

Key Highlights of Digital Personal Data Protection Bill - India



Digital Personal Data Protection Bill: Key Highlights

DATA PROTECTION

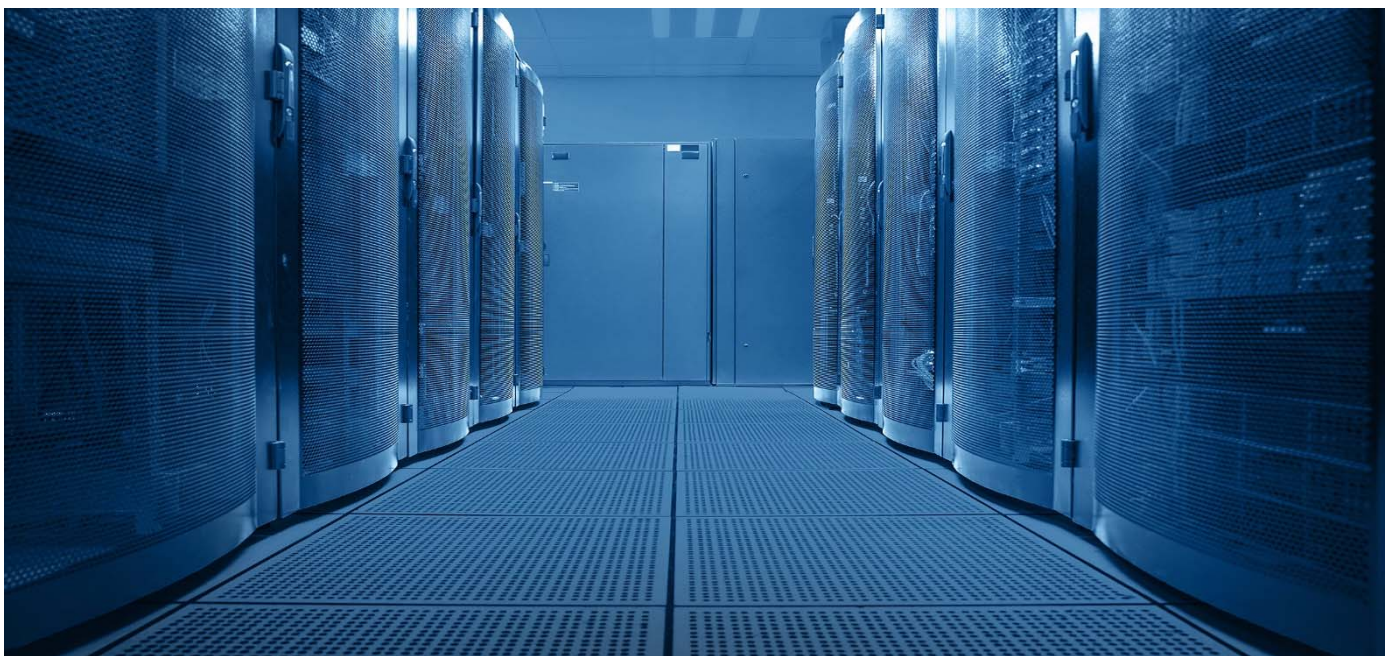


1. Introduction/Background:

The ‘Digital India’ campaign has evidently bolstered the Indian economy to digitization and there is a significant wave of innovation and entrepreneurship across the country. At present, there are over 76 crore (760 million) active internet users which are expected to touch to 120 crore (1.2 billion) in the coming years.

With the development in the space of technology and digitization, “Data” is growing immensely, in the digital form. It is, therefore, the need of the hour to have a proper legislative framework governing the principles of trust, safety, openness and accountability is in place. The erstwhile drafts for data protection included the Personal Data Protection Bill, 2019 which was introduced on December 11, 2019, and was referred to the Standing Committee. The Standing Committee on December 16, 2021 published a report, however the Personal Data Protection Bill, 2019 was subsequently withdrawn on August 3, 2022 (“Erstwhile Drafts”).

