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REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY
PAPERS LAID
DATE: 7th MAY 2019 DAY
LAID BY: Hon. William Cheptumo
CLERK-AT-THE-TABLE: Mr. Mbolo

THE NATIONAL ASSEMBLY
TWELFTH PARLIAMENT – THIRD SESSION

THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT ON CONSIDERATION OF THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 2019

(NATIONAL ASSEMBLY BILLS No. 21)

VOLUME 1

DIRECTORATE OF COMMITTEE SERVICES
CLERK'S CHAMBERS
PARLIAMENT BUILDINGS
NAIROBI

May, 2019

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CHAIRPERSON'S FOREWORD

The Statute Law (Miscellaneous Amendments) Bill, 2019 (National Assembly Bills No. 21) was published on 29th March, 2019 and underwent First Reading in the National Assembly on 3rd April, 2019. 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 10th April, 2019 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 three (3) sittings considering the Bill during which submissions from stakeholders were considered. The Committee considered and unanimously adopted its report on 30th April, 2019. 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, 2019 (National Assembly Bills No. 21), 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. Environment and Natural Resources
4. Finance and National Planning;
5. Sports, Culture and Tourism;

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, 2019 (National Assembly Bills No. 21) pursuant to the provisions of Standing Order 199 (6).

Signed.....

HON WILLIAM CHEPTUMO, M.P.

Chairperson, Departmental Committee on Justice and Legal Affairs

This...07....**day of**...May...**2019**

PART 1

1. PREFACE

1.1. Mandate of the Committee

1. 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.

2. 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

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

No.	NAME	CONSTITU-ENCY	PARTY
1.	Hon. William Cheptumo, M.P. – ***Chairperson***	Baringo North	Jubilee
2.	Hon. Alice Muthoni Wahome, M.P. – ***Vice Chairperson***	Kandara	Jubilee
3.	Hon. John Olago Aluoch, M.P.	Kisumu West	ODM
4.	Hon. Roselinda Soipan Tuya, M.P.	Narok County	Jubilee
5.	Hon. Charles Gimose, M.P.	Hamisi	Ford Kenya
6.	Hon. William Kamoti Mwamkale, M.P.	Rabai	ODM
7.	Hon. Peter Opondo Kaluma, M.P.	Homa Bay	ODM
8.	Hon. Ben Orori Momanyi, M.P.	Borabu	Wiper Democratic Movement
9.	Hon. Johana Ng'eno, M.P.	Emurua Dikirr	KANU
10.	Hon. George Gitonga Murugara,	Tharaka	Democratic

	M.P.		Party
11.	Hon. Anthony Githiaka Kiai, M.P.	Mukurueni	Jubilee
12.	Hon. Gladys Boss Shollei, CBS, M.P.	Uasin Gishu County	Jubilee
13.	Hon. Beatrice Adagala, M.P.	Vihiga County	Amani National Congress
14.	Hon. Jennifer Shamalla, M.P.	Special Interests	Jubilee
15.	Hon. John Munene Wambugu, M.P.	Kirinyaga	Jubilee
16.	Hon. Japheth Mutai, M.P.	Bureti	Jubilee
17.	Hon. Adan Haji Yussuf, M.P.	Mandera West	Economic Freedom Party
18.	Hon. John Kiarie Waweru, M.P.	Dagoretti South	Jubilee
19.	Hon. Zuleikha Hassan, M.P.	Kwale County	ODM

1.3. Committee Secretariat

Mr. George Gazemba	-	Principal Clerk Assistant II
Mr. Denis Abisai	-	Principal Legal Counsel I
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. Hakeem Kimiti	-	Audio Officer

4. 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

5. 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 Kenya School of Law Act (No. 26 of 2012)
(ii) The Legal Education Act (No. 27 of 2012);
(iii) The Kenya Law Reform Commission Act (No. 19 of 2013);
(iv) The Companies Act (No. 17 of 2015);
(v) The Insolvency Act (No. 18 of 2015);
(vi) The Court of Appeal (Organisation and Administration) Act (No.28 of 2015);

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

6. The Bill proposes to amend section 4 to the Kenya School of Law Act, 2012, to remove the current exclusivity enjoyed by the Kenya School of Law and open up the licensing of other education providers to train persons to be admitted as advocates under the Advocates Act (Cap. 16). The proposed amendments also seek to delete the provisions hitherto empowering the Kenya School of Law to determine the admission requirements to the Advocates Training Programme as this is a function of the Council for Legal Education.

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

7. The Bill proposes 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 of the Advocates Training Programme in order to open allow other institutions to offer the programme.

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

8. The Bill seeks to amend the Act to give clarification on the composition of the Kenya Law Reform Commission, and on the authority mandated to appoint members of the Commission.

(iv) The Companies Act, 2015 (No. 17 of 2015)

9. The Bill seeks to amend the Act to require companies to keep a register of beneficial owners, and to provide for the particulars to be included in the register. The Bill further seeks to provide for the convening of annual general meetings by registered companies, and for the manner in which directors of a company may allot shares in a company or convert shares of the company into security.

10. The Bill further seeks to amend the Act to reduce the percentage of shares acquired by an offeror which may trigger "squeeze-in and sell-out" of minority shareholders from from ninety to fifty per cent.

(v) The Insolvency Act, 2015 (No. 18 of 2015)

11. The Bill seeks to amend the Act to specify matters a court may take into consideration in granting an approval for the lifting of a moratorium.

(vi) The Court of Appeal (Organisation and Administration) Act, 2015 (No. 28 of 2015)

12. The Bill seeks to amend the Act to provide for the period during which the Court of Appeal will be proceeding on vacation.

13. The Bill does not concern county governments within the meaning of Article 110 of the constitution. The enactment of the Bill shall not occasion expenditure of public funds.

2.2 PUBLIC PARTICIPATION IN THE REVIEW OF THE BILL

14. 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''

15. 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''

16. In line with the Constitution and Standing Orders, the National Assembly in the local daily newspapers of April 10th 2019 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.

17. The Committee received written submissions on the proposed amendments to the following statutes-

(i) The Kenya School of Law Act (No. 26 of 2012)
(ii) The Legal Education Act (No. 27 of 2012);
(iii) The Companies Act (No. 17 of 2015);

18. The following stakeholders submitted written submissions -

(i) Bowmans (Coulson Harney LL.P law firm);
(ii) Council of Legal Education and the Kenya School of Law;
(iii) The Institute of Certified Secretaries; and
(iv) Ms. Tyler Hawi Ayah.

The written submissions received are contained in annexure 3 of this report.

PART 3

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

19. Having considered the Bill, clause by clause, the Committee made the following recommendations including amendments to be moved during the Committee of the whole House –

3.1. THE KENYA SCHOOL OF LAW ACT (NO. 26 OF 2012)

3.1.1. Proposed amendment to section 4(2) of the Act

20. **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''

(i) Stakeholders' submissions

21. The Council of Legal Education and the Kenya School of Law (through a Joint Memorandum) made the following submissions:

(a) Section 4 of the Act should not be amended because the provisions of section 4(2)(a) are the core mandate of the Kenya School of Law, that is, to train persons to be advocates under the Advocates Act;

(ii) Committee's Observation

22. The Committee observed as follows-

(a) The proposed amendments to the Kenya School of Law Act (No. 26 of 2012) were also included in the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bills No. 12) and in its Report to the House, the Committee recommended that all the amendments to the Act be rejected;

(b) From the Joint Memorandum of the Council of Legal Education and the Kenya School of Law both institutions oppose the amendment to section 4(2) since the amendment will take away the core mandate of the School: to train persons to be advocates under the Advocates Act;

(c) The amendment will leave a lacuna in the training of persons to be advocates in Kenya as no institution will have that mandate until it has been accredited by the Council of Legal Education as envisaged in the proposed amendments to the Legal Education Act;

(d) The Taskforce on Legal Sector Reforms constituted by the Hon. Attorney-General on 26th September 2016 had terms of reference which included, among others, the suitability and quality of legal education and professional legal training, curriculum, standards, entry qualification criteria, and delivery systems; the legal and institutional frameworks for regulating and licensing legal education providers;

(e) The Taskforce had completed its work but the Committee was not aware of the recommendations it made as regards the training of persons seeking to become advocates in Kenya;

(f) The Committee, in its report on the Statute Law (Miscellaneous Amendments) 2018 (National Assembly Bills No. 12) rejected the amendments.

(iii) Committee's Recommendation

23. The Committee recommends that the amendments to the Act be rejected

(iv) Rationale for the rejection

24. 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 had constituted a Taskforce on legal sector reforms that was to address the challenges on liberalisation of training of Advocates and admission requirements, which the Bill seeks to address were part of the terms of reference of the Taskforce.

(c) The Taskforce had completed its work but the Committee was not aware of any of the recommendations it made as it had not been served with a copy of the Report ;

(d) There is need to urgently address the issues in the Bill but this should be done through substantive amendments to the relevant statutes and Regulations.

3.1.2. Proposed amendment to section 16 of the Act

25. **Section 16**

Delete

(i) Stakeholders submissions

26. **The Council of Legal Education and the Kenya School of Law (through a Joint Memorandum)** made the following submissions-

(a) Section 16 of the Act should be amended by deleting the words "set out in the Second Schedule for that course" appearing immediately after the words "admission requirements" and substituting therefore the words "prescribed by the Council of Legal Education".

(b) The rationale for this amendment is that following the proposed amendments to centralise admission requirements to the Advocates Training Programme under the Legal Education Act and its Regulations, it then becomes necessary to reword the provisions of Section 16 to accord with the mandate of the CLE under the Legal Education Act

(ii) Committee's observations

27. The Committee observed as follows-

(a) The proposed amendments to the Kenya School of Law Act (No. 26 of 2012) were also included in the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bills No. 12) and in its Report to the House, the Committee recommended that all the amendments to the Act be rejected;

(b) From the Joint Memorandum of the Council of Legal Education and the Kenya School of Law, both institutions are of the view that section 16 of the Act should be amended to provide that admission requirements shall be prescribed by the Council of Legal Education and not as prescribed under the Second Schedule of the Kenya School of Law Act;

(c) The proposals by the Kenya School of Law and the Council of Legal Education that section 16 of the Act be amended run contrary to the proposal in the Bill that section 16 be deleted;

(d) The anchorage of admission requirements to the ATP in an Act of Parliament is a tested and important policy strategy in regulating entry into the legal profession and great caution should be exercised before relegating that mandate to regulations to made by the Council of Legal Education;

(iii) Committee's recommendations

28. The Committee recommends that the amendments to the Act be rejected

(iv) Rationale for rejection

29. 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 had constituted a Taskforce on legal sector reforms that was to address the challenges on liberalisation of training of Advocates and admission requirements, which the Bill seeks to address were part of the terms of reference of the Taskforce;

(c) The Taskforce had completed its work but the Committee was not aware of any of the recommendations it made as it has not been served with a copy of the Report;

(d) There is need to urgently address the issues in the Bill but through substantive amendments to relevant statutes and Regulations.

3.1.3. Proposed amendment to Second Schedule of the Act

30. **Second Schedule**

Delete

(i) Stakeholders submissions

31. **The Council of Legal Education and the Kenya School of Law (through a Joint Memorandum)** made the following recommendations-

(a) The Second Schedule should be amended by deleting paragraph (a) and (b). The justification for the amendment is that the provisions of the Second Schedule of the Kenya School of Law Act relate to admission requirements which it is proposed in the Bill that they be anchored in the Legal Education Act 2012.

(ii) Committee's observations

32. The Committee observed as follows-

(a) The proposed amendments to the Kenya School of Law Act (No. 26 of 2012) were also included

in the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bills No. 12) and in its Report to the House, the Committee recommended that all the amendments to the Act be rejected;

(b) That the Second Schedule sets out the admission requirements to the Advocates Training Programme as follows-

(1) A person shall be admitted to the School if:

(a) having passed the relevant examination of any recognized university in Kenya holds, or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) of that university; or

(b) having passed the relevant examinations of a university, university college or other institutions prescribed by the Council of Legal Education, holds or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) in the grant of that university, university college or other institution-

(i) attained a minimum entry requirements for admission to a university in Kenya;

(ii) obtained a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent; and

(iii) has sat and passed the Pre-Bar examination set by the School.

(c) That the High Court of Kenya in **Petition No. 398 of 2017** **Adrian Njenga versus the Kenya School of Law** interpreted the meaning of the above Second Schedule to the effect that the students who had attended University studies in

Kenya and had obtained the minimum entry requirements as set out in the Schedule were exempted from sitting for the Pre-Bar examination. The School had interpreted the provision as requiring all students to attend the Pre-Bar Examination;

(d) The anchorage of admission requirements to the ATP in an Act of Parliament is an important policy strategy in regulating entry into the legal profession and great caution should be exercised before relegating that mandate to regulations to made by the Council of Legal Education;

(e) That it is important to safeguard the requirement in the Second Schedule to the Act that persons seeking admission to the ATP must hold bachelor's degrees in law from recognized universities and also that such persons must meet the minimum academic requirements for admission to a public university in Kenya;

(f) The requirement that persons seeking entry to the ATP must hold bachelors degrees in law is an important public safeguard from law schools which may admit persons without the degree into the ATP and yet the persons will be left in a professional jungle after completion of the programme because they can not be admitted as advocates by virtue of the provisions of section 13 of the Advocates Act which stipulates that one can not be admitted as an advocate without having qualified for the conferment of a degree in law;

(iii) Committee's recommendations

33. The Committee recommends that the amendments to the Act be rejected

(iv) Rationale for rejection

34. 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 had constituted a Taskforce on legal sector reforms that was to address the challenges on liberalisation of training of Advocates and admission requirements, which the Bill seeks to address were part of the terms of reference of the Taskforce;

(c) The Taskforce had completed its work but the Committee was not aware of any of the recommendations it made as it has not been served with a copy of the Report;

(d) There is need to urgently address the issues in the Bill but through substantive amendments to relevant statutes and Regulations.

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

3.2.1. Proposed amendment to section 8(1) of the Act

35. 34. Insert the following new paragraph immediately after paragraph (f) -

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

Stakeholders' submissions

36. The Council of Legal Education and the Kenya School of Law (through a Joint Memorandum) proposed an amendment to insert the words "for candidates who hold foreign qualifications in law" at the end of the proposed new paragraph. The rationale for their amendment is that the Bill proposes to regularize the administration of the pre bar examinations for entry to the advocates training programme.

37. **Ms. Tyler Hawi Ayah, a student at Riara University,** opposed the amendment and relied on the case of *Adrian Kamotho Njenga v Kenya School of Law* (Petition No. 398 of 2017) where the High Court had held that students who had attended University studies in Kenya and had obtained the minimum entry requirements as set out in the Second Schedule of the Kenya School of Law Act (No. 26 of 2012) were exempted from sitting for the Pre-Bar examination. The School had interpreted the

provision as requiring all students to attend the Pre-Bar Examination. Ms. Tyler contended that if the proposed amendment is enforced, thus reinforcing the pre-bar requirement, the existence of the *Adrian Kamotho Njenga* case will mean the existence of unreasonable and unjustified discrimination not just to students who studied law locally but also to foreign students. Ms. Tyler proposes that there are less restrictive means of achieving the purpose of conducting pre-Bar examination to foreign students: one, the mandatory requirement that foreign students submit their documents to Council of Legal Education for recognition; and two, the requirement that foreign students submit their documents to Kenya National Qualifications Authority for equation of their certificates to the Kenyan system's equivalent.

