Approved for tabling
SNA
3/7/18

PARLIAMENT OF KENYA

THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – SECOND SESSION

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT ON:

THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2018

(NATIONAL ASSEMBLY BILLS No. 12)

Directorate of Committee Services,
National Assembly,
Parliament Buildings,
NAIROBI.

June, 2018

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LIST OFABBREVIATIONS AND ACRONYMS

ACECA	-	Anti-Corruption and Economic Crimes Act
AG	-	Attorney-General
AGM	-	Annual General Meeting
ARO	-	Advocates Remuneration Order
CEO	-	Chief Executive Officer
DPP	-	Director of Public Prosecutions
EACC	-	Ethics and Anti-Corruption Commission
JSC	-	Judicial Service Commission
KAM	-	Kenya Association of Manufacturers
KEPSA	-	Kenya Private Sector Alliance
KSL	-	Kenya School of Law
LSK	-	Law Society of Kenya
NCAJ	-	National Council for Administration of Justice
NCAJ	-	National Council for Law Reporting
ODPP	-	Office of the Director of Public Prosecutions
PARLSCOM	-	Parliamentary Service Commission
SRC	-	Salaries and Remuneration Commission
UNCITRAL	-	United Nations Commission on International Trade Law

LIST OF ANNEXURES

VOLUME 1 OF THE REPORT

Annexure 1: Minutes of Committee sittings on the consideration of the Bill

Annexure 2: Newspaper advertisement inviting the public to submit memoranda on the Bill

Annexure 3: Written submission received from stakeholders following newspaper advertisement

CHAIRPERSON'S FOREWORD

The Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bills No. 12) was published on 10th April, 2018 and underwent First Reading on 18th April, 2018. After First Reading, the Bill was committed to relevant Departmental Committees for review and report to the House pursuant to the provisions of Standing Order 216(5)(c).

The National Assembly through local daily newspapers of *Daily Nation*, *the Star*, *People Daily* and *the Standard* of 7th May, 2018 invited the public to make representations on the Bill. Members of the public either individually or representing institutions and organizations submitted memoranda which the Committee took into account while reviewing the Bill.

The Committee held a total of four (4) sittings considering the Bill during which selected institutions and organizations appeared before the Committee on invitation and made representations on the Bill. The Committee considered and unanimously adopted its report on 13th June, 2018. Minutes of all sittings of the Committee on the review of the Bill are annexed to this report.

By virtue of having a majority number of statutes being amended in the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bills No. 12), the Departmental Committee on Justice and Legal Affairs was tasked to Table in the House reports of all Departmental Committees that considered the Bill. Volume 1 of the report is the report of the Departmental Committee on Justice and Legal Affairs while Volume 2 of the report comprises reports of the following Departmental Committees that also considered the Bill–

1. Administration and National Security;
2. Transport Public Works and Housing;
3. Education and Research;
4. Trade Industry and Co-operatives;
5. Labour and Social Welfare;
6. Environment and Natural Resources
7. Finance and National Planning;
8. Lands;
9. Sports, Culture and Tourism;
10. Defence and Foreign Relations
11. Agriculture and Livestock;
12. Communication, Information and Innovation

May I take this opportunity to express gratitude to Committee Members for their resilience and devotion to duty which made review of the Bill successful. May I also express gratitude to the Speaker and Clerk of the National Assembly for guiding and providing direction to Committees in the discharge of their mandate. Finally, may I thank the secretariats for exemplary performance in providing technical and logistical support to Committees. Indeed, their roles were critical in the consideration of the Bill and production of reports.

On behalf of the Departmental Committee on Justice and Legal Affairs and all Committees that considered the Bill, it's my pleasure and privilege to Table in the House reports of the Committees on the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bills No. 12) pursuant to the provisions of Standing Order 199 (6).

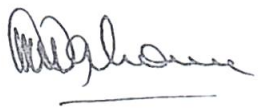
Signed.....

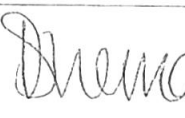
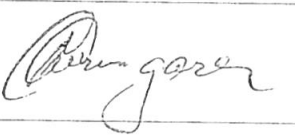
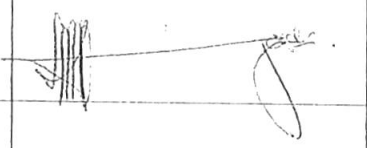
HON WILLIAM CHEPTUMO, M.P.
Chairperson, Departmental Committee on Justice and Legal Affairs

this.....day of.....2018

ADOPTION OF THE REPORT OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2018

We, the Honourable Members of the Departmental Committee on Justice and Legal Affairs, today the 13th day of June, 2018 do hereby affix our signatures to this report on the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12) to affirm our approval and support.

No.	NAME OF MEMBER	SIGNATURE
1.	Hon. William Cheptumo, M.P. – *Chairperson*	
2.	Hon. Alice Muthoni Wahome, M.P. – *Vice Chairperson*	
3.	Hon. John Olago Aluoch, M.P.	
4.	Hon. Roselinda Soipan Tuya, M.P.	
5.	Hon. Charles Gimose, M.P.	
6.	Hon. Johana Ng'eno Kipyegon, M.P.	
7.	Hon. William Kamoti Mwamkale, M.P.	
8.	Hon. Ben Orori Momanyi, M.P.	

9.	Hon. Peter Opondo Kaluma, M.P.	
10.	Hon. Beatrice Adagala, M.P.	
11.	Hon. Jennifer Shamalla, M.P.	
12.	Hon. Gladys Boss Shollei, CBS, M.P.	
13.	Hon. John Munene Wambugu, M.P.	
14.	Hon. George Gitonga Murugara, M.P.	
15.	Hon. Anthony Githiaka Kiai, M.P.	
16.	Hon. Japheth Mutai, M.P.	
17.	Hon. John Kiarie Waweru, M.P.	
18.	Hon. Adan Haji Yussuf, M.P.	
19.	Hon. Zuleikha Hassan, M.P.	

PART 1

1. PREFACE

1.1. Mandate of the Committee

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

(a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;

(b) study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;

(c) study and review all legislation referred to it;

(d) study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;

(e) investigate and enquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;

(f) vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments)

(g) examine treaties, agreements and conventions;

(h) make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;

(i) consider reports of Commissions and Independent Offices submitted to the House pursuant to provisions of Article 254 of the Constitution; and

(j) examine any questions raised by Members on a matter within its mandate.

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

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

1.2. Committee Membership

The Committee was constituted on Thursday, 14th December, 2017 and comprises the following Honourable Members-

Hon. William Cheptumo, M.P. – *Chairperson*
Hon. Alice Muthoni Wahome, M.P. – *Vice Chairperson*
Hon. John Olago Aluoch, M.P.
Hon. Roselinda Soipan Tuya, M.P.
Hon. Charles Gimose, M.P.
Hon. Johana Ng'eno, M.P.
Hon. William Kamoti Mwamkale, M.P.
Hon. Ben Orori Momanyi, M.P.
Hon. Peter Opondo Kaluma, M.P.
Hon. Jennifer Shamalla, M.P.
Hon. Beatrice Adagala, M.P.
Hon. Gladys Boss Shollei, CBS, M.P.
Hon. John Munene Wambugu, M.P.
Hon. George Gitonga Murugara, M.P.
Hon. Anthony Githiaka Kiai, M.P.
Hon. John Kiarie Waweru, M.P.
Hon. Japheth Mutai, M.P.
Hon. Adan Haji Yussuf, M.P.
Hon. Zuleikha Hassan, M.P.

1.3. Committee Secretariat

Mr. George Gazemba	-	Senior Clerk Assistant
Mr. Denis Abisai	-	Principal Legal Counsel I
Ms. Doreen Karani	-	Legal Counsel II
Ms. Halima Hussein	-	Clerk Assistant III
Ms. Fiona Musili	-	Research Officer III
Mr. Omar Abdirahim	-	Fiscal Analyst III
Mr. James Macharia	-	Media Liaison Officer
Ms. Roselyne Ndegi	-	Serjeant-at-Arms

Mr. Richard Sang'	-	Serjeant-at-Arms
Mr. Ian Otieno	-	Audio Officer

The Minutes of sittings of the Committee in respect of the consideration of the Bill are attached to this report as annexure 1.

PART 2

2. INTRODUCTION AND BACKGROUND

2.1 Memorandum of objects and reasons of the Bill

The Bill seeks to amend the following statutes relating to subjects under the purview of the Departmental Committee on Justice and Legal Affairs

(i) The Judicature Act, (Cap 8);
(ii) The Oaths and Statutory Declarations Act (Cap 15);
(iii) The Advocates Act (Cap 16);
(iv) The Civil Procedure Act (Cap 21);
(v) The Law of Contract Act (Cap 38);
(vi) The Foreign Judgment (Reciprocal Enforcement) Act (Cap 43);
(vii) The Probation of Offenders Act (Cap 64);
(viii) The Criminal Procedure Code (Cap 75);
(ix) The Extradition (Contiguous and Foreign Countries) Act (Cap 76);
(x) The Law of Succession Act (Cap 160);
(xi) The National Council for Law Reporting Act (No 11 of 2011);
(xii) The Witness Protection Act (No. 16 of 2006);
(xiii) The Proceeds of Crime and Anti-Money Laundering Act (No.9 of 2009);
(xiv) The Judicial Service Act (No. 1 of 2011);
(xv) The Office of the Director of Public Prosecutions Act (No. 12 of 2012);
(xvi) The Kenya School of Law Act (No. 26 of 2012)
(xvii) The Legal Education Act (No. 27 of 2012);
(xviii) The Kenya Law Reform Act (No. 19 of 2013);
(xix) The Nairobi Centre for International Arbitration Act, (No. 26 of 2013);
(xx) The Companies Act (No. 17 of 2015);
(xxi) The Bribery Act (No. 47 of 2016).

(i) The Judicature Act, (Cap 8)

The Bill seeks to amend the Act to include the Employment and Labour Relations Court and the Environment and Land Court in the Act in line with Chapter 10 of the Constitution. It also seeks to include the High Court as a court dealing with matters relating to land. It also seeks to amend the definition of the term "judge"

(ii) **The Oaths and Statutory Declarations Act (Cap 15)**

The Bill seeks to amend the Act to remove references to offices and terminologies which have been rendered obsolete.

(iii) **The Advocates Act (Cap 16)**

The Bill seeks to amend the Act to include the reference to the Disciplinary Tribunal following change of nomenclature. It also seeks to amend section 46 to outlaw agreements whereby an Advocate receives more than twenty-five per cent of the general damages received for a suit handled by him/her.

The Bill also seeks to amend section 57 on membership of the Tribunal to allow the Attorney-General to appoint a representative to the Tribunal. It also proposes a term of office of four years from the previous term of three years and also introduces a new subsection which provides for the staggering of the appointment of members of the Tribunal for the purposes of continuity.

(iv) **The Civil Procedure Act (Cap 21)**

The Bill seeks to amend the Act to replace the term ''district'' with the term ''county'' in keeping with the Constitution of Kenya, 2010. It also seeks to repeal section 21 and 40 and to delete the words ''other than a magistrate's court of third class'' in section 65(1)(b) since third class magistrate courts no longer exist.

(v) **The Foreign Judgement (Reciprocal Enforcement) Act (Cap 43)**

The Bill seeks to amend the Act to expand the definition of the expression ''Superior Courts of Kenya'' to incorporate all the courts provided for in the Constitution.

(vi) **The Probation of Offenders Act (Cap 64)**

The Bill proposes to amend the Act to introduce an interpretation provision for the terms applied in the Act. It also proposes to amend section 4 to introduce new sub-sections (5) (6) and (7) to require the presentation of a pre-sentence report by probation officer before the court makes a Probation Order.

The Bill further proposes to give the probation officer authority to access records and other necessary information for purpose of making a social inquiry report. It also proposes to introduce

new provisions to give courts issuing probation orders discretion to extend the period of residence and discretion to make further orders providing for the offender to attend non-residential programmes.

(vii) The Criminal Procedure Code (Cap 75)

The Bill seeks to amend the Criminal Procedure Code (Cap 75) to empower the Inspector-General of Police to give directions as to the person to act as the officer in charge of a police station replacing the Attorney-General.

(viii) The Extradition (Contiguous and Foreign Countries) Act (Cap 76)

The Bill seeks to amend the Act to replace the expression "House of Representatives'' appearing therein with the expression ''National'' as that expression is obsolete.

(ix) The Law of Succession Act (Cap 60)

The Bill seeks to amend the Act to give the Court handling a succession dispute discretion to exclude persons who are not members of the court or parties to the case from any proceeding relating to the administration of a deceased person's estate.

The Bill further seeks to give the court discretion to prohibit publication of any matter arising in cases in respect of which exclusion Orders are made.

(x) The Witness Protection Act, 2006 (No. 16 of 2006)

The Bill seeks to amend the Act to require that the Director be given opportunity to defend himself where a petition seeking his dismissal has been presented to the Board. It also seeks to apply the legislative and regulatory provisions on auditing of security organs to the Agency.

The Bill further seeks to replace the term ''Minister'' with the term ''Cabinet Secretary" in keeping with the Constitution of Kenya, 2010 and to clarify the various responsibilities of different cabinet secretaries under the Act.

(xi) The Proceeds of Crime and Anti Money Laundering Act, 2009 (No. 9 of 2009)

The Bill proposes to amend the Act to include accountants, advocates and notaries or their employees, trust and company service providers in the definition of the expression ''designated

non-financial businesses or professions'' for purposes of the Act.

The Bill also seeks to amend section 48 of the Act to expand the reporting obligations to include accountants, advocates, notaries or their employees, trust and service providers.

(xii) The Judicial Service Act, 2011 (No. 1 of 2011)

The Bill seeks to amend the Judicial Service Act, 2011 to provide for approval by the National Assembly prior to appointment by the President of nominees to the Judicial Service Commission.

(xiii) The Kenya School of Law Act, 2012 (No. 26 of 2012)

The Bill proposes to amend section 4 of the Act to remove the current exclusivity and open up the licensing of other education providers to train advocates under the Advocates Act. It also deletes the provisions hitherto empowering the Kenya School of Law to determine admission requirements for the advocates' training programme as this is the function of the Council of Legal Education.

