The Bar Council

Mini-Pupils: Implications for your Practice

Purpose:	To address issues arising from mini-pupillages
Scope of application:	All practising barristers
Issued by:	The Ethics Committee
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Status and effect:	**Please see the notice at end of this document. This is not "guidance" for the purposes of the BSB Handbook I6.4.**

Background

A. Mini-pupillages, which are nowhere defined but which for the purposes of this Note cover all forms of work experience offered by the Bar (formal or informal, assessed or unassessed), have for several decades been an established part of the Bar's engagement with those considering, or interested in, a career at the Bar. They perform an important role, not just in enabling those with a possible or actual interest in a career at the Bar to experience practice at first hand, but also as part of the Bar's efforts to increase equality and diversity within the profession, and to improve the accessibility of a career at the Bar, particularly to those from less advantaged groups within society[1].

B. Mini-pupillages give rise to some potential ethical and legal issues for barristers and their Chambers. The Bar Council is not aware that these issues have given rise to any problems in practice, but it is right that you should be reminded of them in the light of the ever-increasing use of electronic communications and documents, new practices in the use of contractual terms, and the requirements of the BSB Handbook.

[1] The Bar Council includes in this description schemes such as those run in partnership with the Social Mobility Foundation.

What are mini-pupillages?

C. The term "mini-pupillage" may be applied to a variety of arrangements. Often, the term will refer to students in higher or further education spending a few days, a week, or more in Chambers, but it may also apply to others such as those still at school[2]. For the purposes of this document, mini-pupillages are not considered distinct from work experience arrangements under another name.

D. The main aim of most mini-pupillages is to provide experience of the work of a barrister, to enable mini-pupils to decide whether to pursue a career at the Bar.

Issues to be considered

E. If you or your Chambers are to take a mini-pupil, then you will need to consider the following issues:

(1) Confidentiality
(2) Data protection

and to decide how to manage the risks to which each may give rise in your own practice. In some contexts this will require you to obtain an understanding of your client own understanding/wishes, and the extent to which your mini-pupils can be relied upon to respect client confidentiality and data protection obligations.

F. In considering these issues, you should remember that mini-pupils, unlike pupils, will not usually be subject to the Code of Conduct in the BSB Handbook, or to any other professional obligations.

G. The Bar Council hopes and anticipates that a considered, structured approach to mini-pupillages should lead to their continuing to be available and continuing to perform their important role. It encourages you and your Chambers to develop an approach that enables you to continue to comply with your obligations in a practical and efficient way. Most Chambers have a policy specific to mini-pupillages and you should look to see if your Chambers has such a policy.

[2] Additional considerations relevant to the case of student placements are set out in the Bar Council's note on Confidentiality and Data Protection Issues with regard to Student Placements

1. Confidentiality

(a) The starting point

1.1 Every barrister owes a core duty (CD6) to keep the affairs of each client confidential.

1.2 Rule C15.5 expands on this by providing that your core duties include an obligation to "*protect the confidentiality of each client's affairs, except for such disclosures as are required or permitted by law or to which your client gives informed consent*".

1.3 The duty of confidentiality also arises as a matter of law.

(b) The general legal position on disclosure of confidential information to mini-pupils

1.4 The prudent approach will be to obtain informed consent from your professional or public access client to the disclosure of confidential information to mini-pupils as a matter of course. This may most conveniently be done in your contractual terms or terms of acceptance of instructions, but can also be done at a later stage. Contractual terms and the obtaining of consent are considered in sections 1(c)(d)(e) below.

1.5 If the terms of your contract or instructions do not deal with this, then the question of whether (in the absence of explicit consent) allowing a mini-pupil to read papers or to listen in to discussions would be a breach of confidence is a question of law. The Bar Council is not aware of any authority on the issue.

1.6 The Bar Council's own view is as follows, but it remains to be seen whether the courts will agree with it:

(a) The courts are likely to hold that you may disclose confidential (including privileged) information to a mini-pupil without being in breach of your duties of confidence if:

(i) the mini-pupil is subject to an obligation to maintain confidentiality similar to your own; and

(ii) you reasonably believe that the mini-pupil fully understands that obligation, and will comply with it.

