



Photo by Towfiq barbhuiya on Unsplash

Thinking about data protection

A draft data protection bill has been made public and it is clear that it requires a lot more work before being tabled in parliament.

In early November 2022 the Ministry of Information, Communication and Technology (MICT) published a notice calling for inputs to the draft data protection bill. The public inputs were to be submitted to the ministry by 30 November for consideration. The following are a summary of recommendations on improving the draft data protection bill taken from an analysis report produced for Democracy Report by South Africa-based [ALT Advisory](#).

General recommendations

The Bill, while ensuring public participation and the full and proper protection of data subjects, should be fast-tracked to

ensure that constitutional obligations, in this instance the protection and promotion of the right to privacy, are performed diligently and without delay.

The Bill should be further developed following this public participation process and further opportunities to provide written submissions on future versions of the Bill should be provided to all stakeholders, including civil society.

Prior consent

Adding the element of prior consent to all data subjects strengthens the definition of “consent” in **section 1** of the Bill and ensures that data subjects must consent to the processing of their personal data *prior to* processing.

TO PAGE 2

The rights of data subjects

The Bill should reintroduce **Part III of the 2020 version of the Bill** as a new Part 2 in the present Bill, with the “Data Protection Supervisory Authority” part becoming a new Part 3. This will correctly give prominence to the primary rights holders in the Bill: data subjects.

Independence of the Supervisory Authority

Part 2 of the Bill needs to be substantially redrafted in line with the 2020 version of the Bill to ensure that appointments, removals, and the remuneration of board members of the Supervisory Authority are determined by Parliament as opposed to the Minister, and that board members, including the chairperson and the vice-chairperson, are afforded security of tenure and are shielded from undue political influence. Additionally, in appointing board members, Parliament should be directed to seek public nominations before initiating any appointment processes.

Enforcement powers of the Supervisory Authority

The MICT may consider defining, or providing further clarity on, “the Court” in **section 5(1)(h)** and including additional enforcement-related provisions within **sections 4 and 5** which explicitly empower the Supervisory Authority to issue sanctions, in the form of fines and other administrative penalties, for non-compliance with the Act.

Offences, penalties, and administrative fines

A **new Part or Chapter** should be included in the Bill which refers directly to offences, penalties, and administrative fines. This Chapter should consolidate the offences and administrative fines referenced in the Bill.

Civil liability

Either in **sections 4 and 5** or in a **new Part or Chapter**, the power of the Supervisory Authority, or an individual, to institute civil action should be prescribed.

Exceptions

Sufficiently detailed regulations should be published in terms of **section 43(1)** providing clear and precise definitions, objective and adequate safeguards, and further general guidance on the application of the exceptions contained in **section 43(1)** of the Bill, particularly **sections 43(1)(a), (c), (d), and (i)**. Alternatively and preferably, the Bill itself should be developed to provide further guidance on the exceptions.

An express exemption for journalistic, literary, or artistic purposes should be recognised in the Bill, either in **section 34(1)(f)** or **section 43**, and should provide that “The Act does not apply to the processing of personal data solely for the purpose of journalistic, literary, or artistic expression to the extent that such an exclusion is necessary to reconcile, as a matter of

public interest, the right to privacy with the right to freedom of expression, including press freedom.” (Additionally, an express exemption for processing personal data for academic purposes, with sufficient safeguards, should be considered by MICT)

Exemption applications

Section 43 does not empower the Supervisory Authority to grant additional “exclusions” or exemptions for the processing of personal data. While this may perceivably fall within the remit of “Codes of Conduct” in **sections 44 to 52**, an express enabling provision should be included in the Bill within **section 43**, alternatively a new **section 44**, to enable the Supervisory Authority to grant an exemption to a responsible party to process personal information if it is in the public interest to do so, and there is a clear benefit to the data subject or a third party that outweighs, to a substantial degree, any interference with the privacy of the data subject or third party that could result from such processing.

Interaction with the Information Commissioner

Sections should be expressly included in both the Bill and the **Access to Information Bill** to delineate how the mandates of the Supervisory Authority and the Information Commissioner will interact in order to ensure that both oversight bodies are able to function cohesively and effectively.

Additional recommendations

To ensure consistency in the Bill, **section 30** should be re-titled or renamed “Personal data breach notifications” to align with the definition of a “personal data breach” in **section 1**.

A new subsection in **section 30** should provide for offences, penalties, and/or administrative fines in the event that a data controller does not provide the required notification of a personal data breach. Alternatively, the suggested **new Part or Chapter** on offences, penalties, and administrative fines should expressly list a failure to notify a data subject of a personal data breach as an offence warranting a penalty or administrative fine.

Unsolicited direct marketing – by any means or form of electronic communication, including automatic calling machines, facsimile machines, SMSs, or e-mail – should be expressly prohibited in the Bill due to its intrusive, unwanted, and non-consensual nature. As a result, a **new section** should be introduced in the Bill which expressly prohibits unsolicited direct marketing, without consent, and enables the Supervisory Authority to issue administrative fines against responsible parties.

