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Interception of Communications and Legal Professional Privilege and the Rule of Law

Lisa Webley¹

Legal professional privilege, sometimes referred to as legal privilege, sits at the intersection between professional conduct rules, more general precepts about duties of confidence we owe to others, and common law principles designed to protect the functioning of the legal system. Legal advice privilege only extends to communications between the lawyer and the client seeking that advice; litigation privilege is broader taking in communications between third parties too, as long as the principal purpose of those communications relates to the litigation contemplated or underway. The professional conduct rules indicate that solicitors and barristers must neither disclose their client's privileged information to others, nor make use of privileged material that has been revealed to them in error.² But the common law principles bind everyone including the state and have done for around 400 years. They play an important role in safeguarding the rule of law, in part by seeking to ensure that clients are not dissuaded from seeking legal advice and counsel, and further to permit them to be represented fully, frankly and robustly when litigation is in prospect and for there to be the prospect of a fair trial. They act as a (modest) protection against the covert investigatory powers of the state; some branches of the state may be lawfully empowered to spy on clients forms of communications but not those covered by privilege. Even lawyer-client interactions are sometimes exempt from privilege, for example where they are used as a means through which to commit crime.³ These common law principles were put on a statutory footing by the Police and Criminal Evidence Act 1984 (PACE) in the context of lawyer-client communications in custody⁴, and have been recognised in European Court of Human Rights judgments as well as those in British courts. Lawyer-client privileged communications have, until recently, been considered to be a constitutional no-go area for the security services in Britain. In sum, legal professional privilege is viewed as central to the lawyer-client relationship and to the system of justice.

Or so as lawyers we have been taught. But the enactment of the Regulation of Investigatory Powers Act 2000 (RIPA) in Britain provided no overt protection for legal professional privilege when greater powers of state surveillance were granted to a range of public authorities; the

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² For a summary on Legal Professional Privilege and its limits as regards the solicitors' profession see Chapter 6 legal professional Privilege 22nd October 2013 accessible at:

<http://www.lawsociety.org.uk/support-services/advice/practice-notes/aml/legal-professional-privilege/> all websites were last accessed on 2 May 2016). As regards barristers see CD 6 in the Bar Code and rC26.6 which requires a barrister to return instructions if she comes into contact with privileged

information relating to someone else involved in the matter in which she has been instructed https://www.barstandardsboard.org.uk/media/1731225/bsb_handbook_sept_2015.pdf . See too

"Barristers instructed as "Independent Counsel" to advise upon legal professional privilege in relation to seized material" for an interesting note (2010, reviewed April 2016) from the Bar Council for

barristers consulted as independent counsel by investigatory authorities who have seized material and are seeking to establish whether any of the material is legally privileged:

http://www.barcouncil.org.uk/media/436952/lpp-independent_counsel_in_relation_to_seized_material.pdf

³ "Protecting privilege: The Chairman warns of the dangers posed to legal professional privilege by the Investigatory Powers Bill" <http://www.counselmagazine.co.uk/articles/protecting-privilege>

⁴ Section 58(1) Police and Criminal Evidence Act 1984.

powers are granted through differing levels of executive rather than judicial authorisation.⁵ The issue was not debated in Parliament and it was unclear whether this was an oversight or a deliberate omission.⁶ The matter was left to Codes of Practice⁷ that explain when appropriate and how public authorities may be permitted to use powers of covert surveillance; the Codes also provide guidance on what procedures must be followed in the event that the powers are to be deployed. But these were felt to afford inadequate protections by the legal professional bodies. Given the seriousness of the situation the Bar Council attempted to rectify the defects of RIPA as regards legal professional privilege by advocating for a new clause to be introduced into the Protection of Freedoms Bill prior to its enactment in 2012, but it was unsuccessful.⁸ RIPA provides for oversight of the use of covert surveillance powers by the Investigatory Powers Tribunal⁹, which may determine complaints where a claimant asserts that a public authority's use of covert techniques is unlawful on grounds of breach of European Convention on Human Rights (ECHR) article 8 privacy rights and other fundamental human rights. However, the Tribunal is not a fully constituted court with plenary powers and, further, as the Human Rights Act 1998 does not give even plenary courts the power to set aside primary legislation on grounds of its incompatibility with the ECHR, the Tribunal's judgments act more as a means to point a moral compass than a mechanism through which to enforce rights.

Those who may have thought that the omission of specific protection for legal privilege was likely a mistake, and in any event would not allow for the clearly enumerated common law principles to be overborn and/or would still be respected by the state, have since been disabused. A number of revelations have made this clear, including the use of undercover policing in circumstances where covert officers have had explicit access to legally privileged material, in at least one instance by attending a lawyer-client meeting when neither the lawyer nor the client-defendant was on notice that the person concerned was a police officer.¹⁰ Convictions in at least 20 other criminal cases have been overturned following fresh scrutiny about undercover policing methods that rendered those convictions unsafe.¹¹ The House of Lords' majority decision *In Re McE*¹² reluctantly laid to rest the contention that the legal privilege was transcendent in English Law (always unlikely given that it lived in the common law, subordinate to statute), and further that the lack of express words in RIPA to override the protections in PACE afforded to clients in custody could be used as a means to distinguish such communications from RIPA's scope (although the dissenting opinion of Lord Mavres indicates that he considered that PACE prevailed for that very reason)¹³ And material that

⁵ Section 27 indicates that "Conduct to which this Part applies shall be lawful for all purposes if (a) an authorisation under this Part confers and entitlement to engage in that conduct on the person whose conduct it is; and (b) his conduct is in accordance with that authorisation." For a synopsis of the powers see: <http://www.ipt-uk.com/section.aspx?pageid=3>

⁶ See http://www.barcouncil.org.uk/media/99643/bar_council_briefing_on_pof_bill_and_lpp_-_hol_report_stage.pdf

⁷ Current and previous codes are available here: <https://www.gov.uk/government/collections/ripa-codes>.

