



**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR)**

**ADVISORY ON THE PRIVACY AND DATA PROTECTION POLICY AND  
BILL, 2018**

PRESENTED TO:

- 1. The Principal Secretary, ICT & Innovation; Ministry of Information Technology and  
Communication  
&**
- 2. The Chairperson, Taskforce on Development of the Policy and Regulatory Framework  
for Privacy and Data Protection in Kenya**

Dated: 1<sup>st</sup> October, 2018

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## INTRODUCTION

1. The Kenya National Commission on Human Rights (KNCHR) is a constitutional body established under Article 59 of the Constitution of Kenya and Section 3 of the Kenya National Commission on Human Rights Act No 14 of 2011 (revised 2012). It has the core mandate to develop a culture of human rights through the promotion and protection of rights and fundamental freedoms as well as state compliance on both domestic and international human rights obligations.
2. The KNCHR submits this advisory pursuant to its mandate under Articles 59 (2) (f) and 59 (2) (g) Constitution of Kenya and Sections 8 (e) (f) Kenya National Commission on Human Rights Act 2011 (revised 2012) to ‘investigate and research a matter in respect of human rights and make recommendations to improve the functioning of state organs.’ KNCHR is also mandated to promote the protection and observance of human rights in public and private institutions. The submission is also made pursuant to article 249 (1) (c) which identifies the promotion of constitutionalism as one of the principle objects of Constitutional Commissions and Independent Offices.
3. The Constitution of Kenya, 2010 recognizes the right to privacy (Article 31). The need for privacy and confidentiality must be considered alongside transparency and the right to access to information. Article 31(c) of the Constitution of Kenya guarantees the right not to have information relating to one’s family or private affairs unnecessarily revealed or the privacy of their communications infringed.
4. The right to privacy is recognised under the Universal Declaration of Human Rights (**Article 12**). “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”. Similarly, **Article 17** of the International Covenant on Civil and Political Rights provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation.

5. The United Nations Human Rights Committee, in interpreting the scope of obligations of State Parties to the International Covenant on Civil and Political Rights (ICCPR) above, expounded on the right to privacy secured under Article 17 thus:

*“In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.”* (Human Rights Committee, General Comment No 16 on Article 17 of ICCPR).

The advisory relates to both the Policy (PART A) and separately the Bill (PART B).

## **PART A: PRIVACY AND DATA PROTECTION POLICY, 2018**

6. The Commission welcomes the principles of data protection outlined in section 5 of the Policy which are in line with the International standards of data protection. However, paragraph 5.1.4 should be amended to clarify that the duty to inform the data subject should be prior to the processing of data. There is also need to further clarify if the duty to inform is to at every stage of the processing (refer to the definition of the term ‘processing’) or does a one off consent at the initial stages suffice?

The principles should also provide for ‘full disclosure’ as to the scope of use of the intended data; use of the vague term ‘sufficiently’ (5.1.4) is inadequate as it is left to the discretion of the data collector to discern what is sufficient disclosure.

7. Fairness and lawfulness and Transparency are separate concepts that should be treated as such. The concept of Transparency needs to stand alone principle not only as a matter of good drafting but especially for emphasis. It is further proposed that transparency should also cover information on design and data collection methodology as well as data collected. The methodology should be accessible in line with the right to access to information.
8. The Policy should guarantee integrity and confidentiality of correspondence de jure and de facto. Correspondence should be delivered to the addressee without interception and without

being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should also be expressly prohibited. This is in line with the General Comment No 16 on Article 17 of the ICCPR (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation).

- 9. Data Subject Rights (Section 6)** - The Policy suggests that there may be limitation on rights of data subject by other ways other than by law “or when there are competing rights.” This is contrary to **Article 24** of the Constitution which provides that a right or fundamental freedom in the Bill of Rights may be limited only by law. The Article reads thus: “ *“A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.”* Thus, even in cases of ‘competing rights’ there must be a legal basis. Such limitation must be justifiable in a just and democratic society.

The Commission therefore recommends that all exemptions relating to the different data protection principles must be provided for in a law and in a form which is clear, precise and specific.