(i) Committee's observations

38. The Committee observed as follows-

(a) That Parliament had in 2014 vide the Statute Law (Miscellaneous Amendments) Act, No. 18 of 2014, amended the Second Schedule to make the Pre-Bar Examination mandatory for all candidates seeking admission to the ATP;

(b) That the High Court of Kenya in **Petition No. 398 of 2017 Adrian Njenga versus the Kenya School of Law** interpreted the meaning of the amended Second Schedule to the effect that students who had attended University studies in Kenya and had obtained the minimum entry requirements as set out in the Schedule were exempted from sitting for the Pre-Bar examination;

(c) That the submissions by the CLE and the KSL were that the Pre-Bar examination be done only by candidates who hold foreign degrees in law only;

(d) That subjecting only holders of foreign law degrees to the Pre-Bar Examination will amount to unjustified discrimination against the prospective ATP students who attended foreign law schools;

(e) The amendment is an important mechanist to sieve and determine the suitability of candidates seeking admission to the ATP;

(f) The Pre-Bar Examination should be made compulsory to all candidates seeking admission to the ATP;

(ii) Committee's recommendations

39. The Committee recommends that the amendments to the Act be rejected

(iii) Rationale for rejection

40. 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 had constituted a Taskforce on legal sector reforms that was to address the challenges on liberalisation of training of Advocates and admission requirements, which the Bill seeks to address were part of the terms of reference of the Taskforce;

(c) The Taskforce had completed its work but the Committee was not aware of any of the recommendations it made as it has not been served with a copy of the Report;

(d) There is need to urgently address the issues in the Bill but through substantive amendments to relevant statutes and Regulations.

3.2.2. <u>Proposed amendment to section 8(2) of the Act</u>

41. 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

42. **The Council of Legal Education and the Kenya School of Law (through a Joint Memorandum)** proposed an amendment to delete the proposed new paragraph (aa) and to amend the existing paragraph (a) by inserting the words "of the Advocates Training Programme" immediately after the words "for the purpose of licensing". The existing paragraph (a) provides for "accreditation of legal education providers for the purposes of licensing". The justification that was given for the amendment is that the Bill proposes to give the Council the mandate to license legal education providers to offer the Advocates Training Programme in Kenya.

(ii) Committee's observations

43. The Committee observed as follows-

(a) The amendment seeks to liberalise the training of advocates by empowering the Council for Legal Education to accredit institutions to offer the programme, a responsibility currently exclusively vested in KSL;

(b) That the KSL and CLE were in support of the amendments but suggested an alternative drafting approach to the issue;

(c) The amendment seeks to grant the CLE an unfettered discretion to accredit legal education providers to offer the ATP and there is need for proper safeguards to be put in place before the mandate is operationalized.

(d) The amendment will leave a lacuna in the training of persons to be advocates in Kenya as no institution will have that mandate until it has been accredited by the Council of Legal Education as envisaged in the proposed amendments to the Legal Education Act

(iii) Committee's recommendations

44. The Committee recommends that the amendments to the Act be rejected

(iv) Rationale for rejection

45. 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 had constituted a Taskforce on legal sector reforms that was to address the challenges on liberalisation of training of Advocates and admission requirements, which the Bill seeks to address were part of the terms of reference of the Taskforce;

(c) The Taskforce had completed its work but the Committee was not aware of any of the recommendations it made as it has not been served with a copy of the Report;

(d) There is need to urgently address the issues in the Bill but through substantive amendments to relevant statutes and Regulations.

3.2.3. Proposed amendment to section 8(3) of the Act

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

(i) Stakeholders' submissions

47. **The Council of Legal Education and the Kenya School of Law (through a Joint Memorandum)** agreed to the proposed amendment. The justification given was that the Bill proposes to require the Council of Legal Education to set standards for all legal education and training programmes in Kenya.

(ii) Committee's observations

48. The Committee observed as follows-

(a) The 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;

(b) 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;

(c) The anchorage of admission requirements to the ATP in an Act of Parliament is an important policy strategy in regulating entry into the legal profession and great caution should be exercised before relegating that mandate to regulations to made by the Council of Legal Education;

(d) That it is important to safeguard the requirement in the Second Schedule to the Act that persons seeking admission to the ATP must hold bachelor's degrees in law from recognized universities and also that such persons must meet the minimum academic requirements for admission to a public university in Kenya;

(e) The requirement that persons seeking entry to the ATP must hold bachelors degrees in law is an important public safeguard from law schools which may admit persons without the degree into the ATP and yet the persons will be left in a professional jungle after completion of the programme because they can not be admitted as advocates by virtue of the provisions of section 13 of the Advocates Act which stipulates that one can not be admitted as an advocate without having qualified for the conferment of a degree in law;

(iii) Committee's recommendations

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

(iv) Rationale for the rejection

50. 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 AG had constituted a Taskforce on legal sector reforms that was to address the challenges on liberalisation of training of Advocates and admission requirements, which the Bill seeks to address were part of the terms of reference of the Taskforce;

(c) The Taskforce had completed its work but the Committee was not aware of any of the recommendations it made as it has not been served with a copy of the Report;

(d) There is need to urgently address the issues in the Bill but through substantive amendments to the relevant statutes and Regulations.

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

3.3.1. Proposed amendment to section 8(1)(b) of the Act

51. Delete the expression "Cabinet Secretary" and substitute therefor the expression "Attorney-General".

(i) Rationale for the amendment

52. Section 8 of the Kenya Law Reform Commission Act (No. 19 of 2013) provides for the composition of the Commission. The amendment to section 8(1) (b) is to assign appointive power to the AG and not the Cabinet Secretary.

(ii) Stakeholder's submissions

The Committee did not receive any views from Stakeholders.

(iii) Committee's observations

53. The Committee observed as follows-

(a) Section 2 of the Kenya Law Reform Commission Act defines "Cabinet Secretary" to mean the Cabinet Secretary for the time being responsible for matters relating to law reform;

(b) Kenya has not had a Cabinet Secretary for matters relating to law reform, justice, and other functions which would have been traditionally performed by that Cabinet Secretary;

(c) Various Acts of Parliament make reference to Cabinet Secretary to mean the Cabinet Secretary for the time being responsible for matters relating to justice and these Acts

include, among others, the Legal Aid Act (No. 6 of 2016), Legal Education Act (No. 27 of 2012);

(d) In Petition 238 of 2016, *George Bala versus Attorney-General* [2017] eKLR, the Petitioner had challenged the President's executive order where the Attorney-General had been assigned portfolio responsibilities and functions relating to the Council of Legal Education. The Court made a declaration that that whereas the respondent the Attorney General, is a member of the Cabinet, he is not a Cabinet Secretary and therefore cannot, where to do so would be contrary to an Act of Parliament, perform or purport to perform the functions specifically reserved for a Cabinet Secretary under any piece of legislation;

(e) Under the current section 8(1) of the Kenya Law Reform Commission Act, the Attorney-General has the power to appoint several other members;

(f) Under the Interpretations and General Provisions Act (Cap. 2), there are two terms that have been defined: "Cabinet Secretary" and "the Cabinet Secretary" as follows—

"Cabinet Secretary" means a person appointed as a Cabinet Secretary of the Government of Kenya under the Constitution;

"the Cabinet Secretary" means the Cabinet Secretary for the time being responsible for the matter in question, or the President where executive authority is retained by him:

Provided that for the purposes of the administration of laws relating to the legal sector, the expression shall, subject to any assignment under Article 132 (3) (c) of the Constitution, include the Attorney-General.

However, under the Kenya Law Reform Commission Act, the term defined is "Cabinet Secretary" and not "the Cabinet Secretary".

(g) Although the amendment seeks to vest appointive powers to the Attorney-General, the Kenya Law Reform Commission Act should be amended substantively to resolve a number of issues including:

a. Resolving the interpretational challenges in the definition of the term "Cabinet Secretary" by amending the section 2 of the Kenya Law Reform Commission Act;
b. Addressing references to the Cabinet Secretary in the Act vis-à-vis the role of the Attorney-General in the Act.

(iv) Committee's recommendations

54. The Committee recommends that the proposed amendment be rejected.

(v) Rationale for the rejection

55. The Committee rejected the amendment for the following reasons:

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

(b) A substantive amendment would address the lacuna that the amendment seeks to fill while at the same time addressing and clarifying the role of the Cabinet Secretary and the references made in the Act instead of piece-meal amendments.

(c) Although in the *George Bala* case, the case concerned a challenge raised on the President's executive order where the Attorney-General had been assigned portfolio responsibilities and functions relating to the Council of Legal Education, and the amendment seeks to respond to this, the amendment may still be challenged in court if the role of the Cabinet Secretary is not addressed through substantive amendments and not miscellaneous amendments.

3.3.2. Proposed amendment to section 8(1)(c) of the Act

56. Delete and substitute therefor the following new paragraphs—

"(c) one member, being an Advocate of the High Court of Kenya, nominated by the Law Society of Kenya and appointed by the Attorney-General;

(ca) one member, being an officer in the Office of the Attorney-General, appointed by the Attorney-General."

(i) Rationale for the amendment

57. Section 8 of the Kenya Law Reform Commission Act (No. 19 of 2013) provides for the composition of the Commission. The amendment seeks to clarify on the composition of the Kenya Law Reform Commission.

(ii) Stakeholder's submissions

58. The Committee did not receive any views from Stakeholders.

(iii) Committee's observations

59. The Committee made the following observations-

(a) Section 8(1)(c) of the Act provides for "two persons appointed by the Attorney General, of whom one shall be an advocate of the High Court of Kenya nominated by the Law Society of Kenya, and the other an officer in the Office of the Attorney General";

(b) The amendment is not substantive but has been redrafted by splitting the provision into two paragraphs in order to provide clarity.

(iv) Committee's recommendation

60. The Committee agrees to the proposed amendment because it is not substantive and provides clarity on the composition of the Commission under paragraph (c).

3.3.3. Proposed amendment to section 8(4) of the Act

Delete

(i) Rationale for the amendment

61. The amendment seeks to delete subsection (4) of section 8 because the subsection has been rendered superfluous by virtue of

the amendments proposed to the previous section 8(1). Subsection 4 makes reference to officers from the Office of the Attorney-General in relation to members referred to in subsection (1) (b) and (c). The members in paragraphs (b) and (c) are members appointed through an open and competitive process and another nominated by the LSK respectively.

(ii) Stakeholders submissions

62. The Committee did not receive any views on the proposed amendment.

(ii) Committee's Observations

63. The Committee made the following observations:

(a) The proposed deletion of section 8(4) of the Act is not substantive and corrects an error since it provides that the members referred to in paragraphs (b) and (c) in subsection (1) shall be officers from the Office of the AG or the respective State Department, as the case may be, and a representative from the Law Society of Kenya; and

(b) The proposed deletion of section 8(4) in line with the amendment to section 8(1) (c) which the Committee has agreed to renders subsection (4) nugatory.

(iii) Committee's Recommendation

64. The Committee agrees to the proposed deletion of section 8(4) because it seeks it is superfluous when read together with section 8 1(a) and (b) of the Act.

3.3.4. Proposed amendments to section 11(9) of the Act

65. Delete

(i) Rationale for the amendment

66. Section 11 of the Act provides for the appointment of chairperson and members. Section 11(9) which is proposed to be deleted provides that "until after the first general elections under the Constitution, the President shall, in the appointment of chairperson or members of the Commission, consult the Prime Minister".

(ii) Stakeholders submissions

67. The Committee did not receive any views from stakeholders.

(iii) Committee's observations

68. The current section 11(9) of the Act is redundant by virtue of effluxion of time and should be deleted.

(iv) Committee's Recommendation

69. The Committee recommends that the proposed amendments be agreed to.

3.4. THE COMPANIES ACT, 2015 (NO 17 OF 2015)

3.4.1. Proposed amendment to section 9(1) (a) of the Act

70. Insert the following new sub-paragraph immediately after sub-paragraph (iii) —

> "(iv) requires the consent of all members to add a new member."

(i) Stakeholders submissions

71. **Bowmans** opposed the amendment for various reasons:

(a) The proposed new extension to the definition of a private company is unconventional and impractical;

(b) The onus for the determination of the type of consent (ordinary, special or unanimous) required to effect an admission of a new member/investor by way of transfer of shares or subscription for shares/equity is a matter solely to be determined by a company's members in its articles of association. Private companies opted to delegate that power to boards of directors.

(c) The Companies Act, 2015 cannot purport to legislate the internal workings of a company to the exclusion of the doctrines of freedom of association

and privity of contract that have underpinned private company formation for centuries;

(d) The amendment vacates the power of the board of directors , if given the authority by the Articles of Association or by resolution of the members (as currently provided in the Companies Act) to approve transfers of shares and allotment of shares to a new member by requiring that the company at general meeting must unanimously approve that transfer or allotment of shares to a new member.

(e) Large portions of the powers of directors will become redundant and unworkable in the Companies Act if this new definition is approved;

(f) The amendment has the practical and legal effect that one person holding only one share can veto the admission of new members who may be intending to invest large sums for the development of the company and the situation where members of a private company disappear or die would greatly complicate this— making it impossible to develop the company while it subsists;

(g) Where shares are held by nominees or by other companies this would require that consent of persons in those entities must be obtained before the right can be exercised— again greatly and unnecessarily complicating the operation of private companies;

(h) The provision is a deterrent to investment and will be harmful to Kenya's economic and development agenda.

72. The Institute of Certified Secretaries opposed the amendment for the following reasons:

(a) The proposal uses the words "new member" which is not defined in the Act. There is only a passing reference of the same in the title of section 901. It is not used

anywhere in the Companies Act including in the contents of the said section 901 hence it is misplaced.

(b) The intention of the proposal is practically impossible which will lead to legal absurdity for reasons that the expectations for unanimity or consent of all members may not be attainable. That is why there are provisions in the Companies Act dealing with how decisions are carried out by members whether simple majority through ordinary resolution or defined super majority which is above the simple majority (most often put at 75% or such other higher number than 50%). Unanimity will always lead to deadlocked positions in companies which may have adverse consequences in the commercial world and may lead to disputes arising from deadlock in the running of companies.

(c) In the alternative, should this provisions be retained, then it should be amended to provide as follows: "restrict the addition of a new member". In our opinion this will accommodate other provisions in the Çompanies Act such as section 329 which provide for procedure of allotment whose consequences may include new members being added.

(d) The requirement for consent of all members is likely to cause a lot of hardship and burden on running of businesses.

(e) As a matter of comparative analysis, some of the progressive jurisdictions including South Africa and UK from where our Companies Act was borrowed heavily do not have such restrictive requirements.

(ii) Committee's observations

73. The Committee made the following observations:

(a)The amendment seeks to amend section 9(1)(a) of the Act in the description of private companies and makes it a feature of a private company that it shall require the consent of all members to add a new member.

(b) The proposed amendment is substantive and should not have been moved through miscellaneous amendments;

(c) The submissions by Bowmans and the Institute of Certified Secretaries raise pertinent legal challenges that may arise if the amendment is passed;

(d) The requirement of consent of all members of a private company in order for a new member to be added to the private company is onerous whereas there are no justifiable reasons for such a requirement;

(e) The amendment, if approved, will necessitate amendments to other provisions in the Companies Act.

(iii) Committee's Recommendation

74. The Committee recommends that the proposed amendment be rejected.

(iv) Rationale for rejection

75. The Committee rejected the proposed amendment for the following reasons:

(a) The proposed amendment is substantive and should not have been moved through miscellaneous amendments;

(b) The amendment triggers pertinent legal challenges that may arise if the amendment is passed;

(c) The requirement of consent of all members of a private company in order for a new member to be added to the private company is onerous whereas there are no justifiable reasons for such a requirement;

(d) The amendment, if approved, will necessitate amendments to other provisions in the Companies Act.

3.4.2. Proposed amendment to section 93(1) of the Act

76. Delete the expression "which shall include information relating to beneficial owners of the company, if any".

(i) Stakeholders submissions

77. **Bowmans** agreed to the proposed amendment as it reverts to the original wording of section 93(1) under the Companies Act.

(ii) Committee's observations

(a) The amendment seeks to amend subsection (1) to remove references to a register of beneficial owners which is being provided for separately in the proposed New Section 93A;

(b) Section 93 of the Companies Act provides for a company's obligation to keep register of members.

(iii) Committee's Recommendation

78. The Committee recommends that the proposed amendment be agreed to.

3.4.3. Proposed amendment to section 93(2) (c) of the Act

79. Delete

(i) Stakeholders submissions

80. **Bowmans** opposed the amendment for the following reasons:

(a) The removal of the requirement to enter the date on which a shareholder ceases to be a shareholder in the register of records will create disparity in the company's books that are unclear;

(b) The register of members is relied upon by the Registrar of Companies, the courts, officers, members of the company and members of the public who may rely on the register to determine who the current members of the company are;

(c) The register of members is prima facie evidence of all matters stated in section 105 of the Companies Act, 2015, including title to the shares. This therefore requires that the register of members should be a complete record and a 'one-stop shop' record for all matters relating to the shareholding of the company.