(xiv) The Legal Education Act, 2012 (No. 27 of 2012)

The Bill seeks to amend section 8 of the Legal Education Act to regularise the administration of the pre-bar examination for entry into the advocates' training programme. It also provides for accreditation of legal education providers for the purpose of licensing the advocates training programme in order to open up other institutions to offer the programme.

(xv) The Kenya Law Reform Commission Act, 2013 (No. 19 of 2013)

The Bill proposes to amend the Act to clarify the functions of the Commission. It also seeks to amend section 8(4) to clarify on membership to the Commission and to provide for a representative of the Law Society of Kenya. It further clarifies on the term of office of the chairperson and members.

(xvi) The Nairobi Centre for International Arbitration Act, 2013 (No. 26 of 2013)

The Bill seeks to amend the Act to streamline membership of the Board of Directors of the Centre and to clarify on the role of

Registrar and his term of office. It also seeks to clarify on the composition of the Arbitral Court.

The Bill further seeks to introduce, a new schedule for the conduct of affairs of the Arbitral Court. It also seeks to amend section 25 which deals with the power of the Board to make rules, to give more scope to the exercise of the power. It also seeks to amend the schedule to clarify on the term of office of the chairperson.

(xvii) Other statutes

The Bill also seeks to make clarifications and corrections to the following statutes-

(a) The Bribery Act, 2016 (No. 47 of 2016);
(b) Law of Contract Act, (Cap 23);
(c) The National Council for Law Reporting Act, (No.11 of 1994);
(d) The Office of the Director of Public Prosecutions Act, (No. 2 of 2013);

The Bill does not concern county governments within the meaning of Article 110 of the constitution. The enactment of the Bill may occasion additional expenditure.

2.2 PUBLIC PARTICIPATION IN THE REVIEW OF THE BILL

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

''Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees''

Standing Order 127(3) provides as follows-

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

In line with the Constitution and Standing Orders, the National Assembly in the local daily newspapers of May 7th 2018 invited the public to make representations on the proposed amendments in the Bill as per annexure 2 of the report. Several members of the public either individually or representing institutions and organizations

submitted their views to the Committee by way of written and oral submissions.

The Committee received oral and written submissions on the proposed amendments to the following statutes-

(i) The Judicature Act, (Cap 8);
(ii) The Oaths and Statutory Declarations Act (Cap 15);
(iii) The Advocates Act (Cap 16);
(iv) The Civil Procedure Act (Cap 21);
(v) The Law of Contract Act (Cap 38);
(vi) The Probation of Offenders Act (Cap 64);
(vii) The Criminal Procedure Code (Cap 75);
(viii) The Law of Succession Act (Cap 160);
(ix) The National Council for Law Reporting Act (No 11 of 2011);
(x) The Proceeds of Crime and Anti-Money Laundering Act (No.9 of 2009);
(xi) The Judicial Service Act (No. 1 of 2011);
(xii) The Office of the Director of Public Prosecutions Act (No. 12 of 2012);
(xiii) The Kenya School of Law Act (No. 26 of 2012)
(xiv) The Legal Education Act (No. 27 of 2012);
(xv) The Nairobi Centre for International Arbitration Act, (No. 26 of 2013);
(xvi) The Bribery Act (No. 47 of 2016).

The following stakeholders submitted written submissions –

(i) The Office of the Attorney-General and Department of Justice;
(ii) The Judiciary;
(iii) The Law Society of Kenya;
(iv) The Office of Director of Public Prosecutions;
(v) The Ethics and Anti-Corruption Commission;
(vi) The Department of Probation and After-Care Services;
(vii) The National Council for Law Reporting;
(viii) The Transparency International Kenya;
(ix) Institute of Commission of Jurists-Kenya (ICJ-Kenya);
(x) Chartered Institute of Arbitrators-Kenya;
(xi) Kenya Magistrates and Judges Association;
(xii) The Kenya Bankers Associations;
(xiii) The National Association of Private Universities in Kenya;
(xiv) Anjarwalla and Khanna Advocates;
(xv) Kaplan and Stratton Advocates;
(xvi) Muturi S.K & Co. Advocates; and

(xvii) Ms. Annah Konuche

Other than the written submissions received pursuant to the advertisement inviting submission of memoranda, the Committee invited the following institutions to present oral submission on the amendments-

(i) The Judiciary;
(ii) The Kenya Bankers Association;
(iii) The Consumer Federation of Kenya;
(iv) The Kenya Private Sector Alliance;
(v) The Ethics and Anti-Corruption Commission;
(vi) The Office of the Attorney-General and Department of Justice;
(vii) The Taskforce on Legal Sector Reforms.

In response to the Committee's invitation, the following stakeholders appeared before the Committee and made oral submissions -

(i) The Office of the Attorney General and Department of Justice and the National Council for Law reporting;
(ii) The Judiciary;
(iii) The Office of the Director of Public Prosecutions
(iv) The Ethics and Anti-Corruption Commission (EACC)
(v) The Kenya Bankers Association;
(vi) Mr. Clement Oketch from the Department of Probation and Aftercare Services

The written submissions received are contained in Volume 2 of the report.

(i) The Consumer Federation of Kenya;
(ii) The Kenya Private Sector Alliance; and
(iii) The Taskforce on Legal Sector Reforms.

PART 3

3. CONSIDERATION OF THE BILL BY THE COMMITTEE AND PROPOSED COMMITTEE STAGE AMENDMENTS

Having considered the Bill, clause by clause, the Committee made the following recommendations including amendments to be moved during the Committee Stage of the Whole House -

3.1 THE JUDICATURE ACT (CAP 8)

3.1.1 Proposed amendment to section 2 (a) of the Act

(a) Delete the definition of the word" judge" and substitute therefor the following new definition-

> "Judge" means the Chief Justice or any other judge appointed under Article 166 of the Constitution and includes a judge serving in an acting capacity.

(i) Stakeholders' submissions

Institute of Commission of Jurists (ICJ Kenya) was of the view that the amendment was unconstitutional and should be deleted as it breached Article 166 and 167. There would be no security of tenure hence prone to political manipulation and in comparison, section 34 of the Public Service Commission Act provides that "acting" cannot exceed six (6) months.

The Judiciary opposed the amendment on grounds that it violates the constitution in Articles 161, 166 and 168. The Constitution doesn't contemplate the position of acting judge. It further argued that the proposed amendment would violate the principle of security of tenure of judges and independence of the Judiciary.

The Kenya Magistrates and Judges Association opposed the amendment on grounds that the Constitution doesn't contemplate the position of acting judge.

The Law Society of Kenya opposed the amendment to the extent that it refers to acting judges because in its opinion, there would be no security of tenure for the acting judges hence would be prone to political manipulation.

(ii) Observations

The Committee observed as follows-

(a) the amendments seek to redefine the term "judge";
(b) the Act as it presently is and the amendments proposed make reference to judges serving in acting capacity;
(c) the concept of appointment of Commissioners of Assize to aid in clearing of backlog is no longer in practice and the solution adopted in order to deal with a large volume of matters has been the enhancement of capacity of judges by recruitment;
(d) following the enactment of the Constitution, Judges enjoy independence, security of tenure and the retirement age of seventy (70) years;
(e) the aspect of acting appointments in relation to Judges offends the provisions of the Constitution.

(iii) Recommendation

The committee recommends that the Bill be amended by deleting the words "and includes a judge serving in an acting capacity."

(iv) Rationale for the proposed amendment

The Committee was satisfied that the Constitution does not contemplate for the appointments of acting Judges hence this amendment seeks to remove the offending aspects of the proposal in the Bill.

3.1.2 Proposed amendment to section 2 (b) of the Act

(b) Insert the following new definitions in proper alphabetical sequence-

"Employment and Labour Relations Court" means the Employment and Labour Relations Court established by the Employment and Labour Relations Court Act, 2011.

"Environment and Land Court" means the Environment and Land Court established by the Environment and Land Court Act, 2011.

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Observations

The Committee observed that the amendments aim to include the Employment and Labour Relations Court and the

Environment and Land Court in the Judicature Act in line with Chapter 10 of the Constitution.

(iii) Recommendation

The Committee recommends that the amendment as proposed in the Bill be agreed to.

3.1.3 Proposed amendment to section 3(1) of the Act

Insert the words "the Environment and Land Court, the Employment and Labour Relations Court and" immediately after the expression "High Court".

(i) Stakeholders' submissions

The Judiciary supported the proposed amendments.

(ii) Observations

The Committee observed that-

(a) The amendments aim to include the Employment and Labour Relations Court and the Environment and Land Court in the Act in line with Chapter 10 of the Constitution.

(b) Section 3(1), which makes reference to the mode of exercise of jurisdiction by Courts, makes reference to all courts in Kenya except the Supreme Court, the Environment and Land Court and the Employment and Labour Relations Court. These Courts were established in 2010 on the enactment of the Constitution. In particular, the Supreme Court of Kenya which is the highest-ranked Court in Kenya and an integral part of the Kenyan Judicial structure is not mentioned.

(iii) Recommendation

The Committee recommends a further amendment to section 3(1) to include the Supreme Court.

(iv) Rationale for the amendment

The amendment will align section 3(1) of the Act with the Constitution by making reference to all Courts in Kenya established by the Constitution, including the Supreme Court.

3.1.4 Proposed amendment to section 3(2) of the Act

Insert the words "the Environment and Land Court, and "the Employment and Labour Relations Court and" immediately after the expression "High Court".

(i) Stakeholders' submissions

The Judiciary supported the amendments.

(ii) Observations

The Committee observed as follows-

(a) The amendments aim to include the Employment and Labour Relations Court and the Environment and Land Court in the Act in line with Chapter 10 of the Constitution.

(b) Section 3(2), which makes reference to the mode of exercise of jurisdiction by Courts, makes reference to all courts in Kenya except the Supreme Court, the Environment and Land Court and the Employment and Labour Relations Court. These Courts were established in 2010 on the enactment of the Constitution. In particular, the Supreme Court of, which is the highest-ranking Court in Kenya and an integral part of the Kenyan Judicial structure, is not mentioned.

(iii) Recommendation

The Committee recommends a further amendment to section 3(2) to include the Supreme Court.

(iv) Rationale for the amendment

The amendment will align section 3(2) of the Act with the Constitution by making reference to all Courts in Kenya established by the Constitution, including the Supreme Court.

3.2 THE OATHS AND STATUTORY DECLARATIONS ACT (CAP 16)

3.2.1 Proposed amendment to section 12 of the Act

Delete the words "a deputy registrar and district registrar" and substitute therefor the expression "and a Deputy Registrar"

(i) Stakeholders' submissions

The Judiciary was of the view that further amendments be introduced to include the terms "Deputy Registrar of the Environment and Land Court and "a Deputy Registrar of the Employment and Labour Relations Court"

(ii) Observations

The committee observed as follows-

(a) the amendments seek to remove references to offices and terminologies which have been rendered obsolete;

(b) the Deputy Registrars in the Employment and Labour Relations Court and Environment and Labour Relations Court have similar ranking to deputy registrars of the High Court and also administer oaths.

(iii) Recommendation

The Committee recommends a further amendment to include Deputy Registrars in the Employment and Labour Relations Court and Environment and Labour Relations Court.

(iv) Rationale for the amendment

The Committee was satisfied that the Deputy Registrars in the Employment and Labour Relations Court and Environment and Labour Relations Court, who have similar ranking to Deputy Registrars of the High Court, also administer oaths hence the law should be amended to reflect this position.

3.2.2 Proposed amendment to section 13 of the Act

The section be deleted.

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders

(ii) Observations

The Committee observed that-

(a) Section 13 which the subject of deletion refers to the taking of oaths by Africans not being Christians or Muslims in the manner prescribed by the person's tribe;

(b) the amendment takes cognizance of social changes that have taken place in the society over the years and seeks to align the Act with current times.

(iii) Recommendation

The Committee recommends that the amendment as proposed in the Bill be agreed to.

3.3. THE ADVOCATES ACT (CAP 16)

3.3.1 Proposed amendment to section 11(4) of the Act

Delete the expression "Disciplinary Committee" and substitute therefor the expression "Disciplinary Tribunal".

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders

(ii) Observation

The Committee observed that the amendments seek to make reference to the "Disciplinarily Tribunal" instead of the "Disciplinary Committee" following the change of nomenclature. Section 2 of the Act defined "Disciplinary Tribunal" as the Disciplinary Tribunal established under section 57;

(iii) Recommendation

The Committee recommends the amendment as proposed in the Bill be agreed to.

3.3.2 Proposed amendment to section 19 of the Act

Delete the expression "Disciplinary Committee" wherever it appears in paragraphs (a) and (b) and substitute therefor the expression "Disciplinary Tribunal".

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders

(ii) Observation

The Committee observed that the amendments seek to include the reference to the Disciplinarily Tribunal following the change of nomenclature.

(iii) Recommendation

The committee recommends the amendment as proposed in the Bill be agreed to.

3.3.3 Proposed amendment to section 23 of the Act

Insert the following new subsection immediately after subsection (2)-

''(2A) Every advocate to whom a practicing certificate has been issued and who draws any legal document that includes pleadings, affidavits, depositions, deeds and other related instruments set out in section 34 and filed in any registry under any law requiring filing by an advocate shall in addition to setting out the firm's details include the name of the advocate drawing the document, the advocate's admission number and signature and the stamp of the respective law firm''

(i) Stakeholders' submissions

The Law Society of Kenya was of the view that the amendment was good as it remedies the problem of issuing a stamp annually. It proposed that the existing subsection 2A be deleted as it provides for issue of a stamp annually.

Kaplan and Stratton Advocates propose that the clause be amended by deleting the existing section 23A and substituting therefor-

"Every advocate who draws any legal document that includes pleadings, affidavits, depositions, deeds and other related instruments set out in section 34 and filed in any registry under any law requiring filing by an advocate shall in addition to setting out the firm's details include the name of the advocate drawing the document, and the advocate's admission number.''

The firm opines that this is necessary to reconcile the proposed amendment and the existing provision. Further, it states that the underlying principle is unsatisfactory due to the endless delays in issuing practising certificates and unsatisfactory jurisprudence spawned by section 34. By way of example, the firm noted that it was still awaiting certificates for applications accepted and paid for in December 2017.

