



The Personal Data Protection Bill, 2019 (PDP Bill 2019) received approval from the Cabinet Committee on 4 December 2019 and was tabled in Parliament on 12 December 2019. This PDP Bill 2019 is a modified version as compared to the Draft Personal Data Protection Bill, 2018 (2018 Bill). Some of the key elements of the proposed framework are discussed below:

## Background

The key concepts in the PDP Bill 2019 overlap with the 2018 Bill, such as:

- The PDP Bill 2019 lays down the roles and responsibilities of data fiduciaries in processing “personal data” and “sensitive personal data”.
- Additional obligations are specified for “significant data fiduciaries.”
- Rights of data subjects are specified.
- Establishment of a Data Protection Authority of India for enforcement and monitoring.
- Penalties are specified for contraventions of the law.

## Key Changes in the PDP Bill 2019

- **Grounds of Processing:** The changes to the grounds of processing are as follows –
  - The PDP Bill 2019 frames consent as the primary ground for processing personal data as well as sensitive personal data. The ingredients of valid consent remain the same as in the 2018 Bill – free, informed, specific, clear and capable of being withdrawn. For sensitive personal data, explicit consent needs to be obtained which has a higher threshold in line with the 2018 Bill.
- **New categories of data fiduciaries:**
  - *Consent managers:* The PDP Bill 2019 introduces consent managers, who are data fiduciaries who enable a data principal to gain, withdraw, review and manage their consent through an accessible, transparent and interoperable platform. These entities serve the purpose of communicating consent to data fiduciaries on behalf of data principals, and will need to be registered with the Data Protection Authority.

- Apart from consent, additional grounds of processing are specified for all personal data (presumably including sensitive data) – for any function of the state; for compliance with orders or judgements; to respond to medical and other emergencies. Personal data that is not sensitive may also be processed for employment related reasons specified in the law. The grounds of processing are not specified in separate chapters for personal and sensitive personal data, as in the 2018 Bill – however, they remain substantially similar.
- The requirement to obtain consent for processing personal data has also been dispensed with if such processing is necessary for “reasonable purposes”, which ground is presumably available to personal data including sensitive data. Operation of search engines has been added as a category in the PDP Bill 2019 in addition to the 2018 Bill categories of credit scoring, whistle blowing, mergers, etc.

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**Social media intermediaries:** This category has been defined as an intermediary who primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information. The definition aims to target social media companies and exclude e-commerce companies, telecom service providers and search engines. Such companies may be notified as significant data fiduciaries, who have higher obligations under law. Every social media intermediary notified as a significant data fiduciary shall enable voluntary verification of users of their service and provide a mark of verification visible to all users. The assessment of compliance with this provision will be included in data audits of such intermediaries. Please also note that this may have implications for the revised draft of the amendment to the Intermediaries Guidelines Rules under the IT Act, which may replicate this definition.

- **Data Localisation / Cross Border Transfer of Data:**

The localisation provisions are diluted, as the requirement of storing one copy of all personal data in India under the 2018 Bill has been dispensed with. Instead, the compliances are as follows: - Sensitive personal data may be transferred outside India for processing, but will need to be stored in India. Cross border transfer of such data may be made only with explicit consent of the data principal, and when one of the following additional grounds are fulfilled: (a) the transfer is made pursuant to a contract or intra group schemes approved by the Data Protection Authority (DPA); (b) adequacy determination for a specific country, class of entities, or international organization; (c) the DPA has permitted transfer for a particular purpose.

- Critical personal data, as notified by the Central Government, is subject to hard localisation, and may be processed only in India. No guidelines for the kind of data to be considered critical has been provided.
- Critical personal data may be transferred out of India only when such transfer is: (a) to a person or entity engaged in the provision of health services or emergency services

or when such transfer is necessary for “prompt action.” Please note that this term is not defined in the PDP Bill, 2019.

