THE LAW SOCIETY of SCOTLAND
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Written Evidence

Investigatory Powers Bill

The Law Society of Scotland's response
April 2016

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

We are pleased to consider and respond to the UK Parliament's House of Commons Public Bill Committee call for written evidence on the Investigatory Powers Bill, which received its first reading on the 1 March 2016. The provisions of the Bill have been considered by the Society's Privacy Law Committee, with additional input on the aspects of clause 25 (Professional legal privilege) provided a Society internal working group.

General Comments

The provisions of the Bill have serious implications for the rights of individuals. In a democratic society, it is essential for legislation, such as this, to be sufficiently debated and scrutinised. Such scrutiny is essential to maintain public trust and confidence in the legislative process and to ensure that the Bill is competent in meeting the policy and intent objectives. Scrutiny is of particular importance if the provisions of the Bill have the potential to undermine the privacy of ordinary citizens.

We are supportive and understand the policy aim of the Bill, but sufficient time and scrutiny must be given to ensure that the right balance is struck between the rights of British citizens and protecting the security and wellbeing of society. It is important that sufficient safeguards are expressly included in the Bill.

Professional legal privilege: clause 25, 100, 135 and 171

In the evolving world of communications it is also important to consider what aspects of communication should be covered by LPP. Clearly content is an essential component. However, communications data can reveal a great deal about the interaction between a lawyer and client. For example communication with a specific expert witness can reveal a great deal about the subject matter of other communications. We therefore would suggest that consideration should be given to creating similar protections for communications data analogous to those applied to LPP communications.

Collection of large quantities of data relating to large numbers of people in a fairly indiscriminate fashion will inevitably result in collecting data relating to lawyer-client communications: this requires protection. Such large scale collection of data is in any case likely to be in contravention of EU law subsequent to the decision of the Grand Chamber of the Court of Justice of the European Union (CJEU) in the joined cases brought by Digital Rights Ireland (C-293/12) and Seitlinger and Others (C-594/12)[1] handed down on 8 April 2014. The Government should explain how they believe the Bill complies with EU law in this respect.

On the 14 December we provided oral evidence to the Joint Committee, alongside the Law Society of England and Wales, expressing our shared and serious concerns in relation to professional legal privilege and the provisions of the Draft Bill[2]. Legal professional privilege (LPP), referred to in Scotland as the 'obligation of confidentiality' is key to the rule of law and is essential to the administration of justice as it permits information to be communicated between a lawyer and client without fear of it becoming known to a third party without the clear permission of the client. Many UK statutes give express protection of LPP and it is vigorously protected by the courts. The 'iniquity exception' alleviates concerns that LPP may be used to protect communications between a lawyer and client which are being used for a criminal purpose. Such purpose removes the protection from the communications, allowing them to be targeted using existing powers and not breaching LPP.

[1] http://curia.europa.eu/juris/document/document.jsf?docid=150642&doclang=EN
[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473770/Draft_Investigatory_Powers_Bill.pdf

We were pleased to note the Joint Committees recommendation in the Draft Bill report[3] that LPP be expressly protected on the face of the Bill, and were further pleased to note that the Joint Committee recommended that '*The Government should consult with the Law Societies and others as regards how best this can be achieved*.[4] However, we were disappointed that the Government did not engage with the Law Society of Scotland on LPP, as recommended, before the introduction of the Bill.

The Govement did however acknowledge and follow the recommendation to expressly protect LPP, and this has been reflected in clauses 25, 100, 135 and 171 of the Bill. In relation to these clauses, we do not believe that they are as clear as they should be and have a number of points to raise in this regard for further consideration.

Items 'subject to legal privilege' is defined within clause 225. Clause (b) (i) refers to communications between a 'professional legal adviser' and the adviser's client. However, there is no prescribed definition of 'professional legal adviser' leaving this open to ambiguous and wide interpretation.

