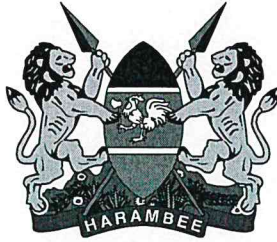


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REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – FIFTH SESSION

DEPARTMENTAL COMMITTEE ON DEFENCE & FOREIGN RELATIONS

REPORT ON THE CONSIDERATION OF THE FOREIGN SERVICE BILL (NATIONAL ASSEMBLY BILL NO. 8 OF 2021)

	
THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 01 JUL 2021	DAY: THURSDAY
TABLED BY:	CHAIR, DC - DEFENCE & FOREIGN RELATIONS HON. KATOO OLE MEIITO, CGH, MP
CLERK-AT-THE-TABLE:	Ahmed Khadhi

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JULY, 2021

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CHAIRPERSON'S FOREWORD

This report contains the Committee's proceedings on the consideration of the Foreign Service Bill, 2021 that was read a First Time on 4th May 2021, and committed to the Departmental Committee on Defence & Foreign Relations pursuant to Standing Order 127.

The Foreign Service Bill (National Assembly Bills No. 8 of 2021), sponsored by Hon. Katoo Ole Metito, MP, Chairperson of the Committee, is a Committee-sponsored Bill that seeks to provide for the establishment, management, administration, accountability and functioning of a professional foreign service.

The Committee called for memoranda from the public pursuant to Article 118(1)(b) of the Constitution and Standing Order 127(3), and received responses from three stakeholders. The Committee further held a meeting with the chief practitioner and consumer of the Bill, the Ministry of Foreign Affairs, on 26th May 2021.

The stakeholders proposed certain amendments that have been exhaustively addressed in Part III of this report, with the Committee's final decision reflected therein and in the attached schedule.

On behalf of the Departmental Committee on Defence and Foreign Relations and pursuant to provisions of Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the Report of the Departmental Committee on Defence and Foreign Relations on the Foreign Service Bill, 2021. The Committee is grateful to the offices of the Speaker and Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee further wishes to thank all stakeholders who submitted their comments on the Bill. Finally, I wish to express my appreciation to the Honourable Members of the Committee and the Committee Secretariat who made useful contributions towards the preparation and production of this report.

It is my pleasure to report that the Committee has considered the Foreign Service Bill, 2021 and has the honour to report back to the National Assembly with the recommendation that the Bill should be approved with amendments.

Hon. Katoo Ole Metito, EGH, MP

Chairperson, Departmental Committee on Defence and Foreign Relations

PART I

1.0 PREFACE

1.1 Establishment and Mandate of the Committee

1. The Departmental Committee on Defence and Foreign Relations is established under Standing Order No. 216. Its mandate pursuant to SO 216 (5) with the following terms of reference;
 - i) investigate, inquire into and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and Departments;*
 - ii) study the programme and policy objectives of the Ministries and Departments and the effectiveness of the implementation;*
 - iii) study and review all legislation after First Reading subject to the exemptions under Standing Order 101 A (4);*
 - iv) study and review all legislation referred to it;***
 - v) study, assess and analyze the relative success of the Ministries and Departments as measured by the results obtained as compared with its stated objectives;*
 - vi) 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 or a Minister; and*
 - vii) make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.*
2. The Committee is mandated to consider the following subjects:
 - i) Defence
 - ii) intelligence,
 - iii) foreign relations
 - iv) diplomatic and consular services,
 - v) international boundaries,
 - vi) international relations,
 - vii) agreements,
 - viii) treaties and
 - ix) Conventions.
3. In executing its mandate, the Committee oversees the following government Ministries, departments and or agencies, namely:
 - i) Ministry of Defence
 - ii) Ministry of Foreign Affairs
 - iii) Ministry of East African Community & Regional Development
 - iv) The National Intelligence Service

1.2 Committee Membership

4. The Committee Membership is as follows:

The Hon. Katoo Ole Metito, EGH, MP (Chairperson)
MP for Kajiado South Constituency

Jubilee Party

The Hon. Richard Tongi, MP (Vice Chairperson)
MP for Nyaribari Chache Constituency

Jubilee Party

The Hon. Yusuf Hassan Abdi, MP
MP for Kamukunji Constituency

Jubilee Party

The Hon. Charles Kilonzo, MP
MP for Yatta Constituency

Independent

The Hon. Stephen Mule, MP
MP for Matungulu Constituency

WDM-K Party

The Hon. Dido Ali Raso, MP
MP for Saku Constituency

Jubilee Party

The Hon. Maoka Maore, MP
MP for Igembe North

Jubilee Party

The Hon. Irene Kasalu, MP
MP for Kitui County

WDM-K Party

The Hon. Gideon Konchella, MP
MP for Kilgoris Constituency

Jubilee Party

The Hon. Memusi Ole Kanchory, MP
MP for Kajiado Central Constituency

ODM Party

The Hon. Martha Wangari, MP
MP for Gilgil Constituency

Jubilee Party

The Hon. Major (Rtd.) Bashir Sheikh
Abdullah, MP

MP for Mandera North Constituency

Jubilee Party

The Hon. (Dr.) Lilian Gogo, MP
MP for Rangwe Constituency

ODM Party

The Hon. Zachary Thuku, MP
MP for Kinangop Constituency

Jubilee Party

The Hon. Moses Nguchine Kirima, MP
MP for Central Imenti Constituency

Jubilee Party

The Hon. Vincent K. Tuwei, MP
MP for Mosop Constituency

Jubilee Party

The Hon. Ernest Ogesi Kivai, MP
MP for Vihiga Constituency

ANC Party

The Hon. Caleb Amisi, MP
MP for Saboti Constituency

ODM Party

The Hon. Asha Hussein Mohamed,
MP

MP for Mombasa County

ODM Party

1.3 Committee Secretariat

5. The Committee is facilitated by the following members of the secretariat.

Mr. Victor Weke
First Clerk Assistant
Lead Clerk

Mr. Abdiaziz Shobay
Clerk Assistant II

Mr. Edison Odhiambo
Fiscal Analyst

Mr. John Ng'ang'a
Audio Officer

Ms. Mercy Wanyonyi/ Mr. Salem
Lorot
Legal Counsels

Ms. Deborah Mupusi
Media Relations Officer

PART II

2.0 OVERVIEW OF THE FOREIGN SERVICE BILL, 2021

6. The principal object of this Bill is to provide for the establishment, management, administration, accountability and functioning of a professional foreign service of the Republic of Kenya and for connected purposes.
7. PART II (Clause 3-7) of the Bill contains provisions on the establishment and composition on the Foreign Service and the key functions of the Cabinet Secretary and the Principal Secretary in relation to the Service and Kenya's foreign relations.
8. PART III (Clause 8-11) of the Bill outlines the relationship between the Ministry responsible for foreign affairs and overseas Missions.
9. PART IV (Clause 12-22) of the Bill contains provisions on the staffing conditions of the personnel of the Foreign Service.
10. PART V (Clause 23-26) of the Bill contains provisions relating to the appointment and termination of high commissioners, ambassadors and other diplomatic and consular representatives by the President. The part additionally provides for matters relating to the accreditation of appointed diplomats.
11. PART VI (Clause 27-28) of the Bill contains provisions on the appointment and functions of honorary consuls.
12. PART VII (Clause 29-30) of the Bill contains provisions underpinning the formulation, publication and dissemination of the foreign policy objectives of the Republic.
13. PART VIII (Clause 31-46) of the Bill contains provisions on the establishment, functions and administration of the Foreign Service Academy. The Academy is to be administered by a Council and its day-to-day affairs run by a Director-General.
14. PART IX (Clause 47-49) of the Bill contains miscellaneous provisions.
15. PART X (Clause 50) of the Bill contains provisions on the powers delegated to the Cabinet Secretary responsible for foreign affairs.
16. PART XI (Clause 51) of the Bill contains transitional provisions.

PART III

4.0 PUBLIC PARTICIPATION/ STAKEHOLDER ENGAGEMENT

17. Following call for memoranda from the public through the placement of advertisements in the print media on 13th May 2021 requesting for comments from the public on the Bill.
18. The Committee received memoranda from the following stakeholders;
 - i. Ministry of Foreign Affairs
 - ii. Ministry of Industrialization, Trade and Enterprise Development
 - iii. Kenya Law Reform Commission

The stakeholders made submissions as elaborated in the clauses below, with the Committee observations thereunder;

19. LONG TITLE

Ministry of Foreign Affairs

Proposed amendment: Insertion of the words: the establishment, functions and administration of the Foreign Service Academy of the Republic of Kenya and for connected purposes;

to read as:

ACT of Parliament to provide for the establishment management, accountability and functioning of a professional foreign service; the establishment, functions and administration of the Foreign Service Academy of the Republic of Kenya and for connected purposes.

Justification:

To ensure that the long title provides for the Foreign Service Academy established in the Bill. The Academy is one of the main subject matter that the law seeks to provide for.

Committee observations and recommendations: The Committee observed that the long title as provided was sufficient.

20. CLAUSE 1

Ministry of Foreign Affairs

Proposed amendment: Insertion of the words “and shall come into operation on such date as the Cabinet Secretary may, by notice in the Gazette, appoint”.

To read as;

This Act may be cited as the Foreign Service Act, 2021 and shall come into operation on such date as the Cabinet Secretary may, by notice in the Gazette, appoint.

Justification:

It is important to include the commencement to allow the Government to make administrative and financial arrangements to enable the operationalization of provisions of the Act.

Committee observations and recommendations: The Committee observed that it was preferable that commencement should be automatic unlike when this is left to the Cabinet Secretary who will have discretion to do this at an unspecified date in future.

21. CLAUSE 2

Ministry of Foreign Affairs

Proposed amendment: Delete the definition “dependant child” and substitute therefor the following new definition:

“dependant child” means a biological offspring or a legally adopted child who is not married—

- (a) and is under the age of twenty-two years;
- (b) is in school and is under the age of twenty-four years; or
- (c) has special needs and is wholly dependent on an officer.

Justification: The substitution clarifies the age and marital status of dependant children.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

Proposed amendment: Insertion of a new definition:

“Headquarters” means the administrative centre of the Service in Kenya;

Justification: The insertion provides clarity as to the meaning of the term headquarters as used in the Bill.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

Proposed amendment: Amend the definition “locally engaged staff”

Deletion of the following words:

“abroad or within the Republic”;

“Locally engaged staff” means staff employed on local terms in a Kenyan Mission;

Justification: The term Mission is defined to Missions whether abroad or within the Republic.

Committee observations and recommendations: The Committee observed that the proposed definition was to be read together with the next proposed amendment to the definition “Mission”. The Committee agreed to the proposed amendment.

Proposed amendment: Delete the definition “Mission” and substitute with the following new definition:

“Mission” means a Kenyan Embassy, High Commission, Consulate-General or a duly accredited representational office abroad or within the Republic;

Justification: The definition provides for a comprehensive and inclusive meaning of the term Mission and is in line with diplomatic practice.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

Proposed amendment: Delete the definition “Officer” and substitute with the following new definition:

“Officer” means a foreign service officer.

Justification:

- The new definition seeks to differentiate foreign service officers from other members of staff employed in the service.
- Foreign Service Officers are the specialized and professional officers in matters foreign affairs.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

Proposed amendment: Amend the definition “Public Service Commission”

Delete the words “Public Service”

“the Commission” means the Public Service Commission established under Article 233 of the Constitution;

Justification: To ensure ease of reference.

Committee observations and recommendations: The Committee observed that the proposed amendment affected clauses 12, 13, 14,15 and 17 and was of the view that the definition should not be amended.