- (b) on the basis of adequacy determination of a specific country or international organization or class of entities.
- **Government Exemptions:** The Government may exempt any government agency from compliance with this law where necessary or expedient in the interest of national security, prevention of incitement of violence, etc.
- **Additional Rights of Data Principals:** The data principal has been provided with two additional rights under the PDP Bill 2019:
  - the right to access in one place the identities of all data fiduciaries with whom their data has been shared, and
  - a right to erasure of personal data on request.
- **Additional Compliance Issues:**
  - A privacy by design policy requirement exists for data fiduciaries which may be submitted to the DPA for certification. The certified design policy should be published on the website of both the data fiduciary and the DPA. Further regulations will be enacted in relation to certifications. This may likely impact data audit standards to be complied by the data fiduciaries.
  - Some of the standards of compliance that were earlier subject to a “reasonable” standard have now been subjected to a “necessary” standard – such as, necessary security safeguards as opposed to reasonable security safeguard to be the standard for data fiduciaries and data processors in relation to activities such as de-identification and encryption, to prevent misuse, unauthorized access of personal data; necessary steps to ensure accuracy of personal data, etc.
- **Sandbox:** The DPA may create a sandbox for the purposes of encouraging innovation in artificial intelligence, machine learning and other emerging technology in public

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- interest. Exemptions will be provided from specific compliances such as purpose limitation, collection limitation and retention limitation, for a limited time, for any data fiduciary operating within the sandbox. Selection will be on the basis of applications made demonstrating innovations and benefits, and having a certified privacy by design policy is a precondition to such an application.
- Application of Law: The Central Government may by notification exempt the processing of personal data of data principals outside India, under contract with any company or person outside India, even if any data processor is incorporated under Indian law. This may be designed as an exemption for the outsourcing industry.
  - Policies for digital economy: Under the PDP Bill, 2019, the Central Government has been empowered to frame any policy for the digital economy that does not govern personal data. Further, the Central Government in consultation with the DPA may direct any data fiduciary or processor to provide any anonymized personal data or other non-personal data to enable targeted delivery of services or formulation of evidence based policy.
  - Biometric data: Under the PDP Bill, 2019, data fiduciaries are prohibited from processing biometric data that has been notified by the Central Government unless such processing is permitted by law.
  - Selection Committee constitution: The constitution of the members of the Selection Committee have undergone a change under the PDP Bill, 2019 and now only includes civil servants.
  - Codes of Practice: The ability of the data fiduciary or processor to demonstrate compliance with equivalent or higher standard before the DPA /court or any

tribunal that existed under the 2018 Bill has no longer been retained under the PDP Bill, 2019. Similarly, the DPA's requirement to maintain a register containing codes of practices and publishing such codes of practices on their website/public domain does not exist under the PDP Bill, 2019.

- Powers of Authorized Officer: The powers of the Authorized Officer as envisaged under the 2018 Bill to search buildings, break open the lock etc. are not present under PDP Bill, 2019
- RTI Amendment: The 2018 Bill proposed an amendment in the Right to Information Act, 2005 to include a clause to assess protection of personal data and the harm likely to be caused to data principals, which has been excluded from the PDP Bill 2019.
- Transitional Provisions: While the 2018 Bill included specific transitional provisions such as timelines for issuance of notifications and codes of practice, these provisions have been deleted from the PDP Bill, 2019.

Please get in touch with the SAM attorney you regularly work with or with Shahana Chatterji at [Shahana.chatterji@amsshardul.com](mailto:Shahana.chatterji@amsshardul.com) if you would like to discuss any aspect of the PDP Bill 2019 in more detail.

SAM Co. is a leader in the data protection field in India. The Firm has represented several clients in landmark privacy and data protection litigation before various courts in India and regularly provides legal, and public policy inputs to leading foreign and Indian businesses. The Firm's technology practice specialises in issues relating to emerging technology including internet regulation, intermediary liability, digital payments, cybersecurity, and unmanned aviation.

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