REDRESS

Ending Torture. Seeking Justice for Survivors

SUBMISSION TO POLICE REFORM AND SOCIAL RESPONSIBILITY PUBLIC BILL COMMITTEE

17 January 2011

Introduction

1. The Redress Trust (REDRESS) is an international human rights organisation whose mandate is to seek justice for torture survivors. REDRESS' work has included making numerous submissions to UK parliamentary committees on matters concerning torture and other serious international crimes in recent years.[1]

2. The current submission is in respect of Clause 151 of the Police Reform and Social Responsibility Bill (the Bill) headed "Restrictions on issue of arrest warrants in private prosecutions."

3. REDRESS has a long-standing interest in the strengthening and enforcement of universal jurisdiction legislation and principles in the UK, and has, for example, examined existing UK legislation, policies and procedures regarding the prosecution of suspects of certain international crimes.[2]

4. In January 2010, along with five other NGOs, REDRESS submitted a briefing to parliamentarians opposing proposals for the Attorney General to interfere in the arrest warrant procedure.[3] Most recently, in November 2010, REDRESS together with FIDH,[4] published a report examining the exercise of extraterritorial jurisdiction in all Member States of the European Union, focussing on trial strategies from the perspective of victims and witnesses of international crimes.[5]

Summary of current submission

5. There is no need to restrict the present private arrest procedure, whereby the judiciary must satisfy itself that there are "reasonable grounds to suspect" that an

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[1] For more information, see our website www.redress.org and in particular www.redress.org/smartweb/reports/reports.

[2] See for example the report co-authored with other NGOs and interested parties *"Ending impunity in the United Kingdom for genocide, crimes against humanity, war crimes, torture and other crimes under international law",* July 2008, available at http://www.redress.org/downloads/publications/UJ_Paper_15%20Oct%2008%20_4_.pdf.

[3] *"Briefing to Parliamentarians by the UK Universal Jurisdiction group: Reasons to oppose the Attorney General interfering in the arrest warrant procedure in cases of suspected serious international crimes"* , 27 January 2010, available at

http://www.redress.org/downloads/publications/UJ_Parliamentary_briefing_27_01_2010.pdf.

[4] International Federation of Human Rights, www.fidh.org.

[5] REDRESS and FIDH, "*Universal Jurisdiction Trial Strategies: Focus on victims and witnesses",* November 2010, available at http://www.redress.org/downloads/publications/Universal_Jurisdiction_Nov2010.pdf.

offence has been committed under UK law in order to issue an arrest warrant. There is no evidence of any abuse of the current arrest warrant procedure; on the contrary, evidence shows that the judiciary is effective in filtering out potential abuse.

6. If, as proposed in the Bill, the Director of Public Prosecutions is granted a veto over the judiciary issuing a "private arrest warrant" this will undermine the ability to prosecute genuine suspects of international crimes due to the inevitable delay that would be incurred.

7. The standard to be applied by the DPP in giving its 'consent' raises questions as to whether the DPP is effectively overseeing the judiciary in the application of the law. In addition, it would appear that such 'consent' introduces a subjective test applied by the executive in establishing grounds for an arrest rather than the long-standing objective test applied by the police/judiciary which represents a basic principle of the rule of law.

8. It is submitted that the Bill, if adopted, would send signals to those responsible for international crimes that this jurisdiction is increasingly 'perpetrator-friendly', and one where the important role of civil society organisations seeking to end impunity for grave violations is obfuscated.

Submission on Clause 151

9. The proposed new Clause provides a radical change to the long-established procedure governing private arrest warrants. If enacted, the consent of the Director of Public Prosecutions (the DPP) will be required before a private individual[6] can obtain an arrest warrant against a suspected perpetrator of certain international crimes,[7] allegedly committed outside of the UK and over which the UK has jurisdiction. As set out in the Explanatory Notes to the Bill:

   No warrant can be issued without first receiving the consent of the Director of Public Prosecutions. The consent thus becomes a condition precedent to the issue of the warrant. [8]

