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THE NATIONAL ASSEMBLY  
TWELFTH PARLIAMENT – THIRD SESSION, 2019

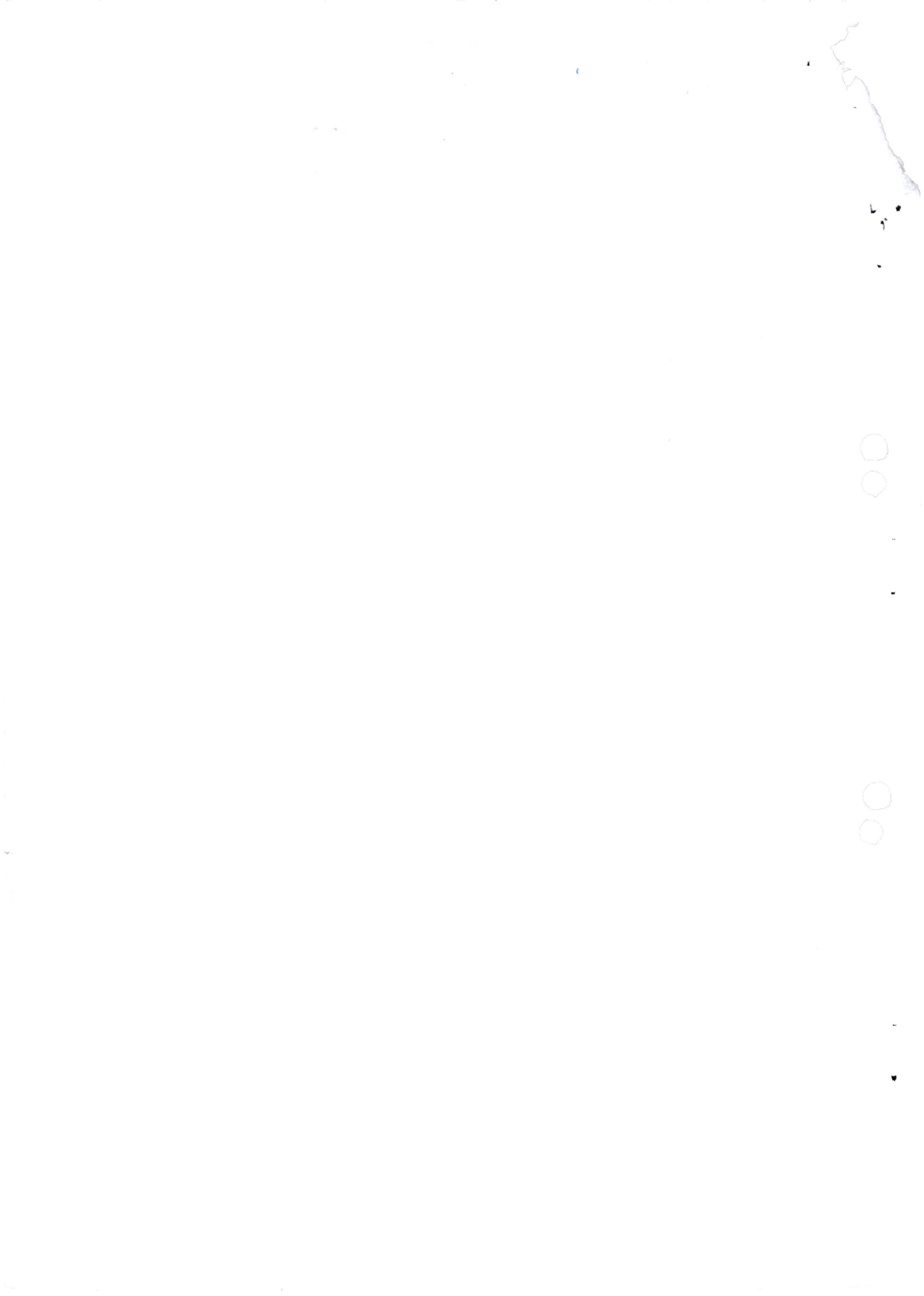
THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL  
AFFAIRS

REPORT ON THE INSTITUTE OF DIRECTORS OF KENYA  
BILL, 2019

(NATIONAL ASSEMBLY BILLS No. 3 OF 2019)

DIRECTORATE OF COMMITTEE SERVICES  
THE NATIONAL ASSEMBLY  
PARLIAMENT BUILDINGS

THE NATIONAL ASSEMBLY  
PAPERS LAJD  
DATE: 14 JUL 2019  
Tabled by: The Chairperson, Committee on Justice & Legal Affairs  
Clerk to the Table: Getrude Chebet  
DAY: Thursday  
JULY, 2019



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## **LIST OF ANNEXURES**

- Annexure 1:** Minutes of Committee sittings on consideration of the Bill and adoption of report.
- Annexure 2:** Signed list of Members who attended the sitting that considered and adopted the report on the Bill.
- Annexure 3:** Copy of newspaper advertisement inviting the public to present written submissions on the Bill.
- Annexure 4:** Submissions from stakeholders
- Annexure 5:** Copy of the Presidential memorandum, 2017

## CHAIRPERSON'S FOREWORD

The Institute of Directors of Kenya Bill, 2019 is sponsored by Hon. Chris Wamalwa, Member for Kiminini and Deputy Minority Whip of the National Assembly.

The Bill was published in the Kenya Gazette on 19<sup>th</sup> February, 2019 (*National Assembly Bills No. 3 of 2019*). The Bill underwent First Reading on 20<sup>th</sup> March, 2019 and was immediately committed to the Departmental Committee on Justice and Legal Affairs for review and report to the House pursuant to the provisions of Standing Order 127(1).

Pursuant to the provisions of Article 118 of the Constitution of Kenya and Standing Order 127 (3) the Committee through advertisement in the local daily newspapers of 29<sup>th</sup> March, 2019 invited the public to make representations on the Bill. Several institutions submitted written and oral representations which have been taken into account while considering the Bill.

It should be noted that a similar Bill sponsored by Hon. David Ochieng, Member for Ugenya, was passed by the House towards the end of the 11<sup>th</sup> Parliament but the President refused to assent to the Bill and referred it back to the House with reservations attached as *annexure 5*. The 11<sup>th</sup> Parliament concluded its term before addressing itself to the Presidential Memorandum. Consequently, Hon. Chris Wamalwa revived the Bill by way of a fresh legislative proposal which the Departmental Committee on Justice and Legal Affairs approved for publication with a rider that the sponsor amends the legislative proposal and takes into account the issues raised in the Presidential reservations.

The Committee held three (2) sittings considering the Bill clause by clause. The Committee considered and unanimously adopted its report on the Bill at its sitting of 18<sup>th</sup> June, 2019.

May I take this opportunity to -

- (i) Commend the Committee Members for their devotion and commitment to duty which made consideration of the Bill successful;
- (ii) Express gratitude to the Offices of Speaker and Clerk of the National Assembly for always providing leadership and guidance;

- (iii) Appreciate the Committee secretariat for exemplary performance in providing technical and logistical support.

Indeed, their roles were critical to the Committee in the consideration of the Bill.

On behalf of the Departmental Committee on Justice and Legal Affairs and pursuant to the provisions of Standing Order 199 (6), it is my pleasant privilege and duty to present to the House a report of the Committee on the Institute of Directors of Kenya Bill, 2019.

**HON. WILLIAM CHEPTUMO, M.P.**  
**CHAIRPERSON, DEPARTMENTAL COMMITTEE ON**  
**JUSTICE AND LEGAL AFFAIRS**

## PART 1

### **1. PREFACE**

#### **1.1. Mandate of the Committee**

1. The Departmental Committee on Justice and Legal Affairs derives its mandate from Standing Order No. 216(5) which provides for the functions of Departmental Committees as follows-

- (a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- (b) study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;
- (c) study and review all legislation referred to it;
- (d) study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;
- (e) investigate and enquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;
- (f) vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments)
- (g) examine treaties, agreements and conventions;
- (h) make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
- (i) consider reports of Commissions and Independent Offices submitted to the House pursuant to provisions of Article 254 of the Constitution; and
- (j) Examine any questions raised by Members on a matter within its mandate.

2. The Second Schedule of the Standing Orders on Departmental Committees further outlines the Subjects of the Committee, as follows-

- (a) Constitutional affairs;
- (b) The administration of law and Justice
- (c) The Judiciary;
- (d) Public prosecutions;
- (e) Elections;
- (f) Ethics, integrity and anti-corruption; and
- (g) Human rights.

### 1.2. Committee Membership

3. The Committee was constituted on Thursday, 14<sup>th</sup> December, 2017 and comprises the following Honourable Members-

No.	NAME	CONSTITU-ENCY	PARTY
1.	Hon. William Cheptumo, M.P. – <i>Chairperson</i>	Baringo North	Jubilee
2.	Hon. Alice Muthoni Wahome, M.P. – <i>Vice Chairperson</i>	Kandara	Jubilee
3.	Hon. John Olago Aluoch, M.P.	Kisumu West	FORD-Kenya
4.	Hon. Roselinda Soipan Tuya, M.P.	Narok County	Jubilee
5.	Hon. Charles Gimose, M.P.	Hamisi	FORD- Kenya
6.	Hon. William Kamoti Mwamkale, M.P.	Rabai	Orange Democratic Movement (ODM)
7.	Hon. Peter Opondo Kaluma, M.P.	Homa Bay Town	Orange Democratic Movement (ODM)
8.	Hon. Ben Orori Momanyi, M.P.	Borabu	Wiper Democratic Movement
9.	Hon. Johana Ng'eno, M.P.	Emurua Dikirr	Kenya African National Union (KANU)



10.	Hon. George Gitonga Murugara, M.P.	Tharaka	Democratic Party
11.	Hon. Anthony Githiaka Kiai, M.P.	Mukurueni	Jubilee
12.	Hon. Gladys Boss Shollei, CBS, M.P.	UasinGishu County	Jubilee
13.	Hon. Beatrice Adagala, M.P.	Vihiga County	Amani National Congress
14.	Hon. Jennifer Shamalla, M.P.	Special Interests	Jubilee
15.	Hon. John Munene Wambugu, M.P.	Kirinyaga	Jubilee
16.	Hon. Japheth Mutai, M.P.	Bureti	Jubilee
17.	Hon. Adan Haji Yussuf, M.P.	Mandera West	Economic Freedom Party
18.	Hon. John Kiarie Waweru, M.P.	Dagoretti South	Jubilee
19.	Hon. Zuleikha Hassan, M.P.	Kwale County	Orange Democratic Movement (ODM)

### 1.3. Committee Secretariat

4. The Committee's secretariat comprises the following officers-

Mr. George Gazemba	-	Principal Clerk Assistant II
Mr. Denis Abisai	-	Principal Legal Counsel I
Ms. Halima Hussein	-	Clerk Assistant III
Ms. Fiona Musili	-	Research Officer III
Mr. Omar Abdirahim	-	Fiscal Analyst III
Mr. Joseph Okongo	-	Media Liaison Officer
Mr. Hakeem Kimiti	-	Audio Officer
Ms. Roselyne Ndegi	-	Serjeant-at-Arms

5. Minutes of Committee sittings on the consideration of the Bill and adoption of report form *annexure 1* of this report.

## **PART 2**

### **2. INTRODUCTION AND BACKGROUND**

#### **2.1. Memorandum of objects and reasons of the Bill**

6. The principal object of the Bill is to establish the Institute of Directors of Kenya. The Bill provides for the registration and regulation of Directors. The Institute is to be issuing certificates of registration to its members annually as a form of quality assurance to the public bodies, entities, enterprises and companies on whose boards its members serve.
7. Part I of the Bill provides for preliminary matters including the title of the Bill and the interpretation of terms used in the proposed Act.
8. Part II of the Bill provides for the establishment of the Institute and its membership. Part III provides on the administration and management of the Institute.
9. Part IV provides for registration of members of the Institute and vests this function in the Executive Director. The part also provides for the disqualification of members for registration and cancellation of the registration.
10. Part V provides for the disciplining of members and proposes the establishment of a Disciplinary Committee that will ensure that registered directors undertake the practice of their profession within their professional norms and standards.
11. Part VI contains provisions relating to financial assets of the Institute including sources of funds for the Institute, the financial year and accounting and auditing provisions. Part VII contains miscellaneous provisions and in particular the falsification of registers and the general penalty to the commission of an act contrary to the Bill.
12. Part VIII contains transitional provisions that provide for the first elections of the Board and the fate of existing Board members. Part IX of the Bill provides for regulations made by the Institute for the better administration of the Institute.
13. The Bill does not contain any provisions limiting any fundamental rights and freedoms. The Bill does not concern county governments nether does it contain provisions affecting the functions, powers or

finances of county governments or relate to the election of members of a county assembly or county executive.

14. The enactment of the Bill will not occasion additional expenditure of public funds.

## PART 3

### **3. PUBLIC PARTICIPATION IN THE REVIEW OF THE BILL**

15. Article 118 (1) (b) of the Constitution of Kenya provides as follows-

*“Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees”*

16. Standing Order 127(3) provides as follows-

*“The Departmental Committee to which a Bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the Committee makes its recommendations to the House”*

17. In line with the Constitution and Standing Orders, the Departmental Committee on Justice and Legal Affairs, in the local daily newspapers of 29<sup>th</sup> March, 2019 attached as *annexure 3* of the report invited the public to make representations on the Bill. The Committee got responses from the following institutions attached as *annexure 4*-

- a) Institute of Certified Secretaries (ICS);
- b) Institute of Certified Public Accountants of Kenya (ICPAK);
- c) Anjarwalla & Khanna Advocates;
- d) The Association of Professional Societies in East Africa (APSEA)
- e) Mr. James Nabangi

18. The Office of the Attorney-General and Department of Justice through invitation by the Committee appeared on 14<sup>th</sup> June, 2019 and made submissions on the Bill. Written submissions by stakeholders form *annexure 3* of this report.

