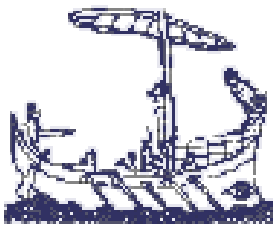

The Odysseus Trust
(Office of Lord Lester of Herne Hill QC)

RESPONSE TO THE JOINT COMMITTEE ON THE DRAFT INVESTIGATORY POWERS BILL

Call for Evidence

15 December 2015

Introduction

1. The Odysseus Trust is a non-profit company limited by guarantee which seeks to promote good governance and the effective protection of human rights. The Trust is directed by Lord Lester of Herne Hill QC, who is assisted by his senior researcher Caroline Baker and Parliamentary Legal Officers, Clare Duffy and Zoe McCallum.

2. This document responds to the Call for Evidence made by Joint Committee on the Draft Investigatory Powers Bill ("the Bill"). It focuses on arrangements for the interception of communications subject to legal professional privilege (LPP), in response to the second of the Committee's thematic questions.

Summary

3. The Trust shares the view of the Bar Council and Law Society that

    - There should be a statutory prohibition on the *deliberate* targeting of communications subject to LPP;

    - Where there are reasonable grounds for suspecting LPP is being abused, there must be a system of *prior judicial authorisation* (akin to the protection currently given to journalists' sources) for covert information-gathering; and

    - Codes of Practice must contain stringent safeguards to minimise damage where legally privileged information is *likely to be* obtained and minimise the risk of *accidentally* examining, using, disseminating to third parties, or retaining it.

4. The bill as currently worded falls short because

- It authorises the interception of communications subject to LPP;
- It treats LPP as less worthy of protection than either journalistic or parliamentary privilege;
- It contains no statutory safeguards to protect against the deliberate targeting of LPP; and
- Any additional safeguards to protect LPP are left to be spelt out in Codes of Practice which are restricted to the exercise of powers provided under Part 3, have not yet been made available for scrutiny, do not have legal force and can be changed by statutory instrument.

The importance of legal professional privilege

5. Legal professional privilege (LPP) is the right of an individual to consult a legal adviser in absolute confidence, knowing there is no risk that the information will become known to a third party without the client's clear authority. It exists for the benefit of the client, not the lawyer, who has no right to waive LPP without the client's express agreement.

6. In view of the fundamental rights at stake, it is wholly inadequate that a detainee can avoid covert surveillance only by electing not to speak to his or her lawyer. Where fear of surveillance inhibits lawyer-client communication, the accuracy of legal advice is the casualty. Defence teams may never know about legitimate defences open to a defendant and would be unable to advance them at trial. Courts will adjudicate cases on a misleading or incomplete basis. Where LPP is inhibited, it is not just individual privacy that is affected but the administration of justice as a whole.

Why it is unnecessary to legislate for exceptions to LPP

7. LPP attaches only communications *genuinely* aimed at obtaining legal advice. Any communication between a lawyer and their client in furtherance of a criminal purpose, including terrorism, do not attract its protection[1]. Where the authorities have reasonable grounds for suspecting that the privilege is being abused, they may obtain a warrant for interception without overriding LPP. It is therefore **unnecessary** to legislate for exceptions to enable the *deliberate* targeting of communications subject to LPP.

[1] This is known as the "iniquity exception", though it is more accurately described as a contrant on the scope of LPP. See for example s10(2) of the Police and Criminal Evidence Act 1984 ("items held with the intention of furthering a criminal privilege are not items subject to legal privilege").

8. It is true that in 2009, the House of Lords held by a majority that RIPA authorised covert surveillance of legal consultations in exceptional circumstances[2]. That decision was consistent with the European Convention of Human Rights, which has not expressly prohibited such surveillance. The Strasbourg Court has instead made clear that Article 8 of the Convention affords strengthened protection to exchanges between lawyers and their clients. The Court expects the same safeguards to be in place to protect individuals from arbitrary interference in cases of the surveillance of a legal consultation as it requires in other cases concerning the interception of communications[3].

9. The decision in *Re McE* came as a surprise to many lawyers, as:

    - LPP has been protected as absolute privilege in common and statute law since at least the sixteenth century;
    - RIPA does not refer to LPP; and
    - Parliament never debated the issue during the passage of the legislation.

10. It is important to emphasise that the circumstances envisaged by the Law Lords were **truly** exceptional. Lord Carswell gave examples confined to grave and imminent threats – such as a terror attack or the killing of a child[4]. Lord Phillips of Worth Matravers took the view that

    > "Covert surveillance is of no value if those subject to it suspect that it may be taking place. If it is to take place in respect of consultations between solicitors and their clients in prison or the police station, it will be of no value unless this is such a rare occurrence that its possibility will not inhibit the frankness with which those in custody speak with their lawyers"[5].

11. By inhibiting discussion between lawyer and client, any expansion of these rare circumstances would undermine the whole rationale for conducting surveillance of legally privileged communications. In addition, the necessarily secretive nature of interception makes difficult to win back public confidence once undermined. Even where surveillance powers are closely circumscribed, the chilling effect could easily be triggered.

12. It is noted that in evidence before the Committee on 30th November 2015, the government did not foresee circumstances in which it would seek intentionally to target communications subject to LPP. The sole

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[2] *Re McE*[2009] 1 A.C. 908

[3] At least insofar as these principles can be applied to the form of surveillance in question: *R.E v United Kingdom*, Application No 62498/11, 27 October 2015, §131. For those safeguards

[4] Ibid, §102

[5] Ibid, §51.

reason given for interception was that "there may be situations in which people try to abuse the privileges available to them"[6]. That response misunderstood the scope of LPP and overlooked the existence of the iniquity exception.

