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Open justice and legal professional privilege

The need to protect confidential communications between a lawyer and a client can sometimes trump the principle of open justice

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The government recently published its draft Investigatory Powers Bill, aka the "Snoopers' Charter". In response, Peter Carter, QC, chairman of the Bar's surveillance and privacy working group, lamented: "The bill undermines the right to a fair trial

because barristers will no longer be able to reassure clients that their communications, which the public interest demands should be immune from state intrusion, are in fact private and confidential."

Our medical records are shared with others by a doctor only if we give consent. The same implied confidentiality, termed legal professional privilege (LPP), extends to lawyers: a principle established in the reign of Queen Elizabeth. The First, not the Second.

The privilege conferred by LPP is ours as the client, not the lawyer's. Just like our doctors, we trust our lawyers because communications with them are protected, preventing unauthorised disclosure. So what about a dispute between lawyers and their client? Should it be heard in open court, thereby destroying confidentiality?

Fashionably paraded as the order of the day, open justice rejoices in two watchwords: accessibility and transparency. "It is a fundamental feature of the rule of law in any modern democratic society," according to Lord Neuberger, president of the Supreme Court.

As cameras are set to open up more courtrooms, the media will continue to report the most newsworthy cases, although reporting restrictions sometimes apply. Integral to the open justice agenda, Lord Neuberger argues, is that that judges should minimise the circumstances where they sit in closed session — once called, confusingly, "in camera".

"The law is framed," said Mr Justice Mostyn last year, "to enable the press to be the eyes and ears of the public so as to ensure that the case is conducted fairly and to enable the public to be educated in an abstract and general way about the processes that are deployed, but does not extend to breaching the privacy of the parties in these proceedings that parliament has given to them".

However if justice has to be seen to be done, do closed sessions provoke suspicion that private justice means diminished justice? Or even worse, that it might not be done at all?

The reality is nuanced. Open justice is not always in the public interest. Terrorist trials

are routinely held in private, likewise some criminal trials and Family Division hearings, civil proceedings with a security dimension, and cases requiring a Public Interest Immunity Certificate.

And that lawyer-client dispute? If your private information ended up in the public domain, then you might think twice before ever hiring lawyers. As Lord Brougham concluded: “If the privilege did not exist at all, every one would be thrown upon his own legal resources, deprived of professional assistance, a man would not venture to consult any skilful person, or would only dare tell his counsellor half his case.”

For a company, sensitive information might be introduced as evidence with reputational consequences. True, commercial disputes are often resolved behind closed doors, preventing private grief being aired in public. But not every dispute can be. So even if you win, fighting your lawyers might carry unforeseen costs.

Whatever the respective merits of open justice and LPP, some cases demonstrate that an inherent incompatibility can exist between them. The issue provokes little reaction outside the legal profession. But should you be in dispute with your lawyers, would you want your confidential discussions available for public scrutiny?

As Mr Justice Tugenhadt recently observed, “A hearing, or any part of it, may be in private if publicity would defeat the object of the hearing.” Otherwise, it would not be “in the interests of justice”.

Open justice may maintain public confidence in its administration, but it is not in the interests of justice in every case.

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