

REPUBLIC OF KENYA



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THE NATIONAL ASSEMBLY  
THIRTEENTH PARLIAMENT – THIRD SESSION – 2024

DIRECTORATE OF DEPARTMENTAL COMMITTEES


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DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

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REPORT ON:

**THE CONSIDERATION OF THE ANTI-CORRUPTION AND  
ECONOMIC CRIMES (AMENDMENT) BILL, 2023**  
(NATIONAL ASSEMBLY BILL NO. 40 OF 2023)

|   |   |
|---|---|
| <br>THE NATIONAL ASSEMBLY<br>PAPERS LAID |   |
| DATE: 31 JUL 2024   | DAY: WEDNESDAY                            |
| TABLED BY:  | CHAIRPERSON, JLAC<br>HON. GEORGE MUREGARA |
| CLERK AT THE TABLE:   | TRACEY CHEBET                             |

CLERK'S CHAMBERS  
DIRECTORATE OF DEPARTMENTAL COMMITTEES  
PARLIAMENT BUILDINGS  
NAIROBI

JULY 2024

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## List of Abbreviations and Acronyms

|       |   |   |
|-------|---|---|
| OAG   | - | Office of the Attorney-General                      |
| APNAC | - | African Parliamentarians Network Against Corruption |
| CSPEN | - | Civil Society Parliamentary Engagement Network      |
| FORD  | - | Forum for the Restoration of Democracy              |
| KLRC  | - | Kenya Law Reform Commission                         |
| LSK   | - | Law Society of Kenya                                |
| MCCP  | - | Maendeleo Chap Chap Party                           |
| ODPP  | - | Office of the Director of Public Prosecutions       |
| ODM   | - | Orange Democratic Movement                          |
| TI    | - | Transparency International                          |
| UDA   | - | United Democratic Alliance                          |
| UNCAC | - | United Nations Convention against Corruption        |
| WDM   | - | Wiper Democratic Movement                           |

## **Annexures**

- Annexure 1: Adoption Schedule
- Annexure 2: Minutes
- Annexure 3: Anti-Corruption and Economic Crimes (Amendment) Bill, 2023
- Annexure 4: Advertisement inviting the public to submit memoranda on the Bill
- Annexure 5: Letters from the Clerk of the National Assembly inviting stakeholders to attend the public participation forums
- Annexure 6: Memoranda by Stakeholders

## Chairperson's Foreword

This report contains the proceedings of the Departmental Committee on Justice and Legal Affairs on its consideration of the Anti-Corruption and Economic Crimes (Amendment) Bill (*National Assembly Bill No. 40 of 2023*) which was published on 2<sup>nd</sup> August 2023. The Bill seeks to delete the offences of wilfully or carelessly failing to comply with procurement laws, procedures and guidelines and engaging in a project without prior planning.

In compliance with Article 118(b) of the Constitution and Standing Order 127(3), the Committee placed an advertisement in the print media on Friday 10<sup>th</sup> November 2023 inviting the public to submit memoranda by way of written statements on the Bill. In addition, the Committee vide letter Ref. No. NA/DDC/JLAC/2024/058 dated Wednesday 6<sup>th</sup> March 2024 invited key stakeholders to submit views on the Bill and attend a public participation forum on Thursday 14<sup>th</sup> March 2024. The memoranda were to be received on or before Friday 17<sup>th</sup> November 2023 at 5.00 pm (East African Time). By the close of the submission deadline, the Committee had received six (6) memoranda. The OAG, EACC, ODPP, APNAC-Kenya, CSPEN and TI gave their views on the Bill which the Committee considered in the preparation of this report.

While considering the Bill, the Committee observed that, pursuant to Article 201 (d) of the Constitution, public money should be used in a prudent and responsible way. In addition, when a state organ or any other public entity contracts for goods and services, it should be done in accordance with a system that is fair, equitable, transparent, competitive and cost-effective as provided for under Article 227 (1) of the Constitution. Therefore, section 45 (2) (b) and (c) of the Anti-Corruption and Economic Crimes Act, ensures that public money is used in a responsible way and procurement is done in a fair, equitable, transparent, competitive and cost-effective manner. Therefore, the Bill should be akin to strengthening the already existing laws on curbing corruption and not weakening them.

The Committee is grateful to the Offices of the Speaker and Clerk of the National Assembly for the logistical and technical support accorded to it during its consideration of the Bill. The Committee further wishes to thank the OAG, EACC, ODPP, APNAC-Kenya, CSPEN and TI for submitting memoranda on the Bill. Finally, I wish to express my appreciation to the Honourable Members of the Committee and the Committee Secretariat who made useful contributions towards the preparation and production of this report.

On behalf of the Departmental Committee on Justice and Legal Affairs and pursuant to the provisions of Standing Order 199(6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its Consideration of the Anti-Corruption and Economic Crimes (Amendment) Bill (*National Assembly Bill No. 40 of 2023*).

It is my pleasure to report that the Committee has considered the Anti-Corruption and Economic Crimes (Amendment) Bill (*National Assembly Bill No. 40 of 2023*) and have the honour to report back to the National Assembly with the recommendation that **the House rejects the Bill**.

**Hon. Murugara George Gitonga, MP**  
**Chairperson, Departmental Committee on Justice and Legal Affairs**



## CHAPTER ONE

### 1 Preface

#### 1.1 Establishment of the Committee

1. The Departmental Committee on Justice and Legal Affairs is one of twenty departmental committees of the National Assembly established under **Standing Order 216** whose mandate pursuant to the **Standing Order 216 (5)** is as follows:
  - i. *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;*
  - ii. *To study the programme and policy objectives of ministries and departments and the effectiveness of the implementation;*
  - iii. *To, on a quarterly basis, monitor and report on the implementation of the national budget in respect of its mandate;*
  - iv. *To study and review all legislation referred to it;*
  - v. *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;*
  - vi. *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;*
  - vii. *To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);*
  - viii. *To examine treaties, agreements and conventions;*
  - ix. *To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation;*
  - x. *To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and*
  - xi. *To examine any questions raised by Members on a matter within its mandate.*

#### 1.2 Mandate of the Committee

2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider: -
  - a) The Judiciary;
  - b) Tribunals;
  - c) Access to Justice;
  - d) Public prosecutions;
  - e) Ethics, Integrity and Anti-corruption;
  - f) Correctional services;
  - g) Community service orders and witness protection;
  - h) Constitutional Affairs;
  - i) Sovereign immunity;
  - j) Elections including referenda;
  - k) Human rights;
  - l) Political parties; and
  - m) The State Law Office' including insolvency, law reform, public trusteeship, marriages and legal education.

3. In executing its mandate, the Committee oversights the following Ministries, Departments and Agencies:

- a) State Department of Correctional Services;
- b) State Law Office and Department of Justice;
- c) The Judiciary;
- d) Judicial Service Commission;
- e) Office of the Director of Public Prosecutions;
- f) Ethics and Anti-Corruption Commission;
- g) Independent Electoral and Boundaries Commission;
- h) Commission on Administrative Justice;
- i) Office of the Registrar of Political Parties;
- j) Witness Protection Agency;
- k) Kenya National Commission on Human Rights;
- l) Kenya Law Reform Commission; and
- m) Council of Legal Education.



### 1.3 Committee Membership

4. The Committee was constituted by the House on 27<sup>th</sup> October 2022 and comprises the following Members:

#### **Chairperson**

Hon. Murugara George Gitonga, MP  
Tharaka Constituency

#### **UDA Party**

#### **Vice-Chairperson**

Hon. Mutuse Eckomas Mwengi, OGW, MP  
Kibwezi West Constituency

#### **MCCP Party**

#### **Members**

Hon. Maalim Farah, MP  
Dadaab Constituency  
**WDM-Kenya**

Hon. Muriu Wakili Edward, MP  
Gatanga Constituency  
**UDA Party**

Hon. Francis Kajwang' Tom Joseph, MP  
Ruaraka Constituency  
**ODM Party**

Hon. Maina Jane Njeri, MP  
Kirinyaga (CWR)  
**UDA Party**

Hon. Junet Mohamed, CBS, MP  
Suna East Constituency  
**ODM Party**

Hon. Gichohi Kaguchia John Philip, MP  
Mukurweini Constituency  
**UDA Party**

Hon. (Dr.) Otiende Amollo, SC, MP  
Rarieda Constituency  
**ODM Party**

Hon. Mogaka Stephen M, MP  
West Mugirango Constituency  
**Jubilee Party**

Hon. Onyiego Silvanus Osoro, CBS, MP  
South Mugirango Constituency  
**UDA Party**

Hon. Aden Daud, EBS, MP  
Wajir East Constituency  
**Jubilee Party**

Hon. Muchira Michael Mwangi, MP  
Ol Jorok Constituency  
**UDA Party**

Hon. Siyad Amina Udgoon, MP  
Garissa Township (CWR)  
**Jubilee Party**

Hon. Makali John Okwisia, MP  
Kanduyi Constituency  
**FORD-Kenya**

#### 1.4 Committee Secretariat

5. The Committee is well-resourced and facilitated by the following staff:

Mr. Ahmed Salim Abdalla  
**Clerk Assistant I / Head of Secretariat**

Mr. Ronald Walala  
**Senior Legal Counsel**

Ms. Vivienne Ogega  
**Research Officer III**

Ms. Jael Ayiego  
**Clerk Assistant III**

Ms. Mary Kamande  
**Public Communications Officer III**

Mr. Abdikafar Abdi  
**Clerk Assistant III**

Mr. John Nduaci  
**Serjeant-At-Arms**

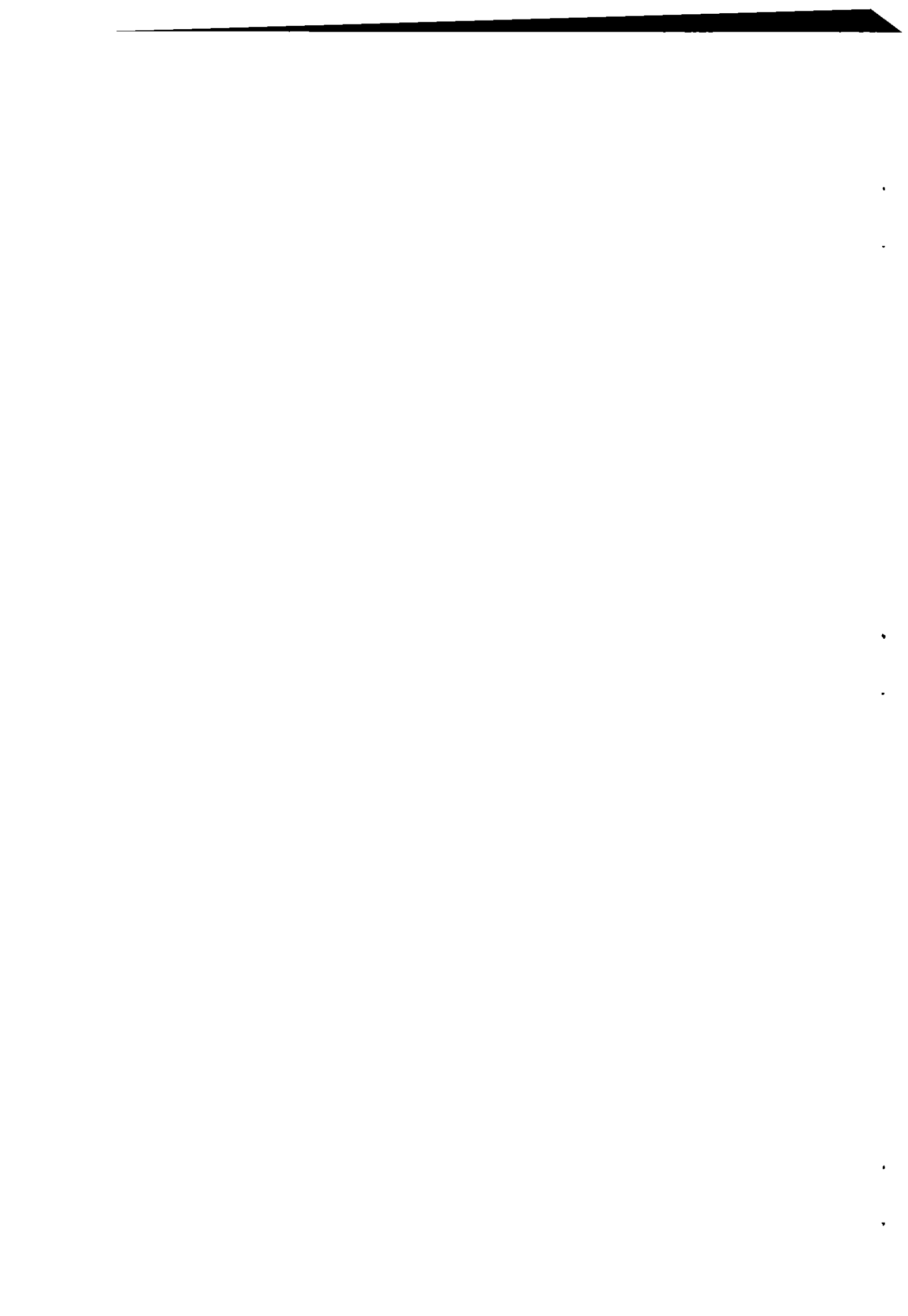
Mr. Omar Abdirahim  
**Fiscal Analyst II**

Mr. Calvin Karung'o  
**Media Relations Officer III**

Mr. Isaac Nabiswa  
**Legal Counsel II**

Mr. Peter Mutethia  
**Audio Officer III**

Mr. Silas Opanga  
**Hansard Reporter III**



## CHAPTER TWO

### **2 Overview of the Anti-Corruption and Economic Crimes (Amendment) Bill (National Assembly Bill No. 40 of 2023)**

#### **2.1 Background**

6. The Bill which is sponsored by the Hon. Geoffrey Kariuki Ruku, MP, was published on 2<sup>nd</sup> August 2023 and read a First Time in the House on 26<sup>th</sup> October 2023. It was thereafter committed to the Committee in line with the provision of Standing Order 127 (1).

#### **2.2 Summary of Legal Provisions**

7. The Bill seeks to amend Section 45 of the Anti-Corruption and Economic Crimes (Amendment) Act, 2003 by deleting subsection (2) and substituting therefor the following new subsection:  
*“(2) An officer or person whose functions concern administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person fraudulently makes payment or excessive payment from public revenues for—*
  - (a) sub-standard or defective goods;*
  - (b) goods not supplied or not supplied in full; or*
  - (c) services not rendered or not adequately rendered.”*
8. The proposal effectively deletes the offences of wilfully or carelessly failing to comply with procurement laws, procedures and guidelines and engaging in a project without prior planning.

## CHAPTER THREE

### 3 Public Participation and Stakeholder Engagement on the Bill

#### 3.1 Legal Framework on Public Participation

9. Article 118 (1)(b) of the Constitution provides that:

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

10. The National Assembly Standing Order 127 (3) and (3A) stipulates that:

*“(3) 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.*

*(3A) 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 Memoranda Received on the Bill

11. Pursuant to the aforementioned provisions of law, the Committee placed an advertisement in the print media on Friday 10<sup>th</sup> November 2023 inviting the public to submit memoranda by way of written statements on the Bill. Further, the Committee vide letter Ref. No. NA/DDC/JLAC/2024/058 dated Wednesday 6<sup>th</sup> March 2024 invited key stakeholders to submit views on the Bill and attend a public participation forum on Thursday 14<sup>th</sup> March 2024.

12. To this end, the Committee received six (6) memoranda from the OAG, EACC, ODPP, APNAC-Kenya, CSPEN and TI. The memoranda are annexed to this report as *Annexure 6*.

13. The Committee received memoranda opposing the Bill in its entirety from the OAG, EACC, ODPP, APNAC-Kenya, CSPEN and TI. They submitted as follows:

14. **OAG** submitted that the amendment is not in line with the anti-corruption policy framework and international obligations that call for strengthening of the legal framework for combatting corruption. The deletion of Section 45(2)(b) and (c) removes procurement fraud and malpractices from the ambit of corruption and economic crimes.

15. **ODPP** submitted that the amendment has far-reaching implications and would negatively impact the legal mechanisms established to actualize Article 201 of the Constitution on the principles of public finance; Article 227 of the Constitution on procurement of public goods and services and the use and management of public resources under the Public Finance Management Act.

16. **EACC** submitted that decriminalizing failure to follow procurement law, procedures and guidelines undermines Article 227 of the Constitution which provides for fairness, equity, transparency and cost-effectiveness in procurement of public goods and services. Investigations by the Commission have consistently demonstrated that procurement entails a process where acts of commission or omission at every stage contribute to the eventual outcome. Therefore, a fault in any stage of the process results in an undesirable or irregular outcome. The need to plan and budget for procurement ensures that procurement entities

initiate and complete projects within approved budgets and agreed timelines reducing incidences of stalled projects and pending bills. The administrative action does not provide a commensurate deterrent effect to the far-reaching negative impacts of corruption. Electing administrative action over prosecution will encourage participants in the procurement process to engage in corrupt conduct without a deterrent consequence. Therefore, the amendment will yield undesired results and is a backslide of the significant gains made in the fight against corruption in safeguarding public resources.

17. **APNAC-K** submitted that the amendments will weaken the fight against corruption and reverse the gains made so far in holding all persons involved at various stages of the procurement process and handling of public resources to account for corrupt conduct. Administrative sanctions alone are insufficient to address the gravity of such offences, considering the dire impact they already have.
18. **CSPEN** submitted that the amendments will afoul several provisions of the Constitution. These provisions include Article 10 on the values and principles of governance; Article 27 on equality and freedom from discrimination; Article 73 on responsibilities of leadership; Article 201 on the principles of public finance; and Article 227 on procurement of public goods and services. In addition, the amendment reverses the presumption of constitutional validity of a law and contravenes the international obligation provided under UNCAC.
19. **TI** submitted that the amendment goes against the public interest, the principles of public finance; leadership and integrity test and the national values and principles of governance. In addition, there is no ambiguity in the term “prior planning” since the Public Procurement and Asset Disposal Act (Cap. 412C) provides for procurement and asset disposal planning.