Proposed amendment: Amend the definition of “spouse”

Insertion of the following words

“recognized under the Marriage Act and”

“spouse” means a wife or husband recognized under the Marriage Act and declared by an Officer;

Justification: To ensure that spouses recognized under this Act are recognized in the Marriage Act.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

Proposed amendment: Amend the definition of “tour of duty”

Delete and substitute with the following new definition:

“tour of duty” means the period of time when an officer is on posting to a mission abroad.

Justification: To simplify the meaning and provide clarity.

Committee observations and recommendations: The Committee considered the views of the Ministry of Foreign Affairs, the Ministry of Industrialization, Trade and Enterprise Development and proposed that the definition “tour of duty” should be defined to mean the period of time between when an Officer is appointed and reports to a Mission; and when the Officer is recalled to Ministry Headquarters.

Proposed amendment: Insertion of the following new definition:

“Service” means the Foreign Service of the Republic of Kenya established by Section 3;

Justification: For ease of reference

Committee observations and recommendations: The Committee agreed to the proposed amendment.

Proposed amendment: Insertion of the following new definition:

“service staff” means persons recruited to offer technical and administrative support to the Service other than foreign service officers;

Justification: To define the cadre of staff who offer technical and administrative support in the service.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

Proposed amendment: Insertion of the following new definition:

“special needs” means a physical or mental condition which necessitates special care for a dependant child.

Justification: To provide clarity as to the conditions that constitute special needs.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

Kenya Law Reform Commission

Proposed amendment: Define the words “Director-General” and “Principal Secretary”.

Justification: They are used in the Act and therefore need to be defined.

Committee observations and recommendations: The Committee was of the view that the terms as used are adequately clear on the persons to whom they refer. There is therefore no need to define them.

The Ministry of Industrialization, Trade and Enterprise Development

Proposed amendment: Under the term “attaché” delete the word “mainstream” and inclusion of the Words Ministry of Foreign Affairs so as to read as follows:

Attaché means a public officer other than a foreign service officer in the Ministry of Foreign Affairs, deployed to a Kenya Mission abroad for specialized duties.

Justification: Inclusion of the term “mainstream” after foreign service officer connotes a hierarchy of foreign service officers over other public officers deployed in a Mission from other Ministries. This could potentially create disharmony between officers in the Mission.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

Proposed amendment: An age limit for biological offspring should be provided for to align with the age limit for a legally adopted child

Justification: Setting an age limit for biological offspring will provide clarity and certainty

Proposed amendment: Delete the definition “dependant child” and substitute therefor the following new definition:

Committee observations and recommendations: The Committee agreed to the proposed amendment and addressed the proposed amendment together with the proposed amendment by the Ministry of Foreign Affairs. Therefore, the proposed new definition provides as follows—

“dependant child” means a biological offspring or a legally adopted child who is not married—

- (a) and is under the age of twenty-two years;
- (b) is in school and is under the age of twenty-four years; or
- (c) has special needs and is wholly dependent on an officer.

Proposed amendment: There is need to provide clarity on when the tour of duty commences, for example is it the date the officer reports in the Mission or from the date of appointment letter.

Justification: Tour of duty under the current practice, commences on reporting to the Mission. Clarity on this issue is critical as it has financial implications on the Government and also provides certainty for the officers posted to the Missions.

Committee observations and recommendations: The Committee agreed to the proposed amendment while also considering the proposed amendment by the Ministry of Foreign Affairs.

22. NEW CLAUSE 2A

Kenya Law Reform Commission

Proposed amendment: Include proposed clause 3 on the application of the Act.

Justification: To provide clarity on whom the Act applies to.

Committee observations and recommendations: The Committee was of the view that the scope of the Bill was clear enough and that there was no need for an application clause.

23. CLAUSE 3

Ministry of Foreign Affairs

Proposed amendment: Delete clause 3(2) (c)

Justification: It is difficult to establish and define who political staff are. Besides the composition of the Service is enshrined under Clause 4 and technical officials, attaches and other staff in the service are provided for therein.

Committee observations and recommendations: The Committee agreed to delete paragraphs (b) and (c).

Proposed amendment: Delete clause 3(3) and replace with the following new sub-clause:

(3) In the performance of its functions, the Service shall be guided by national interests, national values and principles of governance enshrined in the Constitution, international law and customs of diplomatic practice.

Justification: To ensure that the service is guided by National Interests, International Law and customs of diplomatic practice in line with international best practice.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

The Ministry of Industrialization, Trade and Enterprise Development

Clause 3(c) and 4(e)

Proposed amendment: Delete categories of attachés

Justification:

Attachés belong to different schemes of service administered by various Ministries. The provisions bring attachés under the purview of the Ministry of the Ministry of Foreign Affairs which is not the case.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

24. CLAUSE 4

Ministry of Foreign Affairs

Proposed amendment: Replace clause 4(1) with the following:

4. (1) The Service shall comprise officers serving at the headquarters and in missions, who shall include—

- (a) High commissioners, ambassadors and diplomatic and consular representatives;
- (b) Honorary Consuls;
- (c) Special envoys;
- (d) foreign service officers;
- (e) Attachés; and
- (f) any other officer as may be designated by any written law or by the Cabinet Secretary.

Justification: To clarify that officers who serve both at the Headquarters and in Missions are members of the Service.

Committee observations and recommendations: The Committee agreed to the proposal subject to the deletion of attaches.

Proposed amendment: Insertion of the following new sub-clause after clause 4(1):

(2) The composition of the Service shall reflect the diversity of the people of Kenya.

Justification: To ensure that the composition of the service reflects diversity as enshrined in the Constitution.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

Proposed amendment: Amend clause 4(f)

Include the words “in writing” after the word “Secretary” in paragraph (f).

Justification: This provides a record of the designation by the Cabinet Secretary, ensures consistency and prevents verbal appointments which may change haphazardly.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

25. CLAUSE 5

Ministry of Foreign Affairs

Proposed amendment: Replace clause 5 with the following new Clause:

5. In addition to any other responsibilities designated in writing by the President to the Ministry, the Service shall—

- (a) be responsible for the development and management of Kenya's foreign policy;
- (b) conduct and coordinate the international relations and cooperation of the Republic at bilateral, regional and multilateral levels;
- (c) enhance protection of Kenya's sovereignty and territorial integrity;
- (d) enhance national, regional and international peace, security and stability;
- (e) protect, promote and project national interests globally;
- (f) establish and maintain good relations between the Republic and other countries, and international organizations;
- (g) manage the Republic's Missions;
- (h) serve and promote the legitimate interests of Kenyans living abroad;
- (i) administer diplomatic privileges and immunities;
- (j) administer all foreign representations in the Republic;
- (k) be the primary interface between the Republic and foreign states and international organizations or entities;
- (l) negotiate, conclude and maintain custody of international treaties and agreements;
- (m) facilitate the integration of Kenya's foreign policy within national security;
- (n) coordinate, monitor and report on the implementation of the Republic's international obligations;
- (o) coordinate and provide protocol services to designated foreign and national dignitaries as prescribed;
- (p) provide consular services as prescribed;
- (q) coordinate relevant agencies in emergency evacuation of distressed Kenyans abroad; and
- (r) perform any other function as may be necessary for the discharge of its mandate as prescribed by any written law.

Justification: There is no major variance of the functions in the Bill, but the proposed amendments;

(a) summarize and simplify the functions of the Service; and

(b) Align the functions of the service with the Constitution, international treaties, foreign policy, the Defence White Paper, 2017 and modern diplomatic practice.

Committee observations and recommendations: The Committee agreed to the proposed amendment but proposed that the power with regard to treaties should be changed to “facilitation of negotiation and conclusion by relevant ministries and custody of ratified treaties and agreements.”

Kenya Law Reform Commission

Proposed amendment: Include the words “in the performance of their duties” after the word “attaches” in paragraph (p).

Justification: To specify what the Service is required to oversee.

Committee observations and recommendations: The Committee adopted the Ministry of Foreign Affairs’ proposed amendment.

Proposed amendment: Include a general function as paragraph (za) which may provide as follows: “performing such other functions as may be prescribed by the Constitution, this Act or any other written law”.

Justification: To ensure that any function not specifically provided for may still be carried out.

Committee observations and recommendations: The Committee adopted the Ministry of Foreign Affairs’ proposed amendment.

The Ministry of Industrialization, Trade and Enterprise Development

Proposed amendment: Amend clause 5(d) by rephrasing the paragraph as follows:

Positioning Kenya to maximize benefits from the development cooperation terrain at the bilateral and multi-lateral levels

Justification: The paragraph as drafted does not reflect the global paradigm shift away from aid dependence to aid inter-dependence as reflected in various agreements concluded recently such as the WTO Trade Facilitation Agreement

Committee observations and recommendations: The Committee agreed to the proposed amendment but adopted the Ministry of Foreign Affairs’ proposed amendment.

Proposed amendment: Delete paragraphs 5(g) and (h) that relate to promotion of international trade and export of Kenyan product and promotion of Kenya as an investment hub

Justification: These paragraphs as drafted have an implication of expanding the mandate of the Ministry of Foreign Affairs in contravention of the mandate of the Ministry of Foreign Affairs under Executive Order No. 1 of 2020 and Executive Order No. 1 of 2016.

The two functions under clause 5(g and (h) are undertaken by the State Department for Trade and Enterprise Development. These functions are clearly spelt out under Executive Order No. 1 of 2020 and Executive Order No. 1 of 2016. It is our considered opinion that the inclusion of these functions creates an overlap of the functions within the mandate of the State Department for Trade and Enterprise Development and should be deleted.

Committee observations and recommendations: The Committee adopted the Ministry of Foreign Affairs' proposed amendment.

Proposed amendment: Under clause 5(i), more clarity should be provided on this function for greater certainty.

Justification: Clear specification of this function is important for certainty and avoidance of ambiguous interpretation of this role.

Committee observations and recommendations: The Committee adopted the Ministry of Foreign Affairs' proposed amendment.

Proposed amendment: Delete 5(k) and 6(2)

Justifications: Negotiations of international treaties should be initiated by the relevant Ministry responsible for the subject matter of the Treaty/Agreement in line with the provisions of section 4 of the Treaty Making and Ratification Act, 2012

In addition, the role of the Ministry of Foreign Affairs in negotiations of international agreements is limited to headquarters and host country agreements as highlighted under Executive Order No. 1 of 2020 and Executive Order No. 1 of 2016.

The mandate being sought by these provisions will create conflict and duplication of roles with the mandate of relevant Ministries responsible for various subject matters of the Treaties/Agreements, for example under the Ministry of Trade, the National Trade Negotiations Council (composed of various Ministries and Agencies) initiate negotiations for various trade agreements.

Committee observations and recommendations: The Committee observed that Section 4 of the Treaty Making and Ratification Act, 2012 provides as follows—

4.(1) Subject to the provisions of this Act, the national executive shall be responsible for initiating the treaty making process, negotiating and ratifying treaties.

(2) The responsibility provided for in subsection (1) may be delegated to a relevant State department.

The Committee further observed that although the Ministry proposed deletion of clause 6(2), the correct provision should be clause 6(1) (b) which provides that the Cabinet Secretary shall be responsible for—

(b) negotiating, concluding and signing international agreements on behalf of the Republic subject to ratification by the National Assembly.

The Committee recommended that the paragraph (k) be amended as follows: “facilitate negotiation and conclusion of international treaties and agreements by in consultation with relevant ministries”. The Committee recommended that clause 6(1) (b) be deleted.

Proposed amendment: Under clause 5(w) and 11(d), the term “managing” under clause 5(w) and the term “transmitting” be replaced with the term facilitating.

Justification: There is need to provide flexibility to allow various ministries and Government agencies to communicate with other Governments/Organizations in case of urgent matters or where the engagement requires constant communication to avert delays.

The above view is also reinforced by the recent MoH/WHO interaction in management and coordination of the Covid-19 pandemic.

