Response of the Faculty of Advocates

To the consultation on new Codes of Practice under the Regulation of Investigatory Powers (Scotland) Act 2000

Introduction

1. The Faculty welcomes the opportunity to respond to the consultation on the proposed new Codes of Practice under the Regulation of Investigatory Powers (Scotland) Act 2000 ("RIP(S)A"). The focus of the Faculty's comments relates to the provisions concerning the interception and use of information that would otherwise be subject to legal professional privilege ("LPP"). For the reasons set out below, the Faculty is concerned that the protection proposed in the new Codes does not properly reflect the central importance of LPP in securing the rule of law in a democratic society.

Legal Professional Privilege as securing the rule of law:

2. The importance of protecting communications between lawyer and client has been recognised for centuries. Authoritative statements in the law of Scotland and the law of England of its importance are plentiful. For centuries, both it, and its analogue, Professional Secrecy, have been in common law and European systems a fundamental component in ensuring the rule of law. As is discussed below, its importance has been recognised under the European Convention on Human Rights and in the jurisprudence of the European Court of Human Rights.

3. In the Scottish context, writing in the late 19th century, Dickson explained the role of LPP thus:

> "*By a sacred and settled rule of law, communications between a party and his legal adviser regarding the subject of a suit depending or threatened are secure from disclosure.*"[1]

Its importance has not diminished with the passage of time.

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1 Dickson on Evidence at §1663

4. Although legally privileged communications are a form of confidential information, it is important to stress that, in domestic law (as under the ECHR) they enjoy a unique and absolute protection. This was underlined by Dickson's different approaches to LPP and other categories of confidential information. Taking medical records as an example, Dickson explained that:

> "*Communications made by a person to his medical attendant are not privileged; for the discovery of truth is in general more important than the preservation of the confidence that has often to be reposed in a physician or surgeon.*"[2]

That, in the Faculty's view, makes clear the special status of LPP material. Unlike other confidential information, the public interest does not, and cannot, override it. On the contrary, the public interest weighs heavily in favour of maintaining the confidentiality of LPP material; and that is because of its essential role in securing the rule of law.[3]

5. However, LPP does not attach to all lawyer-client communications. The following categories of communication do not fall within its scope (and thus are not protected from disclosure): (a) information that is not provided as a lawyer (for example, a discussion entirely unconnected with any transaction or advice)[4]; (b) communications that were made for the purpose of the client obtaining advice or assistance in committing a crime or other illegal act.[5] That last category is often referred to as the 'iniquity exception' but it is important to recognise that it is not an exception to the general rule: such communications are not within the scope of LPP in the first place.

6. There is a consistent line of authority that follows Dickson which is to the same effect: reiterating time and again the fundamental importance of LPP. We highlight but one example:

> "*The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is*

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2 Dickson on Evidence at §1688

3 That position must now be read subject to s.131(5) of the Investigatory Powers Act 2016 which appears to countenance precisely that sort of balancing exercise which has hitherto been rejected.

4 ***Three Rivers DC v Bank of England (No.6)*** [2004] UKHL 48; [2005] 1 AC 610 at para.58 (Lord Rodger of Earlsferry). But it is not restricted simply to legal advice; it also includes advice about what to do in the relevant legal context: ***Three Rivers DC***, at para.38 (Lord Scott of Foscote); ***Balabel v Air India*** [1988] Ch 317 at pp.330-331 (Taylor LJ).

5 ***McCowan v Wright*** (1852) 15 D 229. More recently confirmed: ***McE v Prison Service of Northern Ireland*** [2009] UKHL 15; [2009] 1 AC 909 at para.11 (Lord Phillips of Worth Matravers)

thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."[6]

But as Lord Neuberger explained, recognising that, regrettably, there are dishonest lawyers and that lawyer-client communications which, for example, further a criminal purpose do not fall within the scope of LPP, monitoring such a lawyer presents a problem:

"*It must be acknowledged that there are two inherent paradoxical problems in the exercise of intercepting or listening in or privileged communications and private consultations between lawyer and client. First, the authorities cannot know if the privilege and right to privacy are being abused and that the iniquity exception applies, until the interception or listening has occurred and its results examined. Secondly, the authorities cannot warn the parties in advance that interception or listening in will or will not occur, as to do so would defeat the whole point of the exercise. Further, it is self-evident that knowing that a consultation or communication may be the subject of surveillance could have a chilling effect on the openness which should govern communications between lawyer and client, and is the very basis of the two rights. However, none of these problems can call into question the lawfulness of the statutory authorising of the surveillance of privileged communications, although they underline the fundamental requirement of clear and stringent rules governing the authorisation, circumstances, manner and control over the fruits, of any surveillance.*"[7]

