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THE NATIONAL ASSEMBLY
THIRTEENTH PARLIAMENT – SECOND SESSION – 2023

DEPARTMENTAL COMMITTEE ON HEALTH

PARLIAMENT
OF KENYA
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REPORT ON:

THE ASSISTED REPRODUCTIVE TECHNOLOGY BILL, 2022 (NATIONAL ASSEMBLY BILL No. 61 OF 2022)

THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 27 SEP 2023	DAY: WED
TABLED BY:	hon Robert Pukose MP Chairperson, Health Committee
CLERK OF THE HOUSE:	Miriam modo

CLERKS CHAMBERS
DIRECTORATE OF DEPARTMENTAL COMMITTEES
PARLIAMENT BUILDINGS
NAIROBI

SEPTEMBER, 2023

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CHAIRPERSON'S FOREWORD

This report contains proceedings of the Departmental Committee on Health on its consideration of the Assisted Reproductive Technology Bill, 2022 (National Assembly Bill No. 61 of 2022), sponsored by the Hon. Millie Odhiambo Mabona M.P. The Bill was published on 24th November 2022, read a First Time in the House on Wednesday, 3rd May 2023, and thereafter committed to the Departmental Committee on Health for consideration and reporting to the House pursuant to the provision of Standing Order 127.

The Bill has fifty-two (52) clauses and seeks to provide for the regulation of assisted reproductive technology, to prohibit certain practices in connection with assisted reproductive technology, to establish an Assisted Reproductive Technology Directorate and to make provision in relation to children born through Assisted Reproductive Technology processes and for connected purposes.

Following placement of advertisements in the print media on Monday, 8th May, 2023 seeking public and stakeholder views on the Bill pursuant to Article 118(1) (b) of the Constitution and Standing Order 127(3), the Committee received memoranda from fourteen (14) stakeholders, namely; the Ministry of Health (MOH), the Kenya Law Reform Commission (KLRC), the National Gender and Equality Commission (NGEC), the Law Society of Kenya (LSK), the LSK Nairobi Branch, the Kenya National Commission on Human Rights (KNCHR), the Office of the Attorney General and Department of Justice (OAG and DOJ), The CRADLE, the University of Nairobi, the African Women Studies Research Centre (AWSRC), the Center for Reproductive Rights (CPR), the World Youth Alliance (WYA), the Kenya Obstetrical and Gynaecological Society (KOGS), the Nairobi IVF Centre and Dr. Gideon Mutua, Dr. Jean Kagia, Susan Muli, Kathambi Kinoti, Dr. Eda J. Tatu Beuttah, Muinde Njoroje and Remigeo P. Mugambi who submitted a joint memorandum.

The Committee vide letter REF: NA/DDC/DC-H/2023/024 dated 10th May 2023 sought and obtained memoranda from key stakeholders and engaged them in meetings held on Tuesday 18th July, 2023 and 10th August, 2023 to discuss the Bill. The Committee also held a retreat with some of the stakeholders on 19th August 2023 at English Point Marina in Mombasa.

The Committee is grateful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee further wishes to thank the sponsor of the Bill, Hon. Millie Odhiambo Mabona, MP who attended all the meetings that the Committee invited her during consideration of the Bill and 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 consideration of the Bill and production of this

On behalf of the Departmental Committee on Health and pursuant to the provisions of Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of the Assisted Reproductive Technology Bill, 2022 (National Assembly) Bill No. 61 of 2022). It is my pleasure to report that the Committee has considered the Assisted Reproductive Technology Bill, 2022 (National Assembly Bill No. 61 of 2022) and has the honour to report back to the House with the recommendation that the Bill be **passed with amendments as reported by the Committee.**

Hon. Dr. Robert Pukose, M.P.
Chairperson, Departmental Committee on Health

CHAPTER ONE

1. PREFACE

1.1 ESTABLISHMENT OF THE COMMITTEE

1. The Departmental Committee on Health is established pursuant to the provisions of Standing Order 216 of the National Assembly Standing Orders and in line with Article 124 of the Constitution which provides for the establishment of the Committees by Parliament. The mandate and functions of the Committee include:
 - a) *To 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) *To study the programme and policy objectives of ministries and departments and the effectiveness of the implementation;*
 - ba) *on a quarterly basis, monitor and report on the implementation of the national budget in respect of its mandate;*
 - c) *To study and review all legislation referred to it;*
 - d) *To 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) *To 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 other law requires the national Assembly to approve, except those understanding Order 204 (Committee on appointments);*
 - g) *To examine treaties, agreements and conventions;*
 - h) *To make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;*
 - i) *To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and*
 - j) *To examine any questions raised by Members on a matter within its mandate.*
2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider matters related to health, medical care and health insurance including universal health coverage.
3. In executing its mandate, the Committee oversees the Ministry of Health with its two State Departments namely the State Department for Medical Services and the State Department for Public Health and Professional Standards.

1.2 COMMITTEE MEMBERSHIP

4. The Departmental Committee on Health was constituted by the House on 27th October 2022 and comprises the following Members:

Chairperson

Hon. (Dr.) Robert Pukose, MP
Endebess Constituency
UDA Party

Vice-Chairperson

Hon. Ntwiga, Patrick Munene MP
Chuka/Igambang'ombe Constituency
UDA Party

Hon. Owino Martin Peters, MP
Ndhiwa Constituency
ODM Party

Hon. Julius Ole Sunkuli Lekakeny, MP
Kilgoris Constituency
KANU

Hon. Muge Cynthia Jepkosgei, MP
Nandi (CWR)
UDA Party

Hon. Maingi Mary, MP
Mwea Constituency
UDA Party

Hon. Wanyonyi Martin Pepela, MP
Webuye East Constituency
Ford Kenya Party

Hon. Mathenge Duncan Maina, MP
Nyeri Town Constituency
UDA Party

Hon. Kipngok Reuben Kiborek , MP
Mogotio Constituency
UDA Party

Hon. Lenguris Pauline, MP
Samburu (CWR)
UDA Party

Hon. (Dr.) Nyikal James Wambura, MP
Seme Constituency
ODM Party

Hon. Oron Joshua Odongo, MP
Kisumu Central Constituency
ODM Party

Hon. Kibagendi Antoney, MP
Kitutu Chache South Constituency
ODM Party

Hon. (Prof.) Jaldesa Guyo Waqo, MP
Moyale Constituency
UPIA Party

Hon. Mukhwana Titus Khamala, MP
Lurambi Constituency
ANC Party

1.3 Secretariat

5. The Committee is supported by the following Members of Staff:

Mr. Hassan Abdullahi Arale
Clerk Assistant I/Head of Secretariat

Ms. Gladys Jepkoech Kiprotich
Clerk Assistant III

Ms. Marlene Ayiro
Principal Legal Counsel II

Ms. Abigael Muinde
Research Officer III

Ms. Faith Chepkemoi
Legal Counsel II

Mr. Hiram Kimuhu
Fiscal Analyst III

Mr. Yakub Ahmed
Media Relations Officer II

Mr. Benson Kimanzi
Serjeant-At-Arms III

Ms. Rahab Chepkilim
Audio Recording Officer II

Mr. Salat Abdi Ali
Senior Serjeant-At-Arms

CHAPTER TWO

2. OVERVIEW OF THE ASSISTED REPRODUCTIVE TECHNOLOGY BILL, 2022 (NATIONAL ASSEMBLY BILL NO. 61 OF 2022)

6. The Bill seeks to provide for the regulation of assisted reproductive technology, to prohibit certain practices in connection with assisted reproductive technology, to establish an Assisted Reproductive Technology Directorate and to make provision in relation to children born through assisted reproductive technology processes and for connected purposes.
7. **PART I** (Clause 1-4) of the Bill contains the preliminary provisions on the short title, interpretation, application and object and purpose of the Act.
8. **PART II** (Clause 5-10) of the Bill provides for the establishment of the Assisted Reproductive Technology Directorate, its composition and functions. It also sets out the obligations of the National Government and County Governments in matters of Assisted Reproductive Technology.
9. **PART III** (Clause 11-19) of the Bill provides for matters regulating prohibited activities in relation to the use of embryos, use of gametes, use of gametes obtained from a minor. It also provides for obtaining the consent of parties who go through assisted reproductive technology processes, and sets out the circumstances for undertaking assisted reproductive technology and circumstances under which assisted reproductive technology is precluded.
10. **PART IV** (Clause 20-32) of the Bill provides for the rights of commissioning parents, donors and children in relation to the right to assisted reproductive technology, the right to assisted reproductive technology by intersex persons. It also makes provisions on the use of sperm after the death of a man, consent to assisted reproductive technology services, the duties of assisted reproductive technology experts, the rights that accrue to children born through assisted reproductive technology, obligations under surrogacy agreements, prohibition of sex selection and commercial artificial reproductive technology and sale of human gametes, zygotes and embryos.
11. **PART V** (Clause 33-37) of the Bill provides for matters regulating access to information as regards assisted reproductive technology including the establishment of an assisted reproductive technology register, the processing and provision of information by the Assisted Reproductive Technology Directorate and restrictions on disclosure of information.
12. **PART VI** (Clause 38-49) of the Bill provides for the regulation of licensing to offer assisted reproduction related services. It also sets out the conditions to be met before a licence is issued and revoked as well as the right of review and appeal where a licence is denied.
13. **PART VIII** (Clause 50 and 51) of the Bill contains miscellaneous provisions on general penalty and offences related to the regulation of assisted reproductive technology.
14. **PART IX** (Clause 52) of the Bill provides for the making of Regulations by the Cabinet Secretary responsible for health in consultation with the Assisted Reproductive Technology Directorate.

CHAPTER THREE

3. CONSIDERATION OF THE BILL BY THE COMMITTEE

3.1. LEGAL PROVISION ON PUBLIC PARTICIPATION

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

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

Standing Order 127(3) provides that—

“The Departmental Committee to which a Bill is committed shall facilitate public participation on the Bill through an appropriate mechanism, including—

- (a) *inviting submission of memoranda;*
- (b) *holding public hearings;*
- (c) *consulting relevant stakeholders in a sector; and*
- (d) *consulting experts on technical subjects.*

16. Standing Order 127(3A) further provides that—

“The Departmental Committee shall take into account the views and recommendations of the public under paragraph (3) in its report to the House.”

3.2. PUBLIC PARTICIPATION AND STAKEHOLDERCONSULTATION

17. The Assisted Reproductive Technology Bill, 2022 sponsored by the Hon. Millie Odhiambo Mabona, MP was published on 24th November 2022, and pursuant to National Assembly Standing Order 127(1), the Bill was committed to the Departmental Committee on Health having been read the first time in the House on 3rd May 2023.
18. Following the call for memoranda from the public through placement of advertisements in the print media on 8th May, 2023 and the request for memoranda from several key stakeholders vide a letter REF: NA/DDC/DC-H/2023/024 dated 10th May 2023. The Committee engaged with the key stakeholders in meetings held on Tuesday 18th July, 2023 and 10th August, 2023. The Committee also held a retreat with some of these stakeholders on 19th August, 2023 in English Point Marina in Mombasa.

3.3 SUBMISSIONS BY STAKEHOLDERS

19. The Committee received submissions through oral presentations and written memoranda from the following persons and institutions:

- (a) The Ministry of Health (MOH)
- (b) The Kenya Law Reform Commission (KLRC) vide letter dated 23rd May 2023;
- (c) The National Gender and Equality Commission (NGEC) vide letter dated 22nd May 2023;
- (d) The Law Society of Kenya (LSK) vide memorandum received on 24th May 2023;
- (e) The LSK Nairobi Branch vide letter dated 18th May 2023;
- (f) The Kenya National Commission on Human Rights (KNCHR) vide letter dated 10th May 2023
- (g) The Office of the Attorney General and Department of Justice (OAG and DOJ) vide memorandum dated 17th July 2023
- (h) The CRADLE vide memorandum submitted on 27th April 2023 and on email of 27th July 2023;
- (i) Dr. Gideon Mutua, Dr. Jean Kagia, Susan Muli, Kathambi Kinoti, Dr. Eda J. Tatu Beuttah, Muinde Njoroge and Remigeo P. Mugambi who submitted a joint memorandum dated 22nd May 2023;
- (j) The University of Nairobi, African Women Studies Research Centre (AWSRC) vide letter dated 22nd May 2023;
- (k) The Center for Reproductive Rights (CPR) vide letter dated 22nd May 2023;
- (l) The World Youth Alliance (WYA) vide email of 22nd May 2023;
- (m) The Kenya Obstetrical and Gynaecological Society (KOGS); and
- (n) The Nairobi IVF Centre

3.3.1 THE MINISTRY OF HEALTH

The Ministry of Health submitted as follows:

20. That it does not support the Bill as it was not responsive to the reproductive health needs of the Kenyan people as it was developed without consultation with all stakeholders in the health Sector.
21. That it had developed a comprehensive reproductive health law, The Reproductive Healthcare Bill 2023 that addresses the prevailing legal gaps in sexual and reproductive health in the country. The Bill has been approved by the Office of the Attorney-General and was ready for presentation to the Cabinet.
22. That the Bill, once enacted into law, would seek to put an end to the litany of several private members' piecemeal legislation on reproductive health and bring sanity in an otherwise emotive, sensitive, legally grey and closely guarded vital domain of the health of the Kenyan population.

