



Bar Council response to the Home Office's consultation on the Extraction of Information from Electronic Devices Code of Practice

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Home Office's consultation¹ titled, 'the Extraction of Information from Electronic Devices Code of Practice'.
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of Criminal and Civil Courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The General Council of the Bar is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Q1. To what extent do you agree or disagree with the guidance the code of practice provides on the circumstances in which the powers can be used and the requirements that must be met?

a) For section 37?

¹ <https://www.gov.uk/government/consultations/extraction-of-information-from-electronic-devices-code-of-practice>

Agree – the code accurately reflects the statute.

b) For section 41?

Agree – the code accurately reflects the statute.

Q2. To what extent do you agree or disagree with the guidance that the code of practice provides on the exercise of the powers in accordance with data protection and human rights legislation?

a) For section 37?

Agree – the application of qualified rights pursuant to Article 8 is correct as are the data protection principles.

b) For section 41?

Agree – the application of qualified rights pursuant to Article 8 is correct as are the data protection principles.

Q3. To what extent do you agree or disagree with the guidance offered in the code on assessing necessity, proportionality, relevance to reasonable line of enquiry or reasonable belief when determining when the powers in sections 37 and 41 should be used?

a) For section 37?

Agree – These are the appropriate considerations and they are correctly expressed.

b) For section 41?

Agree – These are the appropriate considerations and they are correctly expressed.

Q4. To what extent do you agree or disagree with the guidance the code of practice provides on how authorities meet the requirements stated in section

37(1) in the Act, to ensure a person has voluntarily provided their device and agreed to the extraction of information from it?

Agree – The safeguards in terms of obtaining confirmation in writing and providing a written notice are desirable.

Q5. To what extent do you agree or disagree with the guidance that the code of practice provides on how to recognise when a person is vulnerable?

Agree – The adoption of the Victims Code and the College of Policing definitions are appropriate.

Q6. To what extent do you agree or disagree with the guidance that the code of practice provides on how a vulnerable person should be supported?

Agree – The focus on prioritising the return of devices is appropriate. There should perhaps be a target time limit for all vulnerable persons and not just rape victims.

Q7. To what extent do you agree or disagree with the guidance the code of practice provides on who is considered a child, how authorities must where possible involve and support them, and who can make decisions on their behalf?

Neither agree nor disagree – The guidance is largely appropriate but the definition of a responsible person is nebulous and it is conceivable that it could be misused in practice.

Q8. To what extent do you agree or disagree with the guidance the code of practice provides on who is considered an adult without capacity, how authorities must where possible involve and support them, and who can make decisions on their behalf?

Neither agree nor disagree – the use of s1 Mental Capacity Act 2005 is appropriate, but the definition of a responsible person is again problematic.

Q9. To what extent do you agree or disagree with the guidance the code of practice provides on applicable devices for extraction, and the recommendation that selective extraction should be used where possible to minimise intrusion into the device user's privacy?

Agree – the principle of using the least intrusive method is appropriate.

Q10. To what extent do you agree or disagree that with the approach the code of practice provides on how to assess and manage the risk of obtaining confidential material, and how to proceed when it is unintentionally obtained?

Disagree - The definition of LPP as “protected” material correctly incorporates the privilege test set out in s.10 Police and Criminal Evidence Act 1984 but the protection is not absolute, as it should be. Paragraphs 67 to 72 might give the impression that accessing LPP material is a matter of enhanced proportionality as with other confidential material. It is not; LPP material is subject to greater protection than other confidential information.

Q11. In your view is the suggested approach to use of the powers detailed in the code one that can be implemented operationally?

[No response]

Q12. Are there any gaps in the guidance that should be addressed?

[No response]

Q13. Does the code contain links to all relevant material that an authorised person would need in order to ensure lawful use of the powers?

[No response]

Bar Council

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