

UIA International Bar Leaders' Senate
Budapest
29 October 2016

OVERVIEW

1. Legal Professional Privilege is intrinsic to the rule of law. It is fundamentally linked to the independence of the legal profession – its essence.

2. This independence is:
 - Of practitioners from the Executive - this allows practitioners to work fearlessly on their client's behalf holding the Executive to account.

 - Of lawyers from the client's interest.

3. As lawyers, we act as stewards of Legal Professional Privilege and are relied upon to deal with it appropriately - we are officers of the court with duties to protect the integrity of the justice system. We owe duties beyond the client.

4. Our work as bar leaders is to ensure that decision-makers (including politicians) understand:
 - The essential independence of the profession.

 - The link between Legal Professional Privilege and the rule of law

- The responsibility of our profession in dealing with Legal Professional Privilege appropriately.
5. Any measures that affect Legal Professional Privilege undermine the independence of the profession, the integrity of the system of justice and the standing of the legal Profession.
 6. In England and Wales, as in other jurisdictions, Legal Professional Privilege is under pressure. The Investigatory Powers Bill aims to increase the powers of government agencies for law enforcement and surveillance. It is going through the final stage of legislative scrutiny in the House of Lords. When the bill was first introduced it did not protect Legal Professional Privilege, after campaigning efforts of the Law Society and others the Government conceded that it should be protected on the face of the Bill.
 7. Legal Professional Privilege is also strictly protected in the courts. However, it does not apply where communications between a client and lawyer are made in furtherance of a criminal purpose -this is the 'iniquity exception'.
 8. The circumstances in which solicitors are able to disclose client communications are strictly limited. We have a duty to report to the authorities if there are doubts about a transaction that could result, facilitate or enable money laundering.

9. Under the Proceeds of Crime Act 2002 there are provisions for disclosure of information to be made to the National Crime Agency – through a ‘suspicious activity report’ (SAR). This duty is beyond the client and related to safeguarding the integrity of the rule of law and the legal system itself.

10. Solicitors also have a duty of full disclosure to their clients. However, the Proceeds of Crime Act 2002 prohibits disclosure of information to the client in circumstances where a SAR has been made and/or where it would prejudice an existing or proposed investigation.

11. The Law Society of England and Wales is the organisation that provides support to our members in relation to both Legal Professional Privilege and potential conflicts with Anti-Money Laundering legislation.

1. Legal Professional Privilege in England and Wales

- Legal professional privilege (LPP) is **one of the oldest and highest rights** under the law of England and Wales and EU law.
- LPP has existed for over 400 years and is a **fundamental common law and human right** protected by both Article 6 (Fair Trials) and Article 8 (Privacy) of the European Convention on Human Rights (ECHR).
- LPP recognises **the right of individuals and corporations to seek legal advice or to conduct litigation free from state interference**. The rationale is that access to the best advice entails clients having faith in their lawyer's ability to protect confidences. This essential underpinning of the relationship between lawyer and client has been recognised as a cornerstone of the rule of law which, with parliamentary sovereignty, is arguably the foundation of the British Constitution.
- **LPP is vigorously protected by the judiciary through the courts and by Parliament**, which has ensured that provisions are included in every statute and statutory instrument that confers investigatory and evidence gathering powers. The only exception is the Regulation of Investigatory Powers Act (RIPA) 2000.

- LPP **plays a crucial role in the administration of justice and upholding the rule of law.**
- Despite the central position that LPP occupies in our justice system, it can easily be overlooked that this is a right not of lawyers or the legal profession, but of our clients.
- Any failure to protect LPP has the potential to undermine the administration of justice. The judiciary call it the **'chilling effect'** that can arise when clients cannot be assured that their conversations with their solicitors are private. Consequently, they may edit or censor the information provided to their solicitors, causing **a risk that incomplete facts are put before the court**, or clients represent themselves and fail to run appropriate defences.
- Across jurisdictions, we are seeing how growing concerns about terrorist attacks and organised crime, often subsidised by money-laundering activities, are creating a potential conflict between the right to confidence and the public interest, leading to a progressive erosion of LPP.
- In the UK, some regulatory bodies and enforcement authorities have voiced concerns that LPP may be used to frustrate their efforts to undertake fully informed

investigations. This has led the legitimacy of LPP to be called into question, including by representatives of the state.