3.2.1. THE KENYA LAW REFORM COMMISSION (KLRC)

The Kenya Law Reform Commission (KLRC) whilst supporting the Bill, submitted as follows:

23. The words "zygote" and "supervisor" need to be defined.

24. Proposed substitution of the definition of the word "child" with new definition: "child" has the meaning assigned to it under the Children Act" for consistency in definitions within the Statute Book
25. Proposed amendment of clause 4 by renaming the marginal note to "Objects of the Act" since the words "objects" and "purpose" are synonymous.
26. Proposed amendment of clause 6 by substituting the words "with the relevant government agency" with "the Kenya Health Professions Oversight Authority (KHPOA) after the word "consultation in paragraph (g) as KHPOA is responsible for coordination of joint inspections.
27. Proposed redrafting of clause 9(2) as follows: "The Director and staff of the Directorate shall be competitively recruited and appointed on such terms as the Public Service Commission may determine upon the receipt of a request for advice on appropriate officers to be appointed in the Directorate" so that the Cabinet Secretary does not interfere with the Public Service Commission's mandate
28. That clause 12, 13, 17, 20, 27 and 32 be redrafted in the active voice to ensure consistency in the drafting of the Bill and compliance with the principle of plain english drafting.
29. Proposed amendment of clause 17 to use the word "child" as opposed to the word "minor" as the word "child" is defined in clause 2.
30. That clause 18 be moved to the Part on licensing as it sets out considerations for non-issuance of a licence.
31. Proposed amendment of clause 24 by redrafting sub-clause 2(g) to "professional qualifications and skills, if any" so as not to lock out donors who may not possess any professional qualifications and skills.
32. Proposed adoption of the definition of "party" in the Marriage Act, No. 4 of 2014 as follows "in relation to a marriage, an intended marriage or a purported marriage, means a spouse in a marriage, or the intended spouse to a marriage or purported spouse in a marriage" in clause 25. The proposed definition would encompass all matters of assisted reproduction.
33. Proposed deletion of clause 28(1) as it is superfluous as the elements of a valid contract are already provided for under written law.
34. That clause 34 be subjected the clause to the provisions of the Access to Information Act, No. 31 of 2016 so that the Bill complies with the principal law on access to information matters.
35. That clause 36 and 47 amended to specify the government agency referred as the KHPOA for clarity as KHPOA is mandated to handle complaints from patients, aggrieved persons and regulatory bodies under the Health Act, No. 21 of 2017.

36. That Part IV of the Bill be redrafted cover all aspects of licensing by providing for: licensing of ART experts, classes of licences, duration of licences, short term licences, discretion of the ART Directorate to refuse licences, the power of the Directorate to call for further particulars and transferability of a licences.
37. Proposed the deletion of clause 48 as KHPOA is mandated to handle disputes between parties and the application for judicial review will follow if the party is aggrieved by KHPOA's decision.
38. Proposed the inclusion of a penalty for the offences created in clause 50(1) for completeness of the clause.
39. Proposed the deletion of Part IX and moving clause 52 to Part VIII as it falls under the ambit of miscellaneous provisions.
40. The KLRC submitted the words "commissioning parents", "couple" and "parties to a marriage" are used interchangeably within the Bill whereas the term "commissioning parents" has been defined to include couple and parties to a marriage. It therefore recommended the latter should be adopted so as ensure compliance with principles of legislative drafting on consistency within the Bill.

3.2.2. THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR)

The Kenya National Commission on Human Rights (KNCHR) whilst supporting the Bill, submitted as follows;

41. Proposed the inclusion of the definitions of several terms namely abandonment, bank, surrogacy agreement and intended parents to define words used in the Bill as well as to align to its proposal for amendments of other clauses.
42. Proposed amendments to the definition of several terms namely "assisted reproductive technology services", assisted reproductive technology, assisted reproductive technology expert, cryo-preservation, donor, embryo, embryologist, embryology, endoscopic surgery, father, mother, in-vitro fertilization, oocyte, pre-implantation screening and primitive streak to align to best practice and to cover all aspects of assisted reproductive technology.
43. The Commission in clause 5 proposed the establishment of a Board with membership from different Ministries, independent offices and other agencies of both state and non-state actors that would participate in surrogacy procedures and other incidental matters. The Commission indicated that the legal and ethical complexities of ART require a multi-sectoral approach in regulation which is best achieved through a diverse Board. The Commission further proposed that the Kenya Medical Practitioners and Dentists Council be given the mandate of regulating ART in Kenya to ensure cost-effectiveness.

44. In clause 16, the Commission proposed the addition of a new paragraph as follows: “a gamete or embryo other than that consent to by the woman”.
45. In clause 18, the Commission proposed the addition of new paragraphs on the keeping or using a gamete other than a human embryo, the placing of a human gamete in any animal, the placing of a gamete in a woman other than a human gamete; and the placing of an embryo in a woman other than a human embryo;
46. The Commission proposed the deletion of the words “except where such replacement is meant to solve medical problems” in paragraph (e) of clause 18(1). This exclusion will allow human embryo manipulation such as that of Chinese Scientist He Jiankui that produced Lulu and Nana. The Commission further proposed the amendment of paragraph (b) to read *‘the keeping or use of an embryo beyond the appearance of the primitive streak, as typically observed around fourteen days post-fertilization.*
47. The Commission proposed the addition of a new clause on the “use of ovum after death of a woman” in clause 20 so as to comprehensively covers both a man’s sperm and a woman’s ovum.
48. The KNCHR supported clause 23 however it proposed that clause 23(2) be redrafted and that clause 23(3) provides for what should be done with the gametes or embryos in case of death or incapacity of any of the parties including disagreements.
49. KNCHR proposed the addition of the new paragraphs in clause 24(2) on consent or otherwise of disclosure of identity to possible offspring and consent or otherwise for use of donated material for research.
50. KNCHR proposed redrafting of clause 25 (b) to “include parties to a void marriage, provided that both parties were acting under a reasonable and bona fide belief at the time of marriage that the marriage was valid, and subject to adjudication by a competent court”. The Commission indicated that the inclusion of void marriages where parties believed the marriage was valid could potentially lead to complicated legal scenarios. The proposed amendment provides a more definitive stipulation that a good faith belief in the validity of a marriage is necessary, while also deferring to a legal decision on the matter to ensure fairness.
51. In Clause 26, the Commission proposed the provision of access of ART services by foreigners provided that “at least one of the Commissioning parents be domiciled in Kenya”.
52. The Commission proposed the substitution of the word “reserve” with “retain” in clause 26(3) and the insertion of the words “however, disputes regarding the disposition of the embryo shall be resolved by a competent court, considering the best interests of all parties involved” in clause 26(3). The Commission indicated that the provision about withdrawal of consent for embryo implantation after divorce could potentially lead to ethical and legal dilemmas, particularly if one party wants to proceed. Further, the provision about nationality might be overly simplistic and not account for complex

situations that could arise in international law. The proposed amendments therefore acknowledge the complexity of disputes regarding the disposition of embryos post-divorce and defers the final decision to a court.

53. KNCHR proposed that clause 28 provides for negotiations of surrogacy agreements by third parties for financial gains and prohibition of commercialization of surrogacy as this will curb against the involvement of third parties or surrogacy brokers and traffickers who may use surrogacy as a means of trafficking and sale of children.
54. In clause 29, the Commission proposed the insertion of the words “, such disputes should be resolved through mediation, arbitration or court intervention, as deemed appropriate” in clause 29(1)(c) immediately after the words “surrogate mother”. The Commission noted that the provision about dispute resolution before implantation might be overly simplistic and may not account for complex disputes that could arise. Therefore, in anticipation of such issues arising, a dispute resolution mechanism should be embedded in the Bill.
55. The Commission proposed the insertion of the words “subject to agreement and possible mediation in the event of disagreement” and addition of a new sub-clause (e) on “compensation for the surrogate mother irrespective of the pregnancy outcome whether a live birth, still birth or disability” in clause 30(4) and addition of a new sub-clause on entitlement to psychological support during and after the pregnancy, provided by the Commissioning parents. The Commission indicated that the entire section does not address potential disagreements or complications regarding the compensation of the surrogate mother and the provision of psychological support for surrogate mothers.
56. The Commission proposed that clause 31 be redrafted to ensure that while non-medical gender selection is not permissible, room is given for genuine medical concerns especially where there is a risk of gender-linked hereditary diseases.
57. KNCHR proposed the redrafting of clause 32(2) to allow transfer of gametes, zygotes, and embryos under specific conditions and guidelines prescribed by the Directorate. The Commission indicated that the current clause is somewhat restrictive and may not consider all potential scenarios as the need for transfer of gametes, zygotes and embryos may become necessary for legitimate scientific research, international collaboration or access to better medical facilities.
58. The Commission proposed insertion of the words “*with such counselling provided by a certified professional counsellor*” in clause 34(2)(b) to ensure that appropriate counselling is provided to a minor so as to effectively deal with the potential emotional and psychological impacts of disclosure of information.
59. The commission proposed the redrafting of clause 34 (3) to provide for the obtaining of consent at the time of execution of a surrogacy agreement.
60. KNCHR proposed the insertion of the words “with such counselling provided by a certified professional counselor” to clause 35 to ensure that appropriate counselling is

provided to a minor so as to effectively deal with potential emotional and psychological impacts of disclosure of information.

61. KNCHR proposed in clause 38 the insertion of the words “based on the criteria that include but are not limited to: professional qualifications, ethical conduct, and adherence to applicable regulations. Any disputes over licensing decisions can be appealed to an independent tribunal.” immediately after the words “under this Act”. This provides specificity on criteria of issuance, varying, revoking or renewing of a licence and clearly establishes an appeals’ process which ensures fairness and transparency.
62. KNCHR proposed the amendment of clause 40 by redrafting sub-clause (2) to specify additional requirements that might be necessary for licensure under the Bill.
63. KNCHR proposed the prescribing of conditions of storage of gametes or embryos, the disposal of the same at the request of the donors or at expiry of the stipulated storage period and extension of storage period in clause 43.
64. The Commission proposed additional conditions upon which the Directorate may grant a license in clause 44(1) namely the best interest of the child which is paramount and needs to be considered in the licensing process and in all processes. This is in line with the Constitution of Kenya, the Children Act, 2022, the African Charter on the Rights and Welfare of the Child and the United N Convention on the Rights of the Child.
65. The Commission proposed the additional conditions to be adhered to by Supervisors under the Bill in clause 45(1) to the effect that proper informed consent is obtained from all parties involved in the treatment process and that the welfare and well-being of individuals seeking treatment are prioritized.
66. The Commission drew the attention of the Committee to the Recommendations of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material of 2018 on the role of States in surrogacy arrangements.

3.2.3. THE LAW SOCIETY OF KENYA (LSK)

The Law Society of Kenya (LSK) whilst supporting the Bill, submitted as follows:

67. The LSK proposed the substitution of the definition of the word “child” with “child” has the meaning assigned to it under the Children Act” to ensure consistency in definitions within the Statute Book.
68. The LSK proposed redrafting of the definition of “assisted reproductive technology” to reflect modern advancements as technology has advanced and embryos are no longer put in a petri dish.
69. The LSK proposed the inclusion of the definition of the term “intersex “since the term is used within the Bill.

70. To ensure clarity, the LSK proposed that clause 9 should comprehensively set out the composition of the Directorate including the requisite qualifications. The Directorate should comprise of members with technical knowledge on ART. The Directorate may comprise of a director (a medical expert appointed by the Cabinet Secretary) and five (5) other members.
71. The LSK proposed that clause 15 (1)(c) be deleted. LSK such that ART should be undertaken even for speculative purposes as this will allow the consumer of these services freedom to decide when and how they want to have children arising from ART.
72. The LSK stated that clause 19 should provide for limitation of the number of times a donor can donate and the number of times the donor's gametes can be used to inseminate. It also proposed that a database for gametes and embryo donation should be provided for as it will prevent multiple use of a single donor which will eliminate the natural heterogeneity of the human race that exist from natural conception.
73. In clause 20, the LSK proposed the deletion of paragraph (b) and substitution with a new paragraph to the effect that *informed consent in writing be given by a man*". This will ensure credibility and prevent abuse.
74. The LSK proposed that the Bill should obligate a surrogate mother to, before entering a surrogacy agreement, reveal any medical conditions or addictions that may have an adverse impact on the unborn or get exacerbated by the pregnancy in clause 27. This would ensure the safety of the surrogate and the unborn baby.
75. The LSK proposed that the Bill ought to permit a woman who has not given birth to become a surrogate and that the age-limit for surrogate mothers be increased provided that a surrogate undergoes counseling and psychological analysis before surrogacy. The LSK noted that in the United Kingdom, women who are childless and even those in menopause can offer themselves as surrogates provided that a doctor has certified them as being healthy.
76. The LSK proposed that clause 28 should provide that a valid surrogacy agreement has to include the next of kin of the surrogate and the guardian appointed by commissioning parents and their respective identity information. This will provide an alternative contact person should either the surrogate or the commissioning Parents die or become unable to take custody of the child.
77. The LSK further proposed that a legal process of transfer of a child to commissioning parents be enforced diligently to prevent exploitation. DNA testing after birth should be provided for as proof of genetic line with the commissioning parents. This will also prevent exploitation given Kenya's rating as a Tier 2 watchlist country as a source, transit and destination of human trafficking.
78. The LSK proposed the amendment of clause 30 to require that commissioning parents shall be listed as parents in the Birth Notification and Certificate after a legal process transferring custody of a child from a surrogate to commissioning parents. In this

regard, the LSK also proposed that the Births and Death Registration Act, Cap. 149 ought to recognize a commissioning parent as the mother of a child born through assisted reproductive technology.