## CHAPTER FOUR

### 4 Determination on whether or not to amend the Bill

20. Upon reviewing the Bill and the submissions received, the Committee made the following observations:
- a) Section 45 (2) (b) and (c) of the Anti-Corruption and Economic Crimes Act provides that an officer whose function concern the administration, custody, management, receipt or use of public revenue or public property shall be guilty of an offence if he or she wilfully or carelessly fails to comply with any law or procedures and guidelines relating to procurement, management of funds or incurring expenditure or engages in a project without prior planning. The deletion of these offences removes procurement fraud and malpractices from the ambit of corruption and economic crimes and will therefore offend various provisions of the Constitution. They include Articles 10, 27, 73, 201 and 227.
  - b) On determining whether a person is guilty of the offences if no loss was suffered, it was noted that unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, the result intended to be caused by an act or omission is immaterial.
  - c) In cases of emergencies, Article 208 establishes the Contingencies Fund to be utilized when there is an urgent and unforeseen need for expenditure. To give effect to this provision, the Public Management Fund Act (cap. 412A) provides for what constitutes an urgent and unforeseen need for expenditure.
21. In light of the foregoing, the Committee resolved to recommend to the House to reject the Bill in its entirety.


CHAPTER FIVE

5 Committee Recommendations

22. The Committee, having considered the Anti-Corruption and Economic Crimes (Amendment) Bill (*National Assembly No. 40 of 2023*) recommends that **the House rejects the Bill in its entirety.**

SIGNED.......... DATE..... 31.7.2024.....

HON. GEORGE GITONGA MURUGARA, CBS, MP  
CHAIRPERSON  
DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

|   |                   |
|---|-------------------|
| <br>THE NATIONAL ASSEMBLY<br>PAPERS LAID |                   |
| DATE: 31 JUL 2024   |                   |
| TABLED BY:  | CHAIRPERSON, JLAC |
| CLERK-AT-THE-TABLE:   | TRACEY CHEBET     |
|   | DAY: WEDNESDAY    |



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Annexure **1**:  
**Adoption Schedule**



THE NATIONAL ASSEMBLY  
13<sup>TH</sup> PARLIAMENT (THIRD SESSION) - 2024  
JUSTICE AND LEGAL AFFAIRS COMMITTEE

ADOPTION SCHEDULE

**AGENDA:** Adoption of the report on the Anti-Corruption and Economic Crimes (amendment) Bill, 2023 (National Assembly Bill No. 40 of 2023) by the Hon. Geoffrey Ruku, MP

| No. | HON MEMBER  | SIGNATURE |
|-----|---|-----------|
| 1.  | HON. MURUGARA GEORGE GITONGA, CBS, MP –<br><i>Chairperson</i> |           |
| 2.  | HON. MUTUSE ECKOMAS MWENGI, MP – <i>Vice<br/>Chairperson</i>  |           |
| 3.  | HON. MAALIM FARAH, MP   |           |
| 4.  | HON. FRANCIS KAJWANG' TOM JOSEPH, MP                          |           |
| 5.  | HON. JUNET MOHAMED, CBS, MP                                   |           |
| 6.  | HON. ONYIEGO SILVANUS OSORO, CBS, MP                          |           |
| 7.  | HON. (DR.) OTIENDE AMOLLO, SC, MP                             |           |
| 8.  | HON. MUCHIRA MICHAEL MWANGI, MP                               |           |
| 9.  | HON. MAKALI JOHN OKWISIA, MP                                  |           |
| 10. | HON. MURIU WAKILI EDWARD, MP                                  |           |
| 11. | HON. MAINA JANE NJERI, MP                                     |           |
| 12. | HON. GICHOHI KAGUCHIA JOHN PHILIP, MP                         |           |
| 13. | HON. MOGAKA STEPHEN M, MP                                     |           |
| 14. | HON. ADEN DAUD, EBS, MP                                       |           |
| 15. | HON. SIYAD AMINA UDGOON, MP                                   |           |

Annexure **2**:  
**Adoption Minutes**

**MINUTES OF THE FORTY SECOND (42<sup>ND</sup>) SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON TUESDAY, 11<sup>TH</sup> JUNE 2024 AT 10:00AM IN ROOM 18, 3<sup>RD</sup> FLOOR, BUNGE TOWER, PARLIAMENT BUILDINGS**

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**MEMBERS PRESENT**

1. Hon. Murugara George Gitonga, CBS, MP - *Chairperson*
2. Hon. Mutuse Eckomas Mwengi, OGW, MP - *Vice Chairperson*
3. Hon. Maalim Farah, MP
4. Hon. Francis Kajwang' Tom Joseph, MP
5. Hon. Maina Jane Njeri, MP - *virtually*
6. Hon. Muchira Michael Mwangi, MP
7. Hon. Gichohi Kaguchia John Philip, MP
8. Hon. Mogaka Stephen M, MP

**MEMBERS ABSENT WITH APOLOGIES**

1. Hon. Onyiego Silvanus Osoro, CBS, MP
2. Hon. Junet Mohamed, CBS, MP
3. Hon. (Dr.) Otiende Amollo, SC, MP
4. Hon. Makali John Okwisia, MP
5. Hon. Siyad Amina Udgoon, MP
6. Hon. Aden Daud, EBS, MP
7. Hon. Muriu Wakili Edward, MP

**SECRETARIAT**

- |                           |   |                                     |
|---------------------------|---|-------------------------------------|
| 1. Mr. Walala Ronald      | - | Ag. Deputy Director, Legal Services |
| 2. Ms. Jael Ayiego Kilaka | - | Clerk Assistant III                 |
| 3. Mr. Abdikafar Abdi     | - | Clerk Assistant III                 |
| 4. Mr. Omar Abdirahim     | - | Fiscal Analyst II                   |
| 5. Ms. Vivienne Ogega     | - | Research Officer III                |
| 6. Mr. Calvin Karungo     | - | Media Relations Officer             |

**AGENDA**

1. Prayers
2. Preliminaries
3. Confirmation of the previous minutes
4. Consideration and Adoption of the following reports:
  - a. Report on the Anti-Corruption and Economic Crimes (amendment) Bill, 2023 sponsored by Hon. Geoffrey Ruku, MP
  - b. Report on the proposed Advocates (amendment) Bill, 2023 sponsored by Hon. Timothy Kipchumba, MP
  - c. Report on the proposed Public Appointments (parliamentary approval) (amendment) Bill, 2023 sponsored by Hon. Shakeel Shabbir, MP
  - d. Report on the proposed County Government (amendment) Bill, 2023 sponsored by Hon. David Ochieng', MP
  - e. Addendum report to the report submitted on 23<sup>rd</sup> May 2023 to the Office of the Speaker of the National Assembly on the pre-publication scrutiny of the proposed Criminal Procedure Code (amendment) Bill, 2023 sponsored by Hon. Abdul Raheem Dawood, MP
5. Any Other Business
6. Adjournment/ Date of the Next Meeting

**MIN. NO/DDC/JLAC/208/2024:**

**PRELIMINARIES**

The meeting was called to order at fifteen minutes past ten o'clock by the Chairperson followed by a word of prayer from the Chairperson and thereafter Members introduced themselves. The agenda of the meeting was adopted having been proposed by Hon. Maalim Farah, MP and seconded by Hon. Muchira Michael Mwangi, MP.

**MIN.NO/DDC/JLAC/209/2024:**

**CONFIRMATION OF MINUTES**

The agenda was deferred.

**MIN.NO/DDC/JLAC/210/2024:**

**CONSIDERATION AND ADOPTION OF PENDING REPORTS**

**1. Report on the Anti-Corruption and Economic Crimes (Amendment) Bill, 2023 sponsored by Hon. Geoffrey Ruku, MP**

Upon reviewing the Bill and the submissions received, the Committee made the following observations:

- a) Section 45 (2) (b) and (c) of the Anti-Corruption and Economic Crimes Act provides that an officer whose function concern the administration, custody, management, receipt or use of public revenue or public property shall be guilty of an offence if he or she willfully or carelessly fails to comply with any law or procedures and guidelines relating to procurement, management of funds or incurring expenditure or engages in a project without prior planning. The deletion of these offences removes procurement fraud and malpractices from the ambit of corruption and economic crimes and will therefore offend various provisions of the Constitution. They include Articles 10, 27, 73, 201 and 227.
- b) On determining whether a person is guilty of the offences if no loss was suffered, it was noted that unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, the result intended to be cause by an act or omission is immaterial.
- c) In cases of emergencies, Article 208 establishes the Contingencies Fund to be utilized when there is an urgent and unforeseen need for expenditure. To give effect to this provision, the Public Management Fund Act (cap. 412A) provides for what constitutes an urgent and unforeseen need for expenditure.

**Committee Recommendation**

The Committee, having considered the Anti-Corruption and Economic Crimes (Amendment) Bill (National Assembly No. 40 of 2023) and recommended that the House rejects the Bill.

**Adoption of the Report**

The report was therefore adopted, having been proposed by Hon. Maalim Farah, MP and seconded by Hon. Mogaka Stephen M, MP.

**2. Report on the proposed Advocates (Amendment) Bill, 2023 sponsored by Hon. Timothy Kipchumba, MP**

The Committee made the following observations:

- a) That the Committee has been seized of a similar legislative proposal by the Hon. Owen Baya, MP and prepared a report submitted to the Office of the Speaker of the National Assembly.
- b) That the proposal is not necessary to allow for cross-border practice. Cross-border practice is already anchored in the Protocol on the Establishment of the EAC Common Market, 2010 which has enabled advocates to practice in the EAC region.

- c) That the proposal, in keeping with the Treaty for the Establishment of the East African Community and the principle of reciprocity, should look into the incorporation of all other partner states of the East African Community including the Democratic Republic of Congo and the Republic of South Sudan.
- d) That there needs to be a uniformity of the qualifications to study law in Kenya and other Member States. The Republic of Rwanda and the Republic of Burundi have civil legal systems whereas Kenya's is common law hence there ought to be harmonization of the training and assessment needs across all Member States.

#### **Committee Recommendation**

After deliberating on the proposal, the Committee recommended that the Advocates (amendment) Bill, 2023 sponsored by Hon. Timothy Kipchumba, MP should not be published.

#### **Adoption of the Report**

The report was therefore adopted, having been proposed by Hon. Muchira Michael Mwangi, MP and seconded by Hon. Mogaka Stephen M, MP.

### **3. Report on the proposed Public Appointments (Parliamentary Approval) (Amendment) Bill, 2023 sponsored by Hon. Shakeel Shabbir, MP**

The Committee made the following observations:

- a) Section 6(10) of the Public Appointments (Parliamentary Approval) Act gives a candidate an opportunity to withdraw from the approval hearing at any time by giving notice in writing to the Clerk. However, the Act does not expressly give an appointing authority the latitude of withdrawing the nomination of a candidate before an approval hearing is done.
- b) Notwithstanding the fact that the Act does not expressly provide for the power to withdraw a nomination of a candidate, it may be implied that an appointing authority has the power to withdraw the nomination of a candidate before an approval hearing is done.

#### **Committee Recommendation**

After deliberating on the proposal, a majority of the Committee recommends that the Bill should not be published.

#### **Adoption of the Report**

The report was therefore adopted, having been proposed by Hon. Muchira Michael Mwangi, MP and seconded by Hon. Maalim Farah, MP.

### **4. Report on the proposed County Government (Amendment) Bill, 2023 sponsored by Hon. David Ochieng', MP**

The Committee made the following Observations:

- a) That the nine-member select committee that would look into the situation as suggested by the legislative proposal would prolong the impeachment process and be more susceptible to swaying the public's opinion.

#### **Committee Recommendation**

After deliberating on the proposal, the Committee recommends that the Bill should not be published.

#### **Adoption of the Report**

The report was therefore adopted, having been proposed by Hon. Muchira Michael Mwangi, MP and seconded by Hon. Francis Kajwang' Tom Joseph, MP

**5. Addendum Report to the Report submitted on 23<sup>rd</sup> May 2023 to the Office of the Speaker of the National Assembly on the pre-publication scrutiny of the proposed Criminal Procedure Code (amendment) Bill, 2023 sponsored by Hon. Abdul Raheem Dawood, MP**

The Committee made the following observations:

- a) There exists certain legal framework that protects pregnant women and women with infant children in Kenya. They include—
  - (i) Section 11 of the Penal Code provides that where a woman is convicted of an offence punishable by death is found to be pregnant, the sentence passed on her shall be a sentence of imprisonment for life instead of the sentence of death;
  - (ii) Section 30(4) of the Prisons Act provides that the infant child of a female prisoner may be received into prison with its mother and may be supplied with clothing and necessities at public expense. However, the child shall only be permitted to remain in prison until the child attains the age of four years or until arrangements for proper care outside prison are concluded.
- b) The proposal may be unconstitutional as it discriminates against male caregivers in favor of the female gender. As a result, the Committee proposed that clause 15A (1) and (2) be amended to provide for both male and female caregivers.
- c) The proposal under clause 15A (1) imposes a minimum sentence. This seems to be taking away the discretion of a judge or magistrate in passing a sentence. The clause may be amended to provide for a maximum sentence.
- d) The proposal does not adequately address how, who and when pregnancy is to be determined. For clarity, the definition of the term ‘pregnancy’ may be included in the Act.

**Committee Recommendation**

The Committee having considered the legislative proposal and additional submissions from stakeholders, recommends that the legislative proposal should not be published.

**Adoption of the Report**

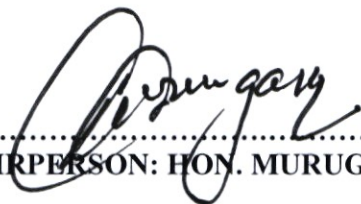
The report was therefore adopted, having been proposed by Hon. Muchira Michael Mwangi, MP and seconded by Hon. Maalim Farah, MP.

**MIN.NO/DDC/JLAC/211/2024:**

**ADJOURNMENT**

The meeting was adjourned at forty-five minutes past eleven o'clock. The next meeting shall be held on Thursday, 13<sup>th</sup> June 2024 at ten o'clock.

SIGNED.....



DATE.....

31.7.24.

(CHAIRPERSON: HON. MURUGARA GEORGE GITONGA, CBS, MP)



Annexure **3** :

**Anti-Corruption and  
Economic Crimes  
(Amendment) Bill, 2023**

**SPECIAL ISSUE**

*Kenya Gazette Supplement No. 125 (National Assembly Bills No. 40)*



REPUBLIC OF KENYA

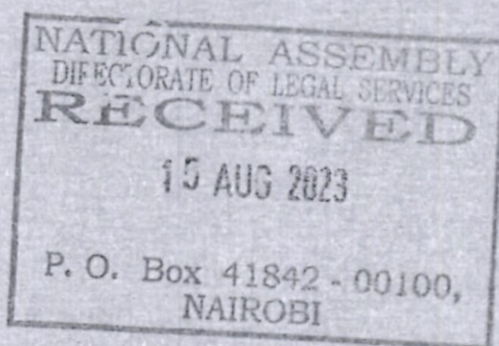
**KENYA GAZETTE SUPPLEMENT**

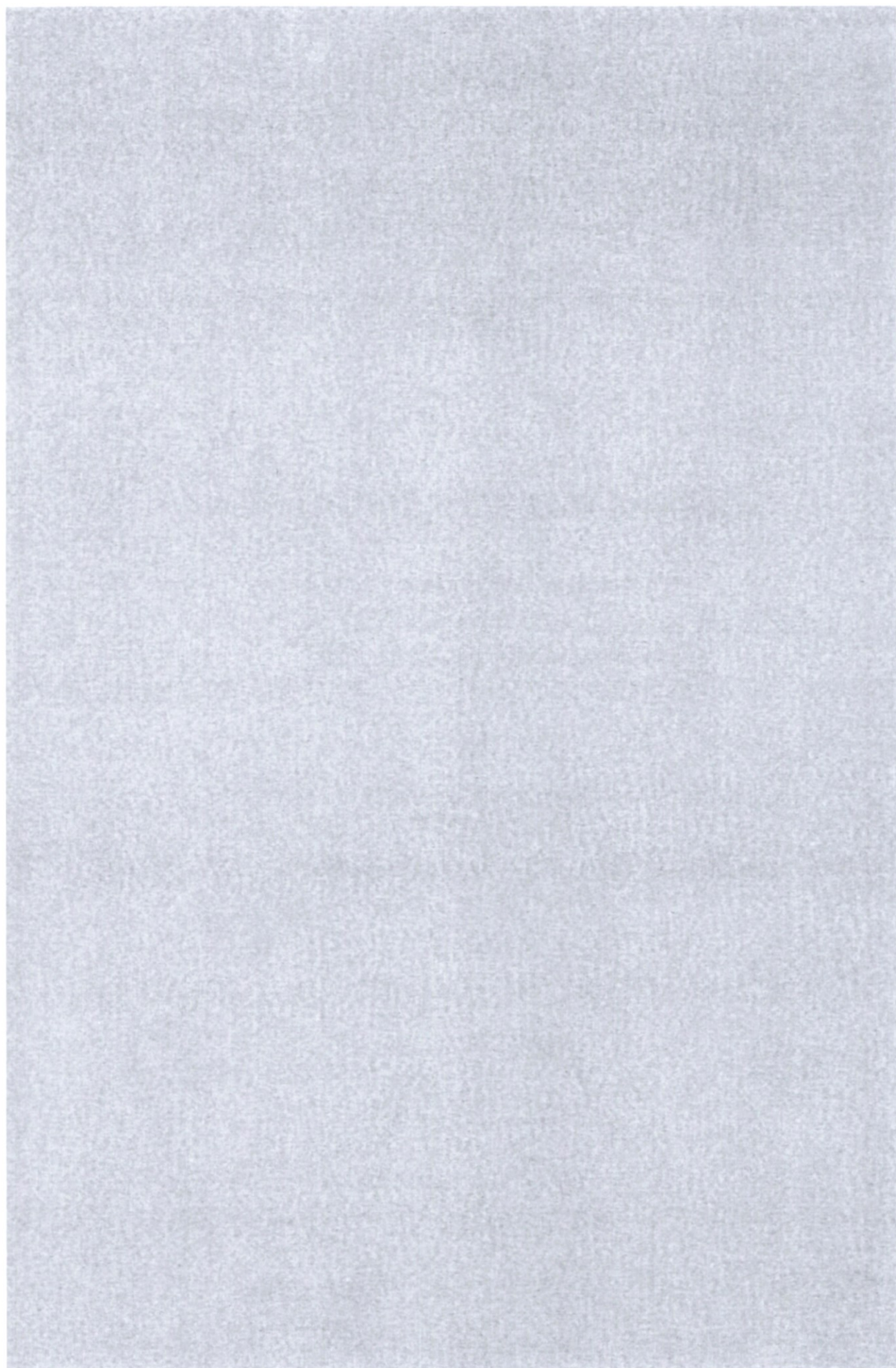
**NATIONAL ASSEMBLY BILLS, 2023**

**NAIROBI, 2nd August, 2023**

CONTENT

| Bill for Introduction into the National Assembly —                | PAGE |
|---|------|
| The Anti-Corruption and Economic Crimes (Amendment) Bill, 2023 .. | 1269 |





**THE ANTI-CORRUPTION AND ECONOMIC  
CRIMES (AMENDMENT) BILL, 2023**

**A Bill for**

**AN ACT of Parliament to amend the Anti-Corruption and Economic Crimes Act, and for connected purposes**

**ENACTED** by the Parliament of Kenya, as follows—

1. This Act may be cited as the Anti-Corruption and Economic Crimes (Amendment) Act, 2023.

Short title.

