The Police Bill [Bill 88 of 1996-97]: Intrusive Surveillance

Research Paper 97/22

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The *Police Bill* [HL][Bill 88 of 1996-97] has completed its passage through the House of Lords and is due to be considered on Second Reading in the House of Commons on Wednesday, February 12th 1997.

This paper considers Part III of the *Police Bill*, which extends throughout the UK and seeks to make statutory provision for the use of intrusive surveillance techniques by the police and HM Customs and Excise by permitting entry on or interference with property or wireless telegraphy in certain circumstances. Parts I and II of the Bill, which make statutory provision for the UK-wide National Criminal Intelligence Service (NCIS) and the National Crime Squad for England and Wales (NCS), and for the creation of service authorities to maintain these two services, are considered in **Library Research Paper 97/21**. Part V of the Bill, which is intended to implement proposals for access to criminal records for employment and related purposes set out in the White Paper *On the Record* [CM 3308] is considered in **Library Research Paper 97/23**.

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Introduction and Summary

This paper considers Part III of the *Police Bill*, which extends throughout the UK and seeks to make statutory provision for the use of intrusive surveillance techniques by the police and HM Customs and Excise in relation to the prevention and detection of serious crime, by permitting entry on or interference with property or wireless telegraphy in certain circumstances.

The use by the police of electronic surveillance devices, or 'bugs', is currently unregulated by statute, and is subject only to Home Office guidelines. The interception by the police and security services (etc) of telephone calls via the telecommunications network, rather than by the planting of listening devices, is however regulated in the UK by the *Interception of Communications Act 1985*. In addition, the use by MI5 of bugging devices for the prevention and detection of serious crime, in support of the police and other law enforcement agencies, is regulated by the *Intelligence Services Act 1994*, as amended. As background, the current arrangements for all of the activities described above are set out in part I of the paper: a table summarising these arrangements is given in part I (E).

Part III of the Police Bill would put intrusive surveillance by the police and HM Customs on a statutory footing: the Government's proposals as set out in the original version of the Bill are described in part II of this paper. These involve a system of authorisation by chief constables. Delegation to other senior officers would be permissible in urgent cases. A surveillance Commissioner would oversee intrusive surveillance operations authorised under the Bill and investigate complaints.

During the passage of the Bill through the House of Lords the question of who should authorise intrusive surveillance operations aroused intense controversy. The debate inside and outside Parliament is described in part III of the paper. At the Report Stage in the Lords, two conflicting amendments to the Bill were passed. One, moved by the Labour Party, involved prior approval of bugging operations by a surveillance Commissioner in some instances. The other, moved by the Liberal Democrats, required authorisation by a circuit judge in all cases. The Government has stated that part III of the Bill is defective due to the contradictory nature of these amendments. In addition, a number of Government amendments made at Report Stage introduce additional safeguards into the intrusive surveillance procedure, by (eg) allowing the appointment of more than one surveillance Commissioner. Amendments to the Bill are dealt with in part V.

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[1] Supplied by Mary Baber, Home Affairs Section

I Intrusive Surveillance and Interception of Communications for the Prevention and Detection of Serious Crime: Current Procedures for Authorisation and Monitoring

A. Intrusive Surveillance: The Police

As mentioned above, the use by the police of electronic surveillance devices is currently unregulated by statute but is subject to Home Office guidelines. The *Guidelines on the use of equipment in police surveillance operations*[1] were released on 19th December 1984. The main points concerning the covert use of listening devices are reproduced below:

> 4. In each case in which the covert use of a listening device is requested the authorising officer should satisfy himself that the following criteria are met:
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> a) the investigation concerns serious crime (except where the last sentence of paragraph 7 applies);
>
> b) nomal methods of investigation must have been tried and failed, or must, from the nature of things, be unlikely to succeed if tried;
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> c) there must be good reason to think that use of the equipment would be likely to lead to an arrest and a conviction, or where appropriate, to the prevention of acts of terrorism;
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> d) use of equipment must be operationally feasible.
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> 5. In judging how far the seriousness of the crime under investigation justifies the use of particular surveillance techniques, authorising officers should satisfy themselves that the degree of intrusion into the privacy of those affected by the surveillance is commensurate with the seriousness of the offence. Where the targets of surveillance might reasonably assume a high degree of privacy, for instance in their homes, listening devices should be used only for the investigation of major organised conspiracies and of other particularly serious offences, especially crimes of violence.
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> 6. The covert use in operations of listening, recording and transmitting equipment (for example microphones, tape recorders and tracking equipment) requires the personal authority of the chief officer [ie the chief constable or equivalent].
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> 7. This authority should not be delegated except in certain categories of case, where there is a degree of consent. Authority may then be delegated to an Assistant Chief Constable. Such categories are cases where the equipment is to be:

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[1] Dep NS 1579

a) knowingly carried by a person other than a police officer who is a party to a conversation which is to be recorded or transmitted;

b) carried by a police officer whose identity is known to at least one other non-police party to a conversation which is to be recorded or transmitted;

c) installed in premises, with the consent of the lawful occupier, to record or transmit a conversation in circumstances where at least one of the parties to the conversation will know of the surveillance;

d) used, with the consent of one of the parties concerned, to record a telephone conversation (but see also paragraph 12);

e) used, with the consent, in the case of a vehicle, of the owner (though not necessarily the driver) to track a vehicle, package or person.

It is recognised that authorisation under d) may in some circumstances be given in a case not involving serious crime, eg the investigation of malicious or obscene telephone calls.

8. When equipment is used more than once during a particular investigation, a record should be kept of each occasion. Authorisation of the use of equipment should be for a maximum period of one month, after which a fresh application must be made to the authorising officer if it is desired to continue the operation.

9. The product [ie recordings made by or directly from the surveillance equipment] of the surveillance should be retained only for as long as it is required by the circumstances of the enquiry or by any subsequent court proceedings, and should be destroyed as soon as it is apparent that it is no longer so required.

10. It is accepted that there may be circumstances in which material obtained through the use of equipment by the police for surveillance as a necessary part of a criminal investigation could appropriately be used in evidence at subsequent court proceedings. The use outside the police service or the courts of material obtained in the course of a criminal investigation through the covert use of listening devices owned, operated and controlled by the police should be authorized only in the most exceptional circumstances, for example, where it is considered necessary in the course of a criminal investigation to enlist the aid of the public, and with due regard for the provisions of the Contempt of Court Act 1981. Authorisation for the use of material in the circumstances covered by this paragraph should, where practicable, be sought from the officer who authorised the use of the equipment concerned. Where this is not practicable, authorisation should be sought from another officer of no lesser rank.

11. A central record should be kept at force headquarters (in the Metropolitan Police at New Scotland Yard) of each application for the use of listening devices.

This should Include:

a) the nature of the case;

b) whether authority was given or refused and by whom;

c) broadly how the criteria set out in paragraph 4 were met; and

d) the final outcome of the investigation.

These records should be retained for a period of at least two years.

They should be made available to HM Inspectors of Constabulary (or in the Metropolitan Police to the Force Inspectorate), together with an inventory of equipment kept by a particular force, where appropriate.

An exercise undertaken by the Government to inform debate on the Police Bill established that in 1995 there were approximately 2,100 chief officer authorisations by police and customs of intrusive surveillance operations in the United Kingdom.[2]

B. Police Powers of Entry and Search

In certain circumstances a person may lawfully go on to another person's property against the occupier's will. A person who enters another person's property when the law does not permit it, or who enters lawfully but exceeds the scope of any permission or authority to enter, becomes a trespasser. In 1765, in the famous case of *Entick v. Carrington*[3], the power of the Secretary of State to issue a general search warrant was rejected, with Lord Camden C.J. stating that:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing.....If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and see if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.

As Richard Stone notes in his book *Entry, Search and Seizure: A Guide to Civil and Criminal Powers of Entry*,[4] general powers of entry have not played a significant part in the range of powers available to the police, probably as a result of the decision in the case, which clearly established the hostility of the English courts to any power of entry not based on a specific and clear authority. Richard Stone adds that the police and other officials need, therefore, to be able to point to statutory or common law authorisation for every power of entry.

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2 HC Deb Vol 288, 21.1.97, c 512W

3 19 State Trials 1065

4 3rd edition 1997 p.55

The police have specific and narrowly defined powers to enter and search premises under a large number of statutory provisions. These include powers of entry under warrant, and powers of entry without warrant. Examples of the latter include provisions under the gaming and licensing Acts and a number of Acts concerning the protection of animals.[5] Police officers also have common law powers of entry without warrant to deal with breaches of the peace or to prevent breaches of the peace which they genuinely and reasonable believe are about to take place.[6] They may also enter premises without a warrant at the invitation, or with the permission of the occupier or other authorised person.

General police powers to enter and search premises under warrants or, in some cases, without warrants, are set out in Part II of the *Police and Criminal Evidence Act 1984*, section 17(5) of which states that, with the exception of the powers concerning breach of the peace:

> all the rules of common law under which a constable has power to enter premises without a warrant are hereby abolished.

Section 17 of the 1984 Act permits a constable to enter and search premises without a warrant to effect an arrest and for a number of other purposes, including recapturing a person who is unlawfully at large, to save life and limb or to prevent serious damage to property. Section 18 also permits a constable to enter and search without warrant premises occupied or controlled by a person who is under arrest for an arrestable offence, if he has reasonable grounds for suspecting that there is on the premises evidence, other than items subject to legal privilege, that relates to the offence or to some other arrestable offence which is connected with or similar to it.

In circumstances other than these the police are required to obtain warrants from justices of the peace under Section 8 of the 1984 Act. Provisions intended to provide safeguards in relation to the issuing to constables of warrants to enter and search premises under any enactment are set out in section 15 of the 1984 Act, which also provides that a warrant shall authorise an entry on one occasion only. Section 16 of the 1984 Act makes provision for the execution of warrants to enter and search premises. It requires a constable executing a warrant to:

- do so at a reasonable hour unless he thinks that this may frustrate the purpose of the search

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5 See Police Powers: A Practitioner's Guide - Levenson, Fairweather & Cape, 3rd edition Legal Action Group 1996 Appendix 6 for a full list of powers of entry and search under warrant and without warrant. The general and specific powers available to the police are also discussed in detail in Entry, Search and Seizure: A Guide to Civil and Criminal Powers of Entry - Richard Stone 3rd edition 1997

6 Thomas v. Sawkins [1935] 2KB 249; McLeod v. Commissioner of Police of the Metropolis [1994] 4 All ER 553

- identify himself to the occupier or if he is not present, to some other person who appears to be in charge

- produce the warrant and supply a copy to the occupier or other person who appears to be in charge

- leave a copy of the warrant in a prominent place on the premises if there is no person present who appears to be in charge.

If the police wish to obtain access to "excluded material"[7] or "special procedure material"[8] they must apply to a circuit judge under Schedule 1 of the 1984 Act for an order requiring the person who appears to be in possession of the material to produce it to a constable for him to take away, or give a constable access to it, within 7 days of the order or a specified longer period.

