

THE DIGITAL PERSONAL DATA PROTECTION BILL, 2022

Ameen Jauhar
Dhruv Somayajula

BACKGROUND



- 4th iteration of a data protection law in India
- Puttaswamy Judgment (2017)
- Justice Srikrishna Committee
- Personal Data Protection Bill, 2018
- Personal Data Protection Bill, 2019
- JPC's Data Protection Bill, 2021

NOTABLE CHANGES



- Protecting digital personal data only, no sub-classification
- Ambiguity about cross border transfer of personal data
- Omission of data localisation requirements
- Duties of data principal
- Significant dilution of the role of the Data Protection Board transforming it from regulator to quasi judicial tribunal.
- Removing the limited checks on state exemptions.

PRELIMINARY PROVISIONS



- Definitional concerns – public interest (inconsistent, repetitive, redundant), harm defined too narrowly.
- Positives include adherence to linguistic diversity of India, as well as using more progressive pronouns in the drafting of the text.
- Internet and digitalisation of data offer great opportunities but also lead to greater challenges. Recognising this and to maintain focus on increasingly digital nature of interactions, the Bill applies to digital personal data.
- Data Principal and Data Fiduciary defined.

DILUTING PURPOSE LIMITATION AND CONSENT

- Grounds on which personal data can be processed are listed. (Section 5)
- Concerns about lack of purpose specification – lawful purpose is part of the purpose limitation – purpose must be clear and specific and not merely lawful to prevent purpose creep. This specific purpose must be disclosed to the data principal when personal data is to be collected. Further reinforce purpose limitation with mentioning collection limitation on for the clear, specific purpose, to which consent must be acquired.
- Problems with “deemed consent” – aims to be focused on voluntary provision of data but the same does not necessarily translate into consent for data processing. Furthermore, deemed consent seems to do away with the idea of withdrawable consent – in contrast, clause 7 allows for withdrawal of consent whereas clause 8 does not. Significant dilution to the informational autonomy. Clause 8(1).
- Clause 8 (2)-(8) are actually non-consensual data processing in the garb of deemed consent which is an erroneous construction.
- Open –ended avenues for non-consensual processing [employment clause in 8(7)].

OBLIGATIONS OF DATA FIDUCIARIES



- Under Clause 9 (6), storage is permissible for additional “business or legal purposes” which is an ambiguous framing undermining the principle of storage limitation. It is unclear, for instance, if a business interest allows data to be stored beyond purposes which a data principal consented to under clause 7.
- Similarly, it is unclear if this broad stipulation will effectively permit for profit entities to store personal information for longer periods than intended by a data principal.
- Specific obligations for processing children’s data is also a bit problematic – reproduces similar provisions to the PDP 2019 bill and clubs all children into one category of under 18.
- Ideally, age brackets need to be structured, and different obligations should stem for young children or adolescents versus, say teenagers. Also, including parents/guardians as data principals dilutes the autonomy of the child.

EXEMPTIONS FOR DATA PROCESSING (CLAUSE 18)

- Ambiguous wording of Cl 18(1)(c) may allow for private entities to claim exemption by stating their data protection is for detection or prevention of a violation of law. Impermissible and must clarify that such exemption is limited to state actors.
- Confusion in the drafting of Cl. 18(1)(d) – residents abroad for travel can effectively lose data protection under this provision. Also, concerns about adequacy for reciprocal data sharing agreements between India and other countries.
- Further dilution of checks and balances against state's exemptions under Cl. 18(2) – Puttaswamy threshold not met, earlier PDP 2019 iteration of procedural safeguards removed. JPC's recommendation of fair processing not adopted.
- Storage exemption under Cl. 18(4) is too broad and not in conformity with the objectives of the proposed legislation or Puttaswamy's understanding of *privacy by design* which incorporates storage limitation as a principle.

CHAPTER 3: RIGHTS & DUTIES OF DATA PRINCIPAL

- Right to obtain confirmation of processing, summary of personal data and details of third parties with access, but no right to access personal data itself. (Section 12)
- Provision to enable correction, update, completion and erasure of personal data. (Section 13)
- Right to file complaint with data fiduciary and right to file grievance with Data Protection Board. (Section 14)
- Right to nomination in respect of personal data added to preserve post-mortem privacy. (Section 15)
- Concerningly, the Bill sets out duties of Data Principals and imposes penalties for violation of duties. (Section 16)
- Right to portability and right to be forgotten omitted from the Bill.

CHAPTER 5: COMPLIANCE FRAMEWORK



- Composition of Data Protection Board left to rules. (Section 19)
- Data Protection Board given only adjudicatory powers to assess and penalize violations, overlooking necessary functions which may be assigned by the Central Government at a later date. (Section 20)
- The DPB shall be ‘digital by design’, with a digital office and has powers to employ technological measures. (Section 21)
- Only significant violations of the provisions can be penalized under the Bill. (Section 21)
- Voluntary undertaking by data fiduciaries has been permitted at any stage. (Section 24)
- Financial penalty set out within Schedule 1 for violations of the Bill. (Section 25)
- The Bill avoids discussing re-identification of anonymized data.

CHAPTER 6: MISCELLANEOUS

- Power of Central Government to make Rules, remove difficulties in implementation of the Bill and limited power to amend Schedule. (Sections 26,27,28)
- To the extent possible, the provisions of the Bill must be read in conjunction with other sector-specific laws.
- In case of conflict, the provisions of the Bill have an overriding effect. (Section 29)

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THANK YOU

Ameen Jauhar
Dhruv Somayajula