2. Section 45 of the Anti-Corruption and Economic Crimes Act is amended by deleting subsection (2) and substituting therefor the following new subsection—

Amendment of section 45 of No.3 of 2003.

“(2) An officer or person whose functions concern administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person fraudulently makes payment or excessive payment from public revenues for —

- (i) sub-standard or defective goods;
- (ii) goods not supplied or not supplied in full;  
or
- (iii) services not rendered or not adequately rendered.”

**MEMORANDUM OF OBJECTS AND REASONS**

The principal object of this Bill is to amend section 45 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 in subsection 2 by deleting subsection 2(b) and 2(c) in order to remove the inordinate and undue criminalization of flaws in public procurement law.

The object of the Bill is to remove the inordinate culpability prescribed on persons in charge of administration, custody, management, receipt or use of any part of public revenue or public property as administrative flaws as they are capable of being adequately and administratively addressed in accordance with Article 226(5) of the Constitution of Kenya, 2010; the Public Procurement and Asset Disposal Act, 2015, the Fair Administrative Action Act, 2015, the Employment Act, 2007 among other Acts of Parliament governing the professional conduct of the various professionals that are engaged in the procurement process. The Bill further proposes to remove the ambiguity of the term prior planning, which is strange to the legislation governing public procurement in Kenya.

The Bill does not contain any provisions limiting any fundamental rights or freedoms.

The Bill does not affect the functions of county governments as set out in the Fourth Schedule to the Constitution and is therefore not a Bill concerning county governments.

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the 27th July, 2023.

GEOFFREY KARIUKI RUKU,  
*Member of Parliament.*

*Section 45 of the principal Act which it is proposed to amend—*

**Protection of public property and revenue, etc.**

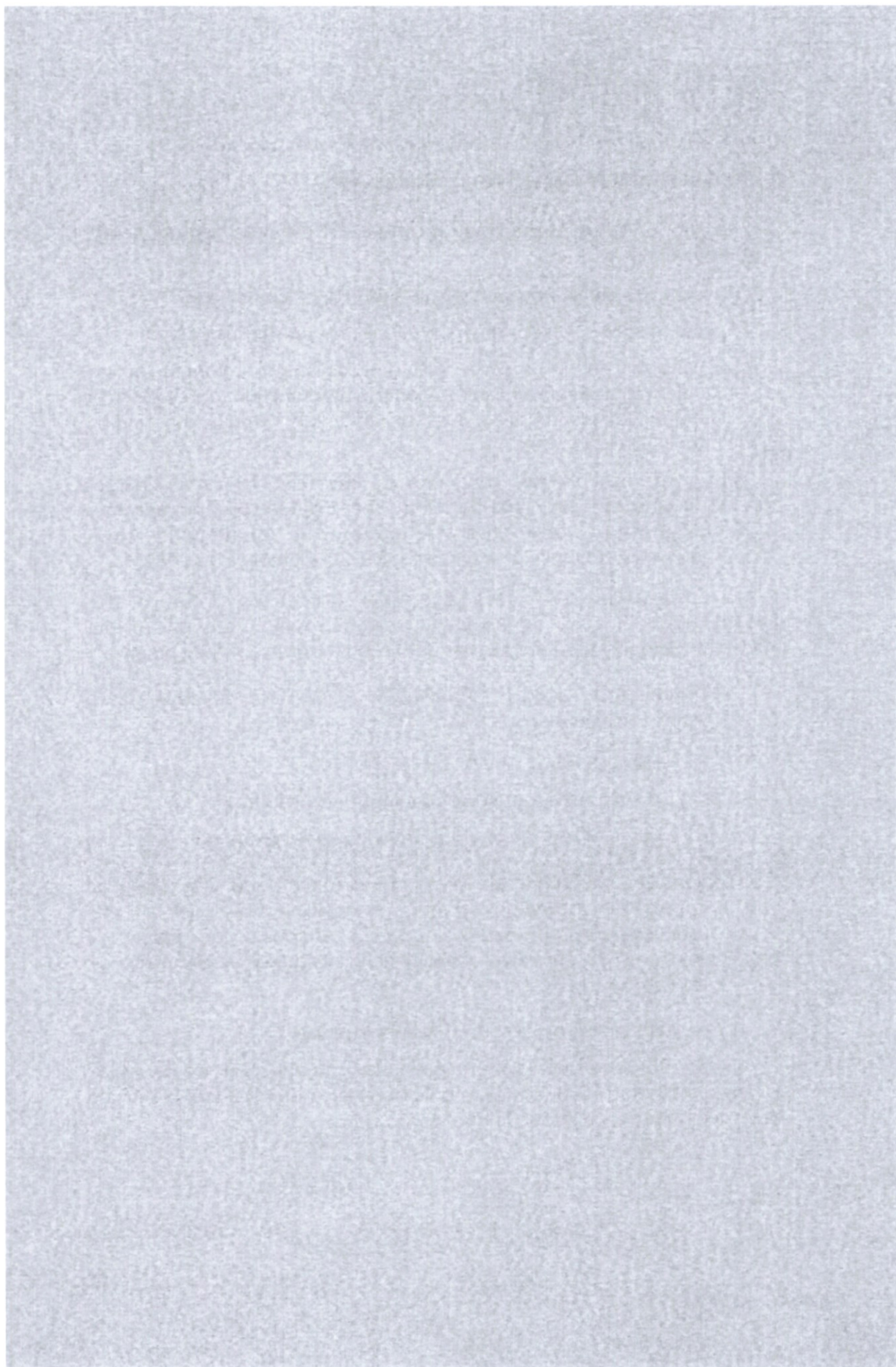
45. (1) A person is guilty of an offence if the person fraudulently or otherwise unlawfully—

- (a) acquires public property or a public service or benefit;
- (b) mortgages, charges or disposes of any public property;
- (c) damages public property, including causing a computer or any other electronic machinery to perform any function that directly or indirectly results in a loss or adversely affects any public revenue or service;
- (d) or (d) fails to pay any taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges.

(2) An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person—

- (a) fraudulently makes payment or excessive payment from public revenues for—
  - (i) sub-standard or defective goods;
  - (ii) goods not supplied or not supplied in full; or
  - (iii) services not rendered or not adequately rendered,
- (b) willfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or
- (c) engages in a project without prior planning.

(3) In this section, “public property” means real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body.



Annexure **4**:

**Advertisement  
inviting the public  
to submit memoranda  
on the Bill**





**REPUBLIC OF KENYA  
THE NATIONAL ASSEMBLY  
THIRTEENTH PARLIAMENT-SECOND SESSION (2023)**

**IN THE MATTER OF ARTICLE 118 (1)(b) OF THE CONSTITUTION  
AND  
IN THE MATTER OF CONSIDERATION BY THE NATIONAL ASSEMBLY OF:**

1. THE ANTI-CORRUPTION AND ECONOMIC CRIMES (AMENDMENT) BILL (NATIONAL ASSEMBLY BILLS No. 40 OF 2023);
2. THE NATIONAL LOTTERY BILL (NATIONAL ASSEMBLY BILLS No. 69 OF 2023);
3. THE GAMBLING CONTROL BILL (NATIONAL ASSEMBLY BILLS No. 70 OF 2023);
4. THE LEARNERS WITH DISABILITIES BILL (SENATE BILLS No. 4 OF 2023); AND
5. THE EQUALISATION FUND (ADMINISTRATION) BILL (SENATE BILLS No. 14 OF 2023)

**INVITATION TO SUBMIT MEMORANDA**

WHEREAS, Article 118(1) (b) of the Constitution and National Assembly Standing Order 127(3) require Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees;

AND WHEREAS, the Anti-Corruption and Economic Crimes (Amendment) Bill (National Assembly Bills No. 40 of 2023); the National Lottery Bill (National Assembly Bills No. 69 of 2023); the Gambling Control Bill (National Assembly Bills No. 70 of 2023); the Learners with Disabilities Bill (Senate Bills No. 4 of 2023); and the Equalisation Fund (Administration) Bill (Senate Bills No. 14 of 2023) have been read a First Time and referred to the relevant Departmental Committees for consideration and reporting to the House;

**IT IS NOTIFIED that:**

1. **The Anti-Corruption and Economic Crimes (Amendment) Bill (National Assembly Bills No. 40 of 2023)** sponsored by Hon. Geoffrey Karuki Ruku, MP seeks to amend section 45 of the Anti-Corruption and Economic Crimes Act, 2003 to remove the inordinate and undue criminalization of flaws in public procurement law.
2. **The National Lottery Bill (National Assembly Bills No. 69 of 2023)** sponsored by Hon. Kimani Ichung'wah, MP, the Leader of Majority Party seeks to provide a legislative framework for the establishment and operation of a socially responsible National Lottery for pooling of resources to be directed to good causes and funding of critical areas. The Bill further proposes a framework for the conduct and regulation of the National Lottery.
3. **The Gambling Control Bill (National Assembly Bills No. 70 of 2023)** sponsored by Hon. Kimani Ichung'wah, MP, the Leader of Majority Party seeks to repeal and replace the Betting, Lotteries and Gaming Act (Cap 131) and provide a legislative framework for the regulation of gambling in Kenya and incorporate safe gambling principles in the gambling sector. Further, the Bill seeks to regulate betting, casinos and other forms of gambling including the authorization of prize competitions, public lotteries and media promotions.
4. **The Learners with Disabilities Bill (Senate Bills No. 4 of 2023)** seeks to provide a proper legal framework to ensure the actualization of the right to basic education for learners with disabilities in Kenya at all three levels of education. The Bill obligates the National Government, through the Ministry of Education and the County governments, to carry out their duties and bring the special needs education of learners with disabilities to parity with normal learners and to end the exclusion of learners with disabilities from the education cycle.
5. **The Equalisation Fund (Administration) Bill (Senate Bills No. 14 of 2023)** seeks to provide the administrative structure for the management of the Equalisation Fund and to establish the criteria through which projects contemplated under Article 204(2) of the Constitution are The Bill also seeks to extend the pendency of the Fund in accordance with Article 204(B) of the Constitution to ensure the purpose of the Fund is met.

NOW THEREFORE, in compliance with Article 118(1) (b) of the Constitution and Standing Order 127(3), the Clerk of the National Assembly hereby invites the public and stakeholders to submit memoranda on the Bills to the respective Departmental Committees listed below-

| S/No. | BILL  | COMMITTEE                     |
|-------|---|-------------------------------|
| 1.    | The Anti-Corruption and Economic Crimes (Amendment) Bill (National Assembly Bills No. 40 of 2023) | Justice and Legal Affairs     |
| 2.    | The National Lottery Bill (National Assembly Bills No. 69 of 2023)                                | Sports and Culture            |
| 3.    | The Gambling Control Bill (National Assembly Bills No. 70 of 2023)                                |                               |
| 4.    | The Learners with Disabilities Bill (Senate Bills No. 4 of 2023)                                  | Education                     |
| 5.    | The Equalisation Fund (Administration) Bill (Senate Bills No. 14 of 2023)                         | Finance and National Planning |

Copies of the Bills are available at the National Assembly Table Office, Main Parliament Buildings and on [www.parliament.go.ke/the-national-assembly/house-business/bills](http://www.parliament.go.ke/the-national-assembly/house-business/bills).

The memoranda may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk, Main Parliament Buildings, Nairobi; or emailed to [ca@parliament.go.ke](mailto:ca@parliament.go.ke) to be received on or before Friday 17<sup>th</sup> November, 2023 at 5.00 p.m.

**S. NJOROGE  
CLERK OF THE NATIONAL ASSEMBLY**

10<sup>th</sup> November 2023

"For the Welfare of Society and the Just Government of the People"



**NATIONAL YOUTH SERVICE**

Telegrams: VIJANA  
Tel: +254-020-2632925  
Fax: +254-020-2378129  
Website: [www.nys.go.ke](http://www.nys.go.ke)  
Email: [Director.general@nys.go.ke](mailto:Director.general@nys.go.ke)

National Youth Service  
Headquarters  
P O Box 30397 - 00100  
NAIROBI - KENYA

**ADDENDUM ON JOB ADVERTISEMENT FOR THE  
DIRECTOR GENERAL / CHIEF EXECUTIVE OFFICER  
POSITION AT THE NATIONAL YOUTH SERVICE (NYS)**

Please note that the closing date for submission of applications in respect of the advertised post of Director General, NYS which appeared on MyGov on Tuesday, 30<sup>th</sup> October, 2023 has been extended from Sunday, 12<sup>th</sup> November, 2023 to Tuesday, 21<sup>st</sup> November, 2023.

**Lt Gen (Rtd) Njuki Mwaniki, MGH, CBS, OGW, ndc (K)  
CHAIRMAN, NATIONAL YOUTH SERVICE COUNCIL**



**THE CO-OPERATIVE UNIVERSITY OF KENYA**  
Empowering Communities

P.O BOX 24814-00802, Karen-Nairobi Tel:020-2430127 / 2579456, 0724 371 808  
Website: [www.cuk.ac.ke](http://www.cuk.ac.ke) Email: [registrars@cuk.ac.ke](mailto:registrars@cuk.ac.ke)

**OFFICE OF THE REGISTRAR  
(ACADEMIC, CO-OPERATIVE DEVELOPMENT, RESEARCH AND INNOVATION)**

**THE 8<sup>th</sup> GRADUATION CEREMONY ANNOUNCEMENT**

**THE 8<sup>th</sup> Graduation Ceremony of The Co-operative University of Kenya (CUK)** will be held at the Graduation Square, Main Campus, Karen-Nairobi on Friday, 1<sup>st</sup> December 2023 starting at 8:00 a.m. All students who have fulfilled the requirements conferment of Degrees and award of Diplomas and Certificates during the 2022/2023 Academic Year are invited to participate.

**GRADUATION STATUS**  
Students who successfully completed their studies in the 2022/2023 Academic Year and those from previous Academic Years who had not graduated are advised to confirm their appearance on the graduation list by Wednesday, 22<sup>nd</sup> November 2023.

**APPLICATION FOR GRADUATION**  
Graduands who have not yet applied are reminded to apply for the 2023 Graduation online through their Students Portal <https://studentportal.cuk.ac.ke> as per the instructions and guidelines that have been emailed on the University website [www.cuk.ac.ke/graduation/](http://www.cuk.ac.ke/graduation/) before Wednesday, 15<sup>th</sup> November 2023.

**CLEARING OF FEES BALANCES**  
Graduands are required to clear all applicable fees including graduation fee before applying for graduation. Anyone with fees arrears will therefore be excluded from the graduation list.

**GRADUATION FEES**  
The graduation fees are as indicated in the table below:

| S/N | AWARD        | GRADUATION FEE (KES) | S/N | AWARD    | GRADUATION FEE (KES) |
|-----|--------------|----------------------|-----|----------|----------------------|
| 1   | Certificates | 4,000.00             | 2   | Diplomas | 5,000.00             |
| 3   | Bachelors    | 8,000.00             | 4   | Masters  | 7,000.00             |

All graduation fee payments must be made before Friday, 17<sup>th</sup> November 2023 through Co-operative Bank. Account Number: 0129082663600 Karen Branch or Equity Bank Account Number: 125027707982 Karen Branch. Failure to pay the graduation fees on time will lead to exclusion from the graduation list.

Apply Now | Jan, May, September Intakes | [www.cuk.ac.ke/programmes](http://www.cuk.ac.ke/programmes)

The Co-operative University of Kenya | The Co-operative University of Kenya | The Co-operative University of Kenya | @CukUniversity | [www.cuk.ac.ke](http://www.cuk.ac.ke) | [registrars@cuk.ac.ke](mailto:registrars@cuk.ac.ke) | (+254) 724 311 808

**ACADEMIC ATTIRE**  
Graduation gowns will be available for hire upon presentation of the original National identity card and of duly filled gown hiring form printed from the Students Portal upon successful application for graduation. Gowns shall be collected from respective Schools/Directorates at Main Campus (Karen, Nairobi) starting from Thursday, 23<sup>rd</sup> November 2023 to Wednesday, 29<sup>th</sup> November 2023 and should be returned at the same venue by Thursday, 1<sup>st</sup> December 2023. Failure to return the gown by the stated date will attract a penalty of KES. 500 per day.