Further provisions concerning the exercise by police constables of their powers to enter and search premises are set out in Code B of the *Police and Criminal Evidence Act 1984 Codes of Practice*, the latest version of which came into force on 10 April 1995.

A person who considers that the police have entered or entered and searched his property in circumstances in which they had no authority to do so, or who considers that such authority as there might have been was exceeded in his particular case, may make use of the complaints procedure set out in the *Police and Criminal Evidence Act 1984*. Under the 1984 Act complaints are investigated by the police, with the Police Complaints Authority (which oversees the operation of the complaints procedure) having a supervisory role in certain serious cases. A person aggrieved by an unauthorised entry and search of his property may also be able to bring civil proceedings for trespass against the police in some cases.[9]

In Northern Ireland, the general statutory powers of the police to enter and search premises without warrant under sections 19 and 20 of the *Police & Criminal Evidence (Northern Ireland) Order 1989*[10] are, like those in England and Wales under sections 17 and 18 of the *Police and Criminal Evidence Act 1984*, restricted to entry for the purpose of carrying out an

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7 Defined in section 11 of the 1984 Act as records which a person has acquired or created by a person in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office and which he holds in confidence; or human tissue or tissue fluid taken for the purposes of diagnosis or medical treatment and held in confidence; or journalistic material held in confidence and consisting of documents or other records

8 Defined in section 14 of the 1984 Act as journalistic material other than excluded material; and material, other than items subject to legal privilege and excluded material, in the possession of a person who acquired or created it in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office and which is held subject to an express or implied undertaking to hold it in confidence, a restriction on disclosure or an obligation of secrecy

9 see Civil actions against the police - R.Clayton & H.Tomlinson 1992, chapters 6 & 7

10 SI 1989/1341

arrest and other similar matters, or entry and search after arrest. There are more specific statutory powers under the *Northern Ireland (Emergency Provisions) Act 1996*, which revised and re-enacted a 1991 Act of the same name, for constables and members of the armed forces to enter and search premises without warrant for the purpose of arresting terrorists,[11] to search for munitions, radio transmitters and scanning receivers,[12] and to search for persons unlawfully detained.[13] The police and armed forces also have general powers of entry and interference with property rights and highways, under section 26 of the 1996 Act, if they consider this to be necessary in the course of operations for the preservation of the peace or the maintenance of order, or if they have been authorised to do so by or on behalf of the Secretary of State.

In Scotland the police have both general common law powers to enter and search premises for particular purposes and specific statutory powers providing authority for the granting of warrants permitting entry to and search of premises. In Shepherd v. Menzies[14] Lord Kellachy said:

> At common law a police officer who has information that an offence is being committed may, if necessary, with or without a warrant, enter upon private property for the purpose of ascertaining the fact, of stopping the commission of the offence, and if necessary of apprehending the wrongdoer.

The Stair Memorial Encyclopaedia on *The Laws of Scotland* notes that:[15]

> Short of entry for the purpose of preventing crime, a constable who enters premises in order to investigate crime or to act otherwise than in the ostensible scope of his duties may be doing so without lawful authority and thus as a trespasser. However, "there is no absolute rule that police officers may only enter private premises if they have a warrant or statutory authority to do so", but if they do so enter,"the question whether what they have done was unlawful and went beyond the execution of their duties" depends on all the circumstances. The courts do appear to be reluctant, on the other hand, to grant any remedy which would hinder police action taken for the detection of crime.

Paragraph 2 of Schedule 7 to the *Prevention of Terrorism (Temporary Provisions) Act 1989,* which extends to England and Wales and Northern Ireland, allows justices of the peace to issue warrants to police constables authorising searches for material other than "excluded" or

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11 section 17
12 section 20
13 section 23
14 (1900) 2 F 443 at 445,446
15 1995 Volume 16 paragraph 1799

"special procedure" material (which is defined in the same way as it is under the *Police and Criminal Evidence Act 1984*). Where material consisting of, or including excluded or special procedure material is concerned, a constable must apply to a Circuit judge (or a county court judge in Northern Ireland) for a warrant to search specified premises under paragraph 5 of Schedule 7. Under paragraph 3 of Schedule 7 a constable may also apply to a Circuit judge (or a county court judge in Northern Ireland) for an order requiring the production of excluded or special procedure material. Orders for production and search warrants cannot be made under these provisions in respect of items subject to legal privilege.

Under paragraph 7 of Schedule 7 to the 1989 Act a police officer of or above the rank of superintendent, who has reasonable grounds for believing that a case is one of great emergency, and that in the interests of the State immediate action is necessary, may by a written order signed by him give to any constable the authority which may be given under paragraph 2 and paragraph 5. Where an authority is given by a senior police officer in this way particulars of the case must be notified as soon as may be to the Secretary of State. As with a warrant from a justice of the peace or a Circuit judge, authorisation from a police officer under paragraph 7 does not include searches for items subject to legal privilege.

In Scotland, Part II of the 1989 Act permits procurators-fiscal to apply to sheriffs for warrants in connection with terrorist investigations and permits senior police officers to provide authorisation in urgent cases.

Under paragraph 8 of Schedule 7 of the 1989 Act, where investigations into possible offences relating to the financing of terrorist organisations are concerned, the Secretary of State may in certain circumstances, give written orders, signed by him, or on his behalf, giving to any constable in Northern Ireland the authority which may be given by a search warrant under paragraphs 2 or 5 of the Schedule 7 or require any person in Northern Ireland to produce excluded or special procedure material. The circumstances are that he is satisfied as to the matters of which a justice of the peace or a circuit judge would have to be satisfied under paragraphs 2 and 5 and it appears to him that the disclosure of information that would be necessary for an application under those provisions would be likely to prejudice the capability of members of the RUC in relation to the investigation of the offences concerned or would otherwise prejudice the safety of, or of persons in Northern Ireland.

C. Intrusive Surveillance: Security Service (MI5)

1. Warrants

Sections 5 and 6 of the *Intelligence Services Act 1994* (as amended by the *Security Service Act 1996*) give the Secretary of State (or, in certain specified circumstances, a senior civil servant) statutory powers to issue warrants authorising entry on, or interference with property or with wireless telegraphy (radio transmitters etc) by the Security Service (MI5), the Intelligence Service (MI6) or GCHQ in certain circumstances, eg. in relation to their common purpose of promoting national security. Although all three services have additional duties in support of the prevention and detection of serious crime, section 5(3) prevents a warrant in connection with serious crime functions from being issued to MI6 or GCHQ in relation to property in the British Isles. Under section 5(3A) and (3B), however, the Home Secretary may in certain circumstances issue such a warrant to MI5 in connection with its function of "supporting the activities of police forces and other law enforcement agencies in the prevention and detection of serious crime". A warrant permitting intrusive surveillance of serious crime suspects in the British Isles may be granted to MI5 where the surveillance relates to one or more offences which either:

(a) involve the use of violence, result in substantial financial gain or constitute "conduct by a large number of persons in pursuit of a common purpose"; or

(b) carry a likely prison sentence of three years or more (where the person convicted is 21 years old or more and has no previous convictions).

This is the same definition of "serious crime" which is used for the purposes of the issuing of warrants for telephone tapping under the *Interception of Communications Act 1985* (see below).[16]

2. Supervision and Complaints

Section 4 of the *Security Service Act 1989* provides for the appointment of a Security Service Commissioner who must be a senior judge or a retired senior judge (ie a Judge of the High

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[16] The rules for the authorisation of intrusive surveillance by MI5 in relation to serious crime, which were inserted by the *Security Service Act 1996*, were debated at length during the Committee Stage in the House of Lords: HL Deb Vol 572, 10.6.96, cc 1491-1539. See also *The Economist*, 29.6.96

Court or above). The Commissioner is responsible for keeping under review the issue of warrants by the Secretary of State for intrusive surveillance by the Security Service.[17]

By section 4(4) of the 1989 Act it is the duty of every member of the Service and of every official of the Home Office to disclose or give to the Commissioner such documents or information as he may require for the purpose of enabling him to discharge his functions. The Commissioner is required to make an annual report to the Prime Minister on the discharge of his functions and the Prime Minister is required to lay a copy of that report before each House of Parliament subject to the exclusion of any matter which would be prejudicial to the continued discharge of the functions of the Service.

Section 5 of the 1989 Act provided for the setting up of the Security Service Tribunal for the purpose of investigating complaints about the Service. Under Schedule 1 of the Act any person may complain to the Tribunal if "aggrieved by anything which he believes the Service has done in relation to him or any property of his". The Tribunal is required to investigate whether the complainant has been the subject of inquiries by the Service and if so, whether the Service had reasonable grounds for deciding to institute or continue such inquiries. The Commissioner is required to give the Tribunal "all such assistance in discharging their functions... as they may require". Where the complainant alleges that anything has been done by the Service in relation to any property of his, the Tribunal shall refer the complaint to the Commissioner who shall investigate whether a warrant has been issued appropriately[18]. The Tribunal must consist of three to five members, all of whom must be lawyers of not less than ten years' standing. The Tribunal currently consists of three members. Again it is the duty of every member of the Service to disclose or give to the Tribunal such documents or information as they may require for the purpose of enabling them to carry out their functions under the 1989 Act[19].

The Tribunal may order one of the following courses of action if it finds in favour of the complainant[20]:

- The Service to end its inquiries about the complainant
- The Service to destroy any records it holds about those inquiries
- The quashing of a property warrant

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17 Under section 8 of the *Intelligence Services Act 1994* a Commissioner is appointed who has similar responsibilities regarding intrusive surveillance warrants issued to MI6 and GCHQ.

18 para 2(4) of Schedule 1

19 para 4(1) of Schedule 2

20 para 6 of Schedule 1

- Financial compensation

If the Tribunal concludes that a complaint should be rejected, but is uneasy about some aspect of what the Service has done, it may refer the matter to the Commissioner who will then investigate[21]. He may then report his findings to the Secretary of State who may take such action as he thinks fit in the light of the report, including any action which the Tribunal have power to take or direct as described above[22].