Committee observations and recommendations: The Committee adopted the proposed amendments by the Ministry of Foreign Affairs.

Proposed amendment: Under clause 5y, amend the specific Article under the Constitution to read as Article 132(c), (iii) of the Constitution of Kenya, 2010 for purposes of clarity

Justification: Article 132 (c) (iii) relates to the specific mandate of the Ministry of Foreign Affairs in relation to reporting on international obligations by the Republic of Kenya.

Committee observations and recommendations: The Committee adopted the proposed amendments by the Ministry of Foreign Affairs.

26. CLAUSE 6

Ministry of Foreign Affairs

Proposed amendment: Delete clause 6 and replace with the following new clause:

6. (1) In addition to any powers or functions designated in writing by the President, the Cabinet Secretary shall—

(i) be the principal advisor to the President on matters relating to foreign policy;

- (ii) provide strategic leadership and policy guidance to the Service;
- (iii) consult and advise the Commission on appropriate officers to be appointed to the foreign service;
- (iv) ensure that the Service and Missions pursue the foreign policy objectives of the Republic, in coordination with other ministries and agencies in the Republic;
- (v) advise the Cabinet on the establishment of Missions of the Republic;
- (vi) provide policy advice to the Government on matters relating to foreign policy;
- (vii) establish such consultative coordination mechanisms as may be necessary for the effective implementation of this Act;
- (viii) conduct and coordinate communications between the government of the Republic and governments of other countries and intergovernmental organizations and agencies;
- (ix) oversee and implement directives by the President relating to the appointment or recall of high commissioners, ambassadors and diplomatic and consular representatives;
- (x) administer, manage and develop the capacity of the Service;
- (xi) issue guidelines on the coordination and alignment of matters relating to foreign affairs to National and County Governments;
- (xii) approve the accreditation of a high commissioner, ambassador, diplomatic or consular representative to serve more than one country or jurisdiction; and
- (xiv) ratify international agreements on behalf of the Republic subject to approval by the National Assembly.

Justification: There is no major variance of the functions in the Bill, but the proposed amendments;

- (a) summarize and simplify the functions of the Cabinet Secretary; and
- (b) align clause (5)(b), with the procedure under the Treaty Making and Ratification Act and the Vienna Convention on the Law of Treaties.

Committee observations and recommendations: The Committee agreed to the proposed amendments.

Kenya Law Reform Commission

Proposed amendment: Delete the words “and advising” in subclause (1)(a)(i) or in the alternative, make it a separate paragraph to read as follows:

“advising the Public Service Commission upon the receipt of a request for advice on appropriate officers to be appointed in the foreign service”.

Justification: This ensures that the Cabinet Secretary is not seen to be interfering in the Public Service Commission’s mandate.

Committee observations and recommendations: The Committee observed that Article 234(2)(a) (ii) of the Constitution provides that the Public Service Commission shall subject to the Constitution and legislation appoint persons to hold or act in those offices, and to confirm appointments.

The Committee further observed that clause 6(1)(a) (i) provides that the Cabinet Secretary shall be responsible for consulting with and advising the Public Service Commission on appropriate officers to be appointed to the Foreign Service.

The Committee observed that the provision as it is does not contravene Article 234(2) (a) (ii) of the Constitution.

Proposed amendment: Include a general duty as paragraph (c).

Justification: To ensure that any function not specifically provided for may still be carried out under the law.

Committee observations and recommendations: The Committee adopted the proposed amendments by the Ministry of Foreign Affairs.

27. CLAUSE 7

Ministry of Foreign Affairs

Proposed amendment: Delete clause 7 and replace with the following new clause:

7. The Principal Secretary shall be responsible to the Cabinet Secretary and shall—

- a) provide administrative supervision to the Service;
- b) co-ordinate the performance management of the Service;
- c) oversee implementation of programmes;
- d) provide foreign policy advice to the Cabinet Secretary upon request;

- e) be the principal accounting officer and ensure efficient utilization of funds and other public resources;
- f) act as the point of contact for the Service;
- g) advise the Cabinet Secretary on human resource matters as appropriate; and
- h) perform any other functions as delegated by the Cabinet Secretary.

Justification:

- Align functions with Public Service Commission Human Resource Policy.
- In addition, 7 (a) I-IX covers functions are too prescriptive in nature and are captured under the general functions in the proposed amendments.

Committee observations and recommendations: The Committee agreed to the proposed amendments.

Kenya Law Reform Commission

Proposed amendment: Substitute the word “establishing” in subparagraphs “(iv), (vi) and (ix) with the word “developing”.

Justification: The word “developing” is more appropriate in this instance.

Committee observations and recommendations: The Committee adopted the proposed amendments by the Kenya Law Reform Commission.

Proposed amendment: Use the active voice instead of the passive voice in paragraphs (b), (c), (d) and (e) i.e. acting, ensuring, recommending and performing, respectively.

Justification: In line with the principles of plain drafting and also for consistency in the drafting of the Bill.

Committee observations and recommendations: The Committee observed that clause 7(b), (c), (d) and (e) as drafted are in active voice and in any case the proposed amendment is not on the substance of the provision.

28. NEW CLAUSE 7A

Ministry of Foreign Affairs

Proposed amendment: Insertion of a new part immediately after Clause 7.

PART III – FOREIGN SERVICE ADVISORY BOARD

7A (1) The Cabinet Secretary shall establish a Foreign Service Advisory Board which shall comprise

- (a) the Principal Secretary for the time being responsible for matters relating to foreign affairs, who shall be the Chairperson; and
- (b) seven other persons in charge of—
 - (i) Multilateral Affairs,
 - (ii) Bilateral Affairs,
 - (iii) Protocol,
 - (iv) Legal Affairs,
 - (v) The Director-General Foreign Service Academy; and
 - (vi) Administration.
 - (vii) Human Resource Affairs who shall be the Secretary to the Board.

Justification:

1. The board is established to assist the Cabinet Secretary to coordinate and manage the affairs of the Service.
2. This is also in tandem with best international and local practice. best international practices in the overall management of Foreign Service. (Countries such as the USA, Philippines India have FSB's that exercise supervisory role the management of the service).
3. The proposed composition of the Board is informed by the need to draw membership from offices that are critical in the implementation of the mandate of the Service.

Committee observations and recommendations: The Committee observed that the proposed amendment refers to staff working in the same Ministry and that this will create unnecessary bureaucracy.

29. NEW CLAUSE 7B

Ministry of Foreign Affairs

Proposed amendment: Proposed New Clause 7B

7B. (1) The Board shall—

- (a) Advise the Cabinet Secretary on the execution of the foreign policy;

- (b) Advise the Cabinet Secretary on the recruitment, deployment, secondment and promotion of officers and staff as may be necessary;
- (c) Review and evaluate on a regular basis, long-term plans for the Service and budget proposals;
- (d) review matters pertaining to the welfare of service members and their families;
- (e) administer and review performance, rewards and sanction mechanisms of the service;
- (f) review, monitor and ensure that the Service effectively and consistently delivers on its mandate; and
- (g) any other matters that be assigned by the Cabinet Secretary.

(2) The Board shall, in performing the functions specified in subsection (1) (b) and (e), consult the Commission.

Justification: The Board advises the Cabinet Secretary on a wide range of issues including foreign policy, human resource and general administration of the service.

Committee observations and recommendations: The Committee observed that the proposed amendment is related to the previous proposed amendment relating to the establishment of an advisory board. The Committee further observed that since the establishment of the advisory board was unnecessary, the functions will also not apply.

30. **CLAUSE 8**

Ministry of Foreign Affairs

Proposed amendment: Part III is deleted and reintroduced as Part V and renumbered accordingly;

23. The Cabinet Secretary shall prescribe the organizational structure of the Service headquarters and its Missions in regulations.

24. (1) For the effective administration of this Act, the Service headquarters shall establish administrative units for the core functions of—

- (a) providing foreign policy advice and coordinating diplomacy;
- (b) coordinating protocol matters for efficient diplomatic engagement;
- (c) legal and compliance;
- (d) advancing economic and commercial diplomacy; and
- (e) central planning and coordination of service projects.

(2) The Service may establish any other offices necessary for the discharge of its functions under this Act.

25. (1) The Cabinet Secretary may, recommend and upon approval by Cabinet, establish a Mission in accordance with the provisions of the Vienna Convention on Diplomatic Relations, 1961, the Vienna Convention on Consular Relations, 1963, and the provisions of treaties and conventions establishing intergovernmental organizations and agencies.

(2) In recommending the establishment of a Mission and any office of the Foreign Service abroad, the Cabinet Secretary shall be guided by the strategic interests of the Republic, including—

- (a) the geopolitical and security interests of the Republic;
- (b) economic, trade and investment considerations;
- (c) the financial viability of maintaining a mission
- (d) the presence of and numbers of Kenyan nationals in the host country; and
- (e) adherence to the principle of reciprocity.

(3) The Cabinet Secretary shall, with the approval of Cabinet, prescribe the territorial accreditation boundaries of a Mission, amalgamate, close or downgrade a Mission.

Justification: Part III is deleted and reintroduced as part V for harmonization and logical flow of Bill.

The proposed amendments place the mandate of establishing and closing down a Mission on the Cabinet Secretary as opposed to the National Government. By placing the responsibility on the National Government, it is not clear which Office is responsible.

In recommending the establishment or closure of a Mission, it is important to assess the cost and benefits;

Reciprocity is a key tenet of diplomatic practice which ensures states enjoy mutual benefits from their relationships or engagements.

Committee observations and recommendations: The Committee was of the view that the proposed amendment touched on the rearrangement of the structure of the Bill and did not propose substantive amendment. The Committee recommended that Part III is retained as it is in the Bill.

Kenya Law Reform Commission

Proposed amendment: Delete clause 8.

Justification: This is an administrative function that does not require to be in law.

Committee observations and recommendations: The Committee observed that the provision was an important one since it empowers the Cabinet Secretary to prescribe the organizational structure of the Ministry headquarters and its overseas Missions in regulations.

31. CLAUSE 9

Kenya Law Reform Commission

Proposed amendment: Delete clause 9.

Justification: This is an administrative function that does not require to be in law.

Committee observations and recommendations: The Committee observed that the provision was an important one since it provides for the establishment of offices for the Ministry headquarters with core functions which have been spelt out.

The Ministry of Industrialization, Trade and Enterprise Development

Proposed amendment: Under Clause 9(1) (c), there is need for clarity on what entails advancing economic and commercial diplomacy

Justification: The sub-clause as drafted has the potential of creating overlap of various Ministries and Agencies involved in economic and commercial advancement of the Republic of Kenya such as the National Treasury and the Ministry of Industrialization, Trade and Enterprise Development. As such there is need for clarity.

Committee observations and recommendations: The Committee observed that the provision is clear as to the functions of the offices.

Proposed amendment: Under clause 9(2), there is need for clarity on this function for avoidance of doubt.

Justification: This provision is not clear and has the potential of wide interpretation hence the need for clarity in light of the functions of the Public Service Commission under Art. 234(2)(a) (i) of the Constitution of Kenya, 2010.

Committee observations and recommendations: The Committee observed that the provision is clear as to the functions of the offices.

32. CLAUSE 11

Ministry of Foreign Affairs

Proposed amendment: Delete Clause 11

Justification: Functions of the mission are deleted because they are provided for under functions of the Service

Committee observations and recommendations: The Committee agreed to the proposed amendment.

The Ministry of Industrialization, Trade and Enterprise Development

Proposed amendment: Amend clause 11(c), by rephrasing this paragraph as follows:

Positioning Kenya to maximize benefits from the development cooperation framework at the bilateral, multilateral and international levels.