**REHEARSAL**  
All Graduands are expected to attend the rehearsals on Thursday, 30<sup>th</sup> November 2023 at 10:00 a.m. at the Graduation Square, Main Campus, Karen, Nairobi

**INVITATION CARDS**  
At the time of collecting the graduation gown, each graduand will be issued with two (2) invitation cards for their guests. Persons without graduation invitation cards shall NOT be allowed into the Graduation Square.

**COLLECTION OF CERTIFICATES**  
Graduates are required to collect their Certificates within a period of 05 (5) Months after the graduation. Any uncollected Certificate will attract annual penalty as specified in the University Policy.

**PUNCTUALITY**  
Graduands and their guests are required to be seated by 8:00 a.m. Those who arrive late shall NOT be allowed into the Graduation Square.

For further information contact the Office of the Registrar Academic, Co-operative Development, Research and Innovation (ACDR) via Telephone: 0724 311 808; e-mail: [registrars@cuk.ac.ke](mailto:registrars@cuk.ac.ke); Website: [www.cuk.ac.ke](http://www.cuk.ac.ke).

REGISTRAR, ACDRI

Annexure **5** :

**Letter from the Clerk  
of the National Assembly  
inviting stakeholders to  
attend the public  
participation forum**



THE NATIONAL ASSEMBLY  
OFFICE OF THE CLERK

P. O. Box 41842-00100  
Nairobi, Kenya  
Main Parliament Buildings

Telephone: +254202848000 ext. 3300  
Email: [cna@parliament.go.ke](mailto:cna@parliament.go.ke)  
[www.parliament.go.ke/the-national-assembly](http://www.parliament.go.ke/the-national-assembly)

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When replying, please quote

Ref: NA/DDC/JLAC/2024/58

6<sup>th</sup> March, 2024

**Hon. Paul N. Maina, OGW, 'ndc' (K)**  
Ag. Chief Registrar Judiciary of Kenya / Secretary  
Judicial Service Commission  
Supreme Court Building  
**NAIROBI**

**Hon. Shadrack John Mose**  
Solicitor General  
The State Law Office and Department of Justice  
Sheria House, Harambee Avenue  
**NAIROBI**

**Maj. (Rtd) Twalib Mbarak, CBS**  
Chief Executive Officer/ Commission Secretary  
Ethics and Anti-Corruption Commission  
Integrity Centre,  
Jakaya Kikwete/Valley Road Junction  
**NAIROBI**

**Mr. Renson Mulele Ingonga, OGW**  
The Director of Public Prosecutions  
ODPP House, Ragati Road, Upper Hill  
**NAIROBI**

**Dr. Bernard Mogesa, PhD, CPM**  
Chief Executive Officer,  
Kenya National Commission on Human Rights  
1<sup>st</sup> Floor, CVS Plaza, Lenana Road  
**NAIROBI**

---

**Dr. Moses Wambugu Marang'a, MBS**  
Executive Director  
National Council on the Administrative of Justice  
Mayfair Center, 5<sup>th</sup> Floor, Upper Hill  
**NAIROBI**

**Mr. Joash Dache, MBS**  
Chief Executive Officer/Commission Secretary  
Kenya Law Reform Commission,  
Reinsurance Plaza, 3<sup>rd</sup> Floor, Taifa Road,  
**NAIROBI**

**Dr. Simon K. Rotich, CBS**  
Chief Executive Officer/Commission Secretary  
Public Service Commission  
Commission House  
Harambee Avenue  
**NAIROBI**

**Ms. Florence Muturi**  
Chief Executive Officer  
Law Society of Kenya (LSK)  
Lavington, Opposite Valley Arcade, Gitanga Road  
**NAIROBI**

**Ms. Christine Gakii Nkonge**  
Executive Director  
Katiba Institute,  
House No. 5 - the Crescent, Off Parklands Road  
**NAIROBI**

**Dr. Mshai Mwangola**  
Chairperson  
Uraia Trust  
Jacaranda Avenue, off Gitanga Road  
**NAIROBI**

**Ms. Caroline Gaita**  
Executive Director  
Mzalendo Trust  
ACK Garden House, 2<sup>nd</sup> Floor, Wing A  
1<sup>st</sup> Ngong Avenue  
**NAIROBI**

**Dr. Annette Mbogoh**  
Executive Director  
Kituo cha Sheria  
Ole Odume Road, Off Argwings Kodhek Road  
**NAIROBI**

**Mr. Irungu Houghton**  
Executive Director  
Amnesty International  
Riverside Studios  
**NAIROBI**

**Ms. Sheila Masinde**  
Executive Director  
Transparency International  
Kindaruma Road, Off Ring Road, Kilimani  
Next to Commodore Office Suites  
**NAIROBI**

Dear *Ms Nkonge*

**RE: INVITATION BY THE DEPARTMENTAL COMMITTEE ON JUSTICE AND  
LEGAL AFFAIRS TO SUBMIT VIEWS ON THE ANTI-CORRUPTION AND  
ECONOMIC CRIMES (AMENDMENT) BILL (NATIONAL ASSEMBLY BILLS NO.  
40 OF 2023) BY THE HON. GEOFFREY RUKU, MP**

---

The Departmental Committee on Justice and Legal Affairs is established pursuant to Standing National Assembly Order 216 which mandates it to *inter alia*, '**study and review all legislation referred to it.**'

The Anti-Corruption and Economic Crimes (Amendment) Bill, 2023 sponsored by the Hon. Geoffrey Kariuki Ruku, MP is before the Committee for consideration and reporting back to the House. The Bill seeks to amend section 45 of the Anti-Corruption and Economic Crimes Act, 2003 in sub-section 2 by deleting subsection 2(b) and 2(c) in order to remove the inordinate and undue criminalisation of flaws in public procurement law.

Article 118(1)(b) of the Constitution of Kenya and National Assembly Standing Order 127(3) require Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees.

In view of the foregoing, the Committee has scheduled to meet you on **Thursday, 14<sup>th</sup> March 2024 at 10:00 am** at a venue to be communicated in due course in order to hear your submissions on the Bill.

You are requested to prepare your written submissions in a matrix format that indicates the section of the Act, specific clause, proposed amendment and justification. You are further requested to

send twenty (20) hard copies of the submissions to the Office of the Clerk of the National Assembly on First Floor, Main Parliament Buildings, a soft copy of which may be emailed to the Office through; [cna@parliament.go.ke](mailto:cna@parliament.go.ke).

Hard copies of the Bill are available at the National Assembly Table Office, Main Parliament Building, while an electronic copy may be accessed on the Parliament website: [www.parliament.go.ke/the-national-assembly/house-bills](http://www.parliament.go.ke/the-national-assembly/house-bills) for reference.

Our Liaison Officers on this matter are **Mr. Ahmed Salim** who may be contacted on tel. no. **0710204056** or email: [ahmed.salim@parliament.go.ke](mailto:ahmed.salim@parliament.go.ke), **Ms. Jael Ayiego Kilaka** on tel. no. **0725385945** or email: [jael.kilaka@parliament.go.ke](mailto:jael.kilaka@parliament.go.ke) or **Mr. Abdikafar Abdi Sheikh** on tel. no. **0715456503** or email: [abdikafar.sheikh@parliament.go.ke](mailto:abdikafar.sheikh@parliament.go.ke).

Yours



**JEREMIAH W. NDOMBI, MBS**  
**For: CLERK OF THE NATIONAL ASSEMBLY**

Copy to:- **Hon. Justin B. N. Muturi, EGH**  
The Attorney General  
The State Law Office and the Department of Justice  
Sheria House, Harambee Avenue  
**NAIROBI**

Annexure **6**:  
**Memoranda**  
**received**

# KENYA LAW REFORM COMMISSION



"A Vibrant Agency for Responsive Law Reform"

Telegrams: "LAWREFORM" NAIROBI  
Telephone: Nairobi, +254-20-2241186/2241201  
Fax: +254-20-2225786  
www.info@klrc.go.ke

When replying please quote

KLRC/8/64VOL.IX(34)

Ref. No. ....  
and Date

② Boylas Katta  
Seal

① DDC  
Please deal  
25/08/23

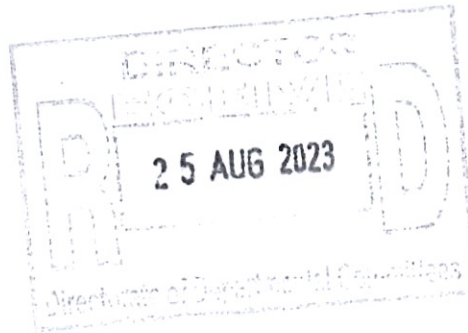


KENYA LAW REFORM COMMISSION  
REINSURANCE PLAZA  
3RD FLOOR  
TAIFA ROAD  
P.O. Box 34999-00100  
NAIROBI, KENYA

22<sup>nd</sup> August, 2023

.....20.....

The Clerk of the National Assembly  
Clerk's Chambers  
National Assembly  
Parliament Buildings  
P.O Box 41842 - 00100  
NAIROBI



(Attn: Mr. Jeremiah Ndombi, MBS)

Dear *Jerem*,

RE: COMMENTS ON THE PROPOSED ANTI-CORRUPTION AND ECONOMIC  
CRIMES (AMENDMENT) BILL, 2023

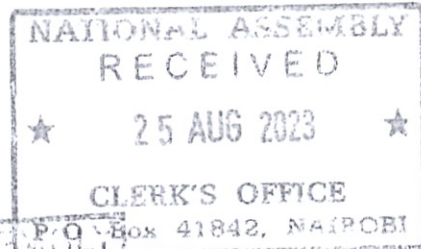
Please refer to the above matter and your letter Ref: NA/DDC/JLAC/2023/ (089) dated 10<sup>th</sup> July, 2023.

Enclosed herewith please find the Commission's comments on Anti-Corruption and Economic Crimes (Amendment) Bill, 2023, for your further action.

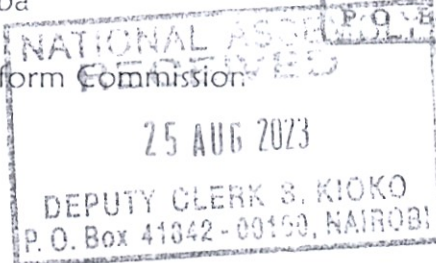
As always, we thank the National Assembly for the continued support and cooperation.

Yours *Sincerely,*  
*Joash Dache*

Joash Dache, MBS  
SECRETARY/CEO



Copy to: Christine Agimba  
Chairperson  
Kenya Law Reform Commission







## COMMENTS ON THE PROPOSED ANTI-CORRUPTION AND ECONOMIC CRIMES (AMENDMENT) BILL, 2023

### A. INTRODUCTION

The Kenya Law Reform Commission, hereinafter referred to as “the Commission”, *Vide* a letter dated 10<sup>th</sup> August, 2023 and referenced as NA/DDC/JLAC/2023/089), from the Clerk of the National Assembly, received an invitation for comments on the proposed Anti-Corruption and Economic Crimes (Amendment) Bill, 2023.

According to its memorandum of reasons and objects, the proposed Anti-Corruption and Economic Crimes (Amendment) Bill, 2023, seeks to amend the Anti-corruption and Economic Crimes Act, No. 3 of 2003, ACECA, by deleting section 45(2) and substituting therefor a new subsection.

Section 45(2) of the Act, provides that

*An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person –*

- (a) fraudulently makes payment or excessive payment from public revenues for—*
  - (i) sub-standard or defective goods;*
  - (ii) goods not supplied or not supplied in full; or*
  - (iii) services not rendered or not adequately rendered,*
- (b) wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or*
- (c) engages in a project without prior planning.*

The justification for the proposed amendment according to its memorandum of reasons and objects, is that the issues are already addressed under Article 226(5) of the Constitution, the Fair Administrative Act, 2015, the Employment Act, 2007 and the Public Procurement and Assets and Disposal Act, 2015.

Against this background, and pursuant to the Commission's mandate under section 6 of the Kenya Law Reform Commission Act, No. 19 of 2013, the Commission, undertook an analysis of the proposed amendment against the relevant provisions of the Constitution.

#### B. ANALYSIS OF THE BILL.

| Provision in the Bill   | KLRC Proposal  | Rationale   |
|---|--|---|
| <p>Clause 2 --- Proposed deletion and substitution of section 45(2) of the Anti-corruption and Economic Crimes Act (ACECA).</p> | <p>The Commission holds the considered view that the proposed amendment is not necessary.</p> <p>The Commission, however, recommends that the use of the phrase "is guilty of" appearing in subsection 45(2), be deleted and substituted therefore the word "commits".</p> | <p>The law making process is often informed by the need to address certain social problems in the society. This could be addressed either through an amendment or standalone Bill. The proposed draft does not provide a proper justification necessitating the need to delete paragraphs 45(2) (b) (c).</p> <p>Although, the provisions of paragraphs 45(2)(b)(c) may have been addressed under certain existing laws such as Article 226(5) of the Constitution, the Fair Administrative Act, 2015, the Employment Act, 2007 and the Public Procurement and Assets and Disposal Act, 2015, this is not enough reason to amend the section, unless those provisions were not in harmony.</p> <p>The proposal to delete the phrase "is guilty of" appearing in subsection 45(2), and the proposal to substitute therefore the word "commits", is grounded on the fact that, the section as is, including the proposed draft amendment, takes away a person's right to presumption of innocence as contemplated under Article 50(2)(a) of the Constitution. The section is therefore inconsistent with Article 50(2)(a) of the Constitution, hence void to the extent of that inconsistency.</p> |

#### C. CONCLUSION

Whereas, the KLRC acknowledges the legislative authority of Parliament as provided for under Article 94 of the Constitution, the KLRC holds the considered view that the proposed amendments is unnecessary. Further, it is our considered view that, should the proposed amendment be adopted, the culpability of a person who fails to comply with the law on procurement or a person who engages in a project without prior planning, will essentially be expunged from the provision of ACECA.



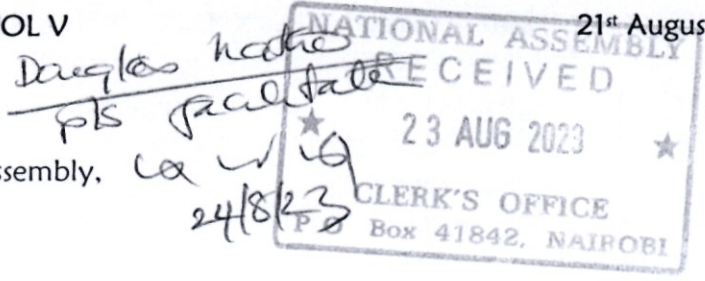
OFFICE OF THE ATTORNEY-GENERAL & DEPARTMENT OF JUSTICE

DO-11101  
23/08

DOJ/CONF/ACE/4/11 VOL V

21<sup>st</sup> August, 2023

Mr. Samuel Njoroge  
Clerk of the National Assembly,  
Parliament Building  
NAIROBI.



RE: COMMENTS ON THE ANTI-CORRUPTION AND ECONOMIC CRIMES (AMMENDMENT) BILL, 2023

We make reference to the above captioned subject matter and your letter dated 10<sup>th</sup> August, 2023 inviting the Office of the Attorney General to appear before the Departmental Committee on Justice and Legal Affairs to submit views on the Anti-Corruption and Economic Crimes Amendment Bill, 2023.

We have reviewed the proposed amendment which seeks to delete the provisions providing for the disqualification of persons convicted of corruption and economic crimes from being elected or appointed as Public Officers for a period of 10 years after the conviction and make the following submissions:

- 1. The proposed amendment is not in line with international standards and best practices;

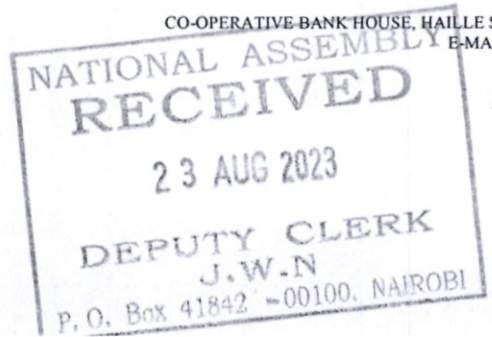
The United Nations Convention against Corruption is the only legally binding universal anti-corruption instrument. Kenya is a state party to the Convention since the year 2003. Article 30 (7) of the Convention states that;

"Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:

- (a) Holding public office; and
- (b) Holding office in an enterprise owned in whole or in part by the State.

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E-MAIL: [info.statelawoffice@kenya.go.ke](mailto:info.statelawoffice@kenya.go.ke) WEBSITE: [www.attorney-general.go.ke](http://www.attorney-general.go.ke)

DEPARTMENT OF JUSTICE  
CO-OPERATIVE BANK HOUSE, HAILLE SELLASIE AVENUE P.O. Box 56057-00200, Nairobi-Kenya TEL: Nairobi 2224029/ 2240337  
E-MAIL: [legal@justice.go.ke](mailto:legal@justice.go.ke) WEBSITE: [www.justice.go.ke](http://www.justice.go.ke)



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This provision in the UN Convention against Corruption is intended to contribute to the broader goals of combating corruption, promoting good governance, and maintaining the integrity of public institutions at both national and international levels.

**2. Proposed amendment is not in line with the Constitution of Kenya, 2010;**

Chapter Six of the Constitution of Kenya contains provisions that establish principles of leadership and integrity for State and Public officers. Article 73 of the Constitution states that Authority assigned to a State Officer is a public trust and should be exercised in a manner that is consistent with the purpose and objects of the Constitution and promotes public confidence in the integrity of the office. Article 75 makes it mandatory that a State Officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids compromising any public or official interests; or demeaning the office that the officer holds. The proposed amendment is therefore not aligned to the principles of integrity as set out in Chapter six of the Constitution.