#### **3.1. Stakeholders Submissions on the Bill**

##### **3.1.1. Submissions by the Institute of Certified Secretaries (ICS)**

19. Through a letter to the Clerk of the National Assembly dated 4 April, 2019, the ICS submitted as follows-

- (i) Directorship is not a profession. The Bill purports to regulate the profession of directorship as stated in its object clause (long title) as follows: **AN ACT of Parliament to establish the Institute of Directors of Kenya; to provide for the registration and regulation of the standards and practice of the profession and for connected purposes.** The ICS made reference to High Court Petition No. 67 of 2015 *Dickson Matei T/A Machete Auctioneers & 10 Others Vs The Nairobi County Government & The Finance County Executive of the Nairobi City County Government* wherein the Court noted that a profession presupposes a course of academic, professional and ethical training, as well as exposure for a period of time to such high professional and ethical standards through working for senior colleagues in the profession. Directorship is therefore not a profession. Enacting this Bill will be creating an additional profession in Kenya which is not backed by the National Qualifications Framework.
- (ii) There is no known specific body of professional skills that can identify a director from other persons who run organizations. Directors are drawn from across all professions, disciplines and businesses. Under the Companies Act, all persons who found companies inevitably become founder directors and it would not be prudent to legislate that they have to become IOD members. The basic minimum requirements of a director is already covered in the Companies Act and there is no rationale in further burdening such investors as this would increase the cost of doing business and make Kenya uncompetitive against her peers.
- (iii) The Bill seek to regulate Boards of Directors, that role has already been assigned to sector regulators including:
- (i) State Corporations Advisory Committee (for State Corporations);
  - (ii) Capital Markets Authority (for Issuers of Securities to the Public;
  - (iii) Insurance Regulatory Authority (for insurance sector),

(iv) Retirement Benefits Authority (for Pensions sector),

(v) Sacco Societies Regulatory Authority (for SACCO sector); and

(vi) Central Bank of Kenya (for the Banking Sector)

(iv) There is no specific professional course for one to qualify to be a member of IOD Kenya, it would not be procedural to require that membership in IOD Kenya would confer any additional qualification to a person to be considered for appointment into public bodies. Different legal and regulatory instruments have already determined the requirements to qualify for appointment as a director depending on the needs of the Institution.

(v) Further, enacting the Bill as proposed will result in a requirement that all persons nominated as Directors for Public and Private sector Boards be members of the Institute of Directors. This is not practical particularly for public sector Boards and State Corporations whose Board members are nominated by line Ministries and H.E. the President.

(vi) Indeed, some of these statutory instruments require some Board positions to be drawn from the membership of different professional bodies, which regulate the conduct of their members. The issue of professionalism in the Boards has thus been adequately legislated on.

(vii) The Bill does not have an explicit criterion of membership and defines members by way of exception/disqualification as per section 22 (Disqualifications).

(viii) Before a law is enacted, there must be a mischief which the law seeks to remedy. In this instance, there is no mischief to be cured. For instance, Section 25 does not seek to cure any mischief as the Bill has not

improved the current status since it is optional to be a member of IOD.

- (ix) In conclusion, the ICS is of the view that the Bill has no utility since regulation of directors falls under different existing laws such as the Companies Act, 2015, State Corporations Act, Cap. 446, Mwongozo Code of Corporate Governance for State Corporations, the CMA Code of Corporate Governance for Issuers of Securities to the Public, The Prudential Guidelines as well as various statutes incorporating individual parastatals & state corporations and the various Articles of Association of the various entities. In this regard therefore, the Bill is seeking to usurp the functions of such regulators which will create duplication and confusion.
- (x) The Institute, nonetheless, suggested that the following amendments be made to the Bill if the House was minded to pass the Bill-
- (a) That the long title of the Bill be amended by deleting the word “profession”. The justification for this amendment is that Directorship is not a profession since there is no laid down curriculum for academic and professional training qualifications requirements for directors;
  - (b) That Clause 2 of the Bill be amended in the definition of the term ‘company secretary’ to make cross reference to the term as used in the Certified Public Secretaries of Kenya Act, Chapter 534, Laws of Kenya;
  - (c) That Clause 6 of the Bill be amended to delete certain functions of the Institute which have been already assigned to other statutory bodies;
  - (d) That Clause 16 of the Bill be amended to provide that the common seal of the Institute shall be authenticated by either by two Board members or one Board member and the Company Secretary, as per established practice;

(e) That Clause 17 of the Bill be amended to provide that the Board Secretary shall be registered as such under the Certified Public Secretaries of Kenya Act;

(f) That Clause 22 of the Bill be amended to be more specific and define who qualifies to be a member of the Institute.

**3.1.2. Submissions by the Institute of Certified Public Accountants of Kenya (ICPAK)**

20. Through a letter to the Clerk of the National Assembly dated 4th April, 2019, ICPAK submitted as follows-

(i) That in Kenya, the Companies Act No. 17 of 2015 has defined and stipulated some of the core functions of Directors. Section 143 of the Companies Act stipulates that a director of a company shall act in the way in which the director considers, in good faith, would promote the success of the company for the benefit of its members as a whole, and in so doing the director shall have regard to —

- a) the long term consequences of any decision of the directors;
- b) the interests of the employees of the company;
- c) the need to foster the company's business relationships with suppliers, customers and others;
- d) the impact of the operations of the company on the community and the environment;
- e) the desirability of the company to maintain a reputation for high standards of business conduct; and
- f) The need to act fairly as between the directors and the members of the company.

(ii) The Bill should speak to the key aspects of membership and the qualification criteria for directors. The ICPAK noted that the Bill is introducing a new profession for one to qualify and serve as a Director yet such positions are pegged on a number of parameters such as experience, professional skills, academic competence and integrity among others. More often, Directors are strategic business leaders appointed on the basis of the value that they bring on the table on the premise of their line qualifications which can be issued by regulatory bodies as Law Society of Kenya (LSK), Institute of Certified Public Secretaries (ICPSK), Institute of Surveyors of



Kenya (ISK), Institute of Certified Public Accountants of Kenya (ICPAK) and the Engineers Registration Board of Kenya among others.

(iii) The ICPAK noted that in most jurisdictions, Institutes of Directors are established by a legal framework. For instance, the United Kingdom IOD is open to all persons occupying strategic leadership such as business owners, senior leaders regardless of their organization size or sector. Often, membership grade is based on the combination of one's total year's business experience or total years in a senior management role and turnover or budget of the organization.

(iv) The ICPAK is of the considered opinion that the Bill should provide for the appointment and vetting of Non-Executive Directors. Indeed, Vetting is at the core of best corporate governance practices. It is the Board of Directors which oversees how the management serves and protects the long term interests of all the stakeholders of the company or entity.

(v) The ICPAK suggested the following specific amendments to the Bill-

- (i) That Clause 4(2)(a) of the Bill be amended to clearly set out the criteria for membership of the IoD;
- (ii) That Clause 14(1) of the Bill be amended by deleting the reference to the Salaries and Remuneration Commission advising on the remuneration of the Executive Director of the IoD;
- (iii) That a New Clause 22 be inserted in the Bill to provide for two separate categories of directors: "Executive" and "Non-Executive Directors";
- (iv) That a New Clause 23 be inserted in the Bill to set out qualifications for persons seeking registration as Executive Directors or Non-Executive Directors;
- (v) That the new Clause 23 proposed for insertion in the Bill provides that membership of Boards shall comprise of both executive and non-executive directors and that the Board shall ensure that non-executive directors form the majority of the Board;

- (vi) That the new Clause 23 proposed for insertion in the Bill provides that the appointment of non-executive directors shall be through a transparent and competitive process and further sets out the principles to guide the Board when appointing non-executive directors.

### **3.1.3. Submissions by Anjarwalla & Khanna, ALN**

21. Through a letter to the Clerk of the National Assembly dated 5th April, 2019, Anjarwalla and Khanna submitted as follows-

- (i) That the objective of the Bill is to regulate the conduct of directors as a form of quality assurance to the public bodies, entities, enterprises and companies on whose Boards the directors are appointed to serve;
- (ii) That the Bill should regulate directors in government run entities, organs, enterprises and corporations. Any membership to the Institute of Directors should be mandatory for any person wishing to be a director in the aforementioned bodies;
- (iii) That Membership to the Institute of Directors should also be mandatory for any person wishing to be a director in a public listed company. ALN were of the view that a public listed company should be required to apply the provisions of the Bill or explain, why, for certain directors they have not complied. This approach would be in line with the approach taken in the Code of Corporate Governance Practices for Issuers of Securities to the public, 2015 published by the Capital Markets Authority. For example, if a director of a public listed company is: (i) from overseas, or (ii) is a director by virtue of his/her position in the company, then such persons should not be required to be a member of the Institute;
- (iv) That membership to the Institute of Directors should not be mandatory for directors of private companies or non-listed public companies; however it should be optional.
- (v) That the following specific amendments be made to the Bill-
  - (i) That Clause 6 of the Bill be amended to insert an additional function of the Institute that will enable it to "do anything incidental or

conducive to the performance of any of the preceding functions";

- (ii) That Clause 7(1)(a) of the Bill be amended to clarify on how the President shall appoint the chairperson of the Institute;
- (iii) That Clause 7(1)(b) of the Bill be amended to provide that that the Companies Registry, the Capital Markets Authority, the Institute of Certified Public Secretaries or the Institute of Public Accountants be represented in the Board;
- (iv) That Clause 8(1) of the Bill be amended to include an additional reason for ineligibility for election as a member of the Board, that is, being convicted of an offence and sentenced to imprisonment or imposition of a fine;
- (v) That Clause 11 of the Bill be amended to provide that the proposed code of conduct for directors be developed in consultation with the private sector and other stakeholders, and that the code of conduct be reviewed every five years and from time to time or on a needs basis as determined by the Board;
- (vi) That Clause 14(3)(b) of the Bill be amended to include the holding of a first degree in economics as a qualification that enables one to be eligible for appointment as the Executive Director of the Institute;
- (vii) That Clause 19(2) of the Bill be amended to provide that the Certificate of Competence issued by the Registrar shall be in a prescribed form as set out in a Schedule proposed to be inserted in the Act;
- (viii) That Clause 20(2) of the Bill be amended to provide that the application for registration shall be in a prescribed form as set out in a Schedule proposed to be inserted in the Act;
- (ix) That Clause 20(3) of the Bill be amended to provide qualifications such as education, professional qualifications, years of experience, membership of a professional body and acceptable professional conduct and general character which persons must meet before being registered as members of the Institute;

- (x) That Clause 22(2) of the Bill be amended to include an additional reason for a person to be deemed as not disqualified, that is, that the matter has been cleared and is no longer existing;
- (xi) That Clause 22(3) of the Bill be deleted for the reason that the circumstances behind the bankruptcy of an individual should not be relevant in reversing a disqualification;
- (xii) That Clause 22(2) of the Bill be amended to include additional grounds for cancellation of registration;
- (xiii) That Clause 26 of the Bill be amended to insert a new sub-clause providing a reporting mechanism whereby the public can refer complaints to the Board. The Board should then determine which complaints should be referred to the Disciplinary Committee;
- (xiv) That Clause 30 of the Bill be amended to insert a new sub-clause that stipulates that where a person has been removed from the register, that person shall not be appointed as a director of a government entity, organ or cooperation and/or public listed company;
- (xv) That the First Schedule to the Act should be amended to indicate the frequency of meetings of the Board to ensure that the Board approves the registration of members on a frequent and scheduled basis.

#### **3.1.4. Submissions by Mr. James Nabangi**

22. Through an email to the Clerk of the National Assembly sent on 4th April, 2019, Mr. James Nabangi submitted as follows-

- (a) The Institute of Directors Kenya loD (Kenya) currently exists as a membership organization of practicing and aspiring directors drawn from both the private and the public sectors. The loD (Kenya) exists to represent directors, advocate their interests and provide business leaders with enhanced professional capacity. Foremost among its goals is to professionalize the career of directors in all sectors of the economy;
- (b) The Institute of Directors Bill 2019 means good to the leadership of this country and its institutions, but it has the following shortcomings-

- (i) The Bill doesn't recognize that there is an Institute of Directors Kenya in existence, fully established and running yet the bill seeks to establish a new enterprise all the same;
- (ii) The Institute of Directors of Kenya exists with a clear mandate to champion director professionalism, not to force directors to be professional;
- (iii) The mandate of the Institute needs to be protected from external interference as proposed in the Bill;
- (iv) There is need to think through what the Bill seeks to regulate. The Bill needs to be clear on whether it seeks to regulate individual directors or seeks the establishment a new profession of directorship;
- (v) The Bill needs to be clear on whether it seeks to regulate directors in the public sector or private sector;
- (vi) There is need to recognize that directorship is a way of life first universally, then a profession;
- (vii) There is need to recognize that there is no University degree for directorship. Lawyers, Accountants, Doctors, Marketers are all directors in their own right and have bodies that regulate their various professional standards;
- (viii) There is need to recognize that membership of the Institute of Directors is voluntary and thus no need for legislation to compel membership;
- (ix) There is need to recognize that there is a Discipline Manual for the Public Service published in May 2016, the Public Officer Ethics Act 2003 and the Penal Code and the enforcement of these laws will achieve the objectives of the Act;
- (x) That if the Bill must be proceeded with, then it should complement the existing Institute of Directors and help

strengthen its mandate for better Governance in the country.

**3.1.5. Submissions by the Association of Professional Societies in East Africa (APSEA)**

23. By letter dated 4<sup>th</sup> April, 2019, the Association of Professional Societies of East Africa submitted as follows-

- (i) The Bill does not provide for the definition of a director,
- (ii) The Bill does not articulate the academic and professional qualifications of a director;
- (iii) There is no stipulated criteria for individuals to meet in order to be registered by the Board;
- (iv) Directorship is not a profession even by the International Labour Organization and Classification, Structures. Internationally similar institutes are social member clubs for networking.
- (v) The Bill anticipates the creation of a profession of Directors which should not be case. A professional is someone who has demonstrated a level of special academic knowledge, professional competence and skills in widely recognized body of learning derived from research, education and training at high level in a structured system.
- (vi) Various Boards are constituted based on the specific Acts of Parliament therefore a conflict shall arise with other Acts of Parliament if the Bill is passed into law;
- (vii) In the memorandum of objects and reasons, it is indicated that the Bill does not concern county governments and that once enacted, it will apply to all public sectors.
- (viii) The Institute of Certified Public Secretaries (ICS) formerly the Institute of Certified Public Secretaries of Kenya (ICPSK) established under Cap 534 which houses the governance professionals in Kenya also trains and monitors Boards' performance.

