



## DATA PROTECTION BILL – LEGAL PROFESSIONAL PRIVILEGE

### HOUSE OF COMMONS SECOND READING: BAR COUNCIL BRIEFING

1. Among the stated purposes of the Data Protection Bill ('the Bill') are to empower individuals by giving them more control over how their data are used, and to preserve existing tailored exemptions to ensure that UK businesses and organisations can continue to support world leading legal services.<sup>1</sup>
2. The Bar Council has two main concerns about the Bill.

#### **Legal Professional Privilege**

3. First, the Bill will authorise the Information Commissioner's Office (ICO) to access and acquire legally privileged material from a citizen's legal representative in the course of its role as the 'supervisory authority'. Legal Professional Privilege (LPP) is a fundamental human right of the client, not the lawyer, and is protected under Article 6 (the right to a fair trial) and Article 8 (respect for private and family life) of the European Convention on Human Rights. LPP has been protected for centuries in common law as an essential element to the Rule of Law in democratic societies and it should not be over-ridden for this purpose. Instead of giving citizens more control over how their data are used, where legally privileged information is concerned the Bill as drafted will diminish rather than enhance their rights.
4. The increased transparency required by the GDPR will require all lawyers to notify all their clients (past and present) of this risk. It is not a risk that can be avoided by clients for data that has already been provided to their lawyers.
5. The effect of giving the ICO such powers includes: the risk of onward disclosure by the ICO's staff, which is protected as a lawful disclosure by the Bill but which may expose clients to prosecutions or civil claims; a conflict between a lawyer's professional obligation to safeguard the client's right to LPP and her legal obligation to comply with ICO requests for data; a chilling effect on the client's confidence to communicate openly and confidentially with her lawyer; and placing UK legal services providers at a disadvantage to their international competitors.

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<sup>1</sup> [Data Protection Bill: Factsheet – Overview, DCMS](#)

6. In addition, the existing protections against self-incrimination in the Bill are inadequate; for client data to which the ICO will have access, these provide no protection for clients, only for the lawyers.
7. The Bar Council has discussed these matters with the DCMS and a number of probing amendments on this point were debated in the Lords stages of the Bill. Despite these efforts, and the fact that some provisions to protect LPP to a limited extent were drafted into the original version of the Bill, the Bar Council is not reassured that existing protections, or those which might be introduced by regulations or codes of practice, will be adequate. The Bar Council is able to provide relevant draft amendments for consideration by members of the Bill committee.

### **Tailored exemptions**

8. The Bar Council's second concern is the inadequate provision of tailored exemptions that will apply to legal services providers. Their absence threatens to add to the burden, and therefore the cost, of providing legal services.
9. When courts are conducting judicial business and when lawyers are advising and representing clients, they must collect, record, amend, consult and communicate personal data. As drafted, however, the Bill will place onerous and unnecessary obligations on legal representatives in relation to the processing of client data.
10. Whilst there are exemptions from the listed GDPR provisions, these apply only to 'disclosure' which does not adequately cover the range of circumstances in which legal professionals need to process their clients' data.
11. The Bill also places restrictions on the processing of special categories of data, such as data on racial origin, health and sexual orientation. Again, whilst there are derogations, these are not adequate and discussions with the DCMS have not resolved this concern.
12. The Bar Council has prepared draft amendments that will address this concern whilst allowing the Government to meet GDPR obligations.

### **Bar Council**

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