THE ALTERNATIVE DISPUTES RESOLUTION (ADR)
FRAMEWORK
APPROVED BY .................................. DATE ............................

THE DATA COMMISSIONER,
REPUBLIC OF KENYA.
DISCLAIMER

This ADR Framework has been prepared for the general guidance of the Stakeholders who wish to engage in Alternative Dispute Resolution (ADR) to resolve their data protection disputes arising under the Data Protection Act, 2019.

This Framework should be construed as having the force of guidelines issued under Section 74(1) of the Data Protection Act. However, the framework does not constitute professional advice and Stakeholders are advised not to act upon information contained in the publication without obtaining professional advice from relevant professionals.

No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this Framework, and, to the extent permitted by Law, the Data Commissioner does not accept or assume any liability, responsibility or duty of care for any consequences suffered by anyone acting, or refraining to act, in reliance to the information contained in this publication or any decision based on it.
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<td>1.</td>
<td>ADR - Alternative Dispute Resolution</td>
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<td>ODPC - Office of Data Protection Commissioner</td>
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<td>DPA - Data Protection Act, 2019</td>
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DEFINITIONS

1. **Alternative Dispute Resolution (ADR)** – in the context of this Framework means voluntary process of settling data protection disputes arising under the Data Protection Act, 2019 between individual complainants and respondent organizations through conciliation, mediation, negotiation and other methods such as arbitration facilitated by the Data Commissioner or otherwise through agreement of the parties and with help of a facilitator whether conciliator, mediator or arbitrator.

2. **ADR Agreement** – Means an executed agreement entered into between parties and witnessed by the Data Commissioner, upon the conclusion of the Alternative Dispute Resolution process whether negotiation, mediation and conciliation and upon the parties reaching a settlement on the dispute with finality.

3. **Dispute** – Means data protection complaint or dispute where applicable between individual complainant(s) and respondent organization(s).

4. **Facilitator** – Means a person who helps parties to negotiate, mediate or conciliate their Data Dispute by engaging the parties to the data protection dispute and providing indirect or unobtrusive assistance, guidance, or supervision for them to reach an agreement.

5. **Facilitated ADR** – Means a dispute resolution process facilitated by the Office of the Data Protection Commissioner in resolving Data Protection Dispute(s) arising from Data Protection Act, 2019.

6. **Parties** - Means Complainant and Respondent seeking to engage in ADR.

7. **Working Meetings** - Refers to the periodic meetings held between a Complainant and the Respondent outside of the Alternative Dispute Resolution meeting during the course of the ADR process.
1 **PREAMBLE**

1.1 The Data Protection Act, 2019 provides that the Data Commissioner shall have power to facilitate Conciliation, Mediation and Negotiation arising from the Act. A Data Protection Dispute commences with response from the Respondent in a Data Complaint objection.

1.2 This Framework seeks to improve on the provisions of the Data Protection (Complaint Handling Procedure and Enforcement) Regulations, 2021 on conciliation, mediation and negotiation as an alternative means of resolving data protection disputes arising under the Act out the Judicial Process.

1.3 ADR is a voluntary, participatory and facilitated resolution of data protection dispute between a complainant and respondent through conciliation, mediation, negotiation and other methods such as arbitration facilitated by the Data Commissioner or otherwise through agreement of the parties and with help of a facilitator whether conciliator or mediator.

1.4 Overall, ADR seeks to enrich the entire dispute resolution process by providing flexibility and eliminating the limitations imposed by judicial and quasi-judicial processes and the complexity of technical procedures and high costs of litigation.

1.5 ADR is favoured over litigation and administrative action because it gives parties autonomy to achieve settlement on their terms. This Framework has been benchmarked against the experiences of many Data Protection Dispute Resolution from the World.

2 **THE OBJECTIVES OF THIS FRAMEWORK**

2.1 To facilitate Alternative Dispute Resolution (ADR) of Data Protection Disputes through conciliation, mediation and negotiation.

2.2 To give Parties an opportunity for amicable resolution of their Data Protection Disputes as an alternate to administrative action and litigation.
2.3 To provide the structures, processes and safeguards to support Alternative Dispute Resolution (ADR) of Data Disputes in Kenya.

