



GNI Submission to Open Consultation on the Draft Indian Telecommunications Bill, 2022

On September 21, 2022, the Ministry of Communications in India released the [Draft Indian Telecom Bill, 2022](#) (“Draft Bill”). The Draft Bill followed a previous [consultation paper](#) from the Department of Telecommunications outlining the “Need for a new legal framework governing Telecommunication in India,” with a call for input that closed on September 1. GNI welcomes the opportunity to respond to the open consultation on the Draft Bill. For the reasons set out below, we encourage additional consultation and revision and provide recommendations for future amendments to ensure a free, open, and secure information and communications technology (ICT) ecosystem in India.

The Global Network Initiative (GNI) is a multistakeholder initiative that brings together 85 prominent academics, civil society organizations, ICT companies, and investors from around the world. Members’ collaboration is rooted in a shared commitment to advancing the GNI Principles on Freedom of Expression and Privacy, which are grounded in international human rights law and the UN Guiding Principles on Business and Human Rights (UNGPs). For over a decade, the GNI Principles and corresponding Implementation Guidelines have guided ICT companies to assess and mitigate risks to freedom of expression and privacy in the face of laws, restrictions, and demands.

In 2020, GNI conducted an analysis using human rights principles of existing and proposed governmental efforts to address various forms of online harm related to user-generated content — a practice we refer to broadly as “content regulation.” After [extensive consultations](#) with GNI members and outside stakeholders, including governments, in a wide range of jurisdictions, GNI published a policy brief titled “[Content Regulation and Human Rights: Analysis and Recommendations](#),” (“Policy Brief”) which set out a range of observations and suggestions on how to regulate content in a manner that upholds and strengthens human rights. The brief was informed by [evaluation](#) of and a [roundtable discussion](#) on the Indian Draft Intermediaries Guidelines (Amendment) Rules, 2018, and served as the basis for additional [comments](#) when the rules were notified in February 2021. GNI has worked on intermediary liability issues in India since 2012, including commissioning a report that demonstrated how greater legal certainty for online intermediaries could help unleash the economic potential of the ICT sector.

The analysis detailed below is informed by the Policy Brief and the [GNI Principles on Freedom of Expression and Privacy](#), and input from our global membership. We appreciate the government’s stated commitment to ensuring availability of affordable, reliable, secure, and universal telecommunication services, and the acknowledgement of the critical role these services play. However, we join many stakeholders inside and outside of India calling for additional consultation on the bill and some critical amendments to meet these aims.

Specifically, we encourage the government to i) reconsider the unprecedented expansion of government authorities to set licensing and registration requirements for a broad array of ICT companies; ii) reaffirm Telecommunications Regulatory Authority of India’s role in providing independent oversight and expertise on related matters; iii) clarify and substantially narrow the provisions for public emergency or public safety powers in the bill, including as related to ordering network disruptions; and iv) to protect encryption and anonymity and utilize the opportunity to align surveillance measures with international human rights standards.

I. Expanded Licensing Authority

Pursuant to the expanded definition of “telecommunications services” set out in Clause 2(21) and the provisions set out in Chapter 3 of the Bill, the Government of India would for the first time be authorized to require the licensing of new categories of communications services, including “video communications services,” “interpersonal communications services,” and “over the top (OTT) communications services.” Furthermore, Clause 23 details that the central government may issue additional standards to be prescribed with respect to telecommunications equipment, networks, and infrastructure. While the specifics as to when and how such requirements would be applied are left to future regulatory decisions, the granting of such a broad and relatively unprecedented power is likely to have significant impacts on investment, competition, and user trust.

The proposed expansion of these authorities is surprising, given that the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, as supplemented by the proposed June 2022 amendments, together with their parent-legislation (Information Technology Act, 2000), already establish substantial regulatory power over intermediaries, including OTT services. Granting another body rulemaking and enforcement authority over the same actors increases the risk of inconsistent requirements and legal uncertainty.

Traditionally, licensing requirements for communications services — whether for television, radio, or telecommunications — have served to incentivize and protect the significant up-front investments required to build related infrastructure, produce content, and

develop market share, as well as to manage finite spectrum and address the “gate keeping” functions inherent in network ownership and operation. Meanwhile, OTT services: require distinct and less-expensive infrastructure, which can often be built as a service grows;¹ often leverage user-generated content; can operate using very little bandwidth and no spectrum; face fewer gate keeping and can operate at various scales, using a wide range of business models. While some governments, including India through the aforementioned Intermediary Guidelines and Digital Media Ethics Code, have introduced requirements to designate a single point of contact and sufficiently mandated legal representative or entity, as part of broader oversight and enforcement frameworks, very few democratic and democratic economies have chosen to apply licensing requirements to those services.