The Tribunal has no power to adjudicate on a complaint about the alleged actions of police officers, whether or not those actions are thought to have been undertaken in order to assist the work of the Security Service. In such cases the usual police complaints mechanisms would have to be employed. In addition the work of the Tribunal does not extend to considering applications about the interception of communications under the *Interception of Communications Act 1985.*

The Security Service Commissioner has reported that so far no complaints have been upheld by himself or the Tribunal. In his annual report for 1991[23] the Commissioner refuted the suggestion that the Tribunal does not fulfil a useful function, because it is not doing its job properly, is not being provided with adequate information or access by the Security Service or for some other reason. He said:

> 7. When the Security Service Bill was debated in Parliament Members in both Houses anticipated that there would be a substantial number of complaints from persons who were suffering from delusions of one sort or another. That has proved to be the case; but the Tribunal has taken the view that these should not be regarded as frivolous or vexatious and thus not investigated. Since the investigation of such complaints is relatively straightforward it has been thought preferable to err on the side of caution and to accept them rather than reject them on this basis.
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> 8. The Act provides that no complaint shall be entertained if and so far as it relates to anything done before the date on which the Act came into force i.e. 18 December 1989. There is an exception to that where inquiries by the Service had been instituted but no decision had been taken before that date to discontinue them. A significant number of complaints have related to periods before the Act came into force. Before deciding that it cannot entertain a complaint for that reason the

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21 para 7(2) of Schedule 1

22 para 7(3) of Schedule 1

23 Cm 1946, May 1992

> Tribunal will investigate whether, assuming that inquiries have been carried out by the Security Service, it is correct that these inquiries had been discontinued prior to 18 December 1989.
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> 9. The Tribunal has investigated a number of complaints relating to vetting in connection with employment. It has not upheld any of these complaints. The Tribunal does not have power to investigate at large why a complainant was refused employment by a department. The reason may well be quite unconnected with any information provided by the Service.
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> 10. A number of complainants have asked to be told whether the Security Service has a file on them and, if so, to be informed of its contents or to be allowed to see it. Some have simply asked the Tribunal to order the destruction of any file which may be held on them. Having regard to the terms of the Act the Tribunal cannot accede to such requests.
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> 11. Every member of the Security Service is required to disclose or give to the Tribunal such documents or information as they may require for the purpose of enabling them to carry out their functions under the Act. The Tribunal is satisfied that members of the Security Service have complied with this requirement. The Service has also assisted the Tribunal on a number of occasions by explaining their procedures. The Tribunal has had the opportunity to comment on these from the point of view of the public interest.
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> 12. Other official agencies than the Security Service have or may have an interest in security. The Tribunal has no power to require those agencies and their members to disclose documents or information which may have a bearing on its investigation of a particular complaint. It may, however, require the Service to produce material supplied by the other agencies. The Tribunal's jurisdiction is solely as to complaints against the Security Service.
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> 13. There can be no doubt that the very existence of the Tribunal as a body empowered to investigate complaints provides the Security Service with a strong additional incentive to ensure that its procedures are designed to eliminate the chance of a complaint being found justified.

In his report for 1993[24] the Commissioner discussed three cases which had been considered by the European Commission of Human Rights in which it had been alleged that the protection offered under the 1989 Act is inadequate and ineffective for, *inter alia*, the following reasons:

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[24] Cm 2523, March 1994

(a) the wide scope of the term "protection of national security"

(b) the fact that the Tribunal gives no reasons for its failure to make a determination in the applicant's favour

(c) the inability of the applicant to verify or correct information recorded

(d) the fact that the Tribunal cannot examine inquiries which ceased before the Act came into force

(e) the limited scope of the Tribunal's jurisdiction, in particular since it cannot examine whether the information, if true, renders the person a security risk

f) the inability of the Commissioner to make binding decisions.

In all three cases the Commission for Human Rights rejected those arguments and the Security Commissioner made the following comments about the significance of those cases:

> 40. The importance of these cases is that they show that in the view of the Commission the 1989 Act and the procedures set up under it comply with the requirements of the Convention. In particular-
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> (a) The Act provides a sufficient basis in domestic law for the operations of the Security Service to be in accordance with the law; the definition of the functions of the Service as being the protection of national security, though wide, is not too wide and does not require to be more closely defined
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> (b) The machinery set up in the Act for consideration of complaints by the Tribunal and the Commissioner is an adequate remedy, notwithstanding that reasons may not be given when the Tribunal does not make a determination in the complainant's favour
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> (c) The power of the Tribunal to refer matters to the Commissioner under Para 7 of the first Schedule of the Act and my willingness to investigate the matters referred is regarded by the Commission as an important safeguard.

D. Interception of Communications: Police and Security Services, etc.

1. Warrants

Section 2 of the *Interception of Communications Act 1985* authorises the relevant Secretary of State (or, in certain specified circumstances, a senior civil servant) to issue warrants to the police, the security and intelligence services and other law enforcement agencies, bodies and persons within the UK, enabling them to intercept communications transmitted by post or through a public telecommunication system (ie telephone tapping). Intentional interception of communications in the absence of such a warrant is a criminal offence except in certain specified circumstances [section 1].[25] A warrant may only be issued where the Secretary of State considers it necessary:

(a) in the interests of national security;

(b) for the purpose of the prevention or detection of serious crime; or

(c) for the purpose of safeguarding the economic well-being of the UK.[26]

The Secretary of State must take account of whether the information which it is considered necessary to acquire could reasonably be acquired by other means. Serious crime is defined under section 10 as conduct constituting one or more offences which either:

(a) involve the use of violence, result in substantial financial gain or constitute "conduct by a large number of persons in pursuit of a common purpose"; or

(b) carry a likely prison sentence of three years or more (where the person convicted is 21 years old or more and has no previous convictions).

The scope and duration of warrants are dealt with in sections 3, 4 and 5 of the 1985 Act. A warrant may be renewed at any time before it is due to lapse, but a renewal must be issued by the Secretary of State himself. A warrant must be cancelled if at any time before it is due to lapse the Secretary of State considers that it is no longer necessary. The scope of a warrant may be modified by the Secretary of State (or, in certain specified circumstances, a senior civil servant) after it has been issued, where this is considered necessary.

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[25] The Calcutt Report noted that prosecution under the 1985 Act is rare: Review of Press Self-Regulation, Sir David Calcutt QC, Cm 2135, January 1993

[26] Relates to the acts or intentions of persons outside the British Islands only.

2. Supervision and Complaints

Where the Secretary of State issues a warrant, he must (unless such arrangements have already been made) make such arrangements as he considers necessary to ensure that:

(a) the extent to which the intercepted material is disclosed;

(b) the number of persons to whom any of the intercepted material is disclosed;

(c) the extent to which the material is copied; and

(c) the number of copies made of any of the material

is limited to the necessary minimum [section 6 of the 1985 Act]. He must also ensure that such copies as are made are destroyed as soon as their retention is no longer necessary. The Commissioner (see below) must report to the Prime Minister on any breach of the Secretary of State's section 6 duties.

The Prime Minister must appoint an Interception of Communications Commissioner under section 8 of the Act. The Commissioner's functions are as follows:

(a) to keep under review the carrying out by the relevant Secretaries of State of their functions in relation to interception warrants; and

(b) to assist the Interception of Communications Tribunal in its functions (see below).

The Commissioner must report annually on the carrying out of his functions to the Prime Minister, who must lay the report before each House of Parliament. The Prime Minister may exclude from the version of the report laid before Parliament any matter which it appears to him would be prejudicial to national security, the economic well-being of the UK or the prevention or detection of serious crime. In addition, where it appears to the Commissioner that the requirements of the 1985 Act in respect of the issuing of warrants have been breached, and the Tribunal has not reported on the contravention, he must make a report to the Prime Minister. All civil servants and post office and telecommunications staff must give the Commissioner such documents and information as he may require in order to carry out his functions.

Section 7 of the 1985 Act established the Interception of Communications Tribunal. Its constitution and procedure, etc, is set out in Schedule 1 to the Act. Any person who believes that communications sent to or by him or her have been intercepted in the course of their transmission by post or telephone may apply to the Tribunal for an investigation under section 7. Where a complaint is made, unless it appears frivolous or vexatious, the Tribunal must investigate whether a warrant was issued and, if so, whether there has been any contravention of the Act's requirements (except in relation to the Secretary of State's duties under section 6: see above).

The Tribunal must inform the complainant of its findings. If the Tribunal finds that the Act has been breached it must also report its findings to the Prime Minister and may, if it thinks fit, make an order doing one or more of the following things:

(a) quashing the relevant warrant;

(b) directing the destruction of copies of the intercepted material; and

(c) directing the Secretary of State to pay a specified sum in compensation.

The Tribunal's findings may not be appealed against or challenged in court.

In his Annual Report for 1992 the then Commissioner, Sir Thomas Bingham, said that there were four major safeguards against abuse in relation to interception warrants:[27]

- The professional vigilance, competence and integrity of those who initiate and prepare warrant applications for consideration by Secretaries of State
- The requirement in the Act that a Secretary of State should personally sign or authorise every warrant
- The Commissioner's review of warrants issued
- The Tribunal whose function is to investigate cases of alleged contravention and (if any contravention is found) report it to the Prime Minister

No complaints have been upheld by the Tribunal to date.

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[27] Cm 2173, pp 1-2

During the passage of the Police Bill through the House of Lords, controversy arose over administrative failures concerning transcripts of telephone taps held by NCIS.[28]

E. Summary of Current Powers to Carry Out Intrusive Surveillance and Interception of Communications for the Prevention and Detection of Serious Crime[29]

Agency	**Entry on to/ interference with property**	**Telephone tapping/ postal interception**	**Electronic surveillance ("bugging")**
Police	Governed mainly by the *Police and Criminal Evidence Act 1984*. Some powers to act without a warrant. May apply to a magistrate for a warrant (section 8) or a circuit judge for a production order/ warrant (Schedule 1)	Authorisation by Secretary of State needed (section 2, *Interception of Communications Act 1985*	Currently unregulated by statute, but subject to Home Office guidelines. Part III of the *Police Bill* would introduce statutory controls
Security Service (MI5)	Authorisation by Secretary of State needed (section 5(3A) & (3B), *Intelligence Services Act 1994*, as amended)	Authorisation by Secretary of State needed (section 2, *Interception of Communications Act 1985*	Authorisation by Secretary of State needed (section 5 (3A) & (3B), *Intelligence Services Act 1994*, as amended)
Secret Intelligence Service (MI6)	Serious crime: may not take action relating to property in the British Islands (section 5(3), *Intelligence Services Act 1994*, as amended)	Authorisation by Secretary of State needed (section 2, *Interception of Communications Act 1985*	Serious crime: may not take action relating to property in the British Islands (section 5(3), *Intelligence Services Act 1994*, as amended)
GCHQ	Serious crime: may not take action relating to property in the British Islands (section 5(3), *Intelligence Services Act 1994*, as amended)	Authorisation by Secretary of State needed (section 2, *Interception of Communications Act 1985*	Serious crime: may not take action relating to property in the British Islands (section 5(3), *Intelligence Services Act 1994*, as amended)

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[28] See NCIS press release 4/97, 21.1.97, "Telephone intercepts and the National Criminal Intelligence Service"; *Times* 22.1.97 "Hundreds of sensitive transcripts lost"

[29] This table is based on one which appeared in the *Briefing on the Police Bill 1996* by the civil rights organisation Liberty (November 1996)

F. Intrusive Surveillance Authorisation Procedures in Other Countries

In December 1996 Justice, the British Section of the International Commission of Jurists, produced a briefing for the Police Bill which focused on the approach to intrusive surveillance which is adopted in various other countries, namely Australia, Canada, New Zealand and the United States (which have systems based on common law); and Germany, France and the Netherlands (which have civil law jurisdictions). Justice found that in all of those jurisdictions surveyed, judicial authorisation is required to lawfully intercept communications, and generally to make use of electronic surveillance devices [p1]:

> The reasons for this are multifold. There is a clear need for an impartial and detached arbiter to be put in between the citizen and the police officer executing the surveillance. This should not be a representative of the executive branch of government, for the executive, and police officers especially, are continually bombarded with the worst society has to offer. They operate in a high pressure environment and are faced on a daily basis with organised crime, terrorist activities, drug trafficking and other manifestations of serious crime. Their powers of judgment will be affected by their daily work.
>
> Also, judicial authorisation will prevent the police from undertaking 'fishing expeditions': police officers will have to demonstrate beforehand that there are objective and reasonable grounds to believe that certain offences have been, or are about to be committed, and that the interception of certain communications, or the use of certain surveillance devices will assist in the investigations while the use of other means is unfruitful or impractical.
>
> Finally, there is the matter that in democratic societies, individual rights and freedoms should not be infringed without prior judicial authorisation. This is one of the general principles recommended in the findings of the Dutch Van Traa parliamentary enquiry commission.
>
> All these considerations have been recognised in other jurisdictions (see e.g. the 1983 Australian Law Commission Report on the Protection of Privacy in Australia; 5 22.3). Indeed, it is now taken for granted that judicial authorisation is needed, and the debate has moved on long since.