Justification: It is imperative that this provision reflects the current global paradigm shift from aid dependence to inter-dependence as manifested under the various international agreements such as the WTO Trade Facilitation Agreement

Committee observations and recommendations: The Committee agreed to the proposed deletion of the clause as proposed by the Ministry of Foreign Affairs.

33. PART IV

Kenya Law Reform Commission

Proposed amendment: Rename the Part to Management of the Service.

Justification: The Part deals with more than matters of staffing and conditions of service.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

34. CLAUSE 12

Ministry of Foreign Affairs

Proposed amendment: Delete and replace the marginal note with the following word:

Recruitment

And Clause 12 with the following new clause:

10. (1) The Cabinet Secretary shall, in consultation with the Commission —

(a) determine the terms and conditions of service of members of the Service; and

(b) establish a Foreign Service Personnel Scheme which shall guide the criteria relating to the recruitment and career progression within the Service.

(2) A person shall not be recruited into the Service unless the person—

(a) is a Kenyan citizen; and

(b) has undertaken and passed Foreign Service Examinations administered by the Academy.

(3) Recruitment and promotion in the Service shall be conducted through a competitive process to determine the competence, fitness and aptitude of candidates to serve in the foreign service.

(4) The Commission shall, in consultation with the Cabinet Secretary, recruit—

(a) suitably qualified officers to execute the functions of the Foreign Service; and

(b) service staff to provide technical and support services to the Service.

(5) The recruitment and appointment procedure under this Act shall comply with the values and principles of Public Service enshrined in the Constitution.

Justification:

- This clause deals with recruitment as opposed to establishment of a foreign service.
- The proposed amendments will enhance the professionalization of the Foreign Service and ensure that candidates who are selected for recruitment have the competence, fitness and aptitude of to serve in the foreign service.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

Kenya Law Reform Commission

Proposed amendment: Amend clause 12 by substituting subclause (2) with the following:

(2) “The Public Service Commission shall appoint suitably qualified officers to execute the functions of the Foreign Service.

(3) In carrying out its function under subsection (2), the Public Service Commission may consult the Cabinet Secretary.”

Thereafter number the paragraphs sequentially.

Justification: This ensures that the Cabinet Secretary is not seen to be interfering in the Public Service Commission’s mandate.

Committee observations and recommendations: The Committee was of the view that the clause is clear on the roles of the Cabinet Secretary and the Public Service Commission. Reference to the Public Service Commission should be written fully and not in abbreviated form of Commission.

35. CLAUSE 13

Kenya Law Reform Commission

Proposed amendment: Substitute subclause (1) with the following:

(1) “The Public Service Commission shall prescribe the conditions of service for officers, high commissioners, ambassadors, diplomatic and consular representatives and other diplomatic personnel.”

(2) In carrying out its function under subsection (1), the Public Service Commission may consult the Cabinet Secretary.”

Thereafter the paragraphs should be numbered sequentially.

Justification: This ensures that the Cabinet Secretary is not seen to be interfering in the Public Service Commission’s mandate.

Committee observations and recommendations: The Committee observed that the Public Service Commission is just an employer and a disciplinarian. Therefore, subclauses (1) and (2) are therefore proper.

Proposed amendment: Delete subclause (3)

Justification: This is the Salaries and Remuneration Commission’s constitutional mandate.

Committee observations and recommendations: The Committee agreed to the proposed deletion of subclause (3).

36. CLAUSE 14

Ministry of Foreign Affairs

Proposed amendment: Replace the word “principal secretary” with “Cabinet secretary” and “public service commission” with “Commission”

The Cabinet Secretary may, with the concurrence of the Commission, second foreign service officers to any intergovernmental organization or agency.

Justification:

- To align with the functions of the Cabinet Secretary under this Act.
- The use of the word Commission is for ease of reference.

Committee observations and recommendations: The Committee agreed to the proposed amendment in respect to replacement of the word “principal secretary” with “Cabinet Secretary”. However, in relation to replacement of “Public Service Commission” with “Commission”, the Committee was of the view that the words “Public Service Commission” should be retained as it is used in other clauses in the Bill.

37. CLAUSE 15

Ministry of Foreign Affairs

Proposed amendment: Delete and replace the marginal note with
Deployment of officers to Missions.

Replace Principal Secretary with Cabinet Secretary and delete clause 15 (3) and (4).

And delete clause 15 (3) and replace with new clause

13. (1) The Cabinet Secretary may, with notification to the Public Service Commission, assign any officer of the Service to any Mission.

(2) The Cabinet Secretary may extend or terminate any overseas assignment under subsection (1), and require an officer to return to headquarters.

(4) Any officer of the Ministry assigned overseas shall, in addition to provisions under his or her employment contract, continue to be bound by the regulations governing the public service.

(5) The Cabinet Secretary may, recall an officer assigned to serve at a Mission prior to the end of his or her term as prescribed in regulations.

Justification:

- Replacement of Principal Secretary to Cabinet Secretary is to align with the functions of the Cabinet Secretary under this Act.
- Upon deployment to a Mission, officers are required to sign an administrative clearance form as opposed to an employment contract.
- There is no need for an officer to sign an employment contract on deployment to a Mission, because there is an existing contract between the officer and the public service commission.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

The Ministry of Industrialization, Trade and Enterprise Development

Proposed amendment: Clear guidelines should be developed for the implementation of this provision

Justification: Clear guidelines will ensure certainty and fairness in execution of this provision specifically in relation to termination of overseas assignment or recalling of officers in the Missions. Moreover, this will ensure due process is followed in making of decisions under this clause.

Committee observations and recommendations: The Committee observed that the proposed amendment fall within the ambit of regulations.

38. CLAUSE 16

Ministry of Foreign Affairs

Proposed amendment: Replace Principal Secretary with Cabinet Secretary.

16. (1) The Cabinet Secretary shall ensure that all officers receive appropriate diplomatic and other training relevant to their rank under the personnel scheme.

Delete and replace sub-clause 16 (2)

16. (2) The training and capacity building of Officers shall be undertaken by the Foreign Service Academy and such other Institutions as may be authorized by the Principal Secretary.

Justification:

- The Cabinet Secretary is in charge of training.
- Training is by the Academy or institutions approved by the PS.
- Sub clause (2) is deleted because training priorities should be informed by the training needs assessment and detailed in the regulations.

Committee observations and recommendations: The Committee agreed to the proposed amendments.

The Ministry of Industrialization, Trade and Enterprise Development

Proposed amendment: Amend clause 16(d) by adding multilateral sources

Justification: There are various multilateral sources/agencies such as UN, WTO, WIPO that offer training hence there is need to tap into such resources.

Committee observations and recommendations: The Committee observed that the proposed amendment is covered under the proposed amendment by the Ministry of Foreign Affairs adopted by the Committee.

39. CLAUSE 17

Ministry of Foreign Affairs

Proposed amendment: Amend clause 17

Insertion of Cabinet Secretary before the word “second”

The Commission may, with the concurrence of the relevant Cabinet Secretary and the Cabinet Secretary, second staff from any other Ministry to any Mission.

And replace two ministries with Cabinet Secretary and relevant cabinet secretary.

(2) Where a person is seconded to a Mission under subsection (1), the Cabinet Secretary and the relevant Cabinet Secretary shall agree on the employment and financial conditions that shall apply for the duration of secondment.

Committee observations and recommendations: The Committee agreed to the proposed amendments.

The Ministry of Industrialization, Trade and Enterprise Development

Proposed amendment: Under clause 17(1), the secondment should be administered as per the Public Service Commission Code of Regulation (CoR).

Justification: Align with Public Service Commission Code of Regulation (CoR)

Justification: It is important that the Commission consults the Cabinet Secretary before seconding officers from other Ministries to ensure that officers are seconded on a need basis and the secondment addresses existing skill gaps in the Service.

Committee observations and recommendations: The Committee agreed to the proposed amendments but noted that these were administrative.

Proposed amendment: Under clause 17(2), all employment and financial conditions of the officers seconded/attached to the Missions should be administered as per the Public Service Commission Code of Regulations.

The word “person” should be replaced with the word

“officer”

There is need to for clarification on the difference between the terms “attached” and “seconded” as used in this clause.

Justification: There is need to align all employment and financial conditions of the officers seconded/attached to the Missions with Public Service Commission Code of Regulations for clarity and consistency.

Committee observations and recommendations: The Committee agreed to the proposed amendments but noted that these were administrative.

40. CLAUSE 18

Ministry of Foreign Affairs

Proposed amendment: Replace “Locally engaged staff) with “local staff” at the Marginal note and

Delete and replace with new clause:

18. (1) The Head of a Mission may, with the consent of the Principal Secretary and in accordance with regulations, employ suitably qualified persons at any Mission to serve as local staff.

(2) The terms and conditions of employment of local staff shall be in accordance with the labour laws of the host country.

Justification: The details as to the recruitment of local staff as provided for in (2), (3) and (5) should be captured in the regulations.

Committee observations and recommendations: The Committee agreed to the proposed amendment to clause 18(2). The Committee recommended that subclauses (3), (4) and (5) should be deleted.

Kenya Law Reform Commission

Proposed amendment: Delete subclause (1) and (2)

Justification: These are administrative in nature. They may be included in the Ministry’s operation manual instead.

Committee observations and recommendations: The Committee agreed to delete subclauses (3), (4) and (5) since they should be captured in the regulations. However, the Committee recommended that subclause (1) be retained whereas subclause (2) be amended by deleting the words “including obtaining criminal records and relevant qualifications and references from previous employers”. The Committee further recommended that the clause should provide for a subclause to provide that “ The terms and conditions of employment of local staff shall be in accordance with the labour laws of the host country”.

Proposed amendment: (3) (The proposed clause (1))

Include the words “and the person” after the word “Ministry” in paragraph (e)

Justification: To specify the parties to the contract

Proposed amendment: (The proposed clauses (2) and (3))

Substitute clause (5) with the following:

“(2) The Head of Mission may terminate the employment of a locally engaged staff for the violation of any ground specified in the employment contract.

(3) Where the question of the locally engaged staff’s termination arises, the Head of Mission shall—

(a) inform the staff, in writing, the reasons for the intended removal; and

(b) give the staff the opportunity to be heard in accordance with the principles of fair administrative action.

Justification: To avail the right to fair administrative action to the staff in question.

Committee observations and recommendations: The Committee agreed to delete subclauses (3), (4) and (5) since they should be captured in the regulations. However, the Committee recommended that subclause (1) be retained whereas subclause (2) be amended by deleting the words “including obtaining criminal records and relevant qualifications and references from previous employers”. The Committee further recommended that the clause should provide for a subclause to provide that “The terms and conditions of employment of local staff shall be in accordance with the labour laws of the host country”.

The Ministry of Industrialization, Trade and Enterprise Development

Proposed amendment: Under clause 18(5), add the terms “subject to due process and host countries’ laws and regulations.

Justification: The current clause 18(5) as drafted has the potential to expose the Republic of Kenya to expensive litigation under the relevant labour laws of the various host countries

Committee observations and recommendations: The Committee agreed to the proposed amendment and it has been covered under the Ministry of Foreign Affairs’ proposed amendment.

41. CLAUSE 19

Ministry of Foreign Affairs

Proposed amendment: Insertion of new sub clauses (2) and (3)

(2) A person who abuses any privilege or immunity granted under this section shall be subjected to disciplinary action as appropriate.

(3) A person shall not vacate the privileges and immunities without express approval of the Cabinet Secretary.

Justification:

1. Sub clause 2 is inserted ensure that privileges and immunities only facilitate the execution of functional roles of an officer and are not misused for personal gain.
2. Sub clause 3 is inserted pursuant to the Vienna Convention on Diplomatic Relations which requires that any waiver of privileges and immunities has to be formally sanctioned by the Government.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

42. CLAUSE 21

Ministry of Foreign Affairs

Proposed amendment: Amend clause 21 by deleting subclause (2).