(ii) Observations

The Committee observed as follows-

(a) the amendment seeks to prescribe the requirements that advocates must meet when drawing legal documents and pleadings to be lodged in registries. The requirement to include name, admission number and signature of the advocate who draws the documents is intended to prevent unqualified persons from drawing legal documents.

(b) Subsection 2A as it is in the Advocates Act presently provides for the inclusion of details of the advocate who draws a legal document and also reference to issuance of a different stamp to practising advocates annually by the Law Society of Kenya.

(c) The proposed amendment makes reference to "advocates issued with a practising certificate". As pointed out by Kaplan and Stratton Advocates, there is often delay in issuance of practising certificates and the provision as drafted may be misconstrued to the effect that advocates may only draw instruments and pleadings after receiving the practising certificates. This could give rise to real and practical challenges to the work and business of advocates where issuance of certificates is delayed at no fault of the advocate.

(iii) Recommendation

The Committee recommends as follows-

(a) That section 23A of the Advocates Act be amended by deleting subsection 2A;

(b) The proposed amendment in the Bill be amended by deleting the words "to whom a practicing certificate has been issued and"

(iv) Rationale for the amendment

The Committee observed that the existing Section 23(2A) makes reference to issuance of annual stamps by the Law Society of Kenya and the requirement for that stamp to be affixed to every document drawn by an Advocate. This step proposed to address the challenges and concerns of unqualified persons practising or masquerading as Advocates. However, the issuance of these stamps has been a challenge as no stamps have ever been issued to advocates by the LSK since the amendment was effected in 2016. The amendment in the Bill sought to address that issue.

However, as drafted the proposal will pose a challenge in that it may be interpreted to applying to "advocates issued with practising certificates" only. Following the concerns raised by stakeholders that delays in issuing a certificate cannot be a ground to deny an advocate his/her ability to earn a livelihood, the committee is of the view that the provision be amended by removing the reference of "advocates issued with a practising certificate". Once a qualified advocate has submitted an application for a practising certificate, he/she should be authorised to draw pleadings and instruments pending issuance of the certificate.

In view of the foregoing, there is therefore need to remove the existing subsection 2A and replace it with the amendment as proposed by the Committee.

3.3.4 Proposed amendment to section 25 of the Act

Delete the expression "Disciplinary Committee" appearing in paragraph (f) and substitute therefor the expression "Disciplinary Tribunal".

Stakeholders' submissions

The Committee did not receive any views from stakeholders

(i) Observation

The Committee observed that the amendment seeks to include the reference to the Disciplinarily Tribunal following the change of nomenclature.

(ii) Recommendation

The committee recommends the amendment as proposed in the Bill be agreed to.

3.3.5 Proposed amendment to section 27 of the Act

Delete the expression "Disciplinary Committee" and substitute therefor the expression "Disciplinary Tribunal".

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders

(ii) Observation

The Committee observed that the amendment seeks to include the reference to the Disciplinarily Tribunal following the change of nomenclature.

(iii) Recommendation

The committee recommends the amendment as proposed in the Bill be agreed to.

3.3.6 Proposed amendment to section 46(d) of the Act

The section be deleted.

Insert the following new paragraphs immediately after paragraph (c)-

"(d) any agreement by which an advocate agrees to accept, in respect of professional business, any fee or other consideration which is less than the remuneration prescribed by any Order under section 44;

(da) any agreement by which an advocate agrees to accept, in respect of professional business, any fee or other consideration which is more than twenty-five percent of the general damages recovered in respect of that business''

(i) Stakeholders' submissions

The Kenya Bankers Association opposed this provision because in their view, the invalidation of agreements between clients and advocates for fees below the remuneration order or whose consideration/fee is more 25% of the general damages recoverable in respect of business is anti-competitive in nature and it amounts to price fixing. They further propose a repeal of the Advocates Remuneration Order on fees matters.

(ii) Observations

The Committee observed as follows-

(a) the amendment in the Bill is a redraft of the current provision on the Act that seeks to offer clarity by separating the ideas in two short paragraphs in line with the House drafting style;

(b) the proposal to delete the provision on fees from the Act and subsequent repeal of the Advocates Remuneration Order is a substantive amendment that ought not to be moved in this Bill to require further input from Advocates and more stakeholders.

(iii) Recommendation

The committee recommends that the amendments as proposed in the Bill be agreed to.

3.3.6 Proposed amendment to section 53(4) of the Act

Delete the expression "Disciplinary Committee" wherever it occurs in paragraphs (b) and (e) and substitute therefor the expression "Disciplinary Tribunal".

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders

(ii) Observation

The Committee observed that the amendment seeks to include the reference to the Disciplinarily Tribunal following the change of nomenclature.

(iii) Recommendation

The Committee recommends the amendment as proposed in the Bill be agreed to.

3.3.7 Proposed amendment to section 53(6C) of the Act

Delete and substitute thereof the following new sub section-

"(6c) An Advocate against whom an Order is made under this section and who has not appealed against such Order under subsection (8) may apply to the Disciplinary Tribunal for a review of the Order''

(i) Observation

The Committee observed that the amendment seeks to allow aggrieved advocates to apply to the Disciplinary Tribunal for review of a decision of the Commission before making an appeal to the High Court.

(ii) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(iii) Recommendation

The committee recommends that the amendment as proposed in the Bill be agreed to.

3.3.8 **Proposed amendment to section 57(1) of the Act**

Insert the words "or his representative" immediately after the expression "Attorney-General" appearing in paragraph (a);

Delete the expression "three years" appearing in paragraph (c) and substitute therefor the expression "four years".

Insert the following new subsection immediately after subsection (1A)-

"(1B) The election of the members referred to in paragraph (1) (c) shall be held at different times so that the expiry of the terms of office of at least two members falls at different times for purposes of continuity''

(i) Observations

The Committee observed as follows–

(a) that the amendments seek to-

(i) empower the Attorney General to nominate his representative to serve in the Tribunal.

(ii) increase the term of the advocates appointed in the Disciplinary Tribunal to four years from the current term of three years.

(iii) introduce a new subsection which provides for the staggering of the appointment of members of the Tribunal for purposes of continuity.

(b) Section 57(1) (b) empowers the Attorney-General to depute a person to serve on the Solicitor-General's behalf. Following the amendment to enable the Attorney General appoint a representative, there is need to have a consequential amendment to paragraph (b) empower the Solicitor-General to nominate his/her own representative.

(c) As it is presently in the law, Section 57(1) (c) provides that one out of the six members nominated by LSK to the Disciplinary Tribunal should be an advocate who does not ordinarily practice in Nairobi. Since the advent of devolution, it has been observed that more advocates have also opened up businesses in areas outside Nairobi. The allowance of only one advocate to represent a significantly large number of advocates practising outside Nairobi does not take cognisance of these changes that have occurred in the past few years. There is therefore need to provide for more representation by increasing the number of "upcountry representative" to two advocates.

(ii) Stakeholders' submissions

The Law Society of Kenya was of the view that the term should remain three years. It submits that term limits provide an important check for the removal of an inefficient member hence strengthens impartiality of the Tribunal. It is of the opinion that although the amendment may be seeking to extend the mandate of a popular member, LSK members would re-elect such a person.

(iii) Recommendation

The Committee recommends that –

(a) Section 57(1)(b) be amended by deleting the words "a person deputed by the Attorney-General" and substituting therefor the words "or his representative";

(b) Section 57 (1)(c) be amended by deleting the proposed amendment in the Bill relating to paragraph (c);

(c) Section 57 (1)(c) be amended deleting the word "one" and substituting therefore the word "two".

(iv) Rationale for the amendment

The Committee was of the view that the term of the six advocates nominated by LSK should remain three years as per the submissions of the Law Society of Kenya which nominates the advocates in question. Term limits provide an important check for the removal of an inefficient member hence strengthens impartiality of the Tribunal.

3.3.9 Proposed amendment to section 57(4) of the Act

Delete the expression "Disciplinary Committee" wherever it appears in paragraphs (c) and (d) and substitute therefor the expression "Disciplinary Tribunal".

(i) Observation

The amendment seeks to include the reference to the Disciplinarily Tribunal following the change of nomenclature.

(ii) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(iii) Recommendation

The Committee recommends that the amendments as proposed in the Bill be agreed to.

3.3.10 Proposed amendment to section 58(2) of the Act

Delete and substitute therefor the following new subsections-

(2) The Attorney-General shall preside at all meetings of the Disciplinary Tribunal at which he is present and in his absence the Solicitor-General shall preside.

(2A) In the absence of both the Attorney-General and the Solicitor-General, the person deputed by the Attorney-General under section 57(1)(b) shall preside, and in the absence of the person so deputed the members present shall elect one from among their number to preside.

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Observation

(a) The amendment seeks to offer clarity on the presiding officer at the meetings of the Tribunal;

(b) The provision needs to be amended to align it with the amendments to section 57(1)(b).

(iii) Recommendation

The Committee recommends that the proposed subsection 2A be deleted and substituted with the following new subsection 2A

(2A) In the absence of both the Attorney-General and the Solicitor-General, the representative of the Attorney General section 57(1)(a) shall preside, and in the absence of the representative of the Attorney General, the members present shall elect one from among their number to preside.

(iv) Rationale for the amendment

To align the provision in the amendment to section 58(1) (b)

3.3.11 Proposed amendment to section 61(2) of the Act

Delete the expression "(if the complaint has been referred by it to the Tribunal)"

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Observation

The amendment seeks to ensure that once reports of the Disciplinary Tribunal are submitted to the Court Registrar, they shall be availed to the Complaints Commission in order to foster openness and allow the Complaints Commission to have records of all proceedings of the Disciplinary Tribunal.

(iii) Recommendation

The Committee recommends that the amendment as proposed in the Bill be agreed to.

3.3.12 Proposed amendment to section 61(3) of the Act

Delete the expression "Attorney-General" and substitute therefor the expression "Director of Public Prosecutions".

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Observation

This amendment is to replace the expression "Attorney-General" with the expression "Director of Public Prosecutions" to align with the functions of their offices.

(iii) Recommendation

The Committee recommends that the amendment as proposed in the Bill be agreed to.

3.3.13 Proposed amendment to section 80 of the Act

Delete the expression "Attorney General and substitute therefor the expression "Director of Public Prosecutions"

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Observation

This amendment is to replace the expression "Attorney-General" with the expression "Director of Public Prosecutions" to align with the functions of their offices.

(iii) Recommendation

The Committee recommends that the amendment as proposed in the Bill be agreed to.

3.4 THE CIVIL PROCEDURE ACT (CAP 21)

3.4.1 Proposed amendments to section 11, 21 and 40 of the Act

Delete the word "district" wherever it appears and substitute therefor the word "county".

(i) Observation

The amendment seeks to replace the term "district" with the term "county" in keeping with the Constitution of Kenya, 2010.

(ii) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(iii) Recommendation

The Committee recommends that the amendment as proposed in the Bill be agreed to.

3.4.2 Proposed amendment to section 65 (1)(b) of the Act

Delete the words "other than a magistrate's court of the third class"

(i) Observations

The amendment seeks to remove references to third-class magistrates' courts which no longer exist.

(ii) Stakeholders' submissions

The Committee did not receive any views from the public.

(iii) Recommendation

The Committee recommends that the amendment as proposed in the Bill be agreed to.

3.4.3 Proposed amendment to section 81(1) of the Act

Delete and substitute therefor the following new subsection–

"(1) There shall be a Rules Committee which shall consist of –

(a) the following members appointed by the Chief Justice-

(i) one judge of the Court of Appeal;
(ii) one judge of the High Court;
(iii) a judge of the Environment and Land Court;

(iv) one judge of the Employment and Labour Relations Court who is a member of the Employment and Labour Relations Court Rules Committee;
(v) two Magistrates, one of whom shall be secretary to the Committee;
(vi) three advocates nominated by the Law Society of Kenya, one of whom shall be nominated by the Mombasa Law Society;
(vii) one representative from the Kenya Law Reform Commission; and
(viii) The Attorney-General or a designated representative.

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Observations

The Committee observed as follows-

(a) The amendment seeks to include in the Rules Committee Judges of the Environment and Land Court and Employment and Labour Relations Court, Magistrates and a representative of the Kenya Law Reform Commission.

(b) There needs to be more representation from advocates practising throughout the Country. Under section 24 (1) of the Law Society of Kenya Act No 21 of 2014, the LSK has eight branches comprising Coast, Rift Valley, North Rift, West Kenya, South West Kenya, Mount Kenya, South Eastern and Nairobi. All the branches may therefore nominate a representative in the rules committee. This is important because each region faces unique challenges and as practitioners and users of the civil procedure rules, each voice from the regions ought to be represented in the Committee.

(iii) Recommendation

The Committee recommends that the proposed new paragraph (vi) be deleted and substituted with the following new paragraph (vi) –

(v) "eight advocates nominated by the Law Society of Kenya to represent the branches of the Society under section 24 of the Law Society of Kenya Act."

(iv) Rationale for the amendment

The Committee is of the opinion that having three advocates in the Civil Procedure Rules Committee to represent all advocates practising in Kenya does not adequately cater for the unique needs of each region around the country. There needs to be more representation from advocates practising throughout the Country. Under section 24 (1) of the Law Society of Kenya Act No 21 of 2014, the LSK has eight branches comprising Coast, Rift Valley, North Rift, West Kenya, South West Kenya, Mount Kenya, South Eastern and Nairobi. All the branches may therefore nominate a representative in the rules committee. This is important because each region faces unique challenges and as practitioners and users of the civil procedure rules, each voice from the regions ought to be represented in the Committee.

3.4.4 Proposed amendment to section 81(1A) of the Act

Delete and substitute therefor the following new subsection—

"(1A) A person shall be qualified to be nominated to the Committee by the Law Society of Kenya if that person-

(a) has been a member in good standing of the Law Society of Kenya for at least ten years; and
(b) holds a current practising certificate at the time of his or her nomination"

New subsection

Insert the following new subsections immediately after subsection (1A)

"1B) A person nominated by the Law Society of Kenya under subsection (1) may be nominated more than once to serve on the Committee.