To foster transparency, **section 5(1)(c)** of the Bill could include a further subsection stating that “The duties and functions of the [Supervisory] Authority in terms of this Act are to monitor and enforce compliance by prescribing the use of

LAC submission on the draft data protection bill

On 30 November the Legal Assistance Centre (LAC) submitted input to the MICT on the draft bill, in support of the ACTION Coalition submission. The LAC input draws on the EU General Data Protection Regulation, 2016/679 (the "GDPR"). The GDPR is a seminal document on data protection principles that is binding only on members of the EU but influential worldwide.

On definitions

The current definition of "processing" fails to clearly include non-automated processing of personal data. As a point of

comparison, recital 15 of the GDPR provides as follows:

"In order to prevent creating a serious risk of circumvention, the protection of natural persons should be technologically neutral and should not depend on the techniques used. The protection of natural persons should apply to the processing of personal data by automated means, as well as to manual processing, if the personal data are contained or are intended to be contained in a filing system. Files or sets of files, as well as their cover pages, which are not structured according to specific criteria should not fall within the scope of this Regulation."

TO PAGE 4



Photo by Luca Bravo on Unsplash

FROM PAGE 2

terms of service icons on applicable websites, applications, and other internet-enabled platforms, and providing guidance to controllers on the use of terms of service icons on these platforms."

In order to ensure that the Supervisory Authority is established within the one-year time period stipulated in **section 75** of the Bill, practical steps should be taken to fully establish, fund, and staff the Supervisory Authority following the commencement of the Act, including taking pre-emptive measures to ensure that there are no delays with the establishment of the Supervisory Authority following the commencement of the Act.

Relevant reading

The draft data protection bill can be viewed at the following link: <https://mict.gov.na/documents/32978/1376285/Data+Protection+Draft+Bill++March+2022....pdf/7c91ff30-2ec4-4ed2-99de-e09ac46466d8>

The full analysis report on the draft data protection bill can be downloaded at the following links: <https://ippr.org.na/publication/data-protection-bill-not-fit-for-purpose/>

We recommend that the definition of the term “processing” should be clarified by an explicit reference to “automated and non-automated processing of personal data”. If this is done, then it would be useful to add a definition of “non-automated processing” as “manual processing of a structured set of personal data that forms part of a filing system or is intended for a filing system where such data is accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis”.

A definition of “transborder flow” should be included into the definitions clause in light of the borderless nature of data transfer from controllers and processors and the many mechanisms of data portability, to clarify the coverage of Part 6 on “Transborder Flows of Personal Data”.

On the purpose of data processing

Clause 22 of the Bill requires further explanation on what constitutes a “specific, explicitly defined and lawful purpose”, and this purpose must be the basis for the legitimacy of the processing of personal data.

First, to be “specific”, any purpose must be sufficiently defined to enable the implementation of any necessary data protection safeguards, and to delimit the scope of the processing operation.

Second, to be “explicitly defined”, the purpose must be sufficiently unambiguous and clearly expressed. Comparing the notion of ‘explicit purpose’ with the notion of ‘hidden purpose’ may help to illuminate the scope of this requirement.

Third, for a purpose to be “lawful” (or “legitimate”, which would be a better word here) goes beyond the requirement to have a legal basis for the processing or to comply with clause 20. Article 5 of the GDPR illustrates how the purpose of the data processing must be linked to the application of the key data protection principles. It states that personal data shall be:

- “processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’);
- collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes... [with exceptions for further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes];
- adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (‘data minimisation’);
- accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay (‘accuracy’);

- kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed [...];
- processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures (‘integrity and confidentiality’). [own emphasis]

The “specific, explicit and legitimate” purpose of personal data processing is the prerequisite for other data protection requirements, including adequacy, relevance and proportionality, accuracy and completeness, and requirements regarding the duration of retention and the right to erasure. These linkages warrant greater attention in the Bill.

It is particularly important to include the principle of “data minimisation” in light of the purpose of the data processing. Personal data processing should be permissible only insofar as necessary for the purposes for which the data is processed. This is not the same as the requirement in clause 20 that “Personal data may only be processed if, given the purpose for which it is processed, it is adequate, relevant and not excessive”.

On general authorisation concerning processing of special personal data

Clause 34 of the Bill should add exceptions for the processing of personal data in relation to employment law, social protection law (including social grants and pensions) and where necessary for the establishment, exercise or defence of legal claims, whether in court proceedings or in administrative or out-of-court procedures.

In addition, although public health purposes are mentioned in paragraph (1)(g), it might be helpful to add more detail to make it clear that this includes health monitoring and health alert purposes and for the prevention or control of communicable diseases and other serious threats to health (even when this does not rise to the level of a “life-threatening epidemic”).

As a point of reference, Recital 52 of the GDPR states that data processing is permissible for “health purposes, including public health and the management of health-care services, especially in order to ensure the quality and cost-effectiveness of the procedures used for settling claims for benefits and services in the health insurance system, or for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes”.

The full LAC submission can be accessed at the following link: https://drive.google.com/file/d/1bGB2c1bQPBPAYbi-A0NZMyzTexprgawk7/view?usp=share_link