Another potential issue may arise with multinational and cross border law firms. An application for a warrant may be made by an intercepting authority in one jurisdiction (i.e. England and Wales) for items subject to legal privilege as defined for that particular jurisdiction in clause 225. However, the client's communications (or part of) may have been made in another jurisdiction (i.e. Scotland) but held on the firm's central server. Therefore this poses the risk that legally privileged information may be inadvertently obtained, as each separate communication will have to satisfy the criteria for that particular jurisdiction.

We note that clause 25 (3) provides that the requirement that the warrant may only be issued for the interception of items subject to legal privilege if the person considers that (a) *'…there are exceptional and compelling circumstances that make it necessary to authorise the interception…'* However this requirement does not apply to items '*likely to include items subject to legal privilege'* under clauses 25 (5) (6) and (7). We would suggest that the requirement should apply to both items subject to legal privilege and those likely to include

[3] http://www.publications.parliament.uk/pa/jt201516/jtselect/jtinvpowers/93/93.pdf
[4] Ibid recommendation 46 Para 537

items subject to legal privilege. Similar protections for LPP should apply to Part 7 of the Bill, relating to bulk personal dataset warrants.

Telecommunications Operators retaining data

We are concerned about the requirement for telecommunications operators to retain communications data. Given the remarkable number of data breaches suffered by commercial organisations in recent months we are not convinced that telecommunications operators will be in a position to store such data securely. Cybercriminals are likely to see such repositories as prime targets, with the data giving the potential for a wide range of crimes including terrorist and hate crimes targeting minority groups, which could fairly easily be identified. Clause 150 (Safeguards relating to the retention and disclosure) requires to be strengthened in that respect. We also feel it would be appropriate for a state agency to be created with specific responsibility for the secure storage of this data. We have prepared a number of suggested amendments to reflect the concerns referred to in this written evidence.

Comments relating to specific clauses

Clause 2 creates the offence of unlawful interception. By virtue of clause 2 (1) (a) (iii) this will include '*a public postal service'.* However, we further note that private postal services are not included, and do not appear to have been considered. Many businesses, including legal service providers such as solicitors, use private postal services (e.g. Legal Post and DX) to send sensitive and confidential documents and information. We suggest that given the possible confidential nature of the communication, private postal services should also be included within the Bill and afforded the protection which clause 2 seeks to achieve.

Clause 6 we take the view that whilst a system of fines is maybe a deterrent, this still means that any person who has suffered loss or damage as a result of the breach is uncompensated. In our view, a scheme of compensation is necessary when the unlawful interception results in loss or damage to the victim. Clause 6 relates to monetary penalties for certain unlawful interception but does not provide any form of damages for loss of damage. Our amendment is intended to remedy this deficiency.

We note that under clause 6(6) and schedule 1 paragraph 4 (4) (g) a person may request an oral hearing before the Commissioner to make representations. It is not clear from the provisions if such a person may have legal representation and if so if legal aid will be available. We would welcome clarification from the Government, and would suggest that given the nature of the Bill and from an equality of arms perspective, legal representation should be available as a right.

Clause 13

Clause 13 (2) and (3) refers to disclosure of intercepted material to the person to whom the warrant is addressed or any person acting on that persons behalf. We question, how is a person 'acting on that person's behalf' authorised to do so, and how can that authorisation be demonstrated and proved?

What is the link between these persons, and how is this to be demonstrated and proved?

Clause 17 provides power to the Secretary of State to issue warrants. We would suggest that all applications for a warrant should be considered by the Judicial Commissioner before being issued. It is important to recognise that such a warrant has Article 8 (right to private and family life) implications and any powers must be balanced with those rights. This same observation also applies to clauses 19, 91, 92 and 93.

Clauses 24 and 94 relate to protection for Members of Parliament and powers to Scottish Minister to issue warrants respectively. We note that clause 24 (2) and 94(3) requires the Secretary of State to consult with the Prime Minister where any application relates to 'a member of the Scottish Parliament'. We would suggest that the duty to consult should also include the head of the relevant devolved administration, such as the First Minister of Scotland.