2.4 To outline basic rules of conduct of Parties and Facilitators and related issues for effective Facilitated ADR of Data Protection Disputes.

3 THE LEGAL BASIS OF FACILITATED ADR

The Alternative Dispute Resolution (ADR) of Data Protection Disputes in Kenya has the following legal basis:


(b) Section 9(1)(c) of the Data Protection Act, 2019.

(c) Section 59C of the Civil Procedure Act, Cap. 21 Laws of Kenya.

(d) Data Protection (Complaint Handling Procedure and Enforcement) Regulations, 2021.

(e) Any other laws relevant to Data Protection in Kenya.

4 INITIATING FACILITATED ADR

4.1 The parties engaging in facilitated Alternative Dispute Resolution of Data Disputes shall do so on a voluntary basis.

4.2 The Complainant or Respondent may request the Data Commissioner to facilitate the resolution of their Dispute through ADR using the prescribed ADR application form.

4.3 A dispute pending before the Data Commissioner may be referred under this Framework to Alternative Dispute Resolution at the request of either party to the dispute, at any stage before issuance of Enforcement Notice, pursuant to the relevant legislation.
4.4 A dispute pending before the Data Commissioner may, at any stage before issuance of Enforcement Notice, be referred under this Framework to Alternative Dispute Resolution including Arbitration, Negotiation, Conciliation and Mediation or any other method outside this Framework upon written agreement of the Parties.

5. **HOW TO COMMENCE ADR**

Alternative Dispute Resolution under this Framework shall commence upon written communication by the Data Commissioner appointing Facilitator and shall be concluded within ninety (90) days thereof or as extended by the agreement of the Parties.

6. **DECISION ON ELIGIBILITY FOR FACILITATED ADR**

6.1 Upon request by the Parties to the Data Commissioner that a dispute be referred to Alternative Dispute Resolution, the Office of the Data Protection Commissioner shall decide whether the matter is eligible for Facilitated ADR under this Framework and shall communicate the decision to the Parties if the decision and reasons is that the Dispute is not eligible for ADR.

6.2 Notwithstanding the Decision of the Office of the Data Protection Commissioner that a dispute is not eligible for Alternative Dispute resolution, the parties may agree to pursue Alternative Dispute Resolution outside this Framework at their own cost.

6.3 Where the Parties opt to engage Alternative Dispute Resolution outside this Framework, the Data Commissioner may upon written request signed of the Parties suspend any administrative steps on the Dispute for specified time or until requested by either party to resume if the ADR process fails.

7. **SUITABILITY OF DISPUTES TO ADR**

A dispute may be deemed not be eligible for Alternative Dispute Resolution by the Data Commissioner under this Framework where:

(a) settlement would be contrary to the Constitution of Kenya, the Data Protection Act or any other law;
(b) the matter in dispute regards technical interpretation of the law;

(c) it is in the public interest to have judicial clarification of the issue;

(d) pursuit of the matter through administrative action or the court system would promote compliance;

(e) one party is unwilling to engage in the Alternative Dispute Resolution process;

(f) Where the Data Commissioner has already issued Enforcement Notice.

8. **ADR STAKEHOLDERS**

Stakeholders to this Framework include but are not limited to:

- (a) Complainant of Data Protection Complaint.
- (b) Respondent to Data Protection Complaint.
- (c) The Office of the Data Protection Commissioner.
- (d) Legal and Professional Advisors.
- (e) The Courts.
- (f) Academia
- (g) Media
- (h) Professional Bodies, Civil Societies and Industries Umbrella Bodies.
- (i) Other Relevant Government Agencies.

9. **LEGAL/PROFESSIONAL ADVISORS IN ADR**

Any party may engage a Legal Advisor or any other Professional Agent for the following role but not limited to:

- (a) Assisting parties in the implementation of this ADR Framework;
(b) Assisting Parties in the initiation of the ADR process and documentation (where necessary);

(c) Submitting their Client’s Case for ADR Consideration;

(d) Assisting parties to identify contentious and non-contentious issues in the Data Protection Dispute;

(e) Assisting parties in the ADR and especially in dispensing with issues for expedited resolution(s).