(b) However, there may be something in the particular circumstances of a case (e.g. a term of your contract with your professional or public access client, or

particular instructions) which might prevent disclosure, or restrict the information that can properly be disclosed.

1.7 In forming this view, the Bar Council has taken account of its belief that the mini-pupillage system is a matter of common knowledge among professional clients, and that they can be expected to be aware of it. They are well able to propose any specific contractual terms that they or the lay client might wish to include in their contract with you, or to give clear instructions, to prevent or restrict disclosure of confidential material to mini-pupils.

1.8 Public access clients may be less aware of the mini-pupillage system *per se*; but it is not dissimilar to internships and work experience offered in many professions and businesses, the existence of which the Bar Council also regards as common knowledge. Public access clients and lay clients ought therefore to anticipate the possibility that those undertaking work experience may be involved in a barrister's work.

1.9 Accordingly, this different degree of knowledge on the part of public access clients will not necessarily mean that you cannot disclose confidential information to mini-pupils in a public access case, but it would be sensible to cater for such disclosure in your client care letter in any event: see further below.

1.10 You should however bear in mind that you could be held personally liable for any breach of confidence committed by a mini-pupil, even if the disclosure by you to the mini-pupil was permitted.

(c) <u>The terms of your contract or instructions</u>

1.11 As noted above, the terms of your contracts or instructions, or the terms on which you accept instructions, may have a bearing on the extent of your duties of confidence. They may make these duties stricter than would otherwise be the case, or they may allow you to make certain types of disclosures.

1.12 There may also be something else in the terms or nature of the relationship with a particular professional or lay client which affects the position.

(d) <u>Examples of standard terms</u>

The Standard Conditions of Contract for the Supply of Legal Services by Barristers to Authorised Persons 2012 (Updated for the UK GDPR in 2018, and to refer to the Money Laundering Regulations in 2020)

1.13 These terms make express provision for the position of mini-pupils.

1.14 Clause 5.1 makes general provision, as follows:

> "5.1 The Barrister will keep confidential all information provided to him in connection with the Case unless:
> 5.1.1 he is authorised by the Authorised Person or the Lay Client to disclose it;
> 5.1.2 the information is in or comes into the public domain without any breach of confidentiality on the part of the Barrister; or
> 5.1.3 he is required or permitted to disclose it by law, or by any regulatory or fiscal authorities, in which case, to the extent that he is permitted to do so, he will endeavour to give the Authorised Person and/or the Lay Client as much advance notice as possible and permitted of any such required disclosure. "

1.15 Clause 5.3 then deals with the position of mini-pupils (and pupils), in the following terms:

> "Unless the Authorised Person expressly informs the Barrister to the contrary in advance in writing, the Barrister may allow the Instructions to be reviewed by another barrister or by a pupil (including a vacation pupil or mini-pupil) in Chambers, on terms that that other barrister or pupil complies with clause 5.1."

1.16 These are terms to be entered into with your professional client. But you may well feel able to rely on the professional client to have explained their implications to the lay client. This will be a matter for you to decide in each case, but the Bar Council would ordinarily expect you to be able to do so.

1.17 Accordingly these terms should allow you to disclose confidential information to a mini-pupil, so long as the mini-pupil is subject to an obligation in the terms of clause 5.1.

The COMBAR/CLLS terms (version 3, 27.4.18)

1.18 Clause 10.2(e) permits you to disclose Information (defined in clause 10.1) to a pupil or mini-pupil, but clause 10.3 stipulates that you will be responsible if the pupil or mini-pupil fails to keep that Information confidential. As the COMBAR guidance to these terms points out (at paragraph 65), this is a strict liability provision, although it also states that Bar Mutual Indemnity Fund Ltd ("BMIF") has confirmed that cover will be available for that liability under the standard BMIF terms.

1.19 However, as stated in paragraph 66 of the COMBAR guidance, this permission to disclose does not cover "secondees and interns" who are not mini-pupils. If you adopt COMBAR/CLLS terms, therefore, you should ensure that you do not disclose any 'Information' to anyone within this description. Whilst the Bar Council would understand the term "mini-pupil" to cover all work experience arrangements (as

indicated earlier at paragraph C), it cannot advise (never mind give a definitive view) on the meaning of "secondees and interns" as used in COMBAR/CLLS contracts, or on where the boundary lies between mini-pupillages and secondments/internships. You should accordingly be alert to any situation involving, potentially, a "secondee" or "intern".

