



## INVESTIGATORY POWERS AND LEGAL PROFESSIONAL PRIVILEGE

*A position paper from the Bar Council and The Law Society*

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1. This position paper represents the views of the Bar Council and The Law Society. The professional bodies representing barristers and solicitors in England and Wales speak with one voice concerning the area of lawyer-client confidentiality known as legal professional privilege (LPP) in the context of investigatory powers. These are the powers wielded by UK public authorities such as the law enforcement and security agencies and include interception of communications, covert surveillance, the use of covert human intelligence sources such as undercover police officers, and the acquisition of communications data.

2. In the European Lawyers Day Declaration 2014, the UK legal professions addressed the fundamental duty of every lawyer to preserve and protect the confidentiality of their clients. The Declaration recalled that the lawyer's duty of confidentiality is entitled to special protection by the state. It affirmed the importance of the work of government bodies engaged in law enforcement and national security in protecting the public and in investigating crime but added that "such activities must nevertheless operate within a legal framework which respects the fundamental rights and freedoms which characterise our constitutional democracy".

3. The position of the U.K. legal professions is further that:-

- a. **LPP is a vital principle of the administration of justice.** It is a cornerstone of society governed by the rule of law that persons are able to consult a legal adviser in absolute confidence, knowing there is no risk that information exchanged between lawyer and client will become known to third parties without the client's clear authority. The "iniquity exception" prevents abuse of the privilege by removing it from communications made in furtherance of a criminal purpose.
- b. **The current legal framework for the exercise of investigatory powers is not fit for purpose. It should be replaced by new law, properly considered and debated in Parliament.** The forthcoming Investigatory Powers Bill provides the appropriate vehicle and opportunity for this comprehensive new legislation.
- c. **The new law should expressly protect LPP from the activities of public authorities seeking to use investigatory powers.** It should protect and safeguard legally privileged communications from all forms of investigatory powers, including the acquisition of communications data.
- d. **The new law should make clear that the deliberate targeting of legally privileged communications, material, information and data is unlawful.** It should also make provision, through codes of practice or otherwise, for

minimising the risk of the authorities accidentally obtaining legally privileged information and setting out the steps to be taken when that happens.

- e. **The new law should state that LPP does not apply where the lawyer-client relationship is being abused for a criminal purpose.** This is sometimes referred to as the 'iniquity exception'. The existence of this 'exception' means that public authorities already have sufficient scope to target lawyer-client communications etc. without the need for additional powers to breach LPP.
- f. **The new law should include a system of prior judicial authorisation for covert information-gathering by a public authority.**
- g. The professions have serious doubts as to whether bulk interception of communications or retention of communications data – that is, where the state gathers data on an indiscriminate basis from large numbers of people, most of whom are not under suspicion of any wrongdoing – is acceptable in a democratic society. But if bulk interception and retention powers are to remain, there should be special provisions to protect legally privileged communications.

## **Legal Professional Privilege**

4. Lawyers are under a legal and professional duty to keep their clients' affairs confidential. But LPP is particularly important because it prevents a third party – including a state official – from gaining access to and making use of lawyer-client communications without the client's knowledge and consent. LPP is fiercely protected by the English courts and virtually every UK statute contains an express privilege protection clause. LPP is a "fundamental condition on which the administration of justice as a whole rests". It is the right of the individual to consult a legal adviser in absolute confidence, knowing there is no risk that information exchanged between lawyer and client will become known to third parties without the client's clear authority. It is a legal principle which is a cornerstone of a society governed by the rule of law and has been continually recognised both in statute and at common law since at least the sixteenth century.

5. It is of particular importance where the individual is in litigation, whether criminal or civil, with the State with its wide ranging powers of covert surveillance. In criminal cases there is a real risk of legally privileged material being passed, whether deliberately or otherwise, to the investigating or prosecuting authorities without the knowledge of the court or the individual. That provides the State with an unfair litigation advantage and creates an obvious and serious danger of miscarriages of justice. Once the State has the power to abrogate the privilege (whether routinely exercised or not), it will have a chilling effect on the integrity of the system of justice. Citizens will no longer trust in the confidentiality of lawyer-client communications and consequently courts will adjudicate cases on an incomplete or misleading basis.

6. LPP is an absolute privilege; there is no balancing exercise of competing public interests to be undertaken. It applies to all communications, howsoever made, and associated documentation passing between lawyer and client. Despite its title, LPP is not a “privilege” of the legal profession. It is the communication that is “privileged”, in the sense of protected, from disclosure to third parties. LPP is for the benefit of the client, not the lawyer. The lawyer has no right to waive it in the absence of the client’s express agreement. Importantly, though, LPP does not extend to communications made with the intention of furthering a criminal purpose. This is generally known as the “iniquity exception”. Through this exception the law protects the lawyer-client relationship against abuse.