On 18th November 2022, the Ministry of Electronics and Information Technology (“MeitY”) introduced the Digital Personal Data Protection Bill (“Bill”) for public consultation and stakeholder’s comments till 17th December 2022. The Erstwhile Drafts resembled the pioneer of the data protection regulation, i.e., the General Data Protection Regulations (“GDPR”) however, the current Bill is disparate from the Erstwhile Drafts. The current Bill shares a striking resemblance with the Singapore’s Personal Data Protection Act, 2012 (“Singapore’s PDPA”, pertinently the provision of deemed consent, voluntary undertaking for non-compliance and factors for determining the financial penalties. In this article, we will be discussing the key highlights of the Bill.



2. Purpose, Scope and Applicability

The purpose of the Bill is to regulate the processing of digital personal data in regarding the rights of the individuals as well as acknowledging the need to process personal data for lawful purposes. The Bill appears to have adopted a balanced approach as it intends to make mutual concessions by laying down certain rights and duties of the Data Principals (individuals to whom the personal data relates, in case of children shall mean the parents or lawful guardians) to protect their personal data and certain obligations on the Data Fiduciaries (persons who determines the purpose and means of processing personal data).

The applicability of the Bill extends to data collected and processed not only within but also outside the territory of India. This includes data collected from Data Principals through online mode as well as the data collected offline which is later digitized. Further, provisions of the Bill shall also apply to the processing of the digital personal data outside the territory of India if such processing is in connection with any profiling or activity of offering goods or services to Data Principals within the territory of India.

3. Obligations of a Data Fiduciary

(a) General obligations of a Data Fiduciary

The Bill sets out the general responsibilities of the Data Fiduciary, which are enumerated as follows: The Data Fiduciaries shall:

- i. Make reasonable efforts to comply with the provisions of the Act (“Bill once enacted”) and;
- ii. Ensure the authenticity of the data processed on her behalf, especially in a scenario where any decision in relation to the data would likely affect the person to whom it belongs;
- iii. Take appropriate technical and organizational measures, and safeguards to prevent any breach of data, notifying the Board in case of a data breach and;
- iv. Remove any personal data collected after it no longer serves the purpose for which it was collected.

(b) Notice and Consent

- Prior to seeking consent from the Data Principal, the Bill requires the Data Fiduciary to give notice prior in clear and plain language, containing a description of personal data they want to procure and the *purpose of processing such data*.
- The Bill has also enumerated 'Consent' to mean and include an unambiguous indication of the Data Principal's wishes indicated by clear affirmative action. Thus, notice is a fundamental basis for receiving Consent which is a pre-requisite for processing and collecting this personal data.
- It is pertinent to note that the Bill also provides requires the Data Fiduciary to give an itemised notice to the Data Principal, where the Consent was obtained before the commencement of this Act.
- The Bill also provides that the request for the Consent shall be presented to the Data Principal in a plain language, along with the contact details of the Data Protection Officer (DPO) where applicable, or any person authorised by the Data Fiduciary who would respond to any communication from the Data Principal.
- Further, the Bill also mentions that a Consent Manager (a Data Fiduciary that enables the Data Principal to manage her Consent), would also act as an intermediary and enable the Data Principal to give, manage or withdraw her consent conveniently. The Consent Manager is required to be registered with the Board.