10. The Ministry of Justice has said, inter alia, that:

    ...[B]ecause the evidence necessary to issue an arrest warrant may be far less than would be needed for a prosecution, the system is open to ***possible*** *abuse by people trying to obtain arrest warrants for grave crimes on the basis of flimsy evidence to make a political statement or to cause embarrassment. In the past, attempts have been made to obtain warrants to arrest visiting foreign dignitaries such as Henry Kissinger, Chinese Trade Minister Bo Xilai and Tzipi Livni, former Foreign Minister and now leader of the Opposition in Israel. (Emphasis added)*[9]

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[6] Clause 151 (1) (4A) states *"Where a person who is not a public prosecutor...".*

[7] Clause 151 (1) "4(D)" sets outs out what is termed a *"qualifying offence"* for the purposes of the proposed new procedure; these offences include piracy, grave war crimes, hostage-taking, hijacking, and torture. Interestingly, neither genocide nor crimes against humanity are included, over which the UK also exercises universal jurisdiction.

[8] Paragraph 234 of Explanatory Notes, available at http://www.publications.parliament.uk/pa/cm201011/cmbills/116/en/2011116en.htm.

[9] Ministry of Justice news release: *"New rules on universal jurisdiction"*, 22 July 2010, available at http://www.justice.gov.uk/news/newsrelease220710b.htm.

11. In relation to this statement, it is first noted that all arrest warrants, both those requested by the police as well as private arrest warrants require far less evidence than would be needed for a prosecution. Indeed, as will be outlined below, the requirements for an arrest and the initiation of a prosecution are different, for very good reasons, and are prescribed as such by established law and procedure.

12. In addition, REDRESS submits that there is no evidence of any actual abuse of the current system. The three examples given in the above Ministry of Justice statement, as examples of possible abuse are disingenuous for the following reasons.

    - The applications regarding Kissinger and Bo Xilai were in fact refused by the Court, demonstrating its capacity to rule on such matters on the basis of evidence provided.
    - The application regarding Livni was one of only two arrest warrants which were actually granted, out of a total of ten applications made in relation to alleged international law crimes to date. These limited numbers were raised and not disputed in the Second Reading debate on the Bill, where it was also highlighted without challenge that "...there is not a single example of the current system failing to filter out cases that are an abuse of process."[10]

13. The onus for showing that there is a genuine and legitimate need to change something which is working effectively should be on those proposing it. This is particularly so when the proposed change undermines values and aspirations of the British public, that the UK should play a positive role, if not leading role in ending impunity for egregious crimes. Indeed, it seems that the proposal is premised on the presumption that applications will *de facto* be frivolous and flimsy; and that political expediency is a preferable policy option than supporting positive steps towards ending impunity. There is no need or justification for requiring a 'consent' by the DPP to the issuing of any kind of arrest warrant, given that this function is effectively performed by the police/judiciary on the basis of evidence of reasonable suspicion.

14. If the change is made, the possibility of prosecuting genuine suspects of international crimes who have come within the UK's jurisdiction will be undermined. This would not only be contrary to repeated policy statements over the years that the UK should not be a safe haven and place of impunity for such alleged criminals,[11] but also to the UK's obligation to bring such persons to justice.[12] The

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[10] Hansard 13 December 2010, column 744, Ann Clwyd MP: *"These judges are known to have thrown out cases against Israeli Defence Ministers Mofaz in 2004 and Barak in 2009, plus several cases against Mugabe. Eight refusals out of 10 means the system is already robust enough to weed out illegitimate cases. Indeed, there is not a single example of the current system failing to filter out cases that are an abuse of process. What is the evidence that the judge acted wrongly in the two cases in question? Does the Crown Prosecution Service have a view? Perhaps we will hear."* Available at http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101213/debtext/101213-0003.htm.