1.20 These are again terms to be entered into with your professional client. But you should, ordinarily, feel able to rely on the professional client as giving necessary informed consent on behalf of the lay client.

The BSB's Model Public Access Client Care Letters

1.21 These make no reference to mini-pupils.

1.22 It is unclear whether disclosure to mini-pupils would be permissible under the terms of a letter in the form of one of these models without more, so you would be wise to consider adding a specific provision allowing you to share confidential information with mini-pupils (and pupils) on terms requiring them to maintain the client's confidentiality.

1.23 You should bear in mind that your public access client may not understand legal terminology. Take care to ensure that any permission to share confidential information with mini-pupils is expressed in plain language.

The Bar Council's Licensed Access Terms of Work Template

1.24 The Bar Council has provided a template for terms of work to be agreed with a licensed access client. It is not obligatory to use the template. If used, the suggested terms will need to be adapted to the particular agreement made with the licensed access client. But you should note the following in Clause 12 of the template:

> "Unless the licensed access client expressly informs the barrister to the contrary in advance in writing, the barrister may allow the Instructions to be reviewed by another barrister or by a pupil (including a vacation pupil or mini-pupil) in chambers, on terms that that other barrister or pupil complies with the duty of confidentiality set out above."

1.25 If agreed, those words should permit you to share confidential information with mini-pupils (and pupils), on terms requiring them also to maintain confidentiality.

1.26 These are again terms to be entered into with your licensed access client. If there is a remoter lay client on whose behalf the licensed access client acts, you will

need to make a judgment as to whether you can rely on the licensed access client as giving necessary informed consent on behalf of the lay client.

(e) Obtaining client consent after instructions have been accepted

1.27 You can of course always seek express consent at a later stage from your professional, public access, licensed access or lay client to the disclosure of confidential information to a mini-pupil.

1.28 It is likely that your clients will be relying on your judgement that the mini-pupil is trustworthy. See section 1.(g) below.

(f) Confidentiality undertakings from mini-pupils

1.29 For many years now there has been a practice (believed to have originated in advice issued by the Bar Council in the 1990s) of requiring mini-pupils to sign confidentiality undertakings, so as to provide some assurance that they understand the importance and effect of their obligations of confidence, before allowing them see or hear any confidential or privileged information[3].

1.30 This practice should continue, and should be implemented in every case, even where the terms of your contract or acceptance of instructions would permit you expressly to disclose confidential information to mini-pupils[4].

1.31 For this purpose, you should take reasonable steps to ensure that your Chambers have a system in place for obtaining and preserving records of these undertakings. Your obligations under the BSB Handbook are likely to require you to do this (subject to rC90). If you or your Chambers have not yet introduced such a system, you/ it should do so now.

[3] The Bar Council believes that the form of wording proposed in the 1990s was along the following lines: "In consideration of the members of [X] Chambers [at X] allowing me to do a mini-pupillage/work experience in Chambers, I undertake to all Members of Chambers that I will maintain absolute confidentiality over all matters I learn from reading papers, attending conferences, discussing cases with members of Chambers and attending private court hearings or otherwise." You could add to this negative undertakings not to use any information except for the purpose of the mini-pupillage and not to disclose it to anyone or in any way. You might also want to use plainer language (e.g. "keep secret" rather than "maintain absolute confidentiality").

[4] It is difficult to see circumstances in which it would be permissible or appropriate to include a contractual term which allowed this to be done without placing an express obligation of confidentiality on mini-pupils.

1.32 Any confidentiality undertaking should extend to all confidential information that a mini-pupil may hear or see, as well as any confidential material that they may read.

1.33 It would be wise to provide a copy of the signed confidentiality undertaking to each mini-pupil. The originals should be retained by you or your Chambers.

(g) Mini-pupils' understanding of duties of confidence

1.34 In addition to obtaining a confidentiality undertaking, you should also ensure that the mini-pupil understands what it means, and will comply with it.