(ii) Committee's observation

81. The Committee made the following observations:

(a) The Bill proposes amendment of section 93(2)(c) of the Act to remove the requirement that a company shall enter in its register of members the date on which any person ceased to be a member;

(b) The proposed amendment removes the utility of having record of the date on which any person ceased to be a member of a company;

(c) Owing to the reasons given by Bowmans' opposition of the amendment, the requirement to keep a record on the date on which any person ceased to be a member of a company should be retained.

(iii) Committee's recommendation

82. The Committee recommends that the proposed amendment be rejected.

(iv) Rationale for rejection

83. The Committee rejected the proposed amendment for the following reasons:

(a) The proposed amendment removes the utility of having record of the date on which any person ceased to be a member of a company;

(b) The information on when a person ceased to be a member of a company helps the Registrar of Companies, the court, officers, members of the company and members of the public to determine current members of a company;

(c) Section 105 of the Companies Act provides that the register of members of a company is evidence of the matters required or authorised to be included in it and therefore having all the necessary information, including date of cessation of membership, is important.

3.4.4. Proposed amendment to section 93(8) of the Act

84. Delete the expression "which shall include information relating to beneficial owners of the company, if any".

(i) Stakeholders submissions

85. **Bowmans** agreed to the proposed amendment as it reverts to the original wording of section 93(1) under the Companies Act.

(ii) Committee's observations

(a) The amendment seeks to amend subsection (8) of section 93 of the Act to remove references to a register of beneficial owners which is being provided for separately in the proposed New Section 93A.

Section 93 of the Companies Act provides for a company's obligation to keep register of members.

(iii) Committee's Recommendation

86. The Committee recommends that the proposed amendment be agreed to.

3.4.5. Proposed new section 93A to the Act

87. Insert the following new section immediately after section 93—

Division 2A — Register of Beneficial Owners

Company to keep register of beneficial owners.

93A. (1) Every company shall keep a register of its beneficial owners.

(2) A company shall enter in its register of beneficial owners, information relating to its beneficial owners as prescribed in the regulations.

(3) A company shall lodge with the Registrar a copy of its register of beneficial owners, within thirty days after completing its preparation.

(4) A company other than a public listed company shall lodge with the Registrar a copy of any amendment to its register of beneficial owners within fourteen days after making

(i) Stakeholders submissions

the amendment.

(5) If a company fails to comply with a requirement of this section, the company, and each officer of the company who is in default, commit an offence and on conviction are each liable to a fine not exceeding five hundred thousand shillings.

(6) If, after a company or any of its officers is convicted of an offence under subsection (5), the company continues to fail to comply with the relevant requirement, the company, and each officer of the company who is in default, commit a further offence on each day on which the failure continues and on conviction are each liable to a fine not exceeding fifty thousand shillings for each such offence.

88. **Bowmans** agreed to the proposed amendment as the proposed new section creates a different regime for the register of beneficial ownership from the general register of members under section 93 of the Companies Act. However, they observed that subsection (2) requires there to be Regulations which have not been published and until they are, they propose that the section should be suspended. They also observe that the new section as well as the regulations should be introduced in a measured manner as there are still a number of concerns around the draft regulations being considered. They pointed out their concerns to include:

i. The non-inclusive nature of the definition of a beneficial owner which does not consider listed companies;

ii. The level of disclosure and who it is applicable to needs to be carefully considered (disclosure of private information which is protected under the

Constitution, data of children and foreign citizens);

iii. Disclosure thresholds;

iv. Capacity of the Companies Registry to enforce the proposed provisions as it is not a law enforcement agency but a collator of information;

v. Adequacy of information requested. It is not possible for the law to fully define what information is needed for law enforcement agencies to effect investigations on beneficial ownership;

vi. Lack of clarity with respect to the information requested in the draft forms;

vii. Duplicity of information; and

viii. The possible extraterritorial effect of the law

(ii) Committee's observations

89. The Committee made the following observations:

(a) The proposed new section 93A seeks to provide for the register of beneficial owners separate from the general register of members under section 93 of the Companies Act. The proposed new section 93A is also tied up to amendments to subsections (1) and (8) of section 93 which had references of the register including information relating to beneficial owners of the company;

(b) A separate register of beneficial owners from the general register of members unlike in the current state where it is mixed, will provide uncluttered reference for any persons who might need the information;

(c) Subsection 2 in the proposed new section provides an opportunity for regulations to be made on the kind of information to be entered for beneficial owners and Regulations may not be made unless such a power is provided for in the parent Act;

(iv) Committee's Recommendation

90. The Committee recommends that the proposed amendment be agreed to.

3.4.6. Proposed new section to the Act

91. Insert the following new section immediately after section 275—

"Annual General Meeting"

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

(2) Subsection (1) does not apply to single member companies.

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

(4) A company that fails to comply with this section commits an offence and is liable to a fine not exceeding one hundred thousand shillings"

(i) Stakeholders submissions

92. **Bowmans** opposed the amendment for the following reasons:

(a) The Companies Act at present does not compel private companies to hold an AGM in every year. A private company is at liberty to call for a general meeting and/or create a requirement to have the general meeting in every year under its articles of association;

(b) The requirement for a general meeting was repealed by the Companies Act, 2015 when the compulsory business to be transacted at the AGM, which was a mainstay under the repealed Companies Act (Cap. 486) was no longer required under the Companies Act, 2015;

(c) There is no longer compulsory business to be transacted at a general meeting for a private company as

would be the case if the small companies exception on preparing annual accounts were to be applied;

(d) Only public companies are mandated to have the general meeting because the Companies Act prescribes mandatory business that must be transacted at the general meeting including the appointment of directors, approval of financials, fixing of remuneration of auditors, considering auditors report, directors report, etc;

(e) The requirement for private companies to have a general meeting also fell away when the written resolutions of shareholders were recognised under the Companies Act which suffice for the shareholders to pass any business they wish in the interests of the company. This ensures that the management of the company as a private enterprise is retained by its members and management;

(f) The original intention behind the Companies Act not requiring an AGM or compulsory business to be transacted at an AGM was to ease the cost and administrative burden on private companies and promote ease of doing business in Kenya.

(g) There is no practical efficacy to legislate annual general meetings in a private company as it reintroduces cost and delay for private business.

93. **The Institute of Certified Secretaries** agreed to the proposed new section because it seeks to give greater clarity.

(ii) Committee's observations

The Committee observed as follows-

(a) The proposed new section 275A requires all registered companies (except single member companies) to convene annual general meetings once a year.

(b) The proposed new section 275A to the Companies Act, 2015 was also included in the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bills No. 12) and in its Report to the House, the Committee recommended that the proposed new section 275A to the Act be rejected;

(c) The 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;

(d) Section 310 of the Companies Act provides for convening of meetings as mandatory for public companies and the penalty for a defaulting company and its officers is set at a fine not exceeding one million shillings.

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

(f) The reasons given by Bowmans opposing the proposed new section 275A were compelling and in tandem with the Committee's reasons for rejection of the proposed new section in its report to the House in 2018;

(g) 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) Committee's Recommendation

94. The Committee recommends that the provision be rejected.

(iv) Rationale for the rejection

95. 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.

3.4.7. Proposed amendment to section 329(1) of the Act

96. "(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.

(i) Stakeholders submissions

97. **Bowmans** opposed the proposed amendment for the following reasons:

(a) there is no apparent or immediate need to delete the authorization for allotment from the articles of association;

(b) Most companies formed in Kenya, including those that have adopted the Model Articles of Association in the Companies Act, 2015, make provision for allotment by directors. This allows for expediency in the management of the company by giving the directors authority to issue and allot shares as per the articles of association without having to revert to the shareholders for authority to issue and allot further shares.

98. **The Institute of Certified Secretaries** opposed the proposed amendment for the following reasons-

(a) There will be an internal inconsistency with section 329 (3) (b) (i) of the Act if the proposed amendment to section 329 is carried since section 329(3) (b) (i) refers to the authorization derived from the company's Articles of Association;

(b) Section 329 was lifted verbatim from section 551 of the UK Companies Act 2006; as a matter of practice, whatever apprehension that may arise (whether held by the Registrar or any other party) by retaining the authorisation from the Articles (i.e by retaining the section as it is) can be cured by the Registrar giving practice directions which require that a resolution of both the members and the Board be provided for purposes of allotment

99. **The Institute of Certified Secretaries** proposed the following: either the amendment be rejected or if it is retained, then section 329(3) (b) (i) should be deleted. They have also proposed that the words "only if they are authorised to do so by a resolution of the company" should be separate from paragraph (b) so that the expression should apply to both paragraphs (a) and (b).

(ii) Committee's Observation

100. The Committee made the following observations:

(a)The amendment seeks to limit the circumstances under which directors of a company may allot shares in a company or convert shares of the company into security only if they are authorised to do so by a resolution of the company;

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

(c) The proposed amendment removes the option of the Articles of Association of a company authorizing the allotment of shares;

(d) There is no apparent or immediate need to remove the option of authorization for allotment from the articles of association of a company;

(e) The amendment will necessitate an amendment to section 329(3)(b)(i) so as to cure the internal consistency since the provision refers to authorization from the company's Articles of Association.

(iii) Committee's Recommendation

101. The Committee recommends that the amendment be rejected.

(iv) Rationale for rejection

102. The Committee rejected the proposed amendment for the following reasons:

(a) The existing provision provides the directors of a company the power to allot shares in the company if either they are authorized to do so by a resolution of the company or if the Articles of Association of the company do so, an option which provides flexibility in the operations of the company;

(b) The proposed amendment removes the option of the Articles of Association of a company authorizing the allotment of shares and it will be a requirement for the directors to revert to shareholders to get authority to issue and allot further shares;

(c) There is no apparent or immediate need to remove the option of Articles of Association of a company authorizing the allotment of shares;

(d) The amendment will necessitate an amendment to section 329(3)(b)(i) so as to cure the internal consistency since the provision refers to authorization from the company's Articles of Association.

3.4.8. Proposed amendment to section 329(2) of the Act

103. Delete the words "and may be unconditional or subject to conditions".

(i) Stakeholders submissions

104. **Bowmans** opposed the proposed amendment because the shareholders of a company, as the owners of the company, are allowed to delegate any power or action to the board as well as direct the conditions, if any, under which shares in the company may be allotted by the board of directors. This power, Bowmans contended, cannot be derogated by statute and therefore the deletion is not well considered and should be struck from the Bill.

(ii) Committee's Observation

105. The Committee made the following observations:

(a) The amendment seeks to delete the latter part of the provision in section 329(2) of the Act which provides that the authorization granted by a company to its directors to allot shares "may be unconditional or subject to conditions";

(b) After assessing the justification by Bowmans, the Committee was of the view that the proposed amendment curtails the shareholders of a company in the in the manner in which they would want the shares in the company to be allotted;

(c) The purpose of subsection (1) would be defeated if the authorization by the shareholders does not give the shareholders latitude to give conditions;

(d) The shareholders of a company, as owners of the company, are allowed to delegate any power to the board and to give their conditions.

(iii) Committee's recommendation

106. The Committee recommends that the amendment be rejected.

(iv) Rationale for rejection

107. The Committee rejected the proposed amendment for the following reasons:

(a) It curtails the shareholders of a company in the in the manner in which they would want the shares in the company to be allotted;

(b) The purpose of subsection (1) would be defeated if the authorization by the shareholders does not give the shareholders latitude to give conditions;

(c) The shareholders of a company, as owners of the company, are allowed to delegate any power to the board and to give their conditions.

3.4.9. Proposed amendments to section 611(2) (a), 611(2) (b), 611(4) (a), 611(4)(b) of the Act

108. Delete the word "ninety" wherever it appears and substitute therefor the word "fifty".

(i) Stakeholders submissions

109. **Bowmans** opposed the proposed amendment. The provisions with respect to squeeze in and sell out are a key minority shareholder protection mechanism to prevent majority shareholders from oppressing minority shareholders in a company in the event of a buy-out. Ideally, squeeze-out and sell-out rights cannot be exercised until a bidder holds both 90% of the shares to which an offer relates, and 90% of the voting rights carried by those shares. The acquisition process is only triggered if 10% or less of the minority shareholders do not wish to sell their shares to the offeror. This ensures that the largest possible opportunity is afforded to minority shareholders to sell-out.

110. Further, Bowmans indicated that the proposed amendment now seeks to trigger an acquisition if 50% or less of the shareholders of the shares on offer do not wish to sell their shares to the offeror. This vacates any minority protections under the Companies Act. The new provisions will most likely lead to abuse of rights of minority shareholders and would likely be challenged under law as oppression. The minority protection rights have long been protected by the courts and these principles have developed over many years of practice and court interpretation. This proposed amendment will be liable to challenge in the courts.

111. English, Canadian, common law and indeed most legal systems in the world set a threshold at 90% and there is no justification in reducing the level.

112. The Capital Markets Authority would object to re-basing to 50%.

113. The provisions are likely to make schemes of arrangement and other thresholds in the law that are set at 75% redundant.

114. The provisions are unworkable and will seriously undermine Kenya's attractiveness as an investment destination. This is an

unworkable and unacceptable proposal and should be struck from the Bill.

115. The Institute of Certified Secretaries opposed the amendment since the proposal to reduce the threshold from 90% to 50% for exercise of the squeeze-in or sell-out rights as the case may be does not reflect the position in some of the advanced jurisdictions. The EU has given a directive for a threshold of between 90% to 95% (Germany, France, Netherlands, Belgium, Czech Republic have a threshold of 95%) while in the USA the threshold stands at 90%. South Africa also maintains a threshold of 90%.

116. The Institute further indicated that as a matter of policy, if the threshold is reduced it is likely to have very drastic consequences in terms of privatization of public companies in Kenya as a result of the ease of squeeze-out of minority shareholders. They therefore proposed that a conservative threshold be maintained at 90%.

(ii) Committee's Observation

117. The Committee made the following observations:

(a) The amendments seek to reduce the percentage of shares acquired by an offeror which may trigger "squeeze-in and sell-out" of minority shareholders from ninety per cent to fifty per cent;

(b) These are substantive amendments and should not have been contained in miscellaneous amendments;

(c) The effect of the proposed amendment would be to remove the minority shareholder protection offered by the requirement of a bidder to have 90% of shares;

(d) Comparative jurisdictions in most commonwealth countries and the UK and Canada have placed their threshold at 90% of shares for buy-outs;

(e) The potential of abuse in case the proposed amendment is carried will be most likely and would be subject to litigation.

(iii) Committee's recommendation

118. The Committee recommends that the amendment be rejected.

(iv) Rationale for rejection

119. The Committee rejected the proposed amendment for the following reasons:

(a) These are substantive amendments and should not have been contained in miscellaneous amendments;

(b) The effect of the proposed amendment would be to remove the minority shareholder protection offered by the requirement of a bidder to have 90% of shares;

(c) Comparative jurisdictions in most commonwealth countries and the UK and Canada have placed their threshold at 90% of shares for buy-outs;

(d) The potential of abuse in case the proposed amendment is carried will be most likely and would be subject to litigation.

3.4.10. Proposed amendments to section 615(3)(a)(i), 615(3) (a) (ii), 615(4) (b) (i), 615(5) (a) (i), 615 (5) (a) (ii) of the Act

120. Delete the word "ninety" and substitute therefor the word "fifty".

(i) Stakeholders submissions

121. **Bowmans** indicated that sections 615(3)(a)(i), 615(3) (a) (ii), 615(4) (b) (i), 615(5) (a) (i), 615 (5) (a) (ii) of the Act which are proposed to be amended to delete the word "ninety" and substitute therefor the word "fifty" are non-existent in the Companies Act. Bowmans indicated that they have assumed that the Bill proposed to amend section 615(3) (b) (i) instead of section 615(3) (a) (i), section 615(3)(b)(ii) instead of 615 (3) (b) (i), section 615 (5) (b) (i) instead of 615 (5) (a) (i), and section 615 (5) (b) (ii) instead of section 615 (5) (a) (ii).