(1C) The Chief Justice may elect to be a member of the Committee, in which case he or she shall be the chairperson, but where he or she elects not to be a member, the he or she shall appoint one of the other members to be chairperson.

(1D) The Committee may co-opt other persons whose knowledge and experience may assist it in the discharge of its functions

(1E) The function of the Committee shall be to –

(a) propose rules not inconsistent with this Act or any other written law to provide for any matters relating to the procedure before courts and tribunals; and

(b) advise the Chief Justice on such rules as may be necessary under this section''

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Observation

The committee observed as follows-

(a) the new subsection 1B is to allow the Law Society of Kenya representative to serve more than once;
(b) the new subsection 1C shall enable the Chief Justice to opt to serve in the Rules Committee as the Chairperson or instead nominate one of the other members to preside;
(c) the new subsection 1D seeks to empower the Committee to obtain expert advice; and
(d) the new subsection 1E is intended to set out the functions of the Committee, that is, to establish rules consistent to the law and matters of court procedure and advise the Chief Justice on rules that may be necessary.

(iii) Recommendation

The Committee recommends that the amendment as proposed in the Bill be agreed to.

3.5 THE LAW OF CONTRACT ACT (CAP 23)

3.5.1 Proposed amendment to section 3 of the Act

Insert the following new sub section immediately after subsection (1) –

"(1A) Notwithstanding subsection (1), before a suit is brought against a defendant under subsection (1), the plaintiff shall first realise the security of the principal."

(i) Stakeholders' submissions

The Attorney General submitted that his office had received an objection to the amendment from Messrs Kaplan and Stratton Advocates. The Objection is to the effect that the proposed change will completely undermine the ability to structure guaranteed bonds and asset backed securities, which will adversely affect capital markets. Further, that the provision is not clear as to the meaning of the term "security" since in some instances, a bare debt obligation has been held to be a security. It is their request that at a bare minimum, the corporate guarantors should be excluded and the potential ambiguities addressed for individuals.

The Attorney General further drew the attention of the Committee to the fact that the amendment was not among those forwarded from his office and therefore sought that the same be withdrawn to allow for consultations among the persons and key institutions that would be likely affected.

(1) The Kenya Bankers Association opposed the amendment as in their view, it will adversely affect the efficacy and utility of guarantees in local and international trade and the borrowing and lending markets and increase credit risk. The proposed amendment may-

(a) inhibit credit to the ordinary man and to small businesses that are seeking to grow since lenders may restrict lending to only very creditworthy persons or only who have access to security;
(b) increase the cost of doing business, which cost can only be passed on to the customer of the bank thereby reducing his welfare; and
(c) further inhibit recovery efforts leading to losses and weakening of banks, which is bad for the financial system and the economy as a whole. The ordinary person and struggling businessperson will bear the brunt of the resultant poorly performing economy.

(2) The Law Society of Kenya opposed the amendment as in its opinion it creates a problem when the value of the security is greater that of the principal thus interfering with the right of use. Further, it submitted that the proposed amendment failed to recognise that-

(a) An indemnity and guarantee have different legal impositions and obligations and a suit can be filed independent of the borrower in some instances;

(b) Once a demand guarantee is called up, the limitation may expire if the security isn't sold on account of pending litigation hence prevents sale of the security. It would cause a substantial loss of additional security to the lender;

(c) Various factors may prevent the sale of security e.g. negligent valuation, market depression or need to file urgent suit for recovery against guarantors before they transfer their properties to defeat the anticipated rights of a lender

(d) It contradicts the provisions of the Land Act relating to chargee's power of sale.

(ii) Observations

The Committee observed as follows-

(i) The proposed amendment to the Law of Contract Act seeks to introduce a new condition to be met by a plaintiff where a defendant is charged for the debt of another person;

(ii) It would be a popular provision with the *mwananchi* who would see it as a way to protect citizens from the predatory tactics of banks who have caused suffering to the citizens;

(iii) It would be seen as a move to also protect innocent guarantors from potential (and allegedly real) collusion between the principal debtor and the bank to sell the guarantor's assets so that the principal debtor goes scot free;

(iv) The proposed amendment will add only a little difficulty to the banks (slightly delaying action against guarantors). In any event, the loss from the delay in enforcement of the guarantee will be compensated by way of interest on the loan to be recovered;

(v) The banks need to initiate a public campaign to win the hearts of the public by showing the benefit to the common man of the role the banks play in the economy;

(vi) The arguments by the Kenya Bankers Association against the amendment make sense logically and economically and legally;

(vii) There is need to have further consultations with all stakeholders in the industry;

(viii) The amendment is not of a miscellaneous nature in light of the views received from stakeholders.

(iii) Recommendations

The committee rejected the proposal in the Bill.

(iv) Rationale for the rejection

The committee agreed with the stakeholders who rejected this proposal since it requires comprehensive public participation with all stakeholders. The amendment needs to be viewed in light of the long term negative effects which will hamper the ease of borrowing by small businesses and the ordinary *mwananchi* who may not have collateral. The committee however agrees in future, banks and other lenders must take steps to engage in a public campaign that resonates with ordinary Kenyans in terms of benefits to them.

3.6 THE FOREIGN JUDGMENT (RECIPROCAL ENFORCEMENT) ACT (CAP 43)

3.6.1 Proposed amendment to section 2 of the Act

Delete the definition of the words "superior courts in Kenya" and substitute therefor the following new definition—

"superior courts in Kenya" means Supreme Court, the Court of Appeal, the High Court, the Employment and Labour Relations Court and the Environment and Land Court.

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Observation

The amendment is aimed at expanding the definition of the expression "Superior Courts of Kenya" to incorporate all the Superior Courts provided for in the Constitution, which is in order.

(iii) Recommendation

The Committee recommends that the amendment as proposed in the Bill be agreed to.

3.7 THE PROBATION OF OFFENDERS ACT (CAP 64)

3.7.1 Proposed amendment to section 2 of the Act

Insert the following new definitions in their proper alphabetical sequence—

"Director" means the Director of Probation whose office is within the Public Service;

"social inquiry reports" means the reports on accused persons or offenders prepared by probation officers under this Act or any other law in force for purposes of criminal justice administration.

(i) Stakeholders' submissions

The Department of Probation and After Care Services proposed that the Act be amended in the proposed definition of the term **'Social inquiry report'** by deleting the word "social inquiry" and substituting therefor the words "pre-sentence"

Justification

There are many types of reports being done by probation officers but the intention in the Bill relates to those prepared before and for the purpose of sentencing. If left as it is, it will be misplaced and confusing especially with regard to its usage in the subsequent sections. "Social inquiry reports" is but a generic term used to indicate their orientation and to substantive to the purpose and therefore would be in appropriate to define it here. The best terminology is "presentence report"

(ii) Observation

The new definitions are intended to provide clarity on the usage of those terms in the context of the Act.

(iii) Recommendation

The Committee recommends that the Bill be amended by deleting the word "social inquiry" in the definition and substituting therefor the word "pre-sentence".

(iv) Rationale for the amendment

The terminology used in the substantive provision in the law is "pre-sentence report" hence the definition ought to define that term. If left as "social inquiry report", it will be misplaced and confusing especially with regard to its usage in the subsequent sections. "Social inquiry reports" is but a generic term used to indicate their orientation and therefore would be inappropriate to define it here. The best terminology is "presentence report"

3.7.2 **Proposed amendment to section 4 of the Act**

Insert the following new subsections immediately after subsection (4)—

"(5) Before making a probation order under subsection (1) or (2), the court may consider the view of the victim as contained in the pre-sentence report prepared pursuant to subsection 6.

(6) Where a subordinate court or a superior court considers making a probation order, it shall, before making such order, direct a probation officer to conduct a social inquiry into the circumstances of the case and the accused and make a pre-sentence report of the findings to the court.

(7) A probation officer shall, while acting on the authority of the court, have the right to access records and any other necessary information from any person or authority having such records or information for the purpose of preparing a social inquiry report.

(8) A pre-sentence report shall include a recommendation as to the suitable period of supervision, rehabilitation programmes and any measures necessary to reduce the risk of re-offending''

(i) Observation

(a) The amendment introduces new sub-sections (5), (6) and (8) to require the presentation of a pre-sentence report by a probation officer before a Court makes a Probation Order. It also gives a probation officer authority to access records and other necessary information for the purpose of making a report.

(b) The term "social inquiry" in the proposed subsection (7) should be accordingly rectified to read "pre-sentence"

(c) As it is presently, section 4 provides for the courts powers to permit conditional release of offenders upon taking consideration of various factors such as youth, character, antecedents, home surroundings, health or mental condition. The committee was of the view that the term "age" would be more suitable term as a factor of consideration instead of "youth".

(ii) Stakeholders' submissions

The Department of Probation and After Care Services proposed that Section 4(7) be amended to replace the words "Social inquiry reports" with pre-sentence reports since the proposed new subsections (4) to (8) deals with pre-sentence reports and not the more general social inquiry reports.

(iii) Recommendation

The Committee recommends –

(a) amendments to section 4 (1) and (2) to substitute the word "youth" with "age";
(b) amendment of the words "social inquiry report" and substitute therefor the words "pre-sentence report"

(iv) Rationale for the amendment

The term "social inquiry" in the proposed subsection (7) should be accordingly rectified to read "pre-sentence"

As it is presently in section 4 of the Probation of Offenders Act provides for the courts powers to permit conditional release of offenders upon taking consideration of various factors such as youth, character, antecedents, home surroundings, health or mental condition. The committee was of the view that the term "age"

would be more suitable and comprehensive term as a factor of consideration which also includes the youth.

3.7.3 Proposed amendment to section 5 of the Act

Insert the following new subsections immediately after subsection (3)-

"(4) The Court may extend the period of residence specified in the probation order for a further period not exceeding twelve months in exceptional circumstances and with compelling reasons provided by the Probation Officer.

(5) The Court may make further orders providing for an offender to attend non-residential programmes at a probation institution or any other such facility established under this Act, or at any other facility suitable for the fulfilment of the supervision order."

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Observations

The introduced new provisions are intended to give a court issuing probation order, the discretion to extend the period of residence of the offender and also give the court discretion to make further orders providing the offender to attend non-residential programmes.

(iii) Recommendation

The Committee recommends that-
(a) section 5(1) by deleting the word "district" and substituting therefor the word "County" in view of the changes by the constitution.

(iv) Rationale for the amendment

To remove reference to the word "district" which is an obsolete terminology as districts no longer exist and replace with "County"

3.7.4 Proposed amendment to section 8(3) of the Act

Delete the expression "two hundred" appearing in paragraph (a) and substitute therefor the expression "twenty thousand".

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Observations

The amendment seeks to enhance the amount of fine that may be imposed for failure to comply with probation Order from twenty thousand shillings up from two hundred shillings the amount of twenty thousand shillings may not be a sufficient as a deterrent measure.

(iii) Recommendation

The Committee recommends that the amendment be agreed to as proposed in the Bill.

3.7.5 Proposed amendment to section 17(F) of the Act

Insert the words "including volunteer probation officers" immediately after the word "any person"

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Observations

The Committee observed as follows-

(a) The amendment seeks to allow for payment or remuneration of volunteer probation officers.

(b) Volunteers should not be facilitated using public funds as they are rendering services without any promise of remuneration. Such a practice would discourage the institution from engaging officers in full time employment.

(iii) Recommendation

The proposed amendment to section 17(f) be rejected

(iv) Rationale for the rejection

Volunteers should not be facilitated using public funds as they render services without any promise of remuneration. Such a practice would discourage the institution from engaging officers in full time employment

3.7.6 Proposed amendments to other sections of the Act

The Department of Probation and After Care Services proposed the following further amendments –

(a) Section 11(1) Replace ''Principal Probation Officer'' with ''Director'' wherever it appears;

(b) Section 11 (3) Replace Principal Probation Officer with ''Director'' wherever it appears. Delete 'District' and replace with 'county' wherever it appears;

(c) Section 11 (5) Delete 'District' wherever it appears and replace with ''County'';

(d) Section 16 (a) Repeat the same with respect to changing the word ''principal probation officer'' with ''Director'';

(e) Section 18 Repeat the same with respect to changing the word ''principal probation'' officer with ''Director'';

Reasons

(a) The Bill proposes a definition of the term 'Director'. '

(b) The Director is the current head of department bestowed with the responsibility of overseeing the implementation of the Act and not the Principal Probation officer;

(c) The Director supervises several officers below him, one of whom is the Principal Probation officer in job Group 'N';

(d) As was the case originally (1946-1993), the Department was headed by a Principal Probation officer but this was changed and a new designation for the head of the department is the Director;

(e) Leaving the term the "Principal Probation officer" in the aforementioned sections of the Act unchanged would mean that even the Director now would be subordinate to the Principal Probation officer.

(i) Observations

The Committee observed that in view of the amendment proposed to section (2), to introduce the term "Director" there

is need to align the entire Act to make reference the proper officer in charge of the Department.

(ii) Recommendation

The Committee recommends that section 11, 16 and 18 of the Act be amended by deleting the word "Principal Probation Officer" wherever it appears and substituting therefor the word "Director" and further, an amendment be moved to Section 11 (3) and (4) to delete the word 'District' wherever it appears and replace with "County".

3.8 THE CRIMINAL PROCEDURE CODE (CAP 75)

3.8.1 Proposed amendment to section 2 of the Act

Delete the expression "Attorney-General" appearing in the definition of the expression "officer in charge of a police station" and substitute therefor the expression "Inspector-General of the National Police Service".

Delete the expression "Commissioner of Police" wherever it appears and substitute therefor the expression "Inspector-General of the National Police Service".

Delete the definition of the expression "police station" and substitute therefor the following new definition-

"police station" means a place designated by the Inspector-General as a police station under section 40 of the National Police Service Act, 2011.

(i) Observations

The rationale for the amendment is as follows-

(i) To replace the Attorney General with the Inspector-General of Police as the right person to give directions as to the person to serve as the officer in charge of a police station. This is in view of the Inspector General of Police's powers under section 245 to exercise independent command over the National Police Service; and

(ii) To ensure uniformity of definitions of terms used in similar context across the statute book. Section 40 of the National Police Service Act empowers the Inspector General of Police to gazette police stations.

