

## Specific comments from CCAOI on the draft Digital Personal Data Protection Bill 2022 (DPDPB, 2022)

It is heartening that the DPDPB, 2022 has been drafted in lucid and easy to understand language, reducing the complex terminologies while retaining the fundamentals. This is easy for all to understand. DPDPB, 2022 has narrowed the focus. The DPDPB, 2022 has removed the requirements of data localisation, which in turn will reduce compliance burden and ensure level playing field between players in the market.

The enhanced grievance redressal process for data principals, proposing a digital Data Protection Board and incorporating an alternative dispute resolution mechanism, removal of criminal provisions are welcome moves.

We submit that while the new provisions in the DPDPB, 2022 are well intended, there are certain aspects in the bill that do not serve to achieve these objectives, and potentially raise new concerns. Our comments on the draft bill.

### Definitions

While “child” is defined “as an individual who has not completed eighteen years of age” however **there is a need to adopt a graded approach in defining the age of a “child”** especially in the online world and keeping in touch with the ground realities of today.

**The definition of harm to the child should be expanded** and not limited to the four categories ((a) any bodily harm; or (b) distortion or theft of identity; or (c) harassment; or (d) prevention of lawful gain or causation of significant loss) listed in the DPDPB, 2022. For example, more than physical harm, in the online world face mental and psychological harm and the same is not listed.

### Deemed Consent

While ‘Deemed Consent’ (Section 8 of the DPDP Bill 2022) aims to address issues of consent fatigue of individuals allowing processing of data without explicit consent an individual, **there is a need for creating safeguards to protect the rights of individuals** in scenarios such as employers processing data, areas of credit scoring and recovery of loans.

Further **clarity is required if the right to withdraw consent** mentioned in Sec 7.4 is applicable to deemed consent or not.

### Children and their data

- (i) Chapter 2, Section 10 (1) mentions that “The Data Fiduciary shall, before processing any personal data of a child, obtain verifiable parental consent in such manner as may be prescribed”. While it is essential that parental consent is taken especially for small children, however we would suggest if a differential approach could be adopted wherein the threshold for requiring parental consent of processing children’s data be different for different categories of content and services could be

laid out. We would suggest **adopting a graded approach towards the consent framework of children** as this will ensure their right to privacy is protected.

Further we wish to point here that there are several challenges related to parental consent such as lack of understanding of many parents of internet and digital technology and many parents are not online and are not using online platforms. In such cases, parental consent will have to be taken off the platform or some alternative mechanism for taking consent has to be worked out.

Since Section 10(4) does provide for exemption of parental requirement under circumstances as may be prescribed, we hope that the graded approach may be adopted.

## **Exemptions to the Government**

Section 18 of the DPDPB, 2022 provides wider exemptions to the government's processing activities from the earlier version. It has removed the previous terms of 'just, fair, reasonable & proportionate' procedure for exemption on case-to-case. This version has provided a blanket exemption for certain fiduciaries including exempting data retention requirements. We would suggest that the terms 'just, fair, reasonable & proportionate' be reintroduced into the DPDPB, 2022, for validating any exemptions on a case to case basis.

Further, today when India wants to promote itself as a trusted destination for data processing, providing such wide exemptions to the government processing activities may act as a deterrent as many nations may view it with some scepticism.

## **Cross border data flow**

Chapter 4 Section 17 states that the government after assessing factors will notify the countries where data transfer will be allowed. However, for business clarity and continuity, it is important to list the **countries where the data can be transferred**. This is because till the time India does not notify the countries post assessment where data can be transferred, all existing transfers by data fiduciaries will become non-compliant. Additionally, since alternative transfer instruments like model contracts or certifications have not been provisioned, this may create a challenge.

Further, experience points that any kind of bi-lateral agreements within countries will take time to be formulated. What happens till then?

## **Data Protection Board**

It is a welcome move that the DPDPB, 2022 suggests that as far as possible, the Board shall "function as a digital office and employ such techno-legal measures as may be prescribed".

While the DPDPB, 2022 mentions that the Board “shall function as an independent body”, however no provision has been laid to scrutinise the appointment and selection process and all the powers related to appointment lie with the Central Government,

We suggest that to ensure the independence of the board, the structure of the Board should be in place along with a mandate to ensure transparency and accountability of its processes. Additionally adequate procedural safeguards should be in place to ensure complete independence of the Board in the draft itself.

### **Right of Data Principals**

Right to data portability, right to be forgotten, right to object to processing of data by a particular Data Fiduciary processing should be reintroduced into the DPDPB, 2022 along with the right to obtain fair compensation by data principals.

Further provisions should be added to ensure data principals are provided clarity on how much information a data fiduciary (holds about them).

Prior to processing the personal data, Data Fiduciaries should provide information to the Data Principal in a clear and transparent manner about how the data will be processed with whom the data will be shared.

### **Future Provisions**

In various sections of the DPDPB, 2022 the term “as may be prescribed” has been used. While we understand this is intended to provide flexibility to the bill, we hope there would be adequate public consultations in a transparent and open manner before these provisions are finalised in future.