122. Even if the proposed amendments had referred to the correct provisions, Bowmans opposed the amendments for the same reasons they had given in the previous amendments.

123. The provisions are likely to make schemes of arrangement and other thresholds in the law that are set at 75% redundant.

124. The provisions are unworkable and will seriously undermine Kenya's attractiveness as an investment destination. This is an unworkable and unacceptable proposal and should be struck from the Bill.

(ii) Committee's Observation

125. The Committee made the following observations:

(a) The proposed amendments to sections 615(3)(a)(i), 615(3) (a) (ii), 615(4) (b) (i), 615(5) (a) (i), 615 (5) (a) (ii) of the Act contained typographical errors and were meant to refer to sections 615(3)(b)(i), 615(3)(b)(ii), 615(5)(b)(i), and 615 (5)(b)(ii) of the Act, respectively;;

(b) The amendments are substantive in nature and should not have been contained in a miscellaneous amendments bill;

(c) The effect of the proposed amendments would have been to remove the minority shareholder protection offered by the requirement of a bidder to have 90% of shares;

(d) An analysis of the prevailing practice in comparative jurisdictions in most commonwealth countries and the UK and Canada have placed their threshold at 90% of shares for buy-outs;

(e) The potential of abuse by majority shareholders to minority shareholders would be most likely be high and would be subject to litigation.

(iii) Committee's recommendation

126. The Committee recommends that the amendment be rejected.

(iv) Rationale for rejection

127. The Committee rejected the proposed amendment for the following reasons:

(a) The proposed amendments to sections 615(3)(a)(i), 615(3) (a) (ii), 615(4) (b) (i), 615(5) (a) (i), 615 (5) (a) (ii) of the Act contained typographical errors and were meant to refer to sections 615(3)(b)(i), 615(3)(b)(ii), 615(5)(b)(i), and 615 (5)(b)(ii) of the Act, respectively;;

(b) The amendments are substantive in nature and should not have been contained in a miscellaneous amendments bill;

(c) The effect of the proposed amendments would have been to remove the minority shareholder protection offered by the requirement of a bidder to have 90% of shares;

(d) An analysis of the prevailing practice in comparative jurisdictions in most commonwealth countries and the UK and Canada have placed their threshold at 90% of shares for buy-outs;

(e) The potential of abuse by majority shareholders to minority shareholders would be most likely be high and would be subject to litigation.

3.4.11. Proposed amendments to section 624 (3) (c) of the Act

128. Delete and substitute therefor the following new paragraph—

"(c) it does not have more than twenty-five employees."

(i) Stakeholder submissions

129. **Bowmans** agreed to the proposed amendment because it may reflect the state of the economy at present.

(ii) Committee's observation

130. The Committee observed as follows-

(a) The amendment seeks to reduce the number of employees that a company should have in order to qualify as a small company from fifty to twenty-five;

(b) The description of a company as a small company is advantageous to that company since such description entitles it to the application of the small companies regime which has less onerous financial reporting and auditing requirements;

(c) The proposed amendment would take away benefits enjoyed by small companies who employed between 26-50 employees who will no longer qualify as small companies if the amendment is passed;

(d) The economy is undergoing a harsh period at the moment and as such the amendment will make the operational environment of small companies employing 26-50 employees more difficult as they will no longer qualify for preferential treatment under the small companies' regime.

(iii) Committee's recommendation

131. The Committee recommends that the amendment be rejected.

(iv) Rationale for rejection

(a) The amendments are substantive in nature and should not have been contained in a miscellaneous amendments bill;

(b) The proposed amendment would take away benefits enjoyed by small companies who employed between 26-50 employees who will no longer qualify as small companies if the amendment is passed;

(c) The economy is undergoing a harsh period at the moment and as such the amendment will make the operational environment of small companies employing 26-50 employees more difficult as they will no longer qualify for preferential treatment under the small companies regime

3.5. THE INSOLVENCY ACT (NO. 18 OF 2015)

3.5.1. Proposed new section 560A to the Act

132. Insert the following new section immediately after section 560—

New Considerations for approval to lift moratorium.

560A. When considering whether to grant approval under section 560, the court may in particular take into consideration —

(a) the statutory purpose of the administration;

(b) the impact of the approval on the applicant particularly whether the applicant is likely to suffer significant loss;

(c) the legitimate interests of the applicant and the legitimate interest of the creditors of the company, giving the right of priority to the proprietary interest of the applicant; and

(d) the conduct of the parties.

(i) Stakeholder submissions

133. The Committee did not receive any views from Stakeholders.

(ii) Committee's observation

(a) The amendment seeks to provide factors that the courts will take into account when considering whether to grant approval to lift a moratorium under section 560 of the Act.

(b) The Committee observed that the amendment was reasonable since it seeks to list factors that the courts will use when considering whether to grant approval to lift moratorium under section 560 of the Act.

(iii) Committee's recommendation

134. The Committee agrees to the proposed amendment.

3.5.2. Proposed amendment to section 615 (4) of the Act

135. Insert the words "including a contract of a loan or other credit or finance facility for the benefit of the company and necessary for the continuation of any business of the company," immediately after the word "contract".

(i) Stakeholder submissions

136. The Committee did not receive any views from Stakeholders.

(ii) Committee's observation

137. (a) Section 615 of the Act provides for the remuneration and expenses of an administrator of a company when his or her appointment has ended. The proposed amendment to subsection (4) seeks to include to amounts payable in respect of a debt or liability arising out of a contract a contract of a loan or other credit or finance facility for the benefit of the company and necessary for the continuation of any business of the company. This amendment fills a gap where there could have been a contract of a loan entered into by the administrator hence it should be a charge on and payable out of property over which the former administrator had control immediately before the termination.

138. (b) The Committee observed that the amendment was reasonable since it fills a gap where there could have been a contract of a loan entered into by the administrator hence it should be a charge on and payable out of property over which the former administrator had control immediately before the termination.

(iii) Committee's recommendation

139. The Committee agrees to the proposed amendment.

3.6. THE COURT OF APPEAL (ORGANISATION AND ADMINISTRATION) ACT (NO. 28 OF 2015)

3.6.1. Amendment to section 26 of the Act

140. Delete and substitute therefor the following new subsection—

"(1) The Court shall proceed on recess annually as follows—

(a) from the second Thursday before Good Friday to the first Tuesday after the Easter Week, both days inclusive;

(b) from the 1st August to the 15th September, both days inclusive; and

(c) from the 21st December to the 13th January, both days inclusive."

(i) Stakeholder submissions

141. The Committee did not receive any views from Stakeholders.

(ii) Committee's observation

142. The Committee made the following observations:

(a) The proposed amendment seeks to amend the Act to provide for the period during which the Court of Appeal will be proceeding on vacation;

(b) The amendments seek to double the statutory recess period for Judges of the Court of Appeal from 45 days as currently provided for to 90 days as per the proposed amendment;

(c) The Judges of the Court of Appeal are also entitled to their annual leave and other leaves as per the provisions of the Employment Act and their terms of employment with the Judiciary;

(d) The amendment will lead to increased number of case backlog in the Court of Appeal and higher numbers of prisoners in jail awaiting their day in the Court of Appeal.

(iii) Committee's recommendation

143. The Committee recommends that the amendment be rejected.

(iv) Rationale for rejection

144. The rational for rejection of the amendment is as follows-

(a) The amendments seek to double the statutory recess period for Judges of the Court of Appeal from 45 days as currently provided for to 90 days as per the proposed amendment;

(b) The Judges of the Court of Appeal are also entitled to their annual leave and other leaves as per the provisions of the Employment Act and their terms of employment with the Judiciary;

(c) The amendment will lead to increased number of case backlog in the Court of Appeal and higher

numbers of prisoners in jail awaiting their day in the Court of Appeal.

ANNEXURE 1

(Minutes of Committee sittings)

MINUTES OF THE ONE HUNDRED AND TWENTY-EIGHTH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON TUESDAY, 30TH APRIL, 2019 AT 10.00 A.M. IN THE BOARDROOM ON 5TH FLOOR, CONTINENTAL HOUSE, PARLIAMENT BUILDINGS

PRESENT-

1. Hon. William Cheptumo, M.P. - **Chairperson**
2. Hon. Beatrice Adagala, M.P.
3. Hon. George G. Murugara, M.P.
4. Hon. Jennifer Shamalla, M.P.
5. Hon. John Olago Aluoch, M.P.
6. Hon. Japheth Mutai, M.P.
7. Hon. William K. Mwamkale, M.P.
8. Hon. Adan Haji Yussuf, M.P.
9. Hon. Peter Opondo Kaluma, M.P.
10. Hon. John M. Wambugu, M.P.

ABSENT WITH APOLOGIES-

1. Hon. Alice Muthoni Wahome, M.P. - **Vice Chairperson**
2. Hon. Roselinda Soipan Tuya, M.P.
3. Hon. Ben Momanyi, M.P.
4. Hon. Charles Gimose, M.P.
5. Hon. Gladys Boss Shollei, CBS, M.P.
6. Hon. Johana Ng'eno, M.P.
7. Hon. Zuleikha Hassan, M.P.
8. Hon. John Kiarie Waweru, M.P.
9. Hon. Anthony G. Kiai, M.P.

IN ATTENDANCE-

COMMITTEE SECRETARIAT-

1. George Gazemba - Principal Clerk Assistant II
2. Dennis Abisai - Principal Clerk I
3. Halima Hussein - Clerk Assistant III
4. Hakeem Kimiti - Audio Recording Officer
5. Bridgit Moraa - Intern

MIN No. 514/2019:- **PRELIMINARIES**

The meeting commenced at 10.15 a.m. with a word of prayer by Hon. John Munene Wambugu.

MIN No. 515/2019:- **CONFIRMATION OF MINUTES OF PREVIOUS SITTINGS**

Confirmation of Minutes of the One Hundred and Twenty-Fourth sitting held on Tuesday, 16th April, 2019 at 2.30 p.m. in Committee Room 7, Main Parliament Buildings were confirmed as true record of proceedings and signed by the chairperson. The confirmation was proposed by Hon. Japheth Mutai and seconded by Hon. Beatrice Adagala.

Confirmation of Minutes of the One Hundred and Twenty Seventh Sitting held on Monday, 29th April, 2019 at 10.00 a.m. in Committee Room 9, Main Parliament Building was deferred to the next meeting

MIN No. 516/2019:- **MATTERS ARISING FROM THE CONFIRMATION OF THE MINUTES**

There were not matters arising from the confirmation of minutes.

MIN No. 517/2019:- **CONSIDERATION AND ADOPTION OF REPORT ON THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 2019 *(NATIONAL ASSEMBLY BILLS No. 21)***

The Committee considered and unanimously adopted its report on the Statute Law (Miscellaneous Amendment) Bill, 2019 (*National Assembly Bills No. 21*) after being proposed by Hon. Jennifer Shamalla and seconded by Hon. Beatrice Adagala with the following recommendations-

(i) Under the **Kenya School of Law Act (No. 20 of 2012)** the Committee would be recommending to the House to reject all the proposed amendments to the Act mainly because the amendments were substantive and could not be effected through miscellaneous amendments.

(ii) Under the **Legal Education Act No. 27 of 2012,** the Committee would be

recommending to the House to reject all the proposed amendments to the Act mainly because the amendments were substantive in nature and could not be effected through miscellaneous amendments.

(iii) Under the **Kenya Law Reform Commission Act (No. 19 of 2013)** the Committee rejected proposed amendments to Section 8(1)(b) on grounds that the proposed amendment was substantive and this warranted comprehensive review of the Act. The Committee however agreed to proposed amendments to section 8(1)(c), 8(4) and 11(9) of the Act.

(iv) Under the **Companies Act, 2015 (No. 17 of 2015)** the Committee rejected proposed amendments to section 9(1)(a) as the amendments were substantive and would raise legal issues if enacted. The amendments if passed would also require amendments to other statutes.

The Committee agreed to the proposed amendments to section 93(1), proposed new section 93(A) and 93(8) of the Act but rejected proposed amendments to section 93(2). The Committee also rejected the proposed introduction of new section 275 A to the Act on grounds that the amendments were substantive and could not be effected through statute law (miscellaneous) amendments among other reasons.

The Committee rejected proposed introduction of new sections 329(1) and 329(2). The Committee also rejected proposed amendments to section 611(2) (a), 611(2) (b), 611(4) (a), 611(4)(b) 615(3)(a)(i), 615(3) (a) (ii), 615(4) (b) (i), 615(5) (a) (i), 615 (5) (a) (ii) of the Act on grounds that the amendments were substantive and could not be effected through statute law (miscellaneous) amendments among other reasons. The Committee however agreed to proposed amendments to section 624 (3) (c) of the Act.

(v) Under the **The Insolvency Act (No. 18 of 2015),** the Committee agreed to the insertion of new clause 560(A) and 615(4).

(vi) Under the **Court of Appeal (Organisation and administration) Act (No. 28 of 2015)** the Committee rejected the proposed amendments to section 26 of the Act as they were not tenable at a time when backlog of cases in courts was an issue of great concern.

MIN No. 518/2019:- **ANY OTHER BUSINESS**

Under this agenda item, the following business was transacted-

(i) The Committee discussed the state of affairs in the country regarding corruption and resolved to meet agencies involved in the fight against corruption on a two day retreat. The Committee would however still meet the Chairperson of Ethics and Anti-Corruption Commission and the Director of Public Prosecutions to discuss investigation and prosecution of cases prior to the retreat. The meeting with the two had been scheduled for 30th April, 2019 but was postponed at their behest as they were out of the country on official duty.

(ii) The Committee interacted with a team from the Commission on Administrative Justice (Ombudsman) of the Republic of Botswana led by Mr. Augustine N. Makgonatsotihe the Commission's chairperson. The team was on a benchmarking visit of Kenya and the meeting discussed as follows-

a) In Botswana, the Commission on Administrative Justice was an agency under a Ministry while in Kenya, the Commission was an independent body established by the Constitution of Kenya;

b) Inadequate budgetary resources was an issue to both the Commissions on Administrative Justice in Kenya and Botswana;

c) Whereas the Kenyan Commission on Administrative Justice had a right to access information while investigating matters, the Commission of Botswana did not have this right;

d) The Commission on Administrative Justice of Botswana cited frustration by Parliament inaction on its reports thereby damaging relations.

MIN No. 514/2019:- **ANY OTHER BUSINESS**

There being no other business to transact, the meeting was adjourned at ten minutes past one in the afternoon until a date and time to be advised.

Signed.....

Chairperson

Date.....07.05.19.....

MINUTES OF THE ONE HUNDRED AND TWENTY-SEVENTH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON MONDAY, 29TH APRIL, 2019 AT 11.00 A.M. IN THE BOARDROOM ON 2ND FLOOR, CONTINENTAL HOUSE, PARLIAMENT BUILDINGS

PRESENT-

1. Hon. William Cheptumo, M.P. - **Chairperson**
2. Hon. Beatrice Adagala, M.P.
3. Hon. George G. Murugara, M.P.
4. Hon. Jennifer Shamalla, M.P.
5. Hon. Anthony G. Kiai, M.P.

ABSENT WITH APOLOGIES-

1. Hon. Alice Muthoni Wahome, M.P. - **Vice Chairperson**
2. Hon. Peter Opondo Kaluma, M.P.
3. Hon. John M. Wambugu, M.P.
4. Hon. Roselinda Soipan Tuya, M.P.
5. Hon. Ben Momanyi, M.P.
6. Hon. Charles Gimose, M.P.
7. Hon. Gladys Boss Shollei, CBS, M.P.
8. Hon. Johana Ng'eno, M.P.
9. Hon. Zuleikha Hassan, M.P.
10. Hon. John Kiarie Waweru, M.P.
11. Hon. John Olago Aluoch, M.P.
12. Hon. Japheth Mutai, M.P.
13. Hon. William K. Mwamkale, M.P.
14. Hon. Adan Haji Yussuf, M.P.