The briefing went on to identify some differences in the seniority of judicial authorisation required in the countries surveyed, but suggested that generally speaking "it seems that the power to issue warrants has in most jurisdictions been granted to those judges competent to hear cases of serious crime in the first instance" [p1]. Different internal review processes which are instigated prior to judicial authorisation were also identified. In the United States, for example, applications go through a strict process of internal review leading up to the Attorney-General before being considered by a federal judge, but in New Zealand any commissioned officer of the police may apply to a High Court judge for a warrant. In the

absence of detailed research, Justice avoided drawing any conclusions from such differences. It could be (they suggest) that applications which had passed strict scrutiny would be more sound than those presented directly before a judge; on the other hand, it could be that judges faced with pre-scrutinised applications would be more lax, which could in turn lead to those carrying out the scrutiny becoming more lax.

A related issue was considered by Justice: the possibility of 'judicial rubberstamping'. The organisation noted that a large percentage of applications for warrants is granted in the Netherlands; and that the special court convened in the United States to consider applications for foreign intelligence surveillance did not refuse to issue a warrant on a single occasion in the period for which information was available (although the jurisdiction of the FISA court in the USA extends only to administrative issues). Justice concluded that there was "a certain danger" in requiring judges to consider applications "not in a technical juridical manner, but rather in a practical and common-sense manner" as happens in non-national security cases in the USA. This allows judges to engage in policy-making decisions, the danger being that the judge's original role of independent arbitrator could "disappear into the background" [p2]:

> A more positive example comes from New Zealand, where Supreme Court jurisprudence requires judges to strictly scrutinise every application. In such an environment, rubberstamping seems out of the question.

II Proposals to Introduce a Statutory Framework For Police Intrusive Surveillance

A. Background

The legal basis of surveillance operations carried out by the police under the above guidelines has recently been called into question. John Marston, in an article in the *New Law Journal* in December 1995, made the following comments on the legislative framework governing covert electronic surveillance operations at that time:[30]

> The authority of the Home Secretary is required to justify entry by the security service under s.3 of the Security Service Act 1989, and in all but the security service there is an absence of lawful authority to justify covert entries to property in order to plant listening or other devices. Such covert entries by the police are unlawful and no amount of Home Office guidance can make them lawful.

The desirability of a statutory system to regulate intrusive surveillance operations by the police was recognised by the Home Secretary, Michael Howard, in January 1996 during the Second Reading of the Security Service Bill (which extended the power of the security service to apply to the Secretary of State for property warrants in 'serious crime' cases). Mr. Howard said:[31]

> Before I leave the subject of warrants, I should make one other point. There is no specific statutory authority for the present arrangements whereby chief officers of police may themselves authorise the use of intrusive surveillance equipment in tackling serious crime. There are guidelines that control police activity of that sort very closely, and there is no evidence that they are being abused.
>
> However, I accept that, as the Home Affairs Select Committee has recommended, a statutory system would be preferable. That is another matter that we are currently working through with the Association of Chief Police Officers. But I do not see it as providing any cause for withholding from the Security Service the necessary powers that clearly are already, and will continue to be, governed by statute and set in the context of their own accountability arrangements.

The proposals for the security service themselves were the subject of lengthy discussion during the Committee Stage of the Security Service Bill in the House of Lords.[32]

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30 'Police surveillance', 15th December 1995, p.1862

31 (HC Deb, v 269, 10th January 1996, c 224

32 HL Deb, v 572, 10th June 1996, cc 1491-1539. See also *The Economist*, 29th June 1996, pp.30-31 "Civil liberties: bugging the castle" for a summary of the issues debated

More recently, attention was focused on the current arrangements governing the use of electronic surveillance devices by the police by the House of Lords judgement in the case of *R v Khan* which concerned the admissibility in criminal proceedings of evidence obtained by the police via bugging.[33] The appeal was unanimously dismissed but Lord Slynn of Hadley made the following comment in his judgement:[34]

> Though I have no doubt in this case that the Chief Constable exercised his discretion fairly and *bona fide* I consider that fairness both to accused persons and to those who have to exercise this discretion make it highly desirable that such interceptions should be governed by legislation."

Lord Nolan, in his judgement, also noted that the absence of a statutory framework for the use of electronic surveillance devices by the police was in contrast with the situation affecting the security service whose activities in this area had been subject to statutory regulation since 1989 (by the *Security Service Act 1989*).

On the same day that the House of Lords gave its judgement in the case of *R v Khan* the Home Secretary made a speech to the Association of Chief Police Officers summer conference in which he accepted the need for legislation and gave his opinion of how the issue of authorisation for intrusive surveillance should be addressed:[35]

> The debate on the Security Service Bill has highlighted the question of how best to regulate the use by the police of intrusive surveillance techniques. The use of microphones and other technical devices without the knowledge of their targets can often provide the crucial piece of the jigsaw in breaking organised criminal activity. I have no doubt about the value of these techniques. There is something of an anomaly at present, with the Security Service being enabled to act under "property warrants" which I sign; while police surveillance operations are authorised by chief officers in accordance with a long-standing Home Office Circular.
>
> I know that chief officers take their responsibilities very seriously and there is no evidence of abuse. The existing guidelines impose a tightly controlled system. But there is a strong case - which I have accepted - for putting the authorisation system on a statutory basis. The existing guidance predates the legislation on Interception of Communications and on the Security Service and intelligence agencies. There is now a reasonable expectation of greater clarity in the way covert activity is controlled.
>
> As to how intrusive police action should be authorised, there are, in theory, three main options. The first is to look to the courts. But I do not think it would be right to involve the courts at this stage in the intelligence gathering process, before it could be known whether criminal charges

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33 *Times Law Report*, 5th July 1996

34 House of Lords, Opinions of the Lords of Appeal for judgement in the cause *Regina v. Khan (Appellant) (on appeal from the Court of Appeal (Criminal Division))* on 2nd July 1996, p.3

35 Michael Howard, Speech to ACPO Summer Conference, 2nd July 1996

were in prospect. There is a danger in identifying the judiciary too closely with the actions of the investigative agencies. The impartiality of the judges could be called into question. There is a particular awkwardness in a judge authorising an action affecting an individual who might never be made aware of the decision. I believe these are properly matters for the executive and I am not attracted to the option of judicial warranting.

On the other two options, the arguments are more finely balanced. The second option would be for Ministerial warranting, by analogy with the systems for interception and Security Service activity. There is a good case for this, because the arrangements in those other areas have worked well. But there are obvious differences between the police and the Security Service. The Security Service is directly accountable to me. Police forces, of course, are not. It would be unusual for a Minister to be as close to operational policing decisions as consideration of the spectrum of surveillance options would require. On balance, I believe that the best option is to formalise the current system of authorisation by chief police officers, with the important addition of an independent Commissioner to oversee the arrangements and investigate any concerns about improper authorisation. It is fully consistent with the operational independence of chief constables. It builds on the successful experience of the existing non-statutory systems but opens it out to formal independent scrutiny. I know that this is the option that ACPO favours and I hope it will command widespread support.

B. Part III of the Police Bill

The Government's proposals, as set out in Part III of the Bill as originally printed [HL Bill 10 of 1996-97] are set out below. This part of the Bill applies to the whole of the UK. Please note that the Bill has subsequently been amended in the Lords, therefore the account given below does not necessarily tally with the current version of the Bill [Bill 88 of 1996-97]. Clause numbers given below do *not* correspond to Bill 88 even where the substantive provision has not been changed. The equivalent Clause, if any, in the current version of the Bill is given in footnotes.

Although Part III of the Bill is concerned with the use of electronic surveillance devices or 'bugs', there is no specific reference to 'bugging' in Part III. **Clause 89(2)**[36] refers to:

> the taking of such action, in respect of such property in the relevant area, as [an authorising officer] may specify, or ... the taking of such action in the relevant area as [an authorising officer] may specify, in respect of wireless telegraphy.

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[36] Clause 92(2), Bill 88. References to authorising officers have been replaced by references to circuit judges in the current version of the Bill

Such action is authorised where an 'authorising officer' thinks it "likely to be of substantial value in the prevention or detection of serious crime" and where he/she is "satisfied that what the action seeks to achieve could not reasonably be achieved by other means" (**clause 89(3)**).[37]

A 'serious crime' is defined in **Clause 89(5)**[38] as an offence which

> involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose, or ... an offence for which a person who has attained the age of twenty-one and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more.

A similar definition of serious crime is used in the *Interception of Communications Act 1985* and the *Intelligence Services Act 1994*, as amended, which regulate telephone tapping by the police and security services (etc) and the use by MI5 of bugging devices for the prevention and detection of serious crime respectively.

'Authorising officers' are defined in **clause 89(6).**[39] They are listed below:

- a chief constable of a police force in England, Wales or Scotland
- the Commissioner or an Assistant Commissioner of the Metropolitan Police
- the Commissioner of the City of London Police
- the Chief Constable or Deputy Chief Constable of the Royal Ulster Constabulary
- the Director General of the National Criminal Intelligence Service
- the Director General of the National Crime Squad
- the customs officer designated by the Commissioner of Customs and Excise for this purpose[40]

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37 Clause 92(3), Bill 88. Again, 'authorising officer' is replaced by 'circuit judge'

38 Clause 92(5)

39 In Clause 92(4) of Bill 88 the same officers are listed, but in relation to officers who may approach a circuit judge for authorisation

40 Customs Officers would only have bugging powers in relation to those serious crimes falling within the scope of their customs and excise duties

Clause 90[41] concerns procedures for delegating these powers in the absence of the authorising officer or in certain instances his or her 'designated deputy' (an assistant chief constable, or equivalent). Where it is not 'reasonably practical' for either person to consider an application for authorisation, then in urgent cases a senior officer (another assistant chief constable) may authorise intrusive surveillance.