79. The LSK further proposed that a Surrogate Birth Register similar to the Adoption Register should be introduced in the Bill to enhance accountability and transparency.
80. The LSK proposed the redrafting of Clause 31 to allow selection of the sex of a child born through ART so as to give commissioning parents freedom to choose a child's gender identity.

3.2.4. THE LSK NAIROBI BRANCH

The LSK Nairobi Branch proposed amendments to the Bill as follows:

81. It proposed the substitution of the definition of the word "child" with "child" has the meaning assigned to it under the Children Act" to ensure consistency in definitions within the Statute Book
82. It proposed the amendment of the definition of "assisted reproductive technology" to reflect modern advancements since technology has advanced and embryos are no longer put in petri dishes.
83. It proposed the amendment of the definition of "ART expert" to include other experts as obstetricians and gynecologists deal with women and are not the only experts and other doctors also attend to fertility issues among men.
84. It proposed redrafting the definition of "cryo-preservation" to include the word "freezing" at the beginning so as to clarify that "cryo-preservation" involves freezing.
85. It proposed the amendment of the definition of "embryo" as it contradicts the Constitution which provides that life begins at conception.
86. It proposed the redrafting of the definition of "couple" to include intersex persons for inclusivity as there are laws acknowledging intersex persons.
87. It proposed the definition of the term "gestational surrogacy" since the Bill largely deals with assisted reproduction.
88. It proposed that in clause 15 (1)(c) be deleted to permit for that the use of ART even for speculative purposes which will give consumers of ART services freedom to decide when and how they want to have children through ART.
89. It proposed redrafting of clause 19 (1) (e) to specify that sperms or embryos are transferred into a uterus since eggs are not placed in a woman.

90. It recommended that clause 20 ought to prescribe regulations on the registration of the informed consent with the Children's court for credibility and to prevent abuse. It further noted that clause 20 was discriminatory and to cure this, the clause should extend the requirement of consent to the use of frozen eggs of a woman after her death. LSK Nairobi Branch stated that the clause makes no provision for use of eggs after a woman's death which will be discriminatory.
91. It proposed that an ART expert should obtain written informed consent and ensure that counseling is done before consent is given under clause 21 for informed decision making. The consent should also extend to the preservation of gametes in the event of death or incapacity in clause 22. Further, psychological analysis is done in other countries including South Africa which introduced psychological analysis for a surrogate and a surrogate's children to prevent trauma to the surrogate's children.
92. It submitted that the right to withdraw consent before implantation of an embryo in clause 26(3) should not arise as the child owing to the use of the word "pre-born" in the definition of an embryo.
93. It proposed that the Bill ought to permit women, who are childless by choice and may want to become surrogates, to become surrogates as is the case in the United Kingdom surrogacy law.
94. It proposed that the Bill should provide that a valid surrogacy agreement has to include the next of kin of the surrogate and the guardian appointed by commissioning parents and their respective identity information. The next of kin to be contacted where a surrogate disappears or develops birth related complications during delivery. The Bill to also provide a legal process of transferring parental rights from a surrogate to commissioning parents as well as DNA testing for confirmation of genetic link with commissioning parents. This will provide protection of the children in the country as Kenya is known as the source, transit and destination country for human trafficking. The United Kingdom is in the process of amending its laws on acknowledgment of parents from the initial stages after registration of the agreement before birth. South Africa has a similar practice.
95. It submitted that clause 30(4)(c) is a good provision however for protection of surrogates and their dependants, the insurance provided should include a life insurance policy for a surrogate that the surrogate may decide later whether or not to continue with the Policy.
96. It proposed the inclusion of a clause on embryo donation, the process of getting the donation and the parental rights and responsibilities of children born out of embryo donation in clause 42(5)(b).
97. It submitted that clause 43(2) does not provide for the disposal of embryos, The duration of storage and disposal of sperms and eggs.

98. It proposed that clause 45(1)(c) should state how disposal of gametes and embryos ought to be done.
99. It submitted that Part V of the Bill on access to information should recognize and respect the privacy of personal information such that only general information e.g., on the number of donors or surrogates may be shared while specific identifiable information should not be shared. It also should be a parent's right to reveal whether they used ART services so as to avoid breaching confidentiality and protecting parties from stigma.
100. For genetic link, the LSK Nairobi Branch submitted that the Bill should require that either a sperm or egg or both have to be from the intended parent(s) before ART is undertaken.
101. It submitted that, for accountability purposes, the Bill ought to provide for a surrogate birth register to list birth certificates upon the issuance of a court decree.
102. Lastly, the LSK Nairobi Branch submitted that that the Bill conflicts with the best interests of children in terms of record keeping on the number of children born through surrogacy arrangements.

3.2.5. THE NATIONAL GENDER AND EQUALITY COMMISSION (NGEC)

The National Gender and Equality Commission (NGEC) submitted as follows:

103. The NGEC proposed the adoption of the definition of "child" in Article 260 of the Constitution and substitution of the word "minor" with "child" in clause 17 and throughout the Bill for alignment with the Constitution and for harmony within the Bill respectively.
104. The NGEC proposed the insertion of the words "unless on the recommendation of a certified medical doctor" after the words "by the minor as parents and guardians can only give consent after a medical doctor's recommendation justifying the need for the use of a child's sperm or ovum."
105. Clause 26, the NGEC proposed substitution of the words "both partners reserve the right to withdraw consent of the implantation of the embryo which has been created by their own sperm or ovum" with the words "both parties will be bound by the agreement and the consent given for the procedure". so as to make commissioning parents accountable for commitments made voluntarily in line with clause 28 on surrogacy agreements. This will prevent abuse of technology leading to the discard of embryos that have life.
106. In clause 22, the NGEC proposed the insertion of the words "and persons with disabilities" after the word "persons" and insertion of the word "appropriate" after the words "access to" which will ensure alignment of the Bill with the National Reproductive

Health Policy, 2022-2032 which recognizes that persons with disabilities have special reproductive needs.

107. It further proposed the insertion of a new sub-clause (4) in clause 26 on the subsisting rights of a child born out of ART in the event of divorce by the commissioning parents. This prevent the violation of the rights accruing to the child should the embryo not be allowed to grow to full term. Further, the definition of term "embryo" in the Bill connotes that an embryo already has life and has the right to life as enshrined in Article 26 of the Constitution.
108. The NGEC proposed the substitution of the words "this Act or any other written law" with the words "the Constitution" in clause 29 and 30 as Article 26(4) of the Constitution is the supreme law on matters of termination of pregnancy.
109. The NGEC proposed the substitution of the word "determine" with the word "select" in clause 31 as the former may be taken as connoting the act of finding out the sex of a foetus during an ultrasound during pregnancy.

3.2.6. CRADLE, THE CHILDREN FOUNDATION

The CRADLE submitted as follows:

110. The CRADLE proposed inclusion of definitions of several terms namely "best interest of the child", "clinic", "cyro bank", "insurance", "intersex", "surrogate agreement", "Pre-implantation Genetic testing" as the terms are used in the Bill as well as in the amendments to other clauses as proposed by CRADLE
111. The CRADLE proposed the deletion and substitution of the definition of various terms as used in the Bill namely "diagnosis" which was replaced with "Pre-implantation Genetic Diagnosis", "donor" replaced with "gamete donor", "commissioning parents" replaced with "intended parents". The meaning of the terms such as "infertility, surrogacy" were also amended to align with best practice on matters of ART.
112. In clause 6, the CRADLE proposed the insertion of the new functions on setting of standards for the qualifications of counsellors under this Act and prescribing regulations for payments to be made under this Act as the same are not provided for in the Bill.
113. The CRADLE proposed insertion of the words "minor and" immediately after the words "the consent of" in clause 17(1). to ensure conformity with the principle of child participation, which is one of the core principles of the Convention on the Rights of the Child (CRC).
114. The CRADLE proposed the insertion of anew paragraph in clause 19(1) criminalizing the use a sperm of any man without the woman's consent; in the course of providing assisted reproductive treatment services to any woman. This is because the Bill does

not give any protection to women from insemination with a sperm that they have not consented to.

115. To clearly set out the objectives of the Bill, CRADLE proposed the addition of objects related to the best interest of children, the registration of children by the registration of births, research into the incidence, causes and prevention of infertility, respect of surrogacy arrangements, establishment of an assisted reproduction directorate and the keeping of the Register of procedures under the Act.
116. To make provision for guiding principles, the CRADLE proposed the introduction of a new clause (5) on guiding principles.
117. The CRADLE proposed the insertion of a new clause 22 immediately after clause 21 requiring the Directorate to ensure that persons providing counselling services under this Act meets the prescribed requirements for counselling under section 6 of the Act.
118. The CRADLE proposed the deletion of clause 24 (3) as children born through ART should not be excluded from finding out the identity of their genetic parents as they are not privy to agreements made during ART arrangements.
119. The CRADLE proposed the deletion of clause 25 since there is no need to define a marriage as couples that are not married may benefit from ART services.
120. The CRADLE proposed the insertion of a new clause 25 pre-implantation diagnosis or testing for the screening of human embryo or gamete for known, pre-existing, heritable or genetic diseases so that no diseases are passed onto the resulting children.
121. The CRADLE proposed the insertion of new clause 26, 27 and 28 that will set age limits for gametes donors and the sperm quality, limit the number of times a person can donate so as to avoid incestual relationships and prevent over commercialization of surrogacy as well as provide for the involvement of the courts through issuance of parental orders prior to the transfer of legal responsibility in order to curb child trafficking.
122. The CRADLE proposed the insertion of a new clauses on prevention of exploitation of the parties to a surrogacy agreement, prohibition on certain publications, offences relating to matching services and limitation on the sale or transfer of gametes outside of Kenya so as prevent commercialization of surrogacy.
123. The CRADLE proposed the deletion of clause 26(5) and introduced an amendment that clarifies that children born as a result of ART take the citizenship of the intended parent irrespective of the citizenship of the surrogate or donor.
124. The CRADLE proposed the to limit the age of surrogates and intending parents in between the age of twenty-five and so as to mimic the age of natural conception.

125. The CRADLE proposed the deletion of clause 28(7) 42(2)(d) as it is impractical to find surrogates who does not require payment for their surrogate services.
126. The CRADLE proposed the deletion of the words "Parties to a marriage or commissioning parents" and substitution with the words "A couple" in clause 28(1) since persons who are not married are eligible for ART services.
127. The CRADLE proposed the deletion of clause 31 and proposed the prohibition of non-medical sex selection which brings about ethical concerns as a particular sex may be predisposed to certain genetic disorders.
128. The CRADLE proposed the insertion of a new sub-clause (f) in Clause 33 on consent to the destruction or disposal by a registered ART provider of any gametes or an embryo formed outside the body of a woman. This will require the ART to obtain prior consent for disposal of embryos within the stipulated period of ten years.
129. The CRADLE proposed substitution of the words "twenty-one" with "eighteen" in clause 34(1) and deletion of clause 34(3) so as to give all adults access to information on their parentage so as to avoid marriage between siblings as the age of marriage in Kenya is eighteen years.
130. The CRADLE proposed the insertion of a new clause 36 to the effect that a person wishing to undergo assisted reproduction shall receive non-identifying information about a donor including the donor's medical history, family medical history and genetics. Such information may be necessary for the purposes of obtaining information on a donor's medical history or genetics for the avoidance of certain combination of gametes or to conduct sperm washing for instance where a donor has a disease such as HIV.
131. The CRADLE proposed the introduction of a new clause on lochia leave, maternity leave and paternity leave for the surrogate and intended parents respectively as the same is provided to parents that conceive naturally under the Employment Act, 2007.
132. The CRADLE proposed the inclusion of a new clause savings and transitional provisions on licensing of existing clinics and cryo banks.
133. The CRADLE proposed the deletion of clause 43(2) and provision for storage of gametes or embryos beyond ten years in exceptional circumstances for instance for a child who may wish to take time before having their own children.
134. The CRADLE further recommended consequential amendments to the Births and Deaths Registration Act, Cap. 149 to provide for the registration of children born through assisted reproductive technology.

