

Parliamentary Brief

Counter-Terrorism and Border Security Bill 2017-19

Monday 3 December, House of Lords Report Stage

The Law Society ('the Society') is the representative body for 180,000 solicitors in England and Wales. The Society negotiates on behalf of the profession, lobbies regulators, Government and others and has a public interest role in working for reform of the law

1. Introduction

This briefing outlines the views of the Law Society on the Counter-Terrorism and Border Security Bill 2017-19, which will be considered at Report Stage in the House of Lords on Monday 3 December.

The Bill consists of two main parts:

- Part 1 of the Bill would bring in the legislative changes arising from the Government's reviews of its counter-terrorism strategy and of counter-terrorism legislation.
- Part 2 of the Bill provides for a new power to harden the United Kingdom's defences at the border against all forms of hostile state activity.

The Law Society's key positions and priorities for the Counter-Terrorism and Border Security Bill

- We recognise that security and law enforcement agencies need sufficient powers to protect national security, through targeted and effective surveillance, criminal investigations and prosecution.
- These powers should be objectively required to meet national security concerns, be proportionate to this end, support the legal system and respect suspects' rights.
- The Bill would have severe implications for legal professional privilege (LPP).
- The Bill infringes the right to confidential and independent legal advice for suspects held at the border.
- We are concerned that the fast-tracked timetable for the Bill makes it difficult for effective scrutiny to be provided by stakeholders, parliamentarians and experts.
- **The Law Society supports Amendments 29, 36 and 37, tabled by the Government, and urges members of the House of Lords to vote for them.**

2. Legal professional privilege (LPP)

Legal professional privilege (LPP) is a cornerstone of the constitution and the rule of law in this country. It guarantees that individuals can consult a legal representative in confidence, underpinning the right to a fair trial and access to justice. This privilege belongs to clients not lawyers.

Not only is legal privilege central to the protection of the rights of individuals, the ability to access a fair and efficient legal system is the reason why our law and jurisdiction are used throughout the world.

R v Derby Magistrates set out that privilege, once established, is absolute and disclosure of privileged material should not be subject to a balancing exercise regarding the interests of justice. The same argument could be said to apply to national security or economic well-being (the tests in this Bill, along with serious crime).

Once such a balancing act takes place, the effectiveness of legal professional privilege is reduced and the policy objectives of full disclosure to lawyers, rule of law, etc. are compromised. It is not self-evident why the Bill needs to go beyond the provisions in the Terrorism Act 2000.

We believe that this Bill will have a serious impact on legal professional privilege in two areas:

- Firstly, in the seizure and examination of privileged material by officials;
- Secondly, by restricting detainees' right to receive legal advice from a solicitor in confidence.

3. Powers to seize journalistic and privileged material

Paragraphs 11 to 22 of Schedule 3 set out the powers to seize journalistic and protected material and the procedure to access, examine and copy such articles. Items subject to legal professional privilege are included in the definition of confidential material, in paragraphs 12(10) and (11) of the Schedule. Stronger safeguards apply to the retention and use of protected material.

3.1 Concerns

The Government's amendments at Committee Stage to these paragraphs of the Schedule have strengthened the safeguards relating to the treatment of legally privileged material. However, we continue to have concerns about the following:

- The Bill (specifically paragraphs 12(7), 16(7) and 18(7)) appears to suggest that legally privileged material can be retained for use as evidence in court, or for deportation proceedings. Legally privileged material should not be retained for any purpose other than a potentially urgent need to prevent death, injury or a hostile act.

- The process by which material can be identified as constituting legally privileged material or not, and who is responsible for making this determination, is not currently explicitly clear in the Bill as drafted. It is important that this determination is made by a legally qualified person who is capable of accurately assessing whether a given article is subject to legal professional privilege.

