



The Law Society

JOINT BRIEFING ON LEGAL PRIVILEGE FOR

HOUSE OF LORDS SECOND READING OF THE INVESTIGATORY POWERS BILL

This paper outlines provisions required to ensure legally privileged communications are protected from surveillance by the Investigatory Powers Bill. This paper reflects the positions of the Bar Council of England and Wales, The Faculty of Advocates, the Bar of Northern Ireland, The Law Society of England and Wales, the Law Society of Northern Ireland, the Chartered Institute of Legal Executives, Liberty and JUSTICE.

A. Importance of LPP

Legal Professional Privilege (LPP) is a cornerstone of the constitution and the rule of law in this country.

This privilege belongs to clients not lawyers. It guarantees that individuals can consult a legal representative in confidence which underpins the right to a fair trial and access to justice.

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.

B. The need for much greater protection for LPP

In our view the Investigatory Powers Bill falls far short of the protection required for LPP.¹ We have identified the following seven points that must be addressed:

Bar on use of LLP material

- (1) There should be a bar on use of the targeted and bulk powers in the Bill for the purpose of obtaining access to LPP material unless a Judicial Commissioner is satisfied that the relevant communication has lost its privilege because made in furtherance of a criminal purpose (the so-called 'iniquity exception' to LPP). The Bill should contain provisions:
 - Precluding the targeting of lawyer-client communications in the absence of compelling evidence of iniquity;
 - Requiring the destruction of LPP material obtained as an unintended by-product of surveillance.

¹ The terms of the Bill fail to protect LPP. As presently drafted the Bill:

- Enables the authorities to obtain a warrant targeting LPP communications in "exceptional and compelling circumstances" (which are not defined) (Clause 27(1); Clause 106(1)).
- Imposes a requirement before granting a warrant that is "likely" to lead to capture of LPP material that undefined "specific arrangements" are in place for handling the LPP material (Clause 27(4); Clause 106(4)).

Statutory requirement to avoid capture of LPP material

- (2) The Bill should include clear provisions to ensure that the authorities use their powers in a way that minimises the inadvertent acquisition, examination, retention or use of material subject to LPP.

Persons outside the UK

- (3) As presently drafted, there are no protections at all for LPP material where it is captured by bulk powers where an individual is outside the UK communicating with a lawyer in the UK.² This is a serious gap in the Bill and is of particular concern to the UK legal services market.

Modifications to warrants

- (4) As presently drafted, the Bill allows some modification of warrants without approval of a Judicial Commissioner even where the modification is likely to lead to the capture of LPP material. That is another serious gap. Any modification which could result in capture of LPP material should require approval from a Judicial Commissioner.

Communications data

- (5) The Bill provides no protection at all for LPP in the context of acquiring communications data, under the specific Part 3 powers, or the bulk Part 6 powers, or as secondary data in the exercise of the other powers in the Bill. However, the aggregation of communications data allows a very precise picture to be built up about a person's dealings with their lawyer, which the courts have recognised can inhibit access to justice. There must be proper protection for data relating to privileged communications.

Recording

- (6) Any authorisation involving LPP must be recorded as such by the Judicial Commissioners. The Annual Report of the Investigatory Powers Commissioner should expressly include data on the number of occasions and agencies which have sought to access, retain or use LPP material subject to exceptional and compelling justification.

RIPA powers

- (7) RIPA 2000 will continue to cover surveillance and use of covert human intelligence sources. The Bill should amend that Act to ensure it adequately protects LPP along the same lines as the above points.

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² This is because the Bill would only require an examination warrant to be obtained to examine material obtained by bulk powers where it is referable to a person who is known to be in the British Isles (s.13(3), 134(4)).