1.35 This involves several elements.

1.36 The first element is an explanation of the nature of confidentiality, and its critical importance in the lawyer-client relationship. Mini-pupils may have little real awareness of these things, or of the seriousness of the duty of confidence. For example, mini-pupils may not realise that telling friends or family about things they have read and heard would be a breach of the undertaking; or that it will make no difference that they asked their friends or family to keep secret what they were told. Similarly, they may not appreciate the risk of inadvertent breaches of confidence in their use of social media.

1.37 The second element is to explain the extent of what may be confidential. You should ensure that mini-pupils understand that confidentiality can extend not just to written information but also to what they hear and see: for example, in conference or consultation, or in discussions with lay or professional clients at court.

1.38 The third element is to reach a judgement about each individual mini-pupil as to whether it is appropriate to disclose confidential information to them. You should consider the age and degree of maturity and responsibility of each mini-pupil, to reach a judgement as to whether the mini-pupil can properly be trusted to maintain confidentiality.

1.39 If there is a real doubt on the matter, you should not take a risk. If you do have doubts, that may in some cases mean declining to take on the mini-pupil: it may not be practicable to avoid a mini-pupil being exposed to at least some confidential information. But other measures may be possible: for example, restricting a mini-pupil to watching members of Chambers in open court, and avoiding any confidential discussions in their presence.

1.40 In cases of particular sensitivity, or with clients who are particularly difficult to deal with, or distrustful of lawyers or the legal system, or where a case involves a

difficult litigant in person, you may in any event decide that the sharing of confidential information with a mini-pupil would be unwise, even if otherwise permissible.

1.41 Note also that there are particular practical and legal obstacles in the way of enforcing obligations of confidence against those who are under the age of 18. See the Bar Council's separate note on Confidentiality and Data Protection Issues with regard to Student Placements.

2. Data Protection

2.1 Data protection law raises different issues. This is not the place for a detailed exposition of your legal duties under data protection law, but the following may assist you in deciding what you need to consider in relation to mini-pupils, and how to manage the risks that a mini-pupillage can pose in relation to the handling of personal data.

(a) Introduction to the legal position

2.2 Every self-employed practising barrister is a data controller under the UK GDPR[5] and the Data Protection Act 2018 ("DPA 2018"), and thus obliged to observe data protection principles in relation to all personal data held.

2.3 Under the UK GDPR personal data means any information capable of being related to an identified or identifiable natural person (a 'data subject'). An identifiable person is one who can be identified, directly or indirectly, from the data; such as by reference to a name, an identification number, location data, an online identifier or to one or more other factors specific to the physical, physiological, genetic, mental, economic or cultural, or social identity of that natural person.

2.4 The circumstances in which you will be able to use such data or disclose it to anyone else, including to a mini-pupil, are restricted as set out in the UK GDPR and the DPA 2018. The UK GDPR imposes obligations on data controllers under the following broad headings:

(i) The principle of accountability – data controllers are responsible for, and must be able to demonstrate compliance with, data protection obligations.

[5] The General Data Protection Regulation. Reference here is to the version of that Regulation retained in English law (UK GDPR): https://www.legislation.gov.uk/eur/2016/679/contents

(ii) The principle of transparency – personal data must be processed in a transparent manner, with data subjects being notified (where required) of the processing of their data.

(iii) The principle of data minimisation – there are strict rules concerning the extent of personal data that may be kept, and the period of time for which it may be kept.

(iv) The requirement of data breach notification – subject to limited exceptions, data breaches must be notified to the supervisory authority and to data subjects.

2.5 Much more detail about the applicability of the UK GDPR to barristers and their Chambers is contained in the Bar Council's UK GDPR Guide at https://www.barcouncilethics.co.uk/documents/gdpr-guide-barristers-Chambers/, and guidance is also available on the Information Commissioner's website at https://ico.org.uk. Some points relevant to the particular context of mini-pupillages are discussed below.

2.6 Your obligations as a data controller apply to all electronic records you hold which contain personal data, and also to any paper records containing such data stored in a filing or other system of sufficient sophistication to provide a similar measure of accessibility to a computerised filing system. If paper records are printouts of electronically-held documents (which would include e-mails and attachments to e-mails), they must be treated as electronic records.