3.2 Recommendations

We recommend that the Bill be amended to:

- Clarify that legally privileged material cannot be retained, copied or used for use as evidence in court, or for use in deportation proceedings, or for any use other than to prevent death, injury or a hostile act.
- Make explicitly clear on the face of the Bill what the process is for assessing whether a seized article is covered by legal professional privilege. This process should be carried out by a legally qualified person.

4. Access to a lawyer and confidential legal advice during detention

Schedule 3, paragraphs 29 to 33, set out the rights of suspects who are held at the border:

- Individuals can be held for an hour; if an officer wants to stop or question a person for more than an hour, they must formally detain them.
- Once a person is detained, they must be released no later than six hours from when questioning first began, unless they are detained under another power.
- The right of a detained person in England and Wales or Northern Ireland to consult a solicitor in private is set out in paragraph 30.

The powers given to the police in Schedule 3 are more extensive than simply the power to delay an interview or disallow a particular solicitor from attending:

- Paragraph 33(1) states that a detainee may consult a solicitor '**only in the sight and hearing of a qualified officer**'. This would compromise the detainee's right to receive confidential legal advice.
- Such advice is legally privileged, and as such an enforcement officer should not be entitled to hear it.
- Concerns have been raised about detainees using unscrupulous lawyers as a means to pass on harmful or criminal information; however, where there is a legitimate suspicion that the lawyer in question is not acting in accordance with their ethical duties, the authorities should proceed with an application to exclude the lawyer from

the proceedings, which is covered in existing legislation.¹ The right to confidential legal advice need not be restricted.

4.1 Concerns

Our concerns are:

- The Bill compromises detainees' right to receive confidential advice from a solicitor by allowing an officer to be present during the consultation with the solicitor, and to watch and hear the advice that is given (paragraph 33(1)).
- Normally individuals are entitled to consult a solicitor immediately when detained by authorities. However, this Bill denies detainees the right to consult a solicitor if the detainee is examined and questioned for less than an hour. The first hour of questioning could be used as evidence in court, and therefore the detainee should be entitled to a solicitor.
- Access to a solicitor is only given on request, as set out in paragraph 30(1): '[...] a detainee who is detained in England, Wales or Northern Ireland is entitled, **if the detainee so requests**, to consult a solicitor as soon as is reasonably practicable, privately and at any time.' This goes against usual practice, which is to offer individuals access to a solicitor before any questioning takes place.

4.2 Recommendations

The Government has tabled amendments to Schedule 3 of the Bill that would address the Law Society's key concerns regarding the right to access confidential advice from a solicitor, namely Amendments 36 and 37.

- Amendment 36 would add a provision to paragraph 30(2) requiring a detainee to be made aware of their right to consult a solicitor from the beginning of a detention. If the detainee requests a consultation with a solicitor pursuant to this right, they cannot be questioned until the consultation has taken place.
- Amendment 37 would remove paragraph 33(1) as a whole, which at present breaches the right to independent legal advice and potentially the right to a fair trial. Conversations between clients and lawyers are legally privileged.

The Government has also tabled a new clause after Clause 16, as Amendment 29, that would amend Schedule 8 of the Terrorism Act 2000 to the same effect as the above amendments to Schedule 3 of the Counter-Terrorism and Border Security Bill. This new clause would:

¹ Police and Criminal Evidence Act 1984, PACE Code C 2018, Section 6 (A), paragraphs 6.6 (a) and 6.9-6.11 <https://www.gov.uk/government/publications/pace-code-c-2018>.

- Add a provision to paragraph 7(2) of Schedule 8 of the Terrorism Act 2000 requiring a detainee to be made aware of their right to consult a solicitor from the beginning of a detention.
- Remove paragraph 9(1) from Schedule 8 of the Terrorism Act 2000, thereby removing the existing provision by which an officer can require that a consultation with a solicitor take place in the sight and hearing of a qualified officer.

The Law Society supports Amendments 29, 36 and 37, which would address our concerns regarding the Bill's impact on the right to access confidential legal advice from a solicitor. The Law Society urges members of the House of Lords to vote for these amendments.

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