

LPP challenges

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4 questions

- 1) What other state challenges have we experienced to client rights to privilege and to the position of lawyers in relations to privilege?
- 2) What is going on? What are the reasons?
- 3) What do we need, as a Bar, to be doing about this?
- 4) Are E&W, or the UK, alone?

Background

Only fairly recently that LPP has been accepted in England and Wales as a fundamental principle. Should ask ourselves whether it is unlimited.

The highpoint of the authorities and textbooks in England and Wales might suggest that it is: certainty of privilege is the "*predominant public interest*" (R v Derby Mags' Ct, ex p. B [1996] 1 AC 487, 509, outweighing all others. So no balancing of competing public interests by the courts.

Seems that we can set limits, though; and as David's talk has explained, we may still be working out where those limits lie.

In the UK at least - as Mark has explained - we have accepted so far that Parliament can set these limits, not just the judges.

There are issues in both areas

1) Recent and current challenges from the state

Clients – 3 areas

1) Investigatory Powers Act 2016, and related Codes of Practice.

- Bar's stance was that illegality, or that rather less clear criterion of 'iniquity' or 'unambiguous impropriety', was a sufficient criterion for the interception or acquisition of privileged material. All examples given by the Government would be caught by that. In all other cases, LPP should be protected.
- Secured improvements during progress through Parliament, but still too much scope for deliberate targeting and interception, without sufficient safeguards to ensure that LPP is not infringed, and is preserved so far as possible if it is infringed.
- Have ended up with a compromise that a warrant can be issued if the circumstances are exceptional and compelling, and the balance of public interest is in favour. And national security trumps all.
- Contrary to court decisions, which reject the idea of a balancing exercise between public interests.
- Insufficient improvement from previous situation?

2) **Data Protection Bill** – currently going through Parliament - scope for ICO to require lawyers to hand over privileged information, which may then be handed on to others. Government unwilling so far to preserve privilege at all times over the 'rights' of a data subject, or to recognise the remaining potential for misuse of the legislation in private litigation.

3) **Prosecutorial pressure** – SFO pressure to cooperate by ensuring investigations are not structured in such a way as to attract LPP. SFO case about which David has spoken is another strand of the same line of attack.

Lawyers – 2 areas

1) **Tax enabler provisions** – civil penalties for ‘enablers’ of certain types of “abusive” tax avoidance (i.e. not illegal, so LPP survives) – can include lawyers – privilege protected in principle, but convoluted and potentially ineffective provisions covering situations in which lawyers are unable to defend themselves due to their obligation to maintain client privilege. In some situations, will remain impossible without breaching privilege.

Just one example of increasing tendency to impose obligations on lawyers to report various types of activities to the authorities, without proper protection for LPP.

2) **Parliamentary select committees** – pressure on lawyers in parliamentary inquiries, often in highly-charged political situations, to reveal privileged information or be subject to criticism personally.

2) What is going on? What are the reasons?

Attitude of prosecution agencies – transparency and admissions given highest priority – financial and practical reasons, as prosecutors seek to rely on work done by the ‘accused’ themselves.

Attitude of politicians – desire (and feel they have the right) to know everything; prioritising of transparency (as David has explained – ‘privacy’ is to be protected, but not ‘secrecy’); feeling that privilege is being abused or used to hide behaviour of which politicians do not approve (e.g. tax avoidance – Panama and Paradise Papers cases); mistrust of institutions (legal profession being one of them) and ‘experts’ – populism.

Attitude of civil servants – similar effects; unwilling to move from initial positions.

All suffer from ignorance, lack of awareness, and lack of understanding.

Courts not immune, as David has explained. Also other areas, e.g.

- Lack of privilege in cases of illegality and iniquity (*'[strong] prima facie case'*) – scope being broadened, beyond dishonesty and fraud? Dangerous if move towards “contrary to public policy”. Not clear where we will end up.
- Long-standing practice in our Court of Appeal, Criminal Division, and now in extradition cases, of requiring a waiver of privilege if you wish to criticise the conduct or decisions of previous counsel (see R (Kelly) v Warley Mags Ct [2007] EWHC 1836 (Admin)). Is this right?

Is it in part because we are still trying to work out the limits?

- David and Mark have described some of this.
- A few areas where this is so for the profession in England:
 - Disclosure to regulator – permissive and compulsory – R (Lumsdon) v LSB [2014] EWHC 28 (Admin); EWCA Civ 1276 – no infringement of LPP because purpose limited, no onward disclosure permitted; [*inherent in the instruction of a lawyer?*]
 - Limits in relation to public safety, e.g. against terrorism? Canada (Smith v Jones [1999] 1 SCR 455) and US.
 - Permitted for lawyers to disclose in order to protect clients’ own safety and best interests?

3) What should we be doing about this?

- Constant vigilance required.
- Language - focus on client rights – “lawyer-client privilege” (variant on US/Canadian language) or “client legal privilege” (Australian Law Reform Commission)?
- Make it relevant to the public
- Public understanding of its value.

Do you have other suggestions?

Do we have lessons to learn from the live televising of constitutional cases in South Africa?

Suspect not, given limited impact of televising of Supreme Court cases: not great television.

4) Are we alone in E&W, or the UK?

No: CCBE concerned with similar trends in Europe; reasonable degree of success in fighting back so far, but looking at Council of Europe Convention, and to include protection for LPP.

Would like to know what the position is in your jurisdiction.

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