



The Law Society

## **Anti-terrorism practice note**

### **The conflicting duties of maintaining client confidentiality and reporting terrorism**

**Legal policy**

**19 July 2007**

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## Introduction

The Law Society recognises the tension that can exist when the duty of solicitors to advance the interests of their clients may conflict with the interests of the public as a whole. There is a potential for this tension to emerge where solicitors are representing people charged with, or suspected of, serious crime, and in particular, in relation to suspected terrorists.

The right of persons suspected of a criminal offence to communicate in confidence with their legal adviser is a fundamental aspect of their right to have a fair trial. The importance of legal professional privilege has been described thus:

‘... there is a clear policy justification for singling out communications between lawyers and their clients from other professional communications. The privilege belongs to the client, but it attaches both to what the client tells his lawyer and to what the lawyer advises his client to do. It is in the interests of the whole community that lawyers give their clients sound advice, accurate as to the law and sensible as to their conduct. The client may not always act upon that advice (which will sometimes place the lawyer in professional difficulty, but that is a separate matter) but there is always a chance that he will. And there is little or no chance of the client taking the right or sensible course if the lawyer's advice is inaccurate or unsound because the lawyer has been given an incomplete or inaccurate picture of the client's position.’<sup>1</sup>

However, The Law Society also recognises that everyone has a public duty, reinforced by the notification offence provisions under consideration in this Practice Note, to co-operate with the authorities in preventing future acts which could result serious harm to others. Solicitors should never knowingly assist others to commit, or cover up, future crimes.

## Disclaimer

This Practice Note is not intended to constitute legal advice. Practitioners are strongly recommended to consult specialist lawyers and take full advice on the issues raised in this Practice Note as applicable to themselves and their practices.

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<sup>1</sup> Per Baroness Hale in *Three Rivers District Council v Bank of England (No 6)* [2004] 3 WLR 1274 at paragraph 61, [2005] 1 AC 610

## **Purpose of the Practice Note**

This Practice Note explains the nature of the solicitor's duty of confidentiality to a client, and how the anti-terrorism 'failure to disclose' offence provisions affect this duty.

Put in stark terms, does a solicitor risk imprisonment for failure to disclose information about terrorism that is gained in the course of their professional duties?

## **Failure to disclose information about terrorism – the offences**

There are three provisions of the Terrorism Act 2000 ('TA 2000'), which penalise, with the threat of imprisonment, persons who fail to disclose varying degrees of knowledge, belief or suspicion of the commission by others of terrorist offences.

### **'Disclosure of information: duty' – s 19 TA 2000**

Under this section it is an offence for a person not to "disclose to a constable as soon as reasonably practicable" his or her belief or suspicion, and the information on which it is based, that another person has committed an offence under sections 15 to 18 of the TA 2000,<sup>2</sup> when that belief or suspicion is based on information coming to him or her in the course of a trade, profession, business or employment.

### **'Failure to disclose: regulated sector' – s 21A TA 2000<sup>3</sup>**

If a person knows or suspects, or has reasonable grounds for knowing or suspecting, that another person has committed an offence under sections 15 to 18 of the TA 2000, and the information, or other matter upon which that knowledge, suspicion, reasonable belief is based, came to him or her during the course of business in the regulated sector, the person commits an offence if he or she does not disclose the information or other matter to a constable (or nominated officer) as soon as practicable after it comes to him or her.

### **'Information about acts of terrorism' – s 38B TA 2000**

If a person has information which he or she "knows or believes might be of material assistance in (a) preventing the commission by another person of an act of terrorism

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<sup>2</sup> Offences of fund raising (s 15), use and possession of terrorist property (s 16), funding arrangements (s 17) and money laundering (s 18).

<sup>3</sup> For full money laundering guidance on these provisions, reference should be made to the money laundering guidance published by the Money Laundering Task Force of the Law Society at [www.lawsociety.org.uk](http://www.lawsociety.org.uk)

or, (b) in securing the apprehension, prosecution or conviction of another person, in the UK, for an offence involving the commission, preparation or instigation of an act of terrorism,” he or she commits an offence if he does not disclose the information to police as soon as reasonably practicable.

