



Presents COMPARATIVE OF THE EARLIER DRAFT
with the

PERSONAL DATA PROTECTION BILL 2019

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EXCALIBURANCY

THE PERSONAL DATA PROTECTION BILL 2019

Recently, in the Lower House of the Parliament (Lok Sabha) the following **Personal Data Protection Bill, 2019** was introduced. It was decided that the same be put before a Joint Select Committee to further enhance the bill. The Committee will comprise of members of both houses of Parliament.

The preamble of the Bill reads as

1. to provide for protection of the privacy of individuals relating to their personal data,
2. specify the flow and usage of personal data,
3. create a relationship of trust between persons and entities processing the personal data,
4. protect the rights of individuals whose personal data are processed,
5. to create a framework for organisational and technical measures in processing of data,
6. laying down norms for social media intermediary,
7. cross-border transfer, accountability of entities processing personal data,
8. remedies for unauthorised and harmful processing, and
9. to establish a Data Protection Authority of India for the said purposes and
10. for matters connected therewith or incidental thereto.

WHEREAS the right to privacy is a fundamental right and it is necessary to protect personal data as an essential facet of informational privacy;

AND WHEREAS the growth of the digital economy has expanded the use of data as a critical means of communication between persons;

LEGEND	
YELLOW	Additions from the Old Draft
GREEN	Reorganized from old draft
BLUE	Deletions from the Old Draft

BASE TERMS

1. "data fiduciary" means any person, including the State, a company, any juristic entity or any individual who alone or in conjunction with others determines the purpose and means of processing of personal data;
2. "data principal" means the natural person to whom the personal data relates;
3. "data processor" means any person, including the State, a company, any juristic entity or any individual, who processes personal data on behalf of a data fiduciary;
4. "processing" in relation to personal data, means an operation or set of operations performed on personal data, and may include operations such as collection, recording, organisation, structuring, storage, adaptation, alteration, retrieval, use, alignment or combination, indexing, disclosure by transmission, dissemination or otherwise making available, restriction, erasure or destruction;

SUMMARY

Summary of some points for consideration:

A. DEFINITION CHANGES

1. Reference to Aadhaar removed
2. "anonymisation" in relation to personal data, means such irreversible process of transforming or converting personal data to a form in which a data principal cannot be identified, **which meets the standards of irreversibility specified by the Authority;**

Anonymized data out of scope of PDPB, 2019 barring the exception in 91 (2) which talks of the **“Central Government in consultation with the Authority granting permission to provide personal data anonymised or other non-personal data to enable better targeting of delivery of services or formulation of evidence based policies by the Government..”**

3. "data processor" means any person, including the State, a company, any juristic entity or any individual, who processes personal data on behalf of a data fiduciary **but does not include an employee of the data fiduciary;**

4. "personal data" means data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, **whether online or offline**, or any combination of such features with any other information, **and shall include any inference drawn from such data for the purpose of profiling;**
5. **Passwords** has been deleted from the definition of Sensitive Personal Data
6. The earlier draft had envisaged the Authority making many of the operational rules. The term "Regulations" has replaced in many places, wordings to the effect of "any other information as may be specified by the Authority".

B. Added Definitions/Concepts

- a. **"in writing"** includes any communication in electronic format as defined in clause (r) of sub-section (1) of section 2 of the Information Technology Act, 2000;
- b. **"data auditor"** means an independent data auditor referred to in section 29;
- c. **"regulations"** means the regulations made by the Authority under this Act;
- d. a **"social media intermediary"** is an intermediary who primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services, but shall not include intermediaries which primarily:-
 - (a) enable commercial or business-oriented transactions;
 - (b) provide access to the Internet;
 - (c) in the nature of search-engines, on-line encyclopaedias, e-mail services or online storage services.
- e. **"consent manager"** is a data fiduciary which enables a data principal to gain, withdraw, review and manage his consent through an accessible, transparent and interoperable platform.
- f. **Sandbox** is a concept mentioned in Clause 40 which is used in the Security filed has been transposed here to provide fillip to innovation. It reads as **"The Authority shall, for the purposes of encouraging innovation in artificial**

intelligence, machine-learning or any other emerging technology in public interest, create a Sandbox”.

C. The bill has an extra territorial jurisdiction and extends to both public as well as private sector.

D. Applicability (Reorganized)

- 1.** Where Personal Data is collected, disclosed, shared or otherwise processed within the territory of India
- 2.** Where Processing is happening in India, by State, Indian Company or person
- 3.** Where Processing is done by Data Fiduciaries/processors not in India, if such processing is
 - a.** in connection with any business carried on in India,
 - b.** or any systematic activity of offering goods or services to data principals within the territory of India; or
 - c.** in connection with any activity which involves profiling of data principals within the territory of India

E. In terms of types of personal data, the **categorization** is three fold:

- 1.** There will be a category “Critical Personal Data” which will be defined by the Government. Critical Personal Data which will be completely restricted barring some rare exception that is related to Health Services or Emergency Services.
- 2.** Second will be Sensitive Personal Data which would have some further exception to move cross border.