7. Having regard to that domestic jurisprudence, the Faculty would make the following observations:

   a. The protection afforded to LPP is a necessary and essential component of the rule of law. That differentiates the protection of LPP from the protection of other classes of confidential information (for example, communications with an elected representative or a journalist). Whilst the protection of those communications is undoubtedly important, they are not in themselves an essential component of the rule of law.

   b. The risk of any 'chilling' effect is very serious. Take a High Court murder trial as an example: the accused invariably has only the resources provided to him by the State to defend the charges brought by the Crown; on the face of it, there is already a significant disparity in the strength of the respective parties; if the accused cannot prepare, and

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6 ***R v Derby Magistrates' Court, ex p B*** [1996] AC 487 at 507 (Lord Taylor of Gosforth CJ)

7 ***McE v Prison Service of Northern Ireland*** [2009] UKHL 15; [2009] 1 AC 909 at para.111

instruct his lawyers, with sufficient confidence that anything he says will not become known to the Crown, he has no real prospect of a fair trial.

c. It is no answer to say that LPP material that is intercepted will not be relied upon in court. Possession of the material in itself provides an unfair advantage (in assessing tactics for a litigation or determining investigations to undertake, to take but two examples). That is most obvious in the criminal context but applies with equal force to non-criminal matters.

d. Indeed, to obtain, but not rely upon, LPP material compounds the problems. Where the material is relied upon (or at least an attempt is made to rely upon it) the fact of the interception becomes known to the other party. But where it is obtained but not relied upon, it becomes an 'unknown unknown'. In other words, the holder of the privilege remains in complete ignorance of the violation of his right.

8. The recognition of the importance of LPP to the securing of the rule of law is not peculiarly Scottish (or British). The core ideal is recognised throughout Europe.[8] As the CCBE explained:

> "*Undermining the confidentiality of lawyer-client communications – whether that confidentiality is founded upon the concept of professional secrecy or (as it is in some jurisdictions) legal professional privilege – means violating international obligations, denying the rights of the accused, and an overall compromising of the democratic nature of the State.*"

The Faculty respectfully agrees.

9. Both the European Convention on Human Rights ("the Convention") and EU law recognise the importance of LPP. Under the structure of the European Convention on Human Rights, legally privileged communications enjoy protection both under article 6 (right to a fair trial) and article 8 (respect for private and family life). This double protection is worth bearing in mind when considering lawyer-client communications. Communications associated with actual or potential criminal and civil proceedings will enjoy protection under both article 6 and article 8, but there will also be privileged lawyer-client communications which do not relate to such actual or potential proceedings, for example, legal advice or assistance given in contract negotiations, property transactions, the drawing of wills and the like, which will not fall under article 6, but will, nonetheless fall under article 8.

10. The European Court of Human Rights has, in the context of Art.6, observed:

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8 CCBE Recommendations: On the protection of client confidentiality within the context of surveillance activities

> "*an accused's right to communicate with his advocate*[9] *out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 para.3(c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.*"[10]

That is consistent with the common law view of the requirements of a fair trial.

11. In the context of Art.8, the same court has held, in a passage that bears repeating in full, that:

> "*The result is that while Article 8 protects the confidentiality of all 'correspondence' between individuals, it affords strengthened protection to exchanges between lawyers and their clients. This is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. Yet lawyers cannot carry out this essential task if they are unable to guarantee to those they are defending that their exchanges will remain confidential. It is the relationship of trust between them, essential to the accomplishment of that mission, that is at stake. Indirectly but necessarily dependent thereupon is the right of everyone to a fair trial, including the right of accused persons not to incriminate themselves.*
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> *This additional protection conferred by Article 8 on the confidentiality of lawyer-client relations, and the grounds on which it is based, lead the Court to find that, from this perspective, legal professional privilege, while primarily imposing certain obligations on lawyers, is specifically protected by that Article.*" [11]

It is important to note that whilst Art.8 is a qualified right (that is, an interference that is for a legitimate purpose, necessary in a democratic society and in accordance with law will be permitted) the protection afforded by Art.6 is absolute (that is, the right to a fair trial is unqualified).