**3. The proposed amendment will create a negative public perception in the fight against corruption.**

Public Perception plays a significant role in the fight against corruption as a positive perception builds trusts in institutions, increases investor confidence and increases collaboration between law enforcement and citizens. Allowing convicted individuals to hold public office can lead to negative public perception and criticism of the Government. It will in turn undermine efforts to promote good governance and erode citizens' confidence in their leaders and institutions.

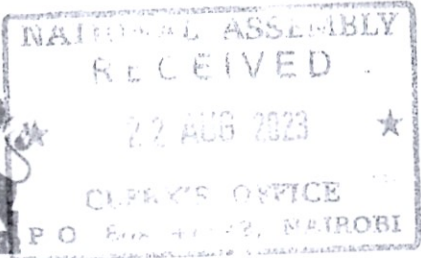
In light of the foregoing it is our considered view that Section 64 of the Anti-Corruption and Economic Crimes Act, 2003 should not be repealed.

We thank you for your continued support and cooperation.

  
Hon J.B.N Muturi, EGH  
**ATTORNEY GENERAL**

Copy to: Hon. Shadrack J. Mose  
**SOLICITOR GENERAL**

DD after  
22/08



**ETHICS AND ANTI-CORRUPTION COMMISSION**

INTEGRITY CENTRE (Jakaya Kikwete/Valley Road Junction) P.O. Box 61130 – 00200, NAIROBI, Kenya  
TEL.: 254 (020) 4997000, MOBILE: 0709 781000; 0730 997000  
FAX: 254 (020) 2240954 EMAIL: [eacc@integrity.go.ke](mailto:eacc@integrity.go.ke) WEBSITE: [www.eacc.go.ke](http://www.eacc.go.ke)

When replying please quote:

**EACC.1/13 Vol. III (5)**

**21<sup>st</sup> August, 2023**

**Mr. Samuel Njoroge**  
Clerk of the National Assembly  
Parliament Buildings  
P.O Box 41842 - 00100  
**NAIROBI**

*Douglas Karo*  
*ptr facilitate*  
*22/8/23*

Dear *Mr. Njoroge,*

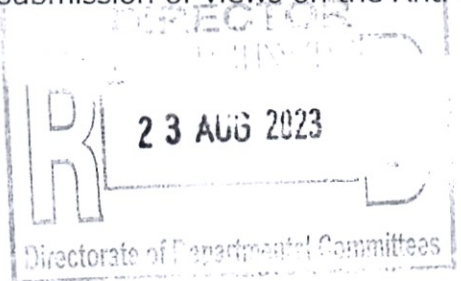
**RE: INVITATION TO THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS TO SUBMIT VIEWS ON THE ANTI-CORRUPTION AND ECONOMIC CRIMES BILL, 2023**

This is to acknowledge receipt of your letter **Ref: NA/DDC/JLAC/2023 (89)** dated **10<sup>th</sup> August, 2023** on the subject matter.

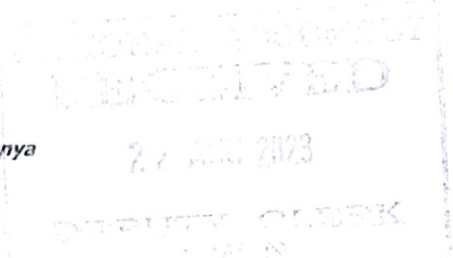
The Ethics and Anti-Corruption Commission (EACC) is established under **section 3** of the Ethics and Anti-Corruption Commission Act, 2011 pursuant to **Article 79** of the Constitution with the mandate to combat and prevent corruption, and promote best practice and standards in ethics and integrity.

The Commission recognizes the important role played by the National Assembly, particularly, the Departmental Committee on Justice and Legal Affairs, in fulfilment of the Standing Orders and legal obligations.

Consequently, the Commission will be represented by **Mr. David K. Too, OGW**, Director Legal Services and Asset Recovery, **Mr. Ben Murei, OGW**, Regional Manager for Lower Eastern Region and **Ms. Regina Muriuki, OGW**, Deputy Director, Evidence Analysis in the Committee meeting scheduled on **Tuesday 22<sup>nd</sup> August 2023** regarding the submission of views on the Anti-Corruption and Economic Crimes Bill, 2023.



*Tuangamize Ufisadi, Tuijenge Kenya*



We thank you for the continued support in the promotion of ethics and integrity.

Yours *Sincerely*



**Abdi A. Mohamud, MBS**  
**Deputy Chief Executive Officer**  
**FOR: SECRETARY/CHIEF EXECUTIVE OFFICER**



**ETHICS AND ANTI-CORRUPTION COMMISSION**

**MEMORANDUM SUBMITTED TO THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS ON THE ANTI-CORRUPTION AND ECONOMIC CRIMES (AMENDMENT) BILL, (NATIONAL ASSEMBLY BILLS No.40 OF 2023) BY HON. GEOFFREY RUKU, MP**

=====  
*Presented to the Justice and Legal Affairs Committee  
Thursday, 14<sup>th</sup> March 2024  
Main Parliament Buildings*  
=====

**MEMORANDUM SUBMITTED TO THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS ON THE ANTI-CORRUPTION AND ECONOMIC CRIMES (AMENDMENT) BILL, (NATIONAL ASSEMBLY BILLS No.40 OF 2023) BY HON. GEOFFREY RUKU, MP**

**Introduction**

- The Ethics and Anti-Corruption Commission (EACC) is a statutory body established under the Ethics and Anti-Corruption Commission Act, 2011, pursuant to the requirement under Article 79 of the Constitution of Kenya, 2010.
- The mandate of the Commission is to combat corruption and economic crime in Kenya through law enforcement, prevention, public education and promotion of standards and practices of integrity, ethics and anti-corruption.
- The Commission also derives its statutory mandate from a number of other statutes namely, the Anti-Corruption and Economic Crimes Act, 2003, the Leadership and Integrity Act, 2012, the Public Officer Ethics Act, 2003 and the Bribery Act, 2016 among others.
- This is a memorandum to the **Departmental Committee on Justice and Legal Affairs** of the National Assembly in relation to the Anti-Corruption and Economic Crimes (Amendment) Bill, (National Assembly Bills No. 40 of 2023) sponsored by the Hon. Geoffrey Kariuki Ruku, MP.
- The memorandum is submitted pursuant to written request vide letter **Ref: NA/DDC/JLAC/2024/58** dated **6<sup>th</sup> March 2024**.

**The law: Anti-Corruption and Economic Crimes Act, 2003**

- Section 45(2) provides:
  1. ...
  2. *An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person—*
    - a) *fraudulently makes payment or excessive payment from public revenues for—*
      - i. *sub-standard or defective goods;*
      - ii. *goods not supplied or not supplied in full; or*
      - iii. *services not rendered or not adequately rendered,*



b) *willfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or*

c) *engages in a project without prior planning.*

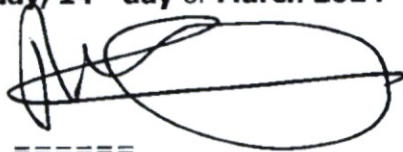
### **Comments/Observations on the Proposed Amendments**

- The Commission **opposes the Bill** on the ground that de-criminalizing failure to follow procurement procedures undermines **Article 227** of the Constitution, which provides for fairness, equity, transparent and cost effectiveness in procurement of public goods and services.
- The Public Procurement and Asset Disposal Act, 2015 was enacted to give effect to Article 227. The legal framework and guidelines has faced challenges in implementation, which impedes the constitutional principles under Article 227.
- In Kenya, public procurement accounts for about 10% to 13% of GDP. This demonstrates the **great portion** of public resources expended through public procurement.
- Section 45(2)(a) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 (ACECA) prohibits and penalizes procurement related corruption among them breaches of procurement law and procedures, irregular tendering of contracts and mismanagement of public resources.
- Investigations by the Commission **have consistently demonstrated** that procurement entails a process where **acts of omission or commission** at every stage contribute to the eventual outcome/award of tender(s). A fault at any stage of the process, therefore, **results in an undesirable/irregular outcome**.
- The Commission has, on numerous occasions, **recommended prosecution** based on procurement breaches **resulting in convictions for corruption**. Courts have regularly pronounced themselves on the issue reinforcing that a flawed process cannot yield a flawless outcome and that parties ought not benefit from irregular transactions.
- The **collusive nature of corruption** cannot be ignored either, hence emphasis on punishment for willful failure to follow procurement procedures designed to confer a benefit upon oneself or associates in a corruption scheme.
- Further, the Commission has successfully instituted civil suits for recovery of proceeds of corruption stemming from irregular procurement processes.
- In addition, we submit that prior planning under Section 45 (2) (b) of ACECA is consistent with section(s) 44 and 53 of the PPADA. The need to plan and budget for

procurement prior to commencement **ensures that procurement entities initiate and complete projects within approved budgets** and agreed timelines hence reducing incidences of stalled projects and pending bills.

- In conclusion, it is our considered view that **administrative action does not** provide a **commensurate deterrent effect** to the **far-reaching negative impact of corruption**. Electing administrative action over prosecution will encourage participants in the procurement processes to engage in corrupt conduct without a deterrent consequence.
- Therefore, amending section 45 of the Anti-Corruption and Economic Crimes Act, 2003 by deleting subsection 2(b) and 2(c) will yield undesired results and is a backslide on the significant gains made in the fight against corruption in safeguarding public resources.

**Dated this Thursday, 14<sup>th</sup> day of March 2024**



=====

**Twalib Mbarak, MGH, CBS**  
**Secretary/Chief Executive Officer**  
**Ethics and Anti-Corruption Commission (EACC)**



**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

**COMMENTS ON**

**ANTI-CORRUPTION AND ECONOMIC CRIMES (AMENDMENT) BILL  
(NATIONAL ASSEMBLY BILLS NO. 40 OF 2023)**

**IN RESPECT OF**

**THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, 2003**

**13 MARCH 2024**

**ODPP COMMENTS ON THE ANTI-CORRUPTION AND ECONOMIC CRIMES (AMENDMENT) BILL, 2023**

|   | SECTION OF THE ACT  | PROPOSED AMENDMENT  | RECOMMENDATION AND JUSTIFICATION  |
|---|---|---|---|
| 1 | <p><b>Section 45- Protection of public property and revenue etc.</b></p> <p>2) An officer or person whose functions concern the administration, custody, management, receipt, or use of any part of the public revenue or public property is guilty of an offence if the person –</p> <p>(a) ...</p> <p>    (i) ...</p> <p>    (ii) ...</p> <p>    (iii) ...</p> <p>(b) willfully or carelessly fails to comply with any law or</p> | <p>The Bill proposes the deletion of Section 45(2)b and c as shown below.</p> <p><del>(b) willfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale, or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or</del></p> | <p><b><u>The Director of Public Prosecutions respectfully opposes the deletion of Section 45(2)b of ACECA.</u></b></p> <ol style="list-style-type: none"> <li>1. The proposed amendment has far-reaching implications and would negatively impact on the legal mechanisms established to actualize Article 227 of the Constitution, The principles of public service under Article 201 and the use and management of public resources under the Public Finance Management Act.</li> <li>2. According to the memorandum of objects and reasons, the principal object of this amendment is to remove the inordinate and undue criminalization of flaws in public procurement law. However, there is need to appreciate the provisions of section 45(2) in its proper context; that is.             <ol style="list-style-type: none"> <li>a) <i>the rationale for the establishment of the procurement laws and regulations.</i></li> <li>b) <i>the mischief that the law makers intended to cure by creating the offence.</i></li> </ol> <p><b><u>The purpose of procurement laws and regulations.</u></b></p> <li>3. The definition of the offence is the “willfully or <i>carelessly</i> fails to comply with any law or applicable procedures and</li> </li></ol> |

|  |  |  |  |
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|  | <p>applicable procedures and guidelines relating to the procurement, allocation, sale, or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or</p> |  | <p><i>guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures."</i></p> <p>4. The rationale for this offence is that public officers who knowingly or carelessly fail to comply with the applicable procedures ought to be held accountable. This should be considered from the perspective <i>that procurement processes constitute the greatest exposure with respect to corruption within public service.</i></p> <p>5. First, Article 227(1) of the Constitution provides that when a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is <b>fair, transparent, competitive, and cost-effective.</b></p> <p>Article 227 was therefore operationalized pursuant to the passing of the <b>Public Procurement and Assets Disposal Act (PPADA)</b> which Act provides for procedures for efficient public procurement and for assets disposal by public entities.</p> <p>The PPADA has elaborately provided for the procurement processes and apportioned clear roles and the responsibilities of public officers engaged in the process, <u>the objective of this is to achieve clarity, efficiency, accountability, and seal loopholes for corrupt practices in public institutions.</u></p> |
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|  |  |  | <p>It is also worth noting that procurement processes in any public institutions cannot be realized without the use of financial resources, the Constitution therefore imposes upon public and state officers' specific responsibilities with regard to use and management of public resources.</p> <p>Article 10 calls for <u>transparency, integrity, and accountability</u> as some of the values and principles of the governance that bind all state organs, state officers, and public officers.</p> <p><b>The mischief that the law makers intended to cure by creating the offence.</b></p> <p>We are of the considered view that the mischief that the law intended to address is that of accountability for public resources. Compliance with above constitutional and legal requirements <b><u>cannot be achieved without an enforcement mechanism</u></b>. The ACECA was established to provide for the <b><u>prevention, investigation and punishment of corruption, economic crimes, and related offences</u></b>.</p> <p>Section 45 of the ACECA provides <u>an enforcement and accountability mechanism</u> for public institutions to comply with the principles established under the constitution, the procedural laws, and regulations under the PPADA and the Public Finance Management Act.</p> |
|--|--|--|---|

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|  |  |   | <p>The Section 45(2)b that the bill seeks to delete is <b>the only</b> enforcement mechanism established in any law that requires institutions to follow the prescribed procedure and removal of the same is likely to render the Public Procurement and Assets Disposal Act significantly irrelevant.</p> <p>Additionally, this is likely to have a ripple effect on other statutes that criminalizes non compliance with certain key requirements.</p>  |
|  |  |   |   |
|  | <p>Section 45(2)(c) engages in a project without prior planning.</p> | <p>(c) engages in a project without prior planning.</p> | <p><b><u>The Director of Public Prosecutions respectfully opposes the deletion of Section 45(2)c of ACECA.</u></b></p> <ol style="list-style-type: none"> <li>1. The offence of <i>“engaging in a project without prior planning”</i> envisages a scenario where a public entity engages in a project which had not been planned, budgeted and no funds were allocated.</li> <li>2. The rationale behind creation of this offence is to protect the Government of Kenya from potential legal actions. It also finds its roots in the principles enshrined in the Constitution, and the Public Procurement and Assets Disposal Act.</li> <li>3. Article 201 provides that the following principles shall guide all aspects of public finance in the Republic.</li> </ol> |

|  |  |  |   |
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|  |  |  | <p>a) <i>there shall be openness and accountability, including public participation in financial matters.</i></p> <p>b) ....</p> <p>c) ...</p> <p>d) <i>Public money shall be used in a prudent and responsible way.</i></p> <p>e) <i>Financial management shall be responsible, and fiscal reporting shall be clear.</i></p> <p>4. The net effect of deleting this section is that the principles of public finance under Article 201 of the Constitution ceases to apply in respect of the said (unplanned) projects. There is no framework for public participation in unplanned project given that the budget component was not part of the budgeting process under the constitution.</p> <p>5. In addition, the constitution requires public money to be used in a <b>prudent</b> and <b>responsible</b> way. The test of prudence and responsibility can only be measured against established rules and procedures which can be audited.</p> <p>The Constitution under Article 220 provides for Budgets and spending by the national and County Government. Institutions are by law required to prepare and submit plans and budgets against which financial resources may be allocated from the consolidated fund.</p> |
|--|--|--|---|



|  |  |  |  |
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|  |  |  | <p>The implication of deleting the said section is that.</p> <ul style="list-style-type: none"><li>a) It gives institutions the freedom to divert to unknown projects that may not pass the suitability test for use of public resources.</li><li>b) There is no legal framework for compliance with the constitutional principles of accountability and public participation.</li><li>c) unplanned projects expose the government in terms of financial liability in the event of breach.</li><li>d) Creates loopholes for corrupt practices.</li></ul> |
|--|--|--|--|

*D/DCS  
For attention of committee  
is requested to invite  
Hon. members  
when considering  
the Bill*



NATIONAL ASSEMBLY  
RECEIVED  
★ 21 SEP 2023 ★  
CLERK'S OFFICE  
P O Box 41842, NAIROBI

**Hon. Shakeel A. Shabbir Ahmed, CBS, MP.**

MBA (UK), GeMBA, (USA), M.A.PolSc (Kenya) FFA, F inst D, FCMI, MCIM, BA Hon BS

Kisumu East Constituency

Chairman - African Parliamentarians Network Against Corruption - (APNAC- Kenya)

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*Mr. W. Kaluma  
to study  
and advise  
21/9/23*

Rt. Hon. (Dr.) Moses M. Wetangula EGH, MP  
The Speaker of the National Assembly of Kenya  
Parliament Buildings  
Nairobi, Kenya.

20<sup>th</sup> September, 2023

Honourable Speaker,

**RE: THE ANTI-CORRUPTION AND ECONOMIC CRIMES (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 30 OF 2023) "KALUMA BILL" & THE ANTI-CORRUPTION AND ECONOMIC CRIMES (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 40 OF 2023) "RUKU BILL"**

I write to you with utmost concern concerning the two bills that are referred to above by their proponents, Hon. George Kaluma and Hon. Geoffrey Ruku, respectively.

The Kaluma Bill seeks to amend the Anti-Corruption and Economic Crimes Act No. 3 of 2003 by deleting Section 64. Presently, Section 64 of this Act disqualifies a person convicted of corruption or an economic crime from holding a public office for a period of ten (10) years after their conviction. It also mandates the Ethics and Anti-Corruption Commission (EACC) to publish the names of such convicted individuals in the Kenya Gazette, yearly.

