

## **ANNEX 1: COMMENTS ON THE PROPOSED DATA PROTECTION BILL, 2018**

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We have reviewed the proposed privacy and data protection policy and bill, 2018 and have come up with the following observations which we are hopeful will be considered.

<b>Clause/ Provision</b>	<b>Recommendation</b>
Definitions Clause	<p>The definition of “Data Controller” be modified to include private entities.</p> <p>We propose that the definition section include definitions of the following terms;</p> <ul style="list-style-type: none"> <li>- Biometric data</li> <li>- Data Protection officer referred to in section 22.</li> </ul> <p>We therefore propose the following definition of biometric data</p> <p>“biometric data” means personal data resulting from specific technical processing relating to physical, physiological or behavioural characterisation including blood typing, fingerprinting, deoxyribonucleic acid analysis, retinal scanning and voice recognition</p>
The Term “Prescribed “	<p>The phrase “as may be prescribed” has been used through the bill.</p> <p>We therefore propose that we incorporate a new section which the drafters can decided which states the following: -</p> <p>The Data Commissioner shall come up with guidelines to give clarity to the following items in the bill: -</p> <ul style="list-style-type: none"> <li>- The prescribed period referred to in Section 18(2)</li> <li>- The specific fees to be levied referred to in Section 19 (4)</li> <li>- The prescribed manner referred to in Section 36</li> <li>- The prescribed period referred to in Section 38</li> <li>- The prescribed manner referred to in Section 38(4)</li> </ul>
Section 16(2)	<p>We propose that at this point of introduction of the possibility of joint registration, it would be prudent to explain what joint registration means. We note that it may be interpreted to mean joint registration as a Data processor and data controller or a joint Data Controllers handling Data Control for more than one entity.</p>
Section 17(7)	<p>We note that this clause is intended to give penalties for non-compliance with sub section 5 and not subsection 6 which deals with non-compliance rectification of information provided by data controller at the point of registration. This needs to be amended accordingly.</p> <p>We note further the penalty under this subsection is much higher</p>

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	<p>than the one for giving wrong information at the point of registration. It is our opinion that the penalty is not proportionate and should be proportionate and similar.</p>
Section 18 (2)	<p>We propose that the timelines within which application for renewal of the registration certificate should be renewed be expressly stated.</p> <p>We propose that the subsection should be amended to read as follows                      “the holder of a registration certificate shall apply for the renewal of the certificate two month before expiry of the certificate”</p> <p>Alternatively as stated earlier in our submission, the Data Commisioner be made to come up with guidelines covering all aspects which are yet to be specified or prescribed.</p>
Section 19	<p>Our feedback is that the subsection should specify where The Register will be made available as well as the specific amount to be paid for a certified copy of an entry in the register and that the term may be amended from time to time.</p>
Section 20	<p>We recommend that the word “on issuance” should be replaced with the word “upon issuance”</p>
Section 21	<p>Our view is that the matter of periodical audits should be made mandatory. We also think that the use of the word “periodic” is vague and leaves the term free for various interpretations.</p> <p>We propose that the clause be amended to read as follows “the Data Commissioner shall carry o9ut audits at least every two years of the systems held by the data controllers or data processors to ensure compliance with the provisions of this Act”</p>
Section 22 (3)	<p>We propose that the clause be amended as follows;</p> <p>A group of entities may appoint a single data protection officer provided that such officer is easily accessible by each of the entities. The ease of accessibility shall be assessed by the Data Commissioner.</p>
Section 22 (5)	<p>We propose that the clause be amended as follows;</p> <p>A person may be designated or appointed as a data protection</p>

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	officer, if that person has the relevant academic or professional qualifications which shall include knowledge and technical skills in data protection.
Section 22 (6)	We propose that the place where and the manner in which the data controller is to publish the contact details of the data protection officer should be specified.
Section 22 (7)	We propose that the clause be amended as follows; b) replace “...policies is duly complied with” with “policies are duly complied with” c) include the word “facilitate” the beginning of the sentence e) We opine that the use of the phrase “any other authority” is too vague and should be struck out
Section 23	b) We propose insertion of the word express with regards to consent of the data subject. Therefore, the clause should read “without <u>express</u> consent of the data subject”  d) We propose that this clause be amended to read “Personal data shall be stored in a confidential manner and for such period as may be <u>reasonably</u> necessary to achieve the intended purpose”  g) We propose that this clause be amended to read “personal data shall not be transferred outside Kenya unless there is proof that the recipient country has adequate data protection laws and provided the express authority of the data subject is obtained prior to the transfer.
Section 24	We are of the opinion that the <i>proviso</i> at the 1(e ) that the data subject shall have no objections is equivalent to a forced waiver of the right to privacy which being a fundamental human right cannot be waived.  We propose that the section (e ) should just read “right to be informed and object on profiling of personal data based on automated decision making.”. The rest of the text be removed.
Section 24 (2)	We propose that this clause be amended to read “the data controller shall inform the data subject of the rights referred to under subsection 1 in an intelligible form, using clear and plain language that is understood by the data subject.
Section 27 (1)	It is our opinion that the duty to inform a data subject should be reinforced and made mandatory.

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	We therefore propose that this clause be amended to read “A data controller shall, before collecting personal data, unless it is reasonably impractical, inform the data subject ...”
Section 33	We propose that this section be reinforced by specifying the point at which the subject is made aware to the intention to process data for marketing and that it is at that point that they should object to the same. Further, it should be made clear that the data subject is at liberty to withdraw their consent at any time.
Section 36 (2)	We propose that this section be reinforced by specifying that the onus will be upon the data controller to prove that they made reasonable efforts to inform third parties processing personal data previously shared of any changes to the data.
Section 37 (4) (a)	We propose that this section be amended to read “ the data shall opt for a data processor who expressly provides sufficient guarantees in respect of security and organisational measures for the purpose of complying with subsection 1
Section 38 (1) (a)	For this section we propose that the manner in which notifications of breach of security on personal data should be given to the data commissioner should be specified.
Part V Section 40 (2) (a) and (e)	We propose that the subsection be amended to read “the data subject <u>expressly</u> consents to the processing”  “the processing is on a matter which is of public interest and the data subject is made aware before the processing of data”