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REPUBLIC OF KENYA




THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – FIFTH SESSION

DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION

REPORT ON-

THE CONSIDERATION OF THE COMPUTER MISUSE AND CYBERCRIMES (AMENDMENT) BILL, 2021 (*NATIONAL ASSEMBLY BILLS NO. 11 OF 2021*)

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE:	04 AUG 2021
	DAY: Wednesday
TABLED BY:	Chairperson DC on Communication, Information & Innovation
CLERK-AT THE-TABLE:	Getnide chebet

CLERK'S CHAMBERS
DIRECTORATE OF DEPARTMENTAL COMMITTEES
PARLIAMENT BUILDINGS
NAIROBI

AUGUST, 2021

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LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
BAKE	Bloggers Association of Kenya
CMCA	Computer Misuse and Cybercrimes Act
DCI	Directorate of Criminal Investigations
ICCPR	International Covenant on Civil and Political Rights
ICT	Information, Communication and Technology
KE-CIRT	Computer Incident Response Team
KES	Kenya Shillings
UAE	United Arab Emirates
UDHR	Universal Declaration of Human Rights
USD	United States Dollars

ANNEXURES

- Annexure 1 Copy of adoption report adoption list of Members
- Annexure 2 Minutes of the Committee
- Annexure 3 Copy of public participation advertisements in the local dailies
- Annexure 4 Copies of public and stakeholder memoranda

CHAIRPERSON'S FOREWORD

This report contains the Committee's proceedings on the consideration of the Computer Misuse and Cybercrimes (Amendment) Bill, 2021 (*National Assembly Bills No 11 of 2021*), sponsored by the Member for Garissa Township Constituency, Hon. Aden Duale, MP. The Bill was published on 16th April, 2021 and read a First Time on 9th June 2021, and committed to the Departmental Committee on Communication, Information and Innovation pursuant to Standing Order 127.

The principal object of the Bill is to amend the Computer Misuse and Cybercrimes Act, No. 5 of 2018 to provide for the prohibition against the sharing of pornography through the internet. The Bill further seeks to prohibit the use of electronic mediums to promote terrorism, extreme religious or cult activities. In addition, the Bill also seeks to provide an additional function of the National Computer and Cybercrimes Co-ordination Committee which is to recommend websites that may be rendered inaccessible within the country.

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 two stakeholders: the Communications Authority of Kenya and a Joint memorandum from Article 19, Eastern Africa, Access Now, the Bloggers Association of Kenya, Defenders Coalition, the Kenya ICT Action Network and the Kenya Union of Journalists. The stakeholders proposed certain amendments that have been exhaustively addressed in Chapter three of this report, with the Committee's final decision reflected therein and in the schedule of proposed amendments in Chapter five of the report.

On behalf of the Departmental Committee on Communication and Innovation 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 Communication, Information and Innovation on the consideration of the Computer Misuse and Cybercrimes (Amendment) 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 Computer Misuse and Cybercrimes (Amendment) Bill, 2021 and has the honour to report back to the House with the recommendation that the Bill should be approved with amendments.

Hon. William Kisang M.P

Chairperson, Departmental Committee on Communication, Information and Innovation

CHAPTER ONE

1.0 PREFACE

1.1 ESTABLISHMENT OF THE COMMITTEE

1. The Departmental Committee on Communications, Information and Innovation is established under Standing Order 216 whose mandate pursuant to the Standing Order 216 (5) is as follows;
 - a. *Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;*
 - b. *Study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation;*
 - c. *Study and review all legislation referred to it;*
 - d. *Study, assess and analyse the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;*
 - e. *Investigate and 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;*
 - f. *Vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);*
 - (fa) *examine treaties, agreements and conventions;*
 - g. *make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;*
 - h. *consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and*
 - i. *Examine any questions raised by Members on a matter within its mandate*

1.2 MANDATE OF THE COMMITTEE

2. In accordance with Second Schedule of the Standing Orders, the Committee is mandated to oversee Communication, Information, media and broadcasting (except for broadcast of parliamentary proceedings), Information Communications Technology (ICT) development and advancement of technology and modernization of production strategies.
3. In executing its mandate, the Committee oversees the following Departments-
 - a. State Department of Broadcasting and Telecommunications
 - b. State Department of ICT & Innovation

1.3 COMMITTEE MEMBERSHIP

4. The Departmental Committee on Communication, Information and Innovation was constituted by the House in December 2017 and comprises of the following Members-

Chairperson

Hon. Kisang William Kipkemoi, M.P
Marakwet West Constituency

Jubilee Party

Vice-Chairperson

Hon. Jane Wanjiku Njiru
Embu County

Jubilee Party

Hon. George Theuri, MP
Embakasi West Constituency
Jubilee Party

Hon. Gertrude Mbeyu , MP
Kilifi County
Orange Democratic Party

Hon. Alfah O. Miruka, MP
Bomachoge Chache Constituency
Kenya National Congress

Hon. Anthony Kiai, MP
Mukurweini Constituency
Jubilee Party

Hon. Annie Wanjiku Kibeh, MP
Gatundu North Constituency
Jubilee Party

Hon. (Eng.) Mark Nyamita Ogola, MP
Uriri Constituency
Orange Democratic Party

Hon. Joshua Kimilu, Kivinda, MP
Kaiti Constituency
Wiper Democratic Party

Hon. Victor Munyaka, MP
Machakos Town Constituency
Jubilee Party

Hon. Marwa Kitayama Maisori, MP
Kuria East Constituency
Jubilee Party

Hon. Erastus Nzioka Kivasu, M.P.
Mbooni
New Democrats Party

Hon. Mwambu Mabongah, MP
Bumula Constituency
Independent

Hon. Innocent Momanyi Obiri, MP
Bobasi Constituency
People's Democratic Party

Hon. Maritim Sylvanus, MP
Ainamoi Constituency
Jubilee Party

Hon. Godfrey Osotsi Atieno, MP
Nominated
African National Congress

Hon. Mwangaza Kawira, MP
Meru County
Independent

Hon. Anthony, Tom Oluoch, MP
Mathare Constituency
Orange Democratic Party

Hon. Jonah Mburu, MP
MP for Lari Constituency
Jubilee Party

1.4 COMMITTEE SECRETARIAT

5. The Committee secretariat comprises -

Head of the Secretariat
Ms. Hellen Kina
Clerk Assistant II

Ms. Ella Kendi
Clerk Assistant II

Mr. Salem Lorot
Legal Counsel II

Dr. Donald Manyala
Research Officer II

Mr. Thomas Ogwel
Fiscal Analyst II

CHAPTER TWO

2.0 OVERVIEW OF THE COMPUTER MISUSE AND CYBERCRIMES (AMENDMENT) BILL, 2021

2.1 BACKGROUND TO THE COMPUTER MISUSE AND CYBERCRIMES ACT

6. The Computer Misuse and Cybercrimes Act (No. 5 of 2018) was assented to on 16th May, 2018 and came to force on 30th May, 2018. The Act provides for offences relating to computer systems; establishes the National Computer and Cybercrimes Co-ordination Committee; enables timely and effective detection, prohibition, prevention, response, investigation and prosecution of computer cybercrimes; facilitates international co-operation in dealing with computer and cybercrime matters.
7. The Bill, as it was then, was sponsored by the Leader of Majority Party, was read a First Time on 10th October 2017, Second Reading done on 21st March 2018, 29th March 2018 and 10th April 2018. The Bill, as it was then, was then considered in the Committee of the whole House on 6th April 2018. The House then passed it during Third Reading on the same day on 6th April 2018.
8. The National Computer and Cybercrimes Co-ordination Committee established under the Act has been assigned a number of functions, including advising the government on security related aspects touching on matters relating to block chain technology, critical infrastructure, mobile money and trust accounts; advising the National Security Council on computer and cybercrimes; coordinating national security organs in matters relating to computer and cybercrimes; receiving and acting on reports relating to computer and cybercrimes, amongst other functions.
9. The Act also provides for various cybercrimes including cyber espionage, computer forgery, cyber harassment, cybersquatting, phishing, identity theft and impersonation, cyber terrorism, amongst others.

2.2 ANALYSIS OF THE BILL

10. The Computer Misuse and Cybercrimes (Amendment) Bill, 2021 (National Assembly Bills No. 11 of 2021), sponsored by the Member for Garissa Township Constituency, Hon. Aden Duale, MP, was published on 16th April, 2021 and read for the First Time on 9th June, 2021.
11. The principal object of the Bill is to amend the Computer Misuse and Cybercrimes Act, No. 5 of 2018 to provide for the prohibition against the sharing of pornography through the internet.
12. The Bill further seeks to prohibit the use of electronic mediums to promote terrorism, extreme religious or cult activities.
13. The Bill also seeks to provide an additional function of the National Computer and Cybercrimes Co-ordination Committee which is to recommend websites that may be rendered inaccessible within the country.

14. **Clause 2** of the Bill seeks to amend section 6 (*on the functions of the National Computer and Cybercrimes Co-ordination Committee*) of the Computer Misuse and Cybercrimes Act in subsection (1) by inserting the following new paragraph immediately after paragraph (j)–

“(ja) recommend websites to be rendered inaccessible within the Republic;”

15. **Clause 3** provides for a new section 24A which provides that a person shall not unknowingly—

- (i) publish pornography through a computer system;
- (ii) produce pornography for the purpose of its publication through a computer system;
- (iii) download, distribute, transmit, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell or offer for sale, let on hire or offer to let on hire, offer in any way, or make available in any way from a telecommunications apparatus pornography;
- or
- (iv) possess pornography in a computer system or on a computer data storage medium.

16. **Clause 4** further provides that the penalty for contravening the provision is a fine not exceeding 20 million shillings or imprisonment for a term not exceeding 25 years, or both. It further provides that it shall be a defence to a charge for the offence where a publication is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, art, representation or figure is in the interest of science, literature, learning or other objects of general concerns.

17. **Clause 4** amends section 27(1) of the Act (*on cyber harassment*) by providing for additional forms of cyber harassment. The amendment inserts the following new paragraphs immediately after paragraph (a)–

- “(aa) is likely to cause those persons to commit suicide or cause any other harm to themselves;
- (ab) is likely to cause other persons to join or participate in unlicensed and extreme religious or cult activities;”

18. **Clause 5** amends section 33 of the Act (*on cyber terrorism*) by inserting the following new subsection immediately after subsection (1) –

“(1A) A person who publishes or transmits electronic messages that is likely to cause other persons to join or participate in terrorist activities, commits an offence and shall be liable on conviction to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding twenty-five years, or both.

CHAPTER THREE

3.1 PUBLIC PARTICIPATION/STAKEHOLDER CONSULTATION

19. Pursuant to Article 118(1) (b) of the Constitution and Standing Order 127(3), which provide that the Parliament shall facilitate public participation, the Committee placed an advert in the local dailies on Friday 11th June, 2021 inviting the public to submit their views to the Clerk of the National Assembly on or before Friday 18th June, 2021.
20. The Committee received two memoranda from the Communications Authority of Kenya and a Joint memorandum from Article 19, Eastern Africa, Access Now, the Bloggers Association of Kenya, Defenders Coalition, the Kenya ICT Action Network and the Kenya Union of Journalists.

