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Liberty's response to the Joint Committee on Human Rights:

“Relaxing the Ban on the Admissibility of Intercept Evidence”

February 2007

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Introduction

1. The Joint Committee on Human Rights (“JCHR”) recently concluded in its report, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention* that the ban on the use of intercept evidence in criminal proceedings should be removed.¹ The JCHR is not alone in reaching this conclusion. The Commissioner of the Metropolitan Police has stated “I have long been in favour of intercept evidence being used in court”² and Dame Stella Rimington, former director of MI5, has described the bar as “ridiculous”.³ The Attorney General and the Director of Public Prosecutions have also supported the lifting of the bar.⁴ Liberty is fully in agreement with these diverse and influential voices. We have for many years urged the Government to remove the bar on intercept evidence in order to facilitate criminal prosecutions in terrorism cases.⁵ There are no fundamental human rights objections to the use of intercept material, properly authorized by judicial warrant, in criminal proceedings.

2. It is nearly 10 years since lifting the bar on intercept evidence was first proposed by Lord Lloyd.⁶ Last February, the Home Secretary stated that the Government was working “to find, if possible, a legal model that would provide the necessary safeguards to allow intercept material to be used as evidence”⁷ and promised a report on this matter later in 2006.⁸ No such report has, to our knowledge, been published. Later last year, in response to the JCHR’s most recent recommendation on this subject, the Government explained again that it is “committed to find, if possible, a legal model that would provide the necessary safeguards to allow intercept to be used as evidence.”⁹ It is disappointing that

¹ Twenty-fourth Report 2005-06, HL 240/HC 1576

² *Telegraph*, “Lift phone tap ban in terror trials, says new Met chief”, 6th February 2005

³ *Guardian*, “Courts set to admit wiretap evidence”, 21st September 2006

⁴ *Ibid* and *Guardian*, “DPP backs attorney’s call to admit phone-tap evidence in court”, 22nd September 2006

⁵ Cf: *Reconciling Security and Liberty in an Open Society*, August 2004

⁶ Lord Lloyd, *Inquiry into Legislation against Terrorism*, 1996, Cm 3420

⁷ HC Deb, 2 Feb 2006, col 479

⁸ HC Deb, 2 Feb 2006, col 482

⁹ The Government Reply to the Twenty-Fourth Report from the Joint Committee on Human Rights’, September 2006

in all this time there have been no legislative proposals from Government to achieve the removal of the bar.¹⁰

3. The JCHR has now called for evidence on ways of relaxing the current statutory prohibition on the admissibility of intercept evidence in UK courts. In particular, views are being sought on: the main practical considerations to be taken into account when devising a legal regime for the admissibility of intercept evidence; what safeguards should apply; whether and how the ordinary disclosure rules need modification; and what would be the role played by the law of public interest immunity. We hope that this inquiry will persuade the Government to make some long-overdue moves on this issue and help to identify the underlying principles that should underlie any change in law that removes the bar.

4. JUSTICE has recently published an excellent report considering this issue in detail.¹¹ In this response we do not attempt to repeat the detailed legal analysis and comparative law research undertaken by JUSTICE. Nor do we reiterate our arguments in favour of lifting the bar, which are now well-known and which we have been repeating for many years.¹² Instead, we provide an overview of the main issues which we consider would be raised by the removal of the bar on intercept evidence and the extent to which these may be adequately addressed by existing legal protections. We are not convinced that it would be necessary to make any major overhauls to existing legal protections in, for example, the Police and Criminal Evidence Act 1984 and under the principle of Public Interest Immunity.

