

Comments on Nigeria Draft Data Protection Bill 2020

To: Legal and Regulatory Reform Working Group of the Digital Identity Ecosystem Project

From: Paradigm Initiative and the NetRights Coalition

Date: 8th September 2020

Subject: Comments on the draft Data Protection Bill, 2020

The NetRights Coalition is a group of civil society organisations working to defend the digital rights of citizens, with a particular focus on the right to privacy and freedom of expression in the digital age. The coalition has over 100 organizations and individuals as members and Paradigm Initiative serves as its secretariat. NetRights Coalition members include Committee to Protect Journalists, DataPhyte, Media Rights Agenda, Premium Times Centre for Investigative Journalism, SafeOnlineNG, Knowledge House Africa and others.

The draft data protection bill has attracted the attention of not only civil society organizations like us but the public - millions of Nigerians and even the international community.

We have therefore highlighted some major points for the consideration of the committee:

1. In Part II, Clause 3(1)(h) needs to protect those fulfilling their duty as journalists against having the law leveraged against them to censor content.
2. Part II, Clause 4(2)(e): It is notable that the rights to privacy and freedom were mentioned but the provision should include interests of journalists or news agencies to report freely, including on individuals.
3. In addition to this, we are worried about Part III clause 8(1) of the draft bill which talks about the establishment, composition, powers, and functions of the Data Protection Commission. The provision in the draft bill calls to question the intended independence of the proposed data protection commission. The board is proposed in a way that it is dominated by government stakeholders. Aside from the fact that this does not reflect the globally recognized internet governance model which is usually a multi-stakeholder approach, with equal representation of diverse stakeholder

groups, the current composition is dominated by government agencies who are themselves data custodians who must be accountable to the commission e.g. NCC, CBN, NPC, INEC, FRSC, etc. It is important to clarify that privacy is a fundamental human rights issue and must not be treated as a consumer protection issue so we propose increase in the number of non-governmental stakeholders to specifically include a representative not below the rank of a Director from the National Human Rights Commission, representatives of the Academia with at least a PhD in a relevant subject area, a retired judge of the Federal High Court, a human rights lawyer with at least 15 years of legal practice, representatives from the media, additional representatives of the technology community and 2 additional representatives of the civil society working on human rights and/or civic technology—This is to balance the composition of the board and not make it a purely government-controlled board.

4. To really achieve independence, we also propose legislative oversight in the appointment, tenure, remuneration, and renewals, granting the Senate the power to approve all board appointments by the President.
5. Section 9 needs to place the privacy burden on companies by focusing on fair information principles like data minimization, use limitation, and privacy by design, even if those requirements affect online business models, which themselves cause serious harm.
6. In Part IV, Clause 11, the draft bill needs to detail the process of appointing the Data Commissioner more, to prevent party loyalty appointments. We could borrow from Section 6 of Kenya's Data Protection Act that allows for public participation:

6. Appointment of the Data Commissioner

(1) The Public Service Commission shall, whenever a vacancy arises in the position of the Data Commissioner, initiate the recruitment process.

(2) The Public Service Commission shall, within seven days of being notified of a vacancy under subsection (1), invite applications from persons who qualify for nomination and appointment for the position of the Data Commissioner.

(3) The Public Service Commission shall within twenty-one days of receipt of applications under subsection (2)—

(a) consider the applications received to determine their compliance with this Act;

(b) shortlist qualified applicants;

- (c) publish and publicise the names of the applicants and the shortlisted applicants;*
 - (d) conduct interviews of the shortlisted persons in an open and transparent process;*
 - (e) nominate three qualified applicants in the order of merit for the position of Data Commissioner; and*
 - (f) submit the names of the persons nominated under paragraph (e) to the President.*
- (4) The President shall nominate and, with approval of the National Assembly, appoint the Data Commissioner.*

7. In Clause 20, where the right to rectification, erasure, and restitution of processing was addressed, we must guard against the potential of abuse by corrupt public office holders by including judicial oversight in the process of determining what is “inaccuracy” or not.
8. The intention in Clause 20 is noble by establishing accountability for breaches of data protection. However, the bill should define “data” in such a way that ensures journalistic reporting, including on individuals, is explicitly protected.
9. Clause 22(4) has the same observation as ‘7’ above. We must guard against the potential of abuse by corrupt public office holders by including judicial oversight in the process.
10. The reference to “legitimate interests” in Clause 23 is loose and should be deleted. “Legitimate purpose” notably relegates “rights and freedoms” and does not include the interest of journalists or news agencies to report freely.
11. Public Interest as referenced in Clause 25 is not defined and it should be defined in the interpretation provisions to include the interests of journalists or news agencies to report freely.
12. The draft bill in Clause 26(b) should clarify what is meant by “sensitive data” and ensure that journalistic reporting, including on individuals, is explicitly protected.
13. Clauses 19 and 28 address the same issue and should be merged.

14. Clause 30 puts a notable responsibility on third parties (e.g. companies) to assess the impact on rights and freedoms, but these assessments should be made public. In reports about police accessing call data to arrest journalists, each telecom company was asked about this concern/responsibility, but none answered. Clauses like this must also ensure that protections are in place for journalists to report freely, including on individuals. Third parties should be publicly accountable.
15. Clause 35(1) lists public order, public safety, public morality, national security and public interest as basis for exemption. However, these terms/phrases are some of the most abused phrases in Nigerian laws, by security agencies and public officials with access to security agencies. The terms/phrases should be clearly defined in Clause 66.
16. Clause 35(3) should protect those performing their duties as journalists from having this law unduly leveraged against them to inhibit reporting or permit censorship.
17. The provisions in Clause 35(9) offer significant opportunity for abuse or justification of crackdowns against the press. In Nigeria, journalists have been accused of, or arrested for, allegedly undermining Nigerian military operations, and the press has been vilified for reporting information that differs from military or government public relations.
18. Clause 43(3,5,6) should protect those performing their duties as journalists against having this law unduly leveraged against them to inhibit reporting or permit censorship.
19. Clause 44(1) brings the same concern we expressed on clause 35(9) in “17” above. These terms (public interest or national security) must be defined. Also, it is concerning that this affords authorities the ability to ignore the law based on “national security” interests given the prevalence of such rationale to restrict critical reporting and retaliate against journalists and media organizations. It also does not define “public interest” as including journalistic activity. “Legitimate purpose” is defined in the bill as “interest in furtherance of prevention of fraud; information security; prevention of criminal acts or threats to public security.” Those performing their duties as journalists should

be protected against having this law unduly leveraged against them to inhibit reporting or permit censorship.

20. In Clause 64, under the power of arrest, search and seizure, it is notable that it created the need for warrants for search and seizure, but it should also endeavour to protect against warrantless access to data afforded in other legislation/regulations e.g. the Freedom of Information law.

We thank you for the opportunity to comment on the draft Data Protection Bill (2020) and look forward to further engaging the legislative process as the eventual bill makes its way through the National Assembly.

Thank you.



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