



The Digital Personal Data Protection Bill, 2023

Introduction

The Digital Personal Data Protection Bill, 2023 (“**DPDP Bill**”) was introduced in the Lok Sabha on 03rd August 2023 by the Ministry of Electronics and Information Technology (“**MeitY**”). The DPDP Bill has been passed by the Lok Sabha on 07th August 2023, the Rajya Sabha on 09th August 2023 and is awaiting the President's assent. The DPDP Bill widely differs from its predecessor the Digital Personal Data Protection Bill, 2019 (“**DPDP 2019**”) which was withdrawn in August 2022, and to a large extent follows the Draft Digital Personal Data Protection Bill, 2022 (“**Draft Bill**”) put up for public consultation by MeitY in November 2022.

On enactment, the DPDP Bill, will become the standalone law on data protection and will replace the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 which presently govern the data protection framework in India. The provisions of the DPDP Bill will be in addition to and not in derogation of any other law in force¹. However, once enacted in case of any conflict between the DPDP Bill and any other law, the provisions of DPDP Bill shall prevail².

The key features of the DPDP Bill are as below.

1. Applicability

The DPDP Bill is applicable to the processing of digital personal data within India³ and will also be applicable to processing of digital personal data outside India if such processing is for any goods or services offered to data principals in India⁴.

The provisions of the DPDP Bill will not be applicable to personal data processed by an individual for personal or domestic purpose, and to personal data made publicly available by, (a) the data principal herself or, (b) by any other person in discharge of obligations under applicable law⁵.

¹ Section 38(1) of the DPDP Bill

² Section 38(2) of the DPDP Bill

³ Section 3 (a) of the DPDP Bill

⁴ Section 3 (b) of the DPDP Bill

⁵ Section 3 (c) of the DPDP Bill

2. Data principal, data fiduciary and significant data fiduciary

Data principal has been defined to mean an individual to whom the personal data relates and in respect of a child or a person with disability, it covers the parent or lawful guardian of the child and the lawful guardian of persons with disability⁶. A child has been defined as an individual who has not completed the age of 18 years⁷. The specific carve out for inclusion of lawful guardians of persons with disability was not included under the Draft Bill or DPDP 2019 and is a welcome step leading towards a more inclusive India.

The DPDP Bill defines data fiduciary as any person who either alone or in conjunction with others determines the purpose and scope of processing of personal data. The term person as defined under the DPDP Bill includes an individual, a Hindu undivided family, a company, a firm, an association of persons or a body of individuals, the State, every artificial juristic person.

Significant Data Fiduciary has been defined to mean any data fiduciary or class of data fiduciaries as may be notified by the Central Government. The obligations of the significant data fiduciaries are wider than those of a data fiduciary and *inter alia* include regular data audits, periodic data protection impact assessments, appointment of data protection officer.

3. Notice⁸ and Consent⁹

The DPDP Bill provides for the requirement of the data fiduciary giving notice to the data principal and obtaining consent from the data principal for processing of personal data. The consent shall be free, specific, informed, unconditional and unambiguous with a clear affirmative action, and shall signify an agreement to the processing of data fiduciary's personal data for the specified purpose and be limited to such personal data as is necessary for such specified purpose. The data principal also has the right to withdraw her consent at any time and the data fiduciary is required to ensure that, the ease of withdrawal should be comparable to the ease with which consent was given. The DPDP Bill also specifically provides that any consent which is contrary to its provisions will be invalid to the extent of such contradiction. The data fiduciary is required to cease processing of personal data within reasonable time upon withdrawal of consent by the data principal.

The data fiduciary may process personal data of a data principal for certain legitimate uses, *inter alia*, including, (a) for the specified purpose for which the personal data has been provided to the data fiduciary, and in respect of which she has not indicated to the data fiduciary that she does not consent to the use of her personal data; (b) for the State and any of its instrumentalities to provide or issue to the data principal subsidy, benefit, service, certificate, licence or permit where data principal has previously consented to the processing of her personal data; (c) for the performance by the State or any of its instrumentalities of any function under applicable law or in the interest of sovereignty and integrity of India or security of the State; (d) for responding to a medical emergency involving a threat to the life or immediate threat to the health of the data principal or any other individual; (e) for the purposes of employment or those related to safeguarding the employer from loss or liability, such as prevention of corporate espionage, maintenance of confidentiality of trade secrets, intellectual property, classified information or provision of any service or benefit sought by a data principal who is an employee.

In view of the illustrations contained in the DPDP Bill, it seems that the form and manner of giving notice and obtaining consent is likely to undergo substantial change from the present practise of blanket notice being given by companies as part of their privacy policies.

