

## **Written evidence submitted by Bates Wells Braithwaite (DPB44)**

### **Submission to the Public Bill Committee**

#### **Data Protection [Lords] Bill**

##### **1. Introduction**

- 1.1 Bates Wells Braithwaite is a UK law firm representing commercial, public and third sector clients. In particular, we are recognised as a leader in advising charity clients.
- 1.2 Our submission is focused on the conditions available for charities to process special category data under the Data Protection Bill. The term “special categories of data” (defined under GDPR Article 9 (1)) is broadly equivalent to “sensitive personal data” under the current Data Protection Act 1998.
- 1.3 In particular, we outline three scenarios – vulnerable individuals and fundraising, safeguarding and provision of care services.

##### **2. Consequences of unlawful processing**

- 2.1 Under the GDPR (and therefore under the Bill) the consequences of unlawful processing are greater than under the Data Protection Act 1998. We note that the potential fines for infringements of Article 9 of the GDPR are the higher level of fines – 20 million Euros or 4% of total worldwide annual turnover (whichever is greater).
- 2.2 As a result of these more significant consequences, organisations understandably seek reassurance that they can process special category data by relying on an available condition. As currently drafted, the Bill sets out a number of limited conditions for processing special category data which may not always cover the circumstances where charities use special category data. This is of concern to charities (in total the charity sector currently represents 0.9% of the UK's GDP and is valued at £45bn per annum to the UK economy) though of course not all charities are affected by this aspect of the GDPR and the Bill.
- 2.3 We wish to draw the Committee's attention to these concerns. Many charities have been collecting and using special category data for several years in order to meet their charitable purposes. The inability to confidently rely on a condition to process special category data could seriously damage the capacity for a charity to provide its services.

##### **3. Vulnerable Individuals and Fundraising**

- 3.1 Parliament required charities, under the Charities (Protection and Social Investment) Act 2016, to implement contractual provisions to govern the treatment of vulnerable people by companies that fundraise on their behalf and, furthermore, to report on how it complied with these obligations in its annual report. In order to comply with this obligation under charity law, charities need to record information about whether a supporter is vulnerable to ensure that it can adequately protect its supporters, comply with relevant law and regulation and

ensure that it is not accepting a donation from someone who lacks capacity to make one. The Fundraising Regulator's Code of Fundraising Practice also requires fundraising charities to take all reasonable steps to treat a donor fairly, which includes considering the needs of a potential donor who may be vulnerable or in vulnerable circumstances.

- 3.2 Given that an assessment that someone is vulnerable can often be linked to their health, we consider the fact that an individual is assessed as vulnerable is likely to be considered health data under the GDPR.
- 3.3 If this data is health data, it falls within the definition of special categories of data. In order to process special category data, charities are required to rely on a condition under Article 9(2) as further detailed in the Bill. However, in such circumstances when an individual is vulnerable they are unlikely to have the capacity to give informed consent<sup>1</sup> so that explicit consent (under Article 9(2) (a)) will not be a suitable condition.
- 3.4 An alternative lawful basis for processing this health data could be Article 9(2) (g) GDPR which permits controllers to process special category data if it is necessary for reasons of substantial public interest. This interest must be proportionate to the aim pursued, respect the essence of the right to data protection and the controller must provide for suitable and specific measures to safeguard the fundamental rights and interests of the individual. The "substantial public interest" in this case is to safeguard and protect vulnerable persons. However, it is not straightforward to fit this scenario under any of the circumstances in Part 2 of Schedule 1 which sets out the substantial public interest conditions. We believe it is important that the Committee clarifies the provision to enable this processing.

#### 4. **Safeguarding**

- 4.1 Charitable and religious organisations have a responsibility to comply with their safeguarding obligations under law and regulation. This can mean, for instance, religious oversight bodies receiving special category data about ministers (who are not employees) or employees which they have a responsibility to disclose to others in line with their safeguarding obligations. Another example is non-religious charities that work with children e.g. sporting charities. These can often have an extensive network of volunteers who run local clubs and societies for children.
- 4.2 Such organisations need reassurance about the ability to continue to collect, process and disclose this special category data in order to comply with safeguarding obligations to protect children and vulnerable adults. There is a concern that the current conditions under Part 2 of Schedule 1 of the Bill do not provide sufficient clarity that they can continue to do so. We should be grateful if the Committee would clarify the provisions.

#### 5. **Provision of care services**

- 5.1 A number of charities provide important services to individuals who have suffered or are suffering from health problems. For instance, charities that provide assistance to individuals who have been diagnosed with cancer or other serious health conditions. Few charities can rely on Article 9 (2) (d). Most, by definition, are not established for a political, philosophical, religious or trade union aim, because these aims are unlikely to meet the test for charitable purposes which are required in order to be registered as a charity.

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<sup>1</sup> Consent must be freely given, specific, informed and unambiguous etc. (Article 4 (11))

5.2 Consequently they either have to rely on explicit consent, the substantial public interest condition or the provision of health and social care condition. Given the complexities surrounding obtaining valid consent as well as the difficulties of demonstrating valid consent if the individual suffers from health problems, consent has real limitations. We should be grateful if the Committee would amend either Paragraph 2 of Part 1 of Schedule 1 (concerning health or social care purposes) or Part 2 of Schedule 1 (substantial public interest conditions) to recognise the important work that charities carry out when providing services and support to these individuals which inevitably involves processing health data, and to ensure that it is clear how they are permitted to continue this work under GDPR.

**Bates Wells Braithwaite**

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