Legal Professional Privilege in England and Wales

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Introduction

In late October 2016 I was pleased to attend the International Bar Leaders Senate at the UIA Annual Congress in Budapest, with representatives from law societies and bars across the world. We enjoyed a wide ranging discussion on confidential client information, and where it should – or shouldn't – be disclosed. I was invited to comment on the principle of legal professional privilege (LPP) in England and Wales.

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. As such, we have a responsibility to challenge any measures that may affect this principle as it undermines the rule of law and the integrity of the justice system.

In England and Wales, as in other jurisdictions, legal professional privilege is under pressure. The Investigatory Powers Act 2016 aimed to modernise the powers of government agencies for law enforcement and surveillance. When the Bill was first introduced it did not recognise or protect legal privilege. However after campaigning efforts of the Law Society of England and Wales and others, the Government conceded that it should be protected on the face of the legislation which received royal assent last month.

Legal professional privilege – A fundamental right

Legal professional privilege (LPP) is one of the fundamental rights[1] recognised by English and Welsh law and the courts[2]. Engaged when clients approach lawyers for legal advice or assistance, it has developed over 400 years. It arises out of the established right of every person to retain legal advice and plays an essential role in the administration of our justice system.

LPP is a right of clients – individual or corporate and the legal profession has a responsibility to deal with it accordingly. Broadly, LPP protects confidential communications and material evidence (such as communications that take place between clients and their lawyers) from disclosure. Whether the source of LPP is derived from common law or statute, it arises in two ways: in connection with the client consulting a lawyer, and in connection with litigation.

When in connection with the client consulting a lawyer, confidential communications between the two, and all material forming part of the continuum of those communications will attract legal privilege[3]. The communications must relate to public or private rights, liabilities, obligations or remedies, or be otherwise made in a "relevant legal context"[4]. The rationale behind this is – as noted by Snowden J – that lawyers must be able to provide clients with candid factual briefings secure in the knowledge that such communications (and records) can only be disclosed with the client's consent[5].

In a similar vein, litigation privilege applies to communications between legal advisers and clients. It also applies to communications with third parties if made for the dominant purpose of engaging in reasonably contemplated adversarial litigation[6].

It should be noted, however, that where a person consults a solicitor in furtherance of a criminal purpose the communications between client and lawyer are not afforded the protection of LPP – the so-called iniquity exception[7]. The exception can provide an accepted basis for intruding on client-lawyer communications in the clearest of cases where there is compelling evidence that the privilege is being abused. It cannot be done on the basis of a mere suspicion.

Present day challenges – Case law

Technological developments present new challenges to the existing legal framework and LPP. This is the case, for example, with bulk interception, acquisition, and equipment interference powers.

Historically, the Courts have reluctantly accepted that in limited instances it has been Parliament's intention to bypass legal professional privilege. Most recently these instances have occurred in cases involving covert surveillance. In these situations the courts have allowed agencies to listen in to privileged conversations between clients and lawyers.

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In the case of *McE* the House of Lords (which used to have judicial powers) found that the Regulation of Investigatory Powers Act 2000[8] did permit the covert surveillance of communications between lawyers and their clients, even though these may attract privilege, and notwithstanding the various statutory rights of people in custody to consult privately with their lawyers.[9] The House of Lords however warned of the very real *'chilling effect'* that such surveillance activities can have on the effectiveness and openness vital to communications between a lawyer and their client, were this activity to happen more than rarely.

The Court was unequivocal in its view that such interference should therefore be permitted, but happen only in rare circumstances. Lord Phillips held that the underlying rationale was the requirement that a client should not be inhibited in speaking freely and frankly by a concern that his words may subsequently be disclosed to his prejudice.

Outside of legislative mechanisms such as the above, the Court has been at pains to be clear it regards LPP as both a procedural right and an important substantive right. In R *(Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* Lord Hoffman said:

> "[Legal professional privilege] *is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.*"[10]

And in 2005 Lord Scott reiterated that LPP must be considered absolute and unable to be overridden by "*some supposedly greater public interest*", except for legislation[11].