(c) Deemed Consent

The Bill also introduces the concept of deemed consent for situations where consent is not expressly needed. Thus situations, where a Data Principal's consent is presumed, includes where:

- i. Personal data is voluntarily provided by the Data Principal, and it is reasonably expected that she would give such data.
- ii. For the performance of any function under the law or for providing any benefit, issuing any certificate or license to the Data Principal by the State;
- iii. Compliance with any judgment or order;
- iv. In response to a medical emergency involving a threat to life or health;
- v. In taking measures to provide medical treatment or health services during an epidemic, an outbreak of disease, and public health crisis like contact tracing;
- vi. Disaster management or public disorder;
- vii. Employment-related purposes;
- viii. In the public interest, for preventing and detecting fraud, mergers, and acquisitions, or other corporate restricting transactions, network, and information security, credit scoring;
- ix. Recovery of debt;

4. Processing of personal data of children

- The Bill also contains separate provisions for the processing of personal data of children. The Bill enumerated the need for verifiable parental consent (includes consent of a child's legal guardian) in order to process the personal data of a Child (a person below the age of 18).
- The Bill also prohibits Data Fiduciaries from processing any personal data which is likely to cause harm, behavioural monitoring of children and advertising targeted at children. This is expected to receive a lot of criticism from stakeholders as it fails to recognize the polarity in the capacity of a toddler and a teenager, and at present there are a lot of products in the market specifically targeting the teenagers.

5. Concept of Significant Data Fiduciary

The Bill has also introduced the concept of Significant Data Fiduciaries (SDF) based on the assessment of factors such as: the volume and sensitivity of personal data processed, risk of harm to the Data Principal and to electoral democracy, security of the State, public order and such other factors that the central government may deem necessary.



6. Rights and Duties of Data Principal

The Bill has also enumerated certain rights and duties of the Data Principals' personal data which are mentioned hereunder:

(b) Right to information

The Data Principal has the right to obtain confirmation and a summary of the personal data processed or being processed and a list of identities of all the Data Fiduciaries with whom the personal data is being shared.

(a) Right to correction and erasure of personal data

Upon request of the Data Principal, the Data Fiduciary is obliged and bound to correct or erase personal data or data no longer necessary for the purpose for which it was processed earlier. However, the Bill failed to refer the right to be forgotten, which was covered in the Erstwhile Drafts.

(c) Right of grievance redressal

The Bill provides an enhanced opportunity to the Data Principals to file a complaint with the board in case they do not receive a satisfactory response from the Data Fiduciary within 7 days.

(d) Right to nominate

In the event of death or incapacity of the Data Principal, the Bill grants the right to nominate any other individual to the Data Principal to exercise other such rights as described in this section.

7. Duties of Data Principal

The Bill does not only mention the rights of the Data Principal but also confers certain duties. The Data Principal shall:

- Refrain from registering a false or frivolous grievance or complaint with a Data Fiduciary or the Board.
- Abstain from furnishing any false specifications or clamping down on material information and impersonating any other person.
- Strive to furnish information that is verifiably authentic.

8. Transfer personal data outside of India

After a thorough assessment of relevant factors, the central government may consider notifying other countries or territories outside India, to which the Data Fiduciary may transfer personal data in accordance with the terms and conditions as may be specified.



9. Exemptions



The Bill has also enumerated certain exemptions where the provisions of the Bill shall not apply, furthermore the central government has been exempted from the application of the provisions for the processing of data, which is not akin to any data protection regulation in any jurisdiction.

10. Data Protection Board

The Bill also provides for the establishment of the Data Protection Board of India (Board) by the notification of the central government, regulatory oversight in order to ascertain non-compliance with the provisions of the Bill and for the imposition of financial penalties. The Board will function as a digital office and operate as *independent body*.

Every order of the board will be deemed as a decree of a civil court. Further, the review of an appeal against the order of the court will lie to the High Court, alternatively the Board also has the power to direct any complaint to alternate dispute resolution.

The Board is also vested with the power to:

- I. Conduct hearings.
- II. Issue, modify, suspend or withdraw directions.
- III. Summon and enforce attendance.
- IV. Examine persons on oath.
- V. Direct the Data Fiduciary in case of a Data Breach to adopt certain measures to remedy and alleviate any harm caused to Data Principals.