5. Before considering the issues that would be raised by the removal of the bar it is useful to provide a brief overview of the current legal regime. The interception of communications is permitted under the terms of the Regulation of Investigatory Powers Act 2000 (“**RIPA**”) in a restricted range of circumstances. In particular, the Secretary of

¹⁰ We do, however, note Lord Lloyd’s current private members Bill on this issue

¹¹ *Intercept Evidence: Lifting the Ban*, October 2006

¹² Cf *Reconciling Security and Liberty in an Open Society*, August 2004 and Submission to the JCHR, “Counter-Terrorism and Human Rights: Supplementary Call for Evidence”, February 2006

State may issue a warrant authorising or requiring interception if this is necessary, *inter alia*: (a) in the interests of national security; or (b) for the purpose of preventing or detecting serious crime, provided that the interference is proportionate.¹³ Despite the fact that RIPA permits interception, Section 17 prohibits evidence, questions, assertions or disclosures for the purposes of, or in connection with, any legal proceedings that might suggest that unlawful interception of post or telecommunications has occurred or that an interception warrant has been issued.¹⁴ It is the removal or amendment of Section 17 which is currently in issue.

Exaggerated Concerns

6. We do not deny that the removal of the bar on intercept evidence would raise some significant issues (considered below). There are, however, a number of concerns which have been expressed in this context which are, in Liberty's view, either incorrect or, at least, over-played. It is important to get some of these out of the way at the outset.

7. The Government has sought to argue that relaxing the bar on the admissibility of intercept would be too difficult to achieve in practice given how quickly the relevant technology changes.¹⁵

“It does not make sense to change our intercept regime before we know what these changes mean for the way interception is carried out. The changeover to computer technology and the effects this will have on interception is not confined to the UK; it is something every country that uses interception will need to address. It might be possible in the future to create a legal framework that has all the checks and balances needed to ensure that material that is intercepted can be put forward as evidence in a way that is not going to damage

¹³ Section 5. There are a number of other situations in which communications may be intercepted. For example, where one party to the communication consents to the interception, the interception does not require a warrant but only a directed surveillance authorisation which may be issued by a superintendent (Section 3)

¹⁴ There are exceptions for proceedings for offences under RIPA 2000 and other communications legislation, and for control order, Special Immigration Appeals Commission and Proscribed Organisations Appeal Commission proceedings (i.e. closed proceedings).

¹⁵ Cf HL Deb, 13th December 2005, col 1236 (Baroness Scotland).

our crime fighting capabilities and satisfy all our legal obligations. But not yet.”¹⁶

Liberty is not convinced by this argument. It appears to look forward to an unspecified future point in time when technological advancement will have halted. This is not realistic. In any case complex and rapidly developing technology has not hampered the Government’s desire or ability to legislate in other fields, for example, legislation governing the matters such as internet gambling,¹⁷ data protection¹⁸ and even RIPA itself. Legislation in almost any field must be drafted in such a way as to take account of relevant developments in technology. This should not, however, prevent the bar being removed. This concern could be dealt with by ensuring that any relevant legislation is drafted in such a way as to provide flexibility for future technological changes including, if necessary, delegated powers subject to appropriate parliamentary scrutiny.

8. It has also been argued that lifting the bar on intercept evidence would damage the relationship between different organs of the state, namely intelligence agencies, the police and the CPS.¹⁹ In a time when the importance of “joined-up Government” is so frequently stressed this argument is surprising. It may, of course, be necessary for these different bodies to agree protocols or codes of practice to ensure that they work effectively together following the lifting of the bar. One could, in fact, argue that removing the bar would remove some of the inter-agency tensions that have been created by the current legal position which must frequently frustrate the desires of the police and CPS to prosecute suspected terrorists and criminals.²⁰

9. A further argument against the admission of intercept evidence is that it would increase administrative burdens on the police and intelligence services which would have to spend time and resources transcribing material in case this is required to be disclosed or used at trial by the prosecution. In addition, it is argued, extra pressure would be put

¹⁶ <http://security.homeoffice.gov.uk/ripa/interception/use-interception/use-interception-review/?version=1>

¹⁷ Gambling Act 2006

¹⁸ Data Protection Act 1998

¹⁹ Ibid

²⁰ Cf *Telegraph*, “Lift phone tap ban in terror trials, says new Met chief”, 6th February 2005

on prosecutors and courts dealing with requests for disclosure from defendants. We do not deny that there would be an increased burden on police, the CPS and intelligence services. Resource issues should not, however, in themselves be used as a reason for rejecting a change in the law that would allow people, currently subject to oppressive measures like control orders, to be given a fair trial and, if found guilty, to be legitimately subjected to effective punishments.