Clause 91[42] provides that written authorisations are required except in urgent cases, where they may be given orally (but only by the authorising officer or his designated deputy). Written authorisations are valid for six months, except where an authorisation is given in the absence of the authorising officer or his deputy, in which case the authorisation ceases to have effect after 15 days. Oral authorisations are valid for 15 days only. It is possible to renew written authorisations for a further six month period, provided the authorising officer or his designated deputy is satisfied that the authorisation remains necessary for the purpose for which it was initially authorised.

Clause 92[43] provides for the Secretary of State to issue a code of practice for authorising officers. **Subsection (2)** requires the Secretary of State to prepare and publish a draft code of practice and consider any representations made to him about the draft. He is then able to modify the draft accordingly. The draft must be laid before both Houses of Parliament **(subsection (3)),** and the Secretary of State has the power to bring the final version of the code into operation by means of an affirmative statutory instrument (**subsections (4) and (5)).** The Secretary of State may, from time to time, revise the code using the procedure described above (**subsection (7)**). Under **Subsection (11)** the code is admissible in evidence if relevant to any criminal or civil proceedings. Failure to comply with the code by any person authorising action under Part III would not render that person liable to criminal or civil proceedings (**subsection (10)**).

During the Second Reading debate in the House of Lords, Baroness Blatch, Minister of State at the Home Office, stated that:[44]

> This code will outline the authorisation procedures to be adopted and will ensure that practitioners are fully aware of what is required of them. It will be publicly available and will be admissible in evidence. Work on drafting the code is well advanced and we hope to make a draft available to the House for the Committee stage.

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41 Clause 93 of Bill 88

42 Clause 94

43 Clause 95

44 HL Deb, vol. 575, 1lth November 1996, cc 792-793

The draft code of practice was issued on 19 November 1996 [Dep 4184 (3S)].

Clause 93[45] establishes the post of a Commissioner, who would be either a serving or a retired senior judge. The Commissioner has the role of reviewing the use of the power to authorise intrusive surveillance and to investigate complaints, including complaints referring to surveillance which occurred at a person's workplace (**Clause 94**).[46] Decisions of the Commissioner are not subject to appeal or liable to be questioned in court.

Schedule 7 makes further provision in relation to the investigation of complaints and the reporting of conclusions by the Commissioner; and the remedies available to the Commissioner. In determining whether the person who gave/renewed the authorisation was acting properly the Commissioner must under **Paragraph 1(2)** of Schedule 7 apply the same principles as a court on an application for judicial review. **Paragraph 2(3)** prevents the Commissioner from giving any reasons for his decisions. If the commissioner finds in favour of a complainant, he may do either or both of the following things (**paragraph 3(1)**):

(a) quash the relevant authorisation and order any records relating to the information obtained (other than records required for pending criminal or civil proceedings) to be destroyed;

(b) direct the authorising officer to pay a sum in compensation as may be specified by the Commissioner .

Compensation may be paid from a police fund, the police authority or joint police board (in Scotland), the police authority (in Northern Ireland), a service fund (for the NCIS and the National Crime Squad) or the Commissioners of Customs and Excise **(paragraph 4).**

Under **Clause 95**[47] the Commissioner must make an annual report to the Prime Minister. The Prime Minister may, after consultation with the Commissioner, exclude from the published annual report any material "prejudicial to the continued discharge of the functions" of those organisations which are entitled to undertake operations under Part III. The Prime Minister must make a statement of any matter thus excluded from the annual report when presenting it to Parliament.

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45 Clause 96 of Bill 88: as amended

46 Clause 97, as amended

47 Clause 98

Clause 95 also requires an individual to provide the Commissioner with any documents or information needed to discharge his statutory functions; and requires the Commissioner to ensure that information provided to him is not further disclosed without that person's consent.

III Reactions to the Government's Proposals

Liberty (formerly the National Council for Civil Liberties) produced a *Briefing on the Police Bill 1996* in November 1996. The organisation welcomed the fact that electronic surveillance operations by the police would be put on a statutory footing, but went on to voice its primary concern with Part III of the Bill, that it would be chief constables themselves would authorise the use of bugging devices, without the need for the use of intrusive surveillance to be assessed by a court or a Minister:[48]

> This internal authorisation is in contrast to analogous police powers, such as the power to enter an individual's home and search for and seize property, and telephone tapping. Powers of entry, search and seizure are usually exercisable only with the authority of a warrant from a magistrate (Section 8 of the Police and Criminal Evidence Act 1984) or a production order or warrant from a circuit judge (Schedule 1 and Code B of the 1984 Act). In order for the police to tap a person's telephone or intercept their post, they must have obtained a warrant from the Home Secretary (Section 2 of the Interception of Communications Act 1985). The new powers in this Bill have neither safeguard.
>
> We would also compare the position of the police with the powers of the security services in relation to serious crime. By the Security Service Act 1996 the Security Service (MI5) were given bugging powers for the first time in respect of serious crime. The 1996 Act (Section 2) requires the Security Service to obtain the prior authorisation of the Home Secretary. Therefore the legislation creates the unjustifiable situation that where the police work together with MI5 on serious crime, MI5 will need the Minister's authority to bug, whereas the police will not...
>
> Liberty believes that the authorisation of police bugging powers should be subject to judicial scrutiny, and that the failure to subject the police to such oversight will mean that the legislation is likely to breach the requirements for independent scrutiny laid down by the European Convention on Human Rights, given the highly intrusive interference with the individual's liberty which this Bill will permit, and the inadequacy of the complaints mechanism.

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[48] Liberty, *Briefing on the Police Bill 1996*, November 1996, pp 9-10

With regard to the complaints mechanism, Liberty commented:[49]

> The Bill will set up a system under which complaints will be investigated by a Commissioner. However, the Commissioner's decisions cannot be appealed, or questioned in court. The Commissioner's powers are set out in schedule 7 to the Bill and are similar to the complaints mechanisms relating to telephone tapping (in the Interception of Communications Act 1985), to the Security Service (in the Security Service Act 1989) and the Secret Intelligence Service (MI6) and GCHQ (in the Intelligence Services Act 1994). We would emphasise that the tribunals established by each of those Acts have never upheld a single complaint. Under the provisions of the Bill, the Commissioner may only apply the very narrow principles applied by the High Court in judicial review proceedings in deciding whether an authorisation has been properly made. Therefore the Commissioner will not assess the merits of a decision as such, as s/he will only be able to uphold a complaint if a decision is so unreasonable as to be perverse. Furthermore, the Commissioner is obliged by the Act *not* [to] give any reasons for *any* decision which s/he makes.

Liberty also voiced concerns about what it described as the "excessive breadth of the bugging powers" granted to the police under Part III of the Bill:

> Fundamentally, the Bill contains no restrictions on the actions which the police will be able to take. The chief constable will be able to authorise *the taking of such action ... as he may specify*. Clause 89(2)[50] will allow the police to plant surveillance devices and, in order to do so, it will be lawful for the police to trespass on, and enter, a person's property, and commit what would otherwise be criminal damage in order to do so...
>
> We also note with concern that there is merely a subjective test of the need for the use of bugging powers - a chief constable may authorise the use of surveillance devices if s/he *thinks it necessary*. There is therefore no objective reasonableness requirement, which would make it very difficult to challenge the chief constable's decision, no matter how unreasonable a decision might be.

Finally, Liberty was also concerned about what it regarded as the very broad definition of 'serious crime' in Part III:

> The definition of 'serious crime' in clause 89(5)[51] is the same definition used in the Interception of Communications Act 1985 and the Security Service Act 1996, but in our view the categories are unacceptably wide and vague. To include a *large number of persons in pursuit of a common purpose* in the definition may mean that, for example, people protesting

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49 Ibid, p. 11
50 Clause 92(2) of Bill 88
51 Clause 92(5) of Bill 88

> peacefully on a public highway about live animal exports, or about road-building, could lawfully be the subject of police bugging.

In the Second Reading Debate in the Lords, the Labour and Liberal Democrat spokesmen Lord McIntosh of Haringey and Lord Rodgers of Quarry Bank expressed doubts over various details of the Government's proposals to put intrusive surveillance by the police on a statutory footing without expressing outright opposition.[52] Lord Blaker welcomed the fact that intrusive surveillance operations were to be put on a statutory footing, but voiced his concern that the Security Service (MI5) might rely on the police to carry out covert surveillance in serious crime cases as this would avoid the need to obtain ministerial authorisation [c 809]. The Home Office Minister Baroness Blatch said in response that in the Government's view, it would quickly become apparent to the Security Service Commissioner and surveillance commissioner if authorisations were being improperly given under the wrong authorisation process. She added that this matter would have to be watched carefully as annual reports were made to Parliament [c 837].

The law lord, Lord Browne-Wilkinson, expressed strong criticism of the proposals. Although Part III of the Bill was being presented simply as one step in the battle against organised crime, it raised "issues of fundamental constitutional importance" [c 810]:

> Until the passing of the Security Service Act earlier this year - a Bill about which at the time I was not enthusiastic - there was only one exception to immunity from police invasion of our privacy; that is, a search warrant granted by an independent court and not by the executive. In relation to matters of national security we tolerated (with our eyes half-closed because it was such an awkward subject) bugging and entering in the interests of protecting national security. But now, following from the Security Service Act, we are sanctioning the entry onto our premises for police purposes not under warrant of the court or under any independent warrant, but under administrative action.
>
> The common law freedoms to which I referred can be curtailed and taken away by Parliament, since Parliament is sovereign. If Parliament enacts, as the Bill proposes, that it be lawful for the police to enter, bug and search our homes, there is nothing that the courts will, in the future, be able to do to protect us from those rights of the state. The bulwark of our freedom will have gone, and not just for the time being but for ever. The powers will be exercisable against us all - the guilty and innocent alike, in any circumstances which fall within the extraordinarily wide words of the Bill. We will be subject to executive inroads on our freedoms.

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[52] HL Deb Vol 575, 11.11.96, cc 797-8 & 801-2

He went on to list his specific objections to the measures proposed in Part III [cc 810-811]:

At first sight the Bill does a great deal more than that. I will not seek to take up your Lordships' time at this stage with a minute section of the Bill. However, perhaps I can point to one or two of the more glaring ways in which our traditional liberties are being curtailed. If the requirements in Clause 89 are satisfied - that is to say, the right of, for instance, the chief constable to make an order - what is authorised is,

"the taking of such action, in respect of such property",

as the chief constable may consider necessary.

We have been talking of bugging homes of drug dealers, money launderers and serious criminals. But that is not the only matter covered by the words of the Bill. The word "property" does not only include land and buildings; it includes personal property. Therefore, the action capable of being taken includes not only the entry onto property and the placing of bugs, but also the searching of property and the removal of documents and other things found there. If an order is made, that can be done - again, subject to an explanation from the Minister explaining why that is not the meaning of the words.