12. In terms of EU law, a similar approach has been taken. Art.4 of the Right of Access to a Lawyer Directive (Directive 2013/48/EU) provides:

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9 In this context, "advocate" is a reference to a lawyer more generally as opposed the more specific meaning that it may have for a Scottish audience.

10 ***S v Switzerland*** (1992) 14 EHRR 670 at para.48. Article 6(3)(c) of the Convention provides: "*to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*"

11 ***Michaud v France*** (2014) 59 EHRR 9 at paras.118-9

"*Member States*[12] *shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.*"

That provision is significant in that it is also absolute. Although directed at criminal proceedings, it reflects, and is consistent with, the principle of the inviolability of LPP. Long before that Directive was adopted, the Court of Justice had taken the same approach: "*any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it.*"[13]

Proposed Protection of LPP

13. In approaching an analysis of the sufficiency of the Codes properly to address the imperative of protecting LPP, it is instructive to have regard to the *Recommendations on the protection of client confidentiality within the context of surveillance activities*[14]. In particular, the Faculty would draw attention to recommendations 2.2, 2.3, and 3.1 to 3.4 inclusive. In the Faculty's view, for the draft Codes to provide adequate protection to LPP they should fully accord with those recommendations. They do not do so and, in the view of the Faculty, do not properly recognise the central role that it plays in securing the rule of law.

14. The following aspects of the draft Codes cause the Faculty particular concern:

    a. There is insufficient appreciation of the particular importance of LPP in terms of the rule of law.

    b. There is insufficient consideration of the consequences of intercepting LPP in terms of Art.6 of the Convention.

    c. The deliberate targeting of matters subject to LPP is, in the Faculty's view, unacceptable.

    d. Where LPP is intercepted incidentally or inadvertently, there should be an obligation to destroy such information once it is identified as such.

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12 The United Kingdom has not opted-in to the Directive.

13 C-155/79 ***AM&S v Commission*** [1982] ECR 1575; [1983] QB 878

14 http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/IT_LAW/ITL_Guides_recommentations/EN_ITL_20160520_CCBE_Guidance_on_Improving_the_IT_Security_of_Lawyers_Against_Unlawful_Surveillance.pdf

Articles 6 and 8 of the ECHR

15. As explained above, LPP plays an essential part in securing the rule of law. In that sense, it is different from the other categories of confidential information considered in the draft Codes (discussions with a minister of religion, an elected representative, a doctor or a journalist). Whilst maintaining the confidentiality of those exchanges is undoubtedly important, it is not, in the Faculty's view, an essential part of securing the rule of law. That is the feature that gives LPP its special status and which should, the Faculty suggests, justify an enhanced and rigorous protection. From our reading of the draft Codes, however, LPP is treated in substantially the same terms as those other categories of confidential information.

16. In particular, the draft Codes appear to consider interference with LPP primarily against the background of the qualified protection accorded under Art.8 and, insofar as it is appropriate so to consider this matter, appears not to recognise the "strengthened protection" under article 8 accorded LPP by the European Court of Human Rights.

17. Furthermore, as explained above, the right under Art.8 remains a qualified right, whereas under Art.6, the right is absolute. It is not qualified by what might be necessary in a democratic society (precisely because a right to a fair trial is a pre-requisite of a democratic society). The importance of LPP in securing a fair trial has long been recognised. There can, in the Faculty's view, be no use of LPP that may qualify the right to a fair trial. The Faculty suggests that there ought to be an absolute prohibition on any LPP material (however it was obtained) from being used by those involved in the prosecution of crime. A rule that such material be inadmissible in a trial is insufficient: that material should not be available to inform tactical decisions associated with the investigation of the case or its presentation at trial.

18. Although often considered in the criminal context, the same approach is required in the determination of civil disputes. In any case where the State is a party to proceedings, there should be an absolute prohibition on any LPP material (however it was obtained) from being used by those involved in the litigation.