⁶ Section 2 (j) of the DPDP Bill

⁷ Section 2 (f) of the DPDP Bill

⁸ Section 5 of the DPDP Bill

⁹ Section 6 and 7 of the DPDP Bill

4. Appointment of a Consent Manager

The DPDP Bill provides that a consent manager must be appointed who is registered with the Data Protection Board of India (“**Board**”) and who acts as a single point of contact for the data principal to whom the consent manager is accountable. This appointment will help the data principal to give, manage, review, and withdraw her consent through an accessible, transparent, and interoperable platform.

5. Applicability to children and person with disability¹⁰

The definition of the data principal includes children and persons with disability which in turn also includes the lawful guardians (includes parents for a child) for such children and persons with disability. A verifiable consent is required to be obtained from the lawful guardians of children and persons with disability for processing their personal data. The personal data of children cannot be used for tracking or behavioural monitoring or target advertising and the personal data is to be processed in a manner which is not likely to cause any detrimental effect on the child. The applicability of above provisions can be diluted in terms of age of child for certain data fiduciaries by way of notification by Central Government. A penalty of Rs. 2000 million has been stipulated in case of breach in observance of additional obligations in relation to children.

6. Transfer of data outside India

The Central Government may by notification restrict the transfer of personal data by a data fiduciary for processing to such country or territory outside India as may be notified.¹¹ The present position has been diluted substantially from the DPDP Bill 2019 wherein data was permitted to be transferred to jurisdictions which had adequate level of protection and from the Draft Bill which provided for notification by government for the countries to which data could be transferred.

7. Obligations of data fiduciaries¹²

The DPDP Bill has prescribed the following obligations for the data fiduciaries:

- i. Comply with the provisions of the DPDP Bill irrespective of whether the data principal has carried out its rights and obligations.
- ii. Appoint, engage, or otherwise use data processors for processing personal data under a valid contract.
- iii. Ensure completeness, accuracy, and consistency of personal data when the personal data is being used to make a decision that affects the data principal or when personal data is being disclosed to another data fiduciary.
- iv. Implement effective technical and organisational measures to give effect to the DPDP Bill (no specific standards for these measures have presently been prescribed under the DPDP Bill).
- v. Take reasonable security safeguards and prevent personal data breach.
- vi. On occurrence of a personal data breach give notice to the Board and the data principal. The form and manner of such notice is yet to be prescribed. A breach of this obligation may attract a penalty which may extend up to Rs. 2000 million¹³.
- vii. Erase personal data (unless retention is necessary under applicable law) upon,
 - a. withdrawal of consent by the data principal or,
 - b. as soon as may be reasonable to presume that the specified purpose is no longer being served*.

¹⁰ Section 9 of the DPDP Bill

¹¹ Section 16 of the DPDP Bill

¹² Section 8 of the DPDP Bill

¹³ Schedule 33(1) read with the Schedule of the DPDP Bill

- viii. Furnish details of a data protection officer or such person who may answer all questions regarding processing of data of the data principal and have an effective grievance redressal mechanism in place.

*The purpose shall be deemed to no longer be served if the data principal does not:

- i. Approach the data fiduciary for the performance of the specified purpose; and
- ii. Exercise any of her rights in relation to such processing, for such time period as may be prescribed, and different time periods may be prescribed for different classes of data fiduciaries and for different purposes.

8. Rights and duties of data principals

The data principal has been vested with the following rights:

- i. Right to access information¹⁴ about, (a) a summary of personal data of the data principal which is being processed by such data fiduciary, (b) the processing activities undertaken in respect to personal data and; (c) details of all the data fiduciaries and data processors (except those authorised by law to obtain such personal data for the purpose of prevention or detection or investigation of offences or cyber incidents, or for prosecution or punishment of offences) with whom such personal data has been shared by data fiduciaries to whom consent has been given previously or under the DPDP Bill.
- ii. Right to correction, completion, updating and erasure of her personal data for the processing of which she has previously given consent under the DPDP Bill¹⁵.
- iii. Right to have readily available means of grievance redressal¹⁶.
- iv. Right to nominate, any other individual, who shall, in the event of death or incapacity of the data principal, exercise the rights of the data principal¹⁷.

The rules to be framed under the DPDP Bill will provide more clarity on the mode manner and form in which the above rights may be exercised by the data principals. The DPDP Bill has also provided certain duties¹⁸ of data principals, such as, (a) compliance with the provisions of all applicable laws while exercising rights under the provisions of the DPDP Bill; (b) not to impersonate another person while providing her personal data; (c) not to suppress any material information; (d) not to register a false or frivolous grievance or complaints; and (e) and furnish only such information as is verifiably authentic. A penalty of Rs. 10,000/- has been stipulated for breach by data principal in observance of its duties under the DPDP Bill¹⁹.