10. The concerns about additional administrative burdens have also, in Liberty's views, been over-played. It is clearly not the case that every piece of intercept material taken would have to be transcribed.²¹ Moreover, as discussed below, lifting the bar on intercept evidence may well have the effect of reducing the number of intercept warrants that are granted in the first place. If this is the case, there would be a reduction in the amount of time and resources spent on intercepting communications. The amount of material that is obtained, and through which the prosecution might be required to trawl, would also be reduced. Finally, these additional administrative challenges to the police and intelligence services are ones which have been met and overcome in virtually every other common law jurisdiction. It should not be beyond the capabilities of the UK.

Privacy Issues

11. The interception of communications clearly affects our personal privacy, protected by Article 8 of the European Convention on Human Rights (the "ECHR"). The subsequent use of intercept material would also engage Article 8. This does not, of course, mean that communications cannot be intercepted or that material obtained should not be used; the right to privacy is not absolute. Interception and the use of material obtained would not raise human rights problems provided that: (A) the interception and use of the material obtained is for a legitimate purpose; (B) is in accordance with the law; and (C) the aim could not be achieved by less intrusive means.

²¹ Clearly material that is to be adduced by the prosecution would need to be transcribed. As we explain below, evidence that weakens the prosecution case or strengthens the defendant's would also need to be transcribed so that it can be disclosed to the defence. (cf *R v H* [2004] UKHL 3, para 35 per Lord Bingham)

12. In this context a legitimate purpose would be relatively easy to establish - usually the interests of national security or the prevention or detection of crime. Indeed, RIPA already contains a limited range of circumstances in which RIPA permits the interception of communications, which broadly correspond with the legitimate reasons in Article 8. Proving guilt of a criminal offence, or disclosure to allow a defendant to receive a fair trial, would also be legitimate reasons for the interference with privacy represented by the use of material obtained from the interception of communications. Indeed, given that the primary privacy interference (the interception of communications) would already have occurred, it is very surprising that the secondary privacy interference (the use of intercept evidence in court) is not permitted. As David Ormerod points out “there is something inherently incoherent and illogical in a scheme which seeks to authorise an activity (ss.1-9), recognises that that activity must lead to material which will be relevant at trial (s.18), and yet seeks to suppress that material and even the fact of its existence (s.17).”²²

13. In this context the requirement that the interception must be carried out in accordance with the law has provided more difficulties. Two adverse judgments from the ECHR criticised the UK’s lack of statutory framework regulating the interception of communications and, effectively, forced the UK Government to put in place domestic legislation, including RIPA.²³ The reasons for this requirement include: protecting the rule of law by creating a legal framework to regulate the exercise of state power and to provide accountability when those laws are breached; providing objective criteria to limit the uses for which interception can occur and to ensure; and providing clear and discernable domestic legal framework to give individuals certainty about the state’s powers to interfere with their privacy.²⁴ As the interception of communications is a form of targeted surveillance which has serious consequences for the privacy of individuals,

²² Ormerod D, “Telephone Intercepts and their Admissibility”, *Crim. L. R* 2004, Jan, 15-38, 31

²³ The judgment in *Malone v UK* (1984) 7 EHRR led to the enforcement of the Communication Act 1985; the judgment in *Halford v UK* (1997) 24 EHRR 523 resulted in RIPA.

²⁴ *Malone v UK*, *Ibid* : “[T]he requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which the [police] are empowered to resort to this secret and potentially dangerous [measure].”

the law in this area must be particularly precise.²⁵ This would also apply to any law that makes intercept evidence admissible.