IN ATTENDANCE-

COMMITTEE SECRETARIAT-

1. George Gazemba - Principal Clerk Assistant II
2. Dennis Abisai - Principal Clerk I
3. Salem Lorot - Legal Counsel II
4. Halima Hussein - Clerk Assistant III
5. Hakeem Kimiti - Audio Recording Officer

6. Bridgit Moraa - Intern
7. Brian Wichabe - Intern

MIN No. 509/2019:- **PRELIMINARIES**

The meeting commenced at 11.15 a.m. with a word of prayer by Hon. Beatrice Adagala.

MIN No. 510/2019:- **CONFIRMATION OF MINUTES OF PREVIOUS SITTINGS**

Confirmation of Minutes of the One Hundred and Twenty-Fourth sitting held on Tuesday, 16th April, 2019 at 2.30 p.m. in Committee Room 7, Main Parliament Buildings was deferred to the next meeting. This had to happen because save for the Chairperson, all the other Members who attended the meeting were not present to propose and second the minutes for adoption.

Minutes of the One Hundred and Twenty Sixth Sitting held on Thursday, 25th April, 2019 at 10.00 a.m. in Committee Room 9, Main Parliament Building were confirmed as true record of proceedings and signed by the chairperson. The confirmation was proposed by Hon. George Murugara and seconded by Hon. Beatrice Adagala.

MIN No. 511/2019:- **MATTERS ARISING FROM THE CONFIRMATION OF THE MINUTES**

There were not matters arising from confirmation of the minutes.

MIN No. 512/2019:- **CONSIDERATION OF THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 2019 *(NATIONAL ASSEMBLY BILLS No. 21)***

The Committee considered the Statute Law (Miscellaneous Amendment) Bill, 2019 as follows-

(i) Under the **Kenya School of Law Act (No. 20 of 2012)** the Committee would be recommending to the House to reject all the proposed amendments to the Act mainly because the amendments were substantive and could not be effected through miscellaneous amendments. The Committee also noted that the amendment if carried would necessitate

amendment of other statutes. It was the Committee's desire that a task force appointed by the Attorney-General to recommend reforms in the legal education sector finalizes its report which would form the basis of comprehensive legislative review.

(ii) Under the **Legal Education Act No. 27 of 2012,** the Committee would be recommending to the House to reject all the proposed amendments to the Act mainly because the amendments were substantive in nature and could not be effected through miscellaneous amendments. It was the Committee's wish that a task force appointed by the Attorney-General to recommend reforms in the legal education sector finalizes its report which would form the basis of comprehensive legislative review.

(iii) Under the **Kenya Law Reform Commission Act (No. 19 of 2013)** the Committee rejected proposed amendments to Section 8(1)(b) on grounds that the proposed amendment was substantive and this warranted comprehensive review of the Act. The Committee however agreed to proposed amendments to section 8(1)(c), 8(4) and 11(9) of the Act.

The Committee also observed that the Council of Legal Education and the Kenya School of Law opposed the amendment.

(iv) Under the **Companies Act, 2015 (No. 17 of 2015)** the Committee rejected proposed amendments to section 9(1)(a) as the amendments were substantive and would raise legal issues if enacted. The amendments if passed would also require amendments to other statutes.

The Committee agreed to the proposed amendments to section 93(1), proposed new section 93(A) and 93(8) of the Act but rejected proposed amendments to section 93(2) on grounds that section 105 of the Companies Act provides that the register of members of a company is evidence of the matters required or authorised to be included in it and therefore having all the necessary information, including date of cessation of membership, is important.

The Committee rejected the proposed introduction of new section 275 A to the Act on grounds 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.

The Committee rejected proposed introduction of new section 329(1) because the existing provision grant the directors of a company the power to allot shares in the company if either they are authorized to do so by a resolution of the company or if the Articles of Association of the company do so, an option which provides flexibility in the operations of the company. Furthermore, there was no apparent or immediate need to remove the option of Articles of Association of a company authorizing the allotment of shares. In addition, the amendment would necessitate an amendment to section 329(3)(b)(i) so as to cure the internal consistency since the provision refers to authorization from the company's Articles of Association.

The Committee rejected the introduction of new section 329(2) because it would curtail the shareholders of a company in the in the manner in which they would want the shares in the company to be allotted. Furthermore, shareholders of a company, as owners of the company, are allowed to delegate any power to the board and to give their conditions.

The Committee rejected proposed amendments to section 611(2) (a), 611(2) (b), 611(4) (a), 611(4)(b) of the Act because the amendments were substantive and the effect of the amendments would be to remove the minority shareholder protection offered by the requirement of a bidder to have 90% of shares. Jurisdictions in most commonwealth countries had placed their threshold at 90% of shares for buy-outs. The potential of abuse in case the proposed amendment is carried will be most likely and would be subject to litigation.

The Committee rejected the proposed amendments to section 615(3)(a)(i), 615(3) (a) (ii), 615(4) (b) (i), 615(5) (a) (i), 615 (5) (a) (ii) of the Act because they were erroneous as they referred to provisions not existing in the Companies Act. Even if the amendments referred to the correct provisions in the companies Act, comparative jurisdictions in most commonwealth countries and the UK and Canada placed their threshold at 90% of shares for buy-outs. The Committee however agreed to proposed amendments to section 624 (3) (c) of the Act.

(v) Under the **The Insolvency Act (No. 18 of 2015),** the Committee agreed to the insertion of new clause 560(A) and 615(4).

(vi) Under the **Court of Appeal (Organisation and administration) Act (No. 28 of 2015) the** Committee rejected the proposed amendment to section 26 of the Act. While rejecting the proposed amendments, the Committee observed that the amendment sought to double the statutory recess period for Judges of the Court of Appeal from 45 days to 90 days which was untenable in view of huge backlog of cases in courts. The Committee also observed that Judges of the Court of Appeal are also entitled to their annual leave and other leaves as per the

provisions of the Employment Act and their terms of employment with the Judiciary.

MIN No. 513/2019:- **ADJOURNMENT**

There being no other business to transact, the meeting was adjourned at fifteen minutes past one in the afternoon until, 30th April, 2019 at 10.00 a.m. at a venue to be advised.

Signed.....
Chairperson

Date.....07.05.19.....

MINUTES OF THE ONE HUNDRED AND TWENTY-SIXTH SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON THURSDAY, 25TH APRIL, 2019 AT 10.00 A.M. IN COMMITTEE ROOM 9, MAIN PARLIAMENT BUILDING

PRESENT-

1. Hon. William Cheptumo, M.P. - **Chairperson**
2. Hon. John Olago Aluoch, M.P.
3. Hon. Beatrice Adagala, M.P.
4. Hon. Anthony G. Kiai, M.P.
5. Hon. Japheth Mutai, M.P.
6. Hon. William K. Mwamkale, M.P.
7. Hon. George G. Murugara, M.P.
8. Hon. Adan Haji Yussuf, M.P.
9. Hon. Jennifer Shamalla, M.P.

ABSENT WITH APOLOGIES-

1. Hon. Alice Muthoni Wahome, M.P. - **Vice Chairperson**
2. Hon. Peter Opondo Kaluma, M.P.
3. Hon. John M. Wambugu, M.P.
4. Hon. Roselinda Soipan Tuya, M.P.
5. Hon. Ben Momanyi, M.P.
6. Hon. Charles Gimose, M.P.
7. Hon. Gladys Boss Shollei, CBS, M.P.
8. Hon. Johana Ng'eno, M.P.
9. Hon. Zuleikha Hassan, M.P.
10. Hon. John Kiarie Waweru, M.P.

IN ATTENDANCE-

COMMITTEE SECRETARIAT-

1. George Gazemba - Principal Clerk Assistant II
2. Halima Hussein - Clerk Assistant II
3. Merlene Ayiro - Legal Counsel 1
4. Salem Lorot - Legal Counsel III
5. Mr. Joseph Okongo - Media Officer
6. Mr. Hakeem Kimiti - Audio Recording Officer

7. Bridgit Moraa - Intern
8. Mohamed Affey - Intern

MIN No. 503/2019:- **PRELIMINARIES**

The meeting commenced at 10.15 a.m. with a word of prayer by Hon. George Murugara.

MIN No. 504/2019:- **CONFIRMATION OF MINUTES OF PREVIOUS SITTING**

Confirmation of Minutes of the One Hundred and Twenty-Fourth sitting held on Tuesday, 16th April, 2019 at 2.30 p.m. in Committee Room 7, Main Parliament Buildings was deferred to the next meeting. This had to happen because save for the Chairperson, all the other Members who attended the meeting were not present to propose and second the minutes for adoption.

Minutes of the One Hundred and Twenty Fifth Sitting held on Tuesday, 23rd April, 2019 at 10.00 a.m. in Committee Room 9, Main Parliament Building were confirmed as true record of proceedings and signed by the chairperson. The confirmation was proposed by Hon. George Murugara and seconded by Hon. Adan Haji Yusuf.

MIN No. 505/2019:- **MATTERS ARISING FROM THE CONFIRMATION OF THE MINUTES**

There were not matters arising from the confirmation of the minutes.

MIN No. 506/2019:- **CONSIDERATION OF THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 2019 *(NATIONAL ASSEMBLY BILLS No. 21)***

The Committee considered the Statute Law (Miscellaneous Amendment) Bill, 2019 as follows-

(i) Under the **Kenya School of Law Act (No. 20 of 2012)** the Committee would be recommending to the House to reject all the proposed amendments to the Act mainly because the amendments were substantive in nature and there was need for comprehensive review of the statute. In fact the Committee had been in the past been informed that the Attorney-

General had constituted a task force to undertake comprehensive review of the statute and the Committee was of the view that comprehensive amendments be undertaken based on the report of the report of the task force.

(ii) Under the **Legal Education Act No. 27 of 2012,** the Committee would be recommending to the House to reject all the proposed amendments to the Act mainly because the amendments were substantive in nature and there was need for comprehensive review of the statute. In fact the Attorney-General had constituted a task force to undertake comprehensive review of the statute and the Committee was of the view that comprehensive amendments be undertaken based on the report of the report of the task force.

(iii) Under the **Kenya Law Reform Commission Act (No. 19 of 2013)** the Committee rejected proposed amendments to Section 8(1)(b) on grounds that the proposed amendment was substantive and there was need for comprehensive review of the Act. The Committee however agreed to proposed amendments to section 8(1)(c), 8(4) and 11(9) of the Act.

(iv) Under the **Companies Act, 2015 (No. 17 of 2015)** the Committee rejected proposed amendments to section 9(1)(a) as the amendments were substantive and also posed legal issues if enacted. The amendments if passed would also require amendments to other statutes.

The Committee agreed to the proposed amendments to section 93(1), proposed new section 93(A) and 93(8) of the Act but rejected proposed amendments to section 93(2) on grounds that section 105 of the Companies Act provides that the register of members of a company is evidence of the matters required or authorised to be included in it and therefore having all the necessary information, including date of cessation of membership, is important.

The Committee rejected the proposed introduction of new section 275 A to the Act on grounds 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.

The Committee rejected proposed introduction of new section 329(1) because the existing provision grant the directors of a company the power to allot shares in the company if either they are authorized to do so by a resolution of the

company or if the Articles of Association of the company do so, an option which provides flexibility in the operations of the company. The Committee also rejected the introduction of new section 329(2) because it would curtail the shareholders of a company in the in the manner in which they would want the shares in the company to be allotted.

The Committee rejected proposed amendments to section 611(2) (a), 611(2) (b), 611(4) (a), 611(4)(b) of the Act because the amendments were substantive and the effect of the amendments would be to remove the minority shareholder protection offered by the requirement of a bidder to have 90% of shares. Jurisdictions in most commonwealth countries had placed their threshold at 90% of shares for buy-outs.

The Committee rejected the proposed amendments to section 615(3)(a)(i), 615(3) (a) (ii), 615(4) (b) (i), 615(5) (a) (i), 615 (5) (a) (ii) of the Act because they were erroneous as they referred to provisions not existing in the Companies Act. Even if the amendments referred to the correct provisions in the companies Act, comparative jurisdictions in most commonwealth countries and the UK and Canada placed their threshold at 90% of shares for buy-outs. The Committee however agreed to proposed amendments to section 624 (3) (c) of the Act.

(v) Under the **The Insolvency Act (No. 18 of 2015),** the Committee agreed to the insertion of new clause 560(A) and 615(4).

(vi) Under the **Court of Appeal (Organisation and administration) Act (No. 28 of 2015)** the Committee rejected the proposed amendment to section 26 of the Act on grounds that increasing the recess period for Court of Appeal Judges at a time when there was serious backlog of cases was untenable.

MIN No. 507/2019:- **ANY OTHER BUSINESS**

In view of the fact that Committees were required to table their reports on the Statute Law (Miscellaneous Amendment) Bill, 2019 by Tuesday, 30th April, 2019, the Committee resolved to meet on Monday, 29th April, 2019 at 11.00 a.m. to consider and adopt its report for tabling on Tuesday, 30th April, 2019 at 2.30 p.m.

MIN No. 508/2019:- **ADJOURNMENT**

There being no other business to transact, the meeting was adjourned at five minutes past one in the afternoon until, 29th April, 2019 at 9.00 a.m. at a venue to be advised.

Signed.....

Chairperson

Date.....07.05.19.....

ANNEXURE 2

(Copy of newspaper advertisement of 10th April, 2019 inviting the public to submit memoranda on the Bill)

DC- JUSTICE

REPUBLIC OF KENYA

NATIONAL ASSEMBLY
TWELFTH PARLIAMENT – THIRD SESSION

In the matter of consideration by the National Assembly of the Statue Law (Miscellaneous Amendment) Bill (National Assembly Bill No. 21 of 2019)

SUBMISSION OF MEMORANDA

Article 118(1)(b) of the Constitution provides that, *"Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees"*. The National Assembly Standing Order 127(3) provides that, *"the Departmental Committee to which a Bill is committed shall facilitate public participation and shall take into account views and recommendations of the public when the Committee makes its report to the House"*.

The **Statue Law (Miscellaneous Amendment) Bill, 2019** seeks to make various amendments to the statutes, which is in keeping with the practice of making various amendments that do not merit the publication of separate Bills and consolidating them into one Bill:-

The Bill has undergone First Reading and pursuant to the provisions of Standing Order 127(1) of the National Assembly Standing Orders which provides that, *"a Bill having been read a First Time shall stand committed to the relevant Departmental Committee"*, the proposed amendments to various Acts of Parliament stand committed to the following Departmental Committees of the National Assembly:-

No.	Act to be amended	Relevant Committee
1.	The District and Provinces Act, 1992 (No. 9 of 1992)	Administration and National Security
2.	The Alcoholic Drinks Control Act, 2010 (No. 4 of 2010)	
3.	The Prevention of Terrorism Act, 2012 (No. 30 of 2012)	
4.	The Companies Act, 2015 (No. 17 of 2015)	Justice and Legal Affairs
5.	The Insolvency Act, 2015 (No. 18 of 2015)	
6.	The Court of Appeal (Organization and Administration) Act, 2015 (No. 28 of 2015)	
7.	The Kenya Law Reform Commission Act, 2013 (No. 19 of 2013)	
8.	The Legal Education Act, 2012 (No. 27 of 2012)	
9.	The Kenya School of Law Act, 2012 (No. 26 of 2012)	
10.	The Value Added Tax Act, 2013 (No. 35 of 2013)	Finance and National Planning
11.	The Microfinance Act, 2006 (No. 19 of 2006)	
12.	The Public Finance Management Act, 2012 (No. 18 of 2012)	
13.	The Tourism Act, 2011 (No. 28 of 2011)	Sports, Culture and Tourism
14.	The Merchant Shipping Act, 2009 (No. 4 of 2009)	Transport, Public Works and Housing
15.	The Wildlife Conversation and Management Act, 2013 (No. 47 of 2013)	Environment and Natural Resources

Following public participation and consideration by the respective Committees, the **Departmental Committee on Justice and Legal Affairs** shall thereafter consolidate the reports of the respective committees and compile one report to the House on the said Bill.