Should the Kaluma Bill pass, individuals who have been convicted for corruption and economic crimes would simply pay a fine or serve time and proceed to occupy public offices where they would potentially engage in much more sophisticated theft of public resources. The Kaluma Bill, contrary to the Constitution of Kenya 2010, also seeks to deny Kenyans the right to access crucial information pertaining to the ethical standing of the individuals whom they would entrust with public resources.

In the same vein, the Ruku Bill seeks to amend Section 45 (2) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. This provision prescribes offences relating to protection of public revenue and property, including money and assets belonging to; or under the control of any public institution. Hon Ruku proposes for the substitution of criminal prosecution of such offences with administrative sanctions; and further, for the removal of the requirement of prior planning in projects.

Procurement related corruption constitutes over 80% of grand corruption and the theft of public resources in Kenya. Section 45 (2) should in fact be strengthened to create more stringent

*Mr. Douglas Katho  
Pk TNA Dkt 29/09/23*

sanctions in order to serve as a deterrence measure against engaging in procurement corruption. Instead, Hon. Ruku seeks to create more loopholes in the Anti-Corruption legislative framework to allow corrupt public officers to escape accountability for their actions. The Ruku Bill is also unconstitutional for seeking to remove prior planning in projects which is a process that requires public participation.

Kindly note also that as a party to the United Nations Convention against Corruption, Kenya has mandatory international obligations in the fight against corruption that will be violated should the Kaluma and the Ruku Bills pass.

I have reached out Hon. Kaluma who happens to be a member of APNAC-K concerning his proposal. Unfortunately, he has ignored several requests imploring him to withdraw this Amendment Bill and instead, has expressed a personal interest in it. Consequently, I have reached out to the Party Leaders of both Hon. Kaluma and Hon. Ruku because their Parties' ethics and philosophies prohibit actions by their members that perpetrate corruption.

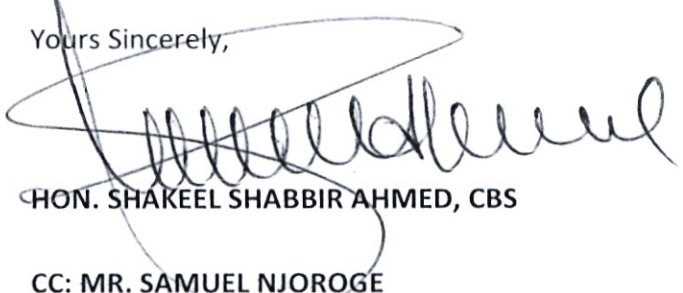
I humbly request that you do not allow the Kaluma Bill and the Ruku Bill to proceed any further. Both Bills contradict the collective values and aspirations of the people of Kenya that are codified in the Constitution of Kenya 2010; and both Bills will weaken the Anti-Corruption legislative framework in Kenya. More importantly, the public trust and confidence in the Legislature is at stake as they will question our integrity and where our interests lie.

I have attached the following documents to this letter for your consideration:

- 1) *Copies of the Anti-Corruption and Economic Crimes (Amendment) Bills (National Assembly Bill No. 30 & 40 of 2023;*
- 2) *Copies of my objections filed with the National Assembly Committee on Justice and Legal Affairs (JLAC) dated 30<sup>th</sup> May 2023 & 22<sup>nd</sup> August 2023; and*
- 3) *Copies of the memoranda by the African Parliamentarians Network against Corruption-Kenya Chapter (APNAC-K) addressing the damage that the proposed amendments could cause.*

We seek your kind guidance on how to proceed further with this urgent matter.

Yours Sincerely,



HON. SHAKEEL SHABBIR AHMED, CBS

CC: MR. SAMUEL NJOROGE  
CLERK OF THE NATIONAL ASSEMBLY OF KENYA



THE NATIONAL ASSEMBLY  
OFFICE OF THE CLERK

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*When replying, please quote*

**REF: NA/CNA/CORR/2023(601)**

**27<sup>th</sup> September, 2023**

**Hon. Shakeel A. Shabbir Ahmed, CBS, MP**

Parliament Buildings

P. O. Box 41842 - 00100

**NAIROBI**

Dear

*Mheshimiwa,*

**RE: THE ANTI-CORRUPTION AND ECONOMIC CRIMES AMENDMENT BILL (NATIONAL ASSEMBLY BILL NO. 30 OF 2023) "KALUMA BILL" & THE ANTI-CORRUPTION AND ECONOMIC CRIMES (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 40 OF 2023) "RUKU BILL"**

We refer to the above matter and your letter dated 20<sup>th</sup> September, 2023.

We advise that the two Bills referred to in the letter seeking to amend the Anti-Corruption and Economic Crimes Act, 2011 constitute proposals by Members **for consideration and approval, or disapproval, by the House**. The proposed amendment by the Hon. Kaluma was read the First time on 2<sup>nd</sup> August 2023 and is currently committed to the Departmental Committee on Justice and Legal Affairs to facilitate public participation. The Bill by the Hon. Ruku shall also, similarly, be referred to the Committee once it is read a First time. We have therefore referred your letter to the Committee for consideration during the preparation of its Reports to the House on the two Bills.

We further urge that you move the House in the manner that you have proposed during the Second Reading of the Bills and also propose appropriate amendments to the Bills for consideration by the Committee of the Whole House.

The Clerk of the National Assembly appreciates your continued vigilance and legislative commitment to the fight against corruption.

Yours

*Sincerely,*

**Samuel Njoroge**

**CLERK OF THE NATIONAL ASSEMBLY**



**MEMORANDUM BY THE AFRICAN PARLIAMENTARIANS NETWORK AGAINST CORRUPTION-KENYA CHAPTER (APNAC-K) ON THE ANTI-CORRUPTION AND ECONOMIC CRIMES (AMENDMENT) BILL 2023 (NATIONAL ASSEMBLY BILL NO. 40 OF 2023)**

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**1. Background**

- ❖ The Anti-Corruption and Economic Crimes (Amendment) Bill 2023 (National Assembly Bill No. 40 of 2023) (hereinafter the “Amendment Bill”) seeks to amend **the Anti-Corruption and Economic Crimes Act No. 3 of 2003** by **deleting Section 45(2)**. Section 45 (2) of the Act prescribes offences relating to protection of public property and revenue, including money and assets belonging to; or under the control of any public institution.
- ❖ The Amendment Bill is currently pending before the National Assembly’s Committee on Justice and Legal Affairs (JLAC) where it was last scheduled for consideration on Wednesday 24<sup>th</sup> May 2023. It is sponsored by the MP for Mbeere North Constituency, Hon. Geoffrey Kariuki Ruku, elected on the Democratic Party (DP) ticket, which is affiliated to the ruling party, United Democratic Party (UDA) and big tent Kenya Kwanza.
- ❖ **His justification for the Amendment Bill is to substitute criminal prosecution for irregularities related to public revenue, property, procurement and projects, with administrative action. He also claims that the term “prior planning” is ambiguous as used in the Act.**
- ❖ The President of Kenya and the leader of Kenya Kwanza, H.E. William Ruto, recently proclaimed a zero tolerance policy on corruption and the looting of public resources by public officers. The Kenya Kwanza manifesto depicts that the ruling party and affiliated parties such as DP, are working towards addressing state capture and conflict of interest by public officers, both of which are concepts directly related to corruption. This Amendment Bill is therefore a violent contradiction of these aspirations and of the President’s proclamation.

*offence if the person.....*”. It is worth noting that the person referred to as an officer under Section 45 is the Accounting Officer of a Procuring Entity (PE). This provision covers any other public officers who are involved at various stages of approvals and authorization of certain processes and payments and/or use of public property. Under public procurement guidelines, **an Accounting Officer of a public entity has the primary responsibility of ensuring that a procurement complies with the procurement law.** However, the Bill seeks removal of the task of ensuring compliance from an Accounting Officer and other relevant officers e.g. Head of procurement and Heads of Accounts. This means that no person shall bear the responsibility of legal compliance/be answerable for intentional or careless procurement mismanagement.

- ✓ The breaches under the procurement law are not stand alone since in the course of investigations, they may point to other unlawful acts like abuse of office, unlawful/fraudulent acquisition of public property, conflict of interest etc.

## 7. Potential Impact of the Amendment Bill

- ❖ The amendments will weaken the fight against corruption and reverse the gains made so far in holding Accounting Officers and other persons involved at various stages of the procurement process and handling of public resources to account for corrupt conduct. Administrative sanctions alone are insufficient to address the gravity of such offences, considering the dire impact they already have.
- ❖ The proposed amendments are dangerous and if enacted into law will deal a big blow to the fight against procurement related corruption, which is primarily responsible for theft of public funds hitherto witnessed in both national and county governments.

## 2. Contents of the Amendment Bill

- ❖ Section 45 (2) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 prescribes offences committed by persons whose functions revolve around the **administration, custody, management, receipt or use of public revenue or public property**.
- ❖ The offences stipulated under Section 45 (2) occur when such a person referred to above **fraudulently** makes payment or excessive payment from public revenues for:
  - i. Substandard or defective goods;
  - ii. Goods not supplied or not supplied in full; or
  - iii. Services not tendered or adequately tendered.
- ❖ Additionally, Section 45 (2) envisages that such person commits an offence when they **willfully or carelessly** fail to comply with the legal procedures for procurement, allocation, sale or disposal of property, tendering of contracts, and management of funds or incurring expenditures.
- ❖ Finally, Section 45 (2) envisages that it is an offence for a person whose functions are mentioned above, to engage in a project **without prior planning**.
- ❖ **The terms used in this provision: fraudulently, willfully, carelessly, and without prior planning; denote intentional, malicious, unlawful intent in relation to public property, and not a mere mistake on the part of the public officer entrusted with it.**

## 3. Kenya's International Obligations

- ❖ Kenya was the first country to both sign and ratify the United Nations Convention against Corruption (hereinafter "UNCAC" of the "Convention") in 2003. The historical context of successive and economically detrimental grand corruption scandals perpetrated by public officials in Kenya in this period may explain this immediate ratification of UNCAC by the Kenyan government. UNCAC requires the formation of domestic laws to implement these internationally recognized norms, practices, and principles in fighting corruption in State Parties. It therefore forms the basis for the establishment of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.
- ❖ The provisions of UNCAC provide that State Parties shall make the commission of an offence established in accordance with the Convention liable to sanctions that take into account **the gravity of offences**. A reading into these provisions shows that UNCAC recognizes and calls for state parties to address and sanction these offences as **criminal acts**.
- ❖ Further, Article 17 of UNCAC envisages the criminal prosecution of public officials who **intentionally** embezzle, misappropriate or in any other unlawful way divert public resources that are entrusted to them by virtue of their office. The provision envisages that State Parties shall establish legislations and take other relevant measures to recognize such actions or omissions are criminal offences.

- ❖ Section 45 (2) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 is the legal, domestic manifestation of Article 17 of UNCAC, showing Kenya's compliance with the international regime in this regard, thus far. The proposal by Hon. Ruku for administrative sanctions is therefore a direct contravention to international law.

#### 4. The Constitution of Kenya 2010

- ❖ **Article 10 of the Constitution of Kenya 2010** recognizes the national values and principles of governance that bind public officers when they enact the law, and when they implement public policy decisions. These national values and principles include: **sharing and devolution of power, the rule of law, good governance, integrity, transparency and accountability.**
- ❖ The Amendment Bill by Hon. Ruku does not demonstrate these national values and principles. Section 45 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 serves to strengthen the accountability of public officers who are entrusted with public resources that they intentionally and or carelessly mismanage. International law that is in fact Kenyan law, calls for the criminal prosecution of such public officers because of the gravity of such mismanagement. The effects of such actions are dire, ranging from nationwide economic loss to stalled development of regional critical infrastructure such as hospitals. The Amendment Bill plays down on the gravity of such offences delineated under Section 45 (2) and thus, does not reflect the public interest.
- ❖ Furthermore, **the management of public revenue and resources is a public policy decision.** Yearly Budget formulation is a culmination of policy statements, reviews, and public participation, and not merely individual decisions and whims. This depicts planning at both national and county levels such that public offices and officers are entrusted with public funds for a specific purpose or project which they are expected to account for by the Constitution of Kenya. Therefore, the proposal by Hon. Ruku to delete Section 45 (2) (c) and the justification that the term "prior planning" is ambiguous, is unconstitutional, frivolous, and fatuous.
- ❖ **Article 227 of the Constitution of Kenya 2010** is also of importance because the Amendment Bill touches on accountability in public procurement. The provision envisages fairness, equity, transparency, and competition in public procurement, and calls for the enactment of a legislation that metes sanctions against persons found guilty of corrupt practices in public procurement. While the Public Procurement and Asset Disposal Act 2015 is the primary governing law in this regard, the Anti-Corruption and Economic Crimes Act No. 3 of 2003 serves to address the punishment and deterrence of corrupt practices by public officials as envisaged by the Constitution and by international law. Therefore, the Amendment Bill by Hon. Ruku further violates the Constitution by seeking to eradicate proportional sanctions stipulated therein which international law has advised should be criminal in nature.



## 5. Case Studies

- ❖ Other countries recognize and enforce the international obligation envisaged above in their respective jurisdictions. For example, in Singapore, the sanctions for public officials that engage in corrupt practices denote that they recognize it as criminal in nature.
- ❖ **Section 5 of the Prevention of Corruption Act 1960** envisages that a person is guilty when it is proven that a contract or a contract proposal with the government was arrived at through corrupt practices. For such guilt, Singapore law prescribes imprisonment of 7 years or a fine of \$100,000.

### Kenya

#### 1. The case of Mike Sonko

Mr. Sonko was impeached from the office of Governor of Nairobi County for among other reasons, abuse of office and violation of Article 75 of the Constitution of Kenya 2010 on the conduct of state officers. This impeachment lay down the foundation for the IEBC's rejection of his application for nomination for the gubernatorial race in the 2022 general elections. Additionally, he did not present certain academic certificates in time. He filed an appeal to the High Court at Mombasa challenging the IEBC's decision, and eventually the matter was decided in August 2022 at the Supreme Court. The Supreme Court held that Sonko's impeachment was proof that he **failed the integrity test needed to qualify for an elective seat in Kenya**. The Court emphasized the importance of Chapter VI of the Constitution of Kenya in setting ethical standards that state officers must attain and comply with. It was therefore decided that Mr. Sonko cannot qualify for any elective seat in Kenya for contravening the Constitution.

Previously, Mr. Sonko had been charged at the Anti-Corruption Court for allegedly receiving Kshs. 20 million to influence the public procurement process in favour of the firm that paid him that bribe. These charges culminated from investigations by the EACC on the same. However, he was acquitted for insufficient evidence. Such actions lay the basis for his impeachment from office.

## 6. Summary of Remarks

- ✓ Procurement accounts for 10% of Kenya's GDP. Yet, procurement related corruption in Kenya is estimated to be over 80% of all mega corruption scandals in the country leading to massive loss of public resources. In sub Saharan African countries, it is estimated that corruption drains off between 20 and 25% of national procurement budgets.<sup>1</sup> The World Bank estimates that it is actually 30-35 % that is lost to procurement malpractices.<sup>2</sup> Any amendments to existing anti-graft laws should be geared towards tightening the controls and loopholes.

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<sup>1</sup> Mutangili K., S. (2019): Corruption in Public Procurement in Kenya: Causes, Consequences, Challenges and Cures. *Journal of Procurement & Supply Chain*, Vol 3(1) pp. 63-72

<sup>2</sup> Muturi S. :Sealing Corruption Loopholes in Public Procurement

- ✓ By terming the failure to follow procurement guidelines as mere administrative flaws, the Amendment Bill is misleading and unconstitutional. This is because failure to adhere to the law and procedures relating to public procurement (as contained in the Public Procurement and Asset Disposal Act, 2015) cannot, by any stretch of imagination, be deemed as administrative flaws. Rather, that is where the bulk of procurement malpractices including conflict of interest, favouritism, skewed procurement specifications, bid rigging, fraudulent tender awards, giving tenders to unqualified persons, over-pricing of goods and services, among others, are committed.
- ✓ The Bill suggests the issue of 'administrative flaws' will be dealt with through administrative mechanisms, including by professional associations. However, it must be noted that professional bodies do not have the necessary enforcement powers to sanction abuse of procurement procedures, especially where the same results in the loss of public revenue and property.
- ✓ The administrative action recommended in the Bill to replace prosecution is **not deterrent to the far-reaching disastrous effects of corruption**. Electing administrative action over prosecution will encourage participants in the procurement processes to engage in corrupt conduct without consequence.
- ✓ Administrative action cannot adequately address the far-reaching impact of corruption. More often than not, **corruption schemes are hatched way before commencement of procurement**. This can happen through **failure to plan and budget for a procurement**.
- ✓ Under public procurement guidelines, an Accounting Officer of a public entity is required to develop a Procurement Plan within the approved budget prior to undertaking any project. The essence is to ensure that all procurement is carried out in an organized manner as per the available budget. It also serves to prioritize capital projects and ensure completion. Lack of planning, after repeal of section 45(2) (c) will, thus, see increased wastage and a mushroom of white elephant projects. Projects will often be commenced with no means/plan of completing them. However, the Bill proposes to repeal the offence of engaging in a project without prior planning. The proposed amendment will thus increase abuse of office incidents leading to increased corruption in the public sector.
- ✓ The requirement for prior planning under Section 45 (2) (b) of ACECA is not strange to procurement law as claimed in the Amendment Bill. The Public Procurement and Asset Disposal Act No.33 of 2015 (PPADA) makes prior planning a requirement under Section(s) 44 and 53 of the PPADA. The need to plan and budget for procurement prior to commencement **ensures that procurement entities initiate and complete projects within approved budgets and appropriate periods reducing incidences of stalled projects**. Repealing section 45(2) (c) as suggested in the Bill will thus thwart these desired objectives and encourage corruption.
- ✓ Section 45 (2) of the Act that is targeted for amendment provides that “ *An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an*



## CSPEN MEMORANDUM ON THE PROPOSED ANTI-CORRUPTION AND ECONOMIC CRIMES (AMENDMENT) BILL, NATIONAL ASSEMBLY BILLS NO. 40 OF 2023 | 13<sup>TH</sup> MARCH 2024

### 1.0 BACKGROUND AND INTRODUCTION

The Civil Society Parliamentary Engagement Network (CSPEN) is a forum for Non-state Actors, bringing together civil society organizations, professional associations, think tanks and research institutions whose programme areas involve working with the legislature. The network was established in 2019 as a joint initiative of the Westminster Foundation for Democracy and Mzalendo Trust to provide a coordinated engagement with the Kenyan legislature, its committees and members in their oversight, legislation, and representation roles. Broadly, CSPEN seeks to engage with the legislature to ensure that legislative output meets the constitutional requirements of leadership, accountability, and integrity and is reflective of and aligns with the broader public interest. Currently, CSPEN has a Membership of Thirty-Seven National Civil Society Organizations, and the priority areas are guided by the design and architectural framework of the parliamentary committees of the 13th Parliament ranging from, Public Finance Management (PFM) and Devolution; Inclusion and Representation; Leadership and Integrity; Human Rights and Access to Justice; Public Participation & Service Delivery; Climate Justice and Environmental democracy.