14. The interception of communications and use of material obtained must also be “be necessary in a democratic society” if it is to comply with Article 8. In other words, any interference must be proportionate to the aim pursued. This will, in each case, involve careful consideration of a number of different factors. A central consideration is that the system has in place proper guarantees against abuse. In *Klass v Germany*, the ECHR stated:

“the Court must be satisfied that, whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by national law”.²⁶

The Court in *Malone v UK* also pointed out that interception “could only be regarded as necessary in a democratic society if the particular system of secret surveillance adopted contains adequate guarantees against abuse”.²⁷

15. The current legal framework does not, in our opinion, offer sufficient protection against such abuse.²⁸ Our main area of concern is that interception does not require prior judicial authorisation. Under RIPA interception only requires a warrant authorised by the Secretary of State. As the ECHR has stated “in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a

²⁵ *Kopp v Switzerland* (1998) 27 EHRR 91. The requirement for the UK to have in place a clear and specific set of laws and regulations governing interception renders the Government’s argument regarding the difficulties of legislating for the complex technology involved particularly weak; regardless of whether or not intercept evidence is to be admitted in the courts, in order not to fall short of the very minimum requirements of European law, the Government is already bound to adapt the current legal framework, i.e. RIPA, in the face of technological advancement.

²⁶ [1978] ECHR 4, para 50

²⁷ *Malone v UK* (1984) 7 EHRR, para 81

²⁸ For example, *Klass v Germany*[1978] ECHR 4; *Kopp v Switzerland* (1998) 27 EHRR 91

whole, it is in principle desirable to entrust supervisory control to a judge.”²⁹ Judicial authorisation in this context would guarantee a more detailed consideration of each request for interception warrants.³⁰ The potential for ill-informed, irrational and arbitrary decision-making under the current scheme for obtaining warrants would seem to be supported by comments made by the former Home Secretary Rt. Hon. David Blunkett MP:

"My whole world was collapsing around me. I was under the most horrendous pressure. I was barely sleeping, and yet I was being asked to sign government warrants in the middle of the night. My physical and emotional health had cracked".³¹

16. The requirement for judicial authorisation would also militate against an over-readiness to grant warrants which is, perhaps, inevitable when a democratically elected politician is given this responsibility. The Home Secretary would understandably be afraid of the public response were it to emerge, after a terrorist attack or serious crime, that s/he had refused to grant an interception warrant. This may well mean that intercept warrants are issued when, in fact, they represent a disproportionate interference with privacy. This would seem to be supported by the most recent published figures. According to the Interception of Communications Commissioner, in 2004 the Home Secretary issued 1,849 warrants and a further 674 warrants continued in force from previous years. The report published by JUSTICE explains that this is higher than the number of judicial intercept warrants issued for the whole of the United States.³²

17. We fear that the Government’s reluctance to allow the use of intercept material in criminal prosecutions may, to some extent, result from concerns about the additional judicial and public scrutiny this would facilitate. The extent of communications

²⁹ *Klass v Germany*[1978] ECHR 4, para 56. See also *Rotaru v Romania*, App. No. 28341/95, Judgement of 4 May 2000, GC

³⁰ The Government argued that authorising interception involves particularly sensitive decisions that are properly a matter for the executive, and that judges cannot reasonably be expected to make decisions on what is or is not in the interests of national security. Liberty rejects this argument.

³¹ <http://politics.guardian.co.uk/blunkett/story/0,,1889881,00.html>

³² JUSTICE, *Intercept Evidence: Lifting the Ban*, October 2006, para 3

interception in the United Kingdom would be likely to come to the public's attention if intercept material were used in high-profile criminal cases. While those who are involved in terrorism or serious organised crime are themselves likely to be aware of this fact, the general public may not. The Government might legitimately fear a major public reaction about the extent to which invasive interception techniques are being used. This is not, however, a legitimate reason to prevent the use of intercept material in criminal courts. It would be no bad thing if greater caution were exercised in the granting of intercept warrants. Lifting the bar on intercept evidence could indirectly have a positive impact on personal privacy.