Recent cases such as *Belhadj and others v Security Service and others* suggest that the use of investigatory powers to access privileged material may not be as exceptional as once thought[12]. Any perception that interception of privileged lawyer client communications was not wholly exceptional risks triggering the chilling effect that concerned the House of Lords. It also risks undermining the administration of justice – clients may be inclined to censor the information they provide to their lawyers out of a misplaced fear of it being intercepted and turned against them. Teasing this point out further, there is a material chance that incomplete facts are presented to the court, or that defendants opt to represent themselves more frequently and fail to mount appropriate or complete defences.

Mounting criticism

Over the last few years, there has been criticism of the way LPP has been asserted in certain situations. For example, the UK's Serious Fraud Office and the Financial Conduct Authority have separately raised concerns that LPP may be invoked in an attempt to prevent fully informed investigations from taking place, or frustrate their efforts to do so.

Similarly, earlier this year the chair of the Work and Pensions Select Committee of the House of Commons criticised practitioners for "*covering up*" details of the advice they provided on the sale of British Home Stores prior to its collapse.

It is also possible that regulators have developed an increasingly negative attitude towards LPP since the 2008/2009 global financial crisis. Public opinion, generally, has held the financial sector primarily responsible for these events, and there has been frequent and occasionally strong public sentiment that the sector as a whole was not properly held to account. Among other issues, LPP was perceived by some as an inconvenience that obstructs regulators and agencies from doing their job.

Investigatory Powers Act

The most recent challenge to LPP came from the recently passed Investigatory Powers Act 2016 (IPA). It was informed by a review conducted by the Independent Reviewer of Terrorism Legislation, David Anderson QC which was published in June 2015 in his report *A Question of Trust*. The review examined the operation and regulation of the investigatory powers available to law enforcement and intelligence agencies, with a particular focus on the interception of communications and communication data. In his report Anderson stated that the legislation in its current format was "*obscure since its inception*", having been "*patched up so many times as to make it incomprehensible to all but a tiny band of initiates. A multitude of alternative powers, some of them without statutory safeguards, confuse the picture further. This state of affairs is undemocratic, unnecessary and – in the long run – intolerable*"[13]. The report concluded that the law in this area was unfit for purpose and in need of reform.

A draft Investigatory Powers Bill was first published in November 2015. The draft Bill was notable for the absence of any provisions to protect legally privileged material from interception. The Law Society was invited to give evidence on the draft Bill, and we submitted written and oral evidence to the committee. As result, the Joint Committee on the Draft Investigatory Powers Bill recommended that protections to LPP should be included in the Bill.

When the Government introduced the Bill itself to Parliament in March 2016 it was with the aim of providing a new framework to govern the use and oversight of investigatory powers by law enforcement and the security and intelligence agencies. Overall the Bill:

- brought together all of the powers already available to law enforcement and the security and intelligence agencies to obtain communications and data about communications; these included powers under RIPA as well as provisions in the Wireless Telegraphy Act 2006, the Telecommunications Act 1984 and the Intelligence Services Act 1994;
- overhauled the way these powers are authorised and overseen by introducing a 'double-lock' for interception warrants, so that, following Secretary of State authorisation, these (and other warrants) could not come into force until they had been approved by a judge;
- created a new Investigatory Powers Commissioner to oversee how the Bill's powers were used; and
- modernised investigatory powers for the digital age by making provision for the retention of internet connection records for law enforcement to identify the communications service to which a device has connected. The Government argued that this would restore capabilities that have been lost as a result of changes in the way people communicate.

The Bill also contained a provision that meant that legally privileged communications could only be intercepted in 'exceptional and compelling' circumstances. This fell short of the level of protection we had been seeking and so, along with the Bar Council, other Law Societies and civil society groups we sought to persuade government and parliamentarians that the Bill required amendments to protect LPP.

Following a concerted effort to engage with legislators, we were able to secure some modifications to the Bill to address our concerns. The Act now provides a number of protections for legally privileged material. The current position is that where the authorities wish to target legally privileged communications in addition to meeting the general requirements for intercepting a communication they must additionally satisfy the Secretary of State that: