



DATA PROTECTION POLICY POSITION AND IMPLICATIONS

Namibia Media Trust
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OVERVIEW

The Covid-19 pandemic has accelerated the process of digital transformation and amplified the urgency for Governments to respond. A key challenge is how to govern and harness effectively the surge in digital data for the global good. It has been estimated that the global Internet traffic in 2022 will exceed all the Internet traffic up to 2016. However, the big numbers are skewed in favour of North America and Europe.

Data has become a key strategic asset for the creation of both private and societal value. How the data is handled will greatly affect our ability to achieve Sustainable Development Goals. For example, new sources of data - such as satellite data -, new technologies, and new analytical approaches, if applied responsibly, can enable more agile, efficient and evidence-based decision-making and can better measure progress on the Sustainable Development Goals (SDGs) in a way that is both inclusive and fair. (elaborate ...). Determining what is the best way forward will be difficult but necessary. Data is multidimensional, and its use has implications, not just for trade and economic development, but also for human rights, peace, and security. Responses are also needed to mitigate the risk of abuse and misuse of data by States, non-State actors and the private sector.

The Namibia Media Trust (NMT) feels it is more important than ever to embark on a new path for digital and data governance in Namibia. This is because 33 African countries have put in place legislation and oversight mechanisms to secure the protection of data and privacy. Namibia is one of the 22 countries on the African continent with no comprehensive laws on Data Protection. However, all is not lost as Namibia is one of the six (6) countries in Africa which have draft legislation. The Draft Data Protection Bill, 2021, is progressive but leaves room for improvement, especially in safeguarding data subjects'¹ rights.

If a (good) law is not passed soon and implemented, the current data landscape risks us failing to capture value that would accrue from digital technologies, and it may create more space for substantial harm related to privacy breaches, cyber-attacks and other risks.

Digitalisation is affecting all aspects of life in Namibia - including how we interact, work, shop, and receive services - as well as how value is created and exchanged. In this process, data and cross-border data flows are becoming more important for development. The readiness of Namibia to harness data for development is equally being affected by lack of comprehensive data protection laws and the development of an entire ecosystem around data governance. We must, therefore, move with speed to have a good data protection framework-law, oversight mechanism, technical expertise and building a community of Namibians aware of the value of data and how to maximize on the possibilities it offers.

¹ Data subject refers to any individual person who can be identified, directly or indirectly, via an identifier such as a name, an ID number, location data, or via factors specific to the person's physical, physiological, genetic, mental, economic, cultural or social identity.

The Draft Data Protection Bill, 2021, issued by the Ministry of Information and Communication Technology of the Republic of Namibia, is the outcome of a long process of consultation and stakeholder involvement. The Bill is progressive in outlook and seeks, as a guiding objective, to establish a Data Protection Supervisory Authority and to provide for its powers, duties and functions and spells out the rights, obligations and responsibilities for data subjects, data controllers and data processors.

The Bill creates direct and indirect obligations to the NMT and News Media Organisations (NMOs). This Policy Statement assesses the implications of the Draft Data Protection Bill, 2021, if adopted in its current version to the NMT and other organisations in the media sector. The NMT, as member and secretariat of the ACTION Namibia Coalition, made a submission on the Draft Data Protection Bill. The submission is available [here](#).



I. Introduction

Journalism seeks to gather, organise, and disseminate a wide variety of information to a broad and unrestricted public. As such journalism plays a vital role in the free flow of communications in a democracy. It increases knowledge, informs debates and helps citizens participate more fully in society. It also helps to hold the powerful to account.

Data Protection on the other hand has as its central purpose the safeguarding of information relating to natural persons to ensure that their privacy and related rights are not unduly undermined.

Therefore, the relationship between journalism and data protection law is not a comfortable one, because data protection constrains the practice of journalism. The most obvious constraint that a data protection law imposes on journalism is that it limits what information can be published about individuals. In addition, a data protection law also has the potential to interfere with other aspects of journalistic activity, such as research and archiving.

It is, therefore, important that any interpretation and application of the data protection law carefully balances fundamental rights especially freedom of expression and the right to privacy. It cannot afford to give primacy to one right to the detriment of the other. Both constitutional rights- right to privacy,² and freedom of speech and expression³ -must be protected. Whether the vision of careful balancing the two fundamental rights will be achieved remains to be seen.

This policy statement is developed to aid the NMT and other NMOs understand the implications of the data protection legislation on their work once it has been passed. The policy statement assumes that the Data Protection Bill, 2021 will be passed by the Namibian parliament without any substantive changes.

² Republic of Namibia, The Constitution of the Republic of Namibia, Article 13.

³ Ibid, Article 21 (1) (a).