Fair Trial Implications

18. There is no doubt that removing the bar on intercept evidence would raise fair trial issues. Foremost among these is the fact that this could make a fair trial possible in a number of cases where, at present, people are instead subject to draconian executive measures like control orders. Liberty's views on such measures are well known. We believe they undermine fundamental democratic values: the rule of law, the presumption of innocence and the right to a fair trial. We have also expressed our fears about the dangerous counter-productivity of repression and injustice, the unintended consequences of over-broad and repressive measures such as the Belmarsh detention regime. The Government has itself stated its preference for prosecuting international terrorists - criminal prosecutions are undoubtedly both fairer and more effective than control orders. Nevertheless, the Government has argued that continued recourse to executive restrictions on freedom is necessary because it is not always possible to prosecute those suspected of involvement in terrorism.

19. Back in 2003, the Newton Committee concluded that lifting the blanket ban on the use of intercepted communications in court would be "one way of making it possible to prosecute in more cases".³³ It proposed the removal of the bar as a "more acceptable and

³³ Privy Counsellor Review Committee: "Anti-terrorism, Crime and Security Act Review: Report", 18th December 2003, para 208

sustainable” approach to the threat from terrorism than executive powers to restrict liberty which evade the criminal justice process.³⁴ Since then a number of other influential bodies have identified the removal of the bar on intercept evidence as a change to the criminal justice system that could facilitate criminal prosecution in the terrorism context instead of continued recourse to measures like control orders.³⁵ The Government has itself argued that one of the reasons why it may not be possible to prosecute those suspected of involvement in international terrorism is the fact that the evidence on which the suspicion is based would be inadmissible in court.³⁶ All of this points to the fact that removal of the bar on intercept evidence would overcome one of the primary obstacles to bringing proper criminal proceedings against terrorist suspects.

20. Article 6 of the ECHR, as protected in UK law by the HRA, would, of course, apply in respect of a criminal prosecution in which intercept evidence is adduced. It is, however, important to clarify that the admission of intercept evidence in a criminal trial would not, in itself, have any negative bearing on the fairness of a trial. Indeed, as the House of Lords pointed out in *R v. P* the more relevant evidence which is presented before the court the more fair the trial is likely to be and the more likely it will be that the jury reaches the right decision. It is the Government’s desire to maintain secrecy, not fair trial principles, that are the reason for the bar on intercept evidence in legal proceedings:

“In this country is it, in the judgment of the Government, the necessity to have a fully effective interception system which creates the necessity for secrecy and consequently the need to keep the evidence of it out of the public domain. But where secrecy is not required, the necessity is that all relevant and probative evidence be available to assist in the apprehension and conviction of criminals and to ensure that their trial is fair. The latter necessity exists in both cases but in the former case it is trumped by the greater necessity for secrecy.”³⁷

³⁴ Ibid, paras 208-215. See also Lord Lloyd, *Inquiry into Legislation against Terrorism*, 1996, Cm 3420; Lord Carlile’s evidence to the Home Affairs Select Committee (Minutes of Evidence 11th March 2003)

³⁵ Cf “First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, 2nd February 2006, para 37

³⁶ Newton Committee Report, para 207

³⁷ *R v. P and Others*, [2000] All ER (D) 2260

While some evidence should never be used in legal proceedings, i.e. evidence obtained by torture, there are no fundamental human rights objection to the use of intercept material, properly authorized by judicial warrant, in criminal proceedings.

21. The European Court of Human Rights has considered the Article 6 (Fair Trial) implications of the use of intercept evidence in a small number of cases.³⁸ These have, however, generally involved the use of intercept evidence that was unlawfully obtained. This would not, of course, be the case in the UK if the bar were lifted.³⁹ In the most important of those cases, *Schenk v. Switzerland* the Court relied on the following factors when reaching its decision that the use of intercept evidence in a criminal prosecution did not violate Article 6: the fact that the intercept evidence was not the only evidence relied on; and that fact that the other party to the intercepted communication had given evidence at the trial. As pointed out above, the Court also noted that, provided that the overall trial was fair, decisions about the admissibility of evidence was within the margin of appreciation of the state.⁴⁰