3.2 SPECIFIC AMENDMENTS

21. In considering the Bill, the Committee took into account the memoranda received from the public and its deliberations.

Clause 2- Amendment of section 6 of the Computer Misuse and Cybercrimes Act

22. The Communications Authority of Kenya recommended the deletion of clause 2. They submitted that the clause contravenes freedom of expression, access to information and intellectual property rights inherent in the website by way of copyright and trademarks. They also submitted on the role of the Communications Authority of Kenya and the Kenya Computer Incident Response Team (KECIRT). They further argued that the clause could not be retained unless it fell within the exemptions to the rights or the contents of the website are a threat to national security or might equate to subversion of national security.

Committee Observations and Recommendations

The Committee made the following observations:

- (a) Clause 2 of the Bill seeks to amend section 6 (*on the functions of the National Computer and Cybercrimes Co-ordination Committee*) of the Computer Misuse and Cybercrimes Act by providing for an additional function of the Committee to recommend websites to be rendered inaccessible within the Republic;
- (b) In the case of *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties)* [2020] eKLR [Petition 206 of 2019], the petitioner had challenged sections 5,16,17,22,23,24,27,28,29,31,32,33,34,35,36,37,38,39,40,41,48,49,50,51,52 & 53 of the Computer Misuse and Cybercrimes Act, 2018.

The court held that:

- (i) The computer misuse and Cybercrimes Act 2018 is valid and does not violate, infringe or threaten fundamental rights and freedoms and is justified under Article 24 of the constitution.

- (ii) Sections 5, 16, 17, 22, 23, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 50, 51, 52, and 53 of the Computer Misuse and Cybercrimes Act are constitutional and do not violate, infringe and/or threaten fundamental rights and freedoms.
 - (c) The Kenya Computer Incident Response Team (KE-CIRT), is a multi-agency collaboration framework that is responsible for the national coordination of cyber security in accordance with the provisions of the Kenya Information and Communications Act 1998 (as amended), which mandates the Communications Authority of Kenya with developing a national framework for the investigation and prosecution of cybercrimes (Section 83C, Kenya Information Communications Act);
 - (d) The mandate of the Kenya Computer Incident Response Team (KE-CIRT) does not conflict with the mandate of the National Computer and Cybercrimes Co-ordination Committee or the proposed amendment in clause 2;
 - (e) Under section 5(1) (g) of the Computer Misuse and Cybercrimes Act, the Communications Authority of Kenya is represented in the National Computer and Cybercrimes Co-ordination Committee through the Director-General of the Communications Authority of Kenya or a representative designated in writing by the Director-General of the Communications Authority of Kenya;
 - (f) The National Computer and Cybercrimes Co-ordination Committee is designed to be a multi-agency Committee to draw its efficiency through collaboration and cooperation by different agencies.
23. The Committee therefore recommended that clause 2 be retained subject to an amendment to qualify the proposed paragraph (ja) to indicate that the websites to be rendered inaccessible are those with pornographic content.
24. In the **Joint Memorandum of Article 19 Eastern Africa, Access Now, the Bloggers Association of Kenya, Defenders Coalition, Kenya ICT Action Network and the Kenya Union of Journalists**, the group recommended the deletion of clause 2 of the Bill.
25. The Civil Society Organizations submitted that the provision seeks to expand the functions of the National Computer and Cybercrimes Coordination Committee (Cybercrimes Committee) to render websites inaccessible in Kenya.
26. The further submitted that digital platforms, including websites, facilitate the rights to access to information and freedom of expression in the digital age. Given their significance, States are prohibited from interfering with individuals' right to *“seek, receive and impart information through any means of communication and digital technologies, through measures such as the removal, blocking or filtering of content, unless this interference is justifiable and compatible with international human rights law and standards”* (Principle 38, Declaration of Principles of Freedom of Expression and Access to Information in Africa).
27. Further, they pointed out that the proposed expansion of the Committee's functions risks contravening the principle of the rule of law under Article 10 of the Constitution of Kenya, 2010. This requires laws to be well-defined, predictable, regular and legally certain, to curb abuse of power, arbitrariness and illegality. The proposed expansion of the Committee's functions contravenes this principle by virtue of its:

- (a) *Vagueness*: the failure to detail, inter alia, the applicable criteria which will be used by the Committee to recommend websites to be made inaccessible, or to provide safeguards and specify enforcement mechanism contravenes the principles of the rule of law and legal certainty. This vague amendment, if enacted, will enable internet controls, leading to an environment of censorship.
- (b) *Duplication of regulatory functions*: the regulation of information and communications services rests with the Communications Authority of Kenya and the Kenya Film Classification Board. This clause will introduce legal uncertainty in regulation, thus infringing on the principles of the rule of law and legality under the Constitution of Kenya, 2010.

Committee observations and recommendations

The Committee made the following observations:

- (a) Clause 2 of the Bill seeks to amend section 6 (on the functions of the National Computer and Cybercrimes Co-ordination Committee) of the Computer Misuse and Cybercrimes Act by providing for an additional function of the Committee to recommend websites to be rendered inaccessible within the Republic;
- (b) Principle 38(1) of the Declaration of Principles of Freedom of Expression and Access to Information in Africa, adopted by the African Commission on Human and Peoples' Rights, provides as follows—
States shall not interfere with the right of individuals to seek, receive and impart information through any means of communication and digital technologies, through measures such as the removal, blocking or filtering of content, unless such interference is justifiable and compatible with international human rights law and standards. (emphasis added)
- (c) Although the Declaration provides that the right to information could be legitimately interfered with if it is justifiable and compatible with international human rights law and standards, the Committee notes that the Bill does not contravene the fundamental rights and freedoms of an individual;
- (d) In order to address concerns of vagueness of the provision, there is need to amend section 70 of the Computer Misuse and Cybercrimes Act to provide for the applicable criteria which will be used by the Committee to recommend websites to be made inaccessible.

28. The Committee therefore recommended that clause 2 be retained subject to an amendment to qualify the proposed paragraph (ja) to indicate that the websites to be rendered inaccessible are those with pornographic content.

29. The Committee further recommended that section 70 of the Computer Misuse and Cybercrimes Act be amended to provide for the applicable criteria which will be used by the National Computer and Cybercrimes Co-ordination Committee to recommend websites to be made inaccessible.

Clause 3- Insertion of new section in the Computer Misuse and Cybercrimes Act, 2018

30. **The Communications Authority of Kenya** recommended the deletion of clause 3 of the Bill. The justifications they provided for their recommendation were three-fold: one, the clause contravenes Article 33 and 34 of the Constitution of Kenya providing for the freedom of expression and freedom of media respectively; secondly, that the clause suppresses freedom of conscience and consumer rights on what adults may watch on the privacy of homes; and thirdly, demystifying pornography is difficult without breaching the rights of media, expression and access to information.

Committee observations and recommendations

The Committee made the following observations:

- (a) Clause 3 provides for a new section 24A which provides that a person shall not unknowingly publish pornography through a computer system; produce pornography for the purpose of its publication through a computer system; download, distribute, transmit, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell or offer for sale, let on hire or offer to let on hire, offer in any way, or make available in any way from a telecommunications apparatus pornography; or possess pornography in a computer system or on a computer data storage medium;
- (b) Clause 3 does not contravene Articles 33 and 34 of the Constitution providing for right to freedom of expression and freedom of the media respectively;
- (c) In the case of *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties)* [2020] eKLR [Petition 206 of 2019], the petitioner had challenged sections 5,16,17,22,23,24,27,28,29,31,32,33,34,35,36,37,38,39,40,41,48,49,50,51,52 & 53 of the Computer Misuse and Cybercrimes Act, 2018.

The court held that:

- (i) The computer misuse and Cybercrimes Act 2018 is valid and does not violate, infringe or threaten fundamental rights and freedoms and is justified under Article 24 of the constitution.
- (ii) Sections 5, 16, 17, 22, 23, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 50, 51, 52, and 53 of the Computer Misuse and Cybercrimes Act are constitutional and do not violate, infringe and/or threaten fundamental rights and freedoms.
- (d) The stakeholder proposes the deletion of the clause but does not offer alternatives of addressing the vice of pornography.

31. The Committee therefore recommended that the clause be retained.

32. In the **Joint Memorandum of Article 19 Eastern Africa, Access Now, the Bloggers Association of Kenya, Defenders Coalition, Kenya ICT Action Network and the Kenya Union of Journalists**, the group recommended the deletion of clause 3 of the Bill.

33. The Civil Society Organizations submitted that despite the statement that the Bill will not limit fundamental rights and freedoms in the Memorandum of Objects and Reasons, they indicated that the proposed ban on pornography will violate Article 24, 33 and 35 of the Constitution of Kenya, 2010.
34. They further submitted that under Article 24 of the Constitution, 2010, the State is under a duty to demonstrate that limitations on fundamental rights and freedoms are permissible in a free and democratic society. They pointed that this requires “*demonstrating the relationship between the limitation and its purpose, and show[ing] that there were no less restrictive means to achieve the purpose intended*”. They stated that this duty had not been discharged.
35. They also pointed out that under Article 33(2) of the Constitution of Kenya, 2010, the right to freedom of expression can only be legitimately restricted where it amounts to “*propaganda for war; incitement to violence; hate speech; or advocacy of hatred that— constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of discrimination specified or contemplated in Article 27(4).*” They argued that the proposed ban on pornography was not one of the permitted grounds specified under Article 33(2) of the Constitution of Kenya, 2010, and will violate the right to freedom of expression.
36. They observed that under international law, pornography is not a form of expression that may be restricted under international law. Attempts to regulate pornography are rooted in morality, culture and tradition arguments. However, they stated, the UN Human Rights Committee affirmed that limitations on rights for the protection of morals must be based on principles not deriving exclusively from a single tradition (social, philosophical or religious). They observed that this had not been demonstrated in the Bill.
37. In addition, they submitted that the proposed definition of “pornography” in the Bill relies on the term “*sexually explicit conduct*”. This vague, subjective broad definition could be used to police content, expression and communication that is perfectly legitimate, lawful and protected under Article 33 (1) (b) and (c) of the Constitution of Kenya, 2010 which provides for freedom of artistic creativity, academic freedom and freedom of scientific research. For example, ordinary citizens who post their photos and videos on social media platforms, and journalists, academics, creatives and artists who depict nudity, sex and eroticism in books, pamphlets, papers, writings, drawings, paintings, art, representations or figures- that should only be accessible to adults- risk prosecution.
38. They submitted that the use of the word “*knowingly*” when prescribing criminal conduct in the clause was not a sufficient intentionality requirement. Instructively, this clause does not rely on the more stringent requirement of “intent” or even serious harm in connection with the offence before criminal sanctions attach. Additionally, subjective *mens rea* typically requires proof or evidence of the accused person’s state of mind plus accompanying evidence that the individual understood that their action or inaction would bring about the harm in question. They therefore stated that this subjective standard lowers the threshold for culpability while raising conceivable risks of abuse by law enforcement agencies.
39. They further submitted that the “*public good*” defence provided in the proposed amendment was insufficient. The lack of any defence of reasonableness or public interest means that the proposed offence could easily be used to punish individuals engaged in entirely legitimate activities.

