

# Parliamentary Brief

## Counter-Terrorism and Border Security Bill 2017-19

Tuesday 9 October, House of Lords Second Reading

*The Law Society ('the Society') is the representative body for 145,000 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 Second Reading in the House of Lords on Tuesday 9 October.

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.

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

## 3. Access to a lawyer and confidential legal advice during detention

Schedule 3, paragraphs 22 to 26, 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 23.

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 26 (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.<sup>1</sup> The right to confidential legal advice need not be restricted.

### 3.1 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 26 (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 23 (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.

### 3.2 Recommendations

The Bill should be amended to:

- Remove paragraph 26 (1) as a whole as it breaches the right to independent legal advice and potentially the right to a fair trial. Conversations between clients and lawyers are legally privileged.
- Remove the words '*if the detainee so requests*' from paragraph 23 (1).

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<sup>1</sup> 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>.

- Enable the suspect access to a lawyer before the detention period starts (i.e. before an hour).

#### **4. Powers to seize journalistic and privileged material**

Paragraph 12 of Schedule 3 sets out the powers to seize journalistic and protected material and the procedure to access and examine it. Items subject to legal professional privilege are included in the definition of protected material, in paragraphs 12 (10) and (11) of the Schedule. Stronger safeguards apply to the retention and use of protected material.

##### **4.1 Concerns**

We are concerned about the following:

- Although the Bill differentiates between confidential material (paragraph 12 (10) of the schedule) and privileged material (paragraph 12 (11) of the schedule), the distinction between these two categories appears to be lost in paragraphs 13 to 15. Confidential journalistic material is significantly different to legally privileged material, and accordingly the safeguards applied to the seizure and use of privileged material should be stronger.
- It is established law that material for use in furtherance of a crime would not be privileged. A 'hostile act' would constitute a crime. Entirely lawful and properly privileged material however should not be accessible to examining officers.
- The safeguards appear only to apply in practical terms after the material has been examined and retained on the basis of a suspicion with potentially no grounds.

##### **4.2 Recommendations**

Therefore, the Bill should contain provisions to:

- Determine whether a communication is privileged material under paragraphs 13 to 15.
- Preclude the targeting of lawyer-client communications in the absence of compelling evidence of iniquity.
- Provide further safeguards to items seized which might be subject to legal professional privilege (even for a short time). For example, they should be sealed in an evidence bag and reviewed by an independent lawyer or counsel who will be able to determine whether it is privileged material. A legally qualified person is needed to conduct this independent assessment to verify not only if the iniquity exception applies but also the offences.
- Ensure that any authorisation involving legal professional privilege must be recorded as such by the Judicial Commissioners under paragraph 13 of the Schedule. The

Annual Report of the Investigatory Powers Commissioner should expressly include data on the agencies which have sought to access, retain or use legally privileged material subject to exceptional and compelling justification and number of occasions of this occurring.

- Ensure that the authorities use their powers in a way that minimises the inadvertent acquisition, examination, retention or use of material subject to LPP.

## 5. Suggested questions to pose during the Second Reading debate

- Does the Minister agree that allowing an official to hear a consultation between a detainee and their lawyer would constitute an infringement on legal professional privilege and the right to confidential legal advice?
- Is the Minister aware that concerns about a potentially unscrupulous lawyer can be addressed through existing legislation, without the need to compromise legal professional privilege?
- Why does the Minister believe it is appropriate not to allow detainees who are questioned for less than an hour to contact a solicitor?
- Does the Minister not agree that access to a solicitor should be provided to a detainee immediately, without the need for the detainee to formally request it?
- Will the Government consider amending the Bill to ensure that a detainee may, in all cases, consult with their solicitor in private?
- Does the Minister agree that officials should not be allowed to examine legally privileged material except where there is compelling evidence of criminal activity?
- Does the Minister agree that legally privileged material is substantively different to confidential journalistic material, and as such should be subject to stricter safeguards when being seized or examined by officials?
- How will the Bill ensure that the inadvertent seizure, examination or retention of legally privileged material is kept to an absolute minimum?

### **For further information please contact:**

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