This will need:

- (a) EXPLICIT CONSENT + CONTRACT/INTRA-GROUP SCHEME** approved by Authority as a baseline for transfer
- (b) EXPLICIT CONSENT + ADEQUACY** given to a Country/Class of entities in a Country/International Organization
- (c) EXPLICIT CONSENT + specific purpose** defined by Authority

3. Third will be the residual general Personal data which can be free to share such as social media data.

The contracts or documentation for transfer of such personal data comes from inference here rather than laid out position. **Clause 41** detailing the conditions for cross border transfers of the earlier draft removed for this “general” personal data.

F. Harm

The proposed bill talks about the concept of Harm, which means that if a Data Principal is aggrieved the law will protect them. The concept of Significant Harm is used in case of Sensitive Personal Data.

"harm" includes—

- i. bodily or mental injury;
- ii. loss, distortion or theft of identity;
- iii. financial loss or loss of property;
- iv. loss of reputation or humiliation;
- v. loss of employment;
- vi. any discriminatory treatment;
- vii. any subjection to blackmail or extortion;
- viii. any denial or withdrawal of a service, benefit or good resulting from an evaluative decision about the data principal;
- ix. any restriction placed or suffered directly or indirectly on speech, movement or any other action arising out of a fear of being observed or surveilled;
- x. any observation or surveillance that is not reasonably expected by the data principal;

"significant harm" means harm that has an **aggravated effect** having regard to the nature of the personal data being processed, the impact, continuity, persistence or irreversibility of the harm;

- G. In the **Right to Confirmation and Access** the bill has added the concept of allowing the **Data Principal to Access the identities of the data fiduciaries with whom his personal data has been shared by any data fiduciary together with the categories of personal data shared with them.**
- H. The **Right to Erasure** has been added to the new draft. So from a Company stand Point **“the erasure of personal data which is no longer necessary for the purpose for which it was processed”** has to be done.

I. Processing Mandates

1. Processing of Data on the basis of Consent
2. Processing of Data without Consent **(Organized Differently from the Old Draft)**
 - (a) for the **performance of any function of the State authorised by law** for—
 - i. the provision of any service or benefit to the data principal from the State; or
 - ii. the issuance of any certification, licence or permit for any action or activity of the data principal by the State;
 - (b) **under any law** for the time being in force made by the Parliament or any State Legislature; or
 - (c) for compliance with any **order or judgment** of any Court or Tribunal in India;
 - (d) to respond to any **medical emergency** involving a threat to the life or a severe threat to the health of the data principal or any other individual;
 - (e) to undertake any measure to provide **medical treatment or health services** to any individual during an epidemic, outbreak of disease or **any other threat to public health**; or
 - (f) to undertake any measure to ensure safety of, or provide assistance or services to, any individual during any disaster or any **breakdown of public order**.
3. Processing for the purpose related to employment
4. Processing for reasonable purpose

In the definition of “Reasonable Purposes without obtaining Consent” in Section 14 they have further defined in the inclusive clause “**the operation of search engines**” being one of the “Reasonable Purposes”.

- J. In the concept of Privacy by Design a procedure to submit the data fiduciary’s **Privacy By Design Policy** and get it certified and published on the website has been detailed.

- K.** In Clause 10 related to Accountability provision of demonstration obligation of the data fiduciary has been done away with.

The data fiduciary should be able to demonstrate that any processing undertaken by it or on its behalf is in accordance with the provisions of this Act.

- L.** In the section related to **withdrawal of consent** (Section 11 (6)) the clause reads as:

Where the data principal withdraws his consent from the processing of any personal data **without any valid reason**, all legal consequences for the effects of such withdrawal shall be borne by such data principal which has extended it from

*“Where the data principal withdraws consent for the processing of any personal data **necessary for the performance of a contract to which the data principal is a party**, all legal consequences for the effects of such withdrawal shall be borne by the data principal”.*

M. Personal Data Breach

In Clause 25 the word **“Action”** has been used in place of **“Measures”**

“....The notice referred to in sub-section (1) shall include the following particulars, namely:—

- (a) nature of personal data which is the subject-matter of the breach;
- (b) number of data principals affected by the breach;
- (c) possible consequences of the breach; and
- (d) **action** being taken by the data fiduciary to remedy the breach.

N. Penalties & Offences

1. The penalty for Companies remains same at **2-4% of total worldwide turnover or Rs 5-15 Crores whichever is higher. In case of contravention of any provision by State, penalty shall not exceed 5 crore under sub-section (1) and 15 crore under sub-section (2)**
2. The new Bill credits the sums realised by way of penalties to the Consolidated Fund of India. **(S. 66(2))**

Please Note: *This comparative is not a legal or professional advise but is intended to be a comparative of the two versions of the personal data protection law.*

ABOUT EXCALIBURANCY

Excaliburancy is a client centric, high engagement and quality driven **techno-legal organization**. We provide strategic and cutting edge techno-legal **advisory and consultancy** in the niche domain areas of **Data Protection, Cyber Security and Intellectual Property Rights**. We assist clients to protect their business while being compliant with laws. All services from **Excaliburancy** leverage our experience of changing and altering business processes.

If you want more clarification about the Bill for your business, please feel free to contact us. Excaliburancy will be happy to help you guide to comply with the Data Protection Bill.

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THANK YOU!