40. They stated that the proposed amendment seeks to introduce inordinately disproportionate sanctions. The custodial sentence of twenty-five (25) years or fines of up to KES 20 million shillings (USD 183,941), is unduly harsh and unreasonable.
41. Finally, they submitted that there was a duplication of child pornography offences under Section 24 of the Computer Misuse and Cybercrimes Act, 2018 and Section 16 of the Sexual Offences Act, 2006.

Committee observations and recommendations

The Committee made the following observations:

- (a) Clause 3 does not contravene Articles 24, 33 and 35 of the Constitution;
- (b) In the case of *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties)* [2020] eKLR [Petition 206 of 2019], the petitioner had challenged sections 5,16,17,22,23,24,27,28,29,31,32,33,34,35,36,37,38,39,40,41,48,49,50,51,52 & 53 of the Computer Misuse and Cybercrimes Act, 2018.

The court held that:

- (i) The computer misuse and Cybercrimes Act 2018 is valid and does not violate, infringe or threaten fundamental rights and freedoms and is justified under Article 24 of the constitution.
- (ii) Sections 5, 16, 17, 22, 23, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 50, 51, 52, and 53 of the Computer Misuse and Cybercrimes Act are constitutional and do not violate, infringe and/or threaten fundamental rights and freedoms.
- (c) The stakeholder proposes the deletion of the clause but does not offer alternatives of addressing the vice of pornography.
- (d) The use of the word “*knowingly*” is proper as it provides for the *mens rea* component for the offence unlike a strict liability offence which does not have a *mens rea* component.
- (e) The penalty proposed in the Bill of a fine not exceeding 20 million shillings or imprisonment for a term not exceeding 25 years is not harsh and is aimed to serve as a deterrent to would-be offenders.
- (f) There is a no duplication of child pornography offences under Section 24 of the Computer Misuse and Cybercrimes Act, 2018 and Section 16 of the Sexual Offences Act, 2006 as indicated by the stakeholder; the Computer Misuse and Cybercrimes Act,2018 provided for a consequential amendment which amended section 16 of the Sexual Offences Act, 2006 so as to distinguish between the two offences;
- (g) Although the stakeholder indicates that “*under international law, pornography is not a form of expression that may be restricted under international law*”, the stakeholder does not buttress that claim; in any case, various international instruments, including Article

19(3) of the International Covenant on Civil and Political Rights (ICCPR) provide that the rights may be subject to certain restrictions.

42. The Committee therefore recommended that the clause be retained.

Clause 4- Amendment of section 27 of the Computer Misuse and Cybercrimes Act

43. **The Communications Authority of Kenya** recommended the deletion of clause 4 of the Bill. They submitted that the clause violates freedom of conscience and religion.

Committee observations and recommendations

The Committee made the following observations:

- (a) Clause 4 of the Bill amends section 27(1) of the Computer Misuse and Cybercrimes Act (*on cyber harassment*) by providing for the following additional forms of cyber harassment that:
 - i. is likely to cause those persons to commit suicide or cause any other harm to themselves
 - ii. is likely to cause other persons to join or participate in unlicensed and extreme religious or cult activities
- (b) Clause 4 of the Bill does not violate freedom of conscience and religion as claimed by the stakeholder;
- (c) In the case of *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties)* [2020] eKLR [Petition 206 of 2019], the petitioner had challenged sections 5,16,17,22,23,24,27,28,29,31,32,33,34,35,36,37,38,39,40,41,48,49,50,51,52 & 53 of the Computer Misuse and Cybercrimes Act, 2018.

The court held that:

- (i) The computer misuse and Cybercrimes Act 2018 is valid and does not violate, infringe or threaten fundamental rights and freedoms and is justified under Article 24 of the constitution.
- (ii) Sections 5, 16, 17, 22, 23, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 50, 51, 52, and 53 of the Computer Misuse and Cybercrimes Act are constitutional and do not violate, infringe and/or threaten fundamental rights and freedoms.

44. The Committee therefore recommended that the clause be retained.

45. In the **Joint Memorandum of Article 19 Eastern Africa, Access Now, the Bloggers Association of Kenya, Defenders Coalition, Kenya ICT Action Network and the Kenya Union of Journalists**, the group recommended the deletion of clause 4 of the Bill.

46. The Civil Society Organisations submitted that clause 4 of the Bill seeks to criminalise conduct using the word “*likely*” which is vague and requires subjective interpretation, and fails to meet the threshold for causation to establish criminal liability. In turn, they observed that the proposed amendment to Section 27 of the Computer Misuse and Cybercrimes Act,

2018 contravenes the principles of legality, legal certainty and the rule of law under Article 10 of the Constitution of Kenya, 2010.

Committee observations and recommendations

The Committee made the following observations:

- (a) The use of the words “*likely to cause*” has been used in other statutes, including sections 23, 27 of the Computer Misuse and Cybercrimes Act, 2018; sections 66 (1) and 95(1)(b) of the Penal Code (Cap 63);
- (b) The use of the words “*likely to cause*” is proper and meets the threshold for causation to establish criminal liability and does not contravene the principles of legality, legal certainty and the rule of law under Article 10 of the Constitution.

47. The Committee therefore recommended that clause 4 of the Bill be retained.

Clause 5- Amendment of section 33 of the Computer Misuse and Cybercrimes Act

- 48. **The Communications Authority of Kenya** recommended that the clause be amended but should be aligned to the Prevention of Terrorism Act (No. 30 of 2012) because there is a need for consistency and alignment.
- 49. In the **Joint Memorandum of Article 19 Eastern Africa, Access Now, the Bloggers Association of Kenya, Defenders Coalition, Kenya ICT Action Network and the Kenya Union of Journalists**, the group recommended the deletion of clause 5 of the Bill.
- 50. They submitted that generally, the offence of cyber-terrorism is improperly canvassed under the Computer Misuse and Cybercrimes Act, 2018, given the existence of a similar offence under Part III of the Prevention of Terrorism Act (No. 30 of 2012). They warned that the proposed amendment risked exposing individuals to excessive criminal liability, by virtue of charges that may be raised under separate offences for the same crime.
- 51. They further submitted that the proposed sentence under clause 5 of the Bill was in direct conflict with the sentence provided under section 30A of the Prevention of Terrorism Act, despite the similarity of offences. They indicated that section 30A of the Prevention of Terrorism Act provides for a maximum of fourteen (14) years, whereas the proposed amendment proposes twenty-five (25) years.
- 52. The group also submitted that the duplication will also contravene the established rule against duplicity and the principle of fairness, which entitles a person charged with a criminal offence to “*know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence.*” This also risked preventing the court from “*hearing the charge [to] know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction*”. More importantly, this duplication would violate the rights of arrested or accused persons generally to a fair trial as guaranteed under Article 49 and 50 of the Constitution of Kenya, 2010.

53. They further submitted that section 30 of the Prevention of Terrorism Act is not properly defined and grants national security organs in Kenya, including the National Intelligence Service and the National Police Service, broad powers to restrict the right to freedom of expression under Article 33 of the Constitution of Kenya, 2010.

Committee observations and recommendations

The Committee made the following observations:

- (a) Clause 5 of the Bill amends section 33 of the Computer Misuse and Cybercrimes Act (on cyber terrorism) by providing for an additional offence of publishing or transmitting electronic messages that is likely to cause other persons to join or participate in terrorist activities.
- (b) Section 29 of the Prevention of Terrorism Act (No. 30 of 2012) provides as follows: *A person who is a member of a terrorist group or who, in committing or in instigating, preparing or facilitating the commission of a terrorist act, holds, collects, generates or transmits information for the use in the commission of a terrorist act commits an offence, and is liable, on conviction, to imprisonment for a term not exceeding thirty years.*
- (c) Section 30 of the Prevention of Terrorism Act, 2012 provides that *a person who knowingly possesses an article or any information held on behalf of a person for the use in instigating the commission of, preparing to commit or committing a terrorist act commits an offence, and is liable, on conviction, to imprisonment for a term not exceeding twenty years;*
- (d) Section 30A of the Prevention of Terrorism Act, 2012 provides for the *offence of publication of offending material*. Section 30A (1) provides that *a person who publishes or utters a statement that is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism commits an offence and is liable on conviction to imprisonment for a term not exceeding fourteen years;*
- (e) The offences proposed in clause 5 of the Bill and section 30A of the Prevention of Terrorism Act, 2012 are therefore similar.

54. The Committee therefore recommended that clause 5 of the Bill be deleted.

3.3 GENERAL COMMENTS

Joint Memorandum by Article 19 Eastern Africa, Access Now, the Bloggers Association of Kenya, Defenders Coalition, Kenya ICT Action Network and the Kenya Union of Journalists

55. Article 19 Eastern Africa, Access Now, the Bloggers Association of Kenya, Defenders Coalition, Kenya ICT Action Network and the Kenya Union of Journalists, in their joint memorandum, urged the sponsor of the Bill to immediately withdraw the Bill for the following reasons:

(a) The Bill limits the rights to freedom of expression and access to information under Articles 33 and 35 of the Constitution of Kenya, 2010 respectively

I. Outright Ban on Pornography

56. Under Article 33(2) of the Constitution of Kenya, 2010, the right to freedom of expression can only be legitimately restricted where it amounts to “*propaganda for war; incitement to violence; hate speech; or advocacy of hatred that- constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of discrimination specified or contemplated in Article 27(4)*”.

57. Based on this, the proposed ban on pornography under clause 3 of the Bill is not one of the permitted grounds specified under Article 33(2) of the Constitution of Kenya, 2010, thus violating the right to freedom of expression, online and offline. Further, pornography is not a form of expression that may be restricted under international law. If Kenya adopts this proposal, it will be in violation of its obligations under the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and African Charter on Human and Peoples’ Rights (ACHPR).

58. This proposal also violates Article 24 of the Constitution of Kenya, 2010 as the Bill has not complied with the standard thereunder. We draw attention to the *Geoffrey Andare case* where the High Court found Section 29 of the Kenya Information and Communication Act, Cap. 411A unconstitutional, on grounds that the State failed to discharge its duty under Articles 24 and 33(2) of the Constitution of Kenya, 2010. Here, the Court emphasized that:

- (i) Article 24(3) of the Constitution of Kenya, 2010 imposed a duty on the State to demonstrate that limitations on the right to freedom of expression was permissible in a free and democratic society. This requires ‘demonstrating the relationship between the limitation and its purpose, and show[ing] that there were no less restrictive means to achieve the purpose intended.’
- (ii) Article 24 of the Constitution of Kenya, 2010 qualifies the presumption of constitutionality, with respect to any law which limits or intends to limit fundamental rights and freedoms.
- (iii) Any limitation on the right to freedom of expression which falls outside the scope of the limitations permitted under Article 33(2) of the Constitution of Kenya, 2010, using vague, imprecise and undefined terms, limits this right to a level that the Constitution did not contemplate or permit, leading to a finding of unconstitutionality.