### **3.1.6. Submissions by the Office of the Attorney-General and Department of Justice**

24. The Office of the Attorney-General and Department of Justice submitted as follows-

- (i) The Bill does not adhere to the established protocols for the establishment of a state corporation. This is because the National Treasury and the State Corporations Advisory Committee have not been consulted to assess the feasibility and efficacy of establishing the proposed Institute of Directors.
- (ii) The conduct of directors of boards in Kenya is already legally regulated by other statutory bodies such as—
  - (a) The Capital Markets Authority which regulates the directors of securities exchanges,
  - (b) the Companies Act, which regulates the directors of companies registered in Kenya; and
  - (c) In the case of State Corporations, the President, the National Treasury and the State Corporations Advisory Committee.

The introduction of the Institute of Directors, a state corporation, to regulate the conduct of directors is therefore an unnecessary duplication. The Bill also presumes directorship to be a “profession” towards which a person can be trained by the Institute, which is not the case.

- (iii) The scope of application of the Bill is not clear. The Bill establishes a professional body but does not expressly stipulate the professionals to whom it applies and the qualifications they should possess to be eligible to be members of the Institute.
- (iv) All state corporations are domiciled in Ministries. In the case of the Institute of Directors the parent Ministry has not been identified.

**3.1.7. Consideration of the Memorandum by H.E President Uhuru Kenyatta upon Refusal to Assent to the Institute of Directors of Kenya Bill, 2017**

25. The Committee also considered a Memorandum dated 4<sup>th</sup> July 2017 signed by H.E the President upon refusal to assent to the Institute of Directors of Kenya Bill, 2017. The Committee noted that the present Bill has not adequately addressed the following issues outlined in the Presidential Memorandum-

- (i) The long title of the Bill made reference to the terms “Director” and “Profession” yet these terms were not defined in the Bill. The President expressed his reservation that the Bill should have expressly stipulated the category of professions to whom it applies;
- (ii) The Bill outlined the functions of the Institute of Directors as including the determination and maintenance of the standards of professional competence and qualifications of directors. The President observed that the State Corporations Act and other Acts of Parliament give the President and Cabinet Secretaries powers to appoint chairpersons and members of the boards of state corporations, respectively, and these statutes also specify the professional competencies of the persons to be appointed. The President thus expressed a reservation that the Institute of Directors would have no part to play in setting the requisite attributes for the appointment of directors to state corporations;
- (iii) The Bill provided that the Board may appoint officers and staff members upon such terms and conditions of service as the Board may determine, upon the advice of the Salaries and Remuneration Commission. The President expressed a reservation that the Institute of Directors was a self-regulating body that will not draw money from public funds and as such the remuneration of its staff should not be regulated by the Salaries and Remuneration Commission;
- (iv) The President noted that current Institute of Directors (Kenya) is established as a voluntary membership institute under the Societies Act and acts as a members’ interactive and training forum for people who are already directors in various bodies. The President further noted that the Bill had stipulated an eligibility and qualifications criteria for persons seeking registration as members of the Institute. The President expressed a reservation



that directorship is not a profession and as such the Institute should not usurp the prescribed qualifications for directors as already set out in various statutes with regard to different professions;

- (v) The Bill provided that the Board may require a person making an application for registration to satisfy the Board regarding his or her knowledge of corporate governance and public administration and failure to do so would lead to non-registration. The President expressed a reservation that this provision encroached on executive powers of appointment since directors of state corporations are usually selected from various professional backgrounds, with priority being given to professionals in the sector in which the state corporation is established;

## PART 4

### 4. COMMITTEE'S OBSERVATIONS FINDINGS AND CONCLUSIONS

26. The Committee observed, found and concluded as follows-

- a) The Bill does not provide for the definition of a director neither does it provides for the academic and professional qualifications of a director.
- b) There is no known specific body of professional skills that can identify a director from other persons who run organizations. Directors are drawn from across all professions, disciplines and businesses. Under the Companies Act, No. 17 of 2015, all persons who found companies inevitably become directors and it would not be prudent to legislate that they have to be members of the Institute of Directors of Kenya and their standards of professional practice and ethical conduct be regulated by the Institute ;
- c) The Bill anticipates the creation of a profession of directorship which is neither feasible nor practicable. A professional is someone who has demonstrated a level of special academic knowledge, professional competence and skills in a widely recognized body of learning derived from research, education and training at high level in a structured system.
- d) The Bill establishes a professional body but does not expressly stipulate the professionals to whom it applies and the qualifications they should possess to be eligible to be members of the Institute.
- e) Directorship is not a profession even by the International Labour Organization Classification and Structures.
- f) Various boards are constituted based on the qualifications and requirements set out in specific Acts of Parliament and therefore a conflict shall arise with other Acts of Parliament if the Institute of Directors of Kenya Bill, 2019 is enacted into law.
- g) The conduct of directors of various boards in Kenya is already legally regulated by other statutory bodies such as the Capital Markets Authority, the Insurance Regulatory Authority, the


Central Bank of Kenya, the Retirements Benefits Authority, the Companies Act and the National Treasury and the State Corporations Advisory Committee;

- h) Membership to the Institute of Directors is voluntary under the Bill and thus there is therefore no need for a legislation that does not compel membership to the Institute;
- i) The Bill has not adequately addressed the reservations raised by H.E the President while refusing to assent to the Institute of Directors of Kenya Bill 2017 and the President is likely to refuse to assent to the Bill again;

**PART 5**

**5. RECOMMENDATION**

**27. The Committee recommends that the House rejects the Bill in its entirety.**

SIGNED..........DATE.....04.07.19.....

**HON. WILLIAM CHEPTUMO, M.P.**  
**CHAIRPERSON, DEPARTMENTAL COMMITTEE ON**  
**JUSTICE AND LEGAL AFFAIRS**

# **ANNEXURE 1**

**(Minutes of Committee sittings on consideration of  
the Bill and adoption of report)**

**MINUTES OF THE 151<sup>ST</sup> SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON TUESDAY, 18<sup>TH</sup> JUNE, 2019 AT 10.00 A.M. IN THE COMMONWEALTH PARLIAMENTARY ASSOCIATION ROOM, PARLIAMENT BUILDINGS**

**PRESENT-**

- |                                    |   |                         |
|------------------------------------|---|-------------------------|
| 1. Hon. William Cheptumo, M.P.     | - | <b>Chairperson</b>      |
| 2. Hon. Alice Muthoni Wahome, M.P. | - | <b>Vice Chairperson</b> |
| 3. Hon. George G. Murugara, M.P.   |   |                         |
| 4. Hon. Jennifer Shamalla, M.P.    |   |                         |
| 5. Hon. Peter Opondo Kaluma, M.P.  |   |                         |
| 6. Hon. Anthony G. Kiai, M.P.      |   |                         |
| 7. Hon. John Olago Aluoch, M.P.    |   |                         |
| 8. Hon. Adan Haji Yussuf, M.P.     |   |                         |
| 9. Hon. William K. Mwamkale, M.P.  |   |                         |
| 10. Hon. Beatrice Adagala, M.P.    |   |                         |

**ABSENT WITH APOLOGIES-**

1. Hon. Japheth Mutai, M.P.
2. Hon. Roselinda Soipan Tuya, M.P.
3. Hon. John M. Wambugu, M.P.
4. Hon. Ben Momanyi, M.P.
5. Hon. Charles Gimose, M.P.
6. Hon. Gladys Boss Shollei, CBS, M.P.
7. Hon. Johana Ng'eno, M.P.
8. Hon. Zuleikha Hassan, M.P.
9. Hon. John Kiarie Waweru, M.P.

**IN ATTENDANCE-**

**COMMITTEE SECRETARIAT-**

- |                       |   |                              |
|-----------------------|---|------------------------------|
| 1. Mr. George Gazemba | - | Principal Clerk Assistant II |
| 2. Mr. Denis Abisai   | - | Principal Legal Counsel I    |
| 3. Ms. Roselyn Njuki  | - | Serjeant-at-Arms             |
| 4. Mr. Simon Maina    | - | Support staff                |

**MIN No. 602/2019:-**

**PRELIMINARIES**

The meeting commenced at 10.20 a.m. with a word of prayer from the chairperson.

**MIN No. 603/2019:-**

**CONFIRMATION OF MINUTES OF  
PREVIOUS SITTINGS**

Confirmation of minutes of previous sittings was deferred to the next sitting.

**MIN No. 604/2019:-**

**CONSIDERATION AND ADOPTION OF  
REPORT ON THE INSTITUTE OF  
DIRECTORS OF KENYA BILL, 2019**

The Committee considered and unanimously adopted its report on the Institute of Directors of Kenya Bill, 2019 and resolved to recommend to the House to reject the Bill in its entirety on the following grounds-

- (i) The Bill does not provide for the definition of a director neither does it provide for the academic and professional qualifications of a director;
- (ii) There is no known specific body of professional skills that can identify a director from other persons who run organizations. Directors are drawn from across all professions, disciplines and businesses. Under the Companies Act, all persons who found companies inevitably become directors and it would not be prudent to legislate that they have to become the Institute of Directors of Kenya Members;
- (iii) The Bill anticipates the creation of a profession of Directors which cannot be the case. A professional is someone who has demonstrated a level of special academic knowledge, professional competence and skills in widely recognized body of learning derived from research, education and training at high level in a structured system;
- (iv) Directorship is not a profession even by the International Labour Organization Classification and Structures.
- (v) Various Boards are constituted based on the specific Acts of Parliament therefore a conflict shall arise with other Acts of Parliament if the Bill is enacted into law.

The adoption of the report was proposed by Hon. George Murugara and seconded by Hon. Anthony Kiai.

**MIN No. 605/2019:-**

**CONSIDERATION AND ADOPTION OF  
REPORT ON KENYA REPARATION  
LEGISLATIVE PROPOSAL BY HON.  
GLADYS SHOLLEI**

Adoption of the report on the legislative proposal was deferred to Tuesday, 25<sup>th</sup> July, 2019 to enable the sponsor respond to arising issues before the Committee could make determination

whether or not to approve it for publication. Among the issues the Committee would be seeking further information from the sponsor would be-

- (i) Cost implications of enacting the reparation legislation;
- (ii) Matters of reparation could be addressed through local and international courts and enforceable judgements obtained;
- (iii) From which year should the enacted law be operationalized if the Bill is passed.

The meeting instructed the secretariat to provide a comparative analysis with other jurisdictions which had enacted and operationalised such legislation most notably the Republic of South Africa.

**MIN No. 606/2019:-**

**ADJOURNMENT**

There being no other business to transact, the meeting was adjourned at ten minutes to noon until, Thursday, 20<sup>th</sup> June, 2019 at ten o'clock in the morning at venue to be advised.

Signed.....  
**Chairperson**

Date.....  
24/07/19



**MINUTES OF THE 147<sup>TH</sup> SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON FRIDAY, 14<sup>TH</sup> JUNE, 2019 AT 10.00 A.M. IN OMO ROOM, CROWNE PLAZA HOTEL**

**PRESENT-**

- |   |   |                         |
|---|---|-------------------------|
| 1. Hon. William Cheptumo, M.P.          | - | <b>Chairperson</b>      |
| 2. Hon. Alice Muthoni Wahome, M.P.      | - | <b>Vice Chairperson</b> |
| 3. Hon. John Olago Aluoch, M.P.         |   |                         |
| 4. Hon. Peter Opondo Kaluma, M.P.       |   |                         |
| 5. Hon. William K. Mwamkale, M.P.       |   |                         |
| 6. Hon. Ben Momanyi, M.P.               |   |                         |
| 7. Hon. Charles Gimose, M.P.            |   |                         |
| 8. Hon. George G. Murugara, M.P.        |   |                         |
| 9. Hon. Jennifer Shamalla, M.P.         |   |                         |
| 10. Hon. Beatrice Adagala, M.P.         |   |                         |
| 11. Hon. Anthony G. Kiai, M.P.          |   |                         |
| 12. Hon. Gladys Boss Shollei, CBS, M.P. |   |                         |
| 13. Hon. John Kiarie Waweru, M.P.       |   |                         |
| 14. Hon. Adan Haji Yussuf, M.P.         |   |                         |
| 15. Hon. John M. Wambugu, M.P.          |   |                         |

**ABSENT WITH APOLOGIES-**

1. Hon. Japheth Mutai, M.P.
2. Hon. Roselinda Soipan Tuya, M.P.
3. Hon. Johana Ng'eno, M.P.
4. Hon. Zuleikha Hassan, M.P.

**IN ATTENDANCE-**

**COMMITTEE SECRETARIAT-**

- |                       |   |                              |
|-----------------------|---|------------------------------|
| 1. Mr. George Gazemba | - | Principal Clerk Assistant II |
| 2. Mr. Denis Abisai   | - | Principal Legal Counsel I    |
| 3. Ms. Halima Hussein | - | Third Clerk Assistant        |
| 4. Ms. Fiona Musili   | - | Research Officer III         |
| 5. Ms. Roselyn Njuki  | - | Serjeant-at-Arms             |
| 6. Mr. Kimiti James   | - | Audio Officer                |
| 7. Mr. Simon Maina    | - | Support staff                |

**INSTITUTE OF DIRECTORS**

- |                     |   |                                     |
|---------------------|---|-------------------------------------|
| 1. Mr. Duncan Watta | - | Chairperson, Institute of Directors |
| 2. Mr. Allen Kimani | - | Director, Institute of Director     |

- |                      |   |                              |
|----------------------|---|------------------------------|
| 3. Mr. John P. Luusa | - | Immediate former Chairperson |
| 4. Mr. Kyalu Mbobu   | - | Member and Legal Officer     |

**OFFICE OF THE ATTORNEY GENERAL**

- |                           |   |                     |
|---------------------------|---|---------------------|
| 1. Ms. Elizabeth Ng'ang'a | - | Chief State Counsel |
| 2. Ms. Linda Musilivi     | - | Chief State Counsel |

**INSTITUTE OF CERTIFIED SECRETARIES**

- |                         |   |                         |
|-------------------------|---|-------------------------|
| 1. Mr. Raphael Mwai     | - | Chairperson             |
| 2. Mr. Jeremiah Karanja | - | Secretariat             |
| 3. Ms. Bernice Gachegu  | - | Council Member          |
| 4. Mr. Obare Nyaega     | - | Chief Executive Officer |
| 5. Ms. Salome Onyonka   | - | Member                  |
| 6. Ms. Evans Lagat      | - | Member                  |

**MIN No. 581/2019:-**

**PRELIMINARIES**

The meeting commenced at 10.00 a.m. with a word of prayer by Chairperson and this was followed by a round of introduction.

