

Memorandum

Data Protection Bill, 2018

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Date: 24th September 2018

Clause	Current clause	Proposal and comment
4	Application	<p>Current clause: 4(b) (i) is established or ordinarily resident in Kenya and processes personal data while in Kenya;</p> <p>The above clause is problematic since the act will only apply to data processors or data controllers while they are in Kenya. These entities should be subject to the law even while outside Kenya in relation to data collected in or from Kenya.</p> <p>Proposed amendment- 4(b) (i) is established or ordinarily resident in Kenya and processes personal data from data subjects resident in Kenya;</p> <p>Current clause: 4(b) (ii) not established or ordinarily resident in Kenya, but uses equipment in the Kenya for processing personal data, other than for the purpose of transit through the country;</p> <p>It is important to note that that a data controller or data processor may process data in Kenya while having no equipment in Kenya. The clause as is only deals with data controllers or data processors using equipment in Kenya. This means, for example social media companies that process data from Kenya and have no equipment in Kenya are not covered.</p> <p>Proposed amendment – 4(b) (ii) not established or ordinarily resident in Kenya but processes personal data from data subjects resident in Kenya;</p>

PART II	Office of the Data Protection Commissioner	<p>The Bill as proposed established the Office of the Data Protection Commissioner comprised of just one commissioner. <i>Owing to the fact that the Office will deal with fundamental rights and freedoms issues, the Office should have at least three Commissioners. That is, a Chairperson and two Commissioners.</i></p> <p>This above proposal is key since the Office will have regulatory, investigative and judicial powers.</p> <p><i>A second proposal would be for the Office of the Data Protection Commission to be run by a Board. Such a Board would have representation from diverse stakeholders including security, ICT, legal etc</i></p> <p><i>With the above proposal, the law should create the position of a Chief Executive Officer who will implement the decisions of the three Commissioners or the Board and be in charge of the day to day running of the office.</i></p>
7	Functions of the Data Protection Commissioner.	<p>Current clause: 7(1)(b) establish and maintain a Register of data controllers and data processors;</p> <p><i>Proposed amendment – Delete the clause (7(1)(b). The Office of the Data Protection Commissioner cannot possibly establish and maintain a register of such nature. Each person resident in Kenya whether natural or legal can be a data controller or data processor.</i></p> <p>Current clause: 7(1)(d) promote self-regulation among data controllers and data processors;</p> <p><i>Proposed amendment – delete the clause (7(1)(d)) as the law cannot promote self-regulation and also regulate at the same time. The law is being proposed because self-regulation has failed.</i></p>

9	Delegation Data Commissioner	<p>Proposed amendment – Delete the Clause (9) .</p> <p>Delegation should only be to committees, subcommittees, staff or agents of the Office.</p>
PART III	Registration of data controllers and data processors	<p>Proposed amendment – Delete Clauses 15 – 20</p> <p>Justification – as indicated above, a natural or legal person operating within Kenya is a potential data processor or data controller. This also includes persons and entities in the academic world. To require registration of data controllers and data processors is an onerous task that no single institution can undertake. Secondly, this will stifle protection and enjoyment of other rights including freedom of the press, freedom of expression and the right to information. What the law should provide for is general principles of data protection that would cover all persons whether natural or legal persons operating within Kenya or getting data from data subjects resident in Kenya.</p>
27	Lawful Processing of personal data.	<p>Current clause: 27(4) A data controller who contravenes the provisions of section (1) commits an offence and shall, on conviction, be liable to a fine not exceeding five million to imprisonment for a term not exceeding five years.</p> <p>Proposed amendment –</p> <p>Have the fines as a percentage of data controller’s or data processor’s revenue. If not a commercial entity, as a percentage of total annual budget. This could be 2%. Secondly, there is no need for a custodial sentence on the issues under regulation within the proposed law.</p> <p>The reason for the above is that there are data controllers and data processors who will be government entities, non-governmental organisations, academic institutions, religious organisations etc. Hence a blanket fine is too punitive. Hence, need for an aggregated way to deal with fines.</p>

38	Notification of breach of security on personal data.	Proposed amendment – The prescribed time to give notice of a data breach should be set at 48 hours.
41	Personal data relating to health.	Proposed amendment – Define the term ‘professional’
42	Offence	Proposed amendment – Have the fines as a percentage of data controller’s or data processor’s revenue. If not a commercial entity, as a percentage of total annual budget. This could be 2%. Secondly, there is no need for a custodial sentence on the issues under regulation within the proposed law.
44	Rule as to data centres and servers	Current clause: 44 (3) Cross-border processing of sensitive personal data is prohibited. Proposed amendment – Clause 44(3) should have a proviso especially when dealing with natural disasters and medical emergencies.
45	Conditions for transfer out of Kenya	Proposed amendment – Clause 45(1)(a) should be deleted. It is highly restrictive and does not make business sense to have to seek authorisation of the Data Commissioner when transferring data out of Kenya. It is important to note that data is collected by the state, businesses, academia etc. Hence, so long as the data processing meets the conditions set forth in the law, there is no need to seek authorisation of the Data Commissioner.
47	General exemptions	Proposed amendment – Under clause 47(2) exemptions should include –

		<ul style="list-style-type: none"> - <i>Processing personal data required to deal with a health emergency</i> - <i>Processing personal data required to deal with a natural disaster</i> <p>Current clause: 47(3) For purpose of subsection (2) (a) a certificate signed by the Cabinet Secretary shall be sufficient evidence of exemption from outlined provisions of this Act.</p> <p><i>Proposed amendment – delete clause 47(3) as the law here anticipated that the CS ICT will be in charge of data regulation for security forces which is not within their mandate.</i></p>
49	Research, history and statistics	<p><i>Proposed amendment –</i> <i>The clause should define ‘research’ for purposes of the proposed law.</i></p>
PART X	Offences	<p><i>Proposed amendment –</i> <i>The fines proposed may be too lenient or strict depending on the agency.</i></p> <p><i>Proposal to have the fines as a percentage of an agency’s revenue. If not a commercial entity, as a percentage of total annual budget. This could be 2%.</i></p>
New Clause	Political use of data	<p><i>A new clause is proposed to deal with political use of data-</i></p> <p><i>An agency shall not use, for political purposes, personal data obtained pursuant to the provisions of this Act unless it has sought and obtained express consent from the data subject.</i></p>