[11] Most recently stated in the same Ministry of Justice news release referred to in footnote 7 above: *"Our commitment to our international obligations and to ensuring that there is no impunity for those accused of crimes of universal jurisdiction is unwavering."*

[12] For example, the "prosecute or extradite" principle contained in the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). Article 5 of UNCAT includes the provision that "...*Each State Party shall ... take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him..."* See also Article 6*: "1.Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in*

ability of a district judge to issue an arrest warrant is crucial to the effective exercise of universal jurisdiction: it enables a proper judicial authority to respond swiftly to the presence or expected impending arrival of a suspect. Time is very much of the essence especially where an alleged perpetrator has the potential to flee the jurisdiction to avoid arrest in the UK.

15. A private arrest warrant is for use in urgent cases, to apprehend a suspect who might otherwise escape from the jurisdiction. [By analogy, the police and even the public can conduct summary arrests, without a warrant, on the same basis of reasonable suspicion, to apprehend a suspect who might otherwise abscond.][13] Without such a power an effective legal process is unlikely to even start because the suspect will simply flee the country. Thus, it is crucial to have a mechanism able to prevent genuine suspects from escaping, while the appropriate authorities (the police and/or Crown Prosecution Service (CPS)) make an informed decision whether to devote resources to an investigation.

16. It is already extremely difficult to prosecute suspects of international crimes: only two suspects have ever been successfully prosecuted in the UK.[14] The same investigators within the police and CPS that have responsibility for anti-terrorism cases also deal with international crimes, and thus face competing demands for their resources. As a result, work on war crimes, torture, genocide and crimes against humanity, is already arguably de-prioritised and under-resourced.[15] To now deprive victims' lawyers of an important and potentially crucial tool to address such cases will only make their investigation and prosecution more difficult. The Government should be seeking ways to enhance the prospect of such prosecutions in a context of diminishing resources, not foreclosing opportunities for effective work with civil society and lawyers seeking to address impunity for the most serious crimes.

17. In the Second Reading debate the Home Secretary argued that the proposed change "addresses another important area of law that is not currently working - the whole issue of how we apply universal jurisdiction..."[16] and went on to say:

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whose territory a person alleged to have committed any offence [of torture] is present, shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted. 2. Such State shall immediately make an inquiry into the facts." See too Article 7(1): *"The State Party in the territory under whose jurisdiction a person alleged to have committed any offence [of torture] is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."*

[13] Police and Criminal Evidence Act, 1984, Section 24.

[14] Afghan Faryadi Zardad was convicted of torture and hostage taking in 2005 and sentenced to 20 years imprisonment. There is an unreported High Court judgment of 19 July 2005 in *R v. Zardad* which relates to certain legal aspects of the case. An appeal was denied 17 February 2007. On 1 April 1999, Anthony (Andrzej) Sawoniuk was sentenced under the War Crimes Act 1991 to life imprisonment for the murder of two civilians. The Court of Appeal upheld his conviction on 10 February 2000 - *R. v. Sawoniuk, Court of Appeal (Criminal Division), [2000] Crim. L. R. 506*. The House of Lords denied leave to appeal on 20 June 2000 - "War Criminal Refused New Hearing," Financial Times, 20 June 2000.

[15] See, *"Ending impunity in the United Kingdom for genocide, crimes against humanity, war crimes, torture and other crimes under international law",* July 2008, at www.redress.org/downloads/publications/UJ_Paper_15%20Oct%2008%20_4_.pdf. See especially the section *"The need for a specialised investigation and prosecution unit"* at pages 14-15, where it is argued, inter alia, that *"There is some concern that as the investigators within the relevant MPS unit and the Crown Prosecutors within the relevant CPS unit also have responsibility for anti-terrorism cases, that even these specialised individuals are facing competing demands and their essential work on international crimes needs to be better 'ring-fenced'.*

[16] Hansard 13 December 2010, column 716.

In relation to this law, the evidential requirement that is needed in order for somebody to go and get an arrest warrant is significantly less than that required for a successful prosecution. We are saying that the Director of Public Prosecutions should be able to look at any such application that is made and give consent to it or otherwise.[17]

18. As mentioned above, REDRESS submits that this analysis conflates the test applied if deciding whether to prosecute, with the test applicable to an arrest. Arrests and prosecutions serve very distinct purposes, and are rightly carried out by different entities; they both already have clear safeguards designed to protect the rights of the suspects concerned.