II. *Rendering Websites Inaccessible*

59. The proposal under clause 2 of the Bill to expand the National Computer and Cybercrimes Coordination Committee's functions to "*recommend that websites be rendered inaccessible in the Republic of Kenya*" will interfere with the rights to freedom of expression and access to information, both online and offline. In turn, the enforcement of these recommendations will violate Articles 33 and 35 of the Constitution of Kenya, 2010, and will undermine ongoing efforts by state and non-state actors to expand access to communication platforms and digital technologies in Kenya.
60. Under Principle 38 of the Declaration of Principles on Freedom of Expression and Access to Information in Africa, States are prohibited from interfering with individuals' right to "*seek, receive and impart information through any means of communication and digital technologies, through measures such as the removal, blocking or filtering of content, unless this interference is justifiable and compatible with international human rights law and standards*". UN experts and high-level officials, including the UN Secretary-General, have also formally affirmed that "*blanket Internet shutdowns and generic blocking and filtering of services are considered by United Nations human rights mechanisms to be in violation of international human rights law*".

(b) The Bill violates the principle of the rule of law, under Article 10 of the Constitution of Kenya, 2010

I. Legally Uncertain and Unenforceable Definitions

61. The principles of legality and legal certainty are integral ingredients of the principle of the rule of law enshrined in Article 10 of the Constitution of Kenya, 2010. The principle of the rule of law requires laws, especially those that create criminal offence, to be well-defined, predictable, regular and certain, to curb abuse of power, arbitrariness and illegality.
62. Under clause 2 of the Bill, the proposed expansion of the Committee's functions is vague, grants virtually limitless powers of recommendation to the Committee, introduces enforcement challenges, and fails to meet the legal certainty and legality tests under the Constitution of Kenya, 2010, and under international law. Specifically, this proposed amendment fails to specify: what criteria will be used by the Committee to recommend websites to be made inaccessible; whether the recommendations must adhere to the permissible limitations of freedom of expression under international law and the Constitution of Kenya, 2010; who the Committee recommends to; which entities (private and/or State) will be tasked with executing and/or implementing the Committee's recommendations to render websites inaccessible; whether liability will be imposed on communications intermediaries; whether these recommendations, and/or their implementation, will be subject to oversight from an independent body, such as the judiciary; and what due process guarantees or remedies will be available to individuals and communities affected by the implementation of these recommendations.
63. Lastly, the proposed expansion of the Committee's functions will result in a duplication of already existing functions possessed by two regulatory bodies, namely the Communications Authority of Kenya and the Kenya Film Classification Board. This duplication risks introducing legal uncertainty into the regulation of communications services in Kenya, which

will infringe on the principles of the rule of law and legality under the Constitution of Kenya, 2010.

64. Under clause 3 of the Bill, the proposed definition of “*pornography*” relies on the term “*sexually explicit conduct*” which is vague, extremely subjective and fails to lend legal certainty. This sweeping definition bestows largely unfettered discretion which could be used to prosecute individuals in the creative and artistic communities who use nudity, depictions of sex or eroticism- that should only be accessible to adults- to express their artistic, journalistic and academic freedoms.
65. This provision could also be used to police content of a sexual nature—that should only be accessible to adults—that is legitimate and lawful, and protected under the right to free expression under Article 33(1) (b) and (c) of the Constitution of Kenya, 2010 which provides for freedom of artistic creativity, academic freedom and freedom of scientific research. Based on this, the proposed amendment contravenes the principle of the rule of law and fails to meet the legal certainty and legality tests under the Constitution of Kenya 2010, and under international law.
66. Clause 4 of the Bill seeks to criminalise conduct using the word ‘likely’ which is vague, requires subjective interpretation, fails to meet the threshold for causation to establish criminal liability, and contravenes the principles of legality, legal certainty and the rule of law. Further, this proposed expansion risks entrenching existing uncertainty and illegality latent in the cyber-harassment provision under Section 27 of the Computer Misuse and Cybercrimes, 2018.

(c) The Bill introduces legal provisions that duplicate existing provisions in other laws, raising the risk of excessive criminal liability

67. The Bill introduces amendments to the Computer Misuse and Cybercrimes Act, 2018 which duplicate existing provisions in other laws. For example, clause 5 of the Bill duplicates a similar provision in Section 27 of the Prevention of Terrorism Act. Likewise, clause 3 of the Bill replicates a similar provision in Section 181 of the Penal Code. This duplication raises the risk that individuals will be charged under separate offences for the same crime, enhancing the risk of excessive criminal liability.
68. Further, this overlap contravenes the established rule against duplicity and the principle of fairness, which entitles a person charged with a criminal offence to “*know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence*”. This also risks preventing the court from “*hearing the charge [to] know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction*”. More importantly, they would violate the rights of arrested or accused persons generally to a fair trial as guaranteed under Articles 49 and 50 of the Constitution of Kenya, 2010.
69. Further, we re-affirm that the offences of cyber-terrorism and child pornography are improperly canvassed under the Computer Misuse and Cybercrimes Act, 2018, given similar offences under Part III of the Prevention of Terrorism Act and Section 16 of the Sexual Offences Act, respectively.

(d) The Computer Misuse and Cybercrimes Act, 2018 is Sub Judice

70. The Computer Misuse and Cybercrimes Act, 2018 is subject to ongoing legal proceedings. In February 2020, the High Court upheld the constitutional validity of twenty-six (26) impugned provisions in the Computer Misuse and Cybercrimes Act, 2018, but this matter is pending appeal at the Court of Appeal. In October 2020, the High Court directed the Speakers of the two Houses of Parliament to regularise the Computer Misuse and Cybercrimes Act, 2018 particularly on whether it was a Bill concerning counties, lest a finding of nullification takes effect. This process is still pending and will lapse in July 2021.

(e) The cost of implementing the Bill will be an excessive burden on taxpayers

71. The cost of legislative processes is borne by Kenyan taxpayers. The stakeholder urged the Committee to ensure that taxpayer's contributions are spent prudently and wisely, by refraining from instituting unnecessary and duplicitous legislative amendment processes, noting the current economic situation in Kenya.

(f) The Computer Misuse and Cybercrimes Act, 2018: A tool of violation of the Bill of Rights, Chapter Four (4) of the Constitution of Kenya, 2010

72. The undersigned organisations have monitored and observed an increase in the frequency of one-off and repeat arrests relying on overbroad, vague and subjective content-related offences under the Computer Misuse and Cybercrimes Act, 2018. These incidents have revealed violations and infringements of, and interferences with, individuals' rights to freedom of expression and access to information and their freedoms of assembly and association, both online and offline.

73. For example, in 2020 alone, reports revealed that this law was used to censor information deemed 'false', despite falsity of information not being a permissible limitation of the right to freedom of expression under Article 33 of the Constitution of Kenya, 2010 and under international law. The following violations, infringements and interferences were documented:

- (i) The use of Sections 22 and 23 of the CMCA, 2018 prohibiting false publications and the publication of false information to target at least seven (7) internet users, respectively. This include digital technology users, such as students, bloggers, citizen reporters, content creators, journalists, and Members of Parliament. These users created and uploaded online content, including websites and posts, commenting on Kenya's political situation, detailing scandals, or countering the government's official Covid-19 narrative.
- (ii) The arbitrary misuse of Sections 22 and 23 of the CMCA, 2018 by one arm of the National Police Service, namely the Directorate of Criminal Investigations (DCI). Reports indicate that DCI officers pressured individuals in custody to either edit the content of articles or pull-down articles, in their individual capacity or via website administrators.

74. Given the foregoing, we recommend that you withdraw the Computer Misuse and Cybercrimes (Amendment) Bill, 2021 in its entirety; and to initiate meaningful consultations with a diverse and representative group of stakeholders to align the Computer Misuse and Cybercrimes Act, 2018 with national and international law and standards.

II. Presentation by the Sponsor of the Bill

The sponsor of the Bill appeared before the Committee and submitted as follows—

75. The Computer Misuse and Cybercrimes (Amendment) Bill, 2021 (National Assembly Bill No. 11 of 2021) seeks to amend the Computer Misuse and Cybercrimes Act No. 5 of 2018.

Background

76. Over the past years, access and usage of internet has proliferated all over the world and created a global village where by a click of a mouse one is able to access a diversity of internet content.
77. The proliferation of technology has brought both opportunities in terms of technological advancement and business opportunities and technology has proved very useful as the world continues to battle the COVID-19 Pandemic.
78. Even our own Parliament has been forced to embrace technology in the manner in which it conducts its activities including Committee meetings. The use of internet and technology has also grown as schools and religious institutions move towards the use of online platforms.
79. As a result, several vices have cropped up in the society among the young people these include pornography, unlicensed and extreme religious activities and cults, luring of young people to commit suicide and use of online platforms such as kids online learning platforms to lure kids into terrorism and extremism. To this end, this Bill seeks to address these vices.

Pornography

80. There has been an increase in internet content that shares nudity and pornography among the young people. Such content is now easily available in the internet exposing many of our children to moral decadency.
81. Unless this is regulated, the lives of innocent Kenyan children shall be exposed to inappropriate sexual content. This is made worse by the fact that the age ratings that are adopted and filtered out internationally vary from one country to another and what may be considered morally appropriate in one country may be morally wrong in Kenya.
82. This calls for the need to regulate what is acceptable accessible content in order to preserve our public morality, cultural and religious values that form the fabric of our country.
83. In our country, although the Computer Misuse and Cybercrimes Act, 2018 and the Sexual Offences Act, 2011 have attempted to legislate on child pornography, many young people continue to have unlimited access to pornography indicating the need to further tighten the law to ensure that pornography is categorized as blocked content and moreover put-up check devices such as age-appropriate filters to such content.

Unlicensed and extreme religious activities and cults

84. On several social media platforms, there is a sudden increase of religious activities and cult like organizations following the COVID-19 restrictions against holding physical religious meetings. Unfortunately, this remains unregulated and as a result a crafty person may prey on the young people to join cults, to believe in weird religious activities thereby completely

brain-washing the youths. If this remains unchecked, soon a whole generation of young people will have joined extremist and cultish religious groups.

Luring of young people to commit suicide

85. With COVID-19 Pandemic there has been an increase in the use of online platforms on schools online learning and e-commerce. Unfortunately, fraudulent persons have taken advantage of this using the online platforms to incite young people to commit suicide. This again must be regulated as it is not only dangerous but may lead to loss of lives of many promising young people.

Terrorism and Extremism

86. It is also notable that access to internet has given an opportunity to terrorists and extremists to communicate, collaborate and convince young people to join and participate in terrorist activities and hence the common phrase 'radicalization'. Again, although the Prevention of Terrorism Act, 2012 attempted to legislate on radicalization, there is need to further amend the law to prohibit accessing or sharing internet content that promotes terrorism.

Comparable jurisdictions

87. Looking at comparable jurisdictions that have been able to successfully regulate and safeguard public morality such as the UAE, the country has a list of prohibited content and the Internet Service providers in UAE are obliged to block access to websites and webpages that contain content that fall under the prohibited content categories.

88. Additionally, websites that are providing their services and targeting users in UAE are advised to respect the public morality in the country, as further detailed in the prohibited content categories, to avoid denial of access to their content and services. It is notable that accessing or sharing internet content that promotes pornography, nudity and anything that promotes immoral practices is prohibited in the UAE.

89. Countries such as the United States are also moving towards regulation while in the past, they had embraced the approach of de-regulation to foster technological advancement.

90. The Trump Administration had banned or rather was contemplating to ban the app *tik tok* due to security concerns. In the wake of the ISIS threat in Europe many European Countries are also tightly regulated in the fight against terrorism and radicalization of the youth.

91. It is therefore imperative that as a country we assess the risks posed by the technology and find ways of protecting the young people from vices such as pornography due to proliferation of social medial platforms that are largely unregulated.

92. As it is presently what happens if someone publishes pornography? What happens if someone causes others to commit suicide, to join cults, extreme religious groups or participate in terrorism activities? These are the questions that my Bill proposes to answer by regulating all these scenarios.

93. This is a very progressive Bill for anyone who cares for the young people of this country, the public morality, public security and safety of the society. This bill will protect public morality, security and safety in our country.

85. It is also desirable that access to internet has given an opportunity to monitor and restricts in communication collaborate and convince young people to join and participate in terrorist activities and hence the common phrase 'radicalization'. Again, although the prevention of Terrorism Act 2011 enacted to legislate on radicalization, there is need to further amend the law to prohibit accessing or sharing internet content that promotes terrorism.

87. Looking at comparable jurisdictions that have been able to successfully regulate and safeguard public morality such as the UAE, the country has a lot of prohibited content and the internet service providers in UAE are obliged to block access to websites and webpages that contain content that fall under the prohibited content categories.

88. Additionally, it enables that we providing their servers and hosting hosts in UAE are advised to respect the public morality in the country, as further detailed in the proposed content categories to avoid denial of access to their content and services. It is notable that accessing or sharing internet content that promotes pornography, nudity and anything that promotes immoral practices is prohibited in the UAE.

89. Countries such as the United States and also many law and regulation wife in the past 15 years had embraced the approach of de-vegetation to foster technological advancement.

90. The Group Administration had banned or rather was contemplating to ban the app for its to security concerns. In the wake of the ISIS threat in Europe many European Countries are also tightly regulated in the fight against terrorism and radicalization of the youth.

91. It is therefore imperative that as a country we assess the risks posed by the technology and find ways of protecting the young people from risks such as pornography, due to proliferation of social media platforms that are largely unregulated.

92. As it is currently what happens if someone publishes pornography? What happens if someone causes harm to someone outside to join cults, extreme religious groups or participate in terrorist activities? These are the questions that the Bill proposes to answer by regulating all these scenarios.

CHAPTER FOUR

4.0 COMMITTEE RECOMMENDATION

The Committee, having considered the Computer Misuse and Cybercrimes (Amendment) Bill, 2021 (National Assembly Bills No. 11 of 2021), recommends that the House **approves the Bill with amendments** as proposed in the schedule.

5.0 SCHEDULE OF PROPOSED AMENDMENTS

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

CLAUSE 2

THAT, Clause 2 of the Bill be amended in the proposed new paragraph (ja) by inserting the words “containing pornographic material” immediately after the word “websites”.

Justification: The additional function in the proposed amendment assigned to the National Computer and Cybercrimes Co-ordination Committee of recommending websites to be rendered inaccessible within the Republic is not clear. The amendment seeks to clarify that this will be in relation to websites containing pornographic material.

CLAUSE 5

THAT, Clause 5 of the Bill be deleted.

Justification: Section 30A of the Prevention of Terrorism Act, 2012 provides for the *offence of publication of offending material*. Section 30A (1) provides that *a person who publishes or utters a statement that is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism commits an offence and is liable on conviction to imprisonment for a term not exceeding fourteen years*. The offences proposed in clause 5 of the Bill and section 30A of the Prevention of Terrorism Act, 2012 are therefore similar.

NEW CLAUSE

THAT, the Bill be amended by inserting the following new clause immediately after Clause 5—

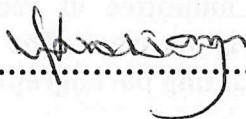
Insertion of new section
in No. 5 of 2018.

5A. Section 70 of the principal Act is amended in subsection (2) by inserting the following new paragraph immediately after paragraph (f)—

“(fa) the procedure and criteria to be applied in recommending websites containing pornographic material to be made inaccessible;”

Justification: The proposed amendment is related to the Committee’s amendment to Clause 2 of the Bill. The amendment seeks to provide in regulations the procedure and criteria to be applied in recommending websites containing pornographic material to be made inaccessible.

SIGNED



DATE

03/08/2021

**HON. WILLIAM KISANG, M.P
CHAIRPERSON
DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND
INNOVATION**

ANNEXURE 1

COPY OF THE ADOPTION LIST

APPENDIX I








COPY OF THE ADOPTION LIST

DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION

12TH PARLIAMENT – FIFTH SESSION (2021)

ADOPTION OF THE REPORT ON THE CONSIDERATION OF THE COMPUTER MISUSE AND CYBERCRIMES (AMENDMENT) BILL, 2021

We, the undersigned, hereby affix our signatures to this Report to affirm our approval

	HON. MEMBER	SIGNATURE
1.	Hon. Kisang, William MP (Chairperson)	ZOOM
2.	Hon. Jane Wanjuki Njiru, MP (Vice Chairperson)	ZOOM
3.	Hon. George Theuri , M.P.	
4.	Hon. Alfah, O. Miruka, M.P.	
5.	Hon. Annie Wanjiku Kibeh, M.P.	ZOOM
6.	Hon. Joshua Kimilu, Kivinda, M.P.	ZOOM
7.	Hon. Marwa Kitayama Maisori, M.P.	
8.	Hon. Mwambu Mabongah, M.P.	ZOOM
9.	Hon. Maritim Sylvanus, M.P.	ZOOM
10.	Hon. Mwangaza Kawira, M.P.	ZOOM
11.	Hon. Jonah Mburu, M.P.	
12.	Hon. Gertrude Mbeyu Mwanyanje, M.P.	ZOOM
13.	Hon. Victor Munyaka , M.P.	
14.	Hon. (Eng). Mark Nyamita Ogola, M.P.	
15.	Hon. Anthony Githiaka Kiai , M.P.	ZOOM
16.	Hon. Erastus Nzioka Kivasu, M.P.	ZOOM
17.	Hon. Godfrey Osotsi, Atieno , M.P.	ZOOM
18.	Hon. Innocent Momanyi, Obiri, M.P.	
19.	Hon. Anthony, Tom Oluoch, M.P.	ZOOM

ANNEXURE 2

MINUTES OF THE COMMITTE

APPENDIX 3

MINUTES OF THE COMMITTEE

MINUTES OF THE 29TH SITTING OF THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION & INNOVATION HELD VIRTUALLY ON TUESDAY 3RD AUGUST, 2021 AT 12.00PM

PRESENT

1. Hon. William Kisang Kipkemoi, M.P. - Chairperson
2. Hon. Jane Wanjuki Njiru, M.P. -Vice- Chairperson
3. Hon. Mwambu Mabongah, M.P
4. Hon. Godfrey Osotsi Atieno, M.P
5. Hon. Gertrude Mbeyu Mwanyanje, M.P
6. Hon. Anthony Githiaka Kiai, M.P
7. Hon. Anthony Oluoch, M.P.
8. Hon. Mwangaza Kawira, M.P
9. Hon. Joshua Kimilu Kivinda, M.P
10. Hon. Erastus Nzioka Kivasu, M.P
11. Hon. Annie Wanjiku Kibeh, M.P
12. Hon. Maritim Sylvanus, MP

ABSENT WITH APOLOGY

1. Hon. Marwa Kitayama Maisori, M.P
2. Hon. (Eng.). Mark Nyamita, M.P
3. Hon. Jonah Mburu, M.P
4. Hon. George Theuri, M.P
5. Hon. Victor Munyaka, MP
6. Hon. Alfah O. Miruka, M.P
7. Hon. Innocent Momanyi Obiri, M.P

THE SECRETARIAT

1. Mr. Daniel Mutunga - Principal Clerk Assistant I
2. Ms. Hellen Kina - Clerk Assistant II
3. Ms. Ella Kendi - Clerk Assistant II
4. Mr. Salem Lorot - Legal Counsel
5. Dr. Donald Manyala - Research Officer II
6. Ms. Winnie Kulei - Research Officer I

AGENDA

1. Preliminaries
 2. Confirmation of the Minutes
 3. Adoption of the draft reports on consideration of the Computer Misuse and Cybercrimes (Amendment) Bill, 2021 and the report on ICT Practitioners Bill, 2020
 4. Adjournment / Date of the Next Meeting
-

MIN.NO/NA/CII/2021/121: PRELIMINARIES

The Chairperson called the meeting to order at ten minutes past twelve o'clock followed by a word of prayer.

MIN.NO/NA/CII/2021/122: CONFIRMATION OF THE MINUTES OF THE PREVIOUS SITTING

The agenda was deferred to the next sitting agenda was deferred.

MIN.NO/NA/CII/2021/123: ADOPTION OF THE DRAFT REPORT ON THE CONSIDERATION OF THE COMPUTER MISUSE AND CYBERCRIMES (AMENDMENT) BILL, 2021

The Committee considered the aforementioned draft report and adopted it with the following amendments having been proposed by Hon. Sylvanus Maritim, MP and seconded by Hon. Mwambu Mabongah,MP.

That the House approves the Bill with the following amendments; -

CLAUSE 2

THAT, Clause 2 of the Bill be amended in the proposed new paragraph (ja) by inserting the words "containing pornographic material" immediately after the word "websites".

Justification: The additional function in the proposed amendment assigned to the National Computer and Cybercrimes Co-ordination Committee of recommending websites to be rendered inaccessible within the Republic is not clear. The amendment seeks to clarify that this will be in relation to websites containing pornographic material.

CLAUSE 5

THAT, Clause 5 of the Bill be deleted.

Justification: Section 30A of the Prevention of Terrorism Act, 2012 provides for the offence of publication of offending material. Section 30A (1) provides that a person who publishes or utters a statement that is likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism commits an offence and is liable on conviction to imprisonment for a term not exceeding fourteen years. The offences proposed in clause 5 of the Bill and section 30A of the Prevention of Terrorism Act, 2012 are therefore similar.

NEW CLAUSE

THAT, the Bill be amended by inserting the following new clause immediately after Clause 5—

Insertion of new section in No. 5 of 2018.

5A. Section 70 of the principal Act is amended in subsection (2) by inserting the following new paragraph immediately after paragraph (f)—

“(fa) the procedure and criteria to be applied in recommending websites containing pornographic material to be made inaccessible;”

Justification: The proposed amendment is related to the Committee’s amendment to Clause 2 of the Bill. The amendment seeks to provide in regulations the procedure and criteria to be applied in recommending websites containing pornographic material to be made inaccessible.

MIN.NO/NA/CII/2021/124:

ADOPTION OF THE DRAFT REPORT ON THE CONSIDERATION OF THE ICT PRACTITIONERS BILL, 2020

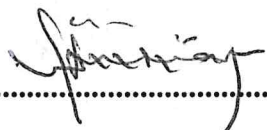
The Committee resolved to hold another meeting on Wednesday 4th August, 2021 at 11.00am for the sponsor of the Bill, Hon. Godfrey Osotsi, MP to respond to concerns raised in the memoranda.