3.2.7. THE UNIVERSITY OF NAIROBI, AFRICAN WOMEN STUDIES RESEARCH CENTRE (AWSRC)

The University of Nairobi, African Women Studies Research Centre (AWSRC) whilst supporting the Bill, went ahead to propose amendments as follows;

135. For alignment with the Children Act, 2022, the AWSRC proposed the deletion and substitution of definition of the word "child" with a new definition to the effect that a "child" means an individual who has not attained the age of eighteen years.
136. For alignment with international best practice, the AWSRC proposed amendments to several terms including commissioning parents", "couple", "assisted reproductive technology", "embryo", "surrogate, "oocyte" and substitution of the word "infertile or sub-fertile client" with "childless client". It also proposed new definitions including gestational carrier, "ovum", "recipient".
137. AWSRC indicated that the ART Directorate should be established under the existing structure of the KMPDC to avoid duplicity of functions for instance on matters of grant, variation, suspension or revocation of licences and the composition of the Directorate ought to be set out for accountability.
138. The AWSRC proposed the removal of the condition that a surrogate mother must have given birth before offering herself as a surrogate in clause 27(1) of the Bill.
139. AWSRC submitted that the register provided for in clause 33 of the Bill should provide for all parties involved in the process of ART including the medical personnel.
140. In clause 50, AWSRC submitted that the clinical and legal offences and their accompanying penalties should be separated to prevent healthcare provider from making intersex persons incapable of sexual reproduction without their informed consent. It also proposed a penalty of a fine not exceeding one million shillings or a term of imprisonment not exceeding two years, or both for contravening the Bill generally under clause 51.
141. The AWSRC submitted that the Bill ought to specify when conception takes place, whether in the petri dish stage or during implantation. The Bill should also make provision for genetically engineered babies and address the moral and ethical issues around the same., Part VII is missing. The Bill should further clearly stipulate the rights of surrogate mothers and the mechanisms of addressing disputes on matters of parentage.

3.2.8. DR. GIDEON MUTUA, DR. JEAN KAGIA, SUSAN MULI, KATHAMBI KINOTI, DR. EDA J. TATU BEAUTTAH, MUINDE NJOROGE AND REMIGEIO P. MUGAMBI;

Dr. Gideon Mutua and six others submitted as follows:

142. They proposed that the short title of the Bill be renamed "The Surrogacy Act" as the law majorly deals with surrogacy in line with clause 14.
143. They proposed that the Bill ought to define the term "conception" for clarity since the term is not defined in the Constitution.
144. They proposed amendments to the definition of the term "commissioning parents" and "couple" so as to restricts ART to married persons who cannot conceive naturally.
145. They submitted that clause 8(b) and (c) compels county governments to allocate financial, human and material resources for the provisions of ART services, which makes the law untenable and presents legal challenges for the two levels of governments.
146. They submitted that clause 9 does not comprehensively set out the composition of the Directorate which would adversely affect its effectiveness.
147. They submitted that clause 14 ought to restrict the persons that can donate sperms or ovum and the persons that can receive such donations. This is to prevent children being born through incest which cannot happen where conception happens through coitus, while giving children genetic link to either of the commissioning parents. It will also remove the possibility of persons designing or creating babies using third parties' gametes since every child has the right to one or two of their birth parents and the Children Act, 2022 provides adoption for persons who want children without a genetic link.
148. They noted that the prohibitions in clause 15 are not very restrictive since there is a wide room for "eugenetics" owing to the apparent provision of "pre-implantation" screening throughout the Bill.
149. They proposed the deletion of the exception of obtaining gametes from a minor for future human procreation in clause 17 since allowing the use of a minor's gametes amounts to child abuse and it may promote child trafficking and child marriages which are illegal in Kenya. ART services ought to be offered to the infertile who have tried to achieve a pregnancy. Further, there are no conditions that may make a child need ART.
150. They sought to know what happens to embryos that are used or kept in the circumstances prohibited under clause 18(1)(b) to (f) and whether criminalizing the keeping or use of embryos that develop a primitive streak under clause 18(1)(b) amounts to killing.

151. They submitted that clause 19 ought to provide for a limitation on the number of times a donor can donate and the number of times the donor's gametes can be used to inseminate. This is to prevent abuse of ART where one person participates in the conception of too many children as happened in the case of a Dutch man suspected of fathering more than 550 children worldwide through sperm donations which the Court eventually ordered him to stop.
152. They submitted that the provision for intersex persons in clause 22 is a disguise to provide ART services to LGBTQ persons which may not be in the best interests of the Child and this endangers social fabric of Kenya.
153. They were interested to know who has the custody of a child born through ART, which of the commissioning parents will have locus to engage the surrogate on custody matters where the parents have divorced and consent has been withdrawn or where the surrogacy agreement ends through natural operation of the law such as the death of the commissioning couple.
154. They also emphasized that the rights of the child must be addressed at all times in the ART services including the right to identity and origin and protection of a child's dignity. This should extend to prohibition of foreigners from procuring ART services without regulation.
155. They submitted that clause 30(2) should provide for what ought to happen where a baby born through ART is diagnosed with severe congenital abnormalities and the surrogate refuses to terminate the pregnancy or where the commissioning parents rejects the baby, or a surrogate develops life time complications or commissioning parents die or divorce.
156. They indicated that they wanted to know if an individual under or above 18 years can request information on the donor of gametes to reduce incest and intermarriages.
157. They submitted that clause 45 was silent on what happens to an ovum or sperm after prolonged storage especially where such gametes will not be needed or used. Will they be destroyed or returned to the owners even if they are no longer interested in ART services? They then suggested that these should be clarified before freezing of embryos is done.
158. They noted that the Bill provides an avenue for creation of human beings with the possibility of willed disposal despite the fact that life is created upon conception. The creation of room for killing is evident in clause 18(1)(b) on embryos with primitive streak and clause 26(3) on withdrawal of consent pre-implantation.
159. They submitted that the extraction of spermatozoa is an indirect encouragement of masturbation, which has direct consequences on the institution of marriage and

morality in society generally. This makes ART counter the traditional, cultural and religious aspirations of the people of Kenya as espoused in the Constitution.

160. They noted that the Bill distorts God's initial plan in Genesis for mankind to fill the earth and rule over other creatures. The Bill also threatens the design of the family (comprising of father, mother and children) as intended and espoused in the Constitution.

161. Lastly, they noted that the Bill is premature as it does not address the ethical, moral, legal and scientific dilemmas posed by ART and which will implementation of the law difficult. As such, other culturally acceptable and religiously sound avenues of getting children for instance through adoption should have been pursued.

3.2.9. THE CENTER FOR REPRODUCTIVE RIGHTS (CPR)

The Center for Reproductive Rights (CPR) submitted as follows:

162. CPR proposes the deletion and substitution of the definition of the terms "assisted reproductive technology, donor, embryo, commissioning parents, primitive streak and surrogate mother, to eliminate discrimination, to emphasize the intention to parent and to align with internationally accepted definitions in ART".

163. The CPR submitted that clause 33 was not clear on the purpose for the collection of information and does not seem to address the need to balance the data or information extraction with the right to privacy for the parties involved in an assisted reproduction process in line with Article 31 (c) and (d) of the Constitution which provides for the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed; or the privacy of their communications infringed. Not acknowledging the lack of assurance of confidentiality between the parties and the ART service providers may result in deserving persons not seeking the ART services as is desired by the Bill. The clause should therefore be amended to require that the information in the register be kept by assisted reproduction service providers and that the Directorate be charged with developing policies and guidelines over the same.

3.2.10. THE OFFICE OF THE ATTORNEY-GENERAL AND DEPARTMENT OF JUSTICE (OAG AND DOJ)

The Office of the Attorney General and Department of Justice (OAG and DOJ)

164. The OAG and DOJ proposed the deletion of the words "National Government" and substitution with the words "Cabinet Secretary" in clause 7 to place responsibility on a specific office for accountability in the performance of the obligations placed on the National Government.

165. The OAG and DOJ proposed that clause 18 (1) be deleted and redrafted to remove the burden being placed on the Directorate not to licence persons who wrongly manipulate embryos contrary to the provisions of the Bill as the restrictions in the clause should rightly be placed on persons that misuse embryos.

166. The OAG and DOJ proposed the deletion of clause 46(1)(d) and clause 46(1)(e) since the provision is not clear on the circumstances that would warrant the revocation of licences under the Bill. Revocation of licences should be based on concrete reasons that can be substantiated and yet the Bill does not prescribe the kind of character that a nominal licensee should possess, and the parameters that the Directorate would use in assessing such character.

3.2.11. THE WORLD YOUTH ALLIANCE (WYA)

The World Youth Alliance (WYA) whilst rejecting the Bill submitted as follows:

167. That the Bill is unconstitutional as it contravenes Article 26 of the Constitution, which provides that life begins at conception, by stating that the presence of a "primitive streak" (fourteen days after conception) signifies the creation of a unique human being. It also allows embryos (fertilized human eggs) to be "stored" (frozen) for up to ten years. Changing the definition of the beginning of life to fourteen days after conception/fertilization is an arbitrary and unconstitutional act and yet the Kenyan society protects all human persons from the moment of creation (fertilization).

168. That the Bill will create several legal problems and violates fundamental human rights of the child protected by the Convention on the Rights of the Child since children would not be given information about their biological parents (donors).

169. That the Bill legalizes surrogacy without offering any guarantees or protections to women who would volunteer as surrogates or giving any detail on how disputes arising from such a complicated new legal situation would be settled. It further legalizes in-vitro fertilization without clear regulation as this is left to the Assisted Reproductive Technology Directorate or the Cabinet Secretary through the development of "standards, regulations, and guidelines on assisted reproductive technology. In addition, there is no definition of the word "infertility".

3.2.12. THE KENYA OBSTETRICAL AND GYNAECOLOGICAL SOCIETY (KOGS)

The Kenya Obstetrical and Gynaecological Society (KOGS) submitted as follows:

170. Proposed the deletion of the words "of placing in a woman sperm and eggs" and substitution with the words "transferring into a uterus" in the definition of the word

"father", in clause 19(1)(e), 23(4), 26(3) and 52(c) and in all the clauses where this appears as it is not possible to place an embryo or sperm and eggs in a woman.

171. That the definition of the word "couple" has left out the intersex group who also have reproductive rights as well as single men and women who may want to have children through ART which discriminatory.
172. That the words "test-tube or elsewhere outside the body" be deleted and replaced with the word "laboratory" in the definition of "in-vitro fertilization".
173. Proposed the deletion of the term "primitive streak" since the same is ambiguous since by the time the primitive streak appears the embryo has implanted and the pregnancy test is positive.
174. The KOGS noted that clause 6(k) is impractical and may not be effectively done by the Directorate. Keeping information about embryos, grading how many are cryopreserved for each patient should be the work of the particular treatment clinics as the Directorate may not have the capacity to do this. The clinics should be mandated to have this information updated on a regular basis.
175. The KOGS noted that clause 6(l) is ambiguous as it vague on the consumer of the information referred to which breaches the right to privacy and confidentiality between doctors and patients.
176. The KOGS proposed the deletion of clause 6(n) as it was very stigmatizing to an already highly stigmatized group of people seeking medical assistance. If there should be a register for infertility patients, then there must be a register for patients suffering from other maladies such as hypertension, malaria, diabetes mellitus, HIV etc. Isolating infertility patients only for such a register is tantamount to discrimination, which is unconstitutional.
177. The KOGS noted that clause 7(b) raises issues of availability, accessibility and affordability and in order to realize the clause it should be stated that the government will subsidize the treatment to a certain percentage for instance 50 %. This will make the treatment more accessible to more patients.
178. The KOGS submitted that in terms of economies of scale, matters under clause 8(c) of procurement of equipment, medicine and medical supplies are better handled centrally through the Kenya Medical Supplies Authority (KEMSA). This will allow reduction of the costs of treatment and increase accessibility and affordability of treatment.

179. The KOGS submitted that the qualifications of the Director of the Directorate should be spelled out to avoid recruitment of people who may not have the requisite qualifications.
180. The KOGS proposed insertion of the word "informed" immediately before the word "consent" in clause 12 and in all other clauses where written consent is required.
181. The KOGS proposed the deletion of clause 14 as it was discriminatory to ladies. Age is a critical factor for consideration even though it is not a medical condition to be qualified by a medical doctor.
182. The KOGS proposed that clause 15(1)(c) be deleted as it is discriminatory and restrictive since it limits the independence of patients who would like to preserve their eggs or sperms for medical reasons. A person should be able to preserve their gametes without restrictions.
183. The KOGS proposed the insertion of the words "except for medical reasons and future human procreation" after the words "guardian of the minor" in clause 17(1).
184. The KOGS proposed the deletion of clause 18(1)(b) since its purpose is not very clear in terms of what it is supposed to control. Embryos are frozen from day two to day five after fertilization and cannot be frozen after day five because they will either have been transferred into a womb or are already frozen on day five.
185. The KOGS proposed clause 20 should provide for the remote possibility of post humous use of sperm and the fact that the man should have given informed consent for the same.
186. The KOGS proposed the insertion of the words "and embryos" in clause 23(2).
187. The KOGS proposed deletion of the words "all diseases" and substitution with the words "possible hereditary diseases" in clause 24(1)(b) as it is not possible to screen for all diseases and conditions that may endanger children born through ART.
188. The KOGS proposed of the words "or more" and substitution with the words "and not more than thirty-five years" in clause 27(1) to provide for an upper limit regarding the age of the surrogate because the older the age of the potential surrogate the higher the chances of obstetric complications such as preeclampsia, gestational diabetes premature delivery among others.
189. The KOGS proposed deletion of the word "child" and substitute therefor the word "foetus" in clause 27(2). A child is one who has been born.