## **The solicitor’s duty of client confidentiality**

A solicitor is under a professional and legal obligation to keep the affairs of clients confidential and to ensure that all members of his or her staff do likewise.<sup>4</sup> This duty of confidence is fundamental to the fiduciary relationship that exists between solicitor and client. It extends to all matters divulged to a solicitor by a client, or on his or her behalf, from whatever source.

## **Overriding confidentiality**

In certain circumstances confidentiality can be overridden. For solicitors the most relevant instances will arise when:

- A court order, or a statutory obligation, requires them to disclose by compulsion of law, or
- When an exception to the duty of confidentiality arises from the public interest.<sup>5</sup>

## **Compulsion of law**

A court has the power to compel the disclosure of confidential information held by a solicitor. The most common examples of this are the statutory powers exercised by judges to compel production of confidential (“special procedure”) material under Schedule 1 of the Police and Criminal Evidence Act 1984 (PACE), and in certain circumstances, the issuing of witness summonses under the Criminal Procedure (Attendance of Witnesses) Act 1965.

## **A duty to the public to disclose**

The circumstances in which a solicitor may make disclosure on grounds related to issues of public interest are very limited. Essentially a solicitor may reveal confidential information only to the extent necessary to prevent the client, or a third party, committing a criminal act that is reasonably believed to be likely to result in

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<sup>4</sup> Practice Rule 16E of the Solicitors' Practice (Confidentiality and Disclosure) Amendment Rule 2004, in effect since April 2006. NB: when the new Solicitors' Code of Conduct comes into effect on 1<sup>st</sup> July 2007 this rule will be incorporated into the Code as Rule 4, and will cease to have effect as a separate Practice Rule.

<sup>5</sup> Confidentiality and Disclosure Guidance - Explanatory notes not forming part of Rule 16E, paragraphs 9 – 20.

serious bodily harm, and in cases of continuing or anticipated child abuse if disclosure is in the public interest.

## Confidentiality and legal professional privilege

Certain confidential communications, however, can never be revealed without the consent of the client; they are privileged against disclosure. This protection is called legal professional privilege ('LPP').

In two recent cases, the House of Lords has underlined the policy behind LPP, its necessity and its nature.

- 'The policy of legal professional privilege requires that the client should be secure in the knowledge that protected documents and information will not be disclosed at all.'<sup>6</sup>
- '... it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busy bodies or anyone else...'<sup>7</sup>
- '...(LPP is) a fundamental human right long established in the common law. It is a necessary corollary to the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.'<sup>8</sup>

## What communications are privileged?

Not everything that lawyers have a duty to keep confidential is privileged. Only those confidential communications falling under either of the two heads of privilege – 'advice privilege' or 'litigation privilege' - are protected by LPP.

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<sup>6</sup> Per Lord Hoffmann in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income tax and Another* [2002] UKHL 21 at paragraph 30, [2003] 1 AC 563

<sup>7</sup> Per Lord Scott in *Three Rivers District Council v Bank of England (ibid)* at paragraph 34

<sup>8</sup> Per Lord Hoffmann in *Morgan Grenfell (ibid)* at paragraph 7

## Who is a 'lawyer' for such purposes?

This includes solicitors and their employees, barristers, in-house lawyers, but does not include accountants, even if they give legal advice (subject to one very limited exception).

## 'Advice privilege'

Communications between a lawyer (acting in his or her capacity as a lawyer) and a client are privileged if they are **confidential** and **for the purpose of seeking legal advice from a lawyer or providing legal advice to a client**.

For example:

- conveyancing documents are not communications;<sup>9</sup>
- neither is a client account ledger maintained in relation to the client's moneys;<sup>10</sup>
- nor is an appointments diary or time record on an attendance note, time-sheet or fee record relating to a client;<sup>11</sup>
- a solicitor's bill of costs and statement of account may, in certain circumstances, be privileged;<sup>12</sup>
- but notes of open court proceedings,<sup>13</sup> or conversations, correspondence or meetings with opposing lawyers<sup>14</sup> are not privileged, as the content of the communication is not confidential.