Such an approach is unlikely to be the least restrictive means of achieving the Draft Bill’s stated regulatory aims. There is a significant risk that by authorizing the registration and licensing of these new categories of services, the Bill will lead to legal uncertainty, chill investment, stifle competition, and negatively impact access to information and freedom of expression in India. Given these risks, and the lack of a clear explanation for why such new authorities are needed or justified, we encourage the Government to reconsider this approach.

II. Centralizing Authority and Rule-Making

Clause 3 of the Draft Bill further sets out that the central government has “exclusive privilege” to carry out the broad authorities detailed above, including on regulatory matters where the Telecommunications Regulatory Authority of India (TRAI) has historically provided support and oversight. In the Policy Brief, we emphasize the need for rule-making that is done “openly, in a participatory manner that allows for diverse and expert inputs, based on empirical analysis, and accompanied by impact-assessments,” which can also help ensure such measures are the “least intrusive instrument” and proportionate to interests to be protected. It is concerning that the approach in the Draft Bill limits opportunities for such expert input while also scaling up the responsibilities of the regulator significantly.

Under the existing Telecom Regulatory Authority of India Act, 1997, any government authority administering a new license must seek a recommendation (albeit non-binding) from the TRAI. The current law also authorizes the TRAI to provide recommendations on the terms and conditions of such arrangements and outlines specific requirements for independence and expertise within TRAI leadership and staff. However, Clause 46 of the Draft Telecom bill revokes

¹ The recent emergence of Web Real-Time Communication (WebRTC) as a free, open-source protocol to allow web browsers and mobile applications to provide real-time communication (RTC) via application programming interfaces is likely to further lower such barriers to entry.

a number of these authorities by removing provisions from section 11 of Telecom Regulatory Authority of India Act, 1997. GNI encourages the government to preserve the TRAI's important oversight role. At minimum, we would call on the central government, including the Department of Telecommunications, to continue to seek independent expert input in any subsequent rulemaking.

While the Draft Bill commits the central government to establish avenues for appeal and alternate dispute resolution in clauses 11 and 18, the provisions are quite vague and could undermine existing avenues for remedy and oversight of the regulator. We encourage the government to reinforce, or at minimum to clearly align any new mechanisms with the existing Telecom Dispute Settlement and Appellate Tribunal established by the 1997 Act. The significant penalties for failure to meet requirements detailed in the Draft Bill, including potential liability for company personnel, (i.e. Clause 48), or suspension or revocation of license to operate (i.e. Clause 7(1)(b)(e)), reaffirm the importance of such dispute resolution mechanisms.

As we note in the Policy Brief, it is critical to continue to emphasize and require transparency, oversight, and remedy measures so as to avoid "confer[ring] unfettered discretion for the restriction of freedom of expression on those charged with its execution." GNI also continues to foster dialogue on what meaningful and effective transparency for digital communications companies means through the [Action Coalition on Meaningful Transparency](#), which we encourage all interested stakeholders to take part in.

III. Network Disruptions

GNI expresses particular concern about the lack of safeguards around network disruptions in the bill, and recommends more oversight, definitional clarity, and transparency on this issue. For years, GNI and its partners have [expressed concern](#) about government-imposed [network disruptions](#). This has included co-leading the Freedom Online Coalition's [Task Force on Internet Shutdowns](#) with Access Now and the United States State Department, issuing [statements](#) condemning network disruptions around the world, and convening [collaborative efforts](#) to [shed light](#) on the critical risks such shutdowns pose to freedom of expression, public safety, and economic activity.

Chapter 6 of the bill provides sweeping powers to the government in cases of public emergency, "in the interest of public safety," during wartime, or in other scenarios where action is required "in the public interest." These powers include the authority to impose internet shutdowns and network disruptions (Clause 24(2)(b)), explicitly codifying rules that had been developed under the Telegraph Act, and the power to take control of networks in

emergency scenarios (Clause 24(1)). These powers are far-reaching, vaguely defined, and detrimental to transparency, accountability, and free expression. GNI urges clarification on the definitions of “public interest,” “public safety” and “public emergency” that would necessitate these powers. Such definitions would be a first step towards greater transparency about the legal reasoning behind network disruptions and a more open debate about these measures.