19. The right to bring a private prosecution is preserved under section 6(1) of the Prosecution of Offences Act 1985. The current law already contains sufficient procedural constraints to prevent abuse, the key safeguard being that the magistrate has discretion to refuse to issue a warrant (or summons) when such an application is made to him under section 1 of the Magistrates Court Act 1980, which section of the said Act Clause 151 now seeks to amend when the application is brought by a private individual. Thus our courts have clearly recognised how this discretion is to be applied; in a recent High Court decision the principles were again referred to:[18]

> *The decision whether or not to issue a summons* [or warrant] *is a judicial one; it calls for the exercise of judgment. In ex p Klahn Lord Widgery CJ, in holding that the magistrate is not compelled to seek submissions from the proposed defendant (and indeed we would not expect him ordinarily to do so), referred to the minimum enquiries which must be made:*
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> > *"It would appear that he should at the very least ascertain (1) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (2) that the offence alleged is not 'out of time'; (3) that the court has jurisdiction; (4) whether the informant has the necessary authority."*

20. By virtue of section 25(2) of the *Prosecution of Offences Act 1985* there is no requirement for a magistrate to satisfy himself as to consent before issuing a warrant of arrest:

> *(2) An enactment to which this section applies—*
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> > *(a) shall not prevent the arrest without warrant, or the issue or execution of a warrant for the arrest, of a person for any offence, or the remand in custody or on bail of a person charged with any offence; (...)*

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[17] Hansard 13 December 2010, column 716 – 717. Again at column 717 she said: *"[The DPP] will look at the prospects for a successful prosecution and balance that issue in the view that he takes. At the moment, the threshold requirement is significantly less than would normally be required in bringing a successful prosecution."*

[18] Lord Justice Hughes in *The Queen (on the application of Stephen Green v The City of Westminster Magistrates Court,* [2007] EWHC 2785 (Admin), at paragraph 35.

21. In *R v Lambert*[19] the purpose of section 25 was examined and it was concluded that it permitted the arrest, charge and remand of a person without the consent of the Attorney General or Director of Public Prosecutions; it covered actions that needed to be taken to apprehend the offender and detain him if there was not time to obtain permission.[20]

22. As a result, it is submitted that under the present system a magistrate will not issue a warrant unless: there are reasonable grounds to suspect that an offence under the relevant legislation has been committed by the named suspect; admissible evidence has been presented which (if uncontradicted) establishes the elements of the offence alleged; s/he has jurisdiction to issue the warrant and has ruled out any immunity of the suspect.

23. The test for initiating a prosecution on the other hand is whether there is "a realistic prospect of conviction".[21] It is unclear what test the DPP would apply in giving consent to an arrest warrant, over and above the requirement already satisfied by a magistrate, that there are "reasonable grounds to suspect". Is the judiciary not trusted to apply the test correctly, requiring oversight by the DPP (the executive)? Or are the grounds for arrest no longer "reasonable grounds to suspect" but instead of a higher or, as it would appear, "subjective" standard? In this context it is perhaps important to note the long history applied in this country to an objective "reasonable man" test, as a cornerstone to the presumption of innocence and the rule of law.

24. Lawyers and human rights organisations assisting victims receive, compile and track information and evidence about international crimes (a function currently under-resourced across relevant bodies including intelligence services, the police, and CPS). While such crimes may allegedly have been committed abroad, they nonetheless constitute punishable offences under UK law. Some human rights organisations may track the whereabouts of such suspects in the absence of effective mechanisms being applied by Government. If a suspect has arrived in or is expected in the UK, lawyers and human rights organisations are able to rapidly produce dossiers providing evidence to the standard of "reasonable grounds to believe", which may satisfy a magistrate to issue an arrest warrant. This evidence must meet the approval of the magistrate in accordance with existing law and procedures, which in the view of REDRESS, work sufficiently well. In practice, the most senior district judges at Westminster Magistrates' Court hear these applications and determine whether the high threshold of evidence, liability and jurisdiction are met and that no immunity applies.

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[19] R v Lambert [2009] EWCA Crim 700.