**MIN No. 582/2019:-**

**CONSIDERATION OF THE INSTITUTE OF DIRECTORS OF KENYA BILL, 2019**

The following institutions appeared before the Committee to induce their submissions regarding the Institute of Directors of Kenya, Bill, 2019;

**Institute of Directors**

Mr Kyalo Mbobu, Director and Legal Officer of the Institute of Directors submitted as follows;

- (i) The country has been in wretched havoc because of lack of a regulatory framework to check corruption and abuse of power example the Kenya Airways, Kenya National Assurance Ltd, Mumias Sugar, CMC Group and others.
- (ii) Corporate governance applies to all entities regardless of whether they are public or private entities. Hence, the role of a Director in either entity is the same. The skills, competence and fiduciary responsibility is therefore standard across both sectors and therefore the Bill aims to improve is the QUALITY of corporate governance by enhancing skills of Directors.

- (iii) The Bill does not in any way intend to interfere with appointing powers of either category. The appointment of Board members and chairpersons of parastatals in the public sector will remain as per the law and will be exercised by the Appointing Authority. While those for publicly listed entities will be appointed at the AGMs as per their respective statutes and those for private entities will be appointed as stipulated in their Memorandum and Articles of Association and guidelines.
- (iv) This Bill does not aim to restrict appointments based on any academic or professional qualifications. Anybody can be appointed to a board, for both public and private sectors and this remains the preserve of the Appointing Authority.
- (v) South Africa, United Kingdom, Australia, USA and many others are jurisdictions that have realized the need to enact such framework and therefore the Bill aims to fast-track the path locally and position Kenya amongst these advanced economies in enforcing good corporate governance as a key driver of economic and national growth.
- (vi) Worldwide especially in advanced jurisdictions, Directorship is now regarded as a critical profession. This is especially so after they realized the critically important role of good corporate governance in the growth of an economy

**Office of the Attorney General**

Ms. Linda Musilivi, State Counsel informed the meeting the following;

- (i) The Bill has not adhered to the established protocols for the establishment of a state corporation as the National Treasury and the State Corporations Advisory Committee have not been consulted to assess the feasibility and efficacy of establishing the proposed Institute of Directors.
- (ii) The conduct of directors of boards in Kenya was already legally regulated by other statutory bodies such as—
  - (a) The Capital Markets Authority which regulates the directors of securities exchanges,
  - (b) The Companies Act, which regulates the directors of companies registered in Kenya and
  - (c) In the case of State Corporations, the President, the National Treasury and the State Corporations Advisory Committee.

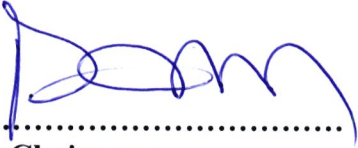
- (iii) The introduction of the Institute of Directors, a state corporation, to regulate the conduct of directors would be an unnecessary duplication.
- (iv) The Bill also presumed directorship to be a “profession” towards which a person can be trained by the Institute, which is not the case.
- (v) The scope of application of the Bill was not clear as it establishes a professional body but does not expressly stipulate the professionals to whom it applies and the qualifications they should possess to be eligible to be members of the Institute.
- (vi) All state corporations are domiciled in Ministries. In the case of the Institute of Directors the parent Ministry is not quite identified.

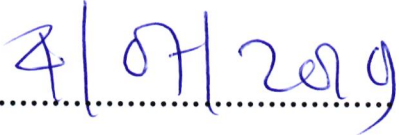
#### **Institute of Certified Secretaries**

Made the following submissions were presented as follows;

- (i) That directorship was not a profession as stated in the bill object clause but an occupation.
- (ii) That there was no known specific body of profession skills that can identify a director from persons who run organizations.
- (iii) Under the Companies Act, all persons who found companies become directors and it would not be prudent to legislate that they have to become Institute of Directors members.
- (iv) The basic minimum requirements of a director has already been covered in the Companies Act, 2015 and there was no rationale in further burdening such as investors as this would increase the cost of doing business and make the country uncompetitive.
- (v) The Bill seeks to regulate Board of Directors and that role has already been assigned to sector regulators
- (vi) There was no specific course for one to qualify to be a member of Institute of Directors of Kenya and it would not be procedural to require that membership would confer any additional qualification to a person to be considered for appointment into public bodies.
- (vii) Enacting the bill as proposed would result in a requirement that all persons nominated as Directors for public and Private sector Boards be member of the Institute of Directors which was not practical for public sector Boards and State Corporations.
- (viii) The bill does not have any explicit criteria of membership and defines members by way of exception.

There being no other business to transact, the meeting was adjourned at one o'clock.

Signed.....  
Chairperson

Date.....

## **ANNEXURE 2**

**(Signed list of Members who attended the sitting  
that considered and adopted the report on the Bill)**

**PARLIAMENT OF KENYA**  
**THE NATIONAL ASSEMBLY**

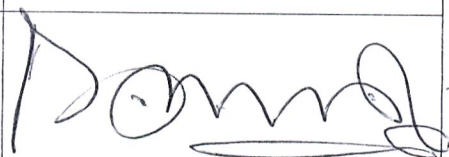
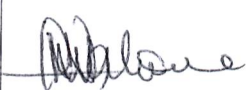
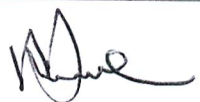



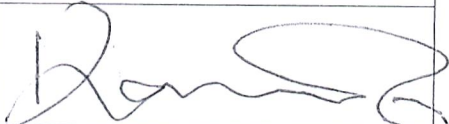
**DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL  
AFFAIRS**

**MEMBERS' MEETING ATTENDANCE REGISTER**

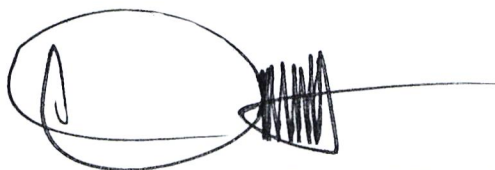
DATE..... 18/06/2019..... TIME..... 10:00 A.M......

VENUE..... CPA ROOM, MAIN PARLIAMENTARY BLDG.....

AGENDA..... CONSIDERATION OF INSTRUMENT OF DIRECTORS  
BILL.....

No.	NAME OF MEMBER	SIGNATURE
1.	Hon. William Cheptumo, M.P. – <i>Chairperson</i>	
2.	Hon. Alice Muthoni Wahome, M.P. – <i>Vice Chairperson</i>	
3.	Hon. John Olago Aluoch, M.P.	
4.	Hon. Roselinda Soipan Tuyu, M.P.	
5.	Hon. Charles Gimose, M.P.	
6.	Hon. Johana Ng'eno Kipyegon, M.P.	
7.	Hon. William Kamoti Mwamkale, M.P.	

8.	Hon. Ben Orori Momanyi, M.P.	—
9.	Hon. Peter Opondo Kaluma, M.P.	<i>PK</i>
10.	Hon. Beatrice Adagala, M.P.	<i>BA</i>
11.	Hon. Jennifer Shamalla, M.P.	<i>JShamalla</i>
12.	Hon. Gladys Boss Shollei, CBS, M.P.	—
13.	Hon. John Munene Wambugu, M.P.	—
14.	Hon. George Gitonga Murugara, M.P.	<i>GMurugara</i>
15.	Hon. Anthony Githiaka Kiai, M.P.	<i>K.A.K</i>
16.	Hon. Japheth Mutai, M.P.	—
17.	Hon. John Kiarie Waweru, M.P.	—
18.	Hon. Adan Haji Yussuf, M.P.	<i>AY</i>
19.	Hon. Zuleikha Hassan, M.P.	—



**George Gazemba, ACI Arb, CPM**  
**For: CLERK OF THE NATIONAL ASSEMBLY**



# **ANNEXURE 3**

**(Copy of newspaper advertisement inviting the public to present written submissions on the Bill)**

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY  
TWELFTH PARLIAMENT - THIRD SESSION

In the Matter of the consideration by the National Assembly:-  
The proposed Public Private Partnership (PPP) agreement between  
Kenya Airways and the Kenya Airports Authority

SUBMISSION OF MEMORANDA

Article 118 (1)(b) of the Constitution provides that, "Parliament shall - facilitate public participation and involvement in the legislative and other business of Parliament and its Committees" and Article 201 (a) of the Constitution provides that, "there shall be openness and accountability, including public participation in financial matters".

The Departmental Committee on Transport, Public Works and Housing is established pursuant to Standing Order 216 of the National Assembly and is mandated to, *inter alia*, "investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary and as may be referred to them by the House".

The Committee intends to conduct an inquiry into the issues of policy, human resource and legal compliance, as well as the general issues of concern to the public as contemplated under Article 95 of the Constitution, in relation to the Kenya Airways (KQ) Privately Initiated Investment Proposal (PIIP) to the Kenya Airports Authority (KAA). The Committee is in receipt of the Proposal from Kenya Airways PLC and the proposal seeks to introduce a Public Private Partnership for the operations, management and development of Jomo Kenyatta International Airport.

Pursuant to the provisions of the said articles of the Constitution, the Committee invites members of the public to submit any views they may have on the said proposal. The views, representations or written submissions may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk, First Floor, Main Parliament Building, Nairobi; or emailed to [clerk@parliament.go.ke](mailto:clerk@parliament.go.ke); to be received on or before Thursday, 4<sup>th</sup> April, 2019 at 5:00 pm.

MICHAEL R. SIALAJI, EBS  
CLERK OF THE NATIONAL ASSEMBLY

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY  
TWELFTH PARLIAMENT - THIRD SESSION

In the matters of consideration by the National Assembly:-  
1. The Livestock and Livestock Products Marketing Board Bill, 2019  
2. The Higher Education Loans Board (Amendment) Bill (National Assembly Bill No.9 of 2019)

SUBMISSION OF MEMORANDA

Article 118(1)(b) of the Constitution provides that, "Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees". The National Assembly Standing Order 127(3) provides that, "the Departmental Committee to which a Bill is committed shall facilitate public participation and take into account the views and recommendations of the public when the Committee makes its report to the House".

The Livestock and Livestock Products Marketing Board Bill, 2019 seeks to streamline the marketing of livestock and livestock products in Kenya. The streamlining of the industry is to be achieved through the establishment of the Livestock and Livestock Products Marketing Promotion Board which is to be the main body dealing with the marketing of livestock and livestock products in the country. It is expected that this will result in an efficient livestock products marketing industry in Kenya.

The Higher Education Loans Board (Amendment) Bill (National Assembly Bill No. 9 of 2019) seeks to amend the Higher Education Loans Board Act, 1995, to provide for the award of bursaries and scholarships to all eligible students from marginalized areas. The amendment is guided by the fact that education is not appreciated in these areas and parents are unwilling to invest in it. Other parents find funding higher education unaffordable despite knowing its value. The Bill will therefore act as a motivating factor for more students to pursue higher education through provision of bursaries to cater for part of their college fees.

The Livestock & Livestock Products Marketing Board Bill, 2019 and the Higher Education Loans Board (Amendment) Bill (National Assembly Bill No. 9 of 2019) have undergone First Reading pursuant to Standing Order 127(3) and stands committed to the Departmental Committee on Agriculture & Livestock and Departmental Committee on Education & Research respectively for consideration and thereafter report to the House.

Pursuant to Article 118(1)(b) of the Constitution and Standing Order 127(3), the respective Committees invites interested members of the public to submit any representations they may have on the said Bills. The Bills can be accessed from the parliamentary website at [www.parliament.go.ke](http://www.parliament.go.ke). The representations or written submissions may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk, Main Parliament Buildings, Nairobi; or emailed to [clerk@parliament.go.ke](mailto:clerk@parliament.go.ke); to be received on or before Thursday, 4<sup>th</sup> April, 2019 at 5:00 pm.

MICHAEL R. SIALAJI, EBS  
CLERK OF THE NATIONAL ASSEMBLY

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY  
TWELFTH PARLIAMENT - THIRD SESSION

In the Matters of consideration by the National Assembly:-  
1. Ratification of the Agreement for the Setting up of a Maritime Information Exchange and Sharing Mechanism in the Western Indian Ocean Region  
2. Ratification of the Regional Agreement on the Co-ordination of Operations at Sea in the Western Indian Ocean

SUBMISSION OF MEMORANDA

Article 118(1)(b) of the Constitution provides that, "Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees". Further, Section 8 of the Treaty Making and Ratification Act, 2012 provides for the consideration and Ratification of Treaties by Parliament and subsection(3) states that, "the relevant Parliamentary Committee shall, during its consideration of the Treaty, ensure Public Participation in the ratification process in accordance with laid down parliamentary procedures".

The National Assembly is in receipt of the above mentioned Agreements for approval for ratification by the Government of the Republic of Kenya. The Agreements seeks to establish a framework for regional cooperation amongst State Parties to enhance maritime safety and security in accordance with the national sovereignty, territorial integrity and non-interference in the internal affairs of States in accordance with international law. The Agreements further seeks to establish a Regional Maritime Information Fusion Centre to facilitate the sharing of maritime information and a Joint Operational Co-ordination Centre to co-ordinate joint interventions in the maritime zones of State Parties and the high seas.

The above mentioned Agreements have been committed to the Departmental Committee on Defence and Foreign Relations pursuant to Standing Order 216(5)(fa) for consideration and thereafter report to the House.

Pursuant to Article 118(1)(b) of the Constitution and section 8 of the Treaty Making and Ratification Act, 2012, the Committee invites members of the public to submit any representations they may have on the said Agreements. The Agreements can be accessed from the parliamentary website at [www.parliament.go.ke](http://www.parliament.go.ke). The representations or written submissions may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk, First Floor, Main Parliament Building, Nairobi; or emailed to [clerk@parliament.go.ke](mailto:clerk@parliament.go.ke); to be received on or before Thursday 4<sup>th</sup> April, 2019 at 5:00 pm.