Justification: Details as to the code of conduct and penalties shall be included in the code itself.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

The Ministry of Industrialization, Trade and Enterprise Development

Proposed amendment: The term “independent contractors” should be defined in clauses 21 and 22

Justification: To provide clarity on the category of people referred to as “independent contractors”.

Committee observations and recommendations: The Committee agreed to the proposed amendment by deleting the words “independent contractors” and replacing them with “locally engaged staff”. The Committee recommended the deletion of clause 22 since details with regard to confidentiality shall be included in the code of conduct.

43. CLAUSE 22

Ministry of Foreign Affairs

Proposed amendment: Delete clause 22 and replace sub clause (2) with the following new sub clause;

(2) A person who contravenes subsection (1) shall, on conviction, be liable to the penalty prescribed under the Data Protection Act or any other written law.

Justification: The Service cannot subject independent contractors to disciplinary action. The new clause aligns the penalties for the breach of confidentiality with the provisions of the Data Protection Act.

Committee observations and recommendations: The Committee recommended the deletion of clause 22 since details with regard to confidentiality shall be included in the code of conduct.

44. NEW CLAUSE 22A

Ministry of Foreign Affairs

Proposed amendment: Proposed New Clause 22A

Insertion of a clause on oath of office

21. (1) Every member of the Service shall upon appointment, take and subscribe to the oath or affirmation of office set out in the Second Schedule.

(2) The oath or affirmation under sub section (1) shall bind members of the service, during and after termination of employment.

Justification:

- (a) The Oath of Office is introduced due to the sensitive nature of the mandate of service in relation to national security and conduct of international relations.
- (b) This is in line with international best practice.

Committee observations and recommendations: The Committee observed that the proposed new clause opens appointments to abuse and that the position does not require taking oath or affirmation of office.

45. NEW CLAUSE 22B

Ministry of Foreign Affairs

Proposed amendment: Insertion of a new clause on Complaints Disciplinary Mechanisms

22. (1) A person shall not be—

(a) victimized or discriminated against for performing the functions of the Service in accordance with this Act or any other written law; or

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

(2) The Cabinet Secretary shall, on the advice of the Board, prescribe rules for the handling of—

(a) complaints raised by or against service members; or

(b) violation of the code of conduct by members of the service.

(3) The Rules made under sub section (2) shall provide for the composition of the disciplinary body, its procedures and appeal mechanisms.

(2) The findings and recommendations regarding disciplinary procedures shall be submitted to the Cabinet Secretary for consideration.

Justification: The objective is to ensure that due process is followed in the handling of complaints against members of the service.

Committee observations and recommendations: The Committee observed that the details as proposed in the proposed new clause are better prescribed in the Code of Conduct and disciplinary action taken by the Public Service Commission.

46. PART V AND VI

Kenya Law Reform Commission

Proposed amendment: Merge Parts V and VI.

Justification: Part V speaks to the appointment of High Commissioners, ambassadors, diplomatic and consular representatives while Part VI is on Honorary Consuls. These may be therefore be merged as they are of a similar subject.

Committee observations and recommendations: The Committee was of the view that the proposed merging of the Parts was not substantive and that the Parts could be retained in the Bill.

47. CLAUSE 23

Ministry of Foreign Affairs

Proposed amendment: Part V is reintroduced as Part VI

Clause 23 deleted and replaced by the following new clause

23. (1) The Office of a high commissioner, ambassador, diplomatic or consular representative shall be a state office for purposes of Article 260 of the Constitution.

(2) Pursuant to Article 132 (2) (e) of the Constitution, the President shall nominate, and subject to the approval of the National Assembly, appoint high commissioners, ambassadors and diplomatic and consular representatives.

(3) The nominations under sub section (2) shall reflect—

(a) a fair balance between career diplomats and other appointees; and

(b) the diversity of the people of Kenya.

(4) A person nominated for appointment under subsection (2) shall be—

(a) a citizen of Kenya; and

(b) of a reputable character and standing within the Republic.

Sub clause 4 is deleted.

Justification:

1. The establishment of the office of Ambassador as a State Office is pursuant to the unique representational nature of both the Republic and the President.
2. Insertion of (3) (b) is in compliance with the spirit and letter of the Constitution.
3. The replacement of sub-clause 3 is addressed by the establishment of the Office of Ambassador as a state office by the new sub-clause 1, 4(a) and Article 78 of the Constitution.

Proposed amendment: Amend clause 23(5) by inserting a new marginal note as Head of Mission

Sub clause 5 deleted and a new clause 23 A inserted immediately after clause 23;

23. A (1) A Mission may have more than one person designated to serve as ambassador or high commissioner.

(2) Where a Mission has more than one ambassador or high commissioner, the ambassador or high commissioner designated as ambassador extraordinary and plenipotentiary shall be the head of Mission.

(3) The Head of a Mission shall—

(a) actively pursue the foreign policy objectives of the Republic in the host country;

(b) act as the personal representative of the Head of State in the host country;

- (c) act as an official representative of the Republic at official functions in the host country;
- (d) be responsible for the management and administration of the Mission and all members of the Foreign Service located at the Mission, including the locally engaged staff in the Mission;
- (e) be accountable for any expenditure of the Mission and ensure that the budget of the Mission is administered in accordance with the Public Finance Management Act, 2012 and all other applicable laws and regulations.

Justification:

- The insertion of 23 A acknowledges that a Mission can have more than one Ambassador posted to serve. It therefore clarifies the hierarchy in a Mission.
- The insertion of (3) (b) is in accordance with diplomatic practice.
- The insertion of (3) (d) reaffirms the responsibilities of a Head of Mission.

Proposed amendment: Delete clause 27(7)

Justification: Delete and reintroduced in the regulations making clause.

Committee observations and recommendations: The Committee agreed to the proposed amendments. However, the Parts as provided in the Bill should be retained.

Kenya Law Reform Commission

Proposed amendment: Delete subclause (4)

Justification: The issue of induction and its content are administrative in nature. They may be included in the Ministry's operation manuals instead.

Committee observations and recommendations: The Committee agreed to the proposed amendments.

The Ministry of Industrialization, Trade and Enterprise Development

Proposed amendment: Under clause 23(2) and (6), in the appointment of high commissioners, ambassadors and diplomats, special consideration should be given in appointment of persons with competencies in trade matters in trade organizations and major trading partners.

Justification: The rationale for this proposal is due to the fact that promotion of Kenya as a hub for trade and investments abroad is a critical component of the Kenyan missions abroad hence having a person who understands trade matters heading a mission is advisable.

In addition, there is need to borrow best practice, with a view to enhancing Kenya's interest. For example, South Africa, India, Nigeria have posted Trade Ambassadors to the WTO

In a modern foreign service envisaged under this Bill, there should be aspiration to align with global best practice.

Committee observations and recommendations: The Committee observed that the President, Parliament and Cabinet determine suitability.

48. CLAUSE 24

The Ministry of Industrialization, Trade and Enterprise Development

Proposed amendment: Under clause 24(4) (a), the term "career diplomats" should be defined

Justification: Definition will provide clarity and avoidance of doubt.

Committee observations and recommendations: The Committee agreed to the proposed amendment. Further, the Committee recommended that the clause be amended by deleting subclause (4). The modalities of what happens where a person is not reappointed should be left to the administrative arrangements of the Ministry and the Service.

49. CLAUSE 25

Ministry of Foreign Affairs

Proposed amendment: Delete clause 25.

Justification: Provisions of this Clause are similar to provision in Clause 24(4). In addition, termination is provided for under the new sub clause 6.

Committee observations and recommendations: The Committee recommended that subclause (2) be deleted. The modalities of what happens where a person is terminated should be left to the administrative arrangements of the Ministry and the Service.

50. CLAUSE 26

Ministry of Foreign Affairs

Proposed amendment: Insertion of a new clause immediately after sub clause 6;

The President may at any time terminate the appointment of a person appointed under this section.

Justification:

- The insertion of this sub clause clarifies that the termination of appointment is at the President's discretion.

Committee observations and recommendations: The Committee observed that clause 26 refers to the accreditation of a Mission and its respective Head of Mission.

51. CLAUSE 27

Ministry of Foreign Affairs

Proposed amendment: Delete the title of PART VI

Justifications: The title is deleted because honorary consuls are consular representatives and therefore fall under PART V which provides for Appointment of High Commissioners, Ambassadors and Diplomatic and Consular Representatives.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

Proposed amendment: Insertion of a new sub clause after clause (27(3)

(b) where there is no Head of Mission, to the Cabinet Secretary.

Justification: The insertion of (3)(b) is to clarify the reporting channels where there is no Head of Mission in a host country.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

52. CLAUSE 29

Ministry of Foreign Affairs

Proposed amendment: Delete Part VII

Justification:

1. Policy issues should not be legislated to allow the Executive room to develop policy in line with prevailing circumstances.
2. 29 (1) and (2) have been addressed under functions of the cabinet secretary.

Committee observations and recommendations: The Committee agreed to delete subclauses (2) and (3).

Kenya Law Reform Commission

Proposed amendment: Substitute subclause (2) with the following:

“(2) The Cabinet Secretary shall publish the Republic’s foreign policy objectives in the Kenya Gazette and—

- (a) a document available to the public at offices of the Ministry; or

- (b) an official government website.”

Justification: A majority of Kenyans know the Kenya Gazette as the official newspaper published by authority of the national government. It should therefore be used in this instance to reach those who may have an interest in this document.

Committee observations and recommendations: The Committee agreed to delete subclauses (2) and (3).

53. CLAUSE 30

Ministry of Foreign Affairs

Proposed amendment: Deleted and reintroduced under Miscellaneous Clause 49.

Justification: It should be under the Miscellaneous Section for logical flow.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

54. CLAUSE 32

Ministry of Foreign Affairs

Proposed amendment: Delete and replace with

32. The Academy shall—

- (a) be the principal institution for training and capacity building of members of the foreign service;
- (b) undertake foreign policy consultancy, research and analysis for the Service, Government and clients in the private and public sectors;
- (c) develop and conduct periodic evaluation of training programmes to ensure relevance, quality and effectiveness;
- (d) undertake continuous foreign service training and other programmes to enhance skills, capacity and professionalism of Officers;
- (e) Offer induction courses to all newly employed persons to help them transition into a career in the Service;
- (f) administer entry and promotional examinations within the Service;
- (g) undertake training of members of the Service before deployment for a tour of duty;
- (h) conduct examinations for the grant of such professional and academic awards as may be prescribed;
- (i) develop and maintain a repository of research resources on foreign policy and related issues;
- (j) develop linkages and collaborations with institutions of learning, professional organizations, private sector and other similar institutions across the world;
- (k) control the publication and use of research findings of the Service; and
- (l) perform all other acts necessary for the proper performance of its functions under this Act, which may lawfully be done or performed by a body corporate.

Justification: The proposals are informed by functions of other foreign service academies and represent international best practice.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

Kenya Law Reform Commission

Proposed amendment: Delete the words “and a system” in paragraph (e).

Justification: For clarity purposes as the use of the word “system” is not clear.

Committee observations and recommendations: The Committee agreed to the proposed amendment by the Ministry of Foreign Affairs which sought to delete and replace the clause.

55. CLAUSE 33

Ministry of Foreign Affairs

Proposed amendment: Delete clause 33(h) and replace with

(h) the Director-General, who shall be an ex-officio member

Justification: To align with the requirements of Mwongozo code which prohibits the CEO from exercising the functions of the corporate secretary.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

Kenya Law Reform Commission

Proposed amendment: Reword paragraph (vi) of subclause (2) to read “any other relevant field”.