[20] See Court of Appeal Criminal Appeal Review of the Legal Year 2008/2009, page 19, available at http://www.hmcourts-service.gov.uk/cms/files/Criminal_Divi_Review_of_legal_year_2009_web.pdf.

[21] See Crown Prosecution Service *"The decision to prosecute",* available at http://www.cps.gov.uk/victims_witnesses/resources/prosecution.html#a03. The test is based on two questions which prosecutors consider, firstly, whether there is enough evidence to provide for a 'realistic prospect of conviction' against the defendant, which is an objective test and means that a jury or bench of magistrates, or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the alleged charge; secondly, is a prosecution in the public interest, and here the more serious the offence or the offender's record of criminal behaviour, the more likely it is that a prosecution will be required in the public interest. In the cases under consideration, which are the most egregious of all crimes, it is virtually inconceivable that the second question will be determinative.

25. If the DPP is to apply a prosecution test in its oversight of the judiciary, it means that lawyers and NGOs would have to compile much more comprehensive dossiers, effectively undertaking work currently fulfilled by the police and the CPS, before consent could be obtained. The dossiers would have to be of the factual and legal standard reached after an investigation and analysis normally done by organs mandated and qualified to do this work. A prosecution test is likely to make a mockery of the process, as it would imply that a warrant would only be issued where evidence provided "a realistic prospect of conviction", enabling prosecution without further investigation.

26. If, on the other hand, the DPP is to apply some other test, that is, something less than "a realistic prospect of conviction," then what is that test going to be, how is it to be applied, and how will it prevent alleged "abuse" or "possible abuse" of the existing procedure? This was raised in the Second Reading debate with no answer from the Government:

> *...[T]he Home Secretary clearly did not know what she was talking about when she was asked what standard of evidence the DPP would require. Is it the prima facie test, the full code test by the prosecutor, or something in between?...If the answer is a full prosecutorial test, that effectively means that no warrants will ever be issued, because that standard of evidence will not have been gathered at the arrest stage.*[22]

27. In the absence of an explanation from the Government on how the DPP's consent is going to work without effectively hamstringing the arrest warrant process, the Government's welcome "commitment to our international obligations and to ensuring that there is no impunity for those accused of crimes of universal jurisdiction [being] unwavering"[23] could be undermined, especially when officials from "friendly states" may be concerned. There are already immunities for certain high-level persons coming to the UK including sitting heads of state and serving heads of governments, foreign ministers and certain diplomats. Clause 151, therefore, appears to reflect a policy which will provide a discretionary extension of these immunities to categories of persons outside the established rules.

28. It is also unfortunate that the effect of Clause 151 is to send the wrong signal to perpetrators suggesting that they can safely come to the UK, thereby making the UK an increasingly perpetrator-friendly destination. REDRESS is opposed to this as a matter of principle and for the practical reasons which have been outlined above.

29. In this regard, the Foreign Secretary has clearly stated that human rights and foreign policy will not be "downgraded" in the pursuit of other objectives:

> *Some people may be concerned that this clear focus on security and prosperity means that we will attach less importance as a government to human rights... and to the upholding of international law. The purpose of this speech is to say that far from giving less importance to these things, we see them as essential to*

[22] Hansard 13 December 2010, column 743, Mr Slaughter MP.

[23] See Ministry of Justice news release, footnotes 9 and 11 above.

and indivisible from our foreign policy objectives. There will be no downgrading of human rights under this Government...[24]

30. REDRESS concurs with other NGOs who have pointed out the importance of the ability of a private individual to bring a prosecution against such persons based on a principle which has existed for centuries in this jurisdiction, and on a right recognised to be a "valuable constitutional safeguard against inertia or partiality on the part of authority."[25]

31. Instead of undermining the capacity for alleged perpetrators to be brought to justice in the UK, the Government ought to be enhancing the process so as to make it more effective, such as providing greater resources to the police and the CPS to pursue such cases, clearing up existing legal anomalies[26] and developing a clear, coherent and committed policy towards making the UK a no-go area for perpetrators of the worst human rights abuses.