Those powers are exercisable not only against villains. Everything that has been said in your Lordships' House today is on the assumption that we are only entering the homes of villains; that we can be penal against them. I am not sure that that is right anyway. I feel that even villains have certain rights which should be protected. But in my mind that is not the right reading of the Bill. The powers conferred by the Bill, if passed, are exercisable in relation to any property, to whoever it belongs; it does not have to be the property of a villain.

It is clear from Clause 94(2) that it is envisaged at the least that orders will be made authorising the entering and bugging of the employer's premises, because there is a right to compensation linked to it. We are therefore talking about a Bill which, on its face, authorises not just the pursuit of the rogue, but intrusion into the individual freedoms of people who happen to cross the rogue's path. Again, the Bill provides no protection for the confidentiality of the press; it offers no protection for legal professional privilege, which has been treated throughout as one of the major safeguards of individual freedom. Most fundamentally, in my view, the whole procedure under the bill is activated, authorised and carried out within one police force.

The Security Service Act took the first step down this road in extending powers of this draconian nature to the security services in the exercise of their police functions; but at least that Act required the personal authority of the Secretary of State. It did not involve one police force authorising itself to do these things. All that we have to protect us is the provision for a commissioner, whose powers are extremely limited, to review retrospectively - not prior, but retrospectively - to say whether or not there has been an intrusion on our premises. What is needed, I

suggest - it may be that the Minister is able to explain in due course why it is not possible - is prior consent to the invasion of our property such as is required for a search warrant. As I see this case at present, it seems to me that judicial search warrants will become things of the past. Why should not the chief constable grant his own force the right to go in and take action in relation to the property in question?

Lord Browne-Wilkinson gave examples of two scenarios which, he argued, showed that Part III as currently worded was open to abuse. The first example was of a person protesting against a new road such as the Newbury bypass [cc 811-812]:

Suppose Mr. A is one of a large number of protesters against making a new road; for example, the Newbury bypass. The form of the protest, as in all these cases, is likely to involve the commission of a crime; for example, criminal damage to property or obstruction of the police. Such crime will, to some eyes surprisingly - constitute a serious crime within the meaning of the Bill because it is a large number of persons acting together.

The local chief constable thinks that it is,

"likely to be of substantial value",

in the prevention or detection of such comparatively minor offences if his force can bug and search the house of Mr. A, the protestor. He authorises such bugging and searching and the removal of documents from Mr. A's house. The evidence available to the chief constable before he does that would not be sufficient for him to obtain a search warrant from the court. The chief constable has reason to believe that Mr. A may be operating not only from home but from his place of work, He therefore authorises entry into and the bugging of Mr. A's employer's premises. From the bugging of Mr. A's own premises, he discovers that Mr. A has telephoned his solicitor and he reaches the not unreasonable view that Mr. A's solicitor may be able to cast light on the matter. So he gets an authority to enter and bug the solicitor's office - unhappily, he may be one of your Lordships' solicitors - and then gains knowledge not only of Mr. A's activities but of the activities of one of your Lordships.

As I read the Bill, all such actions will be lawful. Why should they be? Why should it not be a requirement that there should be a prior authority? This is not serious crime at all in that sense. Legal privilege seems to have no protection.

The second example involved questions of journalistic freedom and the confidentiality of sources [c 812]:

> Let us consider Mr. X, an investigative journalist. He writes a fascinating article dealing with drug dealing or money laundering which is published in a newspaper. In accordance with normal journalistic practice, Mr. X refuses to reveal to the police the sources of his information. The chief constable, not unreasonably, thinks that if he could find out the source of that information he would advance the police investigation. He therefore authorises the entry into and bugging of Mr. X's premises. He can also perfectly lawfully authorise the entry into the premises of the *Daily Post* where Mr. X is employed or any other premises in which the police think they may find the source of that story.

Lord Browne-Wilkinson concluded [c812]:

> I have given these examples - they are not entirely over the top; they are extreme - as illustrations of the fact that the desirable objective sought by Part III of the Bill has been expressed in such general words that it is capable of appalling abuse. What I hope your Lordships will do at the Committee stage is to look at the Bill not with a view of defeating the sense of the proposals but to cutting down the powers to the minimum. If your Lordships or Parliament do not do that, we shall be eroding slowly - and now, if I may say so, fast - the only protection we have from abuse by the state. I hope that at the Committee stage these powers will be looked at closely.

Responding to the debate on behalf of the Government, the Home Office Minister Baroness Blatch, said [cc 837-8]:

> We considered the opinion of judicial warranting; that is, prior authorisation, but ruled it out. We do not believe that it is right to involve judges at the early intelligence gathering stage as regards the prevention of crime as well as the investigation of crimes that have taken place. There is the danger of the judiciary becoming too closely involved in the investigative process and of its impartiality being called into question. There is a distinct difference between sensitive surveillance and the requirement for search warrants. Warrants come at a much later stage, when police can show to the judge evidence to suggest that crime has been committed. A warrant is needed to show to owners and occupiers of premises before the search for and seizure of evidence to support prosecution. Intrusive surveillance is used at an intelligence gathering stage and may never produce evidence sufficient for prosecution. It may also be important to conceal that it has ever taken place. Therefore we do not believe it is a role for judges to be involved. We realise that these are *per se* intrusive powers but we believe that there are sufficient safeguards and independent scrutiny by the commissioner to ensure that these powers are used responsibly and indeed sparingly. There is no evidence to suggest that chief officers abuse the system. We are confident that they will not be so irresponsible as to abuse the system in future and that provision exists to prevent them from doing so. There are a number of safeguards set out in the Bill.

> No doubt we shall discuss those in more detail as we move into the later stages of the Bill.
>
> I was asked by the noble Lord, Lord Rodgers of Quarry Bank, what other options were considered for intrusive surveillance. I have already mentioned the judicial one. Ministerial warranting was also considered. Again we believe it is unusual for Ministers to be so closely involved in these operational decisions.

Baroness Blatch wrote to Lord Browne-Wilkinson on 19 November 1996 answering a number of the points he made in his Second Reading speech. Referring to the examples given by Lord Browne-Wilkinson which are reproduced above, she said:

> I find it hard to imagine circumstances you describe of the road protestor or journalist protecting sources where an authorising officer would be satisfied that this involved serious crime which would justify intrusive surveillance. The code of practice, which we hope to publish this week, makes it clear that authorising officers should satisfy themselves that degree of intrusion into privacy of those affected by surveillance is commensurate with the seriousness of the offence.

The text of the letter is reproduced as an appendix to this paper.

A fuller account of the Second Reading Debate is given in *House of Lords Library Note LLN 96/008*.

The controversy over the intrusive surveillance proposals widened and intensified after the Second Reading in the Lords. Most comment focused on the issue of authorisation, and leading articles in a number of newspapers called for prior judicial authorisation of intensive surveillance.[53] In Committee in the Lords the Labour front bench declined to support a Liberal Democrat amendment requiring prior authorisation by a circuit judge.[54] Hugo Young wrote a series of articles in the *Guardian* arguing that allowing the police to undertake intrusive surveillance without external authorisation amounted to a fundamental erosion of common law freedoms: "The clause will make it legal for lawyers' offices to be bugged, their consultations monitored, their telephones tapped, in Britain exactly as in Cuba or Iraq or any other police state".[55]

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53 See in particular *Daily Telegraph* 3.1.97 "Will bugging be warranted?"; *Daily Mail* 14.1.97 "Bugging should be by judicial warrant"; and the Times, 14.1.97 "A Bill too far". On 6.2.97 the *Guardian* reproduced a *New York Times* leader of 5 January which described part III of the Bill in hostile terms

54 HL Deb Vol 576, 26.11.96, c 215

55 "Contemptible fallout of Blair's power bid", 28.11.96. See also "Jack Straw is wrong, wrong, wrong", 3.12.96; and "Straw drinks in the last chance saloon", 16.1.97

In January 1997 the shadow Home Secretary Jack Straw announced that the Labour Party had reconsidered its position on prior judicial authorisation.[56] The respective positions of Labour and the Liberal Democrats, which resulted in conflicting amendments being passed at Report Stage, are considered later.

Other issues which provoked controversy were the alleged threat of clandestine surveillance which the Bill posed to lawyers, doctors, journalists and even priests;[57] and the definition of "serious crime", which some thought too wide.[58] In addition, the civil liberties journal Statewatch claimed that the proposals for the statutory regulation of intrusive surveillance contained in Part III of the Bill would in fact allow the police greater scope to enter property and place bugs than the Home Office guidelines of 1984 (see above).

Six chief constables gave their support to Part III of the Bill in a letter to the *Guardian* on 15 January 1997.[59] They questioned whether prior judicial authorisation for covert police operations was desirable:

> Chief constables have a responsibility to investigate crime. They should have the authority to do so and should carry the accountability. At present chief constables can be, and are, called to crown courts to justify their actions in this area. Is it right to ask judges to do this instead? To place the judiciary in direct oversight of a key part of police operations would be fraught with constitutional and other implications.

Evidence submitted by the police to the Home Affairs Select Committee inquiry on organised crime in 1994 had suggested that prior judicial authorisation for intrusive surveillance should be considered. In particular, evidence submitted by the Regional Crime Squads stated:[60]

> For the protection of society and to ensure accountability this legislation should be implemented only on judicial authority.

The chief constables' letter to the *Guardian* denied that police would seek routinely to listen to conversations between solicitors and clients:

> It would be quite unlawful for chief constables to authorise such activity on those grounds alone.
>
> If, however, it were to be suspected that solicitors were discussing corrupt acts such as money-laundering and jury-fixing, they would not be so protected - nor should they be. If solicitors or their premises were to be specifically exempted from surveillance, we can readily guess where armed robbers could go to plan their next raid.
>
> Again, a planning meeting by peaceful protestors would be safe from this tactic - it would be unlawful for a chief constable to authorise such activity

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56 *Guardian*, 17.1.97 "Straw in 'spy bill' U-turn"

57 See for example *Times* 24.1.97 "Church joins protest against bugging Bill"; *Observer* 2.2.97 "Howard Bill lets police tap journalists' phones"; and *Times* 29.11.96 "Police may be able to eavesdrop on lawyers"

58 *Daily Telegraph* 14.1.97 "A liberty-taking Bill"

59 See also *Observer* 26.1.97 "What Crime Bill critics ignored" by John Hoddinot, Chief Constable of Hampshire

60 Home Affairs Committee Third Report, HC 18-II of 1994-95, 16.11.94, Evidence: p 136, para 3.8. See also Police memorandum, p 123, paras 4.7 - 4.13; and NCIS memorandum, p 148, para 90

simply on those grounds. If, however, there were to be suspicion that a riot was being planned, surely the public would expect the police to have an interest.