Deliberate targeting

19. In principle, the Faculty would object to the deliberate targeting of LPP material. If the relevant statutory provisions truly permit any such deliberate targeting in some circumstances, then it is essential that those circumstances are truly exceptional. In the Faculty's view, such authorisations should always be sought from a Judicial Commissioner (and not an authorising officer). In assessing whether such a measure is proportionate (and thus compatible with Art.8), it is said that the person from whom authorisation is sought "*will wish to consider carefully whether the activity or threat being investigated is of a sufficiently serious nature to override the public interest in*

preserving the confidentiality of privileged communications."[15] We find it hard to conceive of such a circumstance. The example given in para.8.57 is not convincing. For the information sought to be protected by LPP it is *not* within the 'iniquity exception' (that is, does not relate to the commission or furtherance of a crime). It appears, therefore, that information which could be targeted by such an authorisation is unlikely, in fact, to be LPP material.

20. If deliberate targeting of LPP material is to be part of our law, then the observations of Lord Phillips in ***McE v Prison Service of Northern Ireland*** merit repeating:

> "*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* [or, the Faculty would add, anywhere else], *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. It would seem desirable, if not essential, that the provisions of the Code should be such as to reassure those in custody that, save in exceptional circumstances, their consultations with their lawyers will take place in private.*"[16]

21. It is important, in the Faculty's view, that data is regularly published on the number of authorisations that have been granted for the targeting of LPP material. Simply publishing the number of such authorisations would be sufficient to ensure public awareness and inform the confidence they could have in LPP and the extent of the threat to the proper functioning of the rule of law kept under review.

Incidental and inadvertent interception

22. It is recognised that under any surveillance system, LPP material may be recovered incidentally or inadvertently. In the Faculty's view, in those circumstances, such material should be destroyed as soon as it is recognised as LPP material. If, as a starting point, it is accepted that LPP material should remain confidential, it is imperative that the chilling effect caused by allowing any form of interception of LPP material is minimised by ensuring its destruction when it is intercepted without specific, prior, authorisation. In particular, it is not enough, in the Faculty's view, to simply impose an obligation to treat such material "*in accordance with the safeguards*" set out in the Code and to "*minimise access to the material*" (para.8.62 of the CHIS Code, for example). Similarly, at para.8.65 of the same Code, it is said "*If ... knowledge of matters subject to legal privilege is unintentionally disclosed to the public authority, the public authority in question*

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15 CHIS Draft Code, para.8.58

16 [2009] UKHL 15; [2009] 1 AC 909 at para.51

should ensure that it is not used in law enforcement investigations or criminal prosecutions." That should be taken as a given. But it is unclear to the Faculty why the prohibition is limited to the criminal sphere. It should be equally applicable to any civil or other proceedings. As explained earlier, LPP (and Art.6) applies as much to civil proceedings as it does to criminal prosecutions. In any event, these issues are avoided if a public authority is simply required to destroy LPP material in these circumstances.

23. Requiring destruction is, in the Faculty's view, consistent with Art.8 of the Convention. If the interception of LPP is necessarily an interference with that right, retention in any form, for any purpose and for any length of time is unlikely to be necessary in a democratic society, pursuant to a legitimate aim or in accordance with law. In fact, the Faculty cannot readily conceive of a circumstance where the incidental or inadvertent interception of LPP could fulfil those requirements. If that is so, anything other than its destruction would be incompatible with Art.8 of the Convention and thus unlawful.

24. Where LPP material has been intercepted incidentally or inadvertently, and whether or not there is a requirement to destroy it, a public authority should be required to report the fact of the interception to the Judicial Commissioner. The Judicial Commissioner should then, in the Faculty's view, be required to publish details of the number of such interceptions. Publication of that data (which need not identify the public authorities that made the interception or the manner of the interception) would ensure some public awareness of the incidence of LPP violation. If that is coupled with publication of the number of targeted authorisations, then a clearer picture can be presented of the extent of any interference with LPP, which should in turn inform the extent of any 'chilling' effect.

Conclusion

25. The foregoing proposals are, in view of the Faculty both necessary and proportionate having regard to the underlying guarantees of individual rights and the rule of law both under Scots Law and the European Convention on Human Rights. However, the Faculty is not insensitive to the suggestion that might be made in some quarters that these proposals may limit the room for manoeuvre of those charged with maintaining the safety and security of the State, making, it may be suggested, their task more difficult than if they had a wide and unconstrained discretion. That, however, is inherent in the very nature of a democracy which is governed by the rule of law:

> "*This is the destiny of a democracy – it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its*

understanding of security. At the end of the day they strengthen its spirit and this strength allows it to overcome its difficulties."[17]

17 *Public Committee against Torture v Israel* (1999) 7 BHRC 31 at para.39 (Supreme Court of Israel, Present Barak)