22. Even in the unlikely event that the admission of a certain piece of intercept evidence could prejudice a defendant's right to a fair trial we consider that this would be addressed by the existing rules of criminal evidence. In particular, section 78 of the Police and Criminal Evidence Act ("PACE") gives the court the discretion to exclude evidence if "having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission...would have such an adverse effect on the fairness of proceedings that the court ought not to admit it".⁴¹ The exercise of the courts' discretion under section 78 requires the court to have regard to the circumstances in which the evidence was obtained.⁴²

³⁸ Cf *Schenk v Switzerland* (App. No. 10862/84) and *Chinoy v. United Kingdom* (App. No. 15199/89)

³⁹ To some extent the use of unlawful intercept evidence considered by the Strasbourg institutions raises more difficult fair trial issues given that some legal systems conflate the two questions of the lawfulness of evidence-gathering and the fairness of a trial (cf. *Mapp v. Ohio* 367 U.S. 643 (1961))

⁴⁰ *Schenk v Switzerland* (App. No. 10862/84), paras 45 to 48

⁴¹ There is a further common law power to exclude though this is rarely used.

⁴² *R v. P and Others*, [2000] All ER (D) 2260

23. It is, however, defendants' fair trial rights which indirectly give rise to the Government's concerns that lifting the bar on intercept would make it difficult or impossible to maintain secrecy (see below). The elements of a fair criminal trial that are most relevant from this perspective include:

- The requirement to disclose prosecution evidence to the defendant so that s/he is able to plan his/her defence and to challenge the prosecution evidence by, for example, providing an alternative explanation or alibi. The European Court on Human Rights has stated that “the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused.”⁴³
- The disclosure requirement also covers evidence “which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.”⁴⁴ This recognizes the greater information-gathering capacity of the state vis-à-vis the individual. It also derives from the important principle that the prosecutor plays a “minister of justice”, with some responsibility for the interests of the defendant, and is the trustee of all evidence in its possession, including exculpatory evidence.⁴⁵ This would mean that, if the bar were lifted, the state may be required to disclose intercept material to the defence even if it were not itself planning on adducing such evidence.
- The requirement that the defence can test the reliability of the evidence, including by questioning the reliability of any technology used and cross-examining those involved in gathering intercept material.⁴⁶ In *Schenk* the European Court of Human Rights explained that the following factors were important in reaching its decision that Schenk's trial had not been rendered unfair by the admission of unlawfully obtained intercept material: the fact that the defendant “had the opportunity – which he took – of challenging [the intercept evidence's] authenticity and opposing its use”;⁴⁷ the fact that the defendant was able to examine the other party to the

⁴³ *Edwards v. UK*, (1992) 15 E.H.R.R. 417

⁴⁴ Section 3(1)(a) of the Criminal Procedure and Investigations Act 1996 as amended by the Criminal Justice Act 2003

⁴⁵ Cf *H and C* [2004] 2 W.L.R. 335, para 13

⁴⁶ Cf Article 6(3)(d) of the ECHR

⁴⁷ *Schenk v Switzerland* (App. No. 10862/84), paras 47

intercepted communication; and the fact that the defence “did not summon Inspector Messerli to appear, although he was in charge of the investigation” suggesting that this would have been possible.⁴⁸

24. There may be cases where it would be impossible to maintain the secrecy that the public interest requires while also meeting these requirements of a fair trial. In some of these cases it may be possible to ensure, by other special means, that the defendant’s interests are protected and that s/he receives a fair trial. This would not, however, require a change in the law. It is already being done by the UK courts in cases involving other types of sensitive or secret evidence. In *R v. H*, for example, the House of Lords described one of the questions a court should ask when considering whether disclosure of sensitive or secret evidence is necessary to guarantee the defence a fair trial:

“[C]an the defendant’s interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?”

This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge ...”⁴⁹

There will be cases where the public interest in maintaining secrecy cannot be reconciled with a defendant’s fair trial rights. In such cases, the prosecution would be required to choose between disclosing the relevant evidence or, more likely, discontinuing the proceedings.

⁴⁸ Ibid

⁴⁹ [2003] EWCA Crim 2847, para 36, per Lord Bingham

Security Concerns

25. The most substantial argument advanced by the Government against lifting the bar on intercept evidence is the concern that this would jeopardise security services sources and methods. It has argued that this would, accordingly, jeopardise the ability of the state to protect national security, to detect and investigate future criminal activity.