IV Amendments to Part III of the Bill

A. Prior Authorisation

A number of amendments were made during the passage of the Bill through the Lords. The most significant were, perhaps, amendments concerning prior authorisation moved on Report (and carried on Divisions) by Lord McIntosh of Haringey, on behalf of the Labour Party, and Lord Rodgers of Quarry Bank, on behalf of the Liberal Democrats. References to Clause numbers below are based on the version of the Bill which is current at the time of writing, Bill 88 of 1996-97.

Lord McIntosh's amendment (**Clause 91**) provides that where a chief constable has authorised intrusive surveillance of a building and the consent of the occupier of the premises in question has not been obtained, he or she must first seek the consent of a surveillance Commissioner appointed under Part III of the Bill. Retrospective approval may be obtained in urgent cases where it is not "reasonably practicable" to apply to a Commissioner in advance. Lord Rodgers' amendment, on the other hand, removes altogether the power of chief constables etc. to authorise intrusive surveillance, passing that responsibility to circuit judges (**Clause 92(2)**). A further amendment moved by Lord Rodgers specifies by rank the police and customs officers who may approach a circuit judge seeking authorisation of intrusive surveillance (**Clause 92(4)**). The Liberal Democrat amendments contain no alternative procedure for urgent cases.

In support of his amendment, Lord McIntosh said:[61]

> The fundamental point is that there should be not just independent judicial authority for intrusive surveillance, but that such authorisation should be in advance. That is the difference between us and the Government despite the welcome amendments, to which I shall return in a moment. However, if there is to be judicial authorisation of intrusive surveillance, that judicial authorisation must be effective in the sense that it is not merely nominal formal authorisation but real authorisation by somebody who knows what he or she is doing. It also must be effective: it must not hold up recognition of the need for being tough on crime, for effective policing in pursuit of the prevention and detection of serious crime, a view which we all share.
>
> That is why there are a number of differences in our approach and that of the Government, and of the noble Lord, Lord Rodgers of Quarry Bank. The first difference is that our amendment is more concerned with premises than with property. I am not a lawyer but there are legal definitions of premises and property, and in common parlance we all know what we mean. The term "premises" includes private residential homes. But it also includes workplaces, doctors' surgeries, lawyers' offices, the confessional, lock-up garages, hotel lounges and all places in which the consent of an occupier would have to be obtained before it would be possible to plant a bug without trespass and without committing an offence. Therefore, we believe that the prior judicial

[61] HL Deb Vol 577, 20.1.97, c 393

authorisation procedures should cover all premises not just private residential premises to which most of the judicial concern has been addressed.

At the same time we do not believe that it would be appropriate for prior authorisation to apply to all property. Property includes, for example, vehicles. Intrusive surveillance of vehicles would include not just the bugging of a vehicle but also the tagging of a vehicle in order to determine where it is and where it is going. There is no difference in principle between that and following a vehicle either in another vehicle, a helicopter, or by some other means. There is no issue of civil liberty involved in that.

The issue is a practical one: can a judge or a body of judges be expected to authorise such everyday activities as the tagging of vehicles? It is for that reason that we have chosen to address in our amendment, premises rather than property.

Secondly - this differentiates us from the amendments of the noble Lord, Lord Rodgers of Quarry Bank - we recognise that from time to time occasions arise when the police must take emergency action, where there is simply no time to go to a judge for approval before intrusive surveillance takes place. If, for example, there has been a police action against a group of drug smugglers and those people have holed up in a house where it is expected they will make plans for the next shipment, how to dispose of the last shipment, or whatever it may be, it is no good the police waiting until they have been to a judge for authorisation before they plant a bug. If they are to catch those people before they go away they will have to put a bug in straightaway. Our amendment provides that a chief officer of police can authorise a bug under those circumstances, but that he has to go as soon as is practicable to a judge for retrospective authorisation. That is an important proviso in reaching a balance between effective policing and civil liberties.

Lord Callaghan of Cardiff also spoke in favour of the Labour amendment, whilst suggesting that he might also be persuaded to vote for the Liberal amendment, in view of the fundamental principle at stake [c 400]:

I do not believe that chief constables should be given statutory authority for authorising the warrants when they intend to commit entry upon the premises of a private citizen.

Lord Rodgers welcomed the support of the Labour Party for prior judicial authorisation of electronic surveillance, but highlighted a number of problems which he believed would arise if authorisation by the surveillance commissioners rather than circuit judges was required:[62]

> In the first place, I believe that we are all agreed-and this is a point which has been made constantly by the Minister herself-that decisions on bugging must be implemented with the minimum justifiable delay. That is a point she has made before and will no doubt make again. I do not want to dispute that argument from these Benches, but this would simply not be possible if some 1,300 cases, the figure for England and Wales in 1995 to which the noble Lord, Lord McIntosh, has already referred, are to be referred to three or some other small number of commissioners. The noble Lord has not explained the actual process by which recommendations would be made by police scattered across the country and by customs officials to the judges, the commissioners, who would have to make the decisions.
>
> On the face of it, the recommendations and the decisions would be made by fax, which is hazardous in itself and, more important, excludes any of the arguments which will necessarily have to take place between the authorising officer, if a judicial one, and the police who make the recommendation. So far as I can judge from what we know and from what the noble Lord has said, this process would be cumbersome, unreliable and slow. It would be very unlikely to work.
>
> The noble Lord himself drew attention to this second point: the recognition in subsection (2) of the new clause that there are circumstances when it may not be "reasonably practicable"-they are the words in the amendment-to authorise action through a judicial source. I find this profoundly disturbing, because if we believe that urgent action is always necessary and it is necessary to reconcile operational needs with the need for judicial authorisation, then to have a let-out subsection of this kind is very dangerous. It will certainly allow the police sometimes to act without judicial authorisation; and, beyond that, given that the police will have to give approval and that the commissioners will have to give approval at a later date, it seems to me to be a formula for indecision and muddle. Indeed, it would be the worst of all worlds.
>
> The third point is the most powerful one and one which I hope your Lordships will examine this afternoon. That is the dual role for the commissioners which now seems to be proposed. In the Bill as it stands, the police decide, the commissioners review. In Amendment No. 26, my amendment, the police recommend, the judge decides, the commissioners review. But in the amendment on the Marshalled List by the noble Lord, Lord McIntosh, the police recommend and the commissioners decide, except when the police still decide, in which case the commissioners approve and the commissioners review. Therefore, the commissioners will be both making the decisions in most cases and then reviewing them after an interval reviewing their own decisions.
>
> If, it is right to believe, as we do, that the police should not recommend and approve, then it must be wrong for the commissioners to be in a position of deciding and then reviewing their own decisions. I believe that this is a very serious flaw indeed in the new clause put before the House by the noble Lord. He may not have intended it to have that effect. We shall wait and see. But if indeed he means what he says in this amendment, that alone is a sufficient reason for saying that these proposals do not meet the need for judicial authorisation without introducing another and very dangerous drawback.

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62 Ibid, cc 396-7

The *Explanatory and Financial Memorandum* to Bill 88 states that as a result of conflicting amendments made at Report Stage in the House of Lords, Part III of the Bill is technically defective. Clause 91 and other Clauses make reference to an authorising officer, but the provisions defining the authorising officer and his or her functions have been deleted: references in Clause 92 to authorising officers have been replaced by references to circuit judges. The Prime Minister stated soon after the Report Stage in the Lords that the amendments contradicted one another and "will need to be changed",[63] but the precise approach which will be adopted by the Government is unclear at the time of writing. There was much speculation in the press that the Government would reach a compromise with the Opposition in order to ensure that the Bill was passed in a coherent form and on 9 February 1997 the Home Secretary Michael Howard suggested in television and radio interviews that he would be prepared to countenance some changes to the original proposals in part III. The *Times* reported on 10 February 1997:[64]

> Michael Howard is to modify the Government's plans on bugging and accept that intrusive surveillance must be approved in advance by independent commissioners.
>
> After talks with Jack Straw, the Shadow Home Secretary, Mr Howard is to table amendments to the Police Bill that would require chief constables, except in emergency cases, to seek authorisation before bugging homes and offices. Lock-up garages and warehouses would not be covered by the new rule. A particularly sensitive area is the bugging of doctors', journalists' and lawyers' homes. Telephone conversations between journalists and their sources will be similarly protected...
>
> The Police Bill concessions do not go as far as the Liberal Democrats proposed in the Lords when their amendment providing for prior approval from circuit judges was passed. But Mr Straw indicated that he felt able to recommend Labour MPs to support the compromise.
>
> "He [Mr Howard] has accepted the principle of prior approval in the more sensitive cases. I think that when colleagues see the result of discussions, they will, I hope, believe that what the Government has done is accept very largely the spirit and purpose of the Labour amendment," he said.
>
> Mr Howard said: "What I have sought to do is look at some of the arguments that were put forward in the House of Lords... to see to what extent we could meet some of the reasonable concerns which were expressed."

B. The Code of Practice

The Select Committee on Delegate Powers and Deregulation commented that the breadth of the powers conferred by Part III of the Bill, "which many would characterise as a constitutional change", made particularly important the code of practice for intrusive

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63 HC Deb Vol 288, 21.1.97, c738

64 "Howard bows to demand for prior approval of bugging"

surveillance provided for in Clause 92 [**Clause 95** of Bill 88].[65] The Committee recommended the Bill be amended so that the Secretary of State would be required to consult widely before publishing a draft code. It recommended a further amendment to ensure that the intrusive surveillance powers could not be brought into force before the code of practice came into operation, thus giving Parliament's right to veto the code more force. The Government introduced an amendment at Committee Stage to give effect to the latter recommendation [see **Clause 123(4)** of Bill 88]. A draft code was issued by the Government on 19 November 1996 [Dep 4184 (3S)].

C. Additional Safeguards

The Government introduced amendments on Report which:

- require all authorisations to be notified to the Commissioner in a prescribed form as soon as practicable after they have been made (**Clause 94** of Bill 88);
- give the Commissioner specific power to quash any authorisation, whether or not it is the subject of a complaint (**Clause 97** of Bill 88);
- require the Commissioner to scrutinise particularly sensitive cases within 48 hours. The categories would be specified in a Statutory Instrument. A Home Office press notice[66] stated that the categories the Government has in mind are operations involving private dwellings or those infringing legal, journalistic or medical confidentiality (**Clause 97** of Bill 88);
- provide for the appointment of more than one Commissioner to ensure that reviews are carried out in an effective and timely way (**Clause 96** of Bill 88);
- reduce the period for which authorisations are valid from 6 to 3 months, or 72 hours in the case of the emergency procedures (**Clause 94** of Bill 88).