II. Implications of the Data Protection Bill, 2021

The Namibian Draft Data Protection law aims to protect the privacy and related rights of individuals, purposes which could conflict with free speech of professional journalism that the NMT espouses. Moreover, the statutory Data Protection Supervisory Authority to be established under Section 3 of the law will act as the ‘guardian’ of the data protection framework within Namibia. It will even collaborate with other similar bodies globally on matters of cross-border transfer of personal data and enforcement of privacy laws of other countries.⁴

The Data Protection law, once enacted, will apply to NMT and all other NMOs that collect, organise, use, or keep any information about a living person - even if it's not private. This will have several implications which we discuss below:

1.0 Understand and apply data protection basics

NMOs, including the NMT, will be required to comply with the eight main principles of data protection. The Draft Data Protection Bill, 2021, does not list them but has integrated them into Sections 20-42 that spell out the obligations of data controllers and data processors.

The data protection principles can be summarised as follows:

- i) Collect and use information about people fairly and lawfully, without unwarranted harm or intrusion into their private life [see Section 20].
- ii) Do not use the information for any other incompatible purpose [see Section 22]

⁴ Draft Data Protection Bill, 2021, Section 5 (1) (f).

- iii) Ensure the information is adequate, relevant, and not excessive for your purpose [see Section 20 (2)]
- iv) Ensure the information is accurate and (where necessary) kept up to date [see Section 25]
- v) Do not keep it longer than is necessary [see Section 23]
- vi) Comply with individual's rights (e.g. to access their information, or to object) [see Section 21]
- vii) Keep the information secure [see Section 27]
- viii) Do not send it to anyone outside Namibia without adequate protection.

While most other similar laws provide an exemption for the media's journalistic uses of personal information when publication is in the public interest and compliance would be incompatible with journalism,⁵ the Namibian Data Protection Bill, 2021, does not provide for such exemption.

Lack of an exemption for journalistic use of personal information means that the media is bound by each and every provision of the law regardless of what the media industry may consider as appropriate cases (when public interest overrides the privacy rights of the individual) where personal information can be processed without adhering to the provisions of the law.

2.0 Be able to demonstrate compliance

All NMOs, including the NMT, will be required to comply with applicable data protection legislation in the same way as any other organisation. This is because such organisations are according to the law either data controllers or data processors.

As data controllers, the NMT like all NMOs, as a body corporate is legally responsible and would be subject to any enforcement action as spelt out in Part 7 of the law. Therefore, the organisation(s) should take all necessary measures to ensure compliance with the data protection law requirements and demonstrate compliance.

To be able to effectively demonstrate compliance, the NMT like other NMOs must adopt the following immediately the law is enacted:

- Appoint or designate a competent data protection officer.
- Establish a register of data processing activities.
- Undertake a data protection impact assessment for investigative journalism and set out how the NMT will manage the risks of different types of processing of personal data that it carries out.
- Develop a data protection policy which sets up measures that will help demonstrate that you are complying with the law

Although the data controller, in this case NMT or other any NMO, is legally responsible and would be subject to any enforcement action, individual journalists working in the media houses would need to comply with internal set structures and mechanisms of compliance.

⁵ See for example §52 of the Kenya Data Protection Act, No 24 of 2019 and §7 on exclusion for journalistic, literary or artistic purposes of the South African Protection of Personal Information Act, 2013.

But the situation would be different for freelance journalists, bloggers, and independent content creators. This category of journalists has clear obligations to ensure compliance as they act as both data controllers and data processors.

It must be noted, however, that individual journalists can commit criminal offences if they obtain information unlawfully in breach of among others section 20 (8) and Section 52. It shall be a criminal offence to obtain (or disclose) personal data knowingly or recklessly from a data controller without its consent. This offence can cover obtaining information about someone by deception, subterfuge, hacking, exploiting poor security, or unauthorised leaks.

There is no specific defence for journalists given that the law does not make for a special exemption for purposes of processing personal information for journalistic, academic, or artistic use. While the criminal penalty for such a criminal offence is a fine as may be provided for by the Data Protection Supervisory Authority, in some potentially precarious situations such breaches may lead a journalist to be prosecuted under the cybercrime law for unlawful access to secure databases which could earn him/her a long custodial sentence or huge fines.

3.0 Develop clear mechanisms to keep personal data secure

Security is a key principle of data protection law. It involves protecting personal data against unauthorised or unlawful processing and accidental loss, destruction, or damage.

NMT and other NMOs are expected to have a clear cybersecurity plan and implement it. The plan must be appropriate as it identifies organisational risks and develops necessary technical measures to secure personal data in the custody of NMT and other NMOs.

Such a plan should have clear security arrangements that consider the heightened security risks that may arise because of the work that journalists, especially investigative journalists, do.

Given the new normal after Covid-19 pandemic that more members of staff of NMT and other NMOs may work remotely, use portable devices, such as laptops and smart phones, and portable media such as USB memory sticks, clear security arrangement must be put in place and updated according to periodic risk assessments.

The organisation must make sure that members of staff including journalists are aware of and follow the organisation's security policies and procedures. Information should be locked, password protected, or accordingly anonymised or encrypted.

Proper and adequate security measures provide strong foundations to help any data controller or processor to comply with other aspects of the data protection law.