2.7 As a controller of personal data, any processing of it by you or under your responsibility must be carried out in accordance with the UK GDPR and the DPA 2018. The definition of processing in Article 4(2) UK GDPR covers "any operation or set of operations which is performed on personal data, whether or not by automated means, such as …consultation, use, disclosure by transmission, dissemination or otherwise making available". This is very wide. Allowing a mini-pupil to read a document which you have received electronically (or which is held in a filing system providing similar accessibility) and which contains personal data will involve processing by you of that personal data, for the purposes of the UK GDPR and DPA.

(b) <u>The data controller – processor agreement</u>

2.8 However, allowing a mini-pupil to read a document which you have received electronically (or which is held in a filing system providing similar accessibility) and which contains personal data will arguably also involve processing *by him or her*, on your behalf, of that personal data. The Bar Council's Information Technology Panel takes the view that it does. If so, the mini-pupil will himself or herself be a processor of personal data for the purposes of the UK GDPR and DPA. Article 28(3) UK GDPR

requires that any processing by a data processor on behalf of the data controller must be governed by a written contract stipulating certain matters.

2.9 It will be necessary therefore, at the outset of each mini-pupillage (or at any rate before a mini-pupil is allowed to read such a document), that he or she should have been signed a contract with you (and/or with all members of your Chambers) which complies with Article 28(3). The Bar Council's Information Technology Panel has supplied a helpful precedent for such an agreement, tailored for use with mini-pupils, at Controller-Processor Agreements under the GDPR. You are advised to use that precedent (adapted appropriately, as may be necessary) in your Chambers.

2.10 A data controller-processor agreement is required in every case where you will or may allow a mini-pupil to read an electronic (or similarly accessible) document containing personal data, even if you have already given a sufficient fair processing notification that your processing of personal data may include disclosure to mini-pupils (see paragraph 2.21 to 2.24 below).

2.11 You should therefore take steps to ensure that your Chambers has a system in place for getting mini-pupils to sign such agreements, and for preserving the signed agreements. Your obligations under the BSB Handbook are likely to require you to do this (subject to rC90). If you or your Chambers have not yet introduced such a system, you/ it should do so now.

2.12 You will also have to decide whether each particular mini-pupil can be relied upon to observe the terms of the data controller-processor agreement – e.g. about deleting or returning all personal data received during the mini-pupillage at its end. The guidance given at paragraphs 1.34 to 1.41 above should be reviewed and applied in this context also. If a mini-pupil cannot properly be trusted to maintain confidentiality, it is unlikely that he or she can be trusted to comply with a data controller-processor agreement, and you should not share any personal data with that mini-pupil.

2.13 As with confidentiality undertakings, it would be wise to provide a copy of the signed data controller-processor agreement to each mini-pupil. The original should be retained by you or your Chambers.

(c) The basis of your processing

2.14 Article 5(1) UK GDPR requires, amongst other things, that personal data be processed lawfully, fairly and in a transparent manner, and either with appropriate

and sufficient consent or for specific, explicit and legitimate purposes[6]. You will need to establish (and be prepared to demonstrate) the ground(s) for your/ your mini-pupil's processing.

(d) Processing your own client's "ordinary" personal data (i.e. data not in the UK GDPR Article 9 special categories and not relating to criminal convictions and offences or related security measures)

2.15 The UK GDPR contains different requirements for the processing of "ordinary" personal data on the one hand and for the processing of personal data in the Article 9 special categories, or which relate to criminal convictions and offences or related security measures, (formerly known as "sensitive personal data") on the other hand. (The special categories personal data are dealt with below, at paragraph 2.26 to 2.32 and 2.35 to 2.36).

The basis for processing

2.16 In the case of "ordinary" personal data relating to your client , you must be able to justify your processing, including any by way of disclosure to a mini-pupil, by reference to one of the purposes set out in Articles 6(1)(b)-(f) UK GDPR; or else you must have obtained from your client informed consent to that processing, evidenced "by a statement or by a clear affirmative action" in accordance with Article 6(1)(a) UK GDPR.

2.17 The Article 6 bases for processing likely to be relevant in this context are:

(a) consent of the data subject (Article 6(1)(a) UK GDPR); or

(b) that processing is "necessary for the purposes of legitimate interests pursued by the controller or by a third party". Your legitimate interests and those of the mini-pupil may therefore be relied on to justify the processing/ disclosure, unless "such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child" (Article 6(1)(f) UK GDPR).