Justification: As worded, it presupposes that the fields listed in paragraphs (i) to (vi) are not relevant.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

Proposed amendment: Substitute paragraph (d) of subclause (1) with the following:

“(d) the following persons who shall be competitively recruited and appointed by the Cabinet Secretary—

(i) two persons appointed by the Cabinet Secretary; and

(ii) one person who teaches diplomacy or international relations in a university recognized in Kenya;”

Justification: In compliance with the constitutional values and principles of public service set out in article 232(1)(i) of the Constitution.

Committee observations and recommendations: The Committee agreed to the proposed amendment. Further, the Committee recommended that subclause (1) be amended in paragraph (h) by deleting the words “and secretary to the Council” appearing immediately after the words “ex officio member”. The Committee further recommended that subclause (2)(b)(vi) be amended by deleting the word “a” and substituting therefor the words “any other” to correct a grammatical error.

Proposed amendment: Delete subclause (3) and substitute it as a new clause with the marginal note “Tenure”.

“(1) The chairperson and members appointed under paragraphs (d) and (e) of subsection (1) shall hold office for a term of three years from the date of appointment and shall be eligible for reappointment for one further term.”

Justification: The other members of the Council serve by virtue of the office they hold and their term cannot therefore be limited.

Committee observations and recommendations: The Committee was of the view that the subclause be retained as it is in the Bill but be amended by inserting the words “under subsection (1)(d)” immediately after the word “appointed”.

Proposed amendment: Include the following clause under the marginal note “Tenure”:

(2) The Chairperson and members of the Board shall serve on part-time basis.

Justification: The mode of service should be set out in the Act so as to avoid any misinterpretation.

Committee observations and recommendations: The Committee observed that the Schedule to the Bill effectively provides for the conduct of business and affairs of the Council. It was the view of the Committee that the inclusion of the provision was not necessary.

56. CLAUSE 34

Kenya Law Reform Commission

Proposed amendment: Have a separate clause for the functions of the Council and another one for the Council’s powers.

Justification: For clarity purposes

Committee observations and recommendations: The Committee was of the view that clause 32 of the Bill already provides for the functions of the Academy.

57. CLAUSE 36

Kenya Law Reform Commission

Proposed amendment: Reword clause 36 to the following:

“36. The chairperson and members of the Council shall be paid such remuneration or allowances as the Cabinet Secretary may, on the advice of the Salaries and Remuneration Commission, determine.”

Justification: The Salaries and Remuneration Commission advises on the benefits and remuneration of public officers.

Committee observations and recommendations: The Committee observed that the current provision adequately captures the centrality of the Salaries and Remuneration Commission to the determination of the remuneration to be paid to council members.

58. CLAUSE 37

Kenya Law Reform Commission

Proposed amendment: Substitute subclause (1) with the following clause:

“(1) There shall be a Director-General of the Academy who shall be competitively recruited and appointed by the Council.”

Justification: The appointing authority should be the Council as it is a body corporate and therefore responsible for the appointment of its staff.

Committee observations and recommendations: The Committee agreed to the proposed amendment in line with Mwongozo Code of Governance and best practice in corporate governance.

59. CLAUSE 38

Ministry of Foreign Affairs

Proposed amendment: Delete clause 38 and replace with:

38. The Director-General shall be responsible for—

- a) implementing the decisions of the Council;
- b) efficient administration of the Academy;
- c) preparing annual reports on activities of the Academy;
- d) the day-to-day administration and management of the affairs of the Academy; and

e) the performance of such other duties as may be assigned by the Council, the Board or as may be prescribed by this Act, or any other written law.

Justification: To align with the requirements of Mwongozo code which prohibits the CEO from exercising the functions of the corporation secretary.

To enhance the functions of the Director General.

Committee observations and recommendations: The Committee agreed to the proposed amendment

Kenya Law Reform Commission

Proposed amendment: Include a new paragraph (b) to read as follows:

“(b) be the accounting officer of the Academy”; and”

Justification: This provides clarity on who the accounting officer is.

Committee observations and recommendations: The Committee agreed to the proposed amendment

60. NEW CLAUSE 38A

Ministry of Foreign Affairs

Proposed amendment: Insert a new Clause on Corporation Secretary.

39. (1) There shall be a Corporation Secretary of the Academy who shall be the secretary to the Council.

(2) The terms and conditions of service of the Corporation Secretary shall be determined by the Council in consultation with the Salaries and Remuneration Commission.

Justification: To align with the requirements of Mwongozo code which require a state corporation to appoint a corporation secretary.

Committee observations and recommendations: The Committee agreed to the proposed amendment

61. CLAUSE 46

Ministry of Foreign Affairs

Proposed amendment: Amend clause 46(2)

Delete the word “four” and substitute thereof with the word “three”

And delete the following words;

or to an auditor appointed under this section

(2) Within a period of three months from the end of each financial year, the Council shall submit to the Auditor-General the accounts of the Academy together with—

Justification: This is to align with the Public Audit Act.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

62. PART IX

Kenya Law Reform Commission

Proposed amendment: Include the word “Provisions” in the title of the Part.

Justification: To complete the title

Committee observations and recommendations: The Committee agreed to the proposed amendment.

Proposed amendment: Merge Part IX, X and XI - to read “Miscellaneous Provisions”.

Justification: Provisions on delegated powers and transition can fall within miscellaneous provisions.

Committee observations and recommendations: The Committee observed that Standing Order 118 of the National Assembly Standing Orders requires a separate Part for any provisions delegating legislative powers.

63. CLAUSE 47

Kenya Law Reform Commission

Proposed amendment: Delete clause 47.

Justification: Different bodies administer the Act.

Committee observations and recommendations: The Committee observed that the rationale for the proposed deletion of clause 47 was not clear and that the provision in the Bill had merit.

64. NEW CLAUSE 49A

Ministry of Foreign Affairs

Proposed amendment: Insertion of a new clause on offences

50. A member of the Service may be prosecuted in the Republic for an offence committed in the territory of a foreign state in accordance with Section 66 of the Criminal Procedure Act.

Justification: This is a provision of general application and provides for sanction of officers who offences in foreign jurisdictions.

Committee observations and recommendations: The Committee observed that the proposed amendment was unnecessary since the Committee had already inserted a provision on abuse of diplomatic privileges and immunities by Officers.

65. CLAUSE 50

Ministry of Foreign Affairs

Proposed amendment: Amend clause 50 by inserting the following new sub clauses:

- i. procedure for administering foreign service examinations, including written, oral, physical, foreign language, and other examinations for appointment to the Service;
- ii. the terms and conditions applicable to a special envoy;
- iii. provision of protocol services to designated foreign and national dignitaries;
- iv. provision of consular services; and

Justification: To expend the scope or regulations that may be made by the Cabinet Secretary for administration of the Act.

Committee observations and recommendations: The Committee agreed to the proposed amendment.

66. MEMORANDUM OF OBJECTS AND REASONS

The Ministry of Industrialization, Trade and Enterprise Development

Proposed amendment: The Foreign Service Bill is a money Bill within the meaning of Article 114 of the Constitution of Kenya, 2010

The enactment of the Bill envisages additional funding. It would be imperative how this impacts on other Ministries that have budgetary allocation for foreign service allowances for example the State Department for Trade requires additional funding to cater for commercial/trade attaches posted to various missions

Justification: It would be imperative to understand how additional funding envisaged under the Bill impacts on budgetary allocation for foreign service allowances under the State Department for Trade.

Committee observations and recommendations: The Committee observed that the Memorandum of Objects and Reasons is not a part of the Bill requiring an amendment.

PART IV

5.0 COMMITTEE RECOMMENDATION

67. The Committee having considered the Foreign Service Bill 2021 recommends that the House approves the Bill with amendments as proposed in the schedule.

6.0 SCHEDULE OF PROPOSED AMENDMENTS

68. The Committee proposes the following amendments to be considered by the House in the Committee stage:

LONG TITLE

No amendment.

CLAUSE 1—SHORT TITLE

No amendment.

CLAUSE 2—INTERPRETATION

1. Amend definition of “attache” by deleting the word “mainstream”;

Justification:

For clarity.

2. Delete the definition “dependant child” and substitute therefor the following new definition:

“dependant child” means a biological offspring or a legally adopted child who is not married—

(a) and is under the age of twenty-two years;

(b) is in school and is under the age of twenty-four years; or

(c) has special needs and is wholly dependent on an officer.

Justification:

The substitution clarifies the age and marital status of dependant children.

3. Insertion of a new definition—

“career diplomat” means an Officer of the rank eligible for appointment as a high commissioner, ambassador, diplomatic or consular representative;

4. Insertion of a new definition:

“Headquarters” means the administrative centre of the Service in Kenya;

Justification:

The insertion provides clarity as to the meaning of the term headquarters as used in the Bill.

5. Amend the definition “locally engaged staff” by deleting the words “abroad or within the Republic”;

Justification:

The term Mission is already defined to mean a Mission whether abroad or within the Republic.

6. Delete the definition “Mission” and substitute with the following new definition—

“Mission” means a Kenyan Embassy, High Commission, Consulate-General or a duly accredited representational office abroad or within the Republic;

Justification:

The definition provides for a comprehensive and inclusive meaning of the term Mission and is in line with diplomatic practice.

7. Delete the definition “Officer” and substitute with the following new definition:

“Officer” means a foreign service officer.

Justification:

The new definition seeks to differentiate foreign service officers from other members of staff employed in the service.

Foreign Service Officers are the specialized and professional officers in matters foreign affairs.

8. Amend the definition of “spouse” by insertion of the following words—

“recognized under the Marriage Act and” immediately after the word “husband”

Justification:

To ensure that spouses recognized under this Act are recognized in the Marriage Act. (MFA)

9. Delete definition of “tour of duty” and substitute with the following new definition—

“tour of duty” means the period of time between—

(a) when an appointed Officer reports to a Mission; and

(b) when the Officer is recalled to Ministry Headquarters”

Justification:

To simplify the meaning and provide clarity.

10. Insertion of the following new definition:

“Service” means the Foreign Service of the Republic of Kenya established by Section 3;

Justification:

For ease of reference.

11. Insertion of the following new definition:

“service staff” means persons recruited to offer technical and administrative support to the Service other than foreign service officers;

Justification:

To define the cadre of staff who offer technical and administrative support in the service.

12. Insertion of the following new definition:

“special needs” means a physical or mental condition which necessitates special care for a dependant child.

Justification:

To provide clarity as to the conditions that constitute special needs.

CLAUSE 3—ESTABLISHMENT OF THE FOREIGN SERVICE.

1. Amend Clause 3(2) by deleting paragraph (b) and (c)

Justification:

1. (b) is vague;

2. Under (c) It is difficult to establish and define who political staff are. Besides the composition of the Service is enshrined under Clause 4 and technical officials, attaches and other staff in the service are provided for.

2. Amend Clause 3(3) to insert the words “international law and customs of diplomatic practice” Immediately after the word “Constitution”.

Justification:

To ensure that the service is guided by National Interests, International Law and customs of diplomatic practice in line with international best practice.

CLAUSE 4—COMPOSITION OF THE FOREIGN SERVICE.

Replace clause 4 with the following:

4. (1) The Service shall comprise officers serving at the headquarters and in missions, who shall include—

- (a) High commissioners, ambassadors and diplomatic and consular representatives;
- (b) Honorary Consuls;
- (c) Special envoys;
- (d) foreign service officers; and
- (e) any other officer as may be designated by any written law or by the Cabinet Secretary in writing.

(2) The composition of the Service shall reflect the diversity of the people of Kenya.

Justification:

1. To clarify that officers who serve both at the Headquarters and in Missions are members of the Service;
2. To ensure that the composition of the service reflects diversity as enshrined in the Constitution.

CLAUSE 5--FUNCTIONS OF THE FOREIGN SERVICE.