#### **10. Data Minimization (Section 5.3)**

There is need to expound on the meaning of ‘advance’ in the provision that personal data may not be collected in advance and stored for potential future purposes unless required or permitted by law; the term is vague and may bring confusion in interpretation and implementation.

#### **11. Storage Limitation (Section 5.4)**

Section 5.4.1 provides that personal data shall not be kept for longer periods than is necessary to achieve the purpose for which the data was collected and processed. What is ‘longer than necessary’? There is need to give an indicative time frame.

- 12.** The Commission further welcomes the securing of the various rights of data subjects; Section 6 of the Policy, is a progressive move that empowers the data subjects and will ensure the rights are not unduly compromised.
- 13. Consent (Section 7.2):** Data Controller/Data Processor will obtain consent from Data Subject on the processing of Personal Data including sensitive personal data. There is need to define in the Policy and/or legislation the nature of this consent and especially for vulnerable persons such as children.
- 14.** The Commission notes that the Policy largely imbibes **the human rights based approach** to policy making including the values of public participation, equality and non-discrimination, accountability, and empowerment of the data subject. The principle of accountability however needs to be strengthened. There should a clear mechanism of the redress including an appeal from the decision of the Data Protector. The Commission further expresses concern that while the Policy aims to protect children and vulnerable groups, there is no such provision in relation to consent.
- 15.** There should be provisions regarding the protection of other vulnerable groups in society including the modes of processing this data for instance for persons with disabilities, the marginalized communities and the elderly. There should be clear provisions on how collection and processing of data form vulnerable groups protect their rights. The same should be undertaken in modes that accommodates their vulnerabilities including lawfully obtaining consent, and formats that are accessible and understood by all. No data collection and processing shall be undertaken on grounds that further discriminate the subject matter e.g. health status, sexual orientation, marital status, disability etc. unless with the informed consent of the data subject and the purpose thereof clearly communicated.
- 16. Data Subject rights:** In the light of article 54 (1)(c) and (d) of the Constitution and articles 9 and 21 of the UN Convention on the Rights of Persons with Disabilities, which provides for the right of persons with disabilities to accessible information and appropriate means of communication, it is important to reflect the need to communicate in formats that are accessible

to persons with disabilities in this Policy. The Commission therefore proposes that an additional sub-clause 6.13 be included which states that a data subject has the right, to information in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional costs.

17. The Policy defines vulnerable group/ people with incapacity to include persons who ‘**usually** have difficulties giving free and informed consent’. This part should not define only vulnerable group rather than ‘people with incapacity’ and should read ‘**vulnerable group** includes persons who require support in giving free and informed consent’. **Rationale:** In the light of article 12(2) and (3) of the UN Convention on the Rights of Persons with Disabilities on the right to legal capacity, it is important to underscore the State obligation to provide support to persons with disabilities for their right to exercise legal capacity (which includes the giving of consent for legal acts).
18. The Commission notes and recommends that massive civic education on the provisions of both Policy and Bill for both data controllers/processors and subjects to be able to comply. The Commission further urges for the speedy establishment of the Office of the Data Protection as an independent regulator to facilitate implementation of the Act.

## PART B: PRIVACY AND DATA PROTECTION BILL

The National Commission on Human Rights welcomes the proposed enactment of the Privacy and Data Protection Bill which will provide the much needed legal framework and bite to Article 31 of the Constitution of Kenya 2010. The Commission particularly welcomes the principles set out under Part IV of the Bill, which sets the tone of the interpretation of the rest of the provisions. These principles are in line with the key internationally recognised data protection principles; that is lawfulness, purpose limitation, accuracy, transparency, confidentiality and accountability. There are however various gaps in the proposed law for which the National Human Rights Commission makes proposals for amendments:

### SPECIFIC COMMENTS:

S/No.	Clause and title	Proposed amendment	Rationale
PART I—PRELIMINARY			
1.	<b>Section 2: Definition of Personal data</b>	“Personal data” is defined to mean any information relating to an identified or identifiable natural person.”	This should be expounded to include indirect identification, such as cases where data combined with other data relates to an identifiable individual.
2.	<b>Section 2: Definition of Sensitive personal data</b>	Amend the definition to be in line with that in the Policy (Annexe to the Policy at page 20) in particular, to include other parameters such as age, disability etc	To harmonise the definition in the Bill with the more encompassing definition provided in the Policy.