11. Financial Penalty for non-compliance

The Bill also provides that the Board, upon affording a reasonable opportunity of being heard, impose a penalty in accordance with Schedule 1, not exceeding rupees five hundred crore in each instance.

12. Difference between the Erstwhile Draft and the Bill

The Key points of distinction between the Personal Data Protection Bill, 2019 and the Digital Personal Data Protection Bill, 2022 are mentioned herein below:

Digital Personal Data Protection Bill, 2022 (DPDP Bill)	Personal Data Protection Bill, 2019 (PDP Bill)
1. Personal Data	
Includes all personal data.	Includes only sensitive personal data and critical personal data.
2. Cross Border Transfer	
Cross border transfer of data maybe authorised subject to central government's assessment.	Does not set out any strict data localisation requirements.
3. Processing of Children's Data	
Simplified provisions relating to the processing of children's personal data.	Requires verification of children's personal data.
4. Factors considered while notifying Data Fiduciaries	
Any factors that the central government may deem necessary.	Subject to an assessment that the sensitive personal data needs an adequate level of protection and taking into consideration all applicable international agreements.
5. Rights and Duties of the Data Principals	
Right to nominate any other individual to exercise rights, further also provides a list of duties to be adhered to by the Data Principal.	Provided for portability of data by a Data Principal to a Data Fiduciary, did not confer any duties on the Data Principal.

W&S Takeaway:

The Bill in comparison with the Erstwhile Drafts appears to have adopted a balanced approach, since it does not only aim at regulating the processing of the personal data but also acknowledges the need for its collection and processing. This is reflected by the simplified compliances to be adhered by the Data Fiduciaries. The Erstwhile Drafts were inspired by the GDPR to a large extent, however the current Bill shares resemblance with the Singapore's PDPA.

While the Bill appears to have considered the comments and deliberations undertaken during the Erstwhile Drafts, there has been much deliberation as to whether the Bill has disregarded the essence of the K.S Puttaswamy Judgement (where the right to privacy was recognized as the fundamental right). The Bill provides the central government with a blanket exemption, thereby allowing the Central Government to escape the regulations/compliances under the Bill. It is pertinent to note that such blanket exemptions are not available with the state agencies in the foreign jurisdictions. The GDPR in Europe as well as the proposed data protection legislations in United States exempt the security agencies from the regulations/compliances under the legislations on a case-by-case basis depending on the reasons for collecting the information. However, the Bill is at a nascent stage of development, and therefore it would be very premature to form an opinion in this regard.

Considering the boom in the digital economy in India, and the developing start-up ecosystems in the country, a regulatory framework governing the processing of personal data and having necessary safeguards, reasonable surveillance and oversight as well as appropriate grievance redressal mechanisms is the need of the hour. It will be interesting to see, the outcome of the stakeholders' comments, which may provide a reasonable foresight with regards to the enactment and implementation of the Bill.

Authored By:

Advocate Nikita Mulay, Sr. Associate - Legal

&

Advocate Tanvi Shetty, Associate - Legal

DISCLAIMER

Water and Shark refers to global organization and may refer to one or more member firm of Water and Shark International Inc. (WASII) WASII and its member firms are not a worldwide partnership. WASII does not provide services to client. Please visit website www.waterandshark.com for more details about WASII and its member firms.

This Content has been prepared by Water and Shark Legal LLP an independent member firm of Water and Shark International Inc. As per the rules of the Bar Council of India, the advertisement or solicitation by advocates in any manner whatsoever is impermissible. The information provided through this insight is merely informational and should not be construed as solicitation. In case a person acts relying on any information in this insight, the author or W&S Legal LLP, shall not be liable for the consequences thereof. No entity in Water and Shark network shall be responsible for any loss whatsoever sustained by any readers who relies on this content. Kindly consult your lawyer or attorney before acting on this information.

© 2022 Water and Shark-All rights reserved

For More Details, Contact Us

+91-9152102453

legal@waterandshark.com

www.waterandshark.com