Replace clause 5 with the following new Clause:

5. In addition to any other responsibilities designated in writing by the President to the Ministry, the Service shall—

- (a) be responsible for the development and management of Kenya's foreign policy;
- (b) conduct and coordinate the international relations and cooperation of the Republic at bilateral, regional and multilateral levels;
- (c) enhance protection of Kenya's sovereignty and territorial integrity;
- (d) enhance national, regional and international peace, security and stability;
- (e) protect, promote and project national interests globally;
- (f) establish and maintain good relations between the Republic and other countries, and international organizations;
- (g) manage the Republic's Missions;
- (h) serve and promote the legitimate interests of Kenyans living abroad;
- (i) administer diplomatic privileges and immunities;
- (j) administer all foreign representations in the Republic;
- (k) be the primary interface between the Republic and foreign states and international organizations or entities;
- (l) facilitate negotiation and conclusion of international treaties and agreements by in consultation with relevant ministries;
- (m) maintain custody of ratified international treaties and agreements;
- (n) facilitate the integration of Kenya's foreign policy within national security;
- (o) coordinate, monitor and report on the implementation of the Republic's international obligations;
- (p) coordinate and provide protocol services to designated foreign and national dignitaries as prescribed;
- (q) provide consular services as prescribed;
- (r) coordinate relevant agencies in emergency evacuation of distressed Kenyans abroad; and
- (s) perform any other function as may be necessary for the discharge of its mandate as prescribed by any written law.

Justification:

There is no major variance of the functions in the Bill, but the proposed amendments;

- (a) summarize and simplify the functions of the Service; and

(b) Align the functions of the service with the Constitution, international treaties, foreign policy, the Defence White Paper, 2017 and modern diplomatic practice.

CLAUSE 6—POWERS AND FUNCTIONS OF THE CABINET SECRETARY.

Delete clause 6 and replace with the following new clause:

6. In addition to any powers or functions designated in writing by the President, the Cabinet Secretary shall—

- (a) be the principal advisor to the President on matters relating to foreign policy;
- (b) provide strategic leadership and policy guidance to the Service;
- (c) consult and advise the Public Service Commission on appropriate officers to be appointed to the foreign service;
- (d) ensure that the Service and Missions pursue the foreign policy objectives of the Republic, in coordination with other ministries and agencies in the Republic;
- (e) advise the Cabinet on the establishment of Missions of the Republic;
- (f) provide policy advice to the Government on matters relating to foreign policy;
- (g) establish such consultative coordination mechanisms as may be necessary for the effective implementation of this Act;
- (h) conduct and coordinate communications between the government of the Republic and governments of other countries and intergovernmental organizations and agencies;
- (i) oversee and implement directives by the President relating to the appointment or recall of high commissioners, ambassadors and diplomatic and consular representatives;
- (j) administer, manage and develop the capacity of the Service;
- (k) issue guidelines on the coordination and alignment of matters relating to foreign affairs to National and County Governments;
- (l) approve the accreditation of a high commissioner, ambassador, diplomatic or consular representative to serve more than one country or jurisdiction; and
- (m) ratify international agreements on behalf of the Republic subject to approval by the National Assembly.

Justification:

There is no major variance of the functions in the Bill, but the proposed amendments;

- (a) summarize and simplify the functions of the Cabinet Secretary; and
- (b) align clause (5)(b), with the procedure under the Treaty Making and Ratification Act and the Vienna Convention on the Law of Treaties.

CLAUSE 7—FUNCTIONS OF THE PRINCIPAL SECRETARY.

Delete clause 7 and replace with the following new clause:

7. The Principal Secretary in the ministry responsible for matters related to foreign affairs shall be responsible to the Cabinet Secretary and shall—

- (a) provide administrative supervision to the Service;
- (b) co-ordinate the performance management of the Service;
- (c) oversee implementation of programmes;
- (d) provide foreign policy advice to the Cabinet Secretary upon request;
- (e) be the principal accounting officer and ensure efficient utilization of funds and other public resources;
- (f) act as the point of contact for the Service;
- (g) advise the Cabinet Secretary on human resource matters as appropriate; and
- (h) perform any other functions as delegated by the Cabinet Secretary.

Justification:

Align functions with Public Service Commission Human Resource Policy.

In addition, 7 (a) I-IX covers functions are too prescriptive in nature and are captured under the general functions in the proposed amendments.

CLAUSE 8—ORGANIZATIONAL STRUCTURE

No amendment

CLAUSE 9—MINISTRY HEADQUARTERS AND MISSIONS

Insert the following new paragraph immediately after paragraph (1)(b)—

“(c) legal and compliance;”

CLAUSE 10—ESTABLISHMENT OF MISSIONS OF THE REPUBLIC

Delete and replace with the following new clause—

10. (1) The Cabinet Secretary may, recommend and upon approval by Cabinet, establish a Mission in accordance with the provisions of the Vienna Convention on Diplomatic Relations, 1961, the Vienna Convention on Consular Relations, 1963, and the provisions of treaties and conventions establishing intergovernmental organizations and agencies.

(2) In recommending the establishment of a Mission and any office of the Foreign Service abroad, the Cabinet Secretary shall be guided by the strategic interests of the Republic, including—

- (a) the geopolitical and security interests of the Republic;

- (b) economic, trade and investment considerations;
- (c) the financial viability of maintaining a mission;
- (d) the presence of and numbers of Kenyan nationals in the host country; and
- (e) adherence to the principle of reciprocity.

(3) The Cabinet Secretary shall, with the approval of Cabinet, prescribe the territorial accreditation boundaries of a Mission, amalgamate, close or downgrade a Mission.

Justification:

The proposed amendments place the mandate of establishing and closing down a Mission on the Cabinet Secretary as opposed to the National Government. By placing the responsibility on the National Government, it is not clear which Office is responsible.

In recommending the establishment or closure of a Mission, it is important to assess the cost and benefits;

Reciprocity is a key tenet of diplomatic practice which ensures states enjoy mutual benefits from their relationships or engagements.

CLAUSE 11—FUNCTIONS OF A MISSION

Delete Clause 11

Justification:

Functions of the mission are deleted because they are provided for under functions of the Service.

PART IV—STAFFING AND CONDITIONS OF SERVICE

Rename to “Management of the Service”

Justification:

The Part deals with more than matters of staffing and conditions of service.

CLAUSE 12—ESTABLISHMENT OF A CAREER FOREIGN SERVICE

1. Delete and replace the marginal note with the word “Recruitment”;
2. Delete and replace with the following clause—
 12. (1) The Cabinet Secretary shall, in consultation with the Public Service Commission —
 - (a) determine the terms and conditions of for service of members of the Service; and
 - (b) establish a Foreign Service Personnel Scheme which shall guide the criteria relating to the recruitment and career progression within the Service.
 - (2) A person shall not be recruited into the Service unless the person—
 - (a) is a Kenyan citizen; and
 - (b) has undertaken and passed Foreign Service Examinations administered by the Academy.

(3) Recruitment and promotion in the Service shall be conducted through a competitive process to determine the competence, fitness and aptitude of candidates to serve in the foreign service.

(4) The Public Service Commission shall, in consultation with the Cabinet Secretary, recruit—

- (a) suitably qualified officers to execute the functions of the Foreign Service; and
- (b) service staff to provide technical and support services to the Service.

(5) The recruitment and appointment procedure under this Act shall comply with the values and principles of Public Service enshrined in the Constitution.

Justification:

1. This clause deals with recruitment as opposed to establishment of a foreign service.
2. The proposed amendments will enhance the professionalization of the Foreign Service and ensure that candidates who are selected for recruitment have the competence, fitness and aptitude of to serve in the foreign service.

CLAUSE 13—CONDITIONS OF SERVICE FOR OFFICERS

Delete subclause (3)

Justification:

This is the constitutional mandate of the Salaries and Remuneration Commission.

CLAUSE 14—SECONDMENT OF OFFICERS TO INTERNATIONAL ORGANIZATIONS

Replace the word “principal secretary” with “Cabinet secretary”

Justification:

To align with the functions of the Cabinet Secretary under this Act.

CLAUSE 15—ASSIGNMENT OF OFFICERS WITHIN THE MINISTRY TO SERVE AT MISSIONS.

1. Delete and replace the marginal note with “Deployment of officers to Missions”;
2. Delete and replace clause with—

15. (1) The Cabinet Secretary may, with notification to the Public Service Commission, assign any officer of the Service to any Mission.

(2) The Cabinet Secretary may extend or terminate any overseas assignment under subsection (1), and require an officer to return to headquarters.

(4) Any officer of the Ministry assigned overseas shall, in addition to provisions under his or her employment contract, continue to be bound by the regulations governing the public service.

(5) The Cabinet Secretary may, recall an officer assigned to serve at a Mission prior to the end of his or her term as prescribed in regulations.

Justification:

Replacement of Principal Secretary to Cabinet Secretary is to align with the functions of the Cabinet Secretary under this Act.

Upon deployment to a Mission, officers are required to sign an administrative clearance form as opposed to an employment contract.

There is no need for an officer to sign an employment contract on deployment to a Mission, because there is an existing contract between the officer and the public service commission.

CLAUSE 16—TRAINING

Delete and replace with the following new Clause—

16. (1) The Cabinet Secretary shall ensure that all officers receive appropriate diplomatic and other training relevant to their rank under the personnel scheme.

(2) The training and capacity building of Officers shall be undertaken by the Foreign Service Academy and such other Institutions as may be authorized by the Principal Secretary.

Justification:

The Cabinet Secretary is in charge of training.

Training is by the Academy or institutions approved by the PS.

Training priorities should be informed by the training needs assessment and detailed in the regulations.

CLAUSE 17—SECONDMENT OF OFFICERS FROM OTHER MINISTRIES

Delete and replace with the following new clause—

17(1) The Public Service Commission may, with the concurrence of the relevant Cabinet Secretary and the Cabinet Secretary, second staff from any other ministry to any Mission.

(2) Where a person is seconded to a Mission under subsection (1), the Cabinet Secretary and the relevant Cabinet Secretary shall agree on the employment and financial conditions that shall apply for the duration of secondment.

Justification:

It is important that the Public Service Commission consults the Cabinet Secretary before seconding officers from other Ministries to ensure that officers are seconded on a need basis and the secondment addresses existing skill gaps in the Service.

CLAUSE 18— LOCALLY ENGAGED STAFF

1. Amend subclause (2) by deleting the words “including obtaining criminal records and relevant qualifications and references from previous employers”
2. Delete subclause (3) and substitute therefor the following new subclause—
“(3) The terms and conditions of employment of locally engaged staff shall be in accordance with the labour laws of the host country.”;
3. Delete subclause (4);
4. Delete subclause (5).

Justification:

The details as to the recruitment of local staff as provided for in (2), (3) and (5) should be captured in the regulations.

CLAUSE 19—PRIVILEGES AND IMMUNITIES OF OFFICERS, SPOUSE AND CHILDREN

1. Renumber the existing provisions as subclause (1);
2. Insert the following new subclauses immediately after subclause (1)—
“(2) A person who abuses any privilege or immunity granted under this section shall be subjected to disciplinary action as appropriate.
(3) A person shall not waive the privileges and immunities granted under this section without the express approval of the Cabinet Secretary.”

Justification:

1. Sub clause 2 is inserted ensure that privileges and immunities only facilitate the execution of functional roles of an officer and are not misused for personal gain.
2. Sub clause 3 is inserted pursuant to the Vienna Convention on Diplomatic Relations, which requires that any waiver of privileges and immunities has to be formally sanctioned by the Government.

CLAUSE 20—EXEMPTION FROM DUTIES AND TAX

Delete.

Justification:

Article 210(3) of the Constitution provides that—

No law may exclude or authorise the exclusion of a State Officer from payment of tax by reason of—

- (a) the office held by that State officer; or
- (b) the nature of work of that State officer.