PART II – OFFICE OF DATA PROTECTION COMMISSIONER

<p>3.</p>	<p><b>Section 6: On Process of appointment of Data Commissioner</b></p>	<p>Strengthen the provision around the ODPC, appointment and function and make it an autonomous body that should have a board that draws representation from key actors including the KNCHR. This board would then have a critical role in the recruitment of the Data Protection Commissioner and oversight of the implementation of the provisions of the Act. In order to save costs, the Ministry ICT to host the secretariat.</p> <p>The board and the Commissioner(s) of the oversight entity should be inclusive of all in society including on grounds of gender, disability and age in line with the constitutional obligation.</p>	<p>There is need to further secure independence of the Office in line with best practice and principle enshrined in the Policy for ‘an independent public authority’. Appointment of a single data Commissioner by the Cabinet Secretary does not secure such independence.</p> <p><b>This is especially necessary considering that the Data Commissioner is also proposed to wield oversight powers over the Access to Information Act (No. 31 of 2016), a crucial legislation in furthering the right to access to information secured under Article 31, a role currently vested in the Commission on Administrative Justice.</b></p>
<p>4.</p>	<p><b>Section 7: Functions of the Data Protection Commissioner</b></p>	<p>Add, ‘Providing advice upon request, or on its own initiative, to a Cabinet Secretary or a private or a public body on their obligations under the Act and under international Conventions, and generally on any matter relevant to the operation of this Act’.</p>	<p>In order to carry out some of the other functions, for example, to ‘ensure country’s compliance on data protection obligations under international conventions’, it will be necessary to give directed personalised advice to a Cabinet Secretary or a private or a public body on their obligations.</p>
<p>5.</p>	<p><b>Section 8: Powers of the Data Commissioner</b></p>	<p>Add the following power: ‘To issue, amend and revoke, as necessary, codes of conduct, to assist public and private bodies in complying to the provisions of this Act.’</p>	<p>The carrying out of some of the functions requires the power to issue codes of conduct. For example, the function under Clause 7(1) (a) which is to oversee the implementation of the Act.</p>

6.	<b>Section 8(3)</b>	Provides that The Data Commissioner may enter into association with other bodies or organisations within and outside Kenya as appropriate in furtherance of the object of this Act. Add the following words after ‘Act’ ‘ <i>and to facilitate cross-border cooperation in the enforcement of privacy laws by participating in any initiative that is aimed at such cooperation</i> ’.	To make the provision more comprehensive.
7.	<b>Section 9(1) (c) – Delegation Data Commissioner</b>	This clause allows the Data Commissioner to delegate any power to a recognised self-regulatory organisation. It is proposed that this provision be deleted.	<p>It is preferable that the Data Commissioner delegates his power to a public body rather than a private body, which the ‘self-regulatory organisation’ might be. In addition, it is not clear what standards an organisation should meet in order to be considered a ‘recognised’ self-regulatory organisation.</p> <p>There is need for clarity on this as it tends to claw back on one tidy independent regulatory body.</p>
8.	<b>Section 11: Removal of the data commissioner</b>	Delete the words ‘ <i>arising from physical or mental incapacity</i> ’ and retain only ‘Inability to perform the functions of office’.	As drafted, the clause is potentially discriminatory against persons with disabilities, who have a right to legal capacity under article 12 of the UN Convention on the Rights of Persons with Disabilities and to non-discrimination under article 5(3) of the UN Convention on the Rights of Persons with Disabilities. The right to legal capacity in this context entails continuing to perform the functions of office with support and reasonable accommodations. Reasonable accommodation is an integral element of non-discrimination in the context of disability (Article 2 of the UN Convention on the Rights of Persons with Disabilities). <b>For comparison purposes</b> , in terms of removal from Office, The South African <i>Protection of Personal Information Act 2013</i> does not go into ‘physical or mental’ and simply reads ‘the ground of misconduct, incapacity or incompetence’.