MICHAEL R. SIALAJI, EBS  
CLERK OF THE NATIONAL ASSEMBLY

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY  
TWELFTH PARLIAMENT - THIRD SESSION

In the matters of consideration by the National Assembly:-  
1. The Anti-Corruption and Economics Crimes (Amendment) Bill, 2019  
2. The Institute of Directors of Kenya Bill, 2019

SUBMISSION OF MEMORANDA

Article 118(1)(b) of the Constitution provides that, "Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees". The National Assembly Standing Order 127(3) provides that, "the Departmental Committee to which a Bill is committed shall facilitate public participation and take into account the views and recommendations of the public when the Committee makes its report to the House".

The Anti-Corruption and Economics Crimes (Amendment) Bill, 2019 seeks to amend the Anti-Corruption and Economics Crimes Act No. 3 of 2003 in order to prescribe a minimum penalty to act as deterrence mechanisms for persons who engage in corrupt conduct as defined in the Act.

The Institute of Directors of Kenya Bill, 2019 seeks to establish the Institute of Directors of Kenya and provides for the registration and regulation of their conduct.

The above mentioned Bills have undergone First Reading pursuant to Standing Order 127(3) and stands committed to the Departmental Committee on Justice and Legal Affairs for consideration and thereafter report to the House.

Pursuant to the provisions of Article 118(1)(b) of the Constitution and Standing Order 127(3), the Committee invites members of the public to submit representations they may have on the said Bills. The Bills may be accessed on the Parliamentary website - [www.parliament.go.ke](http://www.parliament.go.ke). The representations may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk, Main Parliament Buildings, Nairobi; or emailed to [clerk@parliament.go.ke](mailto:clerk@parliament.go.ke); to be received on or before Thursday, 4<sup>th</sup> April, 2019 at 5:00 pm.

MICHAEL R. SIALAJI, EBS  
CLERK OF THE NATIONAL ASSEMBLY

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# **ANNEXURE 4**

**(Submissions from stakeholders)**

CPS Governance Centre  
Kilimanjaro Road, Upper Hill  
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Institute of  
Certified Secretaries  
*'The Governance Profession'*



**June 17, 2019**

Mr. Michael Sialai, EBS  
The Clerk  
National Assembly  
Main Parliament buildings  
P.O Box 41842-00100  
Nairobi, Kenya.

Dear Mr. Sialai,

**RE: THE INSTITUTE OF DIRECTORS OF KENYA BILL, 2019**

The Institute of Certified Secretaries (ICS) is a professional membership body, established under the CPSK Act Cap. 534 Laws of Kenya with a mandate of promoting good governance in both public and private sectors.

Further to our letter dated April 4, 2019, we appreciate the opportunity accorded to meet the Departmental Committee on Justice and Legal Affairs on Friday June 14, 2019. We were requested to update our initial memorandum and capture the committee's concerns. This memorandum therefore includes both our initial and additional comments on the Institute of Directors (IOD) of Kenya Bill, 2019 and summarises the same in five main points as follows:

**1. Directorship is Not a Profession**

- (a) The Bill purports to regulate the profession of directorship as stated in its object clause as follows: ***AN ACT of Parliament to establish the Institute of Directors of Kenya; to provide for the registration and regulation of the standards and practice of the profession and for connected purposes.*** Please refer to the High Court Petition No. 67 of 2015 ***Dickson Matei T/A Machete Auctioneers & 10 Others Vs The Nairobi County Government & The Finance County Executive of the Nairobi City County Government*** wherein the Court noted that a profession presupposes a course of academic, professional and ethical training, as well as exposure for a period of time to such high professional and ethical standards through working for senior colleagues in the profession.
- (b) Enacting this Bill will be creating an additional profession in Kenya which is not backed by the National Qualifications Framework under the Kenya National Qualifications Framework (KNQF) act no. 22 of 2014 (and KNQF Regulations, 2018).
- (c) There is no known specific body of professional skills that can identify a director from other persons who run organizations. Directors are drawn from across all

professions, disciplines and businesses. Under the Companies Act, all persons who found companies inevitably become founder directors and it would not be prudent to legislate that they have to become IOD members. The basic minimum requirements of a director is already covered in the Companies Act and there is no rationale in further burdening such investors as this would increase the cost of doing business and make Kenya uncompetitive against her peers.

- (d) There is no specific professional course for one to qualify to be a member of IOD Kenya, it would not be procedural to require that membership in IOD Kenya would confer any additional qualification to a person to be considered for appointment into public bodies. Different legal and regulatory instruments have already determined the requirements to qualify for appointment as a director depending on the needs of the Institution.

## **2. Over Regulation and Cost of Doing Business**

- (a) Regulations, guidelines and standards for conduct of directors are already provided for in the existing legal and regulatory framework including: The Companies Act 2015, the State Corporations Act, Banking Act, the Insurance Act, *Mwongozo*, Code of Governance for Issuers of Securities to the Public, Prudential Guidelines, among other.
- (b) Indeed, some of these statutory instruments require some Board positions to be drawn from the membership of different professional bodies, which regulate the conduct of their members. The issue of professionalism in the Boards has thus been adequately legislated.
- (c) The current gap is not the lack of legal framework but failures in compliance, enforcement and lack of an ethical culture.
- (d) Any additional regulation will only hurt the ease of business and make Kenya to be an uncompetitive market which is unproductive for our developing economy.
- (e) Membership to the Institute of Directors attracts additional costs to directors and institutions in the name of subscriptions and Continues Professional Development requirements.

## **3. Conflicting Mandate with other Statutory Bodies**

- (a) This Bill seek to regulate Board of Directors, that role has already been assigned to sector regulators including:
  - (i) State Corporations Advisory Committee (for State Corporations),
  - (ii) Capital Markets Authority (for Issuers of Securities to the Public,
  - (iii) Insurance Regulatory Authority (for insurance sector),
  - (iv) Retirement Benefits Authority (for Pensions sector),
  - (v) Sacco Societies Regulatory Authority (for SACCO sector), and
  - (vi) Central Bank of Kenya (for the Banking Sector)
- (b) Other Statutory and Professional bodies including Kenya School of Government, State Corporations Advisory Committee, Kenya Institute of Certified Public Accounts of Kenya, Kenya Institute of Certified Public Secretaries of Kenya, among others; have diverse statutory mandates on training, capacity building, regulation and setting of standards for the good governance of institutions. There is therefore no gap that this Bill is seeking to address. Instead IOD would be encroaching on the statutory mandate of other bodies through this legislation.

#### 4. Limiting the Powers of the Appointing Authority

Enacting the Bill as proposed will result in a requirement that all persons nominated as Directors for Public and Private sector Boards be members of the Institute of Directors. This is not practical particularly for public sector Boards and State Corporations whose Board members are nominated by line Ministries and H.E The President.

#### 5. Inconsistencies in the Bill

- (c) The Bill does not have an explicit criteria of membership and defines members by way of exception/disqualification as per section 22.
- (d) Before a law is enacted, there must be mischief for which the law seeks to remedy. In this instance, there is no mischief to be cured. For instance, Section 25 does not seek to cure any mischief as the Bill has not improved the current status since it is optional to be a member of IOD.
- (e) Under the current legal framework, directors could be individual persons or body corporates. For example the Cabinet Secretary National Treasury in the case of state corporations, enforcement of the proposals in the Bill would be difficult to enforce on corporate directors.
- (f) Should Parliament however consider enacting the Bill into law, we propose that the following should be amended:

	<b>PROVISION IN THE BILL</b>	<b>PROPOSED AMENDMENT</b>	<b>JUSTIFICATION</b>
1.	<b>object clause</b>	Delete the word 'profession'	Directorship is not a profession since there is no laid down curriculum for academic and professional training qualifications requirements
2.	<b>S. 1 Company Secretary</b>	Company Secretary means "Secretary shall be registered as such under the Certified Public Secretaries of Kenya Act, Chapter 534 of the Laws of Kenya"	Cross Reference CPSK Act on definition of Company Secretary
3.	<b>S. 6 (a), (b), (c), and (d).</b>	Delete in total	<ul style="list-style-type: none"> <li>• The functions listed under this section have already been assigned to other statutory bodies.</li> <li>• Different legal instruments have already determined the Standards of Professional practice and ethical conduct of directors.</li> <li>• Besides, where a director is required to be a member of a professional body, such professional bodies have in place codes of ethics to regulate the conduct of their members.</li> <li>• Directors should be free to choose their choice of service providers in training and other capacity development programs.</li> </ul>
4.	<b>S 16 (2) Common Seal</b>	Amend to read "The Common Seal of the Institute shall be authenticated by either two Board members, or a Board member and the Company Secretary"	This is the established practice also applicable other laws

5.	<b>S.17 Company Secretary</b>	– Propose that the section provides for qualifications of the Board Secretary as provided for in the CPS Act  Insert S. 17 (3) to read as: “A person appointment as Secretary shall be registered as such under the Certified Public Secretaries of Kenya Act, Chapter 534 of the Laws of Kenya”	It is important that a person appointed as secretary is a trained person and a member of a professional body which regulates his professional conduct as prescribed by Law.
6.	<b>S 22 Disqualificat ions</b>	Amend to include qualification of membership	The Bill should in more specific terms define who qualifies to be a member. Otherwise, the current provisions are vague and open to wide interpretations

In conclusion, IOD Kenya as currently constituted in is a voluntary private association and it is best left as a private association as the practice applying in all other jurisdictions. It is our view therefore that the Bill has no utility since regulation of directors falls under different existing laws such as the Companies Act, 2015, State Corporations Act Cap 446, Mwongozo Code of Corporate Governance for State Corporations, the CMA Code of Corporate Governance for Issuers of Securities to the Public, The Prudential Guidelines as well as various statutes incorporating individual parastatals & state corporations and the various Articles of Association of the various entities. In this regard therefore, the Bill is seeking to usurp the functions of such regulators which will create duplication and confusion.

Should you require any further clarifications, please feel free to contact the undersigned on [ceo@ics.ke](mailto:ceo@ics.ke) or Karanja J.N on [JKaranja@ics.ke](mailto:JKaranja@ics.ke)

Yours sincerely,



**CS Obare Nyaega**  
**Chief Executive Officer**

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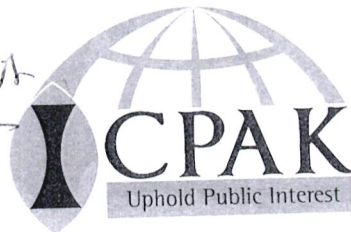
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Our Ref: ICPAK0/04/2019

4<sup>th</sup> April 2019

**Mr. Michael R. Sialai, EBS**  
Clerk of the National Assembly  
Clerks' Chambers  
National Assembly  
Parliament Buildings  
P.O Box 41842-00100  
NAIROBI

① D/conts / DLS  
8/4/19

Dear Mr. Sialai,

**RE: ICPAK SUBMISSION ON THE INSTITUTE OF DIRECTORS BILL 2019**

The Institute of Certified Public Accountants of Kenya (ICPAK) is a statutory body of accountants with the mandate to develop and regulate accountancy profession in Kenya. The Institute is further mandated under Sec 8 of the Accountants' Act of 2008 to advise the Cabinet Secretary for Finance on matters relating to governance and accountability in all sectors of the economy.

Your public notice inviting interested members to submit written memorandum on the Institute of Directors Bill 2019 refers.

The Institute has reviewed the Bill and developed a position paper detailing its proposals for your consideration. Attached herein, please find a copy of the Institute's submission.

In case of need for clarification, please do not hesitate to contact the undersigned on [ceo@icpak.com](mailto:ceo@icpak.com) or CPA Fredrick Riaga on [fredrick.riaga@icpak.com](mailto:fredrick.riaga@icpak.com)

We look forward to your response and appearance before the Committee if accorded an opportunity.

Yours

CPA Edwin Makori  
**CHIEF EXECUTIVE OFFICER**



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Cell: +254 727 531006 / 733 856262  
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Web: [www.icpak.com](http://www.icpak.com)  
Drop in box no. 164  
Revlon Professional Plaza





## ICPAK SUBMISSION ON THE DRAFT INSTITUTE OF DIRECTORS BILL 2019

April 2019

### **Background**

Directors play a critical role in the governance of an entity. In Kenya, the Companies Act 2015 has defined and stipulated some of the core functions of Directors. Section 143 of the Companies Act stipulates that a director of a company shall act in the way in which the director considers, in good faith, would promote the success of the company for the benefit of its members, and in so doing the director shall have regard to —

- a) the long-term consequences of any decision of the directors;
- b) the interests of the employees of the company;
- c) the need to foster the company's business relationships with suppliers, customers and others;
- d) the impact of the operations of the company on the community and the environment;
- e) the desirability of the company to maintain a reputation for high standards of business conduct; and
- f) the need to act fairly as between the directors and the members of the company.

The Institute of Directors Bill 2019 seeks to establish the Institute of Directors of Kenya, provide for the registration and regulation of the standards and practice of the profession. The Institute of Certified Public Accountants of Kenya (ICPAK) in fulfilling its statutory mandate to advise on matters accountability and good governance, analyzed the Bill and developed the following proposals.

### **ICPAK Proposals**

#### **(i) Rethink the structure and Membership of the Institute of Directors**

In most jurisdictions, Institute of Directors 'are established by a legal framework. For instance, the United Kingdom IOD is open to all persons occupying strategic leadership such as business owners, senior leaders regardless of their organization size or sector. Often, membership grade is based on the combination of one's total year's business experience or total years in a senior management role and turnover or budget of the organization. The Bill should thus speak to the key aspects of membership and the qualification criteria.

Moreover, the Bill is introducing a new profession for one to qualify and serve as a Director, yet such positions are pegged on a number of parameters such as experience, professional skills, academic competence and integrity among others. A Director is defined as a person appointed to serve on the Board of an organization or institution. By this definition, there's no direct linkage to a specific qualification framework for one to serve as a Director. More often, Directors are strategic business leaders appointed on the basis of the value that they bring on the table on the premise of their

line qualifications which can be issued by regulatory bodies such as Law Society of Kenya (LSK), Institute of Certified Public Secretaries (ICPSK), Institute of Surveyors of Kenya (ISK), Institute of Certified Public Accountants of Kenya (ICPAK) and The Engineers Registration Board of Kenya among others.