MIN.NO/NA/CII/2021/125:

ADJOURNEMENT AND THE DATE OF THE NEXT MEETING

There being no other business, the meeting was adjourned at one o’clock. The next meeting to be held tomorrow Wednesday 4th August, 2021 at 11.00am.

SIGNED.....



DATE.....

03/08/2021

HON. WILLIAM KISANG, MP

- CHAIRPERSON

ANNEXURE 3

**COPY OF PUBLIC PARTICIPATION
ADVERTISEMENTS IN THE LOCAL DAILIES**

APPENDIX 1

ADVERTISEMENTS BY THE LOCAL BODIES
COPY OF PUBLIC PARTICIPATION



REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY
TWELFTH PARLIAMENT - FIFTH SESSION

In the Matter of Article 118(1) (b) of the Constitution

And

In the Matter of Consideration by the National Assembly of;

- | | |
|--|--|
| <ol style="list-style-type: none"> 1. The Higher Education Loans Board (Amendment) Bill, 2020 (National Assembly Bill No. 37 of 2020); 2. The Pharmacy and Poisons (Amendment) Bill (National Assembly Bill No. 1 of 2021); 3. The Health (Amendment) Bill (National Assembly Bill No. 14 of 2021); 4. The National Electronic Single Window System Bill, 2021 (National Assembly Bill No. 15 of 2021); 5. The Coffee Bill, 2021 (National Assembly Bill No. 17 of 2021); 6. The Community Groups Registration Bill (National Assembly Bill No. 20 of 2021); 7. The Kenya Roads (Amendment) Bill, 2021 (National Assembly Bill No. 13 of 2021); | <ol style="list-style-type: none"> 8. The Computer Misuse and Cybercrimes (Amendment) Bill (National Assembly Bill No. 11 of 2021) 9. The Kenya Industrial Research and Development Institute Bill (National Assembly Bill No. 44 of 2021); 10. The National Construction Authority (Amendment) Bill, 2020 (National Assembly Bill No. 45 of 2020); 11. The Kenya Deposit Insurance (Amendment) Bill (National Assembly Bill No. 43 of 2020); 12. The Public Procurement and Asset Disposal (Amendment) (No. 3) Bill (National Assembly Bill No. 49 of 2020); 13. The Irrigation (Amendment) Bill (National Assembly Bill No. 12 of 2021); 14. The Tax Appeals Tribunal (Amendment) Bill (National Assembly Bill No. 19 of 2021). |
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SUBMISSION OF MEMORANDA

Pursuant to Article 118(1) (b) of the Constitution and Standing Order 127(3) of the National Assembly Standing Orders, the Clerk of the National Assembly hereby invites members of the public and relevant stakeholders to submit memoranda on the aforementioned Bills, whose objects are as follows;

The Higher Education Loans Board (Amendment) Bill, 2020 (National Assembly Bill No. 37 of 2020) sponsored by Hon. Paul Mwirigi, MP, Igembe South Constituency, seeks to amend the Higher Education Loans Board Act in order to provide that a loanee shall commence the repayment of his or her loan once he or she secures employment. The amendment is meant to cushion unemployed graduates from being charged interest on the loan before they have secured employment.

The Pharmacy and Poisons (Amendment) Bill, 2021 (National Assembly No 1 of 2021) sponsored by Hon. Alfred Keter, MP, Nandi Hills Constituency, seeks to amend the Pharmacy and Poison Act to prohibit the sale or dispensing of medicine without written prescription from a registered medical practitioner.

The Health (Amendment) Bill, 2021 (National Assembly No 14 of 2021) sponsored by Hon. Moses Mwambu Vekesa Mabonga, MP, Bumula Constituency, seeks to amend the Health Act No 21 of 2017 to provide that the National government and county governments shall, in consultation through the existing inter-governmental relations mechanism establish regional cancer centers; to make it an offence for a person in-charge of a Public Health facility to demand or permit of payments of advance medical fees as pre-condition for the provision of medical services; to make it an offence for person in-charge of a Public Health facility to detain a body of deceased person as means of enforcing settlement of outstanding medical bills and to provide for regulation on levying of charges for the practice of conventional medical practice.

The National Electronic Single Window System Bill, 2021 (National Assembly Bill No. 15 of 2021) seeks to provide for the establishment and operationalization of the National Electronic Single Window System in order to facilitate trade, the establishment of the Kenya Trade Network Agency, to provide for electronic transactions, and for connected purposes.

The Coffee Bill, 2021 (National Assembly Bill No. 17 of 2021) seeks to provide for development, regulation and promotion of the Coffee Industry, provide for establishment, powers and functions of the Coffee Board of Kenya.

The Community Groups Registration Bill, 2021 (National Assembly Bill No.20 of 2021) seeks to provide a regulatory framework for the registration and regulation of community groups and connected purposes.

The Kenya Roads (Amendment) Bill, 2021 (National Assembly Bill No. 13 of 2021) sponsored by Hon. David Kosgey, MP, Pokot South Constituency, seeks to amend the Kenya Roads Act (No. 2 of 2007) to align the Act with the provisions of the Constitution with regard to the auditing functions of the Office of the Auditor-General. The Act currently refers to the defunct office of the Controller of Budget and the Auditor-General. The Bill further seeks to amend the term of office of and the qualification for the Director-General of the Kenya Roads Board appointed under the Act.

The Computer Misuse and Cybercrimes (Amendment) Bill, 2021 (National Assembly Bill No. 11 of 2021) sponsored by Hon. Aden Bare Duale, MP, Garissa Township Constituency, seeks to amend The Computer Misuse and Cybercrimes Act, 2018 to provide for the prohibition against the sharing of pornography through the Internet and prohibit use of electronic mediums to promote terrorism, extreme religious and cult activities.

The Kenya Industrial Research and Development Institute Bill, 2021 (National Assembly Bill No. 44 of 2021) seeks to establish the Kenya Industrial Research and Development Institute, and for connected purposes. It further provides for the promotion of research, development, technology and innovation in industrial and allied technologies, and for initiation and support of industrial development.

The National Construction Authority (Amendment) Bill, 2020 (National Assembly Bill No. 45 of 2020) sponsored by Hon. David Gikaria, MP, Nakuru Town East Constituency, seeks to amend the National Construction Authority Act, No. 41 of 2011 to ensure women, youth and persons living with disabilities with start-up businesses to apply to be registered as contractors under category six, seven and eight are exempted from paying the prescribed fee. The amendment seeks to recognize women, youth and persons living with disabilities as marginalized groups and to cushion them from the burden of paying registration fees.

The Kenya Deposit Insurance (Amendment) Bill, 2020 (National Assembly Bill No. 43 of 2020) sponsored by Hon. Abdul Rahim Dawood, MP, Imenti North Constituency, seeks to amend section 28 of the Kenya Deposit Insurance Act, 2012 in order to increase the maximum amount a person with an account with an institution under liquidation is to be paid by the Kenya Deposit Insurance Corporation. It further seeks to delete the provision limiting the maximum amount a person is to be paid by the Corporation despite having different accounts.

The Public Procurement and Asset Disposal (Amendment) (No. 3) Bill, 2020 (National Assembly Bill No. 49 of 2020) sponsored by Hon. Benjamin Gathiru Mwangi, MP, Embakasi Central Constituency, seeks to amend the Public Procurement and Asset Disposal Act, 2015 to enhance the amount for tenders where Kenya citizens are given exclusive preference from the sum of five hundred million shillings to twenty billion shillings. This is to protect the Kenyan traders from foreign competitors.

The Irrigation (Amendment) Bill, 2021 (National Assembly Bill No. 12 of 2021) seeks to amend the Act by expanding the administration of irrigation matters to include management and regulation of irrigation matters. The Bill further seeks to amend the Act to harmonize the provision of the Irrigation Act, Water Act and Water Resources Management Rules, 2007.

The Tax Appeals Tribunal (Amendment) Bill (National Assembly Bill No. 19 of 2021) seeks to amend the Tax Appeals Tribunal Act, 2013 to address the challenges affecting the performance of the Tax Appeals Tribunal to facilitate the expedition of tax disputes in the country.

Pursuant to Standing Order 127(1) of the National Assembly Standing Orders, the Bills proposing amendments to the various Acts of Parliament are committed to Departmental Committees of the National Assembly as set out in the schedule hereunder:

SCHEDULE		
No.	BILL	COMMITTEE
1.	The Higher Education Loans Board (Amendment) Bill, 2020 (National Assembly Bill No. 37)	Education and Research
2.	The Pharmacy and Poisons (Amendment) Bill (National Assembly No 1 of 2021)	Health
3.	The Health (Amendment) Bill (National Assembly No 14 of 2021)	Health
4.	The Computer Misuse and Cybercrimes (Amendment) Bill (National Assembly Bill No. 11 of 2021)	Communication, Information and Innovation
5.	The Coffee Bill, 2021 (National Assembly Bill No. 17 of 2021)	Agriculture and Livestock
6.	The Community Groups Registration Bill (National Assembly Bill No.20 of 2021)	Labour and Social Welfare
7.	Kenya Industrial Research and Development Institute Bill (National Assembly Bill No. 44 of 2021);	Trade, Industry and Cooperatives
8.	The Kenya Roads (Amendment) Bill, 2021 (National Assembly Bill No. 13 of 2021)	Transport, Public Works and Housing
9.	The National Construction Authority (Amendment) Bill, 2020 (National Assembly Bill No. 45 of 2020)	Transport, Public Works and Housing
10.	The Kenya Deposit Insurance (Amendment) Bill (National Assembly Bill No. 43 of 2020)	Finance and National Planning
11.	The Public Procurement and Asset Disposal (Amendment) (No. 3) Bill (National Assembly Bill No. 49 of 2020)	Finance and National Planning
12.	The National Electronic Single Window System Bill, 2021 (National Assembly Bill No. 15 of 2021)	Finance and National Planning
13.	The Tax Appeals Tribunal (Amendment) Bill (National Assembly Bill No. 19 of 2021)	Finance and National Planning
14.	Irrigation (Amendment) Bill (National Assembly Bill No. 12 of 2021)	Environment and Natural Resources

The Bills were read a First Time pursuant to Standing Order 127(3) on 8th and 9th June 2021. Copies of the Bills are available at the National Assembly Table Office, or on www.parliament.go.ke/the-national-assembly/house-business/bills.

The memoranda may be addressed to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk, Main Parliament Buildings, Nairobi; or emailed to clerk@parliament.go.ke; to be received on or before Friday 18th June, 2021, at 5.00 pm.