**PART III—REGISTRATION OF DATA CONTROLLERS AND DATA PROCESSORS**

<p><b>9.</b></p>	<p><b>Section 20 on compliance and audit</b></p>	<p>The clause provides that the Data Commissioner may carry out periodical audits of the systems held by the data controllers or data processors to ensure compliance with this Act. It is proposed to change the word ‘may’ to ‘shall’.</p>	<p>It is important to place a (mandatory) obligation on the Data Commissioner to carry out periodical audits of the systems held by the data controllers or data processors to ensure compliance with the Act.</p>
<p><b>10.</b></p>	<p><b>Section 21(5)</b></p>	<p>The section provides that a person may be designated or appointed as a data protection officer, if that person has relevant academic or professional qualifications which may include knowledge and technical skills in matters relating to data protection. It is proposed to change the word ‘may’ to ‘shall’, or, at the bare minimum, to specify that the person should have experience in the field of data science and/or information technology.</p>	<p>It is important to place a mandatory requirement that the Data Protection Officer should be a person skilled in data protection, based on the responsibilities of the Data Protection Officer as provided under Section 21(7). To illustrate, one of the responsibilities of the Data Protection Officer is to advise the data controller or data processor and their employees on data processing requirements provided under this Act or any other written law.</p>
<p><b>11.</b></p>		<p><b>Add a new section 21(8)</b> that places an obligation on every public body to designate a data protection officer. This does not preclude sharing a single data protection officer by a number of entities as provided by Clause 21(3).</p>	<p>It is important to make it clear that each public body has the obligation to designate a data protection officer, given the far reaching proposals of this law.</p>

PART IV–PRINCIPLES AND OBLIGATIONS OF PERSONAL DATA PROTECTION

<p><b>12.</b></p>	<p><b>Section 23: Rights of Data Subject</b></p>	<p>Include a right to lodge a complaint with the Data Protector or other lawful authority regarding the unlawful use/abuse of personal data.</p> <p>There is need to make provision for formulation of Regulations for the realisation of these rights for instance, how a data subject is to exercise the right to access their personal data in custody of a data controller or data processor?</p>	<p>Recognise the right to redress in case of violation; this is in line with the principle of accountability. It is also in line with paragraph 6.1.6 of the Privacy and Data Protection Policy.</p>
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13.	<b>Section 24 – Exercise of rights of the data subject</b>	Delete 24(b) and <b>replace</b> it with ‘Where the data subject has a mental disability, with appropriate support and reasonable accommodation’.	<p>As currently drafted, as the language is derogatory in terming persons with disabilities as ‘unfit’, and also denies persons with disabilities the right to legal capacity protected under article 12 of the UN Convention on the Rights of Persons with Disabilities.</p> <p>The General Comment No. 1 on Article 12 of the CRPD affirms that persons with disabilities should be provided with appropriate support in order to exercise their rights. In particular, the General Comment No. 1 on Article 12 of the CRPD states that: <i>Article 12 of the Convention on the Rights of Persons with Disabilities, however, makes it clear that “unsoundness of mind” and other discriminatory labels are not legitimate reasons for the denial of legal capacity (both legal standing and legal agency). Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity (Committee on the Rights of Persons with Disabilities, General Comment No. 1 on Article 12 of the CRPD, para 13).</i></p>
14.	<b>Section 24 (b)</b>	Amend the words ‘physical and mentally unfit’ or delete it entirely	The words are derogatory, discriminatory and contrary to article 154(1) of the Convention on the rights of persons with disability (CRPD).
15.	<b>Section 38- Notification of breach of security on personal data</b>	Section 38(4) states that the notification to the data subject shall be in writing and shall be communicated in the prescribed manner. <b>Propose to amend to read:</b> The notification to the data subject shall be in writing and shall be communicated in the prescribed manner, and if the data subject has a disability, the communication shall be in accessible formats appropriate to the kind of disability in a timely manner and without additional costs to the data subject.	Inclusivity, emphasis on accessible formats to ensure such communication is intelligible for the data subject concerned.

