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Prison Rules: Unwarranted and self-authorised surveillance of prisoners' legal consultations

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In a written answer provided to the House of Commons on 11 January 2016, Andrew Selous MP[1] made plain the power of the National Offender Management Service ("**NOMS**"—an executive agency) to intercept prisoners' purportedly confidential communications with their legal advisers without the need to first seek a warrant.[2]

Set against the backdrop of the continuing controversy regarding the draft Investigatory Powers Bill (the "**Bill**") published by the Government on 4 November 2015, the legal framework governing the interception of prisoners' communications benefitting from legal professional privilege ("**LPP**") has drawn relatively little comment.

This post examines the worrying absence of robust and independent authorisation and oversight safeguards in NOMS' exercise of intrusive surveillance powers and considers the reforms that could go some way to ensure that prisoners' fair trial rights are not fatally undermined.

Current framework: no checks, no balances

The current legal framework governing the interception of a prisoner's communications with his or her lawyer is a hotchpotch of statutes (the Prison Act 1952, "**Prison Act**" and the Regulation of Investigatory Powers Act 2000, "**RIPA**"), rules (the Prison Rules 1999, "**Prison Rules**") and instructions (Prison Service Instruction 49-2011, "**PSI**").

Section 4(4) of RIPA makes lawful the interception of communications in prisons conducted in accordance with the Prison Rules. Taken together, the Prison Rules and PSI provide that legally privileged communications between a prisoner and his or her lawyer may not be recorded, listened to or read unless the prison governor considers that the arrangements (for the planned interception of the communication) are:

- necessary based on one of six specified and incredibly broad grounds (including for example, "*the protection of health or morals*" and, "*the protection of the rights and freedoms of any person*"); and
- Proportionate to what is sought to be achieved.[3]

Where such planned interception is thought necessary, it must be authorised by one of:

- The Chief Executive Officer of NOMS;
- The director responsible for the National Operations Services of NOMS; or
- The duty director of NOMS.

The only grounds for authorising ongoing interception would be a, "*reasonable belief that that the communication was being made with the intention of furthering a criminal purpose*."[4]

This framework raises serious constitutional concerns as to a lack of independence, expertise and due process.

Remarkably, the authorisation process offers no place for a detailed warrant application to be rigorously scrutinised by an independent judge. Not only does this subvert the fundamental democratic function of an independent judiciary (to act as a brake on the unfettered use of intrusive powers by state bodies) but it also ignores the fact that judges are best placed both to apply the legal tests of necessity and proportionality to ensure that any surveillance is conducted lawfully, and also to make judgements on a difficult and uncertain area of law (LPP).

That the power to grant such intrusive (and ultimately subjective) authorisations vests in the senior civil servant of an executive agency of the Ministry of Justice appears to be at best a democratic oddity and at worst a concentration of power in a role which is neither democratically elected nor judicially qualified.

The legal status of the Prison Rules also offers little comfort to prisoners and their legal advisers. They were not designed to be legally enforceable and the courts have not allowed prisoners to sue for breach of a statutory duty. As Lord Denning M.R. put it in *Becker v Home Office*:

"*The Prison Rules are regulatory directions only. Even if they are not observed, they do not give rise to a cause of action*."[5]

Nor can any protection be sought from the Parliamentary process. Prison Service Instructions (the supplemental administrative guidance from which the bulk of the detail in respect of the interception of prisoners' legally privileged communications is derived) do not enjoy any legal status and are never debated in Parliament.[6]

A clear and present danger

The danger with regard to the lack of procedural safeguards for prisoners' privileged communications is that it leads to what Lord Phillips, in his dissenting judgment in *re McE*, described as the, "*chilling factor that LPP is intended to prevent*."[7] That is, when the law allows the state to listen in on privileged communications, clients feel unable to speak openly with their lawyers. The consequences of this are potentially devastating. Without the full facts, counsel may not be aware of all potential avenues of legal redress available to the prisoner in respect of, amongst other matters, appeals, probationary hearings and complaints as to his or her mistreatment whilst in prison.

This goes to the heart of the criminal justice system and is a very real concern. On 11 November 2014, the then Lord Chancellor and Secretary of State for Justice was forced to announce to the House of Commons that, between 2006 and 2012, there had been a number of instances where telephone calls between a prisoner and his or her lawyer (and, separately, telephone calls between a prisoner and his or her constituent MP) had been wrongly recorded and in some cases listened to by prison staff.[8]

The HM Inspectorate of Prisons inquiry (which was commissioned following the Parliamentary announcement) reported that whilst there was no, "*evidence of a widespread, deliberate attempt to monitor communications*", there was, "*widespread ignorance about how the system was supposed to operate among both prisoners and staff.*"[9]

Such conclusions will do little to allay prisoners' fears that everything they say to their lawyers goes straight to the people responsible for their everyday well-being whilst in prison.

A new, old Bill?

The question then is what measures of increased protection for prisoners' privileged communications does the current version of the Bill provide for? The mandating of a pre-requisite requirement for a judicially approved intercept warrant perhaps? Or the making explicit of LPP protection in primary legislation, as opposed to legally unenforceable instructions which neatly bypass Parliamentary scrutiny?

The answer, sadly, is that the Bill affords no increased protection to a prisoner's legally privileged communications. Section 4(4) of RIPA is merely replicated, in full, at clause 37 of the Bill: doing no more than re-affirm the unsatisfactory status quo. Indeed, LPP is mentioned only once by name in the entire Bill – all the way down at Schedule 6, which provides that a separate code of practice is to be issued which will set out the procedural safeguards for legally privileged communications. This code will have no bearing on prisoners' privileged communications.

Conclusion

That these are testing times for the continued existence of LPP in its current form is beyond doubt. As has been discussed at length in previous blog posts (here and here), the ability of a client to consult, in confidence, with his lawyer, faced a substantive recent restriction in the Court of Appeal and the legislative framework provided for by RIPA is in urgent need of wholesale reform.

The Government should be applauded for deciding to reform this area of law. The need for a legal framework that provides for a lawful and proportionate use of intrusive powers by the state to detect and prevent serious crime is accepted by all but a militant minority. The easiest way for the Government to ensure that the Bill is both lawful and proportionate, however, would be to make explicit, on the face of the legislation[10] (rather than being squirreled away in a supplementary code) the protections that will be afforded to legally privileged communications. There is no principled reason why the legally privileged communications of prisoners should not also be included in these explicit safeguards.

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[1] Parliamentary Under Secretary of State for Prisons, Probation, Rehabilitation and Sentencing.

[2] http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-01-05/20942/.

[3] Prison Rules (rules 34 – 39 and 35A (2) (a) and (b)) and PSI (Outcome 14.2 (f)).

[4] PSI (Outcome 14.2 (f)).

[5] [1972] 2 WLR 1193.

[6] *Livingstone and Macdonald on Prison Law*, 5th Edition, 2015, paragraph 1.49.

[7] [2009] UKHL 15, paragraph 51.

[8] http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm141111/debtext/141111-0001.htm#14111148000001.

[9] https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2015/07/prison-communications-report-web-2015.pdf.

[10] Indeed it seems strange that this has not been done already, given the number of other statutes that provide explicit protection for LPP—including, amongst others, the Police and Criminal Evidence Act 1984, the Criminal Justice and Police Act 2001 and the Proceeds of Crime Act 2002.

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