

Written evidence to the Joint Committee on the Draft Investigatory Powers Bill

**Submitted by
The Chartered Institute of Legal Executives**

18 December 2015



For further details

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1. Introduction

- 1.1 The Chartered Institute of Legal Executives (CILEx) welcomes the intention to consolidate the complex area of law surrounding the use of investigatory and surveillance powers.
- 1.2 A simplified and consistent framework for the use of these powers is necessary to balance the needs for privacy and civil liberties with the need for protection and public safety.
- 1.3 It is equally important that the rules are transparent for the public to have confidence in how the powers are used.
- 1.4 This written evidence relates in the most part to judicial authorisation, and confidential communications between a client and their lawyer; commonly called 'legal professional privilege.'

2. Chartered Legal Executives

- 2.1 CILEx is an Approved Regulator under the Legal Services Act 2007, and the professional association for Chartered Legal Executive lawyers, paralegals, and other legal professionals in England and Wales. We have around 20,000 members, including more than 7,500 fully qualified lawyers known as Chartered Legal Executives.
- 2.2 Chartered Legal Executives are specialist lawyers. They are Authorised Persons under the Legal Services Act 2007, with automatic rights to act as Commissioners for Oaths, and can be authorised for independent practise in litigation, advocacy, probate, conveyancing and immigration, depending on their specialism. They work in all areas of law, in private firms, local authorities, charities, and for government departments. They can set up their own law firms, become partners in established firms, and are eligible for judicial appointments.
- 2.3 The majority of Chartered Legal Executives studied through a vocational or apprenticeship-style route to qualify. Because it is a more accessible and affordable route to a legal career, three-quarters of CILEx lawyers are women, and a third of new students are from Black, Asian or Minority Ethnic backgrounds.

2.4 In recent years CILEx lawyers have increased their opportunities to practise law independently, giving them parity with other types of lawyers. These changes, approved by Parliament¹, are important for diversifying the legal profession, encouraging new businesses, and expanding choice for consumers.

2.5 CILEx Regulation Ltd independently regulates CILEx members and entities in the public interest. They are currently consulting on applications for powers to license Alternative Business Structures (ABSs), which will further expand consumer choice.

2.6 The Draft Bill under consideration will likely impact on legal professional privilege, which applies to the communications between Chartered Legal Executive lawyers and their clients. It is important that any laws impacting on the legal profession or justice system recognise the complete range of lawyers providing services to the public to ensure the law is fit for purpose and does not require subsequent time-consuming revisions.

3. Scope of legal professional privilege (LPP)

3.1 Communications between a client and their Chartered Legal Executive are subject to LPP, in the way same as between a client and their solicitor or barrister.

3.2 This was made explicit by the UK Supreme Court in a 2013 judgment² clarifying the extent of legal advice privilege.

3.2.1 Legal advice privilege (LAP) specifically relates to the communications between lawyers and client, and falls within the wider umbrella of LPP.

3.2.2 The case centred on whether LAP should be extended so as to apply to legal advice given by someone other than a member of the legal profession (in this case to accountants advising on tax law).

3.2.3 The judgment states;

¹ http://www.cilex.org.uk/media/media_releases/new_practice_rights_approved.aspx

² *R (on the application of Prudential Plc and another (Appellants)) v Special Commissioner of Income Tax and another (Respondents)* [2013] UKSC 1

“...it is universally believed that LPP only applies to communications in connection with advice given by members of the legal profession, which, in modern English and Welsh terms, includes members of the Bar, the Law Society, and the Chartered Institute of Legal Executives (CILEX) (and, by extension, foreign lawyers). That is plain from a number of sources, which speak with a consistent voice.”

3.3 It is important therefore that any provisions within the Draft Bill, or recommendations from the committee, should be consistent when referring to the professionals who have duties under LPP. It is essential that where reference is made to barristers and solicitors, there should be explicit inclusion of Chartered Legal Executives.

4. Provisions for legal professional privilege

4.1 It is important to remember that LPP is not a protection for lawyers, but for the public. It is their right to communicate with a lawyer in confidence, and not have those communications intercepted.

4.2 As stated above, CILEx welcomes the moves to consolidate this complex area of law. However the Draft Bill may potentially miss the opportunity to protect the confidentiality of communications which should be subject to LPP.

4.3 Lawyers are under a duty to keep their communications with their clients confidential. This is essential for the proper administration of justice, with the public holding a fundamental understanding that their communications with their lawyer are confidential.

4.4 Instruments of the State and the legal profession have joint responsibility to uphold this public trust. If this is undermined, it could jeopardise the nature and content of these communications, which will impede a lawyer's ability to properly advise their clients based on all the information.

4.5 The committee can be reassured that LPP is not an absolute right. It does not apply where there is reasonable suspicion that the communication is in furtherance of a criminal purpose, known as the 'iniquity exception'.³

³ Longmore LJ in *Kuwait Airways Corpn v Iraqi Airways Co* (No 6) [2005] 1 WLR 2734

4.6 In light of the above, legal professional privilege should be given statutory protection in the Draft Bill.

4.7 CILEx believes that it will not be sufficient to rely on a code of practice for this protection to be maintained in the long term, as it will have less legal force and be more easily amended.

5. Judicial authorisation

5.1 The proposed two stage authorisation process, whereby the Secretary of State and a Judicial Commissioner jointly approve a warrant, may require additional safeguards.

5.2 The purpose of the authorisation process is to independently assess the warrant application and either approve or deny on its merits and legality. The assessment of the warrant application cannot be independently made by the body submitting the warrant. The Draft Bill however allows for warrants to be enacted in 'urgent cases' without the prior approval of a Judicial Commissioner. This may be in a significant number of cases given the nature of the warrants under consideration.

5.3 CILEx believes that explicit judicial authorisation should be obtained in all circumstances. This has the advantage of warrants being independently assessed for their merits and legality, but also with judicial authorisation the evidence that is subsequently obtained is more likely to be adduced and accepted in serious cases.

5.4 Without judicial authorisation, evidence is more likely to be challenged, and dismissed on technicalities.

5.5 In matters of national security and personal freedoms, judicial approval of all intercept warrants as recommended by David Anderson QC, is both achievable and necessary.

5.6 Whatever test the Judicial Commissioner applies in authorising a warrant, it should primarily be to assess the merits and legality of the application.

6. Recommendations to the committee

6.1 CILEx requests that the committee consider the following recommendations:

- 6.1.1 The Bill should grant statutory protection of legal professional privilege, through explicitly including it on the face of the Bill. Such protection would provide reassurance to the public of the importance and preservation of this fundamental right.
- 6.1.2 If this is not to occur, then as an absolute minimum, the relevant codes referred to in the Draft Bill should be enforceable by law, and be drawn up in consultation with the legal professions.
- 6.1.3 Any provisions made by the Draft Bill with regard to legal professional privilege should accurately reflect all the professionals on whom duties are imposed.
- 6.1.4 All warrants should be subject to judicial approval.