4.0 Take reasonable steps to make sure personal data collected and held is accurate

To meet the dictates of section 25 of the Draft Data Protection Bill, the NMT and all NMOs in Namibia must have clear editorial guidelines that act as signposts for ethical conduct of journalists within their stable. Similarly, if there are industry-wide Codes of Conduct, such Codes among others ideally prescribe the place of accuracy and fairness in collection of information. These Codes must be reiterated where they exist and where they do not exist, new ones developed.

Journalists must be urged to ensure that they are open and honest whenever possible. Their sources and subjects should know if they are collecting information about them or from them, where it is practical and would not undermine their journalistic activity. From the substance of the law, it is unlawful to use covert methods as there is no justification through a special exemption that would have provided for public interest or other legitimate interests.

Similarly, journalists must take reasonable steps to ensure they follow existing journalistic practices that enable them to distinguish clearly between fact, opinion, and speculation. Such a process is key in being compliant with the data protection law.

Any collection of information about someone's health, sex life or criminal behaviour if the NMO is confident that it is relevant and that a public interest in doing so sufficiently, justify the intrusion into their privacy and the publication of private facts that may ensue.

The NMT and other NMOs can keep useful personal information if it was obtained legitimately and lawfully. This implies that there no set time limits in the law about how long people's information can be kept, but the organisation should ensure that the information held is still relevant and up to date and deleted immediately if no longer needed.





III. Need for Ongoing Advocacy

The Data Protection Bill, 2021, is progressive in outlook and seeks, as a guiding legal framework, to create an enabling environment for protection and processing of data in accordance with international standards and best practices.

However, there are four areas that may require continued advocacy to secure the rights of Namibians as data subjects but also safeguard the rights of media organisations, the NMT included, to do their work of collecting and curating information for purposes of sharing with the public.

Thus, there is need for the NMT and other NMOs in Namibia to sustain advocacy that seeks to make changes on the proposed law so that it ensures that Namibia is rated as offering adequate safeguards to data protection when compared with other countries it may want to engage with in trade deals that may require cross-border transfer of personal data.

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1.0 Data Subjects Rights

The section on data subject rights is weak. It covers only two rights. A standalone part on the rights of data subjects must be introduced as it ensures that the country can be rated as offering adequate safeguards to personal data from other countries. Lack of such a clear provision will minimise the chances of the country striking trade deals with other countries especially those in Europe that have General Data Protection Regulation⁶ (GDPR) as the minimum data protection law.

A new section reading as follows may be inserted:

A data subject has a right-

- a) *to be informed of the use to which their personal data is to be put;*
- b) *to access their personal data in custody of the data controller or data processor;*
- c) *to object to the processing of all or part of their personal data;*
- d) *to correction of false or misleading data; and*
- e) *to deletion of false or misleading data about them*

2.0 Exemption

The exemption part does not clearly mention the need to use the necessity and proportionality tests to balance the exercise of different fundamental rights and freedoms. This is a critical omission as an exemption to processing personal information for journalistic, artistic, and academic purposes would have ensured the law meets ‘adequacy safeguards’ tests when compared to Convention 108⁷ and the GDPR. We therefore recommend:

- i) Section 43 must be substantially redrafted.
- ii) Provide among others that:
The principles of processing personal data shall not apply where:
 - a) *processing is undertaken by a person for the publication of a journalistic, literary or artistic material;*
 - b) *data controller reasonably believes that publication would be in the public interest; and*
 - c) *data controller reasonably believes that, in all the circumstances, compliance with the provision is incompatible with special purposes.*

⁶ The General Data Protection Regulation is a regulation in EU law on data protection and privacy in the European Union and the European Economic Area.

⁷ The Convention opened for signature on 28 January 1981 and was the first legally binding international instrument in the data protection field. Under this Convention, the parties are required to take the necessary steps in their domestic legislation to apply the principles it lays down in order to ensure respect in their territory for the fundamental human rights of all individuals with regard to processing of personal data.

3.0 Independence and Tenure of the Data Protection Supervisory Authority

The Bill needs to be reformulated to ensure that removal of members of the board must be for clear, objective reasons like violations of the constitution or incapacity to discharge functions and not just at the discretion of the Minister responsible.

4.0 Consent

There is need to add prior consent to section 1 of the Bill.

Secondly, consent is heavily relied upon and for special category of data there is a mention of the requirement of a qualified consent (explicit consent). Perhaps this could be reviewed as where there is a public interest, or a legitimate interest explicit consent make undermine other interests.

5.0 Code of Conduct and Guidelines about Codes of Conduct

Section 44 and Section 49 of the Draft Data Protection Bill, 2021, respectively require the Data Protection Supervisory Authority to issue codes of conduct and guidelines about Codes of Conduct. Such codes of conduct are a statutory practice to support organisations and individuals processing personal data for various purposes.

If section 43 is not reviewed as recommended above in 2, then there is an opportunity for NMT and other NMOs to lobby that a Code of Practice is and be issued by the Supervisory Authority on the Practice of Journalism and Data Protection. Such a code should then spell out clear mechanism and circumstances under which processing of personal data for journalism, artistic, academic purposes may be exempt from some measures under the Data Protection law.

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