7. The legal professions accept the definition of LPP and the iniquity exception as set out in section 10 of the Police and Criminal Evidence Act 1984 (PACE):

- (1) Subject to subsection (2) below, in this Act “items subject to legal privilege” means—
  - (a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;
  - (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and
  - (c) items enclosed with or referred to in such communications and made—
    - (i) in connection with the giving of legal advice; or
    - (ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, when they are in the possession of a person who is entitled to possession of them.
- (2) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege

## The current legal framework

8. The principal primary legislation which empowers the State to conduct covert surveillance is the Regulation of Investigatory Powers Act 2000 (RIPA). It is supplemented by the Data Retention and Investigatory Powers Act 2014 (DRIPA- see below). There are currently five Codes of Practice issued under RIPA which cover an array of human and electronic surveillance techniques. There is a plethora of other related legislation in this area. The recent report of Parliament's Intelligence and Security Committee bemoaned the legislative framework as "unnecessarily complicated" and exhibiting a "lack of clarity."

9. RIPA does not refer to LPP. It had been assumed by practitioners that the powers which it enacted were subject to the privilege. That is not the case. In 2009 the House of Lords held by a majority in *In re McE* [2009] 1 AC 908 that RIPA permits the covert surveillance of meetings between clients and their lawyers at a police station – despite the right of a detained person to a private consultation, which is protected by section 58 PACE. It was held that the unqualified generality of the terms of Section 27(1) RIPA (which provides that properly authorised conduct under the Act "shall be lawful for all purposes") demonstrated that it was the intention of Parliament that the powers of surveillance in Part 2 of RIPA overrode the specific right protected by Section 58 PACE. Lord Phillips of Worth Maltravers dissented in relation to this important aspect of the decision.

10. The decision in *McE* was met with consternation by legal practitioners (in so far as it was widely understood). There had been no debate in Parliament during the passage of the RIPA Bill directly on section 27(1) and LPP and no reference in the Explanatory Note to the Act or other communication from government indicating that RIPA 'trumped' LPP. Following *McE* other types of covert surveillance which can be authorised pursuant to RIPA are similarly not subject to the protection of LPP.

11. Successive governments have resisted the unanimous clamour from the legal professions to amend RIPA in order to re-assert the pre-eminence of LPP. Rather, amendments have been drafted to the various RIPA Codes of Practice which fail to tackle the underlying problem and which fail to provide adequate safeguards to prevent the unintended consequences of deliberate or accidental acquisition of legally privileged material.

12. In his 2009 dissent Lord Phillips pointed out that inadequacies in the then operative Code of Practice would result in clients being inhibited from giving full instructions to their lawyers.

## **Communications Data**

13. The term ‘communications data’ (CD) embraces the ‘who’, ‘when’, ‘where’, and ‘how’ of a communication but not the content, not what was said or written. CD reveals matters such as the identity and whereabouts of the sender and recipient of a communication, together with the date and time of dispatch and delivery.

14. Access to CD now enables the authorities to piece together a very complete picture of what the contents of a communication might look like. As technology has advanced, there is a diminishing distinction between CD and its content in terms of what we can learn about the target. CD may disclose not only the existence of the lawyer-client relationship but also the substance of the advice sought and given (for example the identity of an expert witness who has been cc’d into an email). Accordingly, the argument that CD is not covered by LPP is no longer tenable. The new law should protect and safeguard legally privileged communications from all forms of investigatory powers, including the acquisition of CD.

15. In July, David Davis MP and Tom Watson MP were successful in their judicial review challenging the data retention provisions of DRIPA in the High Court in London. The court held that they were entitled to a declaration that section 1 of DRIPA is inconsistent with European Union law in that (i) it does not lay down clear and precise rules for access to and use of CD retained using powers under DRIPA, and also that (ii) access to the CD is not dependent on prior review by a court or an independent administrative body. The UK legal professions welcome the court’s acknowledgement in that case that “communications with lawyers do need special consideration” and maintain that LPP should be protected explicitly in future legislation.

16. The existing data and surveillance rules are complex and confusing and have been laid down in numerous, badly drafted pieces of legislation, codes and guidance. Too many laws have been rushed through Parliament as emergency legislation (including DRIPA). This has undermined parliamentary scrutiny and democratic debate.

## **Abuse of investigatory powers**

17. The need for express statutory protection of LPP has been emphasised by recent cases where existing investigatory powers have been abused and the authorities have acted unlawfully. This has been the case not only where those powers have been exercised by the security services – MI5, MI6 and GCHQ – but also where they have been exercised by the police.