190. Reference to "of parties to a marriage or couple" in clause 27(2) and clause 28(1), 28(3)(c)(i) and 28(7) is discriminatory as it suggests that only married couples can use ART treatment whereas even single parents can use ART services.
191. The KOGS submitted that compensation directly relating to the process of in-vitro fertilization contemplated in clause 30(4)(a) be expunged or if it is retained then add "if the surrogate is an egg donor to the said intended parent (as the surrogate cannot claim compensation directly relating to the process of in vitro fertilization. The surrogate comes in just for the embryo transfer. The costs related to her preparation until the transfer is done are taken care of by the intended parent(s). Unless she is an egg donor and a surrogate at the same time, then she should be compensated for her role as an egg donor as well as a surrogate.
192. That clause 32 (1) is discriminatory as it takes away the right of the patient(s) to decide. Tests which are done to screen the embryos for chromosomal issues or even for diagnosing hereditary diseases come with a report showing the gender of the embryo. The issues of what happens to the embryos of the unwanted gender should be cured by changing the above clause to allow ART clinics to donate the unwanted embryos to a patient(s) who may not be able to afford ART treatment. This will also cure the issue of abandonment of the said embryos
193. The KOGS submitted that Clause 32(2) is prohibitive, overly restrictive and discriminatory and it should be amended by adding the words "without informed consent of the patients" to cure restriction.
194. The KOGS submitted that the Directorate should not keep the records of all patients undergoing ART treatment but should ensure that the clinics have clear and concise records of their patients under clause 33 (b). The Directorate should also mandate the clinics to keep the patient data for a certain period of time for instance for twenty years and should require the clinics to give the statistics of procedures done in crude numbers.
195. The KOGS proposed the deletion of Clause 33(c) and (e) as it is discriminatory and stigmatizing. It treats ART patients differently from patients who have other diseases.
196. The KOGS proposed the deletion of clause 33(d) as it is discriminatory and unfair to the donors unless there is a hereditary medical condition.
197. The KOGS proposed that clause 34 (1) and (2) be deleted since it is discriminatory and unfair to the children conceived through ART as it will cause not only mental anguish but also lifelong trauma to them and also the parent(s), compounding the stigma of infertility. This will also lead to a breakdown of the affected families who have already been assisted by ART. It emphasized that no amount of counselling can heal this irreparable damage.

198. The KOGS noted that clause 36(1) is vague and can be misused and hence the need clarify which government agencies are allowed access information under the clause so as to protect patient doctor confidentiality.
199. The KOGS noted that clause 42 (2)(b) is vague on the member of the directorate and on the modalities of inspection of premises and hence there is need for clarity on who has the authority from the Directorate to do inspection and on the timelines, purpose and notice for inspections.
200. The KOGS proposed deletion of paragraph(f) of clause 42(2) and substitution with a new paragraph to the effect that the Directorate shall be provided with aggregate numbers of procedures done, age brackets, diagnoses, success rates etc., and not copies or extracts from records. Unless a criminal offence or complaint has been lodged by a patient. The current provision amounts to a breach of trust, privacy and confidentiality of the patient doctor relationship.
201. The KOGS proposed deletion of clause 42(3) as the clause is discriminatory because it treats patients suffering from infertility differently from other patients suffering from other diseases and it also breaches patient doctor privacy, confidentiality and trust.
202. The KOGS proposed deletion of clause 43(1)(d) as the clause is vague on what it is supposed to cure and why the embryos referred to shall be given priority.
203. The KOGS proposed the amendment or deletion of clause 45(1)(c) in light of the constitutional principle that life begins at conception.
204. The KOGS proposed that the word "children" be deleted and substituted therefor with the word "embryos" in clause 52 It further submitted that there is need to clarify whether this provision relates to the number of embryos that may be created from one donor or the number of times a donor may donate his/her gametes.

3.2.13. THE NAIROBI IVF CENTRE

The Nairobi IVF Centre submitted as follows:

205. It proposed amendments to several definitions including assisted reproductive technology, cryopreservation, embryo, pre-Implantation genetic diagnosis", mother, surrogacy and inclusion of new definitions of several terms including foetus, zygote, sperm, surrogate agreement, Pre-implantation genetic testing, sex selection, assisted reproductive technology bank for alignment with best practice on ART matters and to define the terms used in the Bill for purposes of clarity in interpretation.
206. It proposed that clause 3 be deleted and redrafted to the effect that This Act applies to all medically assisted reproductive processes whether or not the process is completed outside the human body" which will take into account processes that are not essentially facilitated "inside" the human body.

207. It proposed the insertion of a new subclause to the effect that the Bill facilitates the registration of children born out of a gestational surrogacy arrangement in Clause 4.
208. It submitted that unlike the Assisted Reproductive Technology Bill of 2019, the Bill completely eschews listing/mentioning the profession(s) and/or qualifications of the management/staff of the Directorate that will oversee assisted reproductive technology. This is not necessarily a good thing, as members with crucial qualifications, knowledge and expertise may be left out such as persons with legal, embryology, fertility medicines, bioethics, medical ethics, ethical and other relevant expertise.
209. It proposed the deletion of the phrase “purely speculative” in clause 15(1)(c). as is discriminative especially for persons who for some reason, a non-medical reason such as work or desire to delay the start of family, especially since gamete (egg and sperm) banking is now an everyday thing for such persons. However, the age of starting family should also be considered for the sake of the child to be born as to whether the same is in their best interest.
210. It proposed the addition of the words “and only after the minor has undergone both psychological analysis and counselling and has a medical report to show the need for speculative reproduction” in clause 17(1). This will prevent abuse of the process and ensure that the minor is fully informed of the choices and consequences.
211. It proposed the addition of the words “an embryo” and substitution with the words “a human embryo” in clause 18(1)(c) so as to differentiate between human and animal embryos.
212. It proposed the addition of new clauses on the prohibition of the sale or transfer of gametes and embryos to any party outside Kenya shall be prohibited except in the case of transfer of a person’s own gametes and embryos for personal use.
213. It proposed the insertion of a new clause 20 (2) to extend the safeguards of post-humous reproduction to women who had been left out.
214. The Nairobi IVF Centre proposed the insertion of a new clause on gamete donation to the effect that a person shall not donate their gametes or embryos more than ten times or undertake ART procedures that may result in more than ten children who are genetic siblings or enter into a surrogacy agreement more than three times in their lifetime and before the lapse of three years between each birth.
215. It proposed deletion of the word “conclusive” in clause 28(5) as the entry of birth will form part of evidence preferred before court but not as proof.

216. It proposed deletion of the words “parties to a marriage” in clause 28(1) to allow single women to access surrogacy services as long as they provide their own eggs and have a genetic link to the child.
217. It proposed the insertion of a new clause on power of the court to make parental orders. It further proposed the deletion of clause 30(3) and introduction of a new clause 29 that will provide for legal registration of children born out of gestational surrogacy and adherence to all international protocols as relates to surrogacy and child trafficking.
218. It submitted that to avoid cases of child trafficking and children of no genetic link, adoption would be a viable option as Kenya falls under tier 3 on child trafficking meaning it is considered a source, transit and destination of trafficked children. Further, a legal process will curb the slippery slope of back door “adoption” of selling and buying children, hence protecting all the parties involved including children born through ART.
219. It proposed the insertion of a new clause 30 (1) (b) immediately after clause 30(1) to the effect that the intending couple or intending woman shall not abandon the child, born out of a surrogacy procedure, whether within Kenya or outside, for any reason whatsoever, including but not restricted to; any genetic defect, birth defect, any other medical condition, the defects developing subsequently, sex of the child or conception of more than one baby and the like. This would curb issues of child abandonment and cements the need for genetic link as it would be used as proof of parentage in cases of abandonment.
220. It proposed the amendment of clause 31 to provide that a person shall not do any act, at any stage of embryo development, to determine the sex of the child to be born through the process of assisted reproductive technology except on medical grounds to determine, diagnose and prevent genetic or hereditary sex-linked disorder or disease. This curbs the idea of sex selection for “social” purposes which in essence are a veiled or camouflaged infanticide however it recognizes the need for sex selection on medical grounds, for the hereditary and sex-linked diseases and disorders including sperm sorting.
221. It proposed the addition of “except in the case of transfer of own gametes and embryos for personal use” in clause 32(2) to allow for persons to import or export their own gametes for personal use. The provision should also be made for donor gametes for own use.
222. It proposed insertion of new clauses on offences related to surrogacy, prohibition of commercial surrogacy and abuse informed by the global best practice and in particular the new Indian Act on surrogacy of 2021 as these issues are the ones that led to not only to the enactment of this Indian law but also the ban of international surrogacy in India. Further, currently, there are agencies predominantly from India mushrooming in the country already with such tendencies.

223. It submitted that the Bill does not provide for the registration of children born via assisted reproductive technology and as such the Centre proposed consequential amendments to the Births and Deaths Registration Act, Cap. 149.
224. The Nairobi IVF Centre recommended that the Bill ought to provide for the legal provision for transfer of parentage, psychological counselling and analysis for gestational surrogates, provision of different lawyers for testing, genetic link and regulation of agencies.
225. The Report contains an analysis of the above stakeholder submissions on the Bill noting the general comments in support of or against the amendments. The analysis is presented in a table annexed to this report as Annexure 6 which highlights the stakeholder comments and the Committee resolution on the various clauses of the Bill.

CHAPTER FOUR

4. COMMITTEE OBSERVATIONS


226. The Committee having considered the Assisted Reproductive Technology Bill, 2022, National Assembly Bill No. 61 of 2022 and submissions from stakeholders made the following observations:

- (a) The Bill regulates the use of assisted reproductive technology and prohibits certain practices such as sex selection and prohibition on transfer of gametes or embryos outside Kenya that would encourage commercialization of surrogacy;
- (b) The Bill aids couples or individuals with challenges of conceiving naturally and in this way the Bill addresses the reproductive health needs of Kenyans. The Bill is therefore aligned to Article 43(1)(a) of the Constitution of Kenya, 2010 which provides for the right to the highest attainable standard of health including the right to reproductive health care;
- (c) The Bill also protects the rights of children born out of assisted reproductive technology including in their birth registration in line with Article 53 of the Constitution and the Children Act, 2022; and
- (d) The Bill also seeks to establish a framework of assisted reproductive technology in the country. The Bill is therefore aligned to the government's commitment of providing the highest quality assisted reproductive technology services to all persons in need as envisioned in the National Reproductive Health Policy, 2022-2032.

CHAPTER FIVE

5. COMMITTEE RECOMMENDATIONS

The Committee recommends that, the house adopts the Assisted Reproductive Technology Bill, 2022 (National Assembly Bill No. 61 of 2022) with amendments.

SIGNED  DATE 5/9/2023

HON. DR. ROBERT PUKOSE, M.P.
CHAIRPERSON, DEPARTMENTAL COMMITTEE ON HEALTH

CHAPTER SIX

6. SCHEDULE OF AMENDMENTS

227. Upon considering the Assisted Reproductive Technology Bill, 2022, National Assembly Bill No. 61 of 2022 and submissions from stakeholders, the Committee recommends the following amendments:

CLAUSE 2

THAT Clause 2 of the Bill be amended by—

- (a) deleting the definition of the term “assisted reproductive technology” and substituting therefor the following definition—

“Assisted Reproductive technology” means the manipulation of eggs, sperm, or embryos outside the human body and transferring the gamete or the embryo into the reproductive system of a woman to increase the likelihood of a successful pregnancy;

Justification: To cover all techniques in assisted reproductive technology.

- (b) inserting the words “and other professionals whose expertise is required in assisted reproductive technology” immediately after the words “fertility medicine” in the definition of the term “assisted reproductive technology”;

Justification: To expand the scope to include other professionals that have technical expertise in matters of assisted reproductive technology.

- (c) deleting the definition of the term “child” and substituting therefor the following new definition—

“child” means an individual who has not attained the age of eighteen years;

Justification: For alignment with the Constitution and the Children Act, 2022.

- (d) deleting the definition of the term “commissioning parents” and substituting therefor the following definition—

“intended parents” means a couple or commissioning parents who enter into a surrogacy arrangement seeking assistance in procreation through the help of a surrogate mother or donor;

Justification: To cement the intention to parent in matters of assisted reproductive technology.

- (e) inserting the words “or intersex person” immediately after the word “female” in the definition of the word “couple”;

Justification: To allow intersex persons to access assisted reproductive technology services.

- (f) deleting the definition of “cryo-preservation” and substituting therefor the following new definition—

"cryo-preservation" means the assisted reproductive technology of freezing and storing of gametes, zygotes, embryos, ovarian and testicular tissues;

Justification: The new definition is more comprehensive.

- (g) deleting the definition of the term "donor" and substitute therefor the following new definition—

"gamete donor" means a person who provides sperm or oocyte with the objective of enabling an infertile person to have a child and the person need not be the spouse of the person she or he is donating the gametes to.

Justification: To remove the element of voluntary donation of gametes.

- (h) deleting the definition of the word "embryo" and substituting therefor the following new definition—

"embryo" means a cell or group of cells containing a diploid complement of chromosomes or group of such cells, not a gamete or gametes, that has the potential to develop into a live born human being if transferred into the body of a person under conditions in which gestation may be reasonably expected to occur.

Justification: To align with internationally accepted definitions for instance by the World Health Organization (WHO) in the International Committee for Monitoring Assisted Reproductive Technology (ICMART) and WHO revised glossary on Assisted Reproductive Technology terminology, 2009.

- (i) deleting the definition of the word "embryologist" and substituting therefor the following new definition—

"embryologist" means a specialist who deals with creation, development, storage and transfer of embryos, gametes and assists in the process of fertilization in the laboratory;

Justification: For a more comprehensive definition of the term.