“There is also a real risk that if the sensitive capabilities and techniques used to gather the information are revealed: criminals will be able to avoid interception by changing how they communicate; we would lose the close intelligence co-operation between agencies that has delivered impressive results in the UK; this would undermine UK agencies’ ability to fight crime as effectively as they might”⁵⁰

As Peter Mirfield has pointed out the goal of RIPA is apparently to “shroud in secrecy many of the workings of the process of investigation”.⁵¹

26. In our opinion, the significance of even this argument has been exaggerated:

- The Government’s position is inconsistent. Foreign intercepts can be used if obtained in accordance with foreign laws.⁵² Bugged (as opposed to intercepted) communications or the products of surveillance or eavesdropping may also be admissible even if they were not authorised and if they interfere with privacy rights. It is difficult to see how this already admissible covert intelligence raises different secrecy concerns to intercept evidence which is not currently admissible.
- The Government’s claim that those involved in serious crime or terrorism are not already well aware of the interception methods employed is naïve, to say the least. The international nature of much serious crime and terrorism and the use of intercept evidence in other jurisdictions mean that criminals and terrorist are highly

⁵⁰ <http://security.homeoffice.gov.uk/ripa/interception/use-interception/use-interception-review/>

⁵¹ P Mirfield, ‘Regulation of Investigatory Powers Act 2000: Part 2: Evidential Aspects’ (2001) Criminal Law Review 91.

⁵² Cf *R v. P and Others*, [2000] All ER (D) 2260

likely to be fully aware of the tools of their adversaries; relying on disclosure of methods in the UK courts would be a most inefficient method for to learn the latest tricks of the Government. There is no reason to suppose that criminals in the UK are so cut off from the rest of the world so as to render this their only source of intelligence.

- Even if the bar were lifted, the prosecution would have the choice about whether or not to adduce intercept material. Therefore, where there was a significant concern about compromising secrecy the prosecution could choose not to rely on intercept material.
- It must, however, be possible to overcome these legitimate concerns. Indeed, as far as we are aware, the approach taken by the UK is an anomaly.⁵³ The JUSTICE report explains that, worldwide, only the UK and Hong Kong maintain a ban on the use of such evidence.⁵⁴ The comparative law research undertaken for the report clearly demonstrates that “the UK is the only country in the common law world that prohibits completely the use of intercepted communications as evidence in criminal proceedings”.⁵⁵ Problems raised by the admissibility of intercept evidence cannot, therefore, be insurmountable – if these other countries can manage it there is no reason why it should be beyond the UK criminal justice system.

27. We do accept that there will be some cases where the admission of intercept material in criminal trials could compromise the Government’s legitimate desire to maintain secrecy. We are not, however, convinced that such concerns could not be met by existing laws. If there are concerns over protecting a state’s sources then clearly established rules of public interest immunity allow disclosure to be withheld from the defence and the public. The court is prohibited from disclosing any material that it concludes is not in the public interest under section 3(6) of the Criminal Procedure and Investigations Act 1996. In addition, there is detailed guidance on the procedures by which the prosecution may

⁵³ Cf JUSTICE, *Intercept Evidence: Lifting the Ban*, October 2006

⁵⁴ Newton Committee Report, para 211

⁵⁵ *Ibid*, Executive Summary

apply to the court to prevent the disclosure of sensitive material.⁵⁶ Security sensitive legal proceedings are nothing new in the UK. The existing laws, designed to guarantee secrecy are regularly used in, for example, “supergrass trials” and other criminal trials where disclosure of the details of an under-cover operation would compromise continuing operations or individual officers who were involved.

Jago Russell and Barbara Davidson, Liberty

⁵⁶ Cf Code of Practice under Part 2 of the Criminal Procedure and Investigations Act 1996; the Attorney General’s guidelines on the disclosure of information in criminal proceedings, and the Joint Operational Instructions for the Disclosure of Unused Material.