We take the view that all MEPs from whichever EU Member State should have the same protections as UK MEPs. UK MEPs may have confidential exchanges with MEPs from other Member States. It is important that all MEPs are respected as members of a Parliament which contributes to the law applying in the UK.

Clause 25 please refer to our earlier comments in this paper, relating to Legal Professional Privilege. These comments also apply to clauses 100, 135 and 171.

Clause 37 provides that the sender or the recipient of a communication can consent to an interception. This consent should be made in writing so that all parties know what is being consented to and a record can be kept.

Clause 40 provides the power to intercept postal communications done in accordance with the Postal Services Act 2000 or 'another enactment'. This is vague, what is another enactment? We believe that 'another enactment' should either be expressly named or its characteristics should be clearly stated so that its relevance can be verified.

Clause 43 authorises 'interception' in the State Hospital (Scotland's high security psychiatric hospital) if it is conduct in pursuance of, and in accordance with, any direction given to the State Hospitals Board for Scotland under section 2(5) of the National Health Service (Scotland) Act 1978. We are pleased that clause 43 now takes into account the current framework for the interception of postal correspondence and telephone calls in psychiatric hospitals within Scotland set out in sections 281-284 of the Mental Health (Care and Treatment) (Scotland) Act 2003, and supplemented by the Mental Health (Specified Persons' Correspondence) (Scotland) Regulations 2005.[5] Section 284 provides for regulations on the use of telephones (including interception). However, section 285 gives a direction-making power to Scottish Ministers as to the implementation by hospital managers of those regulations[6] but is not mentioned in this clause. The Government should explain why this power is not referenced in clause 43.

Clause 72 confirms the lawfulness of certain conduct which is authorised under Part 3 of the Bill. Sub-section (2) exempts a person from civil liability if the conduct is (a) incidental to conduct within the terms of the warrant or (b) is not covered by a warrant. We take the view that clause 72(2) (b) cannot be justified and if the conduct cannot be authorised, it must remain unlawful. Accordingly clause 72(2) (b) should be deleted.

[5] http://www.legislation.gov.uk/ssi/2005/408/made/data.pdf
[6] See the Mental Health (Use of Telephones) (Scotland) Regulations 2005 (SSI 2005/468) http://www.legislation.gov.uk/ssi/2005/468/made/data.pdf

Clause 94 please refer to our earlier comments to clause 24.

Clause 100, 135 and 171 please refer to our previous comments on clause 2.

Clause 195 concerns the terms and conditions of the appointment of the Judicial Commissioner. Under clause 195(5) the Prime Minister can remove a Judicial Commissioner if the Commissioner is made bankrupt, disqualified from being a Company Director or is convicted of an offence for which the penalty is one of imprisonment. These grounds are usual restraints on holding office but omit important reasons for removal, including inability, neglect of duty or misbehaviour. We take the view that these grounds should also result in removal.

We also take the view that a measure of security of tenure must attach to the office of Judicial Commissioner and therefore the Prime Minister should have to consult the heads of the UK jurisdictional judiciaries and the devolved administrations in Scotland and Northern Ireland before removing a Judicial Commissioner.

Clause 205 provides the Secretary of State with powers to modify, by regulations, the functions of the Investigatory Powers Commissioner, or any other Judicial Commissioner. We also note that in exercising this power, the Secretary of State may be exercised by modifying any provisions made by or under an enactment. We suggest, and we are concerned, that these powers are exceptionally wide, effectively amounting to Henry VIII powers. There is no obligation to consult before making such modifications and there is no apparent oversight to ensure there is no excessive dilution of privacy rights. Also, it would appear there is no reasonable restriction on how the powers may be exercised. There should be provision for consultation in connection with these powers. The approval by both Houses of Parliament provided for in clause 228(3) (t) is an insufficient safeguard. The enhanced affirmative procedure under clause 229 is a more appropriate mechanism for scrutiny.

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