10. **THE ADR FACILITATOR(S)**

10.1 Upon request by the Parties to the Data Commissioner that a dispute be referred to Alternative Dispute Resolution, the Commissioner shall appoint a facilitator if the matter is deemed eligible for Facilitated ADR;

10.2 The Facilitator may where feasible initiate and encourage negotiations towards amicable settlement of the Complaint;

10.3 If the Facilitator considers it reasonably possible that a complaint may be conciliated successfully, she may conciliate the complaint between the parties.

10.4 If in the opinion of the Facilitator the complaint may more appropriately be resolved by mediation, the Facilitator shall refer the matter to mediation.

11. **INDEPENDENCE OF THE FACILITATOR(S)**

The Facilitator(s) shall disclose any conflict of interest existing before the commencement of the alternative dispute resolution proceedings or which may arise during the proceedings.

12. **RULES TO GUIDE THE FACILITATOR(S)**

The facilitator(s) shall, for the purposes of resolving any dispute:

(a) hold such number of meetings he or she considers appropriate;
(b) guide the parties in the Alternative Dispute Resolution proceedings towards an amicable settlement;

(c) remain neutral during and the Alternative Dispute Resolution proceedings;

(d) assist in a fair and equitable resolution of the data protection dispute between the parties;

(e) promote and protect the integrity, confidentiality, fairness and efficiency of the process;

(f) act independently and avoid any circumstances that may result in a conflict of interest;

(g) employ procedures that lead to expeditious resolution of the dispute.

13. **CONDUCT OF THE PARTIES TO ADR**

During the Alternative Dispute Resolution meetings, the parties or their appointed representative(s) shall: -

(a) agree to a set of terms and conditions governing the Alternative Dispute Resolution proceedings;

(b) assist to identify the contentious and non-contentious issues in dispute;

(c) uphold and maintain decorum and confidentiality;

(d) uphold the integrity and fairness of the process;

(e) participate in all proceedings fairly and diligently;

(f) make full disclosure of material facts and documentation relevant to the dispute;
(g) be committed to the Alternative Dispute Resolution process and attend all scheduled meetings;

(h) strictly adhere to the agreed timelines, except under reasonable circumstances, which shall be communicated to the facilitator and the other party.

14. MANAGEMENT AND PROCEDURES IN ADR SITTINGS

14.1 The parties to a dispute shall set the date for an Alternative Dispute Resolution meeting as soon as possible and in any case not later than thirty (30) days from the date of application requesting for Alternative Dispute Resolution.

14.2 At the Alternative Dispute Resolution meeting, the party who made the application shall commence the proceedings by stating the grounds of the dispute and providing may support it with relevant evidence.

14.3 The other party shall be entitled to reply to the issues raised or evidence adduced by the applicant and is entitled to produce evidence in rebuttal.

14.4 The parties, with the guidance of the facilitator(s) may determine the dispute on the basis of all the evidence submitted by the parties during the Alternative Dispute Resolution including all documents filed or oral evidence given.

14.5 No party to a dispute shall communicate with the facilitator(s) outside the Alternative Dispute Resolution meeting with regard to matters or issues which are the subject of the dispute.

15. ADJOURNMENTS

Where on the date of the meeting either of the parties or their authorized representative does not appear without a justifiable cause, the facilitator may forthwith schedule another date for the meeting or close the Alternative Dispute Resolution proceedings if he or she deems it appropriate to do so.

16. WORKING MEETINGS
16.1 Where necessary, the facilitator may advise the parties to engage in working meetings for purposes of narrowing down the issues or resolving the dispute.

16.2 The facilitator(s) may attend the working meetings at any time when called upon by the parties to the dispute.

17. **EXPERT EVIDENCE**

Where in the course of resolving a dispute, a matter arises that in the opinion of the facilitator or parties requires certain expertise or competence, the facilitator or the parties by consent, may call upon a subject matter expert to sit at the Alternative Dispute Resolution meeting for the purpose of providing the required expertise.

18. **WITHDRAWAL**

A party to dispute which is subject to Alternative Dispute Resolution may withdraw from the proceedings at any stage and shall notify the Data Commissioner and other parties of such withdrawal within seven days from the date of making such a decision.

