

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 2, page 2, line 30 add at end – “(iv) a private postal service”

Effect

This amendment adds private postal services to the communication methods covered by the offence provisions in Clause 2.

Reason

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

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 6, page 5, line 19 after “served” insert “either or both – (a)”

Effect

Paving amendment

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 6, page 5, line 20 after “notice” insert – “(b) a civil damages notice”

Effect

This amendment creates the concept of a civil damages notice in connection with unlawful interceptions.

Reason

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.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 6, page 5, line 24 add at end – “(3) a civil damages notice is a notice requiring the person on whom it is served to pay to a person specified by the Commissioner an amount by way of civil damages specified in the notice.”

Effect

Consequential amendment.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 6, page 5, line 37 add at end – “(6) the amount of civil damages determined by the Commissioner under the section must not exceed £250,000.”

Effect

Consequential amendment.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 6, page 5, line 41 add at end – “(7) the upper limit of the monetary penalty referred to in this section may be varied by statutory instrument.”

Effect

Consequential amendment.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

In schedule 1, page 186, line 33 after “hearing” insert “(at which the person may be represented)”

Effect

This amendment allows for representation at monetary penalty hearing.

Reason

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.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 24, page 19, line 8 add at end - “and where the warrant relates to a member of the Scottish Parliament the First Minister of Scotland”

Effect

This amendment requires the Secretary of State to consult the First Minister of Scotland about the issue of a targeted interception warrant concern MSPs.

Reason

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.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 24, page 19, line 14 leave out “elected for the United Kingdom “

Effect

This amendment extends the requirements of Clause 24 to any MEP.

Reason

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.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 25, page 19, line 22 after “to” insert “or likely to be subject to”

Effect

This amendment extends the protections of Clause 25 to information which is likely to be subject to legal privilege.

Reason

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 Bill². 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 report³ 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 Government 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 items subject to legal privilege. Similar protections for LPP should apply to Part 7 of the Bill, relating to bulk personal dataset warrants.

³ <http://www.publications.parliament.uk/pa/jt201516/jtselect/jtinvpowers/93/93.pdf>

⁴ Ibid recommendation 46 Para 537

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 25, page 19, line 28 after “to” insert “or likely to be subject to”

Effect

Consequential amendment.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 25, page 19, line 33 after “to” insert “or likely to be subject to”

Effect

Consequential amendment.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 25, page 19, line 39 leave out sub section (4)

Effect

Consequential amendment.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 25, page 19, line 45 leave out sub section (5)

Effect

Consequential amendment.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 25, page 20, line 6 leave out sub section (6)

Effect

Consequential amendment.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 37, page 30, line 43 after “consented” insert “in writing”.

Effect

This amendment requires a person who has agreed to interception to agree in writing.

Reason

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.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 40, page 32, line 20 leave out “or (b) that section and another enactment”

Effect

This amendment clarifies the terms of Clause 40 (1) (b).

Reason

Clause 40 (1) (b) permits interception by a Revenue and Customs officer if it is applied for under the postal services Act 2000 and “another enactment”. This is not clear – the other laws which legitimise this activity should be detailed in the clause.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 72, page 57, line 35 leave out from “and” to end of line 40.

Effect

This amendment deletes clause 72 (2) (b).

Reason

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.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 94, page 72, line 17 leave out “elected for the United Kingdom”.

Effect

This amendment extends the requirements of Clause 94 to any MEP.

Reason

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.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 100, page 77, line 8 after “to” insert “or may be likely to be subject to”

Effect

This amendment extends the protections of Clause 100 to information which is likely to be subject to legal privilege.

Reason

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)⁵ 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 Bill⁶. 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.

⁵ <http://curia.europa.eu/juris/document/document.jsf?docid=150642&doclang=EN>

⁶ 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 report⁷ 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.'*⁸ 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 Government 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 100 (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 100 (4) (5) and (6). We would suggest that the requirement should apply to both items subject to legal privilege and those likely to include items subject to legal privilege. Similar protections for LPP should apply to Part 7 of the Bill, relating to bulk personal dataset warrants.

⁷ <http://www.publications.parliament.uk/pa/jt201516/jtselect/jtinvpowers/93/93.pdf>

⁸ Ibid recommendation 46 Para 537

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 100, page 77, line 15 after “to” insert “or may be likely to be subject to”

Effect

Consequential amendment.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 100, page 77, line 17 after “to” insert “or may be likely to be subject to”

Effect

Consequential amendment.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 100, page 77, line 22 leave out sub section (5)

Effect

Consequential amendment.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 100, page 77, line 32 leave out sub section (6)

Effect

Consequential amendment.

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 195, page 150, line 18 add at end –

“(e) The Commissioner is unfit to hold out office by reason of inability, neglect of duty or misbehaviour”

Effect

This amendment provides other reason for the removal of a Judicial Commissioner.

Reason

Clause 195 currently allows the removal of a Judicial Commissioner if the Commissioner is bankrupt, disqualified as a company director or convicted of an offence.

It does not permit removal if the Commissioner is unfit by reason of inability, neglect of duty or misbehaviour. It is important that these possibilities are provided for in the bill. The additional safeguard of consultation with the heads of the UK jurisdictional judiciaries and the devolved administrations provides a check on unjustified attempts to remove the Judicial Commissioners

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 195, page 150, line 18 add at end –

“(e) Before removing a Judicial Commissioner the Prime Minister must consult –

- (a) the Lord Chief Justice of England and Wales
- (b) the Lord President of the Court of Session
- (c) the Lord Chief Justice of Northern Ireland
- (d) the Scottish Ministers, and
- (e) the First minister and Deputy First Minister in Northern Ireland.”

Effect

This amendment provides other reason for the removal of a Judicial Commissioner.

Reason

Clause 195 currently allows the removal of a Judicial Commissioner if the Commissioner is bankrupt, disqualified as a company director or convicted of an offence.

It does not permit removal if the Commissioner is unfit by reason of inability, neglect of duty or misbehaviour. It is important that these possibilities are provided for in the bill. The additional safeguard of consultation with the heads of the UK jurisdictional judiciaries and the devolved administrations provides a check on unjustified attempts to remove the Judicial Commissioners

THE INVESTIGATORY POWERS BILL
AMENDMENT TO BE MOVED IN COMMITTEE

Clause 225, page 177, line 11 add at end –

““professional legal advisor” means a person who is;-

- (a) an Advocate
- (b) a Barrister
- (c) a Solicitor.”

Effect

This amendment provides a definition of a “professional legal Adviser” which is important for clarification in relation to clauses 25, 100, 135 and 171.

Reason

This amendment defines “ legal professional adviser” as an Advocate, Barrister or Solicitor. It is important that the bill details the advisers with whom a client can communicate in order to gain the protections of clauses 25,100,135 and 171.