Regulation of Investigatory Powers Act Consultation: Equipment Interference and Interception of Communications Codes of Practice

Law Society Response

March 2015

Introduction

This response has been prepared by the Law Society of England and Wales ("the Society"). The Society is the professional body for the solicitors' profession in England and Wales, representing almost 159,000 registered legal practitioners. The Society represents the profession to Parliament, Government and the regulatory bodies and has a public interest in the reform of the law.

The Society welcomes the opportunity to respond to the Home Office consultation on the Equipment Interference and Interception of Communications Codes of Practice. We are happy for our response to be published with attribution.

We largely confine our observations to the subject of Legal Professional Privilege (LPP). In our view LPP is an essential and non-negotiable part of our justice system; existing surveillance legislation does not adequately protect it, and we support the growing number of calls for revision of the legislative framework to be accompanied by explicit statutory protection for LPP. Codes of Practice are inadequate and there is an urgent need for change.

General comments

Legal Professional Privilege (LPP) is a bedrock of our legal system, a basic right that has been called 'a fundamental human right long established in the common law.'[1]

Lord Scott has stated that it is an absolute right: "… if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client, entitled to it and it can be overridden by statute (cf R (*Morgan Grenfell & Co Ltd) v Special Comr of Income Tax [2003] 1 AC 563*), but it is otherwise absolute."[2]

Lord Taylor of Gosforth CJ made a similar point "…I am of the opinion that no exception should be allowed to the absolute nature of legal professional privilege, once established " and, in the same case, Lord Nicholls of Birkenhead rejected the

[1] Lord Hoffmann *R(Morgan Grenfell & Co.Ltd) v. Special Commissioners of Income Tax* [2002] UKHL 21.
[2] *Three Rivers DC v Bank of England (No 6)* [2005] 1 AC 610 at [25]

argument that LPP should be balanced against and other public interests: “there is no escaping the conclusion that the prospect of a judicial balancing exercise in this field is illusory, a veritable will-o'-the-wisp.”[3]

Judicial respect for legal privilege extends beyond the shores of England and Wales. The European Court of Justice (ECJ) judgment of 8 April 2014 in joined cases C-293/12 Digital Rights Ireland and C-594/12 Seitlinger declared the Data Retention Directive (2006/24/EC) invalid. It did so on the basis that ‘in adopting Directive 2006/24, the EU legislature has exceeded the limits imposed by the principle of proportionality in the light of Articles 7 [respect for private and family life], 8 [protection of personal data] and 52(1) [limitation of rights] of the Charter [of Fundamental Rights of the European Union]. The ECJ noted that the Directive constituted ‘an interference with the fundamental rights of practically the entire European population’; and that ‘…[f]urthermore, it does not provide for any exception, with the result that *it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy’* .

Potential surveillance of lawyer-client communications can have an extraordinarily chilling effect. Suspecting that you cannot speak to your lawyer candidly or advise your client confidentially is corrosive of the entire legal process. The terrifying capabilities encompassed by the seemingly innocuous term ‘equipment interference’ compound this chilling effect. ‘Equipment’ includes, but is not limited to, ‘computers, servers, routers, laptops, mobile phones and other devices’. The range of ‘other devices’ that may be subject to such computer network exploitation is almost endless and the control that may be acquired (including by-passing security protections and encryption) total.

The right to LPP supports the rights in Article 6 (Right to a fair trial) and Article 8 (Right to respect for private and family life) guaranteed by the European Convention on Human Rights (ECHR) . It has a key place in protecting the rule of law.

Entry on or interference with property or with wireless telegraphy under s. 5 Intelligence Services Act 1994 (ISA) or interception of communications under s.8(1),

[3] *R v Derby Magistrates ex p. B* [1996] 1 AC 487 at 508-509, and 512.

8(4) or 16(3) the Regulation of Investigatory Powers Act 2000 (RIPA) are interferences with individuals' rights under ECHR Article 8.

The ECHR Article 8 right to respect for private and family life, home and correspondence is not absolute. Limited interference with that right is permissible by a public authority but only where it is in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

LPP, however, *is* absolute. This is of critical importance. It can be overridden by statute.[4] But neither ISA nor RIPA provide any explicit protection for LPP.