- (j) deleting the definition of the word "embryology" and substituting therefor the following new definition—

"embryology" means a branch of biology that deals with creation, development, storage and transfer of gametes of embryos;

Justification: For a more comprehensive definition of the term.

- (k) deleting the definition of the word "endoscopic surgery" and substituting therefor the following new definition—

"endoscopic surgery" means a surgery in assisted reproductive technology involving techniques that limit the size of incisions performed with one or more small incisions instead of large incisions;

Justification: For a more comprehensive definition of the term.

- (l) in the definition of the term "father"—

- (i) inserting a subparagraph in paragraph (b) in the definition of the term "father" as follows—

(iii) is a commissioning or intending parent at the time of assisted reproductive technology

Justification: To ensure that the man in question has the intention to parent.

- (ii) deleting the words "placing in a woman" and substituting therefor the words "transferring into a uterus";

Justification: Eggs are transferred into a womb.

- (iii) deleting the words "artificial insemination" wherever it appears and substituting therefor the words "intrauterine insemination";

Justification: Intrauterine insemination is for human beings while artificial insemination is for animals generally.

- (m) deleting the words "in a test-tube or elsewhere" in the definition of the term "in-vitro fertilization"

Justification: In-vitro fertilization is not only done in test-tubes.

- (n) deleting the definition of the term "mother" and substituting therefor the following new definition—

"mother" means

- (i) a woman who is carrying or has carried a child as a result of placing in her an embryo or sperms;
- (ii) the woman was party to a marriage with the man whose sperm was utilized to create the embryo;
- (iii) the woman has in agreement with the man, written a parental agreement acquiring parental rights of a mother; or
- (iv) the woman is a commissioning or intending parent at the time of assisted reproductive technology.

Justification: To ensure that the woman in question has the intention to parent.

- (o) deleting the word "oocyte" and substituting therefor the word "egg" in the definition of the term "oocyte".

Justification: To avoid using the same word in the definition of the term "oocyte".

- (p) deleting the definition of the term "parties to a marriage"

Justification: Marriage is not a condition to access to assisted reproductive technology services.

- (q) deleting the words "and eliminating the same" in the definition of the term "pre-implantation genetic diagnosis".

Justification: To deal with the vagueness on what is being eliminated which may cause eugenic tendencies.

- (r) deleting the words "to determine the number of chromosomes" and substituting therefor the following new words "to determine the viability or euploidy of an embryo before transferring to the woman's womb" in the definition of the term "pre-implantation screening".

Justification: Pre-implantation screening is not just for the number of chromosomes but also for the viability of the embryo so as to improve the success rates of in vitro fertilization.

- (s) deleting the definition of the term "primitive streak"

Justification: The definition is unnecessary as by the time the primitive streak appears the embryo has implanted and the pregnancy test is positive.

- (t) deleting the definition of the word “sperm” and substituting therefor the following new definition—

“sperm” means the mature male human gamete;

Justification: The new definition is more comprehensive and straightforward.

- (u) deleting the words “a commissioning parent or couple” and substituting therefor the words “an intended parent” in the definition of the term “surrogacy”;

Justification: To provide for the intention to parent in surrogacy.

- (v) deleting the words “another woman” and substituting therefor the words “another person or a couple” in the definition of the word “surrogate mother”;

Justification: To allow extend the use of surrogacy to a couple or any person and not only by a woman.

- (w) inserting the following new definitions in proper alphabetical sequence—

“abandonment” to mean the failure to continue to pay for cryopreservation storage of gametes or embryos;

“best interest of the child” means the principles that prime the child’s right to survival, protection, development above other considerations and includes the rights contemplated under Article 53(1) of the Constitution and section 8 of the Children Act, 2022;

“clinic” means a health facility licensed under this Act for the purpose of conducting assisted reproduction procedures;

“cyro bank” means a facility that is set up to store and supply human gametes or embryos;

“foetus” means the developing human offspring after the embryonic stage prior to birth;

“gestational carrier” means a woman in whom a pregnancy resulted from fertilization with third-party sperm and oocytes and carries the pregnancy with the intention or agreement that the offspring will be parented by one or both of the persons that produced the gametes;

“gestational surrogacy” means the process where a woman carries a pregnancy for the intended parents;

“intersex” means a person with a congenital condition in which the biological sex characteristics cannot be exclusively categorized in the common binary male or female due to inherent and mixed anatomical, hormonal, gonadal or chromosomal patterns;

“ovum” means a single cell released from either of the female reproductive organs that is capable of developing into a new organism when fertilized with a sperm cell.

“pre-implantation genetic testing” means all techniques used to identify genetic defects and aneuploidy in embryos created through in-vitro fertilization before transfer.

“supervisor” means the person responsible for activities authorized under the licence issued under this Act;

“surrogacy agreement” to mean an agreement between a surrogate and an intended parent or intended parents that the surrogate is to undergo one or more relevant assisted reproduction procedures with a view to any child born as a result of such procedure being treated in law—

- (a) as the child of the intended parent or parents, and
- (b) as not being the child of the surrogate or any other individual.

“zygote” means a diploid cell resulting from the fusion of two haploid gametes;

Justification: The proposed definitions are used in the Bill as proposed for amended.

CLAUSE 3

THAT Clause 3 of the Bill be amended by deleting the clause and substituting therefor the following new clause—

3. This Act applies to all medically assisted reproductive processes whether or not the process is completed outside the human body.

Justification: To cover all aspects of assisted reproduction done both outside and inside the human body.

CLAUSE 4

THAT Clause 4 of the Bill be amended by—

- (a) inserting the following new subclauses—
 - (d) ensure the best interest of children;
 - (e) facilitate the registration of children born out of a gestational surrogacy arrangement;
 - (f) promote research into the incidence, causes and prevention of infertility;
 - (g) provide a framework for surrogacy arrangements; and
 - (h) establish an assisted reproduction directorate.
- (b) deleting the words “object and purpose” and substituting therefor the words “objects” in the marginal note

Justification: To include the important aspects in the use of assisted reproductive technology. The words “objects” and “purpose” are synonymous.

- (c) Inserting the following new clause immediately after clause 4:

4A. Guiding principles

The following principles shall guide the application of this Act—

- (a) the best interest of the child born as a result of assisted reproductive procedures;
- (b) non-exploitation of parties;
- (c) non-discrimination including based on marital status; and
- (d) affordability of procedures under this Act.

Justification: To make provision for the principles that will guide all persons implementing this Bill.

CLAUSE 7

THAT Clause 7 of the Bill be amended by the words deleting the words "National Government" and substituting therefor the words "Cabinet Secretary".

Justification: To place responsibility on a specific office for accountability in the performance of the obligations placed on the National Government.

CLAUSE 8

THAT Clause 8 of the Bill be amended—

- (a) in subclause (a) by inserting the word "training," immediately after the words "National Government in";

Justification: To provide for collaboration between the National and County Governments on training on assisted reproductive technology services.

- (b) in sub clause (b) by deleting the word "adequate";
- (c) in sub clause (c) by deleting the words "sufficient" and "adequately".

Justification: To remove ambiguity on the level and scope of the various assisted reproductive technology services to be offered by the County Governments.

CLAUSE 9

THAT Clause 9 of the Bill be amended by inserting the following new subclause (3) as follows—

- (3) A person shall be qualified for appointment as a Director if such person—
 - (a) holds a bachelor's degree in medicine from a university recognized in Kenya;
 - (b) holds a masters' degree in obstetrics, gynaecology, embryology, fertility medicine or other relevant field from a university recognized in Kenya;
 - (c) has at least ten years' experience in assisted reproductive technology;
 - (d) has served in a senior management position for at least five years;
 - (e) is a member of a professional body; and
 - (f) meets the requirements of Chapter six of the Constitution.

Justification: To ensure that the Director is qualified and has specialized knowledge and technical expertise in matters of assisted reproductive technology.

CLAUSE 12

THAT Clause 12 of the Bill be amended by inserting the word "informed" immediately before the word "consent" in subclause (1).

Justification: To ensure that proper consent is obtained for the use of any human reproductive material.

CLAUSE 14

THAT Clause 14 of the Bill be amended by deleting the words "medical doctor that the person requires assisted reproductive technology on medical or health grounds" and substituting therefor the words "a doctor who is an assisted reproductive technology expert that the person requires assisted reproductive technology".

Justification: To give all persons access to assisted reproductive technology services subject to certification by a doctor with specialized knowledge in assisted reproductive technology.

CLAUSE 16

THAT Clause 16 of the Bill be amended by inserting the following new paragraph in subclause (1)—

- (c) a gamete or embryo other than that consent to by the woman;

Justification: To prevent admixing without the consent of the woman into whom a gamete or embryo is being placed into.

CLAUSE 17

THAT Clause 17 of the Bill be amended by—

- (a) deleting subclause (1) and substituting therefor the following new subclause—

(1) A person shall not obtain a sperm or ovum from a child, or use any sperm or ovum obtained from a child except for medical reasons and future human procreation by the child and with informed consent of the minor and parent or legal guardian of the child.

- (b) deleting the word “minor” and substituting therefor the words “a child” in the marginal note;

Justification: For consistency within the Bill as the term child is used throughout the Bill and to prevent abuse of the assisted reproductive technology process.

CLAUSE 18

THAT Clause 18 of the Bill be amended by

- (a) deleting sub-clause (1) and substituting therefor the following new subclause—

(1) A person shall not—

- (a) keep or use an embryo other than a human embryo;
- (b) place a human embryo in any animal;
- (c) transfer an embryo in a woman other than a human embryo;
- (d) keep or use a human embryo in circumstances prohibited under this Act or as prescribed by Regulations;
- (e) replace any part of a human embryo with another part from a cell of any person or embryo or any subsequent development of an embryo except where such replacement is meant to solve a medical problem; or
- (f) undertake any form of human cloning.

- (b) deleting the marginal note and substituting the following new marginal note—

Restrictions on the use of embryos

Justification: To distinguish between human and animal embryos and to place restrictions on persons who misuse embryos and not on the Directorate.

CLAUSE 19

THAT Clause 19 of the Bill be amended in subclause (1) by—

- (a) inserting word “informed” immediately before the word “consent” in paragraphs (b) and (c);

Justification: To ensure that proper consent is obtained for the use of any human reproductive material.

- (b) deleting the words “place sperm and eggs or embryo in a woman” and substituting therefor the words “transfer sperms or embryo into a womb” in paragraph (e).

Justification: Eggs and sperm cannot be transferred into the womb at the same time.

- (c) inserting the following new paragraph—

- (f) in the course of providing assisted reproductive treatment services for any woman, use the sperm of any man without the woman’s informed consent;

Justification: To protect women from insemination with a sperm that they have not consented to.

- (d) inserting the following new clauses immediately after clause 19—

19A. Number of times one can donate gametes or embryos or be a surrogate

- (1) A person shall not donate their gametes or embryos more than ten times.
- (2) A person shall not carry out a treatment procedure using gametes, or an embryo produced by a donor if such procedure may result in more than ten children who are genetic siblings.
- (3) A surrogate mother shall not enter into a surrogacy agreement more than three times in their lifetime and shall be required to wait for two years between each birth to be eligible for another surrogacy agreement.

Justification: To limit the number of donations of gametes and surrogacies for the health and well-being of surrogate mothers.

19B. Donation of gametes or embryos

- (1) A cryo bank shall obtain—
 - (a) male gametes from males between twenty-one years of age and thirty-five years of age; or
 - (b) oocytes from females between twenty-three years of age and thirty-five years of age.
- (2) An assisted reproductive clinic under this Act shall examine the donors for such diseases, as may be prescribed.

Justification: To provide an age limit for gametes donors to ensure its quality.

19C. Disposal of Gametes

- (1) The Directorate may, under such conditions as may be prescribed, permit
 - (a) disposal of the gametes after ten years of preservation;
 - (b) donation of gametes to other couples pursuing assistive reproductive technology; or

- (c) the conduct of research on stem cells and zygotes that are not more than fourteen days old on a written application and if;
 - (i) the applicant undertakes to document the research for record purposes:
and
 - (ii) prior consent is obtained from the donor of such stem cells or zygotes.

(2) Any person who contravenes this provision is guilty of an offence and is liable on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding five years, or to both.

Justification: To provide for the disposal of gametes for instance through donations to couples who need assistance in the event that gametes have not been utilized in the purpose originally intended.

CLAUSE 20

THAT Clause 20 of the Bill be amended—

- (a) by renumbering clause 20 as subclause (1);
- (b) by deleting the marginal note and substituting therefor the following new marginal note—

Posthumous reproduction

- (c) by inserting the following new subclause (2) —
 - (2) Where the ovum of a woman, or any embryo the creation of which was brought about with the ovum of the woman was used after the death of the woman, the woman shall not be treated as the mother of the child unless—
 - (a) The father was married to the woman at the time of the death of the woman; and
 - (b) The woman had given informed consent in writing.

Justification: To provide for post-humous reproduction by a woman and to ensure that proper consent for parentage was obtained prior to the death of the woman.

- (d) by subclause (b) and substituting therefor the following new subclause—
 - (b) there was informed consent in writing by the man.

Justification: To ensure that proper consent for parentage was obtained prior to the death of the man.

