

## Memorandum

### Data Protection Bill, 2018

Presented by: Mugambi Laibuta

Date: 17<sup>th</sup> June 2018

| Clause | Current clause  | Proposal and comment  |
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| 2      | “agency”        | <p>Proposal to have two categories of agencies –</p> <p>“foreign registered agency” means a person or institution not registered or having a physical address in Kenya that collects, stores or processes data from data subjects.</p> <p>“locally registered agency” means a person or institution registered or having a physical address in Kenya that collects, stores or processes data from data subjects.</p> <p>The need to have two categories is based on history. Most recently, Cambridge Analytica used data from Kenyans for campaign purposes. The proposed law should put in place measures to deal with foreign companies that collect, store and process data from data subjects within data. The proposed law should be styled in line with GDPR. If a foreign entity collects, stores and processes data from Kenya, it should be subject to the Kenyan court jurisdictions or face stiff penalties. Some possible penalties may include – stiff fines or suspension from operating within Kenya.</p> |
| 2      | “personal data” | <p>Proposal to have two categories of “personal data”. That is “general personal data” and “sensitive personal data”</p> <p>“sensitive personal data” means any personal data consisting of information as to –</p> <p>(a) the physical or mental health or condition of a data subject;</p>  |

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|   |                          | <p>(b) political opinions;<br/> (c) religious beliefs or other beliefs of a similar nature;<br/> (d) the finger prints or blood type of the person;<br/> (e) Correspondence by a person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence to a third party; and<br/> (f) Financial and financial transactions records.</p> <p>Any other data should be listed as “general personal data”</p> <p>The above proposal means that data controllers have a higher responsibility in relation to “sensitive personal data”. Hence consent, processing, storage and transmission of such data is of a higher standards and any contravention of provisions relation to it should attract higher penalties.</p> |
| 3 | Application              | <p>Proposal to add a new sub-clause –</p> <p>This Act does not apply to the processing of personal data by or on behalf of a public body-</p> <p>3(c) the purpose of which is to prevent, detect, control or eradicate a public medical emergency.</p>   |
| 9 | Rights of a data subject | <p>Proposal to add new sub-clauses –</p> <p>A data subject has a right to</p> <p>9(g) obtain from the agency the erasure of personal data concerning them without undue delay and the agency shall have the obligation to erase personal data without undue delay where one of the following grounds applies:</p> <ol style="list-style-type: none"> <li>i. the personal data is no longer necessary in relation to the purposes for which it was collected or otherwise processed;</li> <li>ii. the personal data have been unlawfully collected, stored or processed; or</li> </ol>  |

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|          |                                   | <p>iii. the personal data unduly infringes on the fundamental rights and freedoms of the data subject.</p> <p>9(h) object to personal data being used for –</p> <ol style="list-style-type: none"> <li>i. direct marketing; or</li> <li>ii. automated decision making;</li> </ol> <p>9(i) move personal data from one agency to another</p> <p>The above proposal is premised on the right to be forgotten. A data subject in Kenya should have the right to petition ‘Google’ for example to have their personal data erased. The above provision is adopted from the GDPR.</p>  |
| 23       | Interference with personal data   | Proposal to have the penalties especially the fines as a percentage of an agency’s annual revenue. Perhaps 2%.  |
| PART III | Processing of Special information | <p>Proposal to have the part should be redrafted to read – Processing of sensitive personal data.</p> <p>Further, the provisions in this proposed part be collapsed into one provision that provides high standards to processing of sensitive personal data.</p> <p>Proposed provision –</p> <p>An agency or person shall not process any sensitive personal data of a data subject except in accordance with the following conditions -</p> <ol style="list-style-type: none"> <li>(a) the data subject has given explicit consent to the processing of the personal data; and</li> <li>(b) the processing is necessary—</li> </ol> |

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|    |          | <ul style="list-style-type: none"> <li>i. for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the agency in connection with employment; or</li> <li>ii. in order to protect the vital interests of the data subject or another person, in a case where— <ul style="list-style-type: none"> <li>(a) consent cannot be given by or on behalf of the data subject; or</li> <li>(b) the data controller cannot reasonably be expected to obtain the consent of the data subject;</li> </ul> </li> <li>iii. in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld;</li> <li>iv. for medical purposes and is undertaken by— <ul style="list-style-type: none"> <li>(a) a healthcare professional; or</li> <li>(b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a healthcare professional;</li> </ul> </li> <li>v. for the purpose of, or in connection with, any legal proceedings;</li> <li>vi. for the purpose of obtaining legal advice;</li> <li>vii. for the purposes of establishing, exercising or defending legal rights;</li> <li>viii. for the administration of justice;</li> <li>ix. for the exercise of any functions conferred on any person by or under any written law; or</li> <li>x. for any other purposes as the Commission thinks fit; or</li> </ul> <p>(c) the information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.</p> |
| 38 | Offences | <p>The fines proposed may be too lenient or strict depending on the agency.</p> <p>Proposal to have the fines as a percentage of an agency’s revenue. If not a commercial entity, as a percentage of total annual budget. This could be 2%.</p>  |

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| New Clause | Political use of data | <p>A new clause is proposed to deal with political use of data-</p> <p>An agency shall not use, for political purposes, personal data obtained pursuant to the provisions of this Act unless it has sought and obtained express consent from the data subject.</p> |