MICHAEL SIALAI, CBS
CLERK OF THE NATIONAL ASSEMBLY
11th June 2021



ಕರ್ನಾಟಕ ಸರ್ಕಾರ
 ಇಲಾಖಾ ಸಚಿವರು
 ಸರ್ಕಾರಿ ಕಚೇರಿ, ಬೆಂಗಳೂರು

ಬೆಂಗಳೂರು, 15/05/2024

ಶ್ರೀ/ಶ್ರೀಮತಿ/ಶ್ರೀಮನ್/ಶ್ರೀಮತೀ
 ಹೆಸರು
 ವಿಳಾಸ
 ಪಿ.ಸಿ.ಎಂ.ಎಸ್. ಸಂಖ್ಯೆ
 ತಾಲ್ಲೂಕು
 ಜಿಲ್ಲೆ

ಶ್ರೀ/ಶ್ರೀಮತಿ/ಶ್ರೀಮನ್/ಶ್ರೀಮತೀ
 ಹೆಸರು
 ವಿಳಾಸ
 ಪಿ.ಸಿ.ಎಂ.ಎಸ್. ಸಂಖ್ಯೆ
 ತಾಲ್ಲೂಕು
 ಜಿಲ್ಲೆ

ಇವುಗಳ ಮೇಲೆ ದಯಮಾಡಿ ದೃಢೀಕರಣ ನೀಡಿ ಕಡತಿಸಿ ಕೊಡುವಂತೆ ಕೋರಲಾಗಿದೆ.

ಇವುಗಳ ಮೇಲೆ ದಯಮಾಡಿ ದೃಢೀಕರಣ ನೀಡಿ ಕಡತಿಸಿ ಕೊಡುವಂತೆ ಕೋರಲಾಗಿದೆ.

ಇವುಗಳ ಮೇಲೆ ದಯಮಾಡಿ ದೃಢೀಕರಣ ನೀಡಿ ಕಡತಿಸಿ ಕೊಡುವಂತೆ ಕೋರಲಾಗಿದೆ.

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ಇವುಗಳ ಮೇಲೆ ದಯಮಾಡಿ ದೃಢೀಕರಣ ನೀಡಿ ಕಡತಿಸಿ ಕೊಡುವಂತೆ ಕೋರಲಾಗಿದೆ.

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ಇವುಗಳ ಮೇಲೆ ದಯಮಾಡಿ ದೃಢೀಕರಣ ನೀಡಿ ಕಡತಿಸಿ ಕೊಡುವಂತೆ ಕೋರಲಾಗಿದೆ.

ANNEXURE 4

**COPIES OF PUBLIC AND STAKEHOLDER
MEMORANDA**

ANNEXURE 4

MEMORANDUM
OFFICE OF THE DIRECTOR
GENERAL OF CUSTOMS AND EXCISE

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COMMENTS ON THE COMPUTER MISUSE AND CYBERCRIMES (AMENDMENT) BILL, 2021

Introduction- An Act of Parliament to amend the Computer Misuse and Cybercrimes Act.

No.	Section	Provision	Recommendations	Justification
1.	Section 2	Section 6 is amended in sub-section (1) by inserting the following new paragraph immediately after paragraph (i) “(ja) recommend websites to be rendered inaccessible within the Republic”	We propose deletion of this section.	Contravention of Freedom of expression, access to information and Intellectual Property rights inherent in the website(copyright and trademarks) Role of CA and KECIRT as representatives in the steering committee. Unless it falls within the exemptions to the rights or the contents of the website are a threat to national security or might equate to subversion of National Security.
2.	Section 3	The principal Act is amended by inserting the following new section immediately after Section 24 - Pornography. 24A	We propose the deletion of this section.	It contravenes Article 33 and 34 of the Constitution of Kenya i.e. Freedom of expression and Freedom of media.

				<p>Suppresses freedom of conscience and consumer rights on what adults may watch on the privacy of homes.</p> <p>Demistifying pornography is difficult without breaching the rights of media ,expression and access to information.</p> <p>Violates freedom of conscience and religion</p>
<p>3.</p>	<p>Section 4</p>	<p>Section 27 on cyber harassment of the principal Act is amended in sub-section (1) by inserting the following new paragraphs immediately after paragraph (a)-</p> <p>“(aa) Is likely to cause those persons to commit suicide or cause any other harm to themselves;</p> <p>(ab) Is likely to cause other persons to join or participate in unlicensed or extreme religious or cult activities”</p>	<p>Proposal is to delete</p>	



**COMMUNICATIONS
AUTHORITY OF KENYA**

<p>4.</p>	<p>Section 5</p>	<p>Section 33 on Cyber Terrorism of the principal Act is amended by inserting the following new subsection immediately after sub-section (1)- (1A) A person who publishes or transmits electronic messages that is likely to cause other persons to join or participate in terrorist activities, commits an offence and shall be liable on conviction to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding twenty-five years, or to both.</p>	<p>Proposal for retention with alignment on anti terrorism law</p>	<p>There is need for consistency and alignment .</p>
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		<p> 1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation $f(x) = x + \sin x$. It is shown that $f(x)$ is an increasing function and that $f(x) > 0$ for all $x > 0$. </p>	<p> 1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation $f(x) = x + \sin x$. It is shown that $f(x)$ is an increasing function and that $f(x) > 0$ for all $x > 0$. </p>	<p> 1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation $f(x) = x + \sin x$. It is shown that $f(x)$ is an increasing function and that $f(x) > 0$ for all $x > 0$. </p>
		<p> 2. In the second part of the paper, the author studies the properties of the function $g(x) = x - \sin x$. It is shown that $g(x)$ is an increasing function and that $g(x) > 0$ for all $x > 0$. </p>	<p> 2. In the second part of the paper, the author studies the properties of the function $g(x) = x - \sin x$. It is shown that $g(x)$ is an increasing function and that $g(x) > 0$ for all $x > 0$. </p>	<p> 2. In the second part of the paper, the author studies the properties of the function $g(x) = x - \sin x$. It is shown that $g(x)$ is an increasing function and that $g(x) > 0$ for all $x > 0$. </p>
		<p> 3. The third part of the paper is devoted to the study of the properties of the function $h(x) = x + \cos x$. It is shown that $h(x)$ is an increasing function and that $h(x) > 0$ for all $x > 0$. </p>	<p> 3. The third part of the paper is devoted to the study of the properties of the function $h(x) = x + \cos x$. It is shown that $h(x)$ is an increasing function and that $h(x) > 0$ for all $x > 0$. </p>	<p> 3. The third part of the paper is devoted to the study of the properties of the function $h(x) = x + \cos x$. It is shown that $h(x)$ is an increasing function and that $h(x) > 0$ for all $x > 0$. </p>

The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation $f(x) = x + \sin x$. It is shown that $f(x)$ is an increasing function and that $f(x) > 0$ for all $x > 0$.





Bloggers
Association
of Kenya



Kenya Union of Journalists

Memorandum on the Computer Misuse and Cybercrimes (Amendment) Bill, 2021

To: The Honorable Aden Duale, Member of Parliament

The Attorney General of Kenya

The Speaker of the National Assembly

The Director of Public Prosecutions

The Chairperson of the National Assembly Departmental Committee on Communications,
Information and Innovation

The Clerk of the National Assembly

Executive Summary

ARTICLE 19 Eastern Africa, Access Now, the Bloggers Association of Kenya, Defenders Coalition, the Kenya ICT Action Network and the Kenya Union of Journalists present this memorandum in response to the Computer Misuse and Cybercrimes (Amendment) Bill, 2021 tabled before the National Assembly.¹⁵

This Bill seeks to amend the Computer Misuse and Cybercrimes Act (CMCA), 2018, and: -

1. provide for the prohibition against the sharing of pornography through the internet;
2. prohibit the use of electronic mediums to promote terrorism, extreme religious or cult activities; and
3. provide an additional function of the National Computer and Cybercrimes Coordination Committee (Cybercrimes Committee) which is to recommend websites that may be rendered inaccessible within the country.

The undersigned organisations have analysed the Bill for its compliance with international, regional and national laws and standards on the rights to freedom of expression and access to information, and the freedoms of assembly and association, both online and offline. Contrary to the assertion in the Memorandum of Objects and Reasons that the Bill does not 'limit fundamental rights and freedoms,' we note that all of the proposed amendments, if adopted, will infringe on protected rights and freedoms under the Bill of Rights, Chapter 4 of the Constitution of Kenya, 2010 and under international human rights law.¹⁶

We are cognisant of the global challenges presented by cyber crimes and the need to address information 'disorders' in the digital environments. Despite this, we reiterate that the government has obligations, under national and international law, to respect, protect and fulfil human rights, both offline and online. Based on this, we highlight the following: -

1. **Clause 2 of the Bill** - the proposed expansion of the functions of the Cybercrimes Committee to render websites inaccessible contravenes the principle of non-interference with communication and digital technologies, and violates the principle of the rule of law under Article 10 of the Constitution of Kenya, 2010.

¹⁵ The Computer Misuse and Cybercrimes (Amendment) Bill, 2021 <TheComputerMisuseandCybercrimes_Amendment_Bill_2021.pdf (kenyalaw.org)>

¹⁶ The Memorandum of Objects and Reasons sets out the rationale for the Bill.

2. **Clause 3 of the Bill** - the proposed ban on pornography violates the right to freedom of expression, online and offline, as this is not one of the permissible limitations specified under Articles 24 and 33 (2) of the Constitution of Kenya, 2010 in a free and democratic society. Pornography is also not a form of expression that may be restricted under international law.
3. **Clause 4 of the Bill** - the proposed expansion of the cyber-harassment provision fails to meet the threshold for causation to establish criminal liability and contravenes the principles of legality, legal certainty and the rule of law under Article 10 of the Constitution of Kenya, 2010.
4. **Clause 5 of the Bill** - the proposed expansion of the cyber-terrorism provision will duplicate a similar offence under Part III of the Prevention of Terrorism Act. This will introduce legal uncertainty and will expose individuals to excessive criminal liability, by virtue of charges that may be raised under separate offences for the same crime.¹⁷ The clause will also violate the rights of arrested or accused persons generally to a fair trial as guaranteed under Articles 49 and 50 of the Constitution of Kenya, 2010.

Recommendations

1. We recommend
 - a. the withdrawal of the Cybercrimes Amendment Bill, 2021, in its entirety.
 - b. the Attorney General, the Hon. Duale, the Director of Public Prosecutions and the Chairperson of the National Assembly Departmental Committee on Communications, Information and Innovation initiate meaningful consultations with a diverse and representative group of stakeholders to align the CMCA, 2018 with international laws and standards.
 - c. the National Assembly places its consideration of the Cybercrimes Amendment Bill, 2021 on hold until:
 - i. Civil Appeal No. 197 of 2020, *The Bloggers Association of Kenya (BAKE) - vs - The Hon. Attorney General & 3 Others* challenging 26 provisions in the CMCA, 2018 before the Court of Appeal is determined.
 - ii. Parliament complies with the High Court's order to regularise the CMCA, 2018 by the end of July 2021, lest the finding of unconstitutionality is given effect.
 - d. the Office of the Director of Public Prosecutions exercises discretion not to charge individuals under the 26 impugned provisions in the CMCA, 2018, which is currently *sub judice* before the Court of Appeal in Civil Appeal No. 197 of 2020, *The Bloggers Association of Kenya (BAKE) - vs - The Hon. Attorney General & 3 Others*.