Pursuant to the provisions of Article 118(1) (b) of the Constitution and Standing Order 127(3), the committee invites members of the Public to submit representations they may have on the said Bill. The representations may be forwarded to the **Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi;** hand-delivered to the **Office of the Clerk, Main Parliament Buildings, Nairobi;** mailed to **clerk@parliament.go.ke;** to be received **not later than Tuesday, 16th April, 2019 at 5.00 pm.**

MICHAEL R. SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY



REPUBLIC OF KENYA

TWELFTH PARLIAMENT
THE SENATE

SESSIONAL COMMITTEE ON COUNTY PUBLIC ACCOUNTS AND INVESTMENTS

NOTICE OF SITTINGS FOR THE MONTHS OF APRIL AND MAY, 2019

Pursuant to the provisions of Articles 96 (3) and 229 (7) and (8) of the Constitution and standing order 220 of the Senate Standing Orders, in exercise of its mandate of oversight over county public accounts and investments, the Senate Sessional Committee on County Public Accounts and Investments informs and invites the Chief Executives of the entities listed in the Schedule below of the sittings for the months of April and May, 2019.

CONSIDERATION OF THE REPORT OF THE AUDITOR- GENERAL ON THE FINANCIAL STATEMENTS FOR THE FINANCIAL YEAR 2017/2018

DAY/ DATE	TIME	ENTITY
Thursday, 25th April, 2019	9.30am	Embu County Excutive
Friday, 26th April, 2019	9.30am	Lamu County Executive
Monday, 29th & Tuesday, 30th April, 2019	9.30am	Nairobi County Executive
Thursday, 2nd May, 2019	9.30am	Kiambu County Executive
Friday, 3rd May, 2019	9.30am	Wajir County Executive
Monday, 13th May, 2019	9.30am	Migori County Executive
Tuesday, 14th May, 2019	9.30am	Homabay County Executive
Wednesday, 15th May, 2019	9.30am	Kisii County Executive
Thursday, 16th May, 2019	9.30am	Taita- Taveta County Executive
Friday, 17th May, 2019	9.30am	Murangá County Executive
Monday, 20th May, 2019	9.30am	Tana River County Executive
Tuesday, 21st May, 2019	9.30am	Meru County Executive
Wednesday, 22nd May, 2019	9.30am	Isiolo County Executive
Thursday, 23rd May, 2019	9.30am	Turkana County Executive
Monday, 27th May, 2019	9.30am	Kirinyaga County Executive
Tuesday, 28th May, 2019	9.30am	Mombasa County Executive
Wednesday, 29th May, 2019	9.30am	West Pokot County Executive
Thursday 30th, May, 2019	9.30am	Kilifi County Executive

NOTES:

1. All County Executives are requested to submit written responses (in hard and soft copy) and all supporting documents to the specific issues raised in the Auditor General's Report on Financial Operations of the respective County Executive for the Financial Year 2017/2018 to the relevant Auditor-General, Regional Hub Offices and to the Office of the Clerk of the Senate, First Floor, Main Parliament Buildings, within the timelines communicated in our previous letters; and
2. Meetings will be held in Committee Room 5, First Floor, Main Parliament Buildings, Nairobi or such other venue as shall be communicated.

CLERK OF THE SENATE/ SECRETARY,
PARLIAMENTARY SERVICE COMMISSION.

ANNEXURE 3

(Memoranda received from the public)

BOWMANS D/Courts 25/4/19

COULSON HARNEY LLP
5th Floor, West Wing, ICEA Lion Centre
Riverside Park, Chiromo Road
PO Box 10643-00100, Nairobi, Kenya
+254 20 289 9000 | +254 709 966 000
+254 20 444 8614 | +254 734 993 739
PIN No. P051229962P | VAT No. 0191639L

www.bowmanslaw.com

Our Reference: RTH/SLMAB/2019 Your Reference: TBA
Direct Line: +254 20 289 9000 Date: 23 April 2019
Email Address: richard.harney@bowmanslaw.com

The Office of the Clerk of the National Assembly
Clerk's Chambers
The National Assembly
Parliament Buildings
P. O. Box 41842 – 00100
Nairobi, Kenya
For the kind attention of: Mr. Michael Sialai, EBS

RECEIVED
24 APR 2019
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via hand delivery and email

Dear Sirs

REVIEW OF THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL 2019

We refer to the Statute Law (Miscellaneous Amendments) Bill 2019 (the **Bill**) which seeks to amend several pieces of Kenyan legislation.

We have conducted a review of the Bill, specifically, the amendments it proposes to make to the following legislation:

1. the Companies Act 2015;
2. the Value Added Tax Act (No. 5 of 2013);
3. the Alcoholic Drinks Control Act (No. 4 of 2010);
4. the Wildlife Conservation and Management Act (no. 47 of 2013);
5. the Microfinance Act (No. 19 of 2006); and
6. the Public Finance Management Act (No. 18 of 2012)

Our review is enclosed with this letter as Annexure 1. We appreciate the opportunity to voice our opinions and comments regarding the above legislation and we look forward to further discussions on the same. Please contact the undersigned if you have any queries on the same.

1. CIAZEMIZA ✓
2. LGATI
3. AKIGN
4. ESTHER

Pls deal

Yours faithfully
COULSON HARNEY LLP

RICHARD HARNEY

Partners RT St A Harney | JSP Coulson | JW Karanja | KC Michira | JN Syekei | AG Njage | CK Kigera | PV Shah | EN Monari | A Njogu | N Mukuha | SM Omondi | TA Mwango | AN Mathini | M Runji | J Mbui | DO Indokhomi | VS Shah | CL Kuyo | Directors R Field | KO Evans | SJ Matthews

KENYA SOUTH AFRICA TANZANIA UGANDA

25/4/19



ANNEXURE 1

THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL 2019

The Statute Law (Amendment) Bill 2019 (the Bill) proposes make amendments to various statutes as follows.

	STATUTE	CURRENT LAW	PROPOSED AMENDMENT	COMMENTS/IMPLICATIONS (IF ANY)
1.	THE COMPANIES ACT 2015			
	Private Companies			
		Section 9 (1)(a) Definition of private company- For the purposes of this Act, a company is a private company if – (a) its articles – (i) restrict a member's right to transfer shares; (ii) limit the number of members to fifty; and (iii) prohibit invitations to the public to subscribe for shares or debentures of the company	For the purposes of this Act, a company is a private company if – (a) its articles – (i) restrict a member's right to transfer shares; (ii) limit the number of members to fifty; (iii) prohibit invitations to the public to subscribe for shares or debentures of the company; and (iv) requires the consent of all members to add a new member.	**Contentious** The proposed new extension to the definition of a private company is unconventional and impractical. The onus for the determination of the type of consent (ordinary, special or unanimous) required to effect an admission of a new member/investor by way of transfer of shares or subscription for shares/equity is a matter solely to be determined by a company's members in its articles of association. Private companies opted to delegate that power to their boards of directors. This practice has found a place in companies' legislation since it is now very prevalent in Commonwealth nations for the board to retain the power to

				approve transfers and allotments to new members. The Companies Act, 2015 (**Companies Act**) cannot purport to legislate the internal workings of a company to the exclusion of the doctrines of freedom of association and privity of contract that have underpinned private company formation for centuries. This amendment also vacates the power of the board of directors, if given the authority by the Articles of Association or by resolution of the members (as currently provided in the Companies Act) to approve transfers of shares and allotment of shares to a new member by requiring that the company at general meeting must unanimously approve that transfer or allotment of shares to a new member. Large portions of the powers of directors will become redundant and unworkable in the Companies Act if this new definition is approved. It also has the practical and legal effect that one person holding only one share can veto the admission of new members who may be intending to invest large sums for the development of the company. The situation

				where members of a private company disappear or die would greatly complicate this – making it impossible to develop the company while this subsists. Where shares are held by nominees or by other companies this would require that consent of persons in those entities must be obtained before the right can be exercised – again greatly and unnecessarily complicating the operation of private companies. This kind of a provision is a deterrent to investment and will be harmful to Kenya's economic and development agenda.
	Company to keep register of beneficial owners			
		Section 93 (1) Every company shall keep a register of its members which shall include information relating to beneficial owners of the company, if any.	Every company shall keep a register of its members ~~which shall include information relating to beneficial owners of the company, if any~~.	**Acceptable** as this section reverts to the original wording of section 93 (1) under the Companies Act.
		Section 93(2)(c) A company shall enter in its register of members – (c) the date on which any person ceased to be a member;	Delete (c) ~~the date on which any person ceased to be a member~~	**Contentious** The removal of the requirement to enter the date on which a shareholder ceases to be a shareholder in the register of records will create disparity in the company's books that

				are unclear. The register of members is relied upon by the Registrar of Companies, the courts, officers, members of the company and members of the public who may rely on the register to determine who the current members of the company are. It must be noted that the register of members is *prima facie* evidence of all matters stated therein – section 105, Companies Act 2015 – including title to the shares. This, therefore, requires that the register of members should be a complete record and a 'one-stop shop' record for all matters relating to the shareholding of the company.
		Section 93(8) A company shall lodge with the Registrar a copy of its register of members including information relating to beneficial owners, if any, within thirty days after completing its preparation	A company shall lodge with the Registrar a copy of its register of ~~members including information relating to beneficial owners, if any,~~ within thirty days after completing its preparation	**Acceptable** as this section reverts to the original wording of section 93 under the Companies Act.
		New section 93A	Division 2A – Register of Beneficial Owners 93A (1) Every company shall keep a register of its beneficial owners. (2) A company shall enter in its register of beneficial owner, information relating to its	**Acceptable.** This section creates a different regime for the register of beneficial ownership from the general register of members under section 93 under the Companies Act.

			beneficial owners as prescribed in the regulations. (3) A company shall lodge with the Registrar a copy of its register of beneficial owners, within thirty days after completing its preparation. (4) A company other than a public listed company shall lodge with the Registrar a copy of any amendment to its register of beneficial owners within 14 days after making the amendment. (5) If a company fails to comply with the requirement of this section, the company, and each officer of the company who is in default, commit[s] an offence and on conviction are each liable to a fine not exceeding KES 500,000. (6) If, after a company or any of its officers is convicted under subsection (5), the company continues to fail to comply with the relevant requirement, the company, and each officer of the company who is in default, commit a further offence on each day on which the failure continues and on conviction are each liable to a fine not exceeding KES 50,000 each for such offence.	However, sub-section (2) requires there to be Regulations – these have not been published and until they are the section should be suspended. The draft Regulations should be provided for comment. This new section in the law as well as the regulations should be introduced in a measured manner as there are still a number of concerns around the draft regulations being considered. Some of these concerns include: - the non-inclusive nature of the definition of a beneficial owner which does not consider listed companies; - the level of disclosure and who it is applicable to needs to be carefully considered (disclosure of private information which is protected under the Constitution, data of children and foreign citizens); - disclosure thresholds; - capacity of the Companies Registry to enforce the proposed provisions as it is not a law enforcement agency but a collator of information; - adequacy of information requested. It is not possible for the law to fully define what information is needed for law

				enforcement agencies to effect investigations on beneficial ownership; - lack of clarity with respect to the information requested in the draft forms; - duplicity of information; and - the possible extraterritorial effect of the law.
	Annual General Meeting			
		New section 275A	275A (1) Every company shall convene a general meeting once a year. (2) Subsection (1) does not apply to single member companies. (3) The Registrar may, on the application of the company or for any other reason the Registrar thinks fit, extend the period referred to in subsection (1) even if, as a result, the period is extended beyond the calendar year. (4) A company that fails to comply with this section commits an offence and is liable to a fine not exceeding KES 100,000.	**Contentious** The Companies Act at present does not compel private companies to hold an annual general meeting in every year. A private company is at liberty to call for a general meeting and/or create a requirement to have the general meeting in every year under its articles of association. The requirement for a general meeting was repealed by the Companies Act when the compulsory business to be transacted at the annual general meeting, which was a mainstay under the repealed Companies Act Cap 486, was no longer required under the Companies Act. There is no longer compulsory

				business to be transacted at a general meeting for a private company. (As would be the case if the small companies exception on preparing annual accounts were to be applied). Only public companies are mandated to have the general meeting because the Companies Act prescribes mandatory business that must be transacted at the general meeting including the appointment of directors, approval of financials, fixing remuneration of auditors, considering auditors report, directors report etc. This requirement for private companies to have a general meeting also fell away when the written resolutions of shareholders were recognized under the Companies Act which suffice for the shareholders to pass any business they wish in the interests of the company. This ensures that the management of the company as a private enterprise is retained by its members and management. The original intention behind the Companies Act not requiring an annual general meeting or compulsory business to be transacted at an annual general meeting was to ease the cost and administrative burden on private

				companies and promote ease of doing business in Kenya. There is still no practical efficacy to legislate annual general meetings in a private company. It reintroduces cost and delay for private business. As such, this amendment should be resisted and struck from the bill.
	Power of directors to allot shares etc. authorization by company			
		Section 329(1) (1) The directors of a company may exercise a power of the company – (a) to allot shares in the company; or (b) to grant rights to subscribe for or to convert any security into shares in the company, only if they are authorized to do so by the company's articles or by a resolution of the company.	(1) The directors of a company may exercise a power of the company to – (a) allot shares in the company; or (b) grant rights to subscribe for or to convert any security into shares in the company, only if they are authorized to do so ~~by the company's articles or~~ by a resolution of the company.	**Contentious** There is no apparent or immediate need to delete the authorization for allotment from the articles of association. Most companies formed in Kenya, including those that have adopted the Model Articles of Association in the Companies Act 2015, make provision for allotment by directors. Again it allows for expediency in the management of the company by giving the directors authority to issue and allot shares as per the articles of association without having to revert to the shareholders for authority to issue and allot further shares.

		Section 329(2) An authorisation under subsection (1) may be given for a particular exercise of the power or for its exercise generally, and may be unconditional or subject to conditions.	An authorisation under subsection (1) may be given for a particular exercise of the power or for its exercise generally~~, and may be unconditional or subject to conditions~~.	**Contentious** The shareholders of a company, as the owners of the company, are allowed to delegate any power or action to the board as well as direct the conditions (if any) under which shares in the company may be allotted by the board of directors. This power cannot be derogated by statute and therefore this, deletion, is not well considered and should be struck from the bill.
	"Squeeze in" and "Sell out" provisions.			
		Section 611(2)(a) (2)An offeror who has, as a result of acceptances of the offer, acquired or unconditionally contracted to acquire: (a) not less than ninety percent value of the shares to which the offer relates;	An offeror who has, as a result of acceptances of the offer, acquired or unconditionally contracted to acquire: (a) not less than ~~ninety~~ fifty percent value of the shares to which the offer relates.	**Contentious** The provisions with respect to squeeze in and sell out are a key minority shareholder protection mechanism to prevent majority shareholders from oppressing minority shareholders in a company in the event of a buy-out. Ideally, squeeze-out and sell-out rights cannot be exercised until a bidder holds both 90% of the shares to which an offer relates, and 90% of the voting rights carried by those shares. The acquisition process is only triggered if 10% or less of the minority shareholders do not wish to sell their shares to the offeror. This ensures that the largest
		Section 611(2) (b) (2)An offeror who has, as a result of acceptances of the offer, acquired or unconditionally contracted to acquire: (b) if the shares to which the offer relates are voting shares – not less than ninety percent of the voting rights conferred by those shares, may give notice to the holder of any shares	(2)An offeror who has, as a result of acceptances of the offer, acquired or unconditionally contracted to acquire: (b) if the shares to which the offer relates are voting shares – not less than ~~ninety~~ fifty percent of the voting rights conferred by those shares, may give notice to the holder of any shares to which the offer relates to that the offeror has not	

		to which the offer relates to that the offeror has not acquired or unconditionally contracted to acquire that the offeror intends to acquire those shares.	acquired or unconditionally contracted to acquire that the offeror intends to acquire those shares.	possible opportunity is afforded to minority shareholders to sell-out. This proposed amendment now seeks to trigger an acquisition if 50% or less of the shareholders of the shares on offer do not wish to sell their shares to the offeror. This vacates any minority protections under the Companies Act. The new provisions will most likely lead to abuse of rights of the minority shareholders and would likely be challenged under law as oppression. The minority protection rights have long been protected by the courts and these principles have developed over many years of practice and court interpretation. This proposed amendment will be liable to challenge in the courts. English, Candaian, common law and indeed most legal systems in the world set a threshold at 90% and there is no justification in reducing the level. The Capital Markets Authority would object to re-basing to 50%. The provisions are likely to make schemes of arrangement and other thresholds in the law that are set at 75% redundant.
		Section 611(4)(a) (4) An offeror who has, as a result of acceptances of the offer, acquired of unconditionally contracted acquire – (a) not less than ninety percent in value of the shares to which the offer relates;	(4) An offeror who has, as a result of acceptances of the offer, acquired of unconditionally contracted acquire – (a) not less than ~~ninety~~ fifty percent in value of the shares to which the offer relates;	
		Section 611 (4)(b) (4) An offeror who has, as a result of acceptances of the offer, acquired of unconditionally contracted acquire – (b) if the shares of that class are voting shares – not less than ninety percent of the voting rights conferred by those shares.	(4) An offeror who has, as a result of acceptances of the offer, acquired of unconditionally contracted acquire – (b) if the shares of that class are voting shares – not less than ~~ninety~~ fifty percent of the voting rights conferred by those shares.	