Additionally, the bill lacks any framework for judicial oversight or review for network suspension decisions. This is a missed opportunity for the Indian government to answer the calls of [civil society](#) and the [Standing Committee on Communications and Information Technology](#) for reforms that would increase transparency for network disruptions in India. GNI recommends developing a framework for external accountability and review of network suspension decisions in order to avoid abuse and to preserve human rights online.

IV. Surveillance & Privacy Issues

The Draft Bill also has important implications for the privacy and security of users. The Draft Bill and the associated rules and licenses can impact users’ ability to maintain anonymity while using communication services, service providers’ ability to offer end-to-end encryption, and the range of service providers who will be subject to the surveillance provisions.² Importantly, the Draft Bill further complicates the concerns around the [surveillance regime in India](#) and misses the opportunity to ensure that it is in line with international human rights standards and the three-prong test established in the [Puttaswamy judgment](#), namely that any infringement of the right to privacy by the state is lawful, for a legitimate purpose, and is necessary and proportionate.

Specific provisions that pertain to surveillance and have implications for privacy include:

- Clause 24(2) of the Bill allows the Government to prohibit the transmission, intercept, detain, or require the disclosure of a message transmitted or received by a "telecommunication services or telecommunication network" on the occurrence of a public emergency or in the interest of public safety. As per the Bill, "telecommunication services or telecommunication network" includes OTT service providers such as Signal and WhatsApp, which offer end-to-end encrypted services, raising questions about their ability to continue to offer these services. As noted in GNI’s [comments](#) to Indian Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, undermining end-to-end encryption weakens the security of those

² Relatedly, the bill’s strict penalties under Schedule 3 for users that use any unlicensed service could similarly limit their options for privacy, anonymity, and free expression online.

communications, putting all users of such a service at risk of surveillance by other governments and malign non-governmental actors.

- Clause 4(7) requires licensed service providers to ensure the identification of all users of its service and 4(8) requires that service providers ensure that the identity of a sender of a message is made available to all recipients of that message. The misrepresentation of identity under clause 4(7) is penalized with imprisonment for up to 1 year, a fine of up to Rs.50,000, and/or suspension of services. In practice this would limit the ability of licensed service providers to allow users to maintain anonymity when using communication services. Such a limitation would likely have disproportionate impacts on certain professions, such as journalism, and marginalized communities. It can also chill users' freedom of expression more broadly.
- Clause 50 and 51, re: "power of search" and "supply of information to authorized officers," offer extremely broad investigatory powers with insufficient safeguards.
- As per clause 52 and 53, existing rules, guidelines or administrative orders, and licenses will remain in effect. This will include the Indian Telegraph (Amendment) Rules 2007 which creates a framework for interception, and security requirements found in the [Telecom Licenses](#), which, among other things, include requirements for the installation of lawful interception systems by service providers.

GNI recommends that the surveillance capabilities established or carried forward under the Bill should, at a minimum:

- Comply with principles of rule of law and democratic governance, as well as human rights principles such as legality, necessity, and proportionality.
- Require independent authorization for any interception measures and include requirements for transparency and accountability to the greatest extent possible.
- Create a framework that protects against [unmediated government access to data, otherwise known as "direct access,"](#) through technical arrangements that allow access to data streams directly without having to request access from the service providers that collect and/or transmit the data as part of their services.
- Uphold commitments to free and secure communications that underpin human rights commitments, data protection principles, and cybersecurity best practices. This includes not undermining encryption and allowing users to maintain anonymity while using communications services.

I. Conclusion

As it currently stands, the Draft Bill raises several concerns for GNI. The unprecedented expansion of licensing requirements for ICT companies, the stripping of power from the Telecommunications Regulatory Authority, the lack of safeguards regarding network disruption, and surveillance authorities are all aspects that we believe could have significant negative and avoidable consequences. If enacted in its current form, the Draft Bill will be a missed opportunity for the Indian government to align its practices on digital rights with international human rights standards and will undermine its international commitment to and reputation for upholding freedom of expression and privacy online. GNI urges the Government of India to revise the Draft Bill to address these concerns and engage in further consultation with academia, civil society, and potentially impacted companies. As always, GNI stands ready to facilitate and support such engagement.