The current codes of practice

The current Interception of Communications Code of Practice suggests that the interception of legally privileged communications under RIPA is 'particularly sensitive'.[5] It therefore provides 'additional safeguards', namely:

- to enable the Secretary of State to take into account when deciding if an interception is necessary and proportionate, any application for a warrant which is likely to result in the interception of legally privileged communications should include…
    - an assessment of how likely it is that communications which are subject to legal privilege will be intercepted and
    - whether the purpose (or one of the purposes) of the interception is to obtain privileged communications.
- the Secretary of State can impose additional conditions in order to exercise their discretion as to whether a warrant should continue to be authorised – for example, regular reporting arrangements;
- where legally privileged communications have been intercepted and retained the matter should be reported to the Interception of Communications Commissioner and the material made available and

[4] Lord Scott in *Three Rivers DC v Bank of England (No 6)* [2005] 1 AC 610
[5] Interception of Communications Code of Practice 2007

- caseworkers examining intercepted material should be alert to any intercept material that might be subject to LPP.

Guidance on legally privileged and confidential information in relation to warrants under ISA s.5 is currently contained in the Covert Surveillance and Property Interference Revised Code of Practice 2014:

- applications should state whether they are intended to acquire knowledge of matters subject to legal privilege;
- where they are not intended to acquire such knowledge but it is likely that they will, the application should state all steps that will be taken to mitigate the risk of acquiring it and
- if there is a remaining risk of acquiring it, the steps that will be taken to ensure that it is not used in law enforcement investigations or criminal prosecutions.
- the Secretary of State should only authorise warrants likely to, or intended to, result in the acquisition of material subject to LPP if there are 'exceptional and compelling circumstances' that make the authorisation necessary:
    - arising in the case of interference not intended to result in the acquisition of LPP material from the interests of national security, the economic well-being of the UK, or for the purpose of preventing or detecting serious crime;
    - arising in the case of interference intended to acquire LPP material where there is threat to life or limb or to national security and the interference is reasonably regarded as likely to yield intelligence necessary to counter the threat.
- The Surveillance Commissioner should be kept informed about LPP material.

Weaknesses of the current regime

LPP is a basic right and an important component of fundamental ECHR rights. It receives no statutory protection in either ISA or RIPA and limited 'protection' – at the discretion of the Secretary of State – under relevant Codes of Practice. Compliance with the current Codes largely comprises officials making the Secretary of State as aware as possible that an authorisation will or may involve LPP material, and the Secretary of State applying additional scrutiny. Relevant Commissioners should be

kept informed. There are no sanctions, criminal or civil, against officials or Ministers for flouting the Codes.

The true picture is more complicated, as the Intelligence and Security Committee (ISC) report *Privacy and Security; A modern and transparent legal framework* (12 March 2015) makes clear. MI5, SIS and GCHQ manage the acquisition of LPP material under a number of handling arrangements and safeguards. These include matters not directly addressed by the current Codes, for example, the need for additional internal authorisation within GCHQ where LPP material is identified as a result of a bulk interception under RIPA s.8(4).

The ISC is quite clear that 'the interactions between the different pieces of legislation which relate to the statutory functions of the intelligence and security agencies are **absurdly complicated**' (p.86, para NN). When the further interaction between this legislation, Human Rights legislation, the common law principle of LPP, various existing codes of practice, the agencies' internal procedures and the discretion of officials and Ministers is added to the mix, the result is utterly opaque.

The new Codes of Practice

The ISC welcomes 'the move towards greater transparency' in the consultation draft Codes of Practice on Interception of Communications and on Equipment Interference. However, in relation to LPP it is not clear that the draft Codes add anything substantial to the 'officials making aware and Ministers taking care' approach of the current Codes. This appears to have been recognised by the ISC who suggest that 'the Government should use this consultation period as an opportunity to strengthen the safeguards for Privileged Information further' (p.99, para UU).

The ISC also notes that the Government has recognised the need for improvements in its concession to the Investigatory Powers Tribunal in February: 'The Government has accepted that the policies and procedures in place relating to legally privileged material have not been in accordance with human rights legislation' (footnote 281).

The Law Society has long called for review and reform of the legislative framework for surveillance in the UK and for statutory protection for LPP. The ISC now also

argues that statutory protection should be considered. It has also called for a ‘fundamental review’ with a view to the introduction of a new Intelligence Services Bill consolidating the provisions of relevant legislation and specifying alongside the agencies’ intrusive powers authorisation and safeguard procedures and the overarching human rights obligations that constrain their use. We agree and would argue strongly that LPP should be embedded within this consolidating act. However, it is also clear that other surveillance legislation used by other public authorities – primarily RIPA, but also the Data Retention and Investigatory Powers Act and the Telecommunications Act 1984 amongst others – should also be reviewed and revised and that protection for LPP should be similarly embedded in revised legislation. It may also be necessary to introduce technical safeguards – for example, ‘bin’-lists that automatically exclude certain communications – including legally privileged communications – from mass surveillance.

The revised Codes of Practice do nothing to change our substantive concerns about the failure to adequately protect LPP. The next Government should move quickly to introduce legislative protection.