Recognizing that Parliament derives its legislative authority from the people, Parliament has put in place measures to comply with the principle of public participation as enlisted under Article 10 of the Constitution of Kenya, 2010. This includes convening public forums, submitting calls for memorandum through print and electronic media, and inviting members of the public, including representatives of civil society organizations to present their views. As a key tenet of entrenching good governance, CSPEN has therefore collectively submit this memorandum on the **Anti-Corruption and Economic Crimes (Amendment) Bill, National Assembly Bills No. 40 of 2023**.

The position as captured below incorporates the views of partner organizations including the African Parliamentarians Network Against Corruption (APNAC-Kenya Chapter); Mzalendo Trust; Development Gateway; Transparency International Kenya; Uraia Trust; National Taxpayers Association (NTA); Collaborative Centre for Gender and Development (CCGD); and The Community Advocacy and Awareness (CRAWN) Trust.

***NB: This memo will be orally submitted by Transparency International Kenya and APNAC Kenya to the JLAC Committee on 14th March 2024.***



We hope our proposals will be considered during the deliberations of the Bill.

Sincerely,

**Caroline Gaita**

**Executive Director**

**Mzalendo Trust**

**Convener, CSPEN**

**Email: [caroline@mzalendo.com](mailto:caroline@mzalendo.com)**

PROPOSED AMENDMENTS TO ANTI-CORRUPTION AND ECONOMIC CRIMES (AMENDMENT) BILL, N.A BILLS NO. 40 OF 2023

| Clause | Proposed Amendments / Ramifications  | Comments on the Proposed Amendments  |
|--------|--|--|
| 2      | <p>Section 45 of the Anti-Corruption and Economic Crimes Act is amended by deleting subsection (2) and substituting therefor the following new subsection-</p> <p>"(2) An officer or person whose functions concern administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person fraudulently makes payment or excessive payment from public revenues for-</p> <p>(i) Substandard or defective goods;</p> <p>(ii) Goods not supplied or not supplied in full; or</p> <p>(iii) Services not rendered or not adequately rendered."</p> | <p>We proffer that the Bill should not be passed, as is, and effected for the reason that the amendments if passed, will afoul several provisions of the Constitution of Kenya 2010 (the Constitution) and legislations, to wit:</p> <p>i. <b>Violation of National Values and Principles of Good Governance</b></p> <p>First, under <b>Article 10(1) of the Constitution</b>, national values and principles of good governance bind all state organs, state officers and public officers when such officer "....enacts, applies, or interprets any law" or "... makes or implements public policy decisions".</p> <p>Under <b>Article 10(2)</b> some of the cardinal national values include the rule of law, good governance, integrity, transparency and accountability.</p> <p>Read to its proper effect, under section <b>45(2) of the Anti-Corruption and Economic Crimes Act 2003 (ACECA)</b> an officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property <u>invariably implements public policy decisions and involves himself or herself in the application and interpretation of the relevant laws and relevant policies.</u></p> <p>Such an officer is expected to exercise his duties in a manner that has integrity, transparency, in an accountable manner and according to the relevant laws. As such, where a person willfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of public property, tendering of contracts, management of funds or incurring of expenditures; or where such a person engages in a project without prior planning, such conduct would, in the first instance, even without more, be a constitutional breach.</p> <p>Even without the prescription provided in section 45(2)(b) and (c) of ACECA, careless conduct of a public officer or willful failure to adhere to the law or relevant policy would negate the integrity, accountability and transparency in that office.</p> |

The principle of accountability requires that a public officer is answerable and must offer explanation and communicate that explanation to persons who are affected by the decisions of the public officer.

Whereas the principle of transparency and good governance require a public officer to be open and prompt in his dealings with the citizenry, the principle of accountability also requires that the exercise of public authority conforms to powers vested by law. A failure, neglect, willfulness or carelessness to exercise powers, follow the law or adhere to policy that is proscribed in an Act of Parliament ought not to be considered or viewed as "inordinate and undue criminalization of flaws in public procurement".

Public procurement as a way of use, administration or disposal of public resources or property must be subject to constitutional values and principles.

**ii. Violation of the Leadership and Integrity Principles**

Second, under **Article 73(1) of the Constitution**, a public officer vested with responsibilities has to understand that it is a public trust exercisable in a manner that is consistent with the objects of (national values and principles), demonstrates respect for the people of Kenya, brings dignity to the office, promotes confidence in that office. For this reason, if carelessness or willful non-compliance with the law cannot be proscribed in a legislation as the amendment seeks, the Constitutional provisions on leadership and integrity may be stultified. If engagement in a project without prior planning is permitted in our society, the kind of arbitrariness and capricious expenditure of public resources and disposal of public property would be so wanton that it would bring dishonor to public offices and undermine confidence in those offices. In our view, a law that instills the values required to uphold public trust is a proper law.

Further, where carelessness, willful neglect or lack of prior planning becomes part of our public ways of doing business, or at the very least if not prohibited in law, we risk sliding down the culture of lack of objectivity, impartiality and decisions influenced by either nepotism, favoritism or other improper motives. Such conduct would lack accountability, honesty, and would not be in the public interest to remove the culpability prescribed on persons in charge of administrative, custody, management, receipt or use of any part of public revenue or public property. Thus, the deletion of section 2(b) and (c) of ACECA would invigorate a culture of impunity and lack of integrity in public finance management contrary to **Article 73(2)**.

More likely where there is no law that criminalizes lack of planning of public projects or willful or careless failure to adhere to the law, policies, guidelines in the procurement, allocation or disposal of public property, there would be no integrity, confidence, honesty objectivity, impartiality, accountability or discipline in public service.

**iii. Violation of the Principles of Public Finance and Public Procurement Laws**

Third, the principles of public finance under **Article 201(a) of the Constitution** denote openness and accountability in the management of public finance. Secondly, **Article 201(d)** prescribes that public finances shall be used prudently and responsibly. In our view, willful and careless failure to adhere to the law, the rules or guidelines contravenes openness and accountability as such decisions would be capricious and arbitrary. Besides, where there is no prior planning as required by **Section 45(2)(c) of ACECA**, there would be no prudent and responsible use, administration, custody, maintenance of public resources and property.

More so, **Article 227 of the Constitution** recognizes that public procurement should occur within a system that is fair, equitable, transparent, competitive and cost-effective. This provision further justifies and legitimises the procedures within the **Public Procurement and Asset Disposal Act (PPADA)**

Spending of public resources has to be planned, and is therefore a public policy decision. This is why Kenya has an annual national budget and county budgets that itemise and plan for activities of the country and the county in that financial year. In **Section 2 of the PPADA** "Procurement" is defined in the to include planning in the supply chain system. Furthermore, **Section 53 (2) of the PPADA** further requires that the accounting officers for each public office, **prepare an annual procurement plan** that is in line with the annual budget, prior to commencement of each financial year.

**Article 220** of the Constitution on form, content and timing of budgets envisions preparation and management of plans in advance. This is also reflected in the Public Finance Management Act **sections 35 and 125** which speak to an integrated development planning process.

Public procurement is how government offices acquire goods and services to effect their projects. Prior planning determines priority projects and how much will be spent on them, at both the national level and in the counties. Consequently, prior planning cannot be separated from government projects and the public procurement process.



**iv. Presumption of Constitutional Validity Favors non-Deletion**

Fourth, in any case, the amendment that is sought does not demonstrate or bring to purview anything that impugns the validity of the provisions sought to be amended. The author of the amendment hasn't shown which law, practice, or any Article of the Constitution that section 45(2)(b) and (c) offend. In Kenya, all laws are presumed valid, regular and unconstitutional unless one demonstrates any unconstitutionality or illegality in any of its provisions. This is what is referred to as the *presumption of constitutionality of a law*. The doctrine presupposes that statutes (as well as regulations and administrative decisions) are presumed to be constitutional, regular and valid in the sense that the individual or entity seeking to impugn a statute bears the onerous onus of demonstrating the unconstitutionality, irregularity or invalidity. In the same breath, the onus is on the challenger to demonstrate that a right or fundamental freedom has been infringed, at which point the burden would shift to the State to demonstrate that the infringement would survive the limitation test in Article 25 of the Constitution.

In the Memorandum of objects and reasons of the Bill, nothing explained there links the amendment sought to any unconstitutionality. In its current form, Section 45 of ACECA does not conflict with any provisions of any law. No invalidity or unconstitutionality of this provision has been demonstrated before Parliament. If a law does not offend any other law or the Constitution, and where it cannot be impeached on any grounds, the *presumption of constitutionality holds* that Parliament enacted such a law validly and considered all factors relevant.

Reversing the presumption of validity imposes the evidential burden on the person who seeks otherwise.

In the Tanzanian case of **Ndyanabo –V- Attorney General (2001) 2 EA 485** in which the said court presided over by the Hon. Chief Justice Samatta stated as follows: -

*"...until the contrary is proved, a legislation is presumed to be Constitutional. It is a sound privilege of Constitutional construction that if possible, a legislation should receive such a construction as will make it operative and not inoperative"*.

*"...since, as stated, a short while ago, there is a presumption of Constitutionality of legislation, the onus is upon those who challenge the Constitutionality of the legislation, they have to rebut the presumption. Fifthly where those supporting a restriction on a fundamental right rely on a claw back or exclusion clause in doing so, the onus is on them, they have to justify the restriction."*

This case was cited with approval by the High Court in *Free Kenya Initiative & 6 others v Independent Electoral & Boundaries Commission & 4 others; Kenya National Commission on Human Rights (Interested party)* [2022] eKLR

This doctrine has been recognized in classical writing as well as judicial authorities:  
**Cooley on Constitutional Limitations (1972)** reprint at p 183:

*"The constitutionality of a law, then is to be presumed, because the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the Constitution upon their action, have adjudged that it is so. They are a co-ordinate department of the government with the judiciary, invested with very high and responsible duties, as to some of which their acts are not subject to judicial scrutiny, and they legislate under the solemnity of an official oath, which it is not to be supposed they will disregard."*

**Black on Interpretation of Laws (1911) p 110:**

*"Every Act of the legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favour of the validity of the Act. If it is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the statute with the Constitution and avoid the consequence of unconstitutionality."*

*Legislators, as well as judges, are bound to obey and support the Constitution, and it is to be understood that they have weighed the constitutional validity of every Act they pass. Hence the presumption is always in favour of the constitutionality of a statute; every reasonable doubt must be resolved in favour of the statute, not against it; and the courts will not adjudge it invalid unless its violation of the Constitution is, in their judgment, clear, complete, and unmistakable."*

It is our firm view that Parliament is prohibited from passing or amending legislation which is a colourable attempt to defeat the objects and purposes of the Constitution. The amendment as proposed is a blatant and barefaced attempt to render ineffectual and ineffective Articles 10, 73 and 201 of the Constitution.

|  |  |   |
|--|--|---|
|  |  | <p><b>V. The Proposed Amendment is Discriminatory and Violates the Equality Provisions of the Constitution</b></p> <p>Article 27(1) provides that every person is equal before the law and the right to equal protection and equal benefit of the law. Further, under Article 27(2), the state shall not discriminate directly or indirectly against any person on any ground.</p> <p>The equal benefit and protection of the law essentially means that all Kenyans are entitled to equal protection and benefit of the law irrespective of their professions. That is to say that the safeguards as well as the prohibitions under section 45(2)(b) and (c) apply to and binds all Kenyans of different walks of life and professions.</p> <p>If the relevant section is to be amended in pursuit of the objects that the sponsor of the Bill suggests, that is: "to remove the inordinate and the undue criminalization of flaws in <u>public procurement law</u>", the same would be discriminatory for the reason that the broader purport and tenor is only to benefit a particular group of persons who apply <u>the procurement law</u>.</p> <p>Given that ACECA applies to all persons who apply all laws in Kenya, whether or not those laws relate to procurement cannot be the only basis for amendment and deletion of a provision targeting all persons (in charge of administration, custody, management, receipt or use of any part of public revenue or property). If section 45(2) is to be amended merely because it poses an inordinate and undue criminalization of flaws in public procurement law, the same is discriminatory in that it targets to protect only procurement officers in public office. To the extent that the amendment and deletion isn't targeted at accountants, clerks, tea servers, directors, legal officers, human resource professionals, it goes against the principle of equality of all before the law and the equal benefit of all before the law.</p> <p><b>vi. Only Penal Laws can Provide Criminal Accountability for Corruption and Ethical Violations</b></p> <p>We note that the sponsor of the Bill alleges that there are statutes that are mentioned in the draft Bill which are sufficient to address the infractions (i.e. the Fair Administrative Action Act, PPADA, Employment Act). We would wish to reiterate that the said laws are not penal laws and cannot therefore provide accountability and sanctions for conduct constituting corruption, lack of integrity and ethical violations.</p> <p>The other statutes so mentioned do not prescribe or proscribe, in the specific terms, as section 45(2)</p> |
|--|--|---|

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|  |  | <p>does, the kind and specific conduct that constitute a criminal offence. One has to show that those other statutes are also capable of criminally sanctioning the breaches. If indeed they do deal with other forms of sanctions, the same cannot be a basis for the repeal of a law.</p> <p><b>vii. International Obligations</b><br/> Kenya was the first country to both sign and ratify the United Nations Convention against Corruption ("UNCAC") in 2003. The historical context of successive and economically detrimental grand corruption scandals perpetrated by public officials in Kenya in the period spanning the 1980's to the early 2000's, may explain this immediate ratification of UNCAC by the Kenyan government. UNCAC requires the formation of domestic laws to implement these internationally recognized norms, practices, and principles in fighting corruption in State Parties. It therefore forms the basis for the establishment of ACECA.</p> <p>Further, <b>Article 17 of UNCAC</b> envisages the criminal prosecution of public officials who intentionally embezzle, misappropriate or in any other unlawful way divert public resources that are entrusted to them by virtue of their office. The provision envisages that State Parties shall establish legislations and take other relevant measures to recognize such actions or omissions are criminal offenses.</p> <p>Section 45 (2) of ACECA is the legal, domestic manifestation of Article 17 of UNCAC, showing Kenya's compliance with the international regime in this regard, thus far. The proposal by Hon. Ruku for administrative sanctions to supplant criminal prosecution of willful and careless disregard for public procurement laws and procedures, contravenes international law and should not be allowed to pass.</p> <p><b>Viii. Criminalization of ACECA offences</b></p> <p>The law envisions the offences listed in Section 45 of ACECA to be criminal in nature, in line with international law, demonstrated above. The Public Finance Management Act, for instance, contains the following provisions from which seriousness and criminality of procurement related offences can be inferred:</p> <p><b>Section 79</b> requires public officers to comply with laws relating to national government resources.</p> <p><b>Section 147:</b> the accounting officer of a county assembly shall monitor, evaluate and oversee the management of their public finances.</p> <p><b>Section 153 (1) -</b> The accounting officer for a county Government entity—</p> |
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|  |  | <p>(a) is responsible for the management of the entity's assets and liabilities; and</p> <p>(b) shall manage those assets in such a way as to ensure that the county government entity achieves value for money in acquiring, using or disposing of those assets.</p> <p><b>Section 196</b> criminalises spending public money otherwise than authorised by the Constitution, an Act of Parliament or County legislation, and prescribes a punishment of imprisonment not exceeding two years or to a fine not exceeding one million shillings, or to both in addition to provisions under Article 226(5) of the Constitution.</p> <p>These offences cannot therefore be termed as being merely administrative flaws, capable of being administratively addressed.</p> <p>Further, none of the proposed alternative laws including the Fair Administrative Act and the Employment Act clearly stipulate culpability for such offences, hence, they would go unpunished despite the huge negative impact to the public.</p> <p>Furthermore, <i>mens rea</i> (the criminal mind) for these offences is already well established and set out in ACECA. The <i>mens rea</i> for the offences is set out as "<b>willfully (intentionally) or carelessly</b>" failing to comply with any law or applicable procedures and guidelines relating to procurement and asset disposal. In the criminal trial process, an accused person is granted fair trial under <b>Article 50 of the Constitution</b>, for these elements to be proven based on admitted evidence, for a conviction to issue. It therefore follows that justice and rule of law should be allowed to take its course. As such, there is no threat of infringement of individual rights, hence no justification for an amendment of the Act.</p> <p>An amendment to the Act will to the contrary infringe on the Constitution and the rights of the public.</p> |
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*Presentation to be done by Transparency International*

| Section | Specific clause/<br>Provision of the Bill  | Proposed amendment/ recommendation  | Justification/ Rationale for Recommendation   |
|---------|--|---|---|
| 2       | <p>Section 45 of the Anti-Corruption and Economic Crimes Act is amended by deleting subsection (2) and substituting therefor the following new subsection-</p> <p>"(2) An officer or person whose functions concern administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person fraudulently makes payment or excessive payment from public revenues for-</p> <p>(i) Sub-standard or defective goods;</p> <p>(ii) Goods not supplied or</p> | <p><b>The deletion of S. 45 (2) (b) and (c) should be rejected on the grounds that:</b></p> <p>1. It is not in the public interest to remove the culpability prescribed on persons in charge of administrative, custody, management, receipt or use of any part of public revenue or public property.</p> <p><b>The deletion of S. 45 (2) (b) and (c) should be rejected since:</b></p> <p>2. the law envisions these offences to be criminal in nature, as demonstrated by the provisions of the Constitution and other relevant laws.</p> | <p>It does not align to constitutional provisions as stipulated below.</p> <p><b>Article 10 (2)</b> on national values and principles of governance which include: accountability, rule of law, good governance and integrity</p> <p><b>Article 201</b> on principles of public finance which include:</p> <p>(a) openness and accountability</p> <p>(d) public money shall be used in a prudent and responsible way</p> <p>(e) financial management shall be responsible, and fiscal reporting shall be clear.</p> <p><b>Article 227</b> on procurement of public goods and services</p> <p>Due to the huge negative impact of corruption related to procurement, to the public and to the economy, these offences are best addressed as criminal offences with criminal sanctions.</p> <p>The Public Finance Management Act contains the following provisions from which seriousness and criminality of offences of corruption relating to procurement can be inferred:</p> <p><b>Section 196</b> criminalizes spending public money otherwise than authorized by the Constitution, an Act of Parliament or County legislation.</p> <p><b>Section 79</b> requires public officers to comply with laws relating to national government resources.</p> <p><b>Section 147:</b> the accounting officer of a county assembly shall monitor, evaluate and oversee the management of their public finances.</p> <p><b>Section 153 (1)</b> - The accounting officer for a county Government entity—</p> <p>(a) is responsible for the management of the entity's assets and liabilities; and</p> <p>(b) shall manage those assets in such a way as to ensure that the county government entity achieves value for money in acquiring, using or disposing of those assets.</p> |