CLAUSE 21—CODE OF CONDUCT

1. Amend subclause (1) by deleting the words “independent contractors” appearing immediately after the words “officers and” and substitute therefor the words “staff”.
2. Delete subclause (2).

Justification:

For clarity and to leave the prescription of the code of conduct. Details as to the code of conduct and penalties shall be included in the code itself.

CLAUSE 22—CONFIDENTIALITY

Delete.

Justification:

Details with regard to confidentiality shall be included in the code of conduct.

CLAUSE 23—APPOINTMENT

Delete and replace with the following new Clause—

23. (1) The Office of a high commissioner, ambassador, diplomatic or consular representative shall be a State office for purposes of Article 260 of the Constitution.

(2) Pursuant to Article 132 (2) (e) of the Constitution, the President shall nominate, and subject to the approval of the National Assembly, appoint high commissioners, ambassadors and diplomatic or consular representatives.

(3) A nomination under sub section (2) shall reflect—

- (a) a fair balance between career diplomats and other appointees; and
- (b) the diversity of the people of Kenya.

(4) A person nominated for appointment under subsection (2) shall be—

- (a) a citizen of Kenya; and
- (b) of a reputable character and standing within the Republic.

Justification:

1. The establishment of the office of Ambassador as a State Office is pursuant to the unique representational nature of both the Republic and the President.

2. Insertion of (3) (b) is in compliance with the spirit and letter of the Constitution on diversity

3. The establishment of the Office of Ambassador as a state office by the new subjects them to the requirements of Article 78 of the Constitution on citizenship and leadership.

NEW CLAUSE

Insert the following new clause immediately after clause 23

Head of Mission.

23A (1) A Mission may have more than one person designated to serve as ambassador or high commissioner.

(2) Where a Mission has more than one ambassador or high commissioner, the ambassador or high commissioner designated as ambassador extraordinary and plenipotentiary shall be the Head of Mission.

(3) The Head of a Mission shall—

- (a) actively pursue the foreign policy objectives of the Republic in the host country;
- (b) act as the personal representative of the Head of State in the host country;
- (c) act as an official representative of the Republic at official functions in the host country;
- (d) be responsible for the management and administration of the Mission and all members of the Foreign Service located at the Mission, including the locally engaged staff in the Mission;
- (e) be accountable for any expenditure of the Mission and ensure that the budget of the Mission is administered in accordance with the Public Finance Management Act, 2012 and all other applicable laws and regulations.

Justification:

The insertion of new clause 23A acknowledges that a Mission can have more than one Ambassador posted to serve. It therefore clarifies the hierarchy in a Mission.

The insertion of (3) (b) is in accordance with diplomatic practice.

The insertion of (3) (d) reaffirms the responsibilities of a Head of Mission.

CLAUSE 24—DURATION OF APPOINTMENT

Amend clause 24 by deleting subclause (4).

Justification:

The modalities of what happens where a person is not reappointed are left to the administrative arrangements of the Ministry and the Service.

CLAUSE 25—TERMINATION OF APPOINTMENT

Amend clause 25 by deleting subclause (2).

Justification:

The modalities of what happens where a person is terminated are left to the administrative arrangements of the Ministry and the Service.

CLAUSE 26—ACCREDITATION.

No amendment.

CLAUSE 27—APPOINTMENT OF HONORARY CONSULS.

Delete subclause (3) and substitute therefor the following new subclause—

“(3) Each Honorary Consul shall report directly to—

- (a) the Head of Mission responsible for that country; or
- (b) where there is no Head of Mission, to the Cabinet Secretary.

Justification:

To clarify the reporting channels where there is no Head of Mission in a host country.

PART VI—HONORARY CONSULS

Delete Part Heading

Justification:

To include the Consuls under the Part on ambassadors, high commissioners, diplomatic and consular representatives.

CLAUSE 28—FUNCTIONS AND RESPONSIBILITIES OF HONORARY CONSULS.

No amendment.

CLAUSE 29—POLICY TO BE PUBLISHED

1. Amend marginal note to “formulation of policy”;
2. Delete subclause (2);
3. Delete subclause (3).

Justification:

The requirement for the publication of the policy and what it should contain is restrictive and overly prescriptive. It may unnecessarily limit the capacity of the Executive to effectively pursue its objectives.

CLAUSE 30—DIPLOMATIC REPORTING, NOTIFICATIONS AND COMMUNICATIONS

Delete and insert immediately after Clause 48 under “Miscellaneous”

Justification:

For logical flow of the provisions.

CLAUSE 31—ESTABLISHMENT OF THE ACADEMY

No amendment.

CLAUSE 32—FUNCTIONS OF THE ACADEMY

Delete and replace with the following new clause—

32. The Academy shall—

- (a) be the principal institution for training and capacity building of members of the foreign service;
- (b) undertake foreign policy consultancy, research and analysis for the Service, Government and clients in the private and public sectors;
- (c) develop and conduct periodic evaluation of training programmes to ensure relevance, quality and effectiveness;
- (d) undertake continuous foreign service training and other programmes to enhance skills, capacity and professionalism of Officers;
- (e) offer induction courses to all newly employed persons to help them transition into a career in the Service;
- (f) administer entry and promotional examinations within the Service;
- (g) undertake training of members of the Service before deployment for a tour of duty;
- (h) conduct examinations for the grant of such professional and academic awards as may be prescribed;
- (i) develop and maintain a repository of research resources on foreign policy and related issues;
- (j) develop linkages and collaborations with institutions of learning, professional organizations, private sector and other similar institutions across the world;
- (k) control the publication and use of research findings of the Service; and
- (l) perform all other acts necessary for the proper performance of its functions under this Act, which may lawfully be done or performed by a body corporate.

Justification:

The proposals are informed by functions of other foreign service academies and represent international best practice.

CLAUSE 33—COMPOSITION OF THE COUNCIL

1. Amend subclause (1)—

(a) by deleting paragraph (d) and substituting therefor the following new paragraph—

“(d) three persons competitively recruited and appointed by the Cabinet Secretary, one of whom shall be a person who teaches diplomacy or international relations in a university recognized in Kenya;”

(b) by deleting paragraph (e);

(c) in paragraph (h) by deleting the words “and secretary to the Council” appearing immediately after the words “ex officio member”.

Justification:

In compliance with the constitutional values and principles of public service set out in article 232(1)(i) of the Constitution which require competition and merit in appointments to public office;

To align with the requirements of Mwongozo code which prohibits the CEO from exercising the functions of the corporate secretary.

2. Amend subclause (2)(b)(vi) by deleting the word “a” and substituting therefor the words “any other”.

Justification:

To correct a grammatical error.

Amend subclause (3) by inserting the words “under subsection (1)(d)” immediately after the word “appointed”.

CLAUSE 34—POWERS OF THE COUNCIL.

No amendment.

CLAUSE 35—CONDUCT OF BUSINESS AND AFFAIRS OF THE COUNCIL

No amendment.

CLAUSE 36—REMUNERATION OF THE COUNCIL

No amendment.

CLAUSE 37— DIRECTOR-GENERAL

Amend subclause (1) by deleting the words “by the Cabinet Secretary on the recommendation” appearing immediately after the word “appointed”.

Justification:

The appointing authority should be the Council as it is a body corporate and therefore responsible for the appointment of its staff.

This is also in line with Mwongozo and best practice in corporate governance.

CLAUSE 38—FUNCTIONS OF DIRECTOR-GENERAL

Delete clause 38 and replace with the following new Clause—

38. The Director-General shall be—

- (a) the accounting officer of the Academy; and
- (b) responsible for—
 - (i) implementing the decisions of the Council;
 - (ii) efficient administration of the Academy;
 - (iii) preparing annual reports on activities of the Academy;
 - (iv) the day-to-day administration and management of the affairs of the Academy; and
 - (v) the performance of such other duties as may be assigned by the Council or as may be prescribed by this Act, or any other written law.

Justification:

To align with the requirements of Mwongozo code which prohibits the CEO from exercising the functions of the corporation secretary.

To provide clarity on who the accounting officer is.

To enhance the functions of the Director General.

NEW CLAUSE

Insert the following new clause immediately after Clause 38—

Corporation Secretary.

38A. (1) There shall be a Corporation Secretary of the Academy who shall be the secretary to the Council.

(2) The terms and conditions of service of the Corporation Secretary shall be determined by the Council in consultation with the Salaries and Remuneration Commission.

Justification:

To align with the requirements of Mwongozo code which require a state corporation to appoint a corporation secretary.

CLAUSE 39—COMMON SEAL

No amendment.

CLAUSE 40—STAFF OF THE ACADEMY

No amendment.

CLAUSE 41—DELEGATION BY THE COUNCIL

No amendment.

CLAUSE 42—PROTECTION FROM LIABILITY

No amendment.

CLAUSE 43—FUNDS OF THE ACADEMY

No amendment.

CLAUSE 44—FINANCIAL YEAR

No amendment.

CLAUSE 45—ANNUAL ESTIMATES

No amendment.

CLAUSE 46—ACCOUNTS AND AUDIT

Amend subclause (2) by deleting the opening statement and substituting therefor the following—

“Within a period of three months from the end of each financial year, the Council shall submit to the Auditor-General the accounts of the Academy together with—”

Justification:

This is to align the provision with the Public Audit Act, 2015

PART IX—MISCELLANEOUS

Amend the title to Part IX by inserting the word “PROVISIONS” immediately after the word “MISCELLANEOUS”

Justification:

To complete the title.

CLAUSE 47—ADMINISTRATION OF ACT

No amendment.

CLAUSE 48—COSTS OF EMERGENCY EVACUATION

No amendment.

CLAUSE 49—FOREIGN EXCHANGE FLUCTUATIONS

No amendment.

NEW CLAUSE

Insert the following new Clause immediately after Clause 49—

Diplomatic reporting, notifications and communications.

49A. (1) Unless otherwise directed by the Cabinet Secretary—

- (a) all diplomatic or official correspondences sent directly to the Republic’s Missions shall be forwarded to or channeled through the Ministry headquarters;
- (b) all diplomatic or official correspondences originating from Embassies within the Republic to any Ministry or agency in the Republic shall be forwarded or channeled through the Ministry headquarters; and
- (c) all diplomatic or official correspondences originating from domestic Ministries, agencies, or Missions and international organizations that are channeled through Ministry headquarters shall, where appropriate, be forwarded to relevant Embassies for their information.

(2) The Head of a Mission or his or her designate shall be the first point of contact for a Mission of the Republic.

(3) The Principal Secretary shall be the first point of contact for the Ministry headquarters.

Justification:

To reintroduce the previous Clause 30 for logical flow of the provisions.

CLAUSE 50—REGULATIONS

Amend subclause (1) by inserting the following new paragraphs immediately after paragraph (c)—

“(ca) procedure for administering foreign service examinations, including written, oral, physical, foreign language, and other examinations for appointment to the Service;

- (cb) procedure for termination or recall of officers assigned to Missions;
- (cc) the terms and conditions applicable to a special envoy;
- (cd) the provision of protocol services to designated foreign and national dignitaries; the provision of consular services; and”

Justification:


To expand the scope or regulations that may be made by the Cabinet Secretary for administration of the Act.

CLAUSE 51—TRANSITION

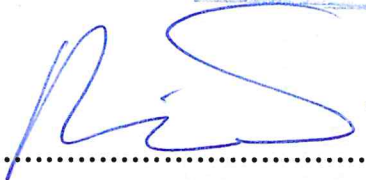
No amendment.

SCHEDULE

No amendment.

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SIGNED.......... **DATE**.....*07/07/2021*.....

HON. KATOO OLE METITO, EGH, MGH, MP
(CHAIRPERSON, DEPARTMENTAL COMMITTEE ON DEFENCE & FOREIGN RELATIONS)