**(ii) Appointment and Vetting of Non-Directors**

ICPAK is of considered opinion that the Bill should provide for the appointment and vetting of Non-Executive Directors. Indeed, Vetting is at the core of best corporate governance practices. It is the Board of Directors which oversees how the management serves and protects the long-term interests of all the stakeholders of the company or entity.

The Institute proposes the following practical considerations for any entity (be it private or public) in vetting candidates for position of a Non-Executive Director:

- a) Visionary, strategic and critical thinking;
- b) Holder of relevant skills and expertise
- c) Demonstrated leadership capability over the years
- d) A person of integrity;
- e) Absolute independence in terms of relationship with the entity which would impair independent judgement;
- f)
- g) Excellent communication skills

**Table: Summary of the proposals on the Draft Institute of Directors Bill 2019**

Clause	Provision in the Bill	Issue of Concern	Proposed Amendment	Justification
1. <b>4(2)(a) Membership to the Institute</b>	The Bill provides categories of Membership to the Institute.	The qualification Criteria for membership is not clear or provided by the Bill.	Should it be a membership group such as KIM, bringing membership from professional bodies such as ICPAK, LSK, ICPSK etc?	For clarity in implementation
2. <b>Clause 14: Executive Director</b>	The Bill requires that the terms and conditions of service of the Executive Director shall be determined by the Board upon the advice of the Salaries and Remuneration	The mandate of the SRC is to set and review the remuneration benefits of all State Officers and advice the national and county Governments the Remuneration and Benefits of all other public officers	Amend by deleting, <i>‘upon the advice of the Salaries and Remuneration Commission’</i>	The IOD’s Executive Director’s remuneration is not drawn from the Consolidated Fund or directly out of money provided by Parliament; and is not under the purview of State or Public Officers,

Clause	Provision in the Bill	Issue of Concern	Proposed Amendment	Justification
	Commission in the instrument of appointment or otherwise in writing from time to time.			there's no need to involve SRC in matters remuneration
3. <b>Introduce New Clause 22: Categories of Directors</b>	The Institute proposes inclusion of a new clause on "Categories of Directors". This will help to cater for the interests of entities who may wish to provide for separate Executive and Non-Executive Director positions. Besides, it is best practice and in line with keeping good corporate governance, to classify directors according to their different roles on the board.	The Institute proposes inclusion of a new clause on "Categories of Directors". This will help to cater for the interests of entities who may wish to provide for separate Executive and Non-Executive Director positions. Besides, it is best practice and in line with keeping good corporate governance, to classify directors according to their different roles on the board.	A director can either be an Executive Director and a Non- Executive Director	The classification of directors is especially important when determining the appropriate membership of specialist board committees, and when making disclosures of the directors' remuneration in the company's annual report.
4. <b>23(1) Qualification for Registration as an Executive Director</b>	In line with the proposal above (new Clause 22), amend Clause 22(1) of the Bill to specify qualification for Registration of an Executive Director	In line with the proposal above (new Clause 22), amend Clause 22(1) of the Bill to specify qualification for Registration of an Executive Director	Amend to read, "Subject to this Section, a person is qualified to be registered as an Executive Director if the person holds a qualification approved under Subsection (2) of the Board"	To distinguish between qualifications for an Executive Director from those of a Non-Executive Director
5. <b>23(2) Qualification for Registration as a Non-Executive Directors</b>	The Institute proposes introduction of a new clause on Non-Executive Directors. A non-executive director or external director is a member of the board of directors of a company or organization who does not form part of the executive management team. They are not employees of the company or affiliated with it in any other way and are differentiated from inside directors, who are members of the board who also serve or previously served as executive managers of the company, most often as corporate officers.	The Institute proposes introduction of a new clause on Non-Executive Directors. A non-executive director or external director is a member of the board of directors of a company or organization who does not form part of the executive management team. They are not employees of the company or affiliated with it in any other way and are differentiated from inside directors, who are members of the board who also serve or previously served as executive managers of the company, most often as corporate officers.	15(1) In constituting boards of institutions, membership of boards shall comprise of executive and non-executive directors; 15 (2) The Board shall ensure that non-executive directors form the majority of the Board. 15 (3) the appointment of non- executive board members shall be through a transparent and competitive process; 15 (4) The terms and conditions of service shall be determined by the Board in the	There are a number of reasons why an entity may decide to bring a non-executive director on to the board of directors, including: <ul style="list-style-type: none"> <li>▪ An entity may wish to utilize the knowledge, skills and reputation of an expert within the industry and access his or her contacts as a means of reaching new</li> </ul>

Clause	Provision in the Bill	Issue of Concern	Proposed Amendment	Justification
			<p>instrument of appointment or otherwise in writing from time to time;</p> <p>15(5) in addition to sub-clause 3 above, the Board shall be guided by the following principles when appointing a Non-Executive Directors:</p> <ul style="list-style-type: none"> <li>a) Visionary, strategic and critical thinking;</li> <li>b) Holder of relevant skills and expertise</li> <li>c) Demonstrated leadership capability over the years</li> <li>d) A person of integrity;</li> <li>e) Absolute independence in terms of relationship with the entity which would impair independent judgement;</li> <li>f) Excellent communication skills</li> </ul>	<p>business opportunities or capital;</p> <ul style="list-style-type: none"> <li>▪ An entity may be too small to employ, or afford to employ, full time executive directors and therefore the appointment of a non-executive director can widen and compliment the board's experience and skill-set;</li> </ul>

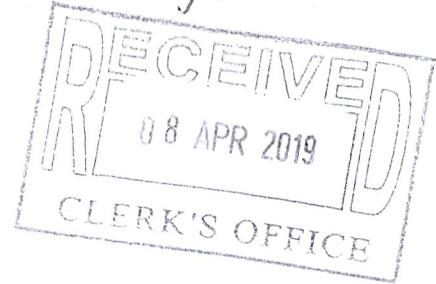
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09/4/19



**Our Ref:** RN/PPP/VNG/Gen  
**Your Ref:** TBA  
**Date:** 5 April 2019

Clerk of The National Assembly,  
Office of the Clerk  
Main Parliament Building  
P. O. Box 41842 – 00100  
**NAIROBI**

① Daniels  
9/4/19



**Attn: Michael R. Sialai EBS (clerk@parliament.go.ke)**

Dear Sirs,

**THE INSTITUTE OF DIRECTORS OF KENYA BILL, 2019**

We refer to the request for submission of comments circulated on 22 February 2018 seeking comments on the Institute of Directors of Kenya Bill, 2019 (the **Bill**).

Our main observation is as follows:

**Objective and Application of the Bill** - the objective of the Bill is to regulate quality assurance of directors in public bodies, entities, enterprises and companies.

In our view, the Bill should regulate directors in government run entities, organs, enterprises and corporations. Any membership to the Institute of Directors should be mandatory for any person wishing to be a director in the aforementioned bodies.

Membership to the Institute of Directors should also be mandatory for any person wishing to be a director in a public listed company. It is our view that a public listed company should be required to apply the provisions of the Bill or explain, why, for certain directors they have not complied. This approach would be in line with the approach taken in the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 published by the Capital Markets Authority. For example, if a director of a public listed company is: (i) from overseas, or (ii) is a director by virtue of him/her position in the company, then such persons should not be required to be a member of the Institute.

Separately, membership to the Institute of Directors should not be mandatory for directors of private companies or non-listed public companies; however it should be optional.

We have set out our comments and proposals in relation to the Bill in the enclosed annexure. We are happy to answer any questions you may have in relation to the comments and proposed amendments.

Yours faithfully

Rosa Nduati-Mutero  
**for and on behalf of Anjarwalla & Khanna**

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**ANNEXURE – Comments and proposed amendments**

<b>No.</b>	<b>Section of the Bill</b>	<b>Comment/ Rationale for recommendation</b>
1.	<b>Application of Bill and membership to the Institute of Directors</b>	<p>The memorandum of object and reasons of the Bill provides that the objective of the Bill is to regulate quality assurance of directors in public bodies, entities, enterprises and companies.</p> <p>In our view, the Bill should regulate directors in government run entities, organs, enterprises and corporations. Any membership to the Institute of Directors should be mandatory for any person wishing to be a director in the aforementioned bodies.</p> <p>Membership to the Institute of Directors should also be mandatory for any person wishing to be a director in a public listed company. It is our view that a public listed company should be required to apply the provisions of the Bill or explain, why, for certain directors they have not complied. This approach would be in line with the approach taken in the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 published by the Capital Markets Authority. For example, if a director of a public listed company is: (i) from overseas, or (ii) is a director by virtue of him/her position in the company, then such persons should not be required to be a member of the Institute.</p> <p>Separately, membership to the Institute of Directors should not be mandatory for directors of private or non-listed public companies; however it should be optional.</p>
2.	<b>Section 3 (1): Typo</b>	Reference to “Institute” should be amended to read “institute”.
3.	<b>Section 6 (l)</b>	<p>This section relates to the functions of the Institute.</p> <p>In our view, the inclusion of the following function “do anything incidental or conducive to the performance of any of the preceding functions” is necessary to ensure that the Institute has sufficient authority to act on matters related to the regulation of directors which may not have been addressed in section 6 (a)-(k).</p> <p>We therefore propose that the function “do anything incidental or conducive to the performance of any of the preceding functions” be included under section 6 (l).</p>
4.	<b>Section 7(1) (a)</b>	<p>This section provides that the chairperson will be appointed by the President from amongst members of the Board.</p> <p>The reference to “President” is unclear and should be clarified.</p>
5.	<b>Section 7 (1) (b)</b>	<p>This section provides that seven other members, who shall be persons with knowledge and experience of at least five years in corporate practice be elected by members of the Institute.</p> <p>While we appreciate the broadness of the membership criteria, it is our view that the Companies Registry, the Capital Markets Authority, the Institute of Certified Public Secretaries or the Institute of Public Accountants be represented on the Board. It should be considered whether these representations should be on the Board.</p>

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No.	Section of the Bill	Comment/ Rationale for recommendation
6.	Section 8 (1)	<p>This section deals with the disqualification from office of a member of the Board to include where a person has been declared bankrupt, has his/her name removed from the register and his/her certificate of competence has been suspended.</p> <p>Under the Companies Act and Capital Market Corporate Governance Requirements, there are penalties imposed on directors for failure to comply with certain legislative provisions. In this regard, we propose that the reasons for ineligibility to be a member of the Board include being convicted of an offence and sentenced to imprisonment or imposition of a fine.</p> <p>It may also be worth considering that a person found guilty of misconduct be disqualified from being a member of the Board.</p>
7.	Section 11	<p>This section mandates the Board to develop a comprehensive code of conduct and ethics that all members shall commit to in writing.</p> <p>The proposed comprehensive code of conduct and ethics would undoubtedly have implications on directors in all sectors. The code should be developed in consultation with the private sector and other stakeholders.</p> <p>In our view, we also recommend that the code be reviewed every five years and from time to time or on a needs basis as determined by the Board.</p>
8.	Section 14 (3) (b)	<p>This section deals with the qualification of the Executive Director. The sub-section is missing qualifications of the Executive Director holding a first degree and ten years' experience in economics yet section 14 (3) (a) holds that the Executive Director may hold post-graduate qualification in economics.</p> <p>In our view, we recommend that the holding of a first degree in economics be included in section 14 (3) (b).</p>
9.	Section 18: Typo	Reference to "15" should be amended to read "14".
10.	Section 19: Typo	Reference to the word "in" has been erroneously included and should be deleted
11.	Section 19 (2)	<p>The Registrar is required to issue a certificate of competence to every person registered under the Act. The certificate of competence is required to be in a prescribed form.</p> <p>In our view, we recommend that the prescribed form of the certificate of competence be included as a Schedule to the Act.</p>
12.	Section 20 (1)	<p>This section provides that a person wishing to be registered a member of the Institute is required to apply in the prescribed form and accompanied by a prescribed fee.</p> <p>In our view, we recommend that the prescribed form of the application and the fees be included as a Schedule to the Act.</p>
13.	Section 20 (3)	This section provides for the qualifications for registration of members of the Institute. The section however fails to provide qualifications such

No.	Section of the Bill	Comment/ Rationale for recommendation
		<p>as education, professional qualifications, years of experience, membership of a professional body and acceptable professional conduct and general character which in practice are required for registration in such bodies.</p> <p>In our view, we recommend that the qualifications to be an approved member of the Institute be specifically provided for on the basis of either the member's expertise or education/professional qualifications.</p>
14.	Section 22: Typo	Reference to "director" should be amended to read "member".
15.	Section 22(2)	<p>This section provides that a person shall not be treated as disqualified if the Board determines that it would be unreasonable to treat him or her after considering:</p> <ul style="list-style-type: none"> <li>a) the period which has lapsed since the conviction concerned; or</li> <li>b) the circumstances of the offence.</li> </ul> <p>In our view, we propose the inclusion of a new section 22(2)(c) as follows:</p> <p><i>"and determining that the matter and/or offence has been cleared and is no longer existing"</i></p>
16.	Section 22(3)	<p>This section provides that a person will not be treated as disqualified if they are a undischarged bankrupt if the Board is satisfied that the bankruptcy of the person concerned arose as a result of unavoidable losses or misfortunes.</p> <p>In our view, this section should be deleted. The circumstances behind the bankruptcy of an individual should not be relevant in reversing a disqualification.</p>
17.	Section 24	<p>A member of the Institute's registration should also be cancelled:</p> <ul style="list-style-type: none"> <li>a) voluntarily; or</li> <li>b) in the event of the demise of the member.</li> </ul>
18.	Section 26 (3) Typo	The words "Disciplinary Committee" should be used instead of the word "committee".
19.	Section 26	<p>This section relates to the establishment and role of the Disciplinary Committee.</p> <p>In our view, in order for the Board to effectively carry out its mandate and regulate quality assurance of directors of governmental bodies and/or public listed companies, there should be a reporting mechanism whereby the public can refer complaints to the Board. The Board should then determine which complaints should be referred to the Disciplinary Committee.</p> <p>We therefore propose that a public reporting mechanism be included in Section 26 (9) of the Bill.</p>
20.	Section 30	<p>This section relates to the effect of removal of a person's name from the register.</p> <p>In our view, we propose the inclusion of a new section 30(2)(a) that stipulates that where a person has been removed from the register, that</p>



<b>No.</b>	<b>Section of the Bill</b>	<b>Comment/ Rationale for recommendation</b>
		person shall not be appointed as a director of a government entity, organ or cooperation and/or public listed company.
<b>21.</b>	<b>First Schedule</b>	In our view, the schedule should indicate the frequency of meetings of the Board to ensure that the Board approves registration of members to on a frequent and scheduled basis.