32. In a meeting with the DPP on 11 January 2011, in response to a request by some NGOs[27] to discuss the application of Clause 151 if passed, the DPP indicated that the prospects of a successful UK prosecution of universal jurisdiction cases were strongest where the CPS and the police had a long lead-in time. He explained that when it came to the investigation and prosecution of these types of crimes, NGOs and lawyers should provide the police with whatever evidence may be available as early as possible, so that the ordinary arrest procedure can be followed. Indeed, this is not disputed, and NGOs and lawyers already proceed in this manner.

33. However, as REDRESS has sought to emphasise in this submission, there have been and will be cases where it is not possible to have a long lead-in time working with the CPS and police in advance. Indeed, given the widespread impunity for most heinous crimes around the world, this might suggest that both NGOs and the CPS/police would have open case-files in place for a very vast number of alleged perpetrators. This would be impractical given the sheer volume of criminality. In practice, opportunities will need to be seized in a specific case, where there is sufficient evidence in the hands of victims, their lawyers or NGOs that assist them to satisfy reasonable suspicion. Time will generally be of the essence to prevent a suspect leaving the jurisdiction. In these circumstances, there are already sufficient

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[24] Foreign Secretary William Hague, 15 September 2010, "*Britain's values in a networked world- the third of four speeches on the Coalition Government's foreign policy*", available at http://www.fco.gov.uk/en/news/latest-news/?view=Speech&id=22864405 .

[25] Lord Wilberforce in *Gouriet v Union of Post Office Workers* [1978] AC 435 at 440. For a clear examination of the development of this right see JUSTICE*, "Arrest Warrants – Universal Jurisdiction*, *JUSTICE Response to Ministry of Justice Consultation",* March 2010, at pages 3-5, available at http://www.justice.org.uk/images/pdfs/JUSTICE%20response%20to%20MoJ%20arrest%20warrants%20universal%20jurisdiction%20note%20march%2010.pdf . See also LIBERTY, "*Liberty's response to the Government's proposals on Arrest Warrants for crimes subject to universal jurisdiction",* April 2010,at pages 3-4, available at http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-response-to-proposals-on-arrest-warrants.pdf.

[26] See for example the report published with other NGOs and interested parties *"Ending impunity in the United Kingdom for genocide, crimes against humanity, war crimes, torture and other crimes under international law",* July 2008, available at http://www.redress.org/downloads/publications/UJ_Paper_15%20Oct%2008%20_4_.pdf. See also REDRESS, "*Universal Jurisdiction Trial Strategies: Focus on victims and witnesses",* November 2010, available at http://www.redress.org/downloads/publications/Universal_Jurisdiction_Nov2010.pdf.UK lawyer Kate Maynard, has spoken of "a patchwork of universal jurisdiction laws so when a victim asks if they have a remedy in the UK, it can be quite difficult or quite arbitrary to respond to that question" – ibid, page 79.

[27] REDRESS, JUSTICE, Global Witness, FIDH and Amnesty International.

safeguards which preserve the rights of suspects. The current private arrest warrant procedure is a critical tool in such cases. Amending it would be a significant loss given the few avenues victims of such crimes have to seek redress.

34. The DPP also indicated that if the legislation was passed, he should exercise his discretion openly and publically and in terms of a protocol and guidelines to be published, and that in his view any decision he made would be open to an application for judicial review. REDRESS' welcomes these indications and would hope to be invited to consult on the determination of such protocols and guidelines if the Bill is adopted.

35. Nevertheless, a number of crucial issues remain with the proposed Clause:

    i. whether the private arrest warrant procedure will be delayed to such an extent so as to defeat its purpose;
    ii. what standard will be applied by the DPP in giving his consent; and whether a subjective determination of an individuals' liberty can be constitutional or undermining of the judiciary; and finally
    iii. in the event of a prosecutorial test being applied, whether this will result in raising the threshold of evidence for a private arrest warrant, to the point of rendering the mechanism obsolete.

36. REDRESS remains available to assist the Committee further with respect of the issues raised in this submission.

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