2.18 Concerning consent, where you are acting on a public access basis, you will be in a position to obtain your client's consent directly (but see para. 1.23 above). Where you have a professional client, it may be more difficult for you to obtain consent directly from your lay client: see further at paragraphs 2.24, 2.25 and 2.31 below.

[6] Disclosure of personal data in breach of confidence will automatically be a breach of the UK GDPR, because it will have been unlawful.

2.19 Concerning "legitimate interests", the Bar Council cannot advise you on this potential basis for disclosing personal data to a mini-pupil, and you must take your own view in the particular case. Prior to making any disclosure on this basis, you should first seek to balance your interests and those of your mini-pupil against the interests or fundamental rights and freedoms of the data subject. You should consider any potential impact of disclosure on the data subject, particularly if he or she is a child.

2.20 Having said that, the view and expectation of the Bar Council is that, whilst greater care and judgement may be called for in some particular cases, disclosure of "ordinary" personal data to a mini-pupil will usually be permissible on this "legitimate interests" basis, taking account of the nature of the data likely to be disclosed, the importance of mini-pupillages for the profession's aims in the areas of equality, diversity and social mobility, as well as their importance in enabling mini-pupils to make more informed career choices.

The principle of transparency. Fair processing notifications.

2.21 Processing must be transparent, which means that data subjects must, in general, be given appropriate notice in advance of the types of processing of their data that a data controller may undertake. The information required to be given to data subjects is set out either in Article 13 (processing of personal data obtained from the data subject) or in Article 14 (processing of personal data not obtained from the data subject).

2.22 In the present context, Article 13 specifies what information must be given to your instructing solicitor or direct access client concerning any intended processing of their own personal data (supplied by them). Article 14 specifies the information to be given to others, whose personal data may or will be processed; and also details (in Article 14(5)) the circumstances in which such information need not be given. See further paragraph 2.38 below. There is some question as to whether Article 13 or Article 14 applies in relation to your lay client's personal data, if that data has been supplied to you by or through a professional client. The safe view (and the view taken by the Bar Council's Information Technology Panel) is that Article 14 applies.

2.23 Whether Article 13 or 14 applies, disclosure of a client's "ordinary" personal data to a mini-pupil will only be permissible if notice of that intended or contemplated disclosure (to a mini-pupil) has been brought to the attention of the client beforehand. This can be achieved by including the information required by these Articles about that processing in your contract, or in the communication of terms of acceptance of instructions. Alternatively, and probably more conveniently, the contract or terms of acceptance may refer to such information on your Chambers website. This information is commonly referred to as a "Privacy Policy" or "GDPR Notice". It is

usually convenient to combine the information requirements of both Article 13 and Article 14 in a single Policy/ Notice.

2.24 In order for fair processing notifications (under Articles 13 and 14) to be effective, the information (or its existence on a website) needs to be brought to the attention of the lay or public access client. This is an important part of obtaining their informed consent to any disclosure to a mini-pupil (if you consider consent is required). In a public access case, bringing the information to the attention of the client should not to cause you any difficulty; but, where you have a professional client, some more thought and effort may be needed to ensure the information does come to the attention of the lay client (cf. paragraph 2.18 above). You will need to take a view on the steps you should take to satisfy yourself that the necessary notification has been given, and (if not relying on the "legitimate interests" basis of processing) that you have your lay client's consent to the disclosure. In general:

(a) Communicating the necessary information directly to your lay client, and seeking their consent to the processing notified (including disclosure to a mini-pupil), would be the ideal from a data protection perspective. But this will often not be practical.

(b) You should however feel able to rely, ordinarily, on a confirmation from your professional client that your lay client has (i) received the notification, and (ii) consents to the processing notified (if you decide that consent is required). However, if you have real doubt about whether your professional client has taken the necessary steps, or whether your lay client has understood the notification, you may need to make further enquiries or take further steps.

(c) Alternatively, to ensure the information reaches your lay client, you might include it (or a reference to your Privacy Policy or GDPR Notice on your Chambers website) in or with the same document which gives notice to your lay client of your Chambers' complaints procedures (as required by the BSB Handbook). (But this will not secure consent, if that is required.)

2.25 You will also need to have procedures in place to ensure that any objection made to any intended or contemplated processing (e.g. disclosure to a mini-pupil) is brought to your attention, because if your client does object it cannot take place.