Handwritten notes: "Kumbon", "pls deal", "FA", "08/4/19"

Handwritten notes: "2) CARZEMISA", "pls deal", "FA", "08/4/19"



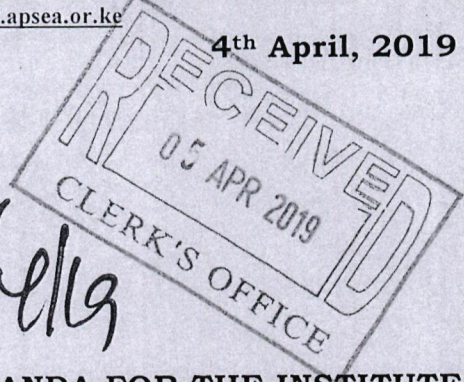
**Association of Professional Societies in East Africa (APSEA)**

Parliament Road, The Professional Centre, P.O. BOX 72643-00200, GPO, Nairobi Tel: 0726-610498/0733-610948  
Fax: 341883 Email: [apsea@apsea.or.ke](mailto:apsea@apsea.or.ke) Website: [www.apsea.or.ke](http://www.apsea.or.ke)

4th April, 2019

**Clerk Kenya National Assembly,  
Parliament Buildings,  
P.O Box 41842 - 00100,  
Nairobi Kenya.**

Handwritten notes: "OD/ants", "5/4/19"



Dear Sir,

**RE: OFFICIAL APSEA SUBMISSION OF MEMORANDA FOR THE INSTITUTE OF DIRECTORS BILL, 2019.**

Receive warm greetings from the Association of Professional Societies in East Africa (APSEA).

The Association of Professional Societies in East Africa (APSEA) is a Joint Forum and an umbrella body of professionals associations established in 1961 comprising of a corporate membership of twenty eight (28) professional associations from diverse professional disciplines in the country. They include; Accounting, Agriculture, Arbitration, Architecture, Bankers, Chemists, Clerks of works, Consulting Engineers, Dentistry, Engineers, Food science and technology, Financial Analysts, Geology, Insurance, Law, Managers, Medicine, Meteorologists, Pharmacy, Physiotherapy, Planning, Procurement and Supplies, Quantity Surveyors, Radiology, Radiography, Certified Secretaries, Surveyors and Veterinary science.

Reference is made to the Gazette notice that featured on the Daily Nation, Friday 29th March 2019- Page 49 from the Office of the Clerk of the National Assembly, inviting the Public to forward submissions on the Institute of Directors of Kenya bill, 2019.

Pursuant to the provisions of Article 118 (1) (b) of the Constitution of Kenya, APSEA hereby submit our submission as follows:

1. That the bill has not provided the definition of a director.
2. The Bill has not articulated the academic and professional qualifications of a director.
3. There is no stipulated criteria for individuals to meet in order to be registered by the Board.
4. APSEA notes that Directorship is not a profession even by the International Labour Organization Classification Structures, and internationally similar institutes are social member clubs for networking.

5. This bill seems to anticipate the creation of a Profession for Directors, BUT a professional is someone who has demonstrated a level of special academic knowledge, professional competence and skills in a widely recognized body of learning derived from research, education and training at high level in a structured system.
6. Appointments to Boards are based on individuals who demonstrate a particular set of skills required in the board composition. Therefore Clause 25 conflicts with existing laws.
  - a. The State Corporation Act prescribes the composition of a board, manner of appointing directors, while the Companies Act clearly prescribes who a director is and the duties and responsibilities of a director. The bill is not in line with existing Acts of Parliament.
  - b. The conduct of a director is provided in the companies Act for private entities and Mwongozo code for public entities.

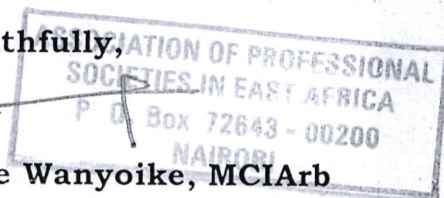
Various boards are constituted based on the specific Acts of Parliament therefore a conflict shall arise with other Acts of Parliament if the bill is passed into law.

7. In the memorandum of Objects and Reasons, it is indicated that the bill does not concern County Governments. Once enacted it applies to all governing sectors.
8. The Institute of Certified Secretaries (ICS) formerly the Institute of Certified Public Secretaries of Kenya established under Cap 534 of 1988, which houses the governance professionals in Kenya also trains and monitors boards performance. ICS has trained its members on governance audit and is involved in its practice. The Function evaluates the boards' performance and trains them as needed. The "Champions of Governance Award" is one of its products. ICS guided the professional development and validation of *Mwongozo*; the Code of Governance for State Corporations. The bill seems to duplicate some of the mandate and functions of the Institute of Certified Secretaries which is a member of APSEA.

Please note that this is the official APSEA position and any other views submitted in the name of APSEA are not to be considered as the views of APSEA.

We look forward with anticipation to your consideration of APSEA's submission and we look forward to engaging with your office on this bill.

**Yours Faithfully,**



**Mrs. Irene Wanyoike, MCI Arb**

**Chairman, Association of Professional Societies in East Africa (APSEA).**

**THE INSTITUTE OF DIRECTORS OF KENYA BILL, 2019**  
(Sponsored by Hon. Chris Wamalwa, Member of the National Assembly)

**SUBMISSIONS BY OFFICE OF THE ATTORNEY-GENERAL AND DEPARTMENT  
OF JUSTICE**

**Memorandum to the Justice and Legal Affairs Committee from the Office of the Attorney-General**

**Background**

The Institute of Directors Bill was first submitted to this Office in 2017 as a draft Vellum which was to be assented to by His Excellency, the President. This Office wrote a Memorandum of Refusal to Assent to the Bill based on the reasons mentioned in the memorandum in which we proposed various amendments to the Bill. The Bill and the Memorandum of Refusal to Assent to the Bill were forwarded to the National Treasury who agreed that the Bill would be difficult to implement and proposed further amendments thereto that would facilitate the operationalisation of the Institute.

The Memorandum proposed the following amendments to the Bill-

- Clause 2; the definition of the terms “profession” and “director”
- Clause 6; the recommendation to delete paragraphs (d) and (e)
- Clause 13; the proposed amendment to the marginal note to read “delegation of functions and powers of the Board”
- Deletion of Clause 22; and
- Deletion of Clause 25.

After the lapse of the 2017 Bill, the National Assembly submitted the Institute of Directors Bill, 2018 to this Office as a legislative proposal for pre-publication scrutiny. None of the recommendations set out above have been incorporated in the new Bill and nor have a number of other recommendations.

**General comments on the Bill**

The Bill has not adhered to the established protocols for the establishment of a state corporation. This is because the National Treasury and the State Corporations Advisory Committee have not been consulted to assess the feasibility and efficacy of establishing the proposed Institute of Directors.

We further note that the conduct of directors of boards in Kenya is already legally regulated by other statutory bodies such as—

- (a) the Capital Markets Authority which regulates the directors of securities exchanges,
- (b) the Companies Act, which regulates the directors of companies registered in Kenya and

(c) in the case of State Corporations, the President, the National Treasury and the State Corporations Advisory Committee.

The introduction of the Institute of Directors, a state corporation, to regulate the conduct of directors is therefore an unnecessary duplication. The Bill also presumes directorship to be a “profession” towards which a person can be trained by the Institute, which is not the case.

The scope of application of the Bill is not clear. The Bill establishes a professional body but does not expressly stipulate the professionals to whom it applies and the qualifications they should possess to be eligible to be members of the Institute.

All state corporations are domiciled in Ministries. In the case of the Institute of Directors the parent Ministry is not quite identified.

## **Analysis of the Bill**

### **LONG TITLE**

The long title provides that the Bill seeks to establish the Institute of Directors of Kenya, to provide for the registration and regulation of the standards and practice of the profession. The profession referred to is not clear.

### **CLAUSE 2**

The Bill does not define the terms “profession” or “director”. The type of professionals that the Bill seeks to regulate is therefore not clear.

The word “profession” is defined in the Oxford Dictionary as a type of job that needs special training or skill, especially one that needs a high level of education.

The Australian Council of Professions defines ‘a profession’ as follows—

A profession is a disciplined group of individuals who adhere to ethical standards and uphold themselves to, and are accepted by, the public as possessing special knowledge and skills in a widely recognised body of learning derived from research, education and training at a high level, and who are prepared to exercise this knowledge and these skills in the interest of others.

Directorship does not fall within this definition.

### **CLAUSE 6**

Clause 6 (d) and (e) provide that the functions of the Institute shall be to—

- (a) determine, maintain and enhance the standards of professional practice and ethical conduct of directors;
- (b) set standards of professional competence and qualifications for directors.

The State Corporations Act as well as other Acts of Parliament give the President power to appoint a chairperson to the board of a state corporation and a Cabinet Secretary power to

appoint other members of such Boards. The respective statutes specify the professional competence of the persons to be appointed. The Institute would therefore have no part to play in setting the requisite qualifications for the appointment of directors.

This provision is therefore not required.

#### **CLAUSE 7**

Clause 7 (1) provides that the management of the Institute shall be vested in a Board which shall consist of—

- (a) a chairperson who shall be appointed by the President from amongst the members elected under paragraph (b); and
- (b) seven other members, who shall be persons with knowledge and experience of at least five years in corporate practice elected by members of the Institute.

Clause 7 (1) is confusing with regard to the number of members of the Board. Will the Board consist of seven members or eight members? In addition, this clause does not provide for the Board to consist of the Principal Secretary of the parent Ministry, the Principal Secretary of the National Treasury and the Attorney-General or his representative. This is inconsistent with section 6 (1) of the State Corporations Act which provides for the composition of the Boards of state corporations.

We advise that the provision be amended to provide for the composition of the Board be consistent with the State Corporations Act .

Clause 7 (3) provides that a person appointed and elected as a member of the Board shall serve for a term of three years and may be re-appointed for a further term of three years. While clause 7 (4) provides that the appointed and elected members of the Board shall take office until the conclusion of the third year in office. Is the term of the members of the Board for a period of three years only or more?

Clause 7 (3) and (4) of the Bill should reflect whether only the chairperson or vice chairperson's post are vacant after three years or whether that applies to all members or whether the membership of the members to the elective posts is what is not subject to renewal.

#### **CLAUSE 11**

This clause provides for the Board to develop a code of conduct for the members of the institute. Since a director has not been defined, it is not clear who qualifies to be a member of the institute and therefore who is to be regulated by the code of conduct.

### **CLAUSE 13**

This clause gives the Board power to delegate to any committee or any member, officer, employee or agent of the Board, the exercise of any of the powers or the performance of any of the functions or duties of the Board under the Act or any other written law. The marginal note refers to Committees of the Board.

The marginal note of Clause 13 should be amended to read “Delegation of functions and powers of the Board”.

### **CLAUSE 22**

Clause 22 (1) stipulates the disqualifications for registration as a director but does not specify the qualifications, experience or expertise of a director in order for such a person to be registered.

One of the functions of the Institute envisioned under the Act is to maintain and improve the director’s professional conduct. Directorship is not a profession. Under the various statutes which provide for the appointment of Board members, qualifications are usually prescribed as conditions for the appointment. The directors are appointed to various Boards on the basis of their professional associations and not on the basis of their qualifications as the appointment of Directors is not regulated by the Institute of Directors.

The current Institute of Directors (Kenya), which is established as a membership Institute under the Societies Act provides an interactive forum for persons who are already directors in various bodies, and also as a training organization for capacity building for serving directors. It does not regulate the directors who are its members.

Clause 22 creates uncertainty as to who is eligible to be registered as a director. For the Act to be effectively implemented, the eligibility criteria must be set out in the Act because the eligibility criteria are a substantive matter and lays the foundation for the regulation of any profession. An illustration of the qualifications of directors of some of the parastatals is as specified in the annexure attached herewith.

Clause 22 of the Bill should be deleted.

### **CLAUSE 25**

Clause 25 of the Bill imposes an obligation on persons who are appointed to the board of a public entity, organ or corporation to register and maintain their membership with the Institute for the period of the appointment .

The State Corporations Act as well as some Acts of Parliament give the President the power to appoint a chairperson to the board of a state corporation and a Cabinet Secretary power to appoint other members of such Boards. This clause seems to intend to restrict these powers of appointment to members of the Institute only, which should not be the case. Prospective directors are subjected to a vetting process before being appointed. This Clause may lock out

duly qualified persons to appointive posts while this Bill does not provide for the qualifications for registration as a director.

Directors of state corporations are usually selected from various professional backgrounds, with priority being given to professionals in the sector in which the state corporation is established. This requirement would therefore encroach on executive powers and inhibit the work of the executive.

We propose that this clause be deleted.

#### **CLAUSE 26**

This clause provides for the establishment of a disciplinary committee. Sub clause (8) provides that the jurisdiction of the Committee shall be to determine the registration of a member who has been convicted for acting in a manner that amounts to professional negligence or professional misconduct as a director. The terms “professional negligence” and “professional misconduct” in respect of his or her position as a director have not been defined.

The conduct of directors of securities exchanges has been provided for under the Capital Markets Act. The conduct of directors of companies has been provided for under Part IX of the Companies Act, 2015.

The conduct of directors of state corporations is provided for under the Leadership And Integrity Act and the Public Officers Ethics Act (for public officers). The Public Officers Ethics Act defines a public officer to include a member, including an unpaid, part-time or temporary officer or member, of any corporation, council, board, and committee. A director of a state corporation is a public officer and his conduct is governed by the Leadership And Integrity Act and the Public Officers Ethics Act.

Since the conduct of directors of state corporations as public officers are governed by the Acts specified herein, it is not clear what the function and scope of the disciplinary committee is.

#### **CLAUSE 28**

This clause provides that where a committee determines that a member has contravenes clause 26, the committee may suspend, withdraw or cancel the certificate of competence of the member. The Bill does not provide for the Institute to issue a certificate of competence. The Bill should be amended to provide for the procedure and qualifications for issuing the certificate of competence.