CLAUSE 22

THAT Clause 22 of the Bill be amended by inserting the following new clause—

22A. Right to assisted reproductive technology by persons with disability

The national and county governments shall put in place measures to ensure that persons with disability have access to appropriate assisted reproductive technology services.

Justification: To make provision for the rights of persons with disability in line with the National Reproductive Health Policy 2022-2032 which recognizes that persons with disability have special reproductive needs.

CLAUSE 23

THAT Clause 23 of the Bill be amended—

(a) by deleting subclause (2) and substituting therefor the following new subclause—

(2) The consent referred to in subsection (1) shall make express provisions on—

- (a) ownership of the gametes or embryos;
- (b) number of embryos to be implanted;
- (c) what should be done with the gametes or embryos in case of—

- (i) the death of any of the parties seeking assisted reproductive technology services;
- (ii) incapacity of any of the parties seeking assisted reproductive technology services;
- (iii) abandonment of the gametes or embryos;
- (iv) dispute;
- (v) divorce; or
- (vi) separation.

(b) in subclause (3), by deleting the words “death or incapacity of any of the parties” and substituting therefor the words “the circumstances referred to in subsection 2(c)”.

Justification: To make provision for obtaining of prior consent in the event of unforeseeable circumstances such as death or divorce.

(c) in subclause (4), by deleting the word “implanting” and substituting therefor the words “transfer of”.

Justification: Embryos are transferred into a womb.

CLAUSE 24

THAT Clause 24 of the Bill be amended—

(a) in subclause (1) by deleting the word “all” and substituting therefor the words “possible hereditary” in paragraph (b);

Justification: It is impractical to screen all diseases.

(b) in subclause (1), by—

- (i) inserting the words “if any” immediately after word “skills” in paragraph (g);

Justification: To avoid locking out donors who do not possess any professional qualifications and skills.

(ii) inserting the following new paragraphs—

- (h) consent or otherwise of disclosure of identity to possible offspring;
- (g) consent or otherwise for use of donated material for research;

Justification: To require consent which will facilitate the use of donated material for research and disclosure of information in relation to assisted reproductive technology while respecting the right to privacy.

(c) inserting a new clause immediately after clause 24 as follows—

24A. Pre-implantation diagnosis or testing

(1) A donor shall undergo a Pre-implantation diagnosis or testing in order to screen the human embryo or gamete for known, pre-existing, heritable or genetic diseases.

(2) The donation of an embryo after Pre-implantation genetic diagnosis to an approved research laboratory for research purposes shall be done only—

(a) with the approval of the commissioning couple or woman; and

(b) when the embryo suffers from pre-existing, heritable, life-threatening or genetic diseases.

Justification: To ensure that no diseases are passed to the resulting child and to place limitations on research undertaken on human embryos.

CLAUSE 25

THAT Clause 25 of the Bill be amended by deleting the entire clause.

Justification: Marriage is not a requirement to accessing assisted reproductive technology services.

CLAUSE 26

THAT Clause 26 of the Bill be amended by—

(a) deleting the words “sexual intercourse” and substituting therefor the words “natural conception” in subclause (1);

Justification: Natural conception is more ideal in comparison to assisted reproductive technology.

(b) deleting the words “both partners reserve the right to withdraw consent of the implantation of the embryo which has been created by their own sperm or ovum” and substituting therefor the words “both parties will be bound by the agreement and the consent given for the procedure” in subclause (3);

Justification: To make parties accountable for the commitments in the surrogacy agreement.

(c) deleting the subclause (5) and substituting therefor the following new subclause—

(5) A child born via surrogacy or any procedure under this Act shall acquire the citizenship of the intended parent unless there is a prohibition under the laws of the country of the intended parent in which case the child shall acquire Kenyan citizenship.”

Justification: To specify that a child born as a result of assisted reproductive technology takes the citizenship of their parent irrespective of the citizenship of the surrogate or donor.

CLAUSE 27

THAT Clause 27 of the Bill be amended—

(a) in subclause (1) by deleting subclause (1) and substituting therefor the following new subclause—

- (1) A woman of twenty-five years and not more than forty years, who has given birth at least to one child and who understands the rights and obligations accruing under a surrogacy agreement, and has undergone comprehensive mental and physical health assessments, may consent to a process of assisted reproduction for purposes of surrogate motherhood.

Justification: To limit the age of the surrogate mother to above twenty-five and below forty years old which will ensure the safety of the foetus and the surrogate mother, and to provide for comprehensive health assessment which is crucial for the surrogate mother's well-being.

(b) in subclause (2) by—

- (i) deleting the word "child" and substituting therefor the word "foetus";
(ii) deleting the words "parties to a marriage or couple" and substituting therefor the words "intended parents"

Justification: A child is one who has been born. Reference to parties to a marriage or couple is discriminatory.

(c) insert the following new subclause immediately after subclause (2) follows —

2. The intended parents are above the age of twenty-five years but below the age of fifty-five."

Justification: To extend the age limit for the surrogates to intended parents so as to follow the normal age of natural conception for the best interests of the child born out of assisted reproductive technology.

(d) inserting the following new clause immediately after clause 27 —

27A. Leave related to surrogacy

- (1) A surrogate mother under this Act shall be entitled to three months lochia leave.
(2) An intended mother under this Act shall be entitled to three months maternity leave.
(3) An intended father under this Act shall be entitled to two weeks paternity leave.

Justification: To provide for leave for intended parents' after the birth of children born out of assisted reproduction.

CLAUSE 28

THAT Clause 28 of the Bill be amended—

- (a) by deleting the words "parties to a marriage" and substituting therefor the words "Intending parents" in subclause (1);

Justification: Reference to parties to a marriage or couple is discriminatory.

(b) by inserting the following new paragraphs in subclause (3);

- (a) where the surrogate appoints a next of kin and provides the identity information of the appointed guardian;

- (b) where the intending parents appoint a guardian and provides the identity information of the appointed guardian;

Justification: To require the provision of an alternative contact person in the event the surrogate or intending parents die or are unable to take custody of the child born out of assisted reproductive technology.

- (c) by inserting the following new clauses—

(8) A surrogacy agreement may indicate terms of the agreement including terms prohibiting the surrogate from partaking any alcohol, smoking, using unprescribed drugs or engaging in dangerous activity that may affect the health or life of a child conceived through assisted reproduction technology.

(9) The terms of the agreement referred to in subsection (8) shall not be overly tasking or prejudicial to the surrogate.

(10) The Cabinet Secretary shall make for the better carrying out of subsection (8).

Justification: To protect the foetus as the intended parents do not have control over a surrogate's actions.

28A Surrogacy agreements by third parties

- (1) No person shall on a commercial basis do any of the following acts in Kenya—

- (a) initiate or take part in any negotiations with a view to the making of a surrogacy arrangement;
- (b) offer or agree to negotiate the making of a surrogacy arrangement; or
- (c) compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements;

and no person shall in Kenya knowingly cause another to do any of those acts on a commercial basis.

- (2) For the purposes of this section, a person does an act on commercial basis if—

- (a) any payment is at any time received by himself or another in respect of it, or
- (b) the person does it with a view to any payment being received by himself or another in respect of making, or negotiating or facilitating the making of, any surrogacy arrangement.

- (3) In this subsection, "payment" does not include payment to or for the benefit of a surrogate mother or prospective surrogate mother.

Justification: To make provision for negotiations of surrogacy agreements by third parties for financial gain.

28B Commercialization of surrogacy

- (1) No person, organization, surrogacy clinic, laboratory or clinical establishment of any kind shall—

- (a) undertake commercial surrogacy, provide commercial surrogacy or its related component procedure or services in any form or run a racket or an organized group to empanel or select surrogate mothers or use individual brokers or intermediaries to arrange for surrogate mothers and for surrogacy procedures, at such clinics, laboratories or at any other place;

- (b) issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated, any advertisement in any manner regarding commercial surrogacy by any means whatsoever, scientific or otherwise;
- (c) abandon or disown or exploit or cause to be abandoned, disowned or exploited in any form, the child or children born through surrogacy;
- (d) exploit or cause to be exploited the surrogate mother or the child born through surrogacy in any manner whatsoever;
- (e) sell human embryo or gametes for the purpose of surrogacy and run an agency, a racket or an organization for selling, purchasing or trading in human embryos or gametes for the purpose of surrogacy;
- (f) import or shall help in getting imported in, whatsoever manner, the human embryo or human gametes for surrogacy or for surrogacy procedures; and
- (g) conduct sex education in any form for surrogacy.

Justification: To make provision for the prohibition of commercialization of surrogacy by medical practitioners and other relevant actors.

CLAUSE 29

THAT Clause 29 of the Bill be amended—

(a) in subclause (1) by—

- (i) deleting the words “this Act or any other written law” with the words “the Constitution” in paragraph (a).

Justification: To cross reference the Constitution which is the supreme law on matters of termination of pregnancy.

- (ii) deleting the word “implantation” and substituting therefor the word “transfer” in paragraph (b).

Justification: Implantation occurs after transfer of the fertilized embryo.

(b) inserting the following new subclause as follows—

- (3) Where a dispute arises over matters related to assisted reproductive technology such disputes may be resolved through mediation, arbitration or court intervention, as deemed appropriate”

Justification: To provide for a dispute resolution mechanism in disputes relating to assisted reproductive technology.

CLAUSE 30

THAT Clause 30 of the Bill be amended—

(a) in subclause (2) by—

- (i) inserting the words “or where a child born out of a surrogacy agreement has congenital abnormalities” immediately after the words “surrogacy agreement”;
- (ii) inserting the words “or normal child” immediately after the words “borne only one child”;

Justification: To ensure that the commissioning parents do not abandon a child with congenital abnormalities who is legally their child.

(b) in subclause (4) by—

- (i) by deleting the words “Notwithstanding the provisions of section 28(7),”
- (ii) by inserting the following new subclause (d)

(d) compensation irrespective of the pregnancy outcome;

Justification: To allow for payment of compensation to surrogates so as to safeguard the wellbeing of surrogates.

(c) in subclause (5) by—

- (i) deleting the word “law” and substituting therefor the word “Constitution” in subclause (5)(a);
- (ii) inserting the following new paragraph as follows—

(e) be entitled to psychological support during and after the pregnancy, provided by the Commissioning parents.

Justification: To cater for the health and wellbeing of a surrogate mother.

(d) by inserting the following new subclause—

(8) The intending couple or intending parent shall not abandon the child, born out of a surrogacy procedure, whether within Kenya or outside, for any reason whatsoever, including but not restricted to; any genetic defect, birth defect, any other medical condition, the defects developing subsequently, sex of the child or conception of more than one baby and the like.

Justification: To prevent child abandonment.

(e) by inserting the following new clause immediately after clause 30—

30A. Payments in relation to surrogacy

(1) The surrogate and the intended parent or parents may indicate within a surrogacy agreement—

- (a) a description for permitted costs;
- (b) a description of discretionary costs; and
- (c) Length of the payment period in relation to a particular description of costs.

(2) Nothing in this Act shall proscribe a party from providing greater protections to a surrogate.

(3) The Cabinet Secretary shall make regulations as to discretionary and permitted payments of the surrogacy agreement.

(4) In this section, permitted payments are those payments incurred by the surrogate to cover the costs of the surrogate pregnancy to be paid mandatorily by the intended parents unless the surrogate waives that payment.

(5) Permitted costs shall include—

- (a) the costs of travel and subsistence (including accommodation) incurred in connection with—
 - (i) The surrogate meeting with the intended parent or parents;
 - (ii) The surrogate attending medical appointments in connection with surrogacy matters;

- (b) the costs of medical care and legal costs incurred in connection with surrogacy matters;
 - (c) costs incurred with a view to ensuring the surrogate's physical, mental and emotional well-being in connection with surrogacy matters including, the costs of counselling, physiotherapy, antenatal classes and fitness classes;
 - (d) the costs of pregnancy-related items for use by the surrogate including, maternity clothes;
 - (e) any increase in food costs that are attributable to the surrogate pregnancy or otherwise to her entering the surrogacy agreement;
 - (f) any costs incurred in securing assistance with the performance of any day-to-day household task that would normally be performed by the surrogate, but that she is unable to perform as a result of carrying, or giving birth to, a child conceived as a result of surrogacy; and
 - (g) the costs of compensating for loss of earnings suffered as a result of the surrogate entering into the surrogacy agreement.
- (5) The surrogate may claim to permitted costs incurred for any duration of time.
- (6) Discretionary payments shall only be made during the protected period.
- (7) In this section, "the protected period" means the period beginning when the surrogacy agreement is entered into and ending—
- (a) If the surrogate gives birth to a child, at the end of the period of twelve weeks beginning with the day of the birth.
 - (b) If the surrogacy agreement expires without a child having been conceived, on the expiry of the agreement, or
 - (c) If, the resulting child is stillborn or miscarried at the end of twelve weeks of death.
- (8) "Discretionary payment" are payments of a description prescribed in regulations made by the Directorate and shall include compensatory consideration which are above the permitted payment.
- (9) In a case within subsection (9), the intended parent or either or both of the intended parents shall give notice to the directorate that they intend to make discretionary payment to the surrogate, and it is made in accordance with any other requirements prescribed in the regulations under subsection (9).
- (10) In making regulations as to the maximum sum of discretionary costs, the Cabinet Secretary shall decide such sum based on the principle of affordability, non-exploitation of the surrogate and non-exploitation of the intended parents.
- (11) Parties to the surrogate agreement shall not vary discretionary payment during the protected period unless by mutual consent of all parties and after consultations with an advocate.