⁸ See "New Clause proposed by the Bar Council of England and Wales for the protection of legal professional privilege" Protection Of Freedoms Bill House Of Lords Report Stage http://www.barcouncil.org.uk/media/99643/bar_council_briefing_on_pof_bill_and_lpp_-_hol_report_stage.pdf

⁹ For details see <http://www.ipt-uk.com/>

¹⁰ *R v Jordan*, no citation available

¹¹ *R v Barkshire & Others* [2011] All ER (D) 180

¹² [2009] 1 AC 908

¹³ *Id.* at paragraph 41

came to light in the *Belhadj* case before the Investigatory Powers Tribunal led the Tribunal to make a declaration “that since January 2010 the regime for the interception/obtaining, analysis, use, disclosure and destruction of legally privileged material has contravened Article 8 ECHR and was accordingly unlawful.”¹⁴ The security service and GCHQ confirmed that they would review their policies and procedures in the light of the draft Interception Code of Practice and following the Tribunal’s ruling.

Given the concerns voiced about the lack of protection afforded to legal privilege, and the mounting evidence that supported those concerns, it is perhaps surprising that the recently published draft Investigatory Powers Bill has not sought to address them other than via a Code. Greater judicial oversight is included, but breaches of the Code will not at present give rise to civil or criminal penalties. The Bar Council, in its evidence to the all-party joint committee scrutinising the draft Bill legislation, considered that the Bill may undermine legal privilege even further if enacted in its current form.¹⁵ In February the Joint Committee gave the Bill its cautious support but did point to the need to strengthen protections within the Bill including protection of privilege.¹⁶ The government’s response gives little hope that they plan to address this issue¹⁷, and the Bill is now making its way through Parliament on a very tight timetable. A public campaign has begun to seek to persuade law-makers in both Houses to think again about the lack of legal professional privilege and whistle-blower safeguards within the Investigatory Powers Bill. The *Speak in Safety* campaign has been championed by the Bar Council, with support from the National Union of Journalists and the Law Society of England and Wales.¹⁸ It believes that the Bill as written undermines the professions that have key roles in ensuing democracy and freedom and further that the provisions undermine the rule of law; it recognises that there is a public interest need for covert surveillance but that suitably rigorous statutory limits must be placed on state powers in the public interest too.¹⁹ The

¹⁴ *Investigatory Powers Tribunal Belhadj and Others -v- Security Service and Others – Judgment and Determination 2015* UKIPTrib 13_132-H available at:

<https://www.judiciary.gov.uk/judgments/investigatory-powers-tribunal-belhadj-and-others-v-security-service-and-others-judgment-and-determination/>

¹⁵ Report of oral evidence is available here: <http://www.parliament.uk/documents/joint-committees/draft-investigatory-powers-bill/oral-evidence-draft-investigatory-powers-committee.pdf> and of written evidence here: <http://www.parliament.uk/documents/joint-committees/draft-investigatory-powers-bill/written-evidence-draft-investigatory-powers-committee.pdf>

¹⁶ The Joint Committee’s report is accessible at:

<http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-investigatory-powers-bill/news-parliament-2015/report-published/>

¹⁷ The government’s report was delivered just under three-weeks after the Joint Committee’s report as it lay the Bill before the House: <http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-investigatory-powers-bill/news-parliament-2015/government-response-published/> and having said that it would consult legal professional bodies following the Joint Committee’s report, it published its own report just four days after consulting the Bar Council on 24th February 2016: “Government Sleight of Hand on Surveillance Bill” 2 March 2016 at:

<http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2016/march/government-sleight-of-hand-on-surveillance-bill/>

¹⁸ “‘Speak In Safety’ Joint Event With NUJ and The Law Society 11 April Houses Of Parliament” 12th

April 2016 <http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2016/april/surveillance-laws-rushed-speak-in-safety/> and for the Chairman’s speech see:

http://www.barcouncil.org.uk/media/432813/160412_speak_in_safety_delivered_version.pdf

¹⁹ Speak in Safety 8th April 2016 <http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2016/april/speak-in-safety/>

proposed Code gives little confidence that the safeguards will be sufficient, and no guarantee that they will not be watered down over time.

It is clear from the written evidence to the Joint Committee that there are many legal professionals who are extremely concerned about the state's apparent appetite to encroach on legal professional privilege. The sheer number of Bar Council press statements on the issue is further testament to that.²⁰ In view of the information that has been made public subsequent to RIPA's introduction they have good reason to be worried. But there are less obvious situations in which legal professionals may struggle with these provisions. For example, prosecution counsel may be handed legally privilege material gained through covert surveillance measures which may have been obtained potentially lawfully in English law, would place them under a professional duty to consider whether they could continue to act for the client. They would have to demur publicly from disclosing their reasons for ceasing to act, as the professional duty of confidentiality trumps the duty to disclose in most instances. Were they to reveal their reasons for returning instructions beyond the client's circle they may face prosecution themselves under the Official Secrets Act 1989 or other legislation that prevents lawyers from tipping someone off that they are under investigation. But they may feel very conflicted knowing that the fairness of litigation may be about to be compromised as a result of intercepted privileged communications with few, if any, avenues to allow them to raise their concerns. It is a murky area, fraught with ethical difficulty, but one that is fundamental to the rule of law.

²⁰ See <http://www.barcouncil.org.uk/media-centre/news-and-press-releases/>