19. **TERMINATION OF ADR PROCESS**

19.1 Alternative Dispute Resolution proceedings may be terminated for the following reasons-

(a) where either party opts to terminate the proceedings or both parties mutually agree to terminate the proceedings;

(b) if a party fails to honour three consecutive Alternative Dispute Resolution meeting invitations without any justifiable cause;

(c) where a party fails to carry out a reasonable request made by the facilitator(s) without a valid justification;

(d) where the ninety (90) day timeline required to resolve disputes under Alternative Dispute Resolution has lapsed and the party that made the Alternative Dispute Resolution application has not sought an extension of time from the either the Tribunal or the Court, as the case may be.

19.2 Upon termination of Alternative Dispute Resolution proceedings, a notice of termination shall be sent to the parties and the matter referred back to the Tribunal or the Court, as may be.
19.3 Any dispute may be re-admitted to Alternative Dispute Resolution upon application of either party, with the consent of the other party.

20. **ADR AGREEMENT**

20.1 Where parties have reached an agreement, the issues agreed upon shall be set out in writing.

20.2 The Alternative Dispute Resolution agreement shall set out:

   (a) the background of the dispute and the issues in contention;
   (b) the processes and specific exercises undertaken during the Alternative Dispute Resolution proceedings;
   (c) both agreed and non-agreed issues;
   (d) the terms of settlement;
   (e) the taxes payable, where applicable, and justifications thereto;
   (f) undertakings given by each party, if any;
   (g) agreed payment plan, where applicable;
   (h) Award of costs, if any.

21. **SIGNING OF ADR AGREEMENT**

21.1 At the conclusion of the Facilitated ADR process, the parties shall sign a negotiation, mediation or conciliation agreement in the Prescribed Form.

21.2 The written agreement entered into under this regulation shall be deemed to be a determination of the Data Commissioner, and shall be enforceable as such.

21.3 The written agreement shall:

   (a) shall be dated and signed by the parties or their duly authorized representatives and witnessed by the facilitator(s);
   (b) a copy shall be retained by each of the parties as evidence of the outcome of the Alternative Dispute Resolution proceedings;
   (c) shall be binding to both parties to the dispute and shall be deemed to be a full and final settlement of the dispute;
   (d) shall be confidential and entered into on a without prejudice basis;
(e) shall not set a precedent;

22. AGREEMENT TERMS, SETTLEMENT PROCEDURES AND APPROVALS

22.1 Where a dispute is resolved wholly or partially the executed Alternative Dispute Resolution agreement shall be filed with the Data Commissioner by the Facilitator.

22.2 Parties to Alternative Dispute Resolution proceedings are obligated to adhere to the terms set out in the executed Alternative Dispute Resolution agreement within the stipulated timelines.

22.3 Where either party to the proceedings violates the terms of the Alternative Dispute Resolution agreement, the other party may apply to Court for enforcement of such agreement.

23. NO AGREEMENT OR DETERMINATION

23.1 Where there is no agreement between the parties after an Alternative Dispute Resolution process, the matter shall be referred back to the Data Commissioner by the facilitator.

23.2 Where the complaint is not determined through negotiation, mediation or conciliation, the Data Commissioner shall proceed to determine the complaint as provided for in the Act and these Regulations.

24. RESERVATION OF RIGHTS

Parties to the Alternative Dispute Resolution proceedings shall not be denied any other rights they would ordinarily have had they not resorted to Alternative Dispute Resolution.

25. REVIEW OF THE FRAMEWORK

This framework may be reviewed from time to time by the Data Commissioner.

26. APPLICATION AND INTERPRETATION

26.1 The Interpretation of this Framework shall be within the Constitution of Kenya, the Data Protection Act, 2019 and the Regulations made thereunder and all laws relevant to Data Protection in Kenya.

26.2 Disputes under Alternative Dispute Resolution prior to these Regulations shall proceed to their conclusion under the administrative framework for the time being in force.
26.3 Any rights and duties arising from disputes resolved or being resolved prior to the coming into force of these Regulations shall be binding on the parties to the dispute.