16.		<p><b>Propose to have a new subsection 38(7) that states that:</b> any communication under this Act in relation to a person with a disability shall be in accessible formats appropriate to the kind of disability in a timely manner and without additional costs to the person.</p>	<p>In the light of article 54 (1) (c) and (d) of the Constitution and articles 9 and 21 of the UN Convention on the Rights of Persons with Disabilities, which provides for the right of persons with disabilities to accessible information and appropriate means of communication, it is important to reflect the need to communicate in formats that are accessible to persons with disabilities in this Bill.</p>
<p><b>PART VI—TRANSFER OF PERSONAL DATA OUTSIDE KENYA</b></p>			
17.	<p><b>Section 40 (c) (iii) and 45 (c) (v)</b></p>	<p><b>Section 40 (c) (iii) and 45 (c) (v) make reference to a data subject who is</b> ‘physically or legally incapable of giving consent’. Change this to ‘data subject who may require support and/or reasonable accommodation in order to give consent’.</p>	<p>Presumptions of incapacity are discriminatorily applied to persons with disabilities, especially those with intellectual and/or psychosocial disabilities. However, the idea of ‘incapacity’ based on disability has been declared as discriminatory on the basis of disability, because it reflects a denial of the exercise of the right to equal recognition before the law on account of disability. In this regard, General Comment No. 1 on Article 12 of the CRPD states that: ‘Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity’.</p>
18.	<p><b>Section 45: Conditions for transfer out of Kenya</b></p>	<p>There is need for stricter provision/condition pegged on the existence of robust legal protections in the target jurisdictions. In case of weak data protection laws in a foreign state where the data controller chooses to store their data, then this should not be allowed.</p> <p>There is also need to clarity on whether the conditions under this section apply conjunctively therefore need to add ‘and’ or otherwise.</p>	<p>The State has a responsibility to prevent the harm of its nationals in another country in this case, possible harm to its nationals in a foreign jurisdiction.</p> <p>Mechanisms should also be put in place to protect the data when shared. These should include some oversight mechanisms like the including favourable laws, legitimacy etc. This is also in line with the provisions of the Policy for cross-border transfer (sections 6.1.11 and 7.5.1).</p>

**PART VII— EXEMPTIONS**

<b>19.</b>	<b>Section 49: Research, history and statistics</b>	The provision provides that, ‘(2) Personal data which is processed for research purposes in compliance with the relevant conditions may be kept indefinitely’. The bill needs to be clear on what encompasses ‘research’ or excludes it otherwise this provision is open to abuse.	The term “research” is ambiguous and can be misused if not defined correctly.
<b>PART VIII— ENFORCEMENT PROVISIONS</b>			
<b>20.</b>	<b>Section 51 (b)</b>	Complaints to Data Commissioner: There should be a set time limit within which the data commissioner is supposed to respond in the event of failure to investigate a complaint.	The use of ‘reasonable time’ may be abused. There is need for certainty in the interest of fair administrative action.
<b>21.</b>	<b>Section 52(1)(a): Investigation of complaints</b>	Continue the sentence and add “...provided persons with disabilities are reasonably accommodated.”	This will ensure for instance those who have disabilities are reasonably accommodated; need to not leave this to chance.
		Provide clarity on whether a person subject of investigation may be represented by an advocate or other third party in the investigation process.	Right to legal representation. The Clause is silent and it is not clear if personal appearance or if representation suffice.
<b>22.</b>	<b>Section 52 (3)</b>	Provide for the penalty either imprisonment or/and fines.	Prescribe an offence for the identified violation.
<b>23.</b>	<b>Section 53</b>	Provides that the Data Commissioner ‘may apply to a court for a preservation order for the expeditious preservation of personal data; where there is reasonable ground to believe that the data is vulnerable to loss or modification’. Amend to include the data subject.	Provision as is suggests that only a data commissioner may make this application; need to include the data subject or other interested party.

PART X— OFFENCES AND MISCELLANEOUS PROVISIONS

<p><b>24.</b></p>	<p><b>Section 61 on Regulations</b></p>	<p>The section places an obligation on the Cabinet Secretary to make Regulations for the better carrying into effect of the provisions of the Act.</p> <p>Add the following between sub-clause c) and d): The provision of information in accessible formats and technologies appropriate to different kinds of disabilities and use of appropriate means of communication in relation to persons with disabilities.</p>	<p>In the light of Article 54 (1) (c) and (d) of the Constitution and articles 9 and 21 of the Convention on the Rights of Persons with Disabilities, which provides for the right of persons with disabilities to accessible information and appropriate means of communication, it is important that the regulations developed take accessibility of information by persons with disabilities into account.</p>
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