Merely because a client is speaking or writing to his or her solicitor does not make that communication privileged - it is only those communications between the solicitor and the client relating to the matter in which the solicitor has been instructed for the purpose of obtaining legal advice that will be privileged. Such communications do not need to "contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client."<sup>15</sup>

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<sup>9</sup> *R v Inner London Crown Court ex parte Baines & Baines* [1988] QB 579

<sup>10</sup> *Nationwide Building Society v Various Solicitors* [1999] P.N.L.R. 53. Such entries are not created for the purpose of giving legal advice to a client but are internal records maintained, in part, to discharge a solicitor's professional and disciplinary obligations under the Solicitors' Accounts Rules.

<sup>11</sup> *R v Manchester Crown Court, ex parte Rogers* [1999] 1 W.L.R. 832

<sup>12</sup> *Chant v Brown* (1852) 9 Hare 790

<sup>13</sup> *Parry v News Group Newspapers* (1990) 140 New Law Journal 1719

<sup>14</sup> *Parry (ibid)*

<sup>15</sup> Per Lord Carswell in *Three Rivers DC v Governor of the Bank of England* [2004] (*ibid*) at paragraph 111

## 'Litigation privilege'

Under this head the following are privileged:-

**Confidential** communications made, **after litigation has started, or is 'reasonably in prospect'**, between:

- a lawyer and a client
- a lawyer and an agent (whether or not that agent is a lawyer); or
- a lawyer, or his or her client, and a third party;

for the **sole or dominant purpose** of litigation, whether:

- for seeking or giving advice in relation to it, or
- for obtaining evidence to be used in it, or
- for obtaining information leading to obtaining such evidence.

## Pre-existing documents

An original document, which is not brought into existence for either of these privileged purposes and so is not already privileged, does not acquire privileged status merely by being given to a lawyer for advice or otherwise for a privileged purpose.

## Fraud or illegality - the crime/fraud exception

It is proper for a lawyer to advise a client on how to stay within the law and avoid committing a crime,<sup>16</sup> or to warn a client that proposed actions could attract prosecution,<sup>17</sup> and such advice will be protected by privilege.

LPP does not, however, exist in respect of documents which themselves form part of a criminal or fraudulent act, or communications which take place in order to obtain advice with the intention of carrying out an offence.<sup>18</sup> It is irrelevant whether or not the lawyer is aware that he or she is being used for that purpose.<sup>19</sup> If the lawyer suspects that he or she is unwittingly being involved by their client in a fraud, before they can consider themselves released from the duty of confidentiality, the courts require there to be strong prima facie evidence before LPP can be displaced.<sup>20</sup> Whilst the lawyer may release himself or herself if such evidence exists, he or she may also

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<sup>16</sup> *Bullivant v Attorney-General of Victoria* [1901] AC 196

<sup>17</sup> *Butler v Board of Trade* [1971] Ch 680 14; *R v Cox & Railton* (1884) 14 QBD 153

<sup>18</sup> *R v Cox & Railton* (*ibid*)

<sup>19</sup> *Banque Keyser Ullman v Skandia* [1986] 1 Lloyd's Rep 336

<sup>20</sup> *O'Rourke v Darbishire* [1920] AC 581

raise the issue with the court for an order authorising him or her to make disclosure to the victim.<sup>21</sup>

The general 'crime/fraud exception' principle is restated in the Police and Criminal Evidence Act 1984 ('PACE')<sup>22</sup> at section 10(2), where items held with the intention of furthering a criminal purpose are declared not to be items subject to LPP. It is important to note that the intention to further a criminal purpose need not be that of the client (or the lawyer) - it is sufficient that a third party intends the lawyer/client communication to be made with that purpose (e.g. where the innocent client is being 'used' by a third party).<sup>23</sup>

## Overriding privilege

### By statute

LPP is a fundamental human right; Parliament can of course legislate contrary to fundamental principles of human rights. However, the House of Lords in *Morgan Grenfell* stressed that a parliamentary intention to override rights, such as LPP, must be expressly stated in the statute or appear by necessary implication.<sup>24</sup>

### Public duty

Unlike the position in relation to confidential material (see above), **there is no public interest exception to LPP**. It is therefore prima facie unlawful for a solicitor to disclose a communication if to do so would involve a breach of LPP.

