in question appears unwilling to comply with its international legal obligations for perfectly sound political reasons?
44. We consider that from a purely legal perspective the answer is obvious; the State has a duty to comply with its international legal obligations. It then becomes a political issue whether to do so or not.
45. It would therefore appear that the current state of the law is that there is no constitutional bar upon the State controlling to some extent the power of individuals to bring private prosecutions. The balance between the State's control over prosecutions and the individual's rights to prosecute is determined both by statute – requiring a Law

Officer's consent to prosecutions in certain circumstances – and by the court's powers to intervene and stay private prosecutions.

46. This analysis of the historical position is partly taken from the judgement in B v Birmingham Magistrates' Court [2009] EWHC 2571 (Admin) 2009 WL 3197492. It would appear from what was said in that case that within the scope of the court's power to prevent inappropriate prosecutions is of course the power to refuse a warrant or summons.
47. The issuing of a summons or a warrant is a judicial act. The approach which judges must adopt to the issue of a summons was authoritatively stated by Lord Widgery CJ in R v West London Metropolitan Stipendiary Magistrate [1979] 1 WLR 933. There is no reason to suppose that the approach should be significantly different in the case of a warrant, apart from the twin considerations of, on the one hand, urgency and on the other, the significance of the deprivation of liberty occasioned by an arrest.
48. Lord Widgery CJ said that, among other matters that the justice should consider was whether the allegation is vexatious:

“Since the matter is properly within the magistrate's discretion it would be inappropriate to attempt to lay down an exhaustive catalogue of matters to which consideration should be given. Plainly he [the justice] should consider the whole of the relevant circumstances.

In the overwhelming majority of cases the magistrate will not need to consider material beyond that provided by the informant. In my judgment however he must be able to inform himself of all relevant facts.”

49. The Court in B v Birmingham Magistrates' Court went on to say that in making a decision as to whether a summons should be issued, the justice has a discretion, albeit not an unfettered discretion. As Lord Widgery put it, he “should consider the whole of the relevant circumstances” and “must be able to inform himself of all relevant facts.” In that case the court said that it may be a relevant circumstance whether or not the person seeking a summons has approached the police. Presumably in the case of an arrest warrant for a crime of universal jurisdiction the same principle would apply?
50. The fact that this discretion is not unfettered means that the issue of

an arrest warrant is itself subject to judicial review so that in the event that a court had failed to act judicially the warrant could be set aside.

51. This review of the law is not undertaken simply from academic interest but to demonstrate that the right of any individual to institute proceedings is far from unfettered, and indeed has been closely circumscribed for some considerable time, both by statute and the common law.
52. In our opinion the constitutional power of an private citizen to prosecute a person within the jurisdiction of England and Wales for an offence of universal jurisdiction has some justification in law and is already circumscribed by three important safeguards: the power vested in the magistrate to refuse the issue of a warrant once she has considered all the relevant circumstances, the right to seek judicial review the decision and finally, even if the warrant is issued, the prosecution would have to then secure the consent of the Attorney-General to proceed.
53. We would echo the view of Longmore J that, in a case where the evidential requirement safeguard is satisfied, it is important that any subsequent decision to stop a prosecution "should be done openly with public explanation after the prosecution has started rather than behind closed doors before it begins"

CONCLUSION

54. We therefore consider that none of the proposals are necessary on legalistic grounds, whilst expressing no view as to the political desirability or otherwise of such prosecutions.

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29 March 2010