(iii) The sections 26 and 386 of the Criminal Procedure Code still make reference to the "Commissioner of Police" and there's need to amend those sections accordingly.

(ii) Stakeholders' submissions

The Committee did not get any views from stakeholders

(ii) Recommendation

The Committee recommends further amendments to sections 26 and 386 of the Criminal Procedure Code in order to replace references to the "Commissioner of Police" with "Inspector General of Police"

(iii) Rationale for the amendment

Prior to 2010, the "Commissioner of Police" was the officer in charge of police but that changed to the "Inspector General of Police" after the enactment of the Constitution of Kenya, 2010. The Act therefore needs to be amended accordingly to reflect this position.

3.8.2 Proposed further amendment to the Criminal Procedure Code

Mr. Clement Okech of probation and aftercare services submitted that a new clause be crafted as section 3 of section 123A to read –

> "In deciding on whether to grant or release an accused person on bail under this section, the court may order a probation officer to inquire into the character, antecedents, associations and community ties of the accused person or any particular matter and prepare and present before it a bail information report"

Reasons

(a) Mr. Okech submitted that the proposal is submitted in consideration of the law, policy and practice related to probation officer work in the court on matters touching on pre-trial services and specifically on bail and bond administration. This is because these are services increasingly evident at the lower courts and High Court.

(b) The clause will anchor in law the current practice on bail information reports prepared by probation officers and used by the courts for bail decision-making.

(c) It will establish the basis upon which the court can rely on in granting or denying bail and thus note leaving this decision to the discretion of the court alone.

(d) The current practice of bail information reports or pre-bail reports are based on court precedents and on Bail and Bond Policy Guidelines (2015) developed by the National Council on the Administration of Justice (NCAJ).

(e) It will establish means through which Victims concerns can be brought to the attention of the court before bail is issued. It will also help address the burgeoning Pre-trail/remand population with the resultant effect or reducing overall prison population especially of non-serious offenders.

(f) It will ensure efficient operation of the Probation Department since anchoring in law the requirement to produce the Bail information reports will result in resource allocation specific for preparation of the Reports.

(iv) <u>Observation</u>

The committee observed as follows-

(a) the decision to grant or decline to grant bail should be left to the Court's discretion;

(b) the preparation of bail information report may be left to policy directions and not anchored in law so as to allow the court discretion to make a determination based on his/ her judgment and not influenced by a mandatory report;

(c) the proposed practice may be subject to abuse; and

(d) in light of the fact that the proposal is not part of the amendments proposed in the Bill, it is advisable that the proposal be brought in future by way of a substantive amendment and not through the miscellaneous amendments in order to facilitate more engagements with stakeholders.

(iii) Recommendation

The proposed new clause from the Department of Probation be rejected.

3.9 THE EXTRADITION (CONTIGUOUS AND FOREIGN COUNTRIES ACT (CAP 76)

3.9.1 Proposed amendment to section 3(3) and 11(2) of the Act

Delete the expression "House of Representatives" and substitute therefor the words "National Assembly".

(i) Stakeholders' submissions

The Committee did not get any views from stakeholders.

(ii) Observation

The amendment seeks to replace the expression "House of Representatives" appearing therein with the expression "National Assembly'' as that expression is obsolete.

(iii) Recommendation

The Committee recommends that the amendment as proposed in the Bill be agreed to.

3.9.2 Proposed amendment to section 15(1)(b) of the Act

Delete the words "Commissioner of Police or chief officer of the police of the district, city, town or area where the prisoner is in custody" and substitute therefor the words "Inspector-General of Police or the Officer Commanding the respective police Division or Police station.

(i) Stakeholders' submissions

The Committee did not get any views from stakeholders.

(ii) Observation

The amendment seeks to provide for proper nomenclature following the enactment of the new Constitution in 2010.

(iii) Recommendation

The Committee recommends that the amendment as proposed in the Bill be agreed to.

3.10. THE LAW OF SUCCESSION ACT (CAP 160)

3.10.1 Proposed new section of the Act

Insert the following new section immediately after section 49 -

Power to clear court

49A. (1). In any proceedings for an application or dispute relating to the administration of a deceased person's estate, the Court hearing the application or dispute may on its own motion or upon an application by any of the parties, direct that any persons, not being members of the Court or parties to the case or their advocates, be excluded from the Court.

(2) The Court may prohibit the publication of the proceedings on the matter in respect of which a direction is given under subsection (1).

(i) Stakeholders' submissions

The Judiciary supported the amendment.

The Law Society of Kenya opposed the amendment on grounds that the publicization of succession matters is necessary to give Kenyans an opportunity to become aware of the real wealth of persons in positions of authority who may at times obtain wealth through corruption. Additionally, the legitimate beneficiaries of the deceased or interested persons will also be able to become aware of and the matter and claim their portion of the estate. It is their view that as with all court matters, these proceedings should remain public records.

(ii) Observation

The amendment seeks-

(a) To empower a court handling a succession dispute to exclude persons who are not members of the court or parties to the case from any proceeding relating to administration of a deceased person's estate;

(b) To empower the court to prohibit publication of any matter arising in case in respect of which an exclusion Order is made. As a result, the media and other persons may be excluded from court during hearings of certain matters.

(iv) Recommendation

The Committee recommends that the amendment be rejected

(v) Rationale

The practice of holding hearings in camera exists and ought to be left to the court's discretion on a case by case basis rather than anchoring the same in law for succession matters only.

3.11. THE NATIONAL COUNCIL FOR LAW REPORTING ACT, 1994 (No. 11 OF 1994)

3.11.1 Proposed amendment to section 2 of the Act

Insert the following new subsection after subsection (3) –

"(4) The Council is the body under the Office of the Attorney-General''

(i) Stakeholders' submissions

The Attorney General indicates that the proposed amendment did not emanate from his office and further, the amendments have far reaching policy implications and legal consequences. He is of the view that the amendments be shelved to allow for further deliberations. He drew the attention of the committee to a previous attempt to amend the National Council for Law Reporting Act through the Election (Amendment) Bill in 2017 to place the Council under the Judiciary. After much deliberation, it was agreed that the amendment be withdrawn to allow for consultations between the Chief Justice, the Chief of Staff and the Head of Public Service. The Attorney General presented objections from the NCLR, which is of the view that the amendment be shelved pending consultations between the Attorney General and the Chief Justice. It is also apparent that there is in place, an Ad-Hoc Committee that was formed for the review of the NCLR Act hence it would be prudent to deliberate the proposed amendments wholly once the report of the Committee is finalised and not in a piecemeal manner.

The International Commission of Jurists opposed the amendment as in its view, the Council had been doing a good job in law reporting in a timely manner which has helped lawyers across the country access to precedent.

The National Council for Law Reports (NCLR) proposed the deletion of the provision as the Council was domiciled in the judiciary as the main stakeholder of the council. For instance, in section 4 of the Act, the Council of NCLR is chaired by the Chief Justice and is also composed of other judges of the Court of Appeal and the High Court as well as the Registrar of the Judiciary. In total, membership of the Board members from the Judiciary comprises almost 30% (4 out of the total 13 members. The function of law reporting also involves reporting on case law as emanating from the courts.

The Judiciary opposed the amendment submitting that it violated the principle of independence of the Judiciary since the Council was domiciled in the Judiciary because law reporting is a judicial function whereby the Attorney-General plays no role. Further, the Judiciary submitted that the Chief is the chairperson of the Council and cannot be subordinated to the Attorney-General or his office. Further, since the Attorney General was a party to some matters litigated before courts, he cannot assume the role of a reporter too.

The Kenya Magistrates and Judges Association opposed the amendment as in its view, it would interfere with independence of the Judiciary.

Transparency International Kenya supported the amendment since in its view, the Attorney-General was a member of the council and functions require to be streamlined to avoid duplication between the two offices on drafting and law reporting.

(iii) Recommendation

The Committee recommends that the amendment be rejected.

(iv) Rationale for the amendment

The Committee took the views of the stakeholders into consideration. Firstly, and most crucially, the Attorney General under whom the Bill seeks to place the National Council for Law Reporting, requested that the amendment be shelved pending further consultation. The Judiciary, National Council for Law Reporting, LSK, ICJ, Kenya Magistrates and Judges Association

also all opposed the amendment as the Council is currently supervised by the Judiciary.

3.12 THE WITNESS PROTECTION ACT (NO. 16 OF 2006)

3.12.1 Proposed amendment to section 2 of the Act

Delete the definition of the word "Minister".

(i) Stakeholders' submissions

The Committee did not get any views from stakeholders.

(ii) Rationale for the amendment

The amendment seeks to replace the term "Minister" with the term "Attorney General" in keeping with the Constitution of Kenya, 2010.

(iii) Recommendation

The Committee recommends that the amendments be agreed to.

3.12.2 Proposed amendment to section 3E of the Act

Insert the following new subsection immediately after subsection (7A)- (7B)

"Notwithstanding subsection (7A), the Board shall afford the Director an appropriate opportunity to defend himself against any allegation made against him before taking any action under that subsection''

(i) Stakeholders' submissions

The Committee did not get any views from stakeholders.

(ii) Rationale for the amendment

The amendment seeks to require that the Director be given an opportunity to defend himself/herself where a Petition seeking his/her dismissal is been presented to the Board.

(iii) Recommendation

The Committee recommends that the amendment be agreed to.

3.12.3 Proposed amendment to section 3F(1) of the Act

Delete the word "Minister" and substitute therefor the words "Cabinet Secretary responsible for finance".

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Rationale for the amendment

The amendment will empower the Cabinet Secretary, Finance to, in consultation with the Salaries and Remunerations Commission approve terms and conditions for the staff of the Agency.

(iii) Recommendation

The Committee recommends that the amendments be agreed to.

3.12.4 Proposed amendment to section 3F (6) of the Act

Delete the word "Minister" and substitute therefor the words "Cabinet Secretary responsible for finance".

(i) Stakeholders' submissions

The Committee did not get any views from stakeholders.

(ii) Observation

The Committee observed that-

(a) This provision as it is presently relates to the establishment of a social security scheme for the staff of the Agency with the approval of the Minister responsible for Finance.

(b) The proposed amendment seeks to replace the term "Minister" with "Cabinet Secretary". However, the amendment proposed as drafted would mean that the words "responsible for Finance" would be repeated hence the phrase should be amended to avoid repetition.

(iii) Recommendation

The Committee recommends that the provision be amended to delete the words "responsible for finance".

(iv) Rationale for the amendment

The words "responsible for finance" are already in section 3F of the Act which talks of "Minister responsible for finance". The amendment as proposed, that is, to delete "Minister" and substitute therefor the words "Cabinet Secretary responsible for finance" would result in a grammatical error in section 3F

3.12.5 **Proposed amendment to section 3F (7) of the Act**

Delete the word "Minister" and substitute therefor the words "Cabinet Secretary responsible for finance".

(i) Stakeholders' submissions

The Committee did not get any views from stakeholders.

(ii) Recommendation

The Committee recommends that the amendment be deleted

(iii) Rationale for the amendment

The Bill seeks to amend section 3F (7), which is non-existent in the Act.

3.12.6 **Proposed amendments to sections 3G(2), 3I(2)(c), 3L(2), 3 L(3), 5(4) of the Act**

Delete the word "Minister" and substitute therefor the expression "'Attorney-General".

(i) Stakeholders' submissions

The Committee did not get any views from stakeholders.

(ii) Rationale for the amendment

The amendment seeks to replace the term "Minister" with "Attorney General" in keeping with the proper reference under the Constitution

(iii) Recommendation

The Committee recommends that the amendment be agreed to.

3.12.7 **Proposed amendment to section 3I(6) of the Act**

Delete the word "Minister" and substitute therefor the expression "Cabinet Secretary responsible for finance".

(i) Stakeholders' submissions

The Committee did not get any views from stakeholders.

(ii) Rationale for the amendment

To enable the Cabinet Secretary for Finance make regulations for the management and administration of the Victims Protection Fund.

(iii) Recommendation

The Committee recommends that the amendment as proposed in the Bill be agreed to.

3.12.8 Proposed amendment to section 3J(5) of the Act

Delete the word "Minister" and substitute therefor the words "Cabinet Secretary responsible for finance".

(i) Stakeholders' submissions

The Committee did not get any views from stakeholders.

(ii) Rationale for the amendment

To enable the Agency seek views to incur expenditure with the authority of the Cabinet Secretary responsible for Finance, as this is a role vested on the CS Finance.

(iii) Recommendation

The Committee recommends that the amendment as proposed in the Bill be agreed to.

3.12.9 Proposed amendment to section 3K of the Act

Insert the following new subsection immediately after subsection (2)-

> (3) The legislative and regulatory provisions on the auditing of national security organs shall apply *mutatis mutandis* to the Agency.

(i) Stakeholders' submissions

The Committee did not get any views from stakeholders.

(ii) Rationale for the amendment

To apply the legislative and regulatory provisions on auditing of security organs to the Agency in view of the sensitive nature of the functions of the Agency and the need to keep information and documentation in its custody as confidential.

(iii) Recommendation

The Committee recommends that the amendment as proposed in the Bill be agreed to.

3.12.10 Proposed amendment to section 3(P) of the Act

Insert the following new subsection immediately after subsection (3)-

> ''(4) A member of the Board may in writing designate an officer not below the level of Director or equivalent to represent him on the Board''

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Rationale for the amendment

The amendment is intended to allow the members of the Board to designate representatives to the Board.

iii) Recommendation

The Committee recommends that the amendment as proposed in the Bill be agreed to.

3.12.11 Proposed amendment to section 30(D) of the Act

Delete the word "Minister" and substitute therefor the expression "Cabinet Secretary".

(i) Stakeholders' submissions

The Committee did not get any views from stakeholders.

(ii) Rationale for the amendment

This provision relates to restriction of access to the premises of the Agency by the Minister for internal security on the request of the Director of the Agency. The amendment is minor one to replace the word "Minister" with "Cabinet Secretary" following change of terminology in 2010.

(iii) Recommendation

The Committee recommends that the amendment as proposed in the Bill be agreed to.