- LPP does not apply where communications between a client and lawyer are made in furtherance of a criminal purpose - the so called '**iniquity exception**'. In other words, where a person consults a solicitor in furtherance of a criminal purpose then, whether or not the solicitor knowingly assists in the furtherance of such purpose, the communications between the client and the solicitor do not attract legal professional privilege.

2. LPP and the Investigatory Powers Bill

- The Investigatory Powers Bill (introduced a year ago) aims to increase the powers of government agencies for law enforcement and surveillance. It is going through the final stage of legislative scrutiny in the House of Lords.
- The original text of the Bill contained no protection for Legal Professional Privilege, the Law Society started a campaign and made representations to parliamentarians highlighting concerns.
- As a result, the Committee scrutinising the Bill recommended that *"provision for the protection of LPP in relation to all categories of acquisition and interference addressed in the Bill **should be included on the face of the Bill and not solely in a***

code of practice. *The Government should consult with the Law Societies and others as regards how best this can be achieved.”*

- The Government responded by including some new provisions in the Bill, when it was published in March 2016. However, those provisions still allowed the authorities to intercept privileged communications between lawyers and their clients.
- They were also gaps (and still are) in the framework set out in the Bill. To highlight some of these:
 - A British person (or any person) outside the British Isles communicating with a solicitor abroad or within the British Isles is not protected. There is no requirement for prior judicial or even independent authorisation before LPP communications can be examined.
 - The Bill makes no provision for the protection of LPP in the context of obtaining communications data. For instance, the information in the body of an email is protected, while details about the sender, recipient and the time of correspondence is not. As technology has advanced, there is a diminishing distinction between content and communications data. Such information provides a precise picture of the interaction between a lawyer and clients. It

enables deductions to be made about the content of such communication and about legal advice sought and received.

- There is no protection in the Bill for LPP material obtained under a warrant inadvertently or where it was not thought 'likely' that such material would be obtained. The only additional protection is that the Investigatory Powers Commissioner must be informed.
- Over the last months, we have worked with other professional bodies and parliamentarians to prioritise protection for LPP whilst ensuring that communications "*tainted with an improper purpose*" can be appropriately accessed. Our amendments to the Bill have received cross-party backing.

4. Anti-Money Laundering

- There has been patchwork implementation of AML requirements across the legal world. The resulting implementation has created disparity within the legal profession, with many "cross-border" international law firms finding themselves subject to unfamiliar and uncertain money laundering requirements as a result.
- In England and Wales, the circumstances in which solicitors are able to disclose client communications are strictly limited. We have a duty to report to the authorities if

there are doubts about a transaction that could result, facilitate or enable money laundering.

- Under the Proceeds of Crime Act 2002 there are provisions for disclosure of information to be made to the National Crime Agency – through a ‘suspicious activity report’ (SAR). This duty is beyond the client and related to safeguarding the integrity of the rule of law and the legal system itself.
- Solicitors also have a duty of full disclosure to their clients. However, the Proceeds of Crime Act 2002 prohibits disclosure of information to the client in circumstances where a SAR has been made and/or where it would prejudice an existing or proposed investigation.

5. Work of the Law Society on LPP and AML

- We will continue our influencing work to ensure that the government and related agencies safeguard Legal Professional Privilege
- The Law Society will publish shortly a practice note on Legal Professional Privilege to advise solicitors on their duty towards clients. We also have a practice note on Anti-Money Launder with a dedicated chapter on how to deal with potential conflicts on LPP.

- We host an AML directory on our website to support our members who require detailed advice to contact a solicitor who specialises in this area. We also offer a number of educational resources to inform members of the latest developments.