18. In February this year, the government conceded that the policies and procedures operated by the security services for the obtaining and handling of legally privileged material breached Article 8 of the European Convention on Human Rights and had been unlawful for the past five years. This was in the context of the *Belhaj* case, a claim brought before the Investigatory Powers Tribunal by the Libyans Abdel-Hakim Belhaj and Sami Al-Saadi and their families against the government. That case culminated in GCHQ being

required to delete or destroy parts of documents they held containing legally privileged information.

19. As *Belhaj* demonstrates, an individual who is bringing a civil action against the state could at the same time be subject to surveillance by the state. This could be in circumstances where there is no basis for supposing that the individual is pursuing some criminal purpose rather than genuinely seeking advice on his civil claim. That prospect, in the light of the rationale for LPP articulated above, is chilling.

20. The Undercover Policing Inquiry was set up in March this year by the Home Secretary, Theresa May, under the chairmanship of Lord Justice Pitchford. This was in recognition of series of historical failings in undercover policing practices which had “profoundly shocked” her. Its terms of reference require it to inquire into and report on undercover police operations conducted by English and Welsh police forces in England and Wales since 1968.

21. It will consider the activities of undercover officers such as PC Mark Kennedy and DC Jim Boyling. They infiltrated protest groups pursuant to RIPA authorisations and maintained their cover while fellow protesters were prosecuted and tried for offences. In Kennedy’s case (*R v Barkshire & Others*), “significant non-disclosure” of his role led to 20 overturned convictions and cases dropped against six other campaigners. The then Lord Chief Justice of England and Wales, Lord Judge, expressed disquiet that an undercover police officer may have been party to legally privileged communications between the defendants and their lawyers. The concerns of the Lord Chief Justice were confirmed in the case of DC Boyling (*R v Jordan*), when it emerged that DC Boyling had indeed attended meetings with the defendant and his solicitor.

22. The *Barkshire* and *Jordan* cases demonstrate the serious problems likely to arise when persons acting under RIPA authorisations obtain access to legally privileged information. This is not simply a privacy or confidentiality issue: there are wider concerns about fair trial when serving police officers covertly access legally privileged information and are in a position to pass it on to the Crown.

## **Recent reviews**

23. During 2015 the use and regulation of investigatory powers has been the subject of three published reports and Parliamentary debate. Significantly, the reports all acknowledge the need to afford greater protection to legally privileged communications. The March 2015 report of the Intelligence and Security Committee of Parliament speaks of the need to afford heightened protection, possibly enforced by statute, to the communications of lawyers and certain other professions. The June 2015 Report of the Investigatory Powers review by David Anderson QC acknowledges that LPP communications fall into a category deserving of particular protection and observes that “there can be no fairness in litigation involving the state if one party to it has the ability to monitor the privileged communications of the other”. Finally, the July 2015 Royal United Services Institute report observes that “privacy is also a pre-requisite for democracy ... Those who challenge the state – through journalism or legal

advocacy, for example – need to be confident they are not spied upon, otherwise they cannot do their jobs effectively, and such jobs are an acknowledged part of a functioning democracy”.

24. During debate in the House of Commons on 25<sup>th</sup> June and in the House of Lords on 8<sup>th</sup> July, there was further recognition of the need for safeguards in relation to LPP. Joanna Cherry MP shared the concerns of the legal bodies “that legal professional privilege ought not to be interfered with”. Dominic Grieve MP acknowledged the need to “craft legislation that provides the reassurance that lawyers undoubtedly need, preserves the principle of legal professional privilege, and also ensures that the material can, if necessary, be accessed if there is good reason to believe that what is taking place is not covered by legal professional privilege at all” and Lord Strasburger agreed “that there must be special protection for the communications of journalists and lawyers...”

25. However, the three reports and, indeed, some of the Parliamentarians debating the issue, stopped short of advocating a complete ban on the deliberate targeting of legally privileged information. The Intelligence and Security Committee, for example, “does not believe that sensitive professions should automatically have immunity when it comes to the interception of communications”. Furthermore, where LPP is addressed in the reports it is often in the context of the broader category of confidential communications with little or no distinction drawn between the confidential lawyer/ client communication and any other confidential or professional/client communication.

26. The position of the legal professions of the United Kingdom is that new law should make clear that the deliberate targeting of legally privileged information is unlawful. In this respect, legally privileged information is to be afforded the highest category of protection from public authorities’ exercise of investigatory powers. For their part, the UK legal professions acknowledge that LPP does not apply where the lawyer-client relationship is being abused for a criminal purpose, in other words when the ‘iniquity exception’ applies. The existence of the iniquity exception means that public authorities already have sufficient scope to target lawyer-client communications etc. without the need for additional powers to breach LPP.