3.13 THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING ACT (NO 9 OF 2009)

3.13.1 Proposed amendment to section 2 and 48 of the Act

Section (2)
Delete paragraph (e) of the definition of the expression "designated non-financial businesses or professionals" and substitute therefor the following new paragraph-

> (e) accountants who are sole practitioners, partners or employees within professional firms;

Insert the following new paragraphs immediately after paragraph (f)-

> (fa) advocates, notaries and other legal professionals who are sole practitioners' partners, or employees within professional firms;
>
> (fb) trust and company service providers.

Section 48

Delete and substitute therefor the following new section –

Application of reporting obligations

8. The reporting obligations under this Part shall apply to-

> (a) advocates, notaries, other independent legal professionals and accountants when preparing or carrying out transactions for their clients in the following situations-
>
> (i) buying and selling of real estate;
> (ii) managing of client money, securities or other assets;

(iii) management of bank, savings or securities accounts;
(iv) organisation of contributions for the creation, operation or management of companies; or
(v) creation, operation or management of buying and selling of business entities or legal arrangements; or

(b) a trust or company service provider not otherwise covered elsewhere in this Act, which as a business, provides any of the following services to third parties—

(i) acting as formation agent of legal persons;

(ii) acting as or arranging for another person to act as, a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;

(iii) Providing registered office business address or accommodation, correspondence or administrative address for a company, partnership or any other legal person or arrangement;

(iv) acting as, or arranging for another person to act as trustee of an express trust; and

(v) acting as or arranging for another person to act as a nominee shareholder for another person.

(i) Stakeholders' submissions

Anjarwalla and Khanna Advocates opposed the amendments as the provisions to include advocates will encroach on the legal privilege of advocate-client confidentiality. The privilege exists even after the relationship has ceased. It is their argument that the amendment is an affront to the constitutional right to privacy under Article 31 of the constitution and the limitation and requirement for such reporting by advocates is neither fair nor reasonable in an open and democratic society.

The Law Society of Kenya opposed the amendment since the amendment will substantively affect the well settled principle of

advocate-client privilege cemented under professional conduct of confidentiality, the evidentiary rule of privilege and the common law principle of advocate-client confidentiality. Section 134 of the Advocates Act provides for advocate-client privilege and gives exceptions of instances where disclosure may be made such as if nondisclosure is in furtherance of an illegality and any fact observed by the advocate showing crime or fraud.

Confidentiality is an ethical duty which every Advocate adheres to even after a relationship ceases. Advocate-client privilege is the oldest privilege recognized by Anglo-American to jurisprudence which is aimed at ensuring that one who seeks advise or aid from an attorney should be free of any fear that his secrets will be uncovered. The underlying principle is to provide for "sound legal advice and advocacy" with the security of privilege, the client will speak frankly and openly disclosing relevant information to enable the advocate give well-reasoned professional advice. The practical consequence is that an attorney may neither be compelled to nor voluntarily disclose any matters conveyed in confidence by the client and the client may not be compelled to testify regarding matters communicated to the lawyer for purposes of seeking legal advice. There is also case law on the matter where the court recognised the waiver of the privilege in certain circumstances matter of fraud is already dealt with under section.

Transparency International supported the amendment and submitted that lawyers should disclose the beneficial owners of their clients under the anti-money laundering regulations hence enhancing transparency in beneficial ownership.

(ii) Observation

The Committee observed as follows–

(a) The amendment seeks to include employees of accountants, advocates and notaries or their employees, trust and company service providers in the definition of the expression "designated non-financial businesses or professions" for purposes of the Act. This will expand the reporting obligations to include employees of accountants, advocates and notaries or their employees, trust and company service providers.

(b) The requirement for advocates to reveal information about their clients is against the principle of advocate-client confidentiality. This is a privilege enjoyed by lawyers and their clients. The Act and other statutes, such as the Advocates Act, makes provisions for the exceptional circumstances when an Advocate can disclose information on their client.

(iii) Recommendation

The Committee recommends that the proposed amendment be amended in the Act by removing the reference to advocates, notaries and other legal professionals.

(iv) Rationale for the amendment

The proposal to include advocates as reporting institutions will encroach on and significantly affect the well settled principle of advocate-client privilege. The privilege is enjoyed by advocates and their clients even after the relationship has ceased. The principle is cemented under professional conduct of confidentiality, the evidentiary rule of privilege and the common law principle of advocate-client confidentiality. Section 134 of the Advocates Act provides for advocate-client privilege by prohibiting disclosure by advocates and also gives the exceptional instances where disclosure may be made, for example if non-disclosure is in furtherance of an illegality and any fact observed by the advocate showing crime or fraud.

Confidentiality is an ethical duty that every Advocate adheres to even after a relationship ceases. Advocate-client privilege is the oldest privilege recognized by Anglo-American to jurisprudence which is aimed at ensuring that one who seeks advice or aid from an attorney should be free of any fear that his secrets will be uncovered. The underlying principle is to provide for "sound legal advice and advocacy". With the security of privilege, the client will speak frankly and openly disclosing relevant information to enable the advocate give well-reasoned professional advice. The practical consequence is that an attorney may neither be compelled to nor voluntarily disclose any matters conveyed in confidence by the client and the client may not be compelled to testify regarding matters communicated to the lawyer for purposes of seeking legal advice.

3.14 THE JUDICIAL SERVICE ACT (NO. 1 OF 2011)

3.14.1 Proposed amendment to section 15(1)(b) of the Act

Delete the word ''seven'' and substitute therefor the word ''fourteen''

(i) Stakeholders' submissions

The Judiciary drew the attention of the Committee to the reference to the "Prime Minister" and arrangements for consultations that existed during the Grand Coalition Government in the provisions of section 15. These provisions are obsolete and it proposed that section 15 be amended accordingly.

(ii) Rationale for the amendment

The Committee observed as follows –

(a) This Amendment seeks to increase the duration for the National assembly to consider appointment of members of the JSC under Article 171(2)(h) (those who represent the public) from 7days to 14 days.

(b) This amendment will align the same with the provisions under the Public Appointments (Parliamentary Approvals) Act.

(c) The references to the consultations under the National Accord and Reconciliation Act are spent and require to be removed from the law.

(iii) Recommendation

The Committee recommends that Section 15(1)(a) of the Act be further amended to remove the spent provisions relating to consultations required under the National Accord and Reconciliation Act. This is by deleting the words "until after the first elections under the Constitution, the President shall, subject to the National Accord and Reconciliation Act, 2008 (No. 4 of 2008) and after consultation with the Prime Minister, within seven days of the commencement of this Act, substituting therefor the words " The President shall, whenever a vacancy occurs".

(iv) Rationale

The National Accord and Reconciliation Act and procedure for consultations thereunder lapsed after the first elections under the Constitution of Kenya, 2010.

3.14.2 Proposed amendment to section 15(2) of the Act

Delete the expression "within three days of receipt of the names" and substitute therefor the expression "within three days after approval by the National Assembly as contemplated under Article 250(2)(b) of the Constitution".

(i) Stakeholders' submissions

The Attorney General wrote to the Committee that the proposed amendment had not been emanated from his office together with the amendments forwarded to the National Assembly for publication. It is his submission that the amendments have far reaching policy implications and legal consequences. He was of the view that the amendments ought to have been processed in consultation with the responsible offices as is supposed to the procedure.

The Judiciary proposed a deletion of the amendment since, in its view; it was unconstitutional as it violates Articles 171 and 248 of the Constitution of Kenya. Article 250(2) (b) does not apply for the appointment of members of the Judicial Service Commission. Further, the PARLSCOM, SRC and JSC are special Constitutional Commissions whose members are neither vetted nor approved by Parliament hence this amendment would be discriminatory against the JSC. They draw the attention of the committee to the Justice Mohamed Warsame case. The amendment would lead to inconsistency in the application of section 15 of the Act.

The Kenya Magistrates and Judges Association opposed the amendment and submitted that it was unconstitutional as it violated Article171 of the Constitution of Kenya.

Muturi S.K. & Co Advocates supported the amendments. The firm was of the view that drafters of the Constitution could not have envisaged a situation where there is election of persons to constitutional commissions then checks and balances provisions are suspended as this would violate Article 259 which provides for interpretation of the Constitution in a manner that promotes good governance.

They argued that vetting was the only way that suitability and integrity can be guaranteed. They proposed further amendments to the JSC Act to give effect to the right to Access to information as JSC lacked transparency and accountability in its operations. They further proposed that JSC publishes a list of cases pending in court and those pending on a quarterly basis and also publicize the amounts it collects by way of fines, donations, gifts etc.

(ii) Observations

The Committee observed that-

(a) The amendment seeks to provide for approval by the National Assembly prior to appointment by the President, of nominees to the Judicial Service Commission;

(b) Following the enactment of the Constitution in 2010, the first members of the Judicial Service Commission under the Constitution were approved by the National Assembly in the 10th Parliament. As such, the precedent has been set with regard to the vetting of all members of the Judicial Service Commission. Indeed, the Attorney General and Chief Justice, who are members of the Commission by virtue of the offices they hold are also vetted and approved by the National Assembly for appointment;

(c) The process of election of members of the Judicial Service Commission to represent the Judges of the Supreme Court, Court of Appeal, High Court and Magistrates and Advocates is a process of "identification and recommendation" in other words "nomination", similar to the one undertaken by the President when identifying suitable nominees to be appointed;

(d) Article 250(2)(b) stipulates that –

250(2) The Chairperson and each member of a commission and independent office shall be-
(a) Identified and recommended for appointment in a manner prescribed by national legislation;
(b) Approved by the National Assembly;
(c) Appointed by the President.

(e) In view of the above provisions of Article 250, all members of constitutional commissions are approved by the National

Assembly. Indeed, even members of the Parliamentary Service Commission who are elected by the people and who were recently appointed after the commencement of the 12th Parliament, were subjected to an approval process;

(f) There is no express provision to oust the jurisdiction of Parliament to vet members of the Judicial Service Commission;

(g) Notwithstanding that the issue of constitutionality of the vetting of JSC commissioners was not canvassed during the 10th Parliament when the commissioners under Article 171 were vetted, Parliament is a House that follows precedent and is bound by its customs, practices, usages and traditions and as such, it does not easily deviate from its own practices and precedent unless there is a compelling justification to do so.

(h) Article 259(1) of the Constitution provides that the Constitution is to be interpreted in a manner that promotes is purposes and values, advances the rule of law, contributes to good governance among other things. Article 259(3) of the Constitution provides that every provision of the Constitution shall be construed according to the doctrine that the law is always speaking. In light of the foregoing, the drafters of the Constitution, and Kenyans generally, intended for a mechanism that would ensure a transparent process whereby the appointment of State Officers and public officers whose suitability meets the constitutional test of integrity. The provisions under article 250(2)(b) allows for the people's elected representatives to the persons proposed to hold certain offices, in this case members of the Judicial Service Commission. Indeed the doctrine of separation of powers underscores the independence of each arm of Government but there is no absolute separation as the three arms put in place mechanisms that check and balance each other against excesses.

(i) In the past, it has been alleged that the election of members to represent judges and magistrates has been marred by electoral malpractices such as voter bribery as was alleged in 2016 and indeed alluded to by the former Chief Justice, Willy Mutunga, who stated that even the election of judges' and magistrates' representatives to the JSC were riddled with corruption, with the officials bribing others to vote for them. These issues were never addressed by the JSC or the

House which had no opportunity to vet those representatives. The vetting by the National Assembly will offer an opportunity for the House to consider such complaints to ensure that the Commissioners appointed are suitable in terms of competency and integrity.

(j) There is need to urgently enact the provision to allow for pending and future appointments to be finalised.

(iii) Recommendation

The Committee recommends that the amendments as proposed in the Bill be agreed to.

3.15 THE KENYA SCHOOL OF LAW ACT (No. 26 OF 2012)

3.15.1 Proposed amendment to section 4(2), 16 and Second Schedule of the Act

Section 4(2)

Delete and substitute therefor the following new subsection-

"(2) Without prejudice to the generality of subsection (1), the object of the School shall be to-

(a) ensure the continuity of professional development for all cadres of the legal profession;
(b) provide para-legal training;
(c) provide other specialised training in the legal sector;
(d) develop curricula, training manuals, conduct examinations and confer academic awards; and
(e) undertake research projects and provide consultancy services''

Section 16

The section be deleted.

Second Schedule

Delete paragraphs (a) and (b).

(i) Stakeholders' submissions

Ms. Annah Konuche opposed the amendments on the following grounds-

(a) the proposed amendments were of substantive nature and not miscellaneous hence should be subjected to proper public participation;

(b) The liberalization of training is the sole mandate of Kenya School of Law and a viable option would be to devolve the school to reduce the cost element.

(c) The issues which were subject to amendment were being handled by the Taskforce on legal sector reforms, and these amendments pre-empt the report.

(d) The amendment in (a) would convert Kenya School of Law to a provider of continuous professional development.

Muturi S.K. Advocates opposed the amendment arguing that it would dilute gains made in terms of standards in the legal profession.

The National Association of Private Universities in Kenya supported the proposal to liberalize the training of Advocates. In its view, inefficiency at the Kenya School of Law had prevailed due to monopoly and lack of competition. It states that other countries that have robust frameworks for the training of Advocates had adopted a liberalized approach to the training. They cited the United States of America (which had law schools in every state), Australia, Canada, United Kingdom and South Africa as jurisdictions where the equivalent of the Advocates Training Programme is offered in various institutions. With the amendments, Kenya School of Law would focus on its key functions being the continuity of professional development of all cadres in the legal profession.

(v) Observation

The Committee observed that-

(a) The amendments seek to liberalize the training of Advocates at post-graduate level, a responsibility currently vested in KSL.

(b) The provision in section 16 and the second schedule relating to admission requirements contradict those of the Council for Legal Education.

(c) The Committee sought the views of the Taskforce on Legal Reforms on the amendments but did not receive any response.

(iv) Recommendation

The Committee recommends that all the amendments to the Act be rejected

(v) Rationale for the rejection

The Committee was of the opinion that-

(a) the amendments are substantive in nature and should not be moved by way of a miscellaneous amendment.
(b) The Attorney General has constituted a Taskforce on legal sector reforms that is to address the challenges on liberalisation of training of Advocates and admission requirements, which the Bill seeks to address are part of the terms of reference of the Taskforce. The Taskforce should be allowed to complete its work and report to the AG since enactment of the amendments would be to pre-empt the recommendations of the Taskforce.
(c) There is need to urgently address the issues in the Bill but through substantive amendments to be effected once the taskforce completes its mandate.