The Home Secretary Michael Howard said that the amendments demonstrated that "the Government is determined to strike the right balance between the operational effectiveness of these crucial techniques and ensuring that a careful watch is kept on their use". The intention of the amendments is to strengthen the powers of the Commissioner; the fact that the police would have to notify the Commissioner of all authorisations as soon as practicable "would put the Commissioner in a position to review most authorisations before an operation has commenced".[67] Lord McIntosh of Haringey, speaking on behalf of the Opposition, described the Government amendments as welcome.[68]

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65 5th Report, HL Paper 12 of 1996-97, 13.11.96

66 007/97, 16 January 1997, "Strengthening safeguards on intrusive surveillance"

67 Ibid

68 HL Deb Vol 577, 20.1.97, c 393

D. Unsuccessful Amendments

At Third Reading in the Lords a Labour amendment to exempt solicitors' offices from bugging was defeated following a Division, on the casting vote of the Lord Chancellor Lord Mackay [HL Deb Vol 577, 28.1.97, c 1099]. A further amendment, giving protection to doctors, journalists and the clergy, was not moved [see also Committee Stage: HL Deb Vol 576, 26.11.96, c 203; Report Stage: HL Deb Vol 577, 20.1.97, c 458].

Further amendments which were debated during the passage of part III of the Bill included the following:

- Definition of "serious crime": Committee Stage, HL Deb Vol 576, 26.11.96, c 235; Report Stage, HL Deb Vol 577, 20.1.97, c 474.

- Circumstances in which authorisation for surveillance may be carried out: Report Stage, HL Deb Vol 577, 20.1.97, c 469 (defeated on a Division); see also Committee Stage, HL Deb Vol 576, 26.11.96, c 231.

- Procedures concerning material obtained as a result of surveillance: Committee Stage, HL Deb Vol 576, 26.11.96, c 238; Report Stage, HL Deb Vol 577, 20.1.97, c 482; Third Reading, HL Deb Vol 577, 28.1.97, c 1099.

- Surveillance Commissioner: role and procedures, etc: Report Stage, HL Deb Vol 577, 20.1.97, c 500, 506; Third Reading, HL Deb Vol 577, 28.1.97, c 1103.

Appendix

POLICE BILL: INTRUSIVE SURVEILLANCE

Text of a Letter from Baroness Blatch, Minister of State at the Home Office, to Lord Browne-Wilkinson, dated 19 November 1996

When I closed the Second Reading debate on the Police Bill, on 11 November, I promised to write to peers, addressing the many individual points raised. In this letter, I would like to respond to the issues you raised in relation to the intrusive surveillance provisions. You will have to forgive the length of this letter but I thought it important to set out in some detail the arguments behind the Government's proposals on this matter.

I certainly sympathise with your emphasis of the principle that an Englishman's home is his castle and our starting point is that any intrusions that are necessary are very carefully controlled. One could argue that it is crime that poses the biggest threat: our homes are, of course, much more likely to be violated by burglars than by the executive. However, the provisions in the Police Bill are not meant to tackle this sort of criminal, or the protester against a new road or the journalist who refuses to reveal his source (the two examples you quoted in your speech). Our provisions are needed to tackle the serious organised criminal who speakers in the debate generally recognised pose a real threat to the fabric of our society. This top echelon criminal, of the sort described by Lord Taylor of Warwick and Lord Milverton, is resistant to normal policing techniques. He normally stays in the background and is never found with "his hands in the till". Yet this is the type of criminal who may infiltrate our banking and financial institutions and who has no qualms about using legitimate fronts, such as firms of solicitors or accountants, to launder the vast profits made from drug trafficking and other illicit activities. Few people are willing to inform on such powerful criminals - they may risk their lives if they do so. In order to bring such people to justice, it is vital to collect intelligence and that intelligence can often only be obtained through the use of intrusive surveillance.

You suggested that there is increasing frankness by the police about conducting such operations. I think it fair to say, in reply, that the police have made no secret of their activities. Both the police and customs have been successfully using these techniques, restricting their use to serious cases over many years. The Home Office guidelines on the use of intrusive surveillance equipment were discussed in the House when they were first issued and a copy of the guidelines has been in the Library since 1984. The material gained through the use of intrusive surveillance is primarily intended for intelligence purposes but has also been used as evidence in court and accepted as admissible. Indeed, you, yourself, were recently involved in the House of Lords judgement in the case of Sultan Khan. I note your caveats in the judgement about the right to privacy but that you otherwise agreed with Lord Nolan's judgement which included comment on how detailed and comprehensive the guidelines were.

We accept that intrusive surveillance operations may put the police at risk of charges of civil trespass and criminal damage. We believe that they should have greater certainty in their legal position and that is why we have introduced this legislation. I think it is important that the courts have ruled in several cases, including that of Sultan Khan, that the action was

justified in the circumstances and have allowed the evidence so gained to be used as part of the prosecution. We are confident that the police and customs have adopted the highest standards and strictest criteria in. authorising these operations and there is no evidence that the system has been abused.

Similar powers were introduced in the Security Service Act 1996 to allow the Security Service to carry out intrusive surveillance when working in support of law enforcement agencies on serious crime. I think it would be a nonsense for the Security Service to have these powers in the small number of cases in which they will provide support but not to allow the same powers to be used by the police and customs who have the primary responsibility for dealing with such crime. Nor do we believe these powers should be more restricted than those of the Security Service.

We were convinced, therefore, that such operations by the police and customs should be allowed to continue. We had then to decide on what basis authorisation should be given.

As I explained to Lord Rodgers, we have considered three options: Ministerial warranting, judicial warranting and chief officer authorisation subject to safeguards and independent scrutiny. We have ruled out judicial warranting for the reasons I gave in the House. We do not think it would be right to involve the courts at this early intelligence gathering stage, before it is known whether criminal charges will be brought. There would be no scope for hearing the other side of the case, which is an essential element of the judicial function in weighing the arguments and deciding a case. I realise that an analogy might be drawn with the procedure for search warrants but there is a particular awkwardness in a judge authorising an action affecting an individual who might never be made aware of that action. There is also a danger in the judiciary becoming too closely involved with the actions of the investigative agencies - and of their impartiality being called into question.

In a recent case (R v Gilligan & Haydon) , the judge expressed his view that it would be impossible to put himself, fairly, in the chief constable's shoes to make a decision on the authorisation of an intrusive surveillance device. His training and experience related to the law not to the police and he believed he would not be well equipped to make the kind of operational judgement required of the chief constable. I agree with the judge's view.

The remaining options are Ministerial warranting or chief officer authorisation. There are some attractions to Ministerial warranting. It would introduce an independent element in the decision making process and it would bring these operations in line with those authorised to be undertaken by the Security Service. However, it would be unusual for Ministers to be so closely involved in the operational decisions of the police and it could be seen as interfering in their independence. The Security Service is directly accountable to the Home Secretary. The police are not. There would, additionally, be administrative problems in obtaining a quick decisions in urgent cases. I note that this is not an option favoured by Lord McIntosh.

Our preference is to build upon the successful existing system of chief officer authorisation but with additional safeguards. Chief officers are uniquely qualified to make these sort of operational decisions and they must ultimately justify their actions in court.

Lord McIntosh expressed some concern as he thought there would be lesser control on placing bugs than on searching premises and that the provisions were less restrictive than the existing

guidelines. I do not believe this is the case. Currently authorisation can be delegated to a superintendent in urgent cases. In the Bill, we are only allowing an officer of ACPO rank or a very senior customs officer to act in limited cases in the absence of a chief officer. Authorisations given in the absence of the chief officer or his designated deputy will also be limited to a short period of 15 days.

At present, police and customs officers normally undertake a feasibility study before applying to their chief officer for authorisation. The application includes details of what other measures have been tried and why they have failed or would not work. It is often the case that officers cannot try other methods first as this would alert the criminal to the interest being shown by the law enforcement agency. Procedures proposed under this Bill will not radically alter the procedure. The police and customs are intending to introduce a standard application form for authorisation throughout the United Kingdom. This will include a section requiring details of the operational feasibility study and reasons why other methods have failed or are likely to fail. The code of practice will lay down that copies of the application form will be sent to the Commissioner every three months. He will review the authorisations and will be able to pick up and investigate any which cause him concern or which lead him to believe that other measures have should have been tried first.

While we do not believe that it would be right to involve the judiciary prior to the intrusive surveillance operation being carried out, there will be a measure of judicial oversight in the form of subsequent scrutiny by the Commissioner. He will be a senior member of the judiciary and he will have access to all documents and persons involved in the authorisation process. This system has worked well with the Interception, Intelligence and Security and Security Service Commissioners and commands the respect of the House. I do not see why it should not be equally successful for intrusive surveillance. This Commissioner will also be able to investigate complaints. We realise that this may be a full-time job and financial provision will be provided for this.

We have tried to mirror the provisions of the Security Service Act in this Bill. Of course, what we propose could provide for the authorisation of activity that goes beyond simple "bugging". However, there is no question of introducing measures to avoid obtaining a search warrant in order to seize documents. Search warrants would continue to be obtained. Criminals would quickly become aware of the covert surveillance if they found their property had been removed.

We have considered whether it would be possible to further restrict the powers of the police and customs officers to conduct intrusive surveillance but believe that this would itself cause problems. We would not, for example, wish to make statutory exceptions for solicitors' offices, as this would create loopholes which criminals would be sure to exploit by setting up their own front companies. There may be occasions when a corrupt lawyer is involved in money laundering and where the police might wish to carry out surveillance on his office premises. However, I have every confidence that our most senior police and customs officers, whose actions will be overseen by an independent Commissioner, would need to be satisfied that the lawyer was actively involved in a criminal enterprise before authorising surveillance of his office.

I find it hard to imagine circumstances you describe of the road protestor or journalist protecting sources where an authorising officer would be satisfied that this involved serious crime which would justify intrusive surveillance. The code of practice, which we hope to publish this week, makes it clear that authorising officers should satisfy themselves that degree of intrusion into privacy of those affected by surveillance is commensurate with the seriousness of the offence. This is especially the case where targets might reasonably assume a high degree of privacy, for instance in their homes. A more appropriate example of where intrusive surveillance would be used is the case of Sultan Khan. He was involved in the importation of drugs for which he received a three year sentence of imprisonment and the prosecution could not have been brought without the material obtained by means of a listening device.

We have confidence that law enforcement agencies will abide closely to the code and will only authorise intrusive surveillance, as presently, to operations against major criminals. If, however, you feel that our proposals are not sufficiently restrictive and you can suggest improved wording which would not unacceptably hamper the law enforcement agencies in their action against organised crime, we would be happy to consider your proposals. Furthermore, if there are any aspects of the provisions with which you remain concerned or would like to discuss further, I will be very glad to arrange a meeting.

I am copying this letter to Lord McIntosh, Lord Rodgers and to all those who spoke in the Second Reading debate and I am also placing copy in the Library of the House.

Recent Research Papers on related subjects include:

97/21	**The Police Bill [Bill 88 of 1996-97]: National Policing Structures**	**11.02.97**
97/23	**The Police Bill [H.L] [Bill 88 of 1996-97]: Access to Criminal Records**	**11.02.97**
96/99	**The Crime (Sentences) Bill [Bill 3 of 1996-97]**	**01.11.96**
96/100	**The Crime (Sentences) Bill and the Crime and Punishment (Scotland) Bill: provisions for mentally disordered offenders**	**31.10.96**

Criminal Justice