(e) <u>Processing your own client's personal data in the UK GDPR Article 9 special categories or which relate to criminal convictions and offences or related security measures</u>

2.26 Personal data in the special categories corresponds approximately to "sensitive personal data" as defined in the old Data Protection Act 1998. Under the UK GDPR, it

refers to personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a person, data concerning health, or data concerning a person's sex life or sexual orientation (Article 9(1)).

2.27 Processing of this type of data is prohibited unless a specific condition for its lawfulness is satisfied. In the present context, these are likely to be (1) that the data subject has given explicit consent[7] – Article 9(2)(a) – or (2) that processing is necessary for the establishment, exercise or defence of legal claims – Article 9(2)(f).

2.28 In recent guidance from the ICO the meaning of "legal claims" has been explained, recognising that it includes "processing necessary for obtaining legal advice [or] establishing, exercising or defending legal rights". This means that it is not limited to situations where contentious proceedings are underway or imminent.

2.29 However, disclosure of personal data in the special categories to a mini-pupil is very unlikely to be "necessary for the establishment, exercise or defence of legal claims". If you wish to disclose this sort of data to a mini-pupil, therefore, you will have to have obtained your client's explicit consent.

2.30 Article 10 UK GDPR imposes a prohibition on processing data relating to criminal convictions and offences or related security measures, except where permitted under national law. DPA 2018 Schedule 1 Part 3 specifies the conditions under which such processing is permitted in the UK, including where the data subject has given consent to the processing (para 29) or where it is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or is necessary for the obtaining of legal advice, or is otherwise necessary for the purposes of establishing, exercising or defending legal rights (para 33). Again, the latter is unlikely to be applicable to disclosure to a mini-pupil, so you will have to be satisfied you have your client's consent to such disclosure.

2.31 In a public access case, you will be able to seek explicit consent from your client to the further disclosure of data in the special categories or relating to criminal convictions (but see paragraph 1.23 above). But where you are instructed by a professional client, obtaining explicit consent from your lay client will require more than is suggested in paragraphs 2.24 and 2.25 above. In this case, you will need to be satisfied that the necessary notification of data processing has reached your lay client and that your lay client has given consent, on an informed basis and explicitly, to the disclosure of that particular data to a mini-pupil.

[7] Except where the law provides that consent does not override the prohibition on processing

(f) Processing personal data relating to someone other than your client

2.32 You are likely also to have control over personal data (both ordinary and, potentially, in the special categories/relating to criminal convictions etc.) relating to people other than your client. Such people ("third parties") may include other parties, witnesses and potential witnesses, family members of your client or of another party, and anyone else whose personal data appears in your instructions or in documents supplied as case papers.

2.33 It will be rare for you to be able to obtain consent to disclose to a mini-pupil personal data from any person who is not your client.

2.34 As a result, as regards third parties' "ordinary" personal data (not in the special categories/relating to criminal convictions etc.), you will have to rely, to justify any disclosure to a mini-pupil, only on the "legitimate interests" basis of processing. You will need to have regard to the guidance at paragraphs 2.17(b), 2.19 and 2.20 above.

2.35 As regards personal data in the special categories/ relating to criminal convictions etc, the situation is much more difficult.

(a) Although you yourself may need to process the personal data in order to be able to deal with your instructions – such processing being "necessary for the establishment, exercise or defence of legal claims" – disclosure to a mini-pupil will not be necessary for such purposes.

(b) Therefore, in many categories of case it will be impossible, at least without the third party's explicit consent, to make *any* disclosure of this type of personal data to a mini-pupil (unless, perhaps, the data has already been placed in the public domain as a result of the deliberate actions of that third party – see UK GDPR Article 9.2(e) and DPA 2018 Schedule 1 para 32). This may well mean that it is impossible to involve a mini-pupil fully in some categories of case, and in some individual cases in other categories.

2.36 The areas of practice which are likely to throw up particular difficulties with disclosure to mini-pupils of personal data in the special categories/relating to criminal convictions will include crime, family, immigration, employment, discrimination, mental health, personal injury and clinical negligence. But this cannot be considered an exhaustive list; and such difficulties can arise in any area of practice.