13. If the executive cannot foresee circumstances in which it would need to target legally privileged communications, it is surely simpler and safer to put this beyond doubt by inclusion of a prohibitory provision to this effect in the bill.

Comparison with parliamentary and journalistic privilege

14. In relation to interception and interference warrants, the bill provides (clause 16) for consultation with the Prime Minister as an additional requirement before authorisation is sought to intercept an MP's communications. Journalists' sources are protected by the additional requirement of judicial approval (clause 61). No equivalent statutory protection is offered in respect of communications subject to LPP. Instead, additional safeguards are left to be set out in Codes of Practice, which appear to be restricted to the exercise of powers provided under Part 3 (Schedule 6, clause 4), have not yet been made available for scrutiny, do not have legal force and can be changed by statutory instrument.

15. It is unclear why LPP is regarded as less worthy of protection than other forms of privilege. Parliamentary and journalistic privilege are vital to freedom of speech and the integrity of the democratic process. LPP is vital to the integrity of the judicial process and the right of any person suspected of wrongdoing to a fair hearing by an independent tribunal established by law. Curtailing parliamentary or journalistic privilege runs the risk of suffocating democracy. Curtailing legal professional privilege runs the risks of committing the innocent to prison, undermining the integrity of the judicial process and weakening public trust in the very system on which society depends as a substitute for violence and disorder.

The risk of interception information being mishandled

16. It is manifestly unfair if one party to litigation has the power to monitor the confidential communications of the other. The government's position is that even where an individual is in litigation with the state, public authorities can intercept lawyer-client communications without interfering with the right to a fair trial – as long as interception information is kept away from prosecutors. Yet abuses have been documented suggesting an obvious and serious danger of miscarriage of justice:

[6] Paul Lincoln, in response to questioning by Lord Hart of Chiltern.

- In 2011, the Court of Appeal struck down the convictions of 20 environmental protestors for aggravated trespass because the prosecution had not been open about the role of an undercover police officer, Mark Kennedy.[7] Tasked with reporting on the proposed criminal activities of extreme left wing protestors, Kennedy had infiltrated various campaigns. He was present when protestors received legal advice about the risks associated with their plan to occupy a power station.

- In April 2015, the Investigatory Powers Tribunal ordered GCHQ to destroy illegally intercepted communications between a Libyan rendition victim, Abdel Belhaj, and his lawyer.[8] Belhaj is suing the UK government for alleged involvement in his rendition and torture, which made the breach of privilege particularly disquieting. In mishandling that data, GCHQ admitted it had broken its own rules and had broken the law.

Existing Codes of Practice

17. In March 2015, the government amended the Acquisition and Disclosure of Communications Data Code of Practice to protect journalistic privilege. For the first time, the Code provided that law enforcement applications to find the source of information given to a journalist must not be granted without prior judicial approval. In light of evidence in the public domain at that time relating to failures by public authorities in the handling of *legally* privileged material, it is regrettable that the government did not take this opportunity to strengthen the protection of communications subject to LPP.

18. In February 2015, the Coalition consulted on two draft Codes of Practice relating to interception of communications and equipment interference, pursuant to s. 71 RIPA. The Codes were amended and laid before Parliament on 4 November 2015[9]. The powers they contain are not sufficiently circumscribed, not subject to adequate protection against abuse. The draft Codes:

    - Continue to permit LPP to be violated for investigatory purposes;

    - Authorise the interception of legally privileged communications in "exceptional circumstances" so broad as to include threats to limb as well as life;

    - Give no assurance that the conditions for interception are confined to reasonable suspicion of *prospective* activity; and

[7] *R. v Barkshire* [2011] EWCA Crim 1885.
[8] *Belhadj and Others v Security Service and Others* [2015] UKIP Trib 13_132–H.
[9] At the time of writing, the Codes have not yet been approved by both Houses of Parliament.

- Provide that authorisation for intercepting communications subject to LPP will be at the discretion of the secretary of state, not an independent judge (unlike the position in relation to identification of journalists' sources).

Further, under s72(2) RIPA, there can be no criminal or civil sanctions against officials or ministers flouting the codes[10].

19. Draft codes of practice to be issued pursuant to the Bill have yet to be published. However, Schedule 6, Clause 4 of the bill appears to confine the forthcoming Codes to the exercise of powers provided under Part 3 (relating to communications data), excluding interception and equipment interference. It is crucial that Codes of Practice relate the exercise of **any** surveillance powers that may result in the acquisition of legally privileged material. The Codes must contain stringent safeguards to minimise the damage where legally privileged information is obtained; and safeguards to minimise the risk of examining, using, disseminating to third parties, or retaining it. At the very least, the Codes must comply with the requirements of the Convention as set out in a well-established line of authorities[11]. There should be parity with the enhanced authorisation procedures and safeguards afforded to journalistic and parliamentary privilege.

Zoe McCallum
Anthony Lester QC (Lord Lester of Herne Hill)

[10] RIPA 2000, s72(2): A failure on the part of any person to comply with any provision of a code of practice for the time being in force under section 71 shall not of itself render him liable to any criminal or civil proceedings.
[11] *Weber and Saravia v Germany* (2008) 46 E.H.R.R. SE5*; Kennedy v United Kingdom* (2011) 52 E.H.R.R. 4; *Uzun v Germany* (2011) 53 E.H.R.R. 24*; Michaud v France* (2014) 59 E.H.R.R. 9*; R.E v United Kingdom* (2015) App No 62498/11.