¹⁷ ARTICLE 19 (2018), Kenya: Computer and Cybercrimes Bill, 2017 <[K:envya-analysis-April-2018.pdf](#) [article19.org]>

MATRIX PRESENTATION
THE COMPUTER MISUSE AND CYBERCRIMES (AMENDMENT) BILL, 2021

Clause	Provision	Proposal	Justification
Clause 2	<p>Proposed amendment to Section 6, CMCA 2018</p> <p><i>Recommend websites to be rendered inaccessible within the Republic</i></p>	<p>We recommend the deletion of this clause</p>	<p>This provision seeks to expand the functions of the National Computer and Cybercrimes Coordination Committee (Cybercrimes Committee) to render websites inaccessible in Kenya.</p> <p>Digital platforms, including websites, facilitate the rights to access to information and freedom of expression in the digital age. Given their significance, States are prohibited from interfering with individuals' right to 'seek, receive and impart information through any means of communication and digital technologies, through measures such as the removal, blocking or filtering of content, unless this interference is justifiable and compatible with international human rights law and standards' (Principle 38, Declaration of Principles on Freedom of Expression and Access to Information in Africa).¹⁸</p> <p>Further, the proposed expansion of the Committee's functions risks contravening the principle of the rule of law under Article 10 of the Constitution of Kenya, 2010. This requires laws to be well-defined, predictable, regular and legally certain, to curb abuse of power, arbitrariness and illegality. The proposed expansion of the Committee's functions contravenes this principle by virtue of its:</p>

¹⁸ African Commission on Human and Peoples' Rights (2019), Declaration of Principles on Freedom of Expression and Access to Information in Africa
<https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression%20and%20Access%20to%20Information%20in%20Africa.pdf>

			<ul style="list-style-type: none"> • <u>vagueness</u>: the failure to detail, <i>inter alia</i>, the applicable criteria which will be used by the Committee to recommend websites to be made inaccessible, or to provide safeguards and specify enforcement mechanisms contravenes the principles of the rule of law and legal certainty. We also note that this vague amendment, if enacted, will enable Internet controls, leading to an environment of censorship. • <u>duplication of regulatory functions</u>: the regulation of information and communications services rests with the Communications Authority of Kenya and the Kenya Film Classification Board.¹⁹ This clause will introduce legal uncertainty in regulation, thus infringing on the principles of the rule of law and legality under the Constitution of Kenya, 2010.
<p>Clause 3</p>	<p>Proposed amendment to Section 24, CMCA, 2018</p> <p><i>Pornography</i></p> <p><i>24A. (1) A person shall not knowingly-</i></p> <p><i>(a) publish pornography through a computer system;</i></p> <p><i>(b) produce pornography for the purpose of its publication through a computer system;</i></p> <p><i>(c) download, distribute, transmit, disseminate,</i></p>	<p>We recommend the deletion of this clause</p>	<p>Despite the statement that the Bill will not limit fundamental rights and freedoms in the Memorandum of Objects and Reasons, we stress that this proposed ban of pornography will violate Articles 24, 33 and 35 of the Constitution of Kenya, 2010.</p> <p>Under Article 24 of the Constitution of Kenya, 2010, the State is under a duty to demonstrate that limitations on fundamental rights and freedoms are permissible in a free and democratic society. This requires ‘demonstrating the relationship between the limitation and its purpose, and show[ing] that there</p>

¹⁹ The Communications Authority of Kenya is mandated, under the Kenya Information and Communications Act, to ‘licence and regulate postal, information and communication services in Kenya.’ Further, the Kenya Film Classification Board is mandated, under the Films and Stage Plays Act (CAP 222), to ‘control the making and exhibition of cinematograph films, for the licensing of stage plays, theatres and cinemas; and for purposes incidental thereto and connected therewith.’

	<p><i>circulate, deliver, exhibit, lend for gain, exchange, barter, sell or offer for sale, let on hire or offer to let on hire, offer in any way, or make available in any way from a telecommunications apparatus pornography; or</i></p> <p><i>(d) possess pornography in a computer system or on a computer data storage medium.</i></p> <p><i>(2) A person who contravenes subsection (1) commits an offence and is liable, on conviction, to a fine not exceeding twenty million shillings or imprisonment for a term not exceeding twenty five years, or to both.</i></p> <p><i>(3) It shall be a defence to a charge for an offence under subsection (1) where a publication is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, art, representation or figure is in the interest of science, literature, learning or other objects of general concerns.</i></p>		<p>were no less restrictive means to achieve the purpose intended.²⁰ We note that this duty has not been discharged.</p> <p>Under Article 33 (2) of the Constitution of Kenya, 2010, the right to freedom of expression can only be legitimately restricted where it amounts to ‘propaganda for war; incitement to violence; hate speech; or advocacy of hatred that—constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of discrimination specified or contemplated in Article 27 (4).’ The proposed ban on pornography is not one of the permitted grounds specified under Article 33 (2) of the Constitution of Kenya, 2010, and will violate the right to freedom of expression.</p> <p>Under international law, pornography is not a form of expression that may be restricted under international law. Attempts to regulate pornography are rooted in morality, culture and tradition arguments.²¹ However, the UN Human Rights Committee affirmed that limitations on rights for the protection of morals must be based on principles not deriving exclusively from a single tradition (social, philosophical or religious).²² We note that this has not been demonstrated in the Bill.</p> <p>The proposed definition of ‘pornography’ in the Bill relies on the term ‘sexually explicit conduct.’ This vague, subjective broad definition could be used to police content, expression and communication that is perfectly</p>
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²⁰ *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR, para 96 <Petition 149 of 2015 - Kenya Law>

²¹ Tagnay, C & Kee, J SM, *Erotics: Sexuality, freedom of expression and online censorship* <standpoints erotics- sexuality freedom of expression and online censorship.pdf (afl.ac.za)>

²² UN Human Rights Committee (1993) General Comment No. 22 (48) (art. 18)* <<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7vhsjYoiCfMKoIRv2FEVaVzRkMfTnjRQ%2bfnud3cPvrcM9YR01Uhd4lvOnM7YUckE6R1aBpK.mYastxgdf4vXLMSlHeILcOio8z%2f9pGJsac2JNOOTO4iAaVkc002vVbw65HVERDHHhA%3d%3d>>

	<p>(4) For purposes of this section— <i>"pornography" "includes any data, whether visual or audio, that depicts persons engaged in sexually explicit conduct; "publish" includes to-</i></p> <p>(a) <i>distribute, transmit, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell or offer for sale, let on hire or offer to let on hire, offer in any other way, or make available in any way;</i></p> <p>(b) <i>having in possession or custody, or under control, for the purpose of doing an act referred to in paragraph (a); or</i></p> <p>(c) <i>print, photograph, copy or make in any other manner whether of the same or of a different kind or nature for the purpose of doing an act referred to in paragraph (a).</i></p>	<p>legitimate, lawful and protected under Article 33 (1) (b) and (c) of the Constitution of Kenya, 2010 which provides for freedom of artistic creativity, academic freedom and freedom of scientific research.²³ For example, <i>ordinary citizens</i> who post their photos and videos on social media platforms, and journalists, academics, creatives and artists who depict nudity, sex and eroticism in books, pamphlets, papers, writings, drawings, paintings, art, representations or figures - that should only be accessible to adults - risk prosecution.</p> <p>The use of the word 'knowingly' when prescribing criminal conduct in this clause is not a sufficient intentionality requirement.²⁴ Instructively, this clause does not rely on the more stringent requirement of 'intent' or even serious harm in connection with the offence before criminal sanctions attach. Additionally, subjective <i>mens rea</i> typically requires proof or evidence of the accused person's state of mind plus accompanying evidence that the individual understood that their action or inaction would bring about the harm in question. This subjective standard lowers the threshold for culpability while raising conceivable risks of abuse by law enforcement agencies.</p> <p>The 'public good' defence provided in the proposed amendment is insufficient. The lack of any defence of reasonableness or public interest means that the proposed offence could easily be used to punish individuals engaged in entirely legitimate activities.</p> <p>Further, the proposed amendment seeks to introduce inordinately</p>
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²³ ARTICLE 19 (2016), Kenya: Cybersecurity and Protection Bill <Analysis-Kenya-Cyber-Security-and-Protection-Bill-2016.pdf (article19.org)>

²⁴ ARTICLE 19 (2018), Kenya: Cybercrime and Computer Related Crimes Bill <Microsoft Word - Kenya Cybercrime Bill 129072014 BB.doc (article19.org)>

			<p>disproportionate sanctions. The custodial sentence of twenty-five (25) years or fines of up to KES 20 million shillings (USD 183,941), is unduly harsh and unreasonable.</p> <p>We note that there is a duplication of child pornography offences under Section 24 of the CMCA, 2018 and Section 16 of the Sexual Offences Act, 2006.</p>
<p>Clause 4</p>	<p>Proposed amendment of Section 27 of the CMCA, 2018</p> <p><i>"(aa) is likely to cause those persons to commit suicide or cause any other harm to themselves;</i></p> <p><i>(ab) is likely to cause other persons to join or participate in unlicensed and extreme religious or cult activities;"</i></p>	<p>We recommend the deletion of this clause</p>	<p>Clause 4 of the Bill seeks to criminalise conduct using the word 'likely' which is vague and requires subjective interpretation, and fails to meet the threshold for causation to establish criminal liability. In turn, the proposed amendments to Section 27 of the CMCA, 2018 contravene the principles of legality, legal certainty and the rule of law under Article 10 of the Constitution of Kenya, 2010.</p>
<p>Clause 5</p>	<p>Proposed amendment of Section 33 of the CMCA, 2018</p> <p><i>(1A) A person who publishes or transmits electronic messages that is likely to cause other persons to join or participate in terrorist activities, commits an offence and shall be liable on conviction to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding twenty five years, or to</i></p>	<p>We recommend the deletion of this clause</p>	<p>Generally, we stress that the offence of cyber-terrorism is improperly canvassed under the CMCA, 2018, given the existence of a similar offence under Part III of the Prevention of Terrorism Act (PTA). This proposed amendment risks exposing individuals to excessive criminal liability, by virtue of charges that may be raised under separate offences for the same crime.</p> <p>Additionally, the proposed sentence under Clause 5 of the Bill is in direct conflict with the sentence provided under Section 30A of the PTA, despite the similarity of offences. Section 30A of the PTA provides for a maximum of fourteen (14) years, whereas this amendment proposes twenty-five (25) years.</p>

			<p>This duplication will also contravene the established rule against duplicity and the principle of fairness, which entitles a person charged with a criminal offence to 'know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence.' This also risks preventing the court from 'hearing the charge [to] know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction.'²⁵ More importantly, this duplication would violate the rights of arrested or accused persons generally to a fair trial as guaranteed under Articles 49 and 50 of the Constitution of Kenya, 2010.</p> <p>We note that Section 30 of the PTA is not properly defined and grants National Security Organs in Kenya, including the National Intelligence Service and the National Police Service, broad powers to restrict the right to freedom of expression under Article 33 of the Constitution of Kenya, 2010.</p>
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both.

²⁵ *Hassan Jillo Bwanamaka & another v Republic* [2018] eKLR <[Criminal Appeal 1 of 2017 - Kenya Law](#)>