## Do sections 19 and 21A of the Terrorism Act 2000 override LPP?

Section 19(5) does not require disclosure by a 'professional legal adviser' of either information which he or she obtains 'in privileged circumstances', or a belief or suspicion based on information which he or she obtains in 'privileged circumstances'.

Section 21A (5) provides that a person does not commit an offence under the section if he or she is a 'professional legal adviser' and the information or other matter came to him or her in 'privileged circumstances'.

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<sup>21</sup> *Finers v Miro* [1991] 1 W.L.R. 35

<sup>22</sup> It is also reflected in numerous other criminal statutes - including the Proceeds of Crime Act 2002 s 330 (failure to disclose) and s 333 (tipping off)

<sup>23</sup> *R v Central Criminal Court ex parte Francis & Francis* [1989] 1 AC 346

<sup>24</sup> See also *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115

Under both provisions, 'privileged circumstances' effectively mirror LPP at common law, and both are subject to the caveat that it will not cover communications in furtherance of a criminal purpose.

A solicitor does not therefore, subject to the caveat, breach these sections of the TA 2000 if he or she fails to disclose information which has come to him or her in privileged circumstances.

## **Does section 38B of the Terrorism Act 2000 override LPP?**

Whilst there is no equivalent provision in this section to that relating to 'professional legal advisers' as in sections 19 and 21A TA 2000, in order to override LPP the statute must do so expressly or by necessary implication.

No express words are used overriding LPP; therefore, only if there is a 'necessary implication' can LPP be overridden.

What is meant by 'a necessary implication'?

Lord Millett expressed the test in *B v Auckland District Law Society*:<sup>25</sup>

'A useful test is to write in the words "not being privileged documents" and ask, not "does that produce a reasonable result" or "does it impede the statutory purpose for which production may be required?" but "does that produce an inconsistency?" or "does it stultify the statutory purpose?" The circumstances in which such a question would receive an affirmative answer would be rare.'

This provides helpful assistance in the absence of specific judicial interpretation of s 38B TA 2000. It would seem unlikely that it could be successfully argued that the statutory purpose of s 38B would be stultified if it was to read (adopting the wording in the earlier sections and adapting Lord Millett's formula), "the person commits an offence if he does not disclose the information unless it was obtained in privileged circumstances as soon as reasonably practicable...".

In these circumstances, therefore, the Law Society considers that LPP is not overridden by s 38B TA 2000 and that information of the kind referred to in the section, if received in privileged circumstances, cannot be disclosed without the authority of the client.

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<sup>25</sup> [2003] 3 WLR 859

It is crucial, however, that a solicitor, when in receipt of such information, should be absolutely satisfied that the client's purpose in supplying that information has been for the obtaining of legal advice and is directly related to the performance by the solicitor of his or her professional duty as the legal adviser of the client.

If it is not, then it is not protected by LPP.

It will, however, remain confidential.

The only defence available to an offence under s 38B is that the person charged has a reasonable excuse for not making a disclosure. Is confidentiality a 'reasonable excuse'?

There is a clear duty owed by the solicitor to the public to disclose confidential information to prevent the client, or a third party, committing a criminal act that is reasonably believed to be likely to result in serious bodily harm.

If there is a public duty to disclose in such circumstances, it would seem likely that confidentiality would not amount to a reasonable excuse for non-disclosure under s 38B TA 2000, and that a solicitor prosecuted for failing to disclose such information would have no defence.

It is The Law Society's view that the solicitor must disclose such confidential information as soon as reasonably practicable.