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|  | <p>(iii) not supplied in full; or Services not rendered or not adequately rendered."</p> |   | <p>These offences cannot therefore be termed as being merely administrative flaws, capable of being administratively addressed. Further, none of the proposed alternative laws including the Fair Administrative Act and the Employment Act clearly stipulate capability and culpability for such offences hence they would go unpunished despite the huge negative impact to the public.</p>  |
|  |  | <p><b>The deletion of S. 45 (2) (b) and (c) should be rejected since:</b></p> <p>3. Mens rea (the criminal mind) for these offences is already well established and set out in the Act. As such, there is no threat of infringement of individual rights, hence no justification for an amendment of the Act. An amendment to the Act will to the contrary infringe on the Constitution and the rights of the public.</p> | <p>The mens rea for the offences is set out as "willfully (intentionally) or carelessly" failing to comply with any law or applicable procedures and guidelines relating to procurement and asset disposal. Therefore, an accused person is granted fair trial under these section since these elements must be proven for a conviction issue. It therefore follows that justice and rule of law should be allowed to take its course.</p>   |
|  |  | <p><b>The deletion of S. 45 (2) (b) and (c) should be rejected noting that:</b></p> <p>4. There is no ambiguity of the term "prior planning" used under section 45 (2) (c) since legislation governing public procurement envisions that there will be a process for planning in procurement and budget processes</p>   | <p>The Public Procurement and Asset Disposal Act was enacted pursuant to <b>article 227 (2) of the Constitution</b> and it provides the framework within which policies relating to procurement and asset disposal shall be implemented. <b>Section 53</b> of the Public Procurement and Asset Disposal Act provides for procurement and asset disposal planning, to be undertaken before any procurement proceeding. <b>Article 220</b> of the Constitution on form, content and timing of budgets envisions preparation and development of plans in advance. This is also reflected in the Public Finance Management Act <b>sections 35 and 125</b> which speak to an integrated development planning process.</p> |

## **Recommendation**

We propose that Clause 2 of the Bill be deleted in its entirety and instead, read as follows:

Section 45 of the Anti-Corruption and Economic Crimes Act is amended by deleting subsection 3 and substituting therefor the following new subsection

—

(3) In this section :-

a. "public property" means real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body.

"prior planning" means all the procedures required by law including the Public Procurement and Asset Disposal Act to be performed by public officers before commencing projects.

## **General Conclusion from CSPEN Members**

In conclusion, the Anti-Corruption and Economic Crimes (Amendment) Bill, 2023 (National Assembly Bill No. 40) is unconstitutional and consequently void as has been demonstrated in the analysis above CSPEN Notes that public procurement is one of the most vulnerable sectors to fraud and corruption, and the fact that Central Government Procurement (CGP) is one of the single biggest item of public spending in the country makes this fact even more concerning.

We oppose the Bill in its entirety, based on the grounds that the proposed amendments go against the public interest, the principles of public finance (article 201 of the Constitution), leadership and integrity standards (chapter 6 of the Constitution), and the national values and principles of governance which include accountability, rule of law, good governance and integrity (article 10(2) of the Constitution). Upholding criminal sanctions for corruption offences relating to procurement is the only way to hold persons who breach the law accountable, which also serves as a deterrence for corruption and non-adherence to the law. Of the sixty (60) corruption cases finalized in court in the financial year 2021/2022, nine (9) were based on section 45(2) (b) of the Anti-Corruption and Economic Crimes Act. The total amount involved in these nine (9) cases was Kshs. 211,423,981. This shows the sheer magnitude and cost of corruption related to procurement.

If passed, the Bill will undermine the progress made in the fight against corruption since the enactment of the Anti-Corruption and Economic Crimes Act in 2003 and will pose a serious threat to the principles of competence, justice, and accountability in the management of public resources.

We submit this memo on the need to strengthen and not weaken the legal framework for anti-corruption.



*Douglas Katho*  
*to facilitate*  
*22/11/23*



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**TRANSPARENCY INTERNATIONAL KENYA MEMORANDUM TO THE CLERK OF THE NATIONAL ASSEMBLY ON THE RECOMMENDATIONS ON THE ANTI-CORRUPTION AND ECONOMIC CRIMES AMENDMENT BILL 2023**

**Organization**

TI-Kenya is a not-for-profit organization that seeks to contribute to developing a transparent and corruption-free society through good governance and social justice initiatives. TI-Kenya is one of the autonomous chapters of the global Transparency International movement that is bound by a common vision of a corruption-free world. The global movement provides a platform for sharing knowledge and experience and developing strategies to respond to regionally distinct patterns of corruption.

TI-Kenya works towards a transparent and corruption-free society. Registered in Kenya in 1999, the organization has built extensive experience in governance work at the national and county levels. TI-Kenya pursues advocacy, partnership development, strategic litigation, research, capacity building, and civic engagement as core approaches. TI-Kenya contributes to developing effective, legal, policy, and legislative frameworks and promoting national values that support transparency and accountability, leadership in all sectors and levels.

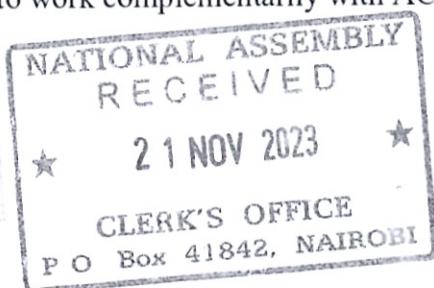
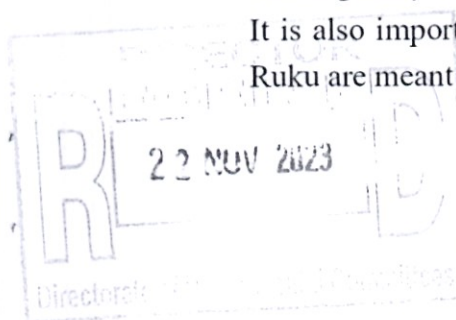
**Introduction**

The Anti-Corruption and Economic Crimes Act (2003) serves as Kenya's primary legal framework for preventing, investigating, and prosecuting corruption-related offenses and economic crimes. Given Kenya's high corruption levels, any amendment to the country's primary anti-corruption law needs to be progressive, properly guided and judiciously scrutinized. Having analyzed the bill, Transparency International Kenya wishes to submit as follows;

1. Deterrence value

Hon. Chair, one of the fundamental principles of the criminal law is deterrence. Criminal laws must have a deterrence value to prevent potential violators from committing offences. This element is primarily attained from the punitive aspect of the law. Accordingly, the Bill's proposal to decriminalize non-compliance of procurement rules and the implementation of unplanned projects and relegate them to the realm of administrative action greatly diminishes that punitive element of Act and in extension, its deterrence.

It is also important to note that the existing administrative options highlighted by Hon. Ruku are meant to work complementarily with ACECA with none meant to supersede the





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other. Both the criminal and administrative options serve different purposes but jointly seek the same goal. That one should be expunged due to the existence of the other is misguided.

2. Constitutional principles

Hon Chair, our constitution underscores principles that should guide all public officers in the performance of their functions generally and specifically on public finance. Article 10 of the Constitution highlights the National values and Principles of governance which include integrity, transparency and accountability. Article 75(2) provides for guiding principles of leadership and integrity which include accountability to the public for decisions and actions. Article 201(d) of the constitution demand public money should be used in a prudent and responsible way.

The import of these and other constitutional provisions is that failure to follow procurement laws is not only criminal, it is also unconstitutional. This demands greater punitive action for procurement violations.

3. Intentionality of offences under sections proposed for repeal

Hon Chair, criminal offences must have an intentionality element, also known as *Mens Rea*. For an action to be considered an offence, it must be committed with full knowledge that it is a criminal offence or a wrong. Sections 45 (b) and (c) which the Bill proposes to repeal both have incorporated this element through the words “**willfully or carelessly**” and “**without prior planning**”. They presuppose that not only should the actions be committed, but they must be committed intentionally and knowingly with full knowledge of existing procurement procedures.

There is therefore absolutely no justification in rendering the provisions unnecessary and subject to repeal. The administrative option recommended also does not address the criminal nature of the actions.

### **Conclusion and Recommendation**

In light of the above, we recommend that the Bill be rejected in its entirety for the following reasons;

1. It serves to weaken constitutional principles: The constitution places high standards of care for public officers. The Bill waters down these standards by discouraging due diligence, professionalism and competence.



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2. It seeks to solve a problem that does not exist: The Bills Memorandum of Objects and Reasons indicate “inordinate culpability prescribed on persons in charge” and “ambiguity of the term prior planning” as key motivations to repeal the provisions. These are strange issues that have never been raised as challenges to procurement.
3. It weakens the fight against corruption: The Bill poses a significant threat, as their enactment into law could undermine the ongoing efforts to curb corruption related to procurement. This has the potential to deal a severe blow to the broader anti-corruption initiatives in Kenya. Notably most corruption related offences are brought under the subject provisions are a repeal will affect most investigations and prosecutions under ACECA.

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**NAIROBI, KENYA**

**Our Ref** GEN/AA  
**Your Ref** TBA  
**Date** 22 August 2023

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8/1/23*

NATIONAL ASSEMBLY  
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★ 22 AUG 2023 ★  
CLERK'S OFFICE  
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The Clerk of the National Assembly  
P.O Box 41842-00100  
Nairobi, Kenya

Attn: Mr. Samuel Njoroge

*Douglas Kestler  
pls facilitate  
W/W  
23/8/23*

via email: [cn@parliament.go.ke](mailto:cn@parliament.go.ke)

Dear Sirs,

**Re: Comments on the Anti-Corruption and Economic Crimes (Amendment) Bill 2023**

Pursuant to your invitation for public participation and submission of memoranda on the Anti-Corruption and Economic Crimes (Amendment) Bill 2023 (the **Bill**) dated 10 August 2023, we have set out our comments below.

Anjarwalla & Khanna LLP (the **Firm**) has a policy to contribute to the development of legislation in Kenya and to encourage the advancement of the rule of law. The Firm is grateful for the opportunity to share its views and has provided detailed comments on the Bill.

DIRECTOR  
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23 AUG 2023  
Directorate of Departmental Committees

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22 AUG  
DEPUTY  
J.W.J  
P.O. Box 41842 -00

1 Detailed Comments

| Proposed Amendment   | Comment/Observation  |
|--|--|
| <p>Clause 2 of the Bill proposes to repeal Section 64 of the Anti-Corruption and Economic Crimes Act, 2003 (the <b>Principal Act</b>).</p> <p>Section 64 of the Principal Act provides for the disqualification of a person convicted of corruption or economic crime from being elected or appointed as a public officer for a period of ten (10) years after the conviction.</p> | <p>Parliament should reject the proposed amendment for the following reasons:</p> <ol style="list-style-type: none"> <li>1. <b>The proposed amendment contravenes Chapter Six of the Constitution</b></li> </ol> <p>Chapter Six of the Constitution is predicated on the premise that state officials are the nerve centre of the Republic; they carry the highest level of responsibility for the management of state affairs and should therefore be individuals of good character, probity, and uprightness. In <i>Republic v Ethics and Anti-Corruption Commission Ex Parte Nairobi City County Assembly &amp; 13 Others</i> [2019] eKLR, the court observed that in the leadership and integrity chapter, Kenyans decreed that people whose conduct does not bring honour, public confidence, and integrity have no place in the management of public affairs.</p> <p>For the above rationale, Article 73(1) of the Constitution states that the authority assigned to a state officer is a public trust that must be exercised in a manner that demonstrates respect for the people, brings honour to the nation and dignity to the office, and fosters public confidence in the office's integrity. Permitting corruption or economic crime offenders to run for office or be appointed to public positions, in our opinion, dishonours state offices, brings shame, and does not promote public confidence. Instead, it promotes the plundering of public resources at the expense of <i>Wananchi</i> and erroneously demonstrates that integrity is irrelevant in leadership.</p> <p>Article 73(2) of the Constitution outlines the guiding principles of leadership and integrity. The proposed amendment is inconsistent with these principles. According to the supreme law, leadership and integrity are guided by the following principles: selection on the basis of personal <b>integrity</b>, competence, and suitability; objectivity and impartiality in decision-making; ensuring that decisions are not influenced by nepotism, favouritism, or other <b>improper motives or corrupt practises</b>; selfless service based solely on the public interest, exemplified by <b>honesty</b> in the execution of public duties; and the disclosure of any <b>perverse interests</b>.</p> <p>As a result, the proposed amendment disregards the requirement that public officials must have integrity, not decide based on improper motives or corrupt practises, and not have perverse interests. In <i>Trusted Society of Human Rights Alliance v The Attorney General &amp; 5 Others</i> [2012] eKLR, the High Court established the following</p> |

| Proposed Amendment | Comment/Observation  |
|--------------------|--|
|                    | <p>standard for integrity: <i>“To our mind, a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, and reputation, the soundness of his moral judgement or his commitment to the national values enumerated in the Constitution”.</i></p> <p>Therefore, if the Bill passes, there is a high likelihood that those convicted of corruption and economic crimes will continue their corrupt practises and will have no incentive to desist from the same. Such an amendment rewards selfish behaviour and, since public officers are in leadership positions, will encourage the worst traits in others.</p> <p style="text-align: center;"><b>2. The proposed amendment undermines and attempts to dilute the overriding national values and principles of governance</b></p> <p>Article 10 of the Constitution stipulates that all persons, state organs, and state offices must adhere to national values and principles when applying or interpreting the Constitution, enacting, applying, or interpreting any law, or making and implementing public policy decisions. The relevant national values include the rule of law, integrity, good governance, transparency, and accountability. The proposed amendment rewards public office abusers with positions of power to carry on with mismanagement. This amendment will result in impunity because those convicted of corruption and economic crimes will feel untouchable and disregard the rule of law and good governance. In addition, the proposed amendment appears to dilute the national values, such as integrity and the rule of law, without complying with the requirements of Article 255 of the Constitution, which stipulates that any amendment to the national values must be approved by referendum. Contrary to Article 10 of the Constitution, by repealing the prohibition on a person convicted of corruption or economic crime from being elected or appointed as a public officer, the amendment effectively waives the requirement of integrity that must be met to assume public or state office.</p> <p style="text-align: center;"><b>3. Kenya risks being grey listed and monitored by the Financial Action Task Force (FATF)</b></p> <p>Over the years, Kenya has endeavoured to convince investors and the international community that its financial and economic system is stable and secure by implementing measures to combat money laundering and terrorist financing. This is evidenced by the passage of the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009 (POCAMLA) and the proposed Anti-Money Laundering and Combating Terrorism Financing Laws</p> |

| Proposed Amendment | Comment/Observation  |
|--------------------|--|
|                    | <p>(Amendment) Bill 2023, which incorporate FATF recommendations. That notwithstanding, the proposed amendment to the Principal Act undermines the progress made by Kenya by allowing corruption or economic crime offenders to run for office or be appointed as public officers. In fact, it blatantly contradicts Kenya's efforts and the government's official policy to strengthen the nation's anti-money laundering and anti-terrorism financing laws in accordance with FATF-set global standards. It shows that such policies and laws are seemingly hypocritical and that the government has no interest in efficacy.</p> <p>Kenya already risks being subjected to increased FATF scrutiny and grey listing, and this amendment would be the final nail in the coffin. FATF places nations on grey lists as a warning to the financial community that the nation in question is not making sufficient efforts to combat financial crime. Consequences of being grey listed include economic sanctions imposed by the IMF and the World Bank, which make it difficult to obtain loans and grants; a significant decrease in capital inflows that can lead to a balance of payments crisis; and a decline in the global competitiveness of Kenyan businesses.</p> |

## 2 Conclusion

- 2.1 As shown, passing the Bill will have serious adverse consequences for Kenya. We urge Parliament to reflect the true wishes of Kenyans and reject it. Parliament should also remember that Articles 94(4) and 10(1) require it to protect the Constitution and uphold national values like the rule of law and integrity when passing laws. Passing the Bill would violate its constitutional obligation. Please contact us should you require any clarification.

Yours faithfully,



Aisha Abdallah

for and on behalf of Anjarwalla & Khanna LLP