Justification: To provide the permitted payments to a surrogate to prevent exploitation of the parties to a surrogacy agreement.

CLAUSE 31

THAT Clause 31 of the Bill be amended by—

- (a) deleting clause 31 and substituting therefor the following new clause—

A person shall not intentionally do any act, at any stage of an assisted reproductive process, to select or determine the sex or physical characteristics or features of the child to be born though the process of assisted reproductive technology.

- (b) renumbering the clause as subclause (1) and inserting the following new subclause (2)—
- (2) A person shall not perform any procedure or provide, prescribe or administer anything that shall ensure or increase the probability that an embryo shall be of a particular sex, or that shall identify the sex of an in vitro embryo, except to diagnose, prevent or treat a sex-linked disorder or disease.

Justification: To prevent sex selection which raises many ethical concerns except for medical grounds.

CLAUSE 32

THAT Clause 32 of the Bill be amended—

- (a) by deleting subclause (1);
- (b) by inserting the words “except in the case of transfer of own gametes and embryos for personal use” immediately after the word “Kenya” in subclause (2);
- (c) renumbering subclause (2) as subclause (1) and inserting the following new subclause (2)—
- (2) The sale or transfer of gametes and embryos to any party outside Kenya shall be prohibited except in the case of transfer of a person’s own gametes and embryos for personal use.

Justification: To prohibit the sale or transfer of gametes and embryos outside Kenya except for personal use.

- (d) inserting the following new clauses immediately after clause 32 —

32A. Offences related to surrogacy, prohibition of commercial surrogacy and abuse

(1) No person, organization, surrogacy clinic, laboratory or clinical establishment of any kind shall;

- a) undertake commercial surrogacy, provide commercial surrogacy or its related component procedures or services in any form or run a racket or an organized group to empanel or select surrogate mothers or use individual brokers or intermediaries to arrange for surrogate mothers and for surrogacy procedures, at such clinics;
- b) issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated, any advertisement in any manner regarding commercial surrogacy by any means whatsoever, scientific or otherwise;
- c) abandon or disown or exploit or cause to be abandoned, disowned or exploited in any form, the child or children born through surrogacy;
- d) exploit or cause to be exploited the surrogate mother or the child born through surrogacy in any manner whatsoever;
- e) sell human embryos for the purpose of surrogacy and run an agency, a racket or an organization for selling, purchasing or trading in human embryos or gametes for the purpose of surrogacy.

(2) Notwithstanding anything contained in any other written law, a person who contravenes section (1) commits an offence and on conviction, shall be liable to pay a fine not exceeding ten million shillings or to imprisonment to a term not exceeding ten years, or to both.

(3) For the purposes of this section, the term "advertisement" includes any notice, circular, label, wrapper or any other document including advertisement through internet or any other media, in electronic or print form.

(4) Any registered medical practitioner, fertility expert, embryologist or any person who owns a fertility clinic or is employed with such a clinic, centre or laboratory and renders his professional or technical services to or at such clinic or centre or laboratory, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act and regulations made under the Act, commits an offence and on conviction, shall be liable to pay a fine not exceeding five million shillings or to imprisonment to a term not exceeding five years, or to both.

Justification: To prohibit the use, abuse and mistreatment of surrogates and the gestational surrogacy process generally. To also adhere to international standards as medical advertisement is frowned upon.

32B. Offences relating to matching services

(1) It is an offence for a person to provide surrogacy matching services in return for a payment.

(2) A person does not commit an offence merely by making use of services which another person is prohibited by this section from providing.

(3) In this section, "surrogacy matching services" means services provided with a view to assisting an individual who wants to enter into a surrogacy agreement to find another individual or individuals with whom to enter into the agreement.

(4) A person who contravenes this section commits an offence and on conviction, shall be liable to pay a fine not exceeding five hundred thousand shillings or to imprisonment to a term not exceeding one year, or to both, and to a fine not exceeding ten million shillings in the case of a body corporate.

Justification: To prevent over commercialization of surrogacy.

32C. Prohibition on certain publications

(1) A person shall not publish, or cause to be published, an advertisement or notice—

- (a) to the effect that a person is or may be willing to enter into a surrogacy arrangement;
- (b) to the effect that a person is seeking another person who is or may be willing to enter into a surrogacy arrangement or to act as a surrogate mother or to arrange a surrogacy arrangement;
- (c) to the effect that a person is or may be willing to accept any benefit under a surrogacy arrangement, whether for himself or herself or for another person; or
- (d) to the effect that a person is or may be willing to accept any benefit under a surrogacy arrangement, whether for himself or herself or for another person that is intended or likely to counsel or procure a person to agree to act as a surrogate.

(2) A person who contravenes this section commits an offence and on conviction, shall be liable to pay a fine not exceeding five hundred thousand shillings or to imprisonment to a term not exceeding one year, or to both, and to a fine not exceeding ten million shillings in the case of a body corporate.

Justification: To prevent over commercialization of surrogacy.

CLAUSE 33

THAT Clause 33 of the Bill be amended by—

- (a) inserting the following new subclause (f) as follows—
- (f) the destruction or disposal by a registered assisted reproductive technology provider of any gametes or an embryo formed outside the body of a woman;

Justification: To ensure that disposal is done within the stipulated period of 10 years.

- (b) renumbering the clause as subclause (1);
- (c) inserting the following new subclause—

- (2) The Directorate shall ensure that all information contained in the register is protected and maintained in a confidential manner in accordance with relevant data protection and privacy laws.
- (3) The Directorate shall maintain all records, charts, forms, reports, consent letters, agreements and all the documents under this Act shall be preserved for a period of twenty-five years or such period as may be prescribed:

provided that, if any criminal or other proceedings are instituted against any surrogacy clinic, the records and all other documents of such clinic shall be preserved until the final disposal of such proceedings.

- (4) All such records under subsection (3) shall, at all reasonable times, be made available for inspection to the appropriate authority or to any other person authorized by the appropriate authority in this behalf.”

Justification: To ensure compliance with the right to privacy as guaranteed under Article 31 of the Constitution of Kenya, 2010 and to ensure preservation of medical records relating to surrogacy in matters of the health of the surrogate, child born out of surrogacy and the commissioning parents.

CLAUSE 34

THAT Clause 34 of the Bill be amended by deleting the words “twenty-one” and substituting therefor the word “eighteen”;

Justification: For conformity with age of consent to marry so as to prevent incest.

CLAUSE 42

THAT Clause 42 of the Bill be amended —

- (a) by deleting subclause (1) and (2) and inserting the following new subclause (1)—

- (1) The Directorate may, in accordance with this Act, attach the following conditions to a licence—

Justification: To merge subclause (1) and (2).

- (b) in subclause (2) by—
 - (i) inserting the word “authorized” immediately before the word “member” in paragraph (b);

Justification: To remove ambiguity on the persons authorized to enter and inspect premises offering assisted reproductive services.

- (ii) deleting the words “unless authorized by the Directorate” in paragraph (d)

Justification: To remove the requirement of authorization of compensation to be paid for the supply of gametes or embryos.

- (c) By renumbering subclause (3), (4), (5) and (6) as (2), (3), (4) and (5) respectively.

Justification: For proper numbering due to the merging subclause (1) and (2).

CLAUSE 43

THAT Clause 43 of the Bill be amended—

- (a) in subclause (1) by inserting the following new paragraphs—

- (g) the cryo bank has adequate safety and security of the gametes or embryos stored;
- (h) the storage tubes are labelled with a unique identifier;
- (i) there is a register linking the unique identifier to the identity of the donors, date of storage and any other relevant information;
- (j) there is maintenance of a movement register of storage and retrieval of stored gametes or embryos; and
- (k) the bank has adequate facilities to ensure privacy and confidentiality of the gamete, embryo and donor identity.

Justification: To make provision on storage requirements to be observed in preservation of embryos or gametes.

- (b) by deleting subclause (2) and substituting therefor the following new subclauses—

- (2) Where a donor or person wishing to store their gamete or embryo in a cryo bank through cryo-preservation, the cryo bank shall only store such gamete or embryo for as long as the owners of the gamete or embryo are alive or for a period not exceeding ten years upon which time the embryo or gamete shall be allowed to perish or be donated to a research organization registered under this Act for research purposes with the consent of the commissioning couple or individual, in such manner as may be prescribed.
- (3) Where a child wishes to store their gametes or embryo by virtue of section 17(1) of this Act, a cryo bank shall preserve such embryo or gamete for a period of twenty years.
- (4) A person wishing to store their gametes or embryo for a longer period of time than otherwise stipulated in subsection (2) and (3) shall make an application to the Directorate to approve longer or further storage of a gamete.
- (5) The Directorate may approve the longer storage period if it considers there are reasonable grounds to do so in the particular case.
- (6) The reasonable grounds referred to in subsection (5) shall include
 - (a) chronic illness; and
 - (b) any other ground as prescribed in regulations.
- (7) In deciding to approve a longer or further storage period, the Directorate shall have regard to the age of the applicant and ensure that such applicant shall not be over the age of fifty-five in the proposed extension period.
- (8) In case of a pending application to the Directorate under this section, a person may cause or permit gametes to remain in storage until the Directorate approves or declines the longer storage period.

Justification: To allow for flexibility to accommodate exceptional circumstances.

CLAUSE 46

THAT Clause 46 of the Bill be amended in subclause (1) by—

(a) deleting paragraph (d);

Justification: There is uncertainty on the circumstances that would warrant the revocation of a licence.

(b) deleting paragraph (e) and substituting therefor the following new paragraph—

(e) that the person responsible has committed a professional malpractice or has been removed from office for contravening the provisions of the Constitution or any other written law;

(c) inserting words “or any other law and sentenced to imprisonment for a term exceeding six months” immediately after the word “Act” in paragraph (e)—

Justification: To empower the Directorate to revoke licences for persons who have committed serious offences and are of questionable character.

Part VIII

THAT the title of Part VIII of the Bill be amended by deleting the expression “PART VIII” and substituting therefor the expression “PART VII”.

Justification: To correct a minor error in numbering of the parts of the Bill.

CLAUSE 50

THAT Clause 50 of the Bill be amended by inserting the following proviso immediately after paragraph (c)—

and is liable upon conviction, to a fine not exceeding two million or to imprisonment for a term not exceeding five years, or to both.

Justification: To provide a penalty for the offences committed under clause 50.

CLAUSE 51

THAT Clause 51 of the Bill be amended by inserting the following new clauses—

51A. Transitional provisions

(1) Every clinic or cryo bank which conducts assisted reproductive technology, partly or exclusively shall, within a period of sixty days from the date of establishment of the Directorate, apply for licenses provided that such clinics and cryo banks shall cease to conduct any assisted reproduction procedures on the expiry of six months from the date of commencement of this Act, unless such clinics and cryo banks have applied for registration.

(2) On receipt of the application under subsection (1), the Directorate shall within a period of thirty days—

- (a) grant registration subject to the provisions of this Act and the rules and regulations made thereunder, and provide a registration number to the applicant; or
- (b) reject the application for reasons to be recorded in writing, if such application does not conform to the provisions of this Act or the rules or regulations made thereunder:"

Justification: To provide for savings and transitional provisions on licensing of existing clinics and cryo banks.

51B. Amendment of Cap. 149

(1) The Births and Deaths Registration Act is amended—

(a) in section 2 by inserting the following new definitions—

"intended parents" means a couple or commissioning parents who enter into a surrogacy arrangement under the Assisted Reproductive Technologies Act;

"surrogate-born child" means a child born as a result of an assisted reproduction procedure undertaken under the Assisted Reproductive Technologies Act;

"surrogate mother" means a woman who has agreed to carry a pregnancy to term for another person or a couple under a surrogacy agreement in accordance with the Assisted Reproductive Technologies Act and lays no legal claim to the born child;

(b) in section 12 by—

(i) inserting the words "or by presenting a surrogacy agreement indicating the particulars of the intended father" immediately after the words "in accordance with some recognized custom";

(ii) inserting the following new clause immediately after Section 12—

"13. The registrar shall cause to be entered in a certificate of birth of child born out of assisted reproductive procedure, the name of the intended parents upon presentation of a valid surrogacy agreement and verification of the agreement by the Directorate established under section 5 of the Assisted Reproductive Technologies Act".

Justification: To facilitate the registration of children born via assisted reproductive technology.

Part IX

THAT the title of Part IX of the Bill be amended by deleting the expression "PART IX" and substituting therefor the expression "PART VIII".

Justification: To correct a minor error in numbering of the parts of the Bill.

CLAUSE 52

THAT Clause 52 of the Bill be amended by –

(a) deleting the words "planted in" and substituting therefor the words "transferred into" in subclause (c);

Justification: Fertilized embryos are transferred into a womb.

- (b) inserting the word "informed" immediately after the words "giving of" in subclause (g);

Justification: To ensure that proper consent is provide for the use of human reproductive material in assisted reproductive processes.

- (c) Deleting the word "children" and substitute therefor the word "embryos" in subclause (h)

Justification: Embryos are created from gametes.