3.16 THE LEGAL EDUCATION ACT, 2012 (NO. 27 OF 2012)

3.16.1 Proposed amendment to section 8(1) of the Act

Insert the following new paragraph immediately after paragraph (f) -

''(g) administer the pre-bar examination for entry into the Advocates Training Programme''

(i) Stakeholders' submissions

Ms. Annah Konuche opposed the amendment on the ground that as the regulator of legal education, it should not be the same institution to administer pre-bar and bar exams.

3.16.2 Proposed amendment to section 8(2) of the Act

Insert the following new paragraph immediately after paragraph (a) -

''(aa) accreditation of legal education providers for the purpose of licensing of the Advocates Training Programme''

(i)Stakeholders' submissions

The Committee did not receive any representations from the public. The Committee wrote to the Taskforce on Legal Reforms to present its views on the amendments but did not receive any response.

(ii) Rationale for the amendment

The amendment seeks to liberalise the training of advocates by empowering the Council for Legal Education to accredit institutions to offer the programme.

3.16.3 Proposed amendment to section 8(3) of the Act

Insert the word "all" immediately before the word "legal" appearing in paragraph (a).

(i) Stakeholders' submissions

The Committee did not receive any representations from the public.

(ii) Rationale for the amendment

This amendment bestows on the Council of Legal Education the responsibility of making Regulations with respect to the admission requirements of persons enrolling in all legal education programmes. The requirements for admission into the Advocates Training Programme are outlined in the Second Schedule of the Kenya School of Law Act, 2012 which the Bill proposed to delete.

Recommendation on all amendments relating to the Legal Education Act

The Committee recommends that all the amendments to the Act be rejected

(iii) Rationale for the rejection

The Committee was of the opinion that-

(a) The amendments are substantive in nature and should not be moved by way of a miscellaneous amendment.

(b) The Attorney General has constituted a Taskforce on legal sector reforms that is to address the challenges on liberalisation of training of Advocates and admission requirements, which the Bill seeks to address are part of

the terms of reference of the Taskforce. The Taskforce should be allowed to complete its work and report to the AG since enactment of the amendments would be to pre-empt the recommendations of the Taskforce.

(c) There is need to urgently address the issues in the Bill but through substantive amendments to be effected once the taskforce completes its mandate.

3.17 THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT, 2013 (NO. 2 OF 2013)

3.17.1 Proposed amendment to section 2(1) of the Act

In the definition of "investigative Agency", delete the expression "Ethics and Anti-Corruption Commission".

(i) Stakeholders' submissions

The **Attorney-General** submitted that the proposed amendment did not originate from his office and further, the amendments had far reaching policy implications and legal consequences. He was of the view that the amendments ought to have been processed in consultation with the responsible institutions and need to be withdrawn at this point.

The **Office of the Director of Public Prosecutions** objected to the amendment on the following grounds-

(a) It will curtail the powers of DPP to prosecute matters relating to corruption in that the DPP cannot direct or request for information from EACC if the amendment is effected. Section 5 of the ODPP Act empowers the DPP to, in exercise of State powers of prosecution, direct an investigative agency to conduct an investigation;

(b) It will adversely affect cases under investigation;

(c) The Office was not aware of the origin and intention of the amendment.

(d) The amendments are not of a miscellaneous nature and ought to be effected through substantive amendments after exhaustive consultations.

Transparency International opposed the amendment on grounds that delinking ODPP and EACC would be a blow to the fight against graft. Further, ODPP was the sole body mandated to conduct public prosecutions and whereas other bodies had investigative mandates whereby their role ended upon

forwarding their recommendations to ODPP for action. The amendment may also likely affect inter-agency coordination in investigation and prosecution of corruption cases.

The Law Society of Kenya opposed the amendment submitting that the function of the ODPP was to prosecute matters and not investigate. The investigative powers should remain with EACC.

The Ethics and Anti-Corruption Commission submitted that it had not presented the amendments but that they may have been informed by a decision on the independence of the Commission as an independent Constitutional Commission hence that it is not subject to direction by any person. Section 11 of the Ethics and Anti-Corruption Commission Act mandates the EACC to investigate and recommend to the DPP the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or any law enacted pursuant to Chapter six of the Constitution. The Anti-Corruption and Economic Crimes Act does also empower the EACC to investigate and mandates it to report to the DPP on the results of an investigation (section 550.

(ii) Observation

The committee observed as follows-

(a) the amendment will remove the EACC from the investigative agencies under the purview of the DPP.

(b) The Anti-Corruption and Economic Crimes Act (ACECA) and the Ethics and Anti-corruption Commission Act mandate the EACC to implement the two Acts and accordingly empower it to carry out investigations and submit reports on the investigations to the DPP.

(c) The amendment will interfere with provisions in other Acts significantly.

(iii) Recommendation

The Committee recommends that the amendments be rejected.

(iv) Rationale for rejection of amendment

The Committee considered the views of the Stakeholders who opposed the amendments. The Attorney General, the ODPP and EACC stated that they were unaware of the source of the amendments and the rationale for the same as it was not included

in the Memorandum of Objects and Reasons in the Bill. The committee was of the view that given the amount of debate the amendments elicited, they were not miscellaneous in nature but substantive. There is therefore need for further consultations with relevant stakeholders before enactment and this amendment should therefore be rejected at this point.

3.18 THE KENYA LAW REFORM COMMISSION ACT (NO 19 OF 2013)

3.18.1 Proposed amendment to section 6(1)(a) of the Act

Delete subparagraph (v) and substitute therefor the following new subparagraph –

> ''(v) that the public is informed of review or proposed reviews of any laws''

Delete subparagraph (vi) and substitute therefor the following new subparagraph –

> ''(vi) that it keeps an updated database of all laws passed by Parliament and all laws under review''

(i) Stakeholders submissions

The **National Council for Law Reporting (Kenya Law)** objected to the amendment to paragraph (vi) on the following reasons-

(a) Kenya Law maintains a comprehensive and up to date database of all the Laws of Kenya. This was developed and is maintained as part of the delegated mandate of the preparation of the annual supplement under the Revision of Laws Act (Cap 1).

(b) The apprehension is that the amendment may be construed to mean that Kenya Law is not allowed to maintain a database of the Laws of Kenya if the Kenya Law Reform Commission should only maintain this.

(iii) Observation

The Committee observed-

(a) That the amendments seek to rectify grammatical errors;

(b) The apprehension by the National Council for Law Reporting is unsubstantiated as the law does not disallow it from maintaining a database of the Laws of Kenya as it currently does.

(iv) Recommendation

The Committee recommends that the amendment as is in the Bill be agreed to

3.18.2 Proposed amendment to section 8(4) of the Act

Delete and substitute therefor the following new subsection-

''(4) The members referred to in paragraphs (1)(b) and (c) shall be officers from the Office of the Attorney-General or the respective State Department, as the case may be, and a representative from the Law Society of Kenya''

(i) Stakeholders submissions

The Committee did not receive any representations on the amendment.

(iii) Rationale for the amendment

To clarify on membership to the Commission and to provide for a representative of the Law Society of Kenya.

(iv) Recommendation

The Committee recommends that the proposed amendment be agreed to.

3.18.3 Proposed amendment to section 11 of the Act

Subsection (5) - Delete the expression "(3) (g)" and substitute therefor the expression "(4) (g)".

Subsection 8- Delete.

(i) Stakeholders submissions

The Committee did not receive any representations on the amendment.

(i) Rationale for the amendment

To correct erroneous cross referencing. The provisions referring to the first general elections under the Constitution are obsolete.

(ii) Recommendation

The Committee recommends that the proposed amendments be agreed to.

3.18.4 Proposed amendment to section 12(3) of the Act

Delete and substitute therefor the following new subsection-

> ''(3) The Chairperson and the Members appointed under subsection 8(1) (b) shall serve on a full-time basis while the Members appointed under subsections 8(1) (c), (d), (e), (f) and (g) shall serve on a part-time basis''

(i) Stakeholders submissions

The Committee did not receive any representations on the amendment.

(ii) Rationale for the amendment

To clarify the terms of service of the Chairperson and the members.

(iii) Recommendation

The Committee recommends that the proposed amendments be agreed to.

3.18.5 Proposed amendment to the second schedule paragraph (5)

Delete the word ''three'' and substitute therefor the word "five".

(i) Stakeholders submissions

The Committee did not receive any representations on the amendment.

(ii) Rationale for the amendment

The rationale is to increase the quorum to five as the commission is composed of seven members. A quorum of three would expose the Commission to a likelihood of hosting two parallel

meetings. As it is also, the resolutions of minority members also bind the entire Commission.

(iii) Recommendation

The Committee recommends that the proposed amendment be agreed to.

3.19 THE NAIROBI CENTRE FOR INTERNATIONAL ARBITRATION ACT, 2013 (NO. 26 OF 2013)

3.19.1 Proposed amendment to section 6(1) of the Act

Delete the word "justice" appearing in paragraph (c) and substitute therefor the word "finance".

Delete the word "five" appearing in paragraph (e) and substitute therefor the word "three"

Delete paragraph (f) and substitute therefor the following new paragraph-

"(f) one person each nominated by the following bodies (f) respectively-

(i) the Kenya National Chamber of Commerce and Industry;
(ii) the Law Society of Kenya;
(iii) the Kenya Association of Manufacturers.

(i) Stakeholders submissions

The Chartered Institute of Arbitrators (Kenya Branch) opposed the amendment to paragraph (e) and proposed that paragraph (f) be amended to include a representative of the Chartered Institute of Arbitrators, Kenya Branch. This was based on grounds that the Institute is the only one that trains and certifies arbitrators and maintains membership of persons in practice.

The Law Society of Kenya proposed as follows-

(a) that the directorship under paragraph (e) be retained as five members instead of three since the Nairobi Centre is a unique body that is being promoted to be the preferred destination for mediation and arbitration. This is because

East African Community has five members states each making use of commercial arbitration and currently only Uganda and Tanzania had representation in the Nairobi Centre for International Arbitration.

(b) the Institute of Chartered Arbitrators of Kenya Branch be retained in the directorships since it is the only arbitral institution and a major stakeholder in Kenya.

(ii) Observations

The Committee observed that the amendments-

(a) Under paragraph (c) seek to include the Principal Secretary, National Treasury and not the Principal Secretary of the Ministry of Justice as the Ministry no longer exists. The Principal Secretary Treasury is represented in semi-autonomous institutions that receive public funds.

(b) Under paragraph (e) aim to reduce the number of persons from domestic arbitration bodies in East Africa from five to three.

(c) Under paragraph (f) aim to reduce the number of bodies nominating board members by removing the representative from Kenya Private Sector Alliance and Chartered Institute of Arbitrators and replacing them with Kenya Association of Manufacturers.

(iii) Recommendation

In the proposed amendment under paragraph (c) the Committee recommends that the proposed amendment be agreed to.

In the proposed amendment under paragraph (e), the Committee recommends that the amendment be rejected

In the proposed amendment under paragraph (f), the Committee recommends that the amendment be rejected subject to amendment of subparagraph (iv) to include the words "Kenya Branch"

(iv) Rationale for the rejection

In the proposed amendment under paragraph (e), the reduction of the members to represent the domestic bodies of Arbitrators

in East Africa from five persons to three persons will create a problem because the East Africa Community has more than three member states. The Committee resolved to retain the number as five in order to allow for all EAC member states to nominate directors.

In the proposed amendment under paragraph (f), the Committee resolved to retain the provision as it is in the law. The Kenya Private Sector Alliance is a more general body which includes the Manufacturers in Kenya. The Chartered Institute of Arbitrators, Kenya Branch, be retained in the membership as it is a crucial stakeholder since the Institute is the only one that trains and certifies arbitrators and maintains membership of persons in practice.

3.19.2 Proposed amendments to section 9 of the Act

Delete the word "Board" and substitute therefor the word "Centre".

Delete and substitute therefor the following new subsection-

> ''(3) The Registrar shall be the chief executive officer of the Centre and responsible for the day-to-day management of the Centre and shall be secretary to the Board''

Insert the following new subsection immediately after subsection (3)-

> ''(4) The Registrar shall hold office for a term of four years and shall be eligible for reappointment for one further term of four years''

(i) Stakeholders submissions

The Committee did not receive any views from stakeholders.

(ii) Rationale for the amendment

The provisions clarify -

> (a) the registrar's role as the registrar of the centre.
> (b) role of the Registrar- holder will be the CEO
> (c) term of office of the registrar (four years) renewable once.

(iii) Recommendation

The Committee recommends that the proposed amendments be agreed to.

3.19.3 Proposed amendments to section 21 of the Act

2(b) Delete and substitute therefor the following new paragraph

''(b) a Deputy President''

(2c) Insert the words "not more than" immediately before the word "fifteen".

(4) Insert at the end thereof the words "and shall serve on a part-time basis".

(5) Delete the words "his deputies" and substitute therefor the words "his deputy".

Insert the following new sub section immediately after sub section (5)-

''(6) The second schedule shall apply in respect of conduct of the affairs of the Arbitral Court''

(i) Stakeholders submissions

The Committee did not receive any views from stakeholders.

(ii) Rationale for the amendments

(a) The proposed amendment to subsection 2(b) aims to reduce the deputies to one;

(b) The proposed amendment to subsection 2 (c) seeks to provide clarity that persons appointed under paragraph (c) should not exceed fifteen.

(c) The proposed amendment to sub section (4) seeks to allow the President of the Centre to serve on part time basis. The word "deputy" however requires to be aligned from plural to singular if the amendment to have one deputy president is agreed to;

(d) The proposed amendment is misplaced as it should be under subsection (4);

(e) The proposed amendment to subsection 6 introduces a schedule for the conduct of affairs of the Court.

(iii) Recommendations

The Committee recommends as follows-

(a) The proposed amendment to subsection (2)(b), be agreed to.
(b) The proposed amendment to subsection (2)(c), be agreed to.
(c) In view of the amendment to subsection (2)(b), it follows that section (4), should be further amended to refer to one deputy;
(d) The proposed amendment to subsection (5), be deleted.
(e) The proposed amendment to subsection (6), be agreed to.