				The provisionsare unworkable and will seriously undermine Kenya's attractiveness as a investment destination. Unworkable and Unacceptable proposal and we recommend that this amendment be struck from the bill.
		Section 615(3)(a)(i)		This section does not exist in the Companies Act. *We have assumed that the Bill proposes to amend section 615 (3)(b)(i)*
		Section 615(3)(b)(i) *The holder of voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquired or contracted to acquire, whether unconditionally, or subject to conditions being satisfied – (i) amount to not less than ninety percent in value of all the voting shares in the company or would do so but for subsection (1) of section 590;*	*The holder of voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquired or contracted to acquire, whether unconditionally, or subject to conditions being satisfied – (i) amount to not less than ~~ninety~~ fifty percent in value of all the voting shares in the company or would do so but for subsection (1) of section 590;*	See above commentary under paragraph 9 above. This is an unworkable and unacceptable proposal and should be struck from the bill.

		Section 615(3)(a)(ii)		This section does not exist in the Companies Act. *We have assumed that the Bill proposes to amend section 615 (3)(b)(ii)*
		Section 615(3)(b)(ii) *The holder of voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquired or contracted to acquire, whether unconditionally, or subject to conditions being satisfied – (ii) confer not less than ninety percent of the voting rights in the company or would do so but for that subsection.*	*The holder of voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquired or contracted to acquire, whether unconditionally, or subject to conditions being satisfied – (ii) confer not less than ~~ninety~~ fifty percent of the voting rights in the company or would do so but for that subsection.*	Same comment as in paragraph 9 above. Unworkable and unacceptable proposal and we recommend that this amendment be struck from the bill.
		Section 615 (4)(b)(i) The holder of the voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquire or contracted to acquire, whether unconditionally or subject to	The holder of the voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquire or contracted to acquire, whether unconditionally or subject to conditions being satisfied – (i) amount not less than fifty ~~ninety~~	Same comment as in paragraph 9 above. Unworkable and unacceptable proposal and we recommend that this amendment be struck from the bill.

		conditions being satisfied – (i) amount not less than ninety percent in value of all the voting shares in the company or would do so for subsection (1) of section 590;	percent in value of all the voting shares in the company or would do so for subsection (1) of section 590;	
		Section 615 (5)(a)(i)		This section does not exist in the Companies Act. *It is possible that the section to be amended may have been Section 615 (5)(b)(i):*
		It is possible that the section to be amended may have been Section 615 (5)(b)(i): *(5) If a takeover offer relates to shares of one classes and at any time before the end of the offer period – (b) those shares, with or without any other shares of that class that the offeror has acquired or contracted to acquire, whether unconditionally or subject to conditions being satisfied – (i) amount not less than ninety percent in value of all the shares of that class;*	*(5) If a takeover offer relates to shares of one classes and at any time before the end of the offer period – (b) those shares, with or without any other shares of that class that the offeror has acquired or contracted to acquire, whether unconditionally or subject to conditions being satisfied – (i) amount not less than fifty ~~ninety~~ percent in value of all the shares of that class;*	Same comment as in paragraph 9 above. Unworkable and unacceptable proposal and we recommend that this amendment be struck from the bill.
		Section 615 (5)(a)(ii)		This section does not exist in the Companies Act. *It is possible that the section to be amended may have been Section 615 (5)(b)(ii)*

		It is possible that the section to be amended may have been Section 615 (5)(b)(ii): *(5) If a takeover offer relates to shares of one classes and at any time before the end of the offer period – (b) those shares, with or without any other shares of that class that the offeror has acquired or contracted to acquire, whether unconditionally or subject to conditions being satisfied –(ii) if the shares of that class are voting shares, confer not less than ninety percent of the voting rights carried by the shares of that class*	*(5) If a takeover offer relates to shares of one classes and at any time before the end of the offer period – (b) those shares, with or without any other shares of that class that the offeror has acquired or contracted to acquire, whether unconditionally or subject to conditions being satisfied –(ii) if the shares of that class are voting shares, confer not less than fifty ~~ninety~~ percent of the voting rights carried by the shares of that class.*	Same comment as in paragraph 9 above. Unworkable and Unacceptable proposal and we recommend that this amendment be struck from the bill.
	Companies qualifying as small: general rules			
		Section 624 (3)(c) The qualifying conditions are satisfied by a company in a year in which it satisfied two or more of the following requirements - (c) it does not have more than fifty employees.	The qualifying conditions are satisfied by a company in a year in which it satisfied two or more of the following requirements - (c) it does not have more than ~~fifty~~ twenty-five employees.	**Acceptable** The proposal to reduce the number of employees that a company should have in order to qualify as a small company in the small companies regime to 25 employees may reflect the economy at present.
2.	**THE VALUE ADDED TAX ACT (NO. 5 OF 2013)**	**Section 17 (5)** "Where the amount of input tax that may be deducted by a registered person under subsection (1) in respect of a tax period exceeds the amount of output tax due for the	**Insertion of sub-section 17(5)(c) &(d)** c) the Commissioner is satisfied that such excess arises from tax withheld by appointed withholding agents;	The VAT Act 2013, only permits refunds where there is excess input tax as a result of making zero rated supplies; refund for tax paid in error; or on bad debts subject to certain conditions.

		period, the amount of the excess shall be carried forward as input tax deductible in the next tax period: Provided that any such excess shall be paid to the registered person by the Commissioner where- a) the Commissioner is satisfied that such excess arises from making zero-rated supplies; and b) the registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax becomes due and payable."	d) the Commissioner is satisfied that such excess arising out of tax withheld by appointed tax withholding agents may be applied any tax payable under this Act.	The amendment proposes two things; a) to provide that one can utilize Withholding VAT (**WHVAT**) credits against any VAT payable in the Act; and b) to provide that WHVAT credits can be part of a refund claim to the Commissioner in VAT refund application. WHVAT is VAT withheld by a recipient of taxable supplies who is appointed by the KRA to deduct VAT and remit the same to the KRA against a supplier. The Withholding VAT rate is 6%. The VAT withholding Agent is expected to remit the WHVAT (6%) to the KRA and remit the balance (10%) to the supplier of taxable supplies. From a legislative perspective, it is not clear how a registered person could utilize the VAT credits arising from WHVAT. We note that in practice, suppliers utilize the VAT credit arising from the WHVAT against VAT payable when accounting for VAT.

				Likewise, registered persons who make both standard rated supplies and zero-rated supplies and are perpetually in a VAT credit position, ordinarily include the WHVAT element in a VAT refund claim to the Commissioner. Therefore, The proposed amendment attempts to bring clarity to what was poor law. It remains to be seen if the amendment will achieve this.
3.	THE ALCOHOLIC DRINKS CONTROL ACT NO. 4 of 2010	Delete the definition of the word "magistrate" and substitute therefor the following "magistrate" has the meaning assigned to it in the Magistrates' Court Act.	The Alcoholic Drinks Act effectively placed offences under the Act outside the jurisdiction of the resident magistrate by defining magistrate as a magistrate above the rank of resident magistrate.	All cadres of magistrates will try offences under the Act.
4.	THE WILDLIFE CONSERVATION AND MANAGEMENT ACT (NO. 47 OF 2013)	**23. Establishment of Endowment Fund** 23. (1) There is established a Wildlife Conservation Trust Fund that shall be vested in a governing body established in accordance with subsection (2)- (2) The governing body referred to in subsection (1) shall serve as a public-private partnership and comprise - a) a Chairperson being appointed the Cabinet Secretary;	Deletion of the word "being" appearing in paragraph 23(2)(a). The sub-section if amended with then read: ***"a) a Chairperson appointed the Cabinet Secretary"*** Deletion of the words "who shall be the Chairperson" appearing in paragraph 23b). The sub-section if amended with then read:	***Note: The substantial change to section 23 resulted from the enactment of The Statute Law (Miscellaneous Amendment) Act 2018 which, when it came into force, repealed the entire section 23 of the Wildlife Conservation and Management Act.*** The change proposed by The Statute Law (Amendment) Bill 2019 seeks to remove ambiguity that arose from the 2018 amendment to section 23.

Council of Legal Education

When replying please quote

Ref. No: CLE/GN/15/Vol.II/(23)

Date: 15th April, 2019

Mr. Michael Sialai, EBS
Clerk of the National Assembly
Office of the Clerk, Main Parliament Buildings
P O Box 41842-00100
NAIROBI

Dear Mr. Michael Sialai, EBS

SUBMISSION OF MEMORANDA IN THE MATTER OF THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 (NATIONAL ASSEMBLY BILL NO. 21 OF 2019)

Reference is made to the above and to the Notice placed in the Standard Newspaper of 10th April, 2019 inviting memoranda on among other Acts of Parliament, The Legal Education Act No. 27 of 2012 and the Kenya School of Law Act No. 26 of 2012.

The Council of Legal Education and Kenya School of Law herewith present A JOINT MEMORANDUM on the proposed amendments in the Statute Law (Miscellaneous Amendments) Bill (National Assembly Bill No. 21 of 2019) for your action.

The two Institutions appreciate the opportunity to submit this memorandum in furtherance of quality standards in legal education and training in Kenya

Yours sincerely

Dr. J.K Gakeri
SECRETARY/CHIEF EXECUTIVE OFFICER
COUNCIL OF LEGAL EDUCATION

Dr. Henry K. Mutai
DIRECTOR/CHIEF EXECUTIVE OFFICER
KENYA SCHOOL OF LAW

cc

Hon Justice P. Kihara Kariuki
Attorney General
P O BOX 40112-00100
NAIROBI

Prof. Githu Muigai - Chairman Council of Legal Education

Prof. Fatuma Chege - Chairperson, Kenya School of Law

Encl.

PROPOSED AMENDMENTS TO STATUTES ARISING FROM JOINT RECOMMENDATIONS OF THE COUNCIL OF LEGAL EDUCATION AND THE KENYA SCHOOL OF LAW

APRIL 2019

This report is structured in two parts – the first Part covers proposed amendments to statutes arising from the recommendations presented in the form of a Statute Law (Miscellaneous Amendments) Bill. The second Part, on the other hand, provides a memorandum giving details and justifications for the proposed amendments.

PART 1

THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019

A Bill for:

AN ACT of Parliament to make minor amendments to Statute Law and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

Short title	1. This Act may be cited as the Statute Law (Miscellaneous Amendments) Act, 2019.
Amendment of written laws	2. The several laws specified in the first column of the Schedule are amended, in the provisions specified in the second column thereof, in the manner respectively specified in the third column.

s. 2 **SCHEDULE**

Kenya School of Law Act (No 26 of 2012)	Section 16	Section 16 is amended by inserting the following new paragraph "a person shall not qualify for admission to a course of study at the School unless the person has met the admission requirements prescribed by the Council of Legal Education."
	Second Schedule	The Second Schedule is amended by deleting paragraphs (a) and (b).

The Legal Education Act (No 27 of 2012)	Section 8	Section 8 is amended by inserting the following new paragraph after paragraph (f) (g) "administer the pre-bar examination for entry into the Advocates Training Programme for candidates who hold foreign qualifications in law".
	Section 8 (2) (a)	Section 8 is amended by inserting the following new paragraph after paragraph (a) of Subsection 2 (a)"accreditation of legal education providers for the purpose of licensing of the Advocates Training Programme"
	Section 8 (3) (a)	Section 8 is amended in paragraph (a) of Subsection (3) By inserting the word "all" between the words "in" and "education

PART 2

MEMORANDUM ON THE PROPOSED AMENDMENTS

PROPOSED AMENDMENT	Proposed amendment	JUSTIFICATION
Kenya School of Law Act (No 26 of 2012) Section 4	The Section should not be amended	The provisions of Section 4 (2)(a) are the core mandate of the School of Law.
Kenya School of Law Act (No 26 of 2012) Section 16	"a person shall not qualify for admission to a course of study at the School unless the person has met the admission requirements prescribed by the Council of Legal Education."	Following the proposed amendments to centralise admission requirements to the Advocates Training Programme under the Legal Education Act and its Regulations, the rewording of the provisions of Section 16 refer to the Legal Education Act 2012.
Second Schedule	The Second Schedule is amended by deleting paragraphs (a) and (b).	The provisions of the Second Schedule of the Kenya School of Law Act relate to admission requirements which will be anchored in the Legal Education Act 2012
The Legal Education Act (No 27 of 2012)	Section 8 Section 8 is amended by inserting the following new paragraph after paragraph (f) (g) "administer the pre-bar examination for entry into the Advocates Training Programme for candidates who hold foreign qualifications in law".	The Bill proposes to regularize the administration of the pre bar examination for entry to the advocates training programme

	Section 8 (2) (a) (a)"accreditation of legal education providers for the purpose of licensing of the Advocates Training Programme"	The Bill proposes to give the Council the mandate to license legal education providers to offer the Advocates Training Programme in Kenya
Section 8 (3) (a)	Section 8 is amended in paragraph (a) of Subsection (3) By inserting the word "all" between the words "in" and "education	The Bill proposes to require the Council of Legal Education to set standards for All legal education and training programmes in Kenya

CPS Governance Centre
Kilimanjaro Road, Upper Hill
P. O. Box 46935-00100
Nairobi, Kenya

Tel: +254 20 3597840/2
info@ics.ke
www.ics.ke

Institute of Certified Secretaries
'The Governance Profession'

April 16, 2019

Mr. Michael Sialai, EBS
The Clerk, National Assembly
P.O Box 41842-00100
Nairobi, Kenya.
Email: clerk@parliament.go.ke

Dear Mr. Sialai,

RE: REVIEW OF THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 2019

The Institute of Certified Secretaries (ICS) is a professional membership body, established under Cap. 534 Laws of Kenya with a mandate of promoting good governance in both public and private sectors.

We refer to your advertisement on Page 19, Daily Nation Newspaper of Wednesday April 10, 2019 on the call for submission of memoranda on the Statute Law Miscellaneous Amendment Bill 2019. The Institute has considered the proposed amendments to the **Companies Act, 2015** as follows:

Section	Proposals in the Bill	ICS Proposals and Justifications
9(1)(a)	**"(iv) requires the consent of all members to add a new member."**	This proposal is not recommended for the following reasons: a) The proposal uses the words "***new member***" which is not defined in the Act. There is only a passing reference of the same in the title of Section 901. It is not used anywhere in the Companies Act including in the contents of the said Section 901 hence it is misplaced. b) The intention of the proposal is practically impossible which will lead to a legal absurdity for reasons that the expectations for **unanimity/consent of all members** may not be attainable. That is why there are provisions in the Companies Act dealing with how decisions are carried out by members whether simple majority through ordinary resolution or defined super majority which is above the simple majority (most often it is put at 75% or such other higher number than 50%). Unanimity will always lead to deadlocked positions in companies which may have adverse consequences in the commercial world and may lead to disputes arising from deadlock in the running of companies. c) In the alternative, should this provision be retained, then it should be amended to provide as follows: "***restrict the addition of a new member***". In our opinion this will accommodate other provisions in the Companies Act such as Sect 329 which provide for procedure of allotment whose consequences may include new members being added. d) The requirement for consent of all members is likely to cause a lot of hardship and burden on running of businesses.