9. Exemptions

The DPDP Bill has provided for a host of exemptions from applicability of provisions pertaining to processing of personal data, requirement of notice and consent, exercise of rights by data principal, restrictions on transfer of data outside India, in cases where processing of personal data is *inter alia*, (a) necessary for enforcing a legal right; (b) for performance of function of any court or tribunal or any other body entrusted with judicial or quasi-judicial function in India; (c) in the interest of prevention, detection, investigation or prosecution of any offence or contravention of any law for the time being in force in India; (d) by certain instrumentalities of state as may be notified, necessary for research, archiving or statistical purposes; or (e) for data principals not within the territory of India, but the data is processed pursuant to any contract entered into with any person outside the territory of India by any person based in India.

¹⁴ Section 11 of the DPDP Bill

¹⁵ Section 12 of the DPDP Bill

¹⁶ Section 13 of the DPDP Bill

¹⁷ Section 14 of the DPDP Bill

¹⁸ Section 15 of the DPDP Bill

¹⁹ Schedule 33(1) read with the Schedule of the DPDP Bill

10. Board

The Board is to be set up as a body corporate consisting of a chairperson and other members having qualifications stipulated under the DPDP Bill who will hold office for a two-year term. To the extent practicable the Board is required to function as a digital body. The process for appointment, resignation, disqualification, salaries, allowances, powers, functions, procedures to be followed in discharge of the powers and functions of the Board have also been prescribed under the DPDP Bill.

11. Grievance Redressal

In case of a data breach, a data principal or such person who has been nominated by the data principal in this regard may first, approach the data fiduciary or the consent manager. The data fiduciary or the consent manager (as the case may be), will be obligated to respond to grievances in such time as may be prescribed.

Upon exhausting the opportunity of redressal before the data fiduciary or the consent manager (as the case may be), the data principal may approach the Board. If the Board is of an opinion that a dispute may be resolved by way of mediation, it may refer a dispute to mediation by a mediator mutually agreeable to the parties.

Any person aggrieved by the decision of the Board may within a period of 60 days from the date of receipt of order of direction of the Board prefer an appeal before the appellate tribunal i.e., the Telecom and Disputes Settlement Appellate Tribunal. An order passed by the appellate tribunal will be executable as a decree of civil court.

The DPDP Bill has also imposed a bar on the jurisdiction of civil courts from trying disputes over which the Board has jurisdiction²⁰.

12. Penalties

The Board has been granted power to impose penalties ranging from Rs. 10,000 to Rs. 2500 million. For determining the amount of monetary penalty, the Board shall have regard to the nature, gravity, duration of the breach, type and nature of personal data affected, repetitive nature of such breach, gain or loss caused due to the breach, impact of imposition of penalty on such person, action taken to mitigate the consequences of breach, proportion, and effectiveness of impact of monetary penalty as a deterrent to such breach. All sums realised by way of penalties will be credited to the Consolidated Fund of India²¹.

The DPDP Bill does not stipulate any compensation which may be offered to the data principal who has suffered a breach. This will be detriment to the interest of the data principal who may have suffered due to the data breach caused. It seems the intention of the legislature for not providing for a compensation could be to avoid unnecessary and frivolous litigations. However, a provision for awarding compensation could have been introduced as a discretionary measure.

13. Voluntary Undertaking²²

The DPDP Bill also provides for a voluntary undertaking that any person may give to the Board in respect of any pending matter related to observance of the provisions of the DPDP Bill. The undertaking may be to take or refrain from taking a specified action within a specified time, or an undertaking to publicize the voluntary undertaking. This undertaking can be given at any stage of the proceedings and if accepted by

²⁰ Section 39 of the DPDP Bill

²¹ Section 33 of the DPDP Bill

²² Section 32 of the DPDP Bill

the Board shall constitute a bar on ongoing proceedings except where a person fails to adhere to any term of the voluntary undertaking so accepted and in case of such breach of undertaking, after giving the person an opportunity of being heard, the Board may proceed with imposing penalties.

14. Memorandum regarding delegated legislation

Section 40 of the DPDP Bill contains a non-exhaustive list of matters for which the Central Government has been empowered to make rules. By way of a ‘memorandum regarding delegated legislation’, the legislature has clarified that the provisions for which the requirement of stipulating rules has been made are matters of detail and it is not practical to provide them in the DPDP Bill itself. The delegation of powers has also been clarified to be of normal character. This memorandum is clarificatory in nature and seems to have been provided on account of the public criticism which the Draft Bill faced for extensive usage of the term “as may be prescribed” therein.

Conclusion

The DPDP Bill has been drafted in a fairly simple language. While the DPDP Bill has amply touched upon several aspects for regulating personal data, detailing of the statute has been left to be done through delegated legislation. The hefty penalties provided under the DPDP Bill are likely to act as a deterrent for personal data misuse and breach. However, the exemptions from use of personal data by State are extensive and could have been narrowed.

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