3.19.4 Proposed amendments to section 22 (1) of the Act

Delete and substitute therefor the following new subsection-

"(1) The Court shall hear and determine all disputes referred to it in accordance with this Act, the rules or any other written law''

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

The amendment seeks to clarify the jurisdiction of the Court. It seeks to rectify the anomaly giving the court both exclusive original and appellate jurisdiction.

(iii) Recommendation

The Committee recommends that the amendment be agreed to.

3.19.5 Proposed amendments to section 23 of the Act

The section be deleted.

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

The deletion aims to remove reference to arbitration rules made under the United Nations Commission on International Trade Law (UNCITRAL). That model law was adopted in 1985 and has been amended severally to cater for socio economic changes but the Centre has since made rules that can be applied locally.

(iii) Recommendation

The Committee recommends that the amendment be agreed to.

3.19.6 Proposed amendments to section 24 of the Act

Delete and substitute therefor the following new subsection-

''Alternative Dispute Resolution

24. Nothing in this Act shall be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution''

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

To remove reference from the examples of Alternative Dispute Resolution mechanisms that may be adopted.

(iii) Recommendation

The Committee recommends that the amendment be agreed to.

3.19.7 Proposed amendments to section 25 of the Act

Delete and substitute therefor the following new section –

''25. The Board may make rules for —

(a) the dispute resolution techniques and processes to be administered by the Court;
(b) the matters reserved for the Court in the Act or any other law;
(c) the general procedure of the Court; and
(d) any other matter to give effect to this Act.

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

The amendment seeks to amend the provision delegating legislative powers to the Board of the Centre as regards the rules that the Board may make.

(iii) Recommendation

The Committee recommends that the proposed amendment be agreed to.

3.19.8 Proposed amendments to schedule paragraph 1

Insert the following new subparagraph immediately after paragraph (2) –

''(3) The chairperson shall hold office for the period of his appointment as a member of the Board or for the term specified in the instrument of appointment as such, and shall be eligible for reappointment for one further term''

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

To provide for a term of office for the chairperson

(iii) Recommendation

The Committee recommends that the amendment in the Bill be agreed to.

3.19.9 Proposed new paragraph

Renumber the existing Schedule as the First Schedule and insert the following new Schedule -

SECOND SCHEDULE (s.21(6))

CONDUCT OF THE AFFAIRS OF THE ARBITRAL COURT

1. The President of the Court shall co-ordinate and supervise the management of the affairs of the Court.

2. The President shall constitute panels consisting of an odd number of members and allocate matters to such panels for the better performance of the functions of the Court.

3. A matter referred to the Court may be heard and determined by one member or a panel of not less than three members in accordance with the court rules of procedure made under section 25 of this Act.

4. The President of the Court shall submit quarterly progress reports to the Board setting out the activities of the Court during the period covered by the report.
5. The President of the Court may delegate any of his duties to the Deputy President.

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

The amendment follows the amendment to section 21(6) which introduces the schedule containing provisions for the conduct of affairs of the Court

(iii) Recommendation

The Committee recommends that the amendment in the Bill be agreed to.

3.20 THE COMPANIES ACT, 2015 (NO 17 OF 2015)

3.20.1 Proposed amendment to section 151(3) of the Act

Insert the words "external and independent" immediately after the words "certified by the company's".

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

To require a declaration of interest filed by a director of a public company to be accompanied by a report of the external auditors of the company certifying the value of the transaction if it exceeds 10% of the value of assets of the company. As it is presently, the law only requires that the certification to be done by the company's auditors without specifying if they should be external auditors.

(iii) Recommendation

The Committee recommends that the proposed amendment be agreed to.

3.20.2 Proposed amendment to section 258 of the Act

Insert the following new subsections immediately after subsection (4)—

> "(5) If the number of votes for and against a proposal are equal, the Members shall refer to the Memorandum and Articles of Association or the Shareholders' Agreement.
>
> (6) Where neither the Memorandum and Articles of Association nor the Shareholders' Agreement have provisions relating to equality of votes, the person presiding at the meeting shall have a casting vote."

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

The provision is introduced to guide the company on the manner to break a tie during voting, that is, by referring the company to its Memorandum and Article of Association.

It further seeks to provide clarity where no such provisions exist in the memorandum and Articles of Association, that is, the person presiding to have a casting vote to break a tie.

(iii) Recommendation

The Committee recommends that the proposed amendment be agreed to.

3.20.3 **Proposed new section to the Act**

Insert the following new section immediately after section 275—

"Annual General Meeting"

275A. (1) Every company shall convene a general meeting once a year.

(1) Subsection (1) does not apply to a single-member company.

(2) The Registrar may, on the application of the company, or for any other reason the Registrar determines necessary, extend the period referred to in subsection (1) even if, as a result, the period is extended beyond the calendar year.

(3) A company that contravenes this section commits an offence and is liable on conviction to a fine not exceeding one hundred thousand shillings"

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

The Committee observed that-

(a) Provision relates to the convening of an Annual General Meeting and proposes to penalise companies that fail to convene an AGM every year as required;

(b) Section 310 of the Companies Act provides for convening of meetings as mandatory for Public companies and penalty a defaulting company and its officers is set at one million shillings.

(c) The rules and standards expected of public companies, is higher and more stringent than those applicable to private companies and single member companies;

(d) A review of other comparative jurisdictions such as Australia and UK reveal that private companies are not compelled to call for Annual General Meetings. Public companies on the other hand must hold annual general meetings and as such, the filing of annual returns with the Registrar of companies is sufficient proof of compliance with the law.

(iii) Recommendation

The Committee recommends that the provision be rejected

(iv) Rationale for the rejection

The Committee was of the view that section 310 of the Companies Act already provides for the convening of an Annual General Meeting for public companies and is sufficient to safeguard the interest of shareholders.

3.20.4 Proposed amendment to section 281(2) of the Act

Delete the word "general" appearing in paragraph (b).

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

The amendment aims to require any meeting being held to comply with the notice period specified.

(iii) Recommendation

The Committee recommends that the proposed amendment be agreed to.

3.20.5 Proposed amendment to section 329 of the Act

"(1) Delete and substitute therefor the following new subsection—

(1) The directors of a company may exercise a power of the company to—

(a) allot shares in the company;

(b) grant rights to subscribe for or to convert any security into shares in the company,

only if they are authorised to do so by a resolution of the company.

(2) Delete the words "and may be unconditional or subject to conditions".

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Observation

As it is presently in the law, the directors of a company may only exercise the powers to allot shares only if authorized by both the Articles of Association and a resolution of the company. The proposed amendment would empower the directors to make allotments of shares using a resolution only.

(iii) Recommendation

The Committee recommends that the amendment be rejected.

(iv) Rationale for rejection of the amendment

To empower the directors of a company to allot shares pursuant to a Board Resolution only gives powers that might be easily abused. It is important that the Articles of Association also empower the Directors to allot shares.

3.20.6 Proposed amendment to section 721(3) of the Act

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

(3) The directors of a public company may appoint an auditor or auditors of the company—

(a) at any time before the general meeting at which the company's first financial statement is presented;

(b) following a period during which the company, being exempt from audit, did not have any auditor, at any time before the next general meeting at which the company's annual financial statement is to be presented; or

(c) to fill a casual vacancy in the office of the auditor, but while any such vacancy continues, the surviving or continuing auditor or auditors, if any, may act:

Provided that the company shall, at the general meeting, remove any such auditor and appoint in their place an auditor or auditors as provided for under subsection (4).

(i) Stakeholders' submissions

The Committee did not receive any representations from stakeholders.

(ii) **Rationale of the amendment**

The amendment is introduced to require a company to, at the Annual General Meeting, remove an auditor appointed before the AGM and appoint in their place an auditor or auditors as provided for under subsection (4). This will enable the Shareholders to appoint preferred auditors.

(iii) Recommendation

The Committee recommends that the amendment be agreed to.

3.20.7 **Proposed amendment to section 721(4) of the Act**

Delete the word ''may'' and substitute therefor the word ''shall''

Delete paragraph (2)

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

The amendments will make it mandatory for public companies to appoint auditors only in accordance with the provisions of the Act.

(iii) Recommendation

The Committee recommends that the amendment be agreed to.

3.21 THE BRIBERY ACT (NO. 47 OF 2016)

3.21.1 Proposed amendment to section 13(1)(c) of the Act

Insert the word "acquiring" immediately before the word "property".

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

The amendment is proposed to make minor clarifications and corrections.

(iii) Recommendation

The Committee recommends that the amendment in the Bill be agreed.

3.21.2 Proposed amendment to section 16 of the Act

Delete the expressions "7" and "12" wherever they appear.

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

The amendment makes minor clarifications and corrections. Section 7 and 12 do not relate to offence but rather a function or activity to which a bribe relates. The reference to these two sections is therefore misplaced. Section 16 is on the offences by body-corporates.

(iii) Recommendation

The Committee recommends that the amendments in the Bill be agreed to.

3.21.3 Proposed amendment to section 27(2) of the Act

Delete the words "this Act" appearing immediately after the words "offence under" and substitute therefor "the Act referred to in subsection (1)".

(i) Stakeholders submissions

The Ethics and Anti-Corruption Commission opposed the enactment of the proposed amendment as it does not cure the anomaly that sought to be cured.

Prior to enactment of the Bribery Act in 2016, there were investigations, prosecutions or court proceedings (based on the offence under the repealed section 39 of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA), actively on course before the commencement of the Bribery Act. It is apparent therefore that intention of Parliament, in enacting section 27 of Bribery Act, was to safeguard those investigations or proceedings instituted under section 39 of ACECA.

However, the provision as it is bears retroactive application of the provisions of the Bribery Act to offences committed before its enactment. The courts have indeed given an interpretation to the effect that section 27(2) has retrospective application. For example, Hon. Justice Ong'udi sitting in the High Court of Kenya at Nairobi in ***REPUBLIC V HENRY NGUGI NJERU alias PATRICK HENRY NGUGI NJERU alias PATRICK HENRY NGUGI DOUGLAS Revision Application No. 7 of 2017,*** in interpreting section 27 of the Bribery Act held that this section is a transitional provision that covers bribery related offences before the enactment of the Bribery Act, 2016. The Judge then went on to advise that charging a suspect of a bribery offence "***under the repealed section 39 of ACECA only or under section 6 of the Bribery Act only would cause challenges***". The Hon. Judge finally upheld the lower court's decision dismissing a charge sheet that had set out bribery offence under the repealed section 39 of ACECA, for being incompetent by virtue of section 89 (5) of the Criminal Procedure Code.

That interpretation of giving section 27 of the Bribery Act retrospective application in relation to offences under the repealed section 39 of ACECA, actually violates **Article 50 (2) (n) of the Constitution of Kenya, 2010.** This Article provides that: *"Every accused person has a right.... not to be convicted for an act or omission that at the time it was committed or*

omitted was not an offence in Kenya; or a crime under international law".

It is therefore clear that in accordance with the provisions of the Constitution, offences that were committed before the enactment of the Bribery Act have to be prosecuted under repealed section 39 of ACECA. The spirit of section 27 of the Bribery Act must have been to preserve the offences committed under section 39 of ACECA.

Transitional provisions ordinarily preserve what was done under the repealed statute and anything done under the repealed statute will be continued under the repealed law as if the repealing statute had not been made (section 23 (3) (e) of Interpretations and General Provisions Act). According to the decision of Hon. Justice Ong'udi in the case referred above, Section 23 of Interpretations and General Provisions Act, being provision of general application would not apply where there is a specific provision dealing with repealed law.

The EACC drew the Committee's attention to the transitional provisions in Section 71 of ACECA, which states:

> 71. Offences under the repealed Act
>
> (1) This section applies with respect to offences or suspected offences under the repealed Act committed before this Act came into operation.
>
> (2) This Act, other than Part V, applies, with any necessary modifications, with respect to offences described in subsection (1) and, for that purpose, such offences shall be deemed to be corruption or economic crimes.
>
> (3) For greater certainty, this section—
>
> (a) does not apply with respect to any act or omission that, at the time it took place, was not an offence; and

Therefore, in order to address the ambiguity in Section 27 (2) of the Bribery Act and which seems not to be cured by the proposed amendment it proposed the proposed amendment be deleted and substituted with the following;

> *"Any Investigation or prosecution or court proceedings instituted before the Commencement of the Bribery Act based on an offence under the Anti-Corruption and*

Economic Crimes Act 2003 shall be continued under the Anti-Corruption and Economic Crimes Act 2003."

Anjarwalla & Khanna Advocates proposed that section 27 (2) of the Bribery Act, 2016 is amended to read as follows:

"The Bribery Act shall not apply with respect to bribery offences or suspected bribery offences under the Anti-corruption and Economic Crimes Act, 2003 committed before the coming into force of the Bribery Act, 2016."

The rationale is that the proposed amendment seems to be a rectification of a presumed reference error to the Bribery Act, 2016 instead of the Anti-corruption and Economic Crimes Act 2003. The amendment, however, does not address concerns on the retrospective application of section 27 of the Bribery Act, 2016.

The **Law Society of Kenya** is of the same opinion as the above in that the amendments do not address the concerns on the retrospective application of section 27 of the Bribery Act.

(ii) Recommendation

The Committee recommends that an amendment be moved to section 27 by deleting subsection (2) and substituting therefor the following new subsection (2)-

Any Investigation or prosecution or court proceedings instituted before the Commencement of the Bribery Act based on an offence under the Anti-Corruption and Economic Crimes Act 2003 shall be continued under the Anti-Corruption and Economic Crimes Act 2003."

(iii) Rationale for the amendment

The proposed amendment will cure the issue of retrospective application of the Bribery Act to offences committed prior to its enactment. The amendment in the Bill as drafted does not address that issue hence the Committee proposed this amendment. The right to not be convicted for an offence that was not a crime at the time it was committed is in accordance with Article 50(2)(n) which provides that-

"Every accused person has the right to a fair trial, which includes the right-

.....

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not-

(i) a offence in Kenya; or

(ii) a crime under international law''