27. In this context it is appropriate to consider the scenarios provided by MI5 to the Intelligence and Security Committee as being illustrative of circumstances in which interception of LPP material might be justified. Two avoid (or could avoid) any violation of LPP at all. The first is an example of deliberate interception of lawyer-client communications where the imprisoned subject of interest is assessed to be co-ordinating the activities of extremist associates outside prison by means of communication with his lawyer. It is acknowledged that this would fall within the iniquity exception. The second is an example of targeted interception of a subject of interest who also happens to be a lawyer but the fact they are considered a threat to national security is unconnected with their legal work; in such a circumstance it is difficult to see why intrusion into legally privileged information would be necessary. The third concerns the incidental interception of LPP material, which we address above. Similarly, Anderson considers current and future threats to the United Kingdom in his report. In relation to organised crime he observes that it is “more complex than terrorism. It is characterised by violence or its threat and but also often depends on the

assistance of corrupt, negligent or complicit professionals, notably lawyers, accountants and bankers.” We would not disagree but this cannot of itself justify the deliberate targeting of legally privileged information. Where a lawyer is corrupt, or complicit in criminal activity, the lawyer’s communications would not be legally privileged information because the iniquity exception would apply. Where a lawyer is simply negligent it could not possibly be justifiable to remove the protection of LPP.

## **Suggested approach to the protection of LPP in new legislation**

28. The Bar Council of England and Wales formulated a series of amendments to RIPA to ensure the protection of LPP in relation to the four techniques for covert information gathering the act deals with: interception of communications, access to communications data, covert surveillance and use of covert human intelligence sources (“CHIS”). Baroness Sally Hamwee moved these in the form of a New Clause at the Report Stage of the Bill for the Protection of Freedoms Act 2012, but they fell to resistance from government. The Bar Council’s draft provisions contained three elements:

- a. A warrant or authorisation for the use of any of these techniques would not authorise “conduct undertaken for the purpose of” obtaining the content of, or information about, a privileged communication – in other words, deliberate targeting of privileged communications would be removed from the scope of RIPA powers. In relation to interception, this would apply equally to “targeted” warrants (for intra-UK communications) and “bulk” warrants (known as “certificated” warrants, for international communications).
- b. The Secretary of State could by regulations establish a mechanism for deciding (but only for the purpose of the RIPA powers) whether privilege in a particular communication was lost as a result of the iniquity exception.
- c. The RIPA Codes of Practice should include specific guidance on (i) the steps the authorities should take to minimise the risk of accidentally accessing the content of, or data about, a privileged communication, and (ii) what the authorities should do on discovering that such accidental access had taken place (which might include, for example, deleting the information and notifying the relevant Commissioner).

29. The debate has moved on, and new legislation dealing with the RIPA powers should additionally meet the following requirements.

30. RIPA is an oddly drafted piece of legislation, because it does not explicitly outlaw unauthorised conduct; rather it provides a blanket legal immunity for any conduct undertaken pursuant to a warrant or authorisation. We consider that the new law should go further and expressly prohibit any public authority from deliberately targeting legally privileged information.

31. Like many others who have expressed views about the law governing investigatory powers, we consider there should be a general requirement of judicial, rather than administrative, authorisation for covert activity by public bodies. It is contrary to the rule of law for organisations to authorise themselves to carry out activity of this kind, as RIPA permits in relation to each technique except interception of communications (the problem in those cases being that a politician, the Home Secretary, is the authorising authority). There is in addition a particularly powerful case for prior judicial authorisation for operations with a potential impact on legally privileged communications – either because the authority concerned alleges that the iniquity exception applies, or because the operation is likely to result in accidental or collateral access to legally privileged information.

32. Bulk retention of communications data from communication and internet providers creates the ‘pool’ from which communications data can be accessed using RIPA powers. Legislation along the above lines would restrict the accessing of legally privileged data in the pool, but would not prevent it entering the pool in the first place. So, if bulk data retention is to continue, we consider that new legislation should prevent an obligation being placed on service providers to retain data relating to communications to or from users known to be professional legal advisers. That could be subject to an appropriate mechanism enabling a retention obligation to be imposed where the authorities, on reasonable grounds, notify the service provider that communications to or from a particular user are considered likely to be caught by the iniquity exception.

33. In addition, the Codes of Practice should contain additional detail to strengthen the protection of privilege, by ensuring that the authorities are properly aware of the scope of LPP and to ensure that legally privileged data obtained by accident is dealt with and protected appropriately.

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**The Bar Council and The Law Society**