2.37 You should therefore at all times take great care and be fully alert to the possibility that you may be handling third party personal data in the special categories/ relating to criminal convictions etc.; and should avoid its disclosure to a mini-pupil.

Fair processing notifications to third parties.

2.38 If you consider you have a proper basis for disclosing ordinary personal data of third parties to a mini-pupil (under the "legitimate interests" basis), in principle you would still need to deal with the fair processing notification requirement under Article 14 UK GDPR. However, such notification is excused by Article 14(5)(d) where the third party's personal data must remain confidential subject to an obligation of professional secrecy under English law (i.e. is covered by legal professional privilege[8]); and this has been carried further by DPA 2018 Schedule 2 paras 18 and 19, which together disapply relevant provisions of Articles 5, 13, 14 and 15 UK GDPR insofar as personal data consists of: (a) information in respect of which a claim to legal professional privilege could be maintained in legal proceedings, or (b) information in respect of which a duty of confidentiality is owed by a professional legal adviser to a client of the adviser. Since any personal data relating to any third parties in your instructions or case papers will usually be privileged and/or confidential to your client, notification of intended processing to those third parties will ordinarily be excused.

(g) <u>Suggestions for dealing with these data protection issues</u>

2.39 You will need to identify those situations in which you may be disclosing personal data to mini-pupils, particularly personal data in the special categories or relating to criminal convictions and offences etc.

2.40 Court hearings

Attendance by mini-pupils at court hearings themselves will not generally give rise to any difficulty. But discussions which do not take place in court (e.g. with your professional, lay or public access client) could involve some additional disclosure of personal data, and therefore a processing of that data. Where that data in not in the special categories or relating to criminal convictions etc., you may be able to justify the disclosure to a mini-pupil, relying on the "legitimate interests" basis for processing. But you must be careful not to disclose to a mini-pupil any personal data in the special categories/ relating to criminal convictions etc., beyond what has already been said in court.

[8] This is made clear by DPA 2018 Schedule 2 paras 18 and 19, which disapply relevant provisions of Articles 5, 13, 14 and 15 insofar as personal data consists of: (a) information in respect of which a claim to legal professional privilege or, in Scotland, confidentiality of communications, could be maintained in legal proceedings, or (b) information in respect of which a duty of confidentiality is owed by a professional legal adviser to a client of the adviser.

2.41 Reading

You will need to be attentive to the content of any document that you allow a mini-pupil to read. Provided you have given an appropriate fair processing notifications, the mini-pupil will usually be able to see both client and third party "ordinary" personal data, on the basis of client consent (if think you need it and are satisfied you have it) or on the basis of "legitimate interests" (though, as to the latter see paragraphs 2.17(b), 2.19 and 2.20 above). But if the document contains your client's personal data in the special categories/relating to criminal convictions etc. you will need to have obtained your client's informed and explicit consent to its disclosure. Third-party data in the special categories/relating to criminal convictions etc. cannot be disclosed.

2.42 Conferences (and pre-reading)

Where it is proposed that a mini-pupil should attend a conference with your professional, lay or public access client, you should take the opportunity to seek and obtain your lay or public access client's consent to the mini-pupil reading papers before the conference. It will be a courtesy to do so, even if your contract, terms of acceptance of instructions permit disclosure to a mini-pupil and an appropriate fair processing notification has been given. Explicit and informed client consent will however be needed before the mini-pupil can have any access to your client's personal data in the special categories/relating to criminal convictions etc. In cases where third-party data in the special categories/relating to criminal convictions etc. may be relevant, such data cannot be made available to a mini-pupil, either before or at the conference. If third party data in the special categories/relating to criminal convictions etc. is liable to be discussed in the course of the conference, you will have to exclude the mini-pupil from that part of the conference. (In some cases, it may just not be possible for the mini-pupil to be present at all during a conference.)

2.43 Seeking consent.

Whenever disclosure to a mini-pupil would require client consent, and especially where explicit consent is need for disclosure of personal data in the special categories/relating to criminal convictions etc, you should reflect upon whether, in all the circumstances, it will be appropriate to seek it; even if you have given appropriate fair processing notifications. The considerations outlined at paragraph 1.40 are relevant here. With some clients, it may not be appropriate even to try to involve a mini-pupil in their cases.

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