#### **CLAUSE 36**

This clause provides for the transition of members of the Board of the Institute yet does not specify whether the Institute is a successor of a certain legal entity. It is not clear whether the Institute proposed in the Bill is intended to take over the functions of the existing Institute of Directors (Kenya). If not, there may be two Institutes operating concurrently.



The Clause should clarify whether the new Institute is a successor to the Institute of Directors (Kenya) or a new institute.

### **Qualifications of Directors**

Regarding qualification for appointment as Board members, this can properly be provided for in the statutes establishing each respective body. There are already various statutes which provide for qualifications for members of Boards, including—

#### ***(a) The Capital Markets Act***

Section 5(4) of this Act provides that the chairman and every member of the Board of the Authority shall have experience and expertise in legal, financial, banking, accounting, economics or insurance matters.

#### ***(b) Independent and Electoral Boundaries Commission Act***

Section 6 of this Act provides that the chairperson of the Commission shall be a person who is qualified to hold the office of judge of the Supreme Court.

This section also provides that a person is qualified to be appointed as a member of the Commission if that person—

- (a) holds a degree from a recognized university;
- (b) has proven relevant experience in any of the following fields—
  - (i) electoral matters;
  - (ii) management;
  - (iii) finance;
  - (iv) governance;
  - (v) public administration;
  - (vi) law; and
- (c) meets the requirements of Chapter Six of the Constitution.

#### ***(c) Basic Education Act***

Section 8 of this Act provides that a person shall be qualified for appointment as the Chairperson of the Board if such person—

- (a) holds a degree in education from a university recognized in Kenya;
- (b) has knowledge and at least 15 years' experience in education matters;
- (c) has had a distinguished career in their respective fields; and
- (d) meets the requirements of Chapter Six of the Constitution.

This section also provides that a person shall be qualified for appointment as a member of the Board if such person—

- (a) holds a degree from a recognized university;
- (b) has knowledge and at least ten years' experience in matters relating to any of the following fields—
  - (i) education;
  - (ii) management;
  - (iii) finance;
  - (iv) governance;
  - (v) human rights;
  - (vi) public administration;
  - (vii) law;
  - (viii) economics; and
  - (ix) meets the requirements of Chapter Six of the Constitution;
- (c) has had a distinguished career in their respective fields; and
- (d) meets the requirements of Chapter Six of the Constitution.

#### ***The Mwongozo The Code Of Governance***

This Code provides that a person shall be qualified to be appointed as a Chairperson or a member of a Board if the person—

- (a) holds a degree in the relevant field from a university recognized in Kenya;
- (b) has proven business management or other relevant professional experience;
- (c) has served in a position of senior management for a period of at least six years;
- (d) has not served in the same entity as an employee in the preceding five years;
- (e) meets the requirements of Chapter Six of the Constitution; and
- (f) meets the requirements of the Fit and Proper Test.

In our opinion the existing Institute of Directors can continue to competently offer capacity building and training in corporate governance to serving directors who have been appointed based on their attributes as set out in this memorandum.

# **ANNEXURE 5**

**(Copy of the Presidential memorandum, 2017)**

Mr. Irungu,  
Kindly file in the  
appropriate file  
Dan. 07/09/17



23A

D/ Legal  
For your file  
Please S.  
7/7

THE CONSTITUTION OF KENYA  
REFUSAL TO ASSENT TO THE INSTITUTE OF DIRECTORS OF  
KENYA BILL, 2017

MEMORANDUM

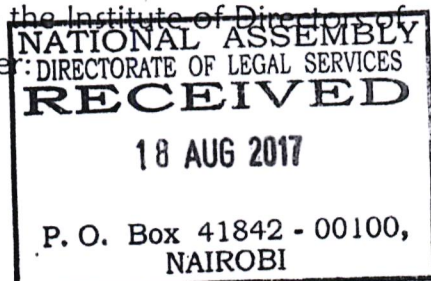
By His Excellency the Honourable Uhuru Kenyatta,  
President and Commander – in – Chief of the Kenya Defence  
Forces.

Submitted to the Speaker of the National Assembly.

**WHEREAS** a Bill entitled “AN ACT of Parliament to establish the Institute of Directors of Kenya, the short title of which is “The Institute of Directors of Kenya Bill, 2017” was passed by the National Assembly on the 1<sup>st</sup> of March, 2017;

**AND WHEREAS** the Institute of Directors of Kenya Bill, 2017 was presented to me for assent, in accordance with the provisions of the Constitution, on 21<sup>st</sup> June, 2017:

**NOW THEREFORE**, in exercise of the powers conferred on me by Article 115(1)(B) of the Constitution, I refuse to assent to the Institute of Directors of Kenya Bill, 2017, for the reasons set out hereunder:



## The Long Title

The Long Title reads as follows-

**An Act of Parliament to establish the Institute of Directors of Kenya; to provide for the registration and regulation of the standards and practice of the profession and for connected purposes**

The Bill does not define the terms “the profession” or “director”. The type of professionals that the Bill seeks to regulate is therefore not clear. The Bill does not expressly stipulate the category of professions to whom it applies.

## RECOMMENDATION

In view of the foregoing reason I recommend that the Bill be amended in the interpretation section by defining the terms “**profession**” and “**director**”.

## CLAUSE 6

Clause 6(d) and (e) of the Bill provide as follows-

The functions of the Institute shall be to-

- (a) determine, maintain and enhance the standards of professional practice and ethical conduct of directors;
- (b) set standards of professional competence and qualifications for directors.

The State Corporations Act as well as Acts of Parliament give the President the power to appoint a chairperson to the board of a state corporation and a Cabinet Secretary power to appoint other members of such Boards. The respective statutes specify the professional competence of the persons to be appointed.

The Institute would therefore have no part to play in setting the requisite attributes for the appointment of directors.

## RECOMMENDATION

In view of the foregoing reason I recommend that clause 6 be amended by deleting paragraphs (d) and (e).

## CLAUSE 7

Clause 7(1) of the Bill provides as follows-

- (1) The management of the Institute shall be vested in a Board known as the Board of the Institute which shall constitute of -
  - (a) a chairperson who shall be appointed from amongst the members elected under paragraph (b); and
  - (b) eight other members, who shall be persons with knowledge and experience of at least five years in corporate practice elected by members of the Institute.

Clause 7(1) the provision causes confusion with regard to the number of members of the Board. It also does not specify the person responsible for the appointment of the chairperson.

## RECOMMENDATION

In view of the foregoing reason, I recommend that-

- (a) the Bill be amended by deleting paragraph (a) and substituting therefor the following new paragraph-
  - (b) a chairperson elected by members of the Institute;
- (c) paragraph (b) be amended by deleting the words "eight other" and replacing them with the word "nine",

#### CLAUSE 7(4)

Clause 7 (4) of the Bill provides as follows-

(4) A person appointed and elected as a member of the Board under this Act, other than an ex officio member, shall serve for a term of three years and shall be eligible for reappointment for a further and final term of three years.

The provision also refers to ex-officio members of the Board. The Bill does not provide for ex-officio members.

#### RECOMMENDATION

In view of the foregoing reason, I recommend that the Bill be amended by deleting clause 7(4) and substituting therefor the following-

(4) A person elected as a member of the Board shall serve for a term of three years and shall be eligible for re-election for a further and final term of three years.

#### CLAUSE 8

Clause 8 provides as follows-

(8) A person becomes ineligible for appointment or election as a member of the Board if the Person-

- (a) is an undischarged bankrupt;
- (b) has his or her name removed from the register; or
- (c) has his or her certificate of competence suspended under section 28.

Clause 8 (1) of the Bill specifies that there are some members of the Board who are appointed and not elected. All members of the Board are elected, and not appointed.

#### RECOMMENDATION

In view of the foregoing reason, I recommend that clause 8(1) be amended by deleting the words "appointed or".

#### CLAUSE 12

Clause 12 of the Bill provides as follows-

(12) The Board may appoint such officers and other staff as necessary for the proper discharge of its functions under this Act, upon such terms and conditions of service as the Board may determine, upon the advice of the Salaries and Remuneration Commission.

The Institute is a self-regulating body and will not draw money from public funds. The remuneration of its staff should therefore not be regulated by the Salaries and Remuneration Commission.

#### RECOMMENDATION

In view of the foregoing reason, I recommend that clause 12 be amended by deleting the words "upon the advice of the Salaries and Remuneration Commission".

#### CLAUSE 13

Clause 13 of the Bill provides as follows-

The Board may, by resolution either generally or in any particular case, delegate to any committee or any member, officer, employee or agent of the Board, the exercise of any of the powers or the performance of any of the functions or duties of the Board under this Act or any other written law.



Clause 13 of the Bill makes provision for the delegation of the powers and the performance of any functions of the Board. The marginal note provides for Committees of the Board.

## RECOMMENDATION

In view of the foregoing reason, I recommend that the marginal note of clause 13 be deleted and replaced with "Delegation of functions and powers of the Board".

## CLAUSE 22

Clause 22 of the Bill provides as follows-

- (1) Subject to this section, a person is qualified to be registered as a director if the person holds a qualification approved under subsection (2) by the Board.
- (2) The Board may, by notice in the Gazette approve qualifications which it considers sufficient to allow a person to be registered, and may, in like manner, withdraw any such approval.

Sub clauses 22 (1) and (2) stipulate the qualifications for registration as a director as follows—

(1) Subject to this section, a person is qualified to be registered as a director if the person holds a qualification approved under subsection (2) by the Board.

(2) The Board may by notice in the Gazette approve qualifications which it considers sufficient to allow a person to be registered and

One of the functions of the Institute envisioned under the Act is to maintain and improve the director' professional conduct. Directorship is not a profession. Under the various statutes which provide for the appointment of Board members, qualifications are usually prescribed as conditions for the appointment. The directors are appointed to the

Board on the basis of their professional background and membership of their respective professional associations. This have nothing to do with the Institute of Directors.

The current Institute of Directors (Kenya), which is established as a membership institute under the Societies Act acts as a members' forum for people who are already directors in various bodies, and acts as an interactive forum for them and also as a training organization to improve their work.

Clause 22 creates uncertainty as to who is eligible to be registered as a director. The uncertainty is further heightened by the fact that the Board can at any time change the qualifications for membership. For the Act to be effectively implemented, the eligibility criteria must be set out in the Act because eligibility criteria is a substantive matter and lays the foundation for the regulation of any profession.

#### **RECOMMENDATION**

In view of the foregoing reason, I recommend that the Bill be amended by deleting Clause 22.

#### **CLAUSE 25**

Clause 25 (1) of the Bill provides as follows-

- (1) Subject to this Act, where a person is appointed to a Board of a public entity, organ, enterprise or corporation, such person shall-
  - (a) if not a member of the Institute, make an application for membership and undertake the prescribed training courses within three months of being appointed as a member to such Board; and
  - (b) maintain his or her membership to the Institute for the period of such appointment.

Clause 25 of the Bill provides for appointments to a public entity, organ, enterprise or corporation. The functions of the Institute conflict with provisions of various laws. The State Corporations Act as well as some Acts of Parliament gives the President the power to appoint a chairperson to the board of a state corporation and a Cabinet Secretary power to appoint other members of such Boards. Clause 25 of the Bill imposes an obligation on persons who are appointed to the board of a public entity, organ or corporation to register and maintain their membership with the Institute for the period of the appointment. Such persons are to be subjected to a vetting process before registration. Clause 22(3) provides that the Board may require a person making an application to satisfy the Board that his or her knowledge of corporate governance and public administration or professional conduct has been such as to make him or her a fit and proper person to be registered and unless that person satisfies the Board he shall not be registered.

Directors of state corporations are usually selected from various professional backgrounds, with priority being given to professionals in the sector in which the state corporation is established. This requirement would therefore encroach on executive powers and inhibit the work of the executive.

## RECOMMENDATION

In view of the foregoing reason, I recommend that clause 25 be deleted.

## CLAUSE 30

Clause 30 of the Bill provides as follows-

- (1) A member whose name has been removed from the register may appeal to the Board for restoration of his or her name in the register after the expiry of a period of three years from the date of such removal.
- (2) The Board may, after considering the appeal made under subsection (1), cause the name of the person appealing to

be restored in the register upon payment of the prescribed fee.

Clause 30 entitles a member who has been removed from the register to appeal for restoration. The application for restoration in the register may only be made after a member's name has been removed from the register for a period of three years and does not amount to the right of appeal. Clause 28(5) of the Bill provides that a member who is aggrieved by the decision of the disciplinary Committee of the Board may appeal to the High Court. Accordingly, a member should therefore "apply" and not "appeal" to the Board for restoration.

### RECOMMENDATION

The intentions of the provisions of this Clause are not quite clear. The appointment of Board members is done independently of the Institute of Directors. The role of the Institute comes into play after their appointment. There is therefore no cause Institute to impose a mandatory requirement for registration.

In view of the foregoing I recommend that Clause 30 of the Bill be deleted.

### CLAUSE 37

Clause 37 of the Bill provides as follows-

Carry-overs

- (1) The members who immediately before the enactment of this Act are members of the Board, shall conduct the first elections to the Board within twelve months after the commencement of this Act.
- (2) The members of the Board immediately preceding the first

elections under this Act shall be eligible for election in the first elections under subsection

- (3) For purpose of subsection (2), the Board refers to the Board to the Institute of Directors in place immediately before the enactment of this Act.

Clause 37 of the Bill makes provision for transition of members of the Board of the Institute yet does not specify the institute has been in existence. The Bill does not specify whether the Institute is a successor of a certain legal entity. It is not clear whether the Institute proposed in the Bill is intended to take over the functions of the existing Institute. If not, there may be two Institutes operating concurrently.

#### RECOMMENDATION

In view of the foregoing reason, I recommend that Bill be amended by deleting clause 37 and substituting therefor the following new clause-

##### Transitional provisions

37. (1) The members of the Board of the Institute of Directors (Kenya) existing before the enactment of this Act shall continue as members of the Board until the first election under this Act.

(2) The members of the Board referred to in sub-section (1) shall be eligible to be elected in the first elections carried out under sub-section (1).

Dated the <sup>th</sup> 4<sup>th</sup> of July, 2017.

A handwritten signature in black ink, appearing to read 'Uhuru Kenyatta', written in a cursive style.

UHURU KENYATTA  
President