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DIRECTOR COMMITTEE SERVICES

		e) As a matter of comparative analysis, some of the progressive jurisdictions including South Africa and UK from where our Companies Act was borrowed heavily do not have such restrictive requirements.
275A	Every company shall general convene a general meeting once a meeting. year.	We support the proposed provision relating to the annual general meeting which seeks to give greater clarity.
329(1)	Directors Powers	While we are not strongly opposed to the substitution of Section 329(1), we are of the opinion that there is need to also delete Section 329(3)(b)(i) as it refers to the authorization derived from the Company's Articles. Please note that reference to authorization from the Company's Articles has been left out in the proposed new section while the existing Section 329(3)(b)(i) still refers to authorization from the Company's Articles. We hold the view that this draftsmanship will therefore lead to internal inconsistency of the law on powers of the Directors on allotment of shares. Our proposals therefore are: a) that Section 329(1) could be left without any amendment; or b) that Section 329(3)(b)(i) be deleted; Section 329 was lifted from the UK Companies Act 2006 section 551 verbatim. Our understanding as a matter of practice, is that whatever apprehension that may arise (whether held by the registrar or any other party) by retaining the authorization from the articles (i.e. by retaining the section as is) can be cured by the Registrar giving practice directions which require that a resolution of both the members and the Board should be provided for purposes of allotment.
		The words " only if they are authorised to do so by a resolution of the company." Should be separate from sub-section (b) so that the expression to apply to both sub-section (a) and (b).
611(2)a & b, 611(3) a & b, 615(3)a	**Squeeze-in and sell-out. Reduce from 90% to 50%**	The proposal to reduce the threshold **from 90% to 50%** for exercise of the squeeze-out or sell-out rights as the case may does not reflect the position in some of the advanced jurisdictions. The EU has given a directive for a threshold of between 90% to 95% (Germany, France, Netherland, Belgium, Czech Republic have a threshold of 95%) while in the USA the threshold stands at 90%. South Africa also maintain a threshold of 90%. As a matter of policy, if the threshold is reduced it is likely to have very drastic consequences in terms of privatization of public companies in Kenya as a result of the ease of squeeze-out of minority shareholders. We propose that a conservative threshold be maintained at 90%. We therefore do not support this amendment.

Other proposals for consideration and amendments to the Companies Act No. of 2015

PROVISION IN THE COMPANIES	PROPOSED AMENDMENT	JUSTIFICATION

ACT, 2015		
S. 3 Interpretation of provisions of this Act	Insert "Secretary" ***"Secretary means a Certified Secretary as defined under the Certified Public Secretaries of Kenya Act, Cap 534 of the laws of Kenya"*** Insert " Practicing Secretary" ***"Practicing Secretary means a Certified Secretary who is licensed to practice under the Certified Public Secretaries of Kenya Act, Cap 534 of the laws of Kenya".***	The word "Secretary" is used throughout the Act and therefore needs to be defined in the preamble. The role and qualifications of the practicing Secretary are provided under the Certified Public Secretaries of Kenya Act, Cap 534 of the laws of Kenya.
S.243 – Private Companies not required to have a Secretary	Section be worded as ***"Requirement for a secretary"*** Section 244 (1) – ***"A private company is required to have a Secretary only if it has:*** a) ***An annual gross turnover of five million shillings or more; Or*** b) ***A paid up capital of five hundred shillings or more."***	The Company Secretary helps the Board to monitor the effectiveness of the Company's governance practice as well as compliance with the law and the Articles and Memorandum of Associations Nominal capital has no relationship on the size and complexity of the company. Many large companies incorporate with share capital of Ksh 100, 000 only. There are large businesses organizations particularly in the social sector (Health and Education) which are limited not by shares but by guarantee. There are many business organizations that are registered under different legislations (law of trust, cooperative societies, NGOs). These should be dealt with under their respective legislations. We acknowledge the need to reduce the cost of doing business even as we promote good governance practices.
243	S. 243 Insert S. 24 ***(3)*** ***The role of the Secretary is to:*** ***(a) ensure compliance with the practice of good governance as provided***	To specify the role and responsibilities of the Secretary under this Act.

	under this Act and any other laws; (b) *Ensure compliance with statutory requirements including annual returns;* (c) *provide company secretarial, administrative and advisory services to the board;* (d) *act as custodian of statutory documents.*	
S. 770. (1) (c) annually assess the extent to which the company has observed those policies and strategies	S.770 (c) Amend to read as follows: "***subject the company to an annual governance audit by a practicing secretary accredited by the Institute of Certified Public Secretaries of Kenya for that purpose***".	Governance Audit will enhance compliance, protect investors' funds and therefore attract more investments. To be consistent with the Code of Governance for State Corporations, *Mwongozo.* To be consistent with the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 as issued by the Capital Markets Authority (CMA).

We hope that the Departmental Committee on Justice and Legal Affairs will consider these concerns before the Bill is enacted into law.

Should you require any further clarifications, please feel free to contact the undersigned.

Yours sincerely,

CS Obare Nyaega
Chief Executive Officer

MEMORANDUM

TO: Mr. Michael Sialai, Clerk Of The National Assembly

FROM: Tyler Hawi Ayah, a student at Riara University

RE: Discrimination and The Proposed Amendment to Section 8(1) of the Legal Education Act.

DATE: 13 APRIL 2019

Dear Mr. Sialai,

This memorandum will discuss the proposed amendment to section 8(1) of the Legal Education Act[1] and some of the implications of its enactment.

The Statute Law (Miscellaneous Amendments) Bill 2018 seeks to revise section 8(1)[2], to insert a new paragraph increasing the functions of the council of legal education (CLE), to include the administering of the pre-bar exam. Despite the fact that the requirement of a pre-bar exam is contained within section 16 of the Kenya School of Law Act[3], enacting the proposed amendment would further reinforce this requirement. The view taken in this memorandum is that further reinforcement of the pre-bar exam perpetuates direct discrimination. This is evident in Mwita J's discussion of section 16(1)[4] in Adrian Kamotho Njenga v KSL[5]. This case established it was not compulsory for local law students to sit the pre-bar exam. The rationale behind this was that the purpose of the pre-bar is to 'set standards', and thus was inapplicable for local universities whose standards were known. Mwita J recognized that "subjecting only…foreign students to this examination would amount to discriminatory practices."[6] Nevertheless, he reasoned this would either fail to amount to discrimination, because the legislature's intention to apply different qualification requirements in section 16 [7] was clear; or alternatively, if it did amount to discrimination, it was reasonable

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P.O. Box 918422-00100, NAIROBI

[1] Legal Education Act, 2011

[2] Ibid

[3] Kenya School of Law Act, 2012

[4] Ibid

[5] Adrian Kamotho Njenga v Kenya School of Law [2017] eKLR

[6] Ibid, Para 44

[7] Kenya School of Law Act (n7), s 16; Adrian Kamotho Njenga v Kenya School of Law (n9), Para 44

and justifiable under Article 24(1)[8]. In Mwita J's view, foreign university standards are not as well known; hence, the pre-bar exam as a standard maintenance mechanism was reasonable and justifiable.

The view of this memorandum respectfully disagrees with this argument. Articles 27(4)-(5)[9] prohibit discrimination against any person on any ground.[10] Furthermore, Article 24(1)(e)[11] requires a consideration of whether, a "less restrictive means to achieve the purpose of limiting a right or fundamental freedom"[12] can be used. It is the view of this memorandum that if the purpose of Section 16(1)(b)(iii)[13] is to maintain standards, then there are less restrictive means of achieving this. Firstly, the mandatory requirement that foreign students submit their documents to CLE for recognition; and secondly, the requirement that foreign students submit their documents to KNQA,[14] for equation of their certificates. Both of these are arguably less restrictive means of achieving this purpose.

With regards to the former, CLE examines transcripts, syllabi and foreign degrees, translating them to a Kenyan equivalent and thereafter refers foreign students to a pre-KSL course. During this course, students are expected to complete certain units to ensure they satisfy local university standards. Similarly, KNQA examines foreign high-school certificates and equates them to the Kenyan system's equivalent. If Mwita J's contention that standard setting as the purpose of the pre-bar was to stand, it follows that foreign students should be exempted from the pre-bar after complying with CLE and KNQA. Presumably, CLE does a thorough job of ensuring that units taken in foreign institutions, meet Kenyan university standards. Foreign students are only referred to pre-KSL to do units that have either failed to meet local standards, or where the student did not take a unit abroad, which is required in meeting local standards. This process suggests that whatever unit a foreign student is not told to undertake in pre-KSL, has already met local university standards. Likewise, whatever unit a student is required to undertake in pre-KSL, has inevitably met local university standards given that these units are undertaken at a local university. Hence, after the completion of CLE's requirements, foreign students ought not to be treated any different than a local student. Doing so would amount to direct discrimination within Article 27.[15] If the proposed amendment of section 8(1)[16] is enforced, thus reinforcing the pre-bar requirement, the existence of Kamotho[17] will mean the existence of

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[8] Constitution of Kenya, 2010

[9] Ibid

[10] Ibid, Article 27 (4)-(5)

[11] Constitution of Kenya (n12)

[12] Ibid, Article 24 (1)(e)

[13] Kenya School of Law Act (n7)

[14] 'Kenya National Qualifications Authority'

[15] Constitution of Kenya (n12)

[16] Legal Education Act (n5)

[17] Adrian Kamotho Njenga v Kenya School of Law (n9)

unreasonable and unjustified discrimination.

The view of this memorandum is that there are two possible courses of action: enact the proposed section 8(1)(g)[18] and simultaneously overrule the Kamotho[19] case. This means that local students will also sit the pre-bar exam. This will stop the overt discrimination towards foreign students. However, this will also mean that the purpose of the pre-bar exam will be defeated, since all the students sitting the exam will have already met the necessary standards. Alternatively, do not enact section 8(1)(g)[20] and remove the requirement of a pre-bar exam entirely, considering that in line with Article 24(1)(e)[21], there are less restrictive means to achieve its purpose. A foreign students obligation to comply with CLE and KNQA ensures these standards are maintained. Furthermore, enacting the proposed amendment to the Kenya School of Law Act[22] could achieve this, as it seeks to delete section 16[23] and paragraphs (a) and (b) in the second schedule. This would not only end the overt discrimination, but also ensure unnecessary exams are avoided. The only foreseeable concern would be an absence of KSL admission requirements; however, this could be an opportunity to create new and equal requirements. This memorandum therefore supports the latter course of action.

Enacting section 1(8)(g)[24] will only reinforce the requirement to sit the pre-bar exam, which alongside Mwita J's judgment in Kamotho[25], results in direct discrimination towards foreign students. Kenya is a nation that ought to pride itself on equality and freedom from discrimination. As it stands, foreign students experience overt discrimination that is unjustified and unreasonable. As a member and the clerk of the national assembly, there is authority[26] to end this discrimination and choose equality.

Thank you,

Yours Sincerely,

Tyler Hawi Ayah

---

[18] Constitution of Kenya (Amendment) Act (n1), p 342

[19] Adrian Kamotho Njenga v Kenya School of Law (n9)

[20] Constitution of Kenya (Amendment) Act, (n1)

[21] Constitution of Kenya (n12)

[22] Kenya School of Law Act (n7)

[23] Ibid

[24] Constitution of Kenya (Amendment) Act, (n1)

[25] Adrian Kamotho Njenga v Kenya School of Law (n9)

[26] Constitution of Kenya (n12), Article 95

ANNEXURE 4

List of Members who attended the Sitting that adopted the report

KENYA NATIONAL ASSEMBLY

DEPARTMENTAL COMIITTEE ON JUSTICE AND LEGAL AFFAIRS

ATTENDANCE REGISTER FOR MEMBERS

DATE 30/04/2019 TIME 10.00AM

VENUE Committee Room 5th Floor CONSIDERATION OF STATUTE LAW BILL MEETING CAJ FROM BOMAS

NO.	NAME	SIGNATURE
1.	Hon. William Cheptumo, M.P. – Chairperson	
2.	Hon. Alice Wahome, MP. - Vice Chairpserson	
3.	Hon. John Olago Aluoch, MP.	
4.	Hon. Roselinda Soipan Tuya, MP.	
5.	Hon. Ben Momanyi,MP.	
6.	Hon. Mwamkale William Kamoti, MP.	
7.	Hon. Peter Opondo Kaluma, MP.	
8.	Hon. Charles Gimose, MP.	
9.	Hon. Johana Ngeno Kipyegon, MP.	
10.	Hon. Zuleikha Hassan, MP.	
11.	Hon. John Kiarie Waweru, MP.	
12.	Hon. George Gitonga Murugara, MP.	

13.	Hon. Adan Haji Yussuf, MP.	
14.	Hon. Japheth Kiplangat Mutai, MP.	
15.	Hon. Anthony Githiaka Kiai, MP.	
16.	Hon. Jennifer Shamalla, MP.	
17.	Hon. Beatrice Adagala, MP.	
18.	Hon. John Munene Wambugu, MP.	
19.	Hon. Boss Shollei, CBS, MP.	

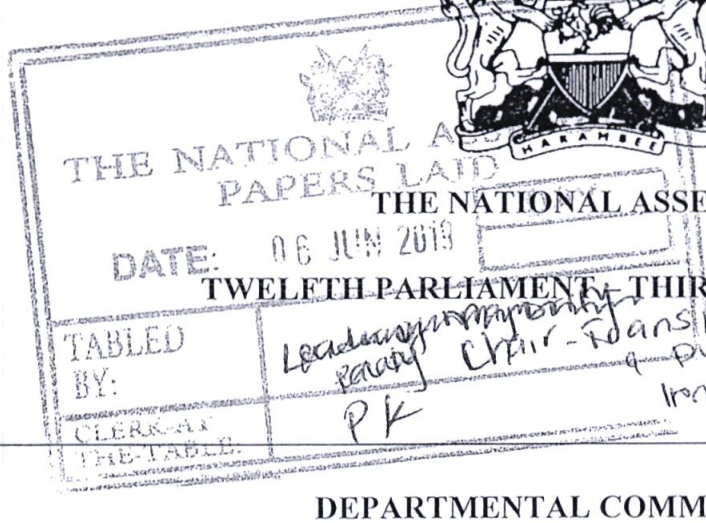
for:

GEORGE GAZEMBA, ACIArb
For: CLERK OF THE NATIONAL ASSEMBLY

Approved for tabling
SWA
6/6/19

REPUBLIC OF KENYA





THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – THIRD SESSION – 2019

DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS AND HOUSING

REPORT ON CONSIDERATION OF THE STATUTE LAW MISCELLENOUS AMENDMENTS BILL, 2019 (NATIONAL ASSEMBLY BILL NO. 21)

VOLUME I

CLERKS CHAMBERS
DIRECTORATE OF COMMITTEE SERVICES
PARLIAMENT BUILDINGS
NAIROBI

JUNE, 2019

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1.0 LIST OF ANNEXURES

Annexure 1:	Minutes of Committee sittings on the consideration of the Bill (Volume I Report)
Annexure 2:	Newspaper advertisement inviting the public to submit memoranda on the Bill (Volume I Report)
Annexure 3:	Written submission received from stakeholders following newspaper advertisement (Volume II Report)

CHAIRPERSON'S FOREWORD

The Statute Law (Miscellaneous Amendment) Bill, 2019 (National Assembly Bill No. 21) was read a first time on **3rd April, 2019** and was subsequently committed to respective Departmental Committees (i.e. Justice and Legal Affairs, Administration and National Security, Finance and National Planning, environment and Natural Resources, Sports Culture and Tourism and Transport, Public Works and Housing) for consideration and facilitation of public participation pursuant to Standing Order 127. The Bill seeks to, among other Statutes; amend the Merchant Shipping Act, No.4 of 2009.

The Clerk of the National Assembly placed adverts in the print media on **10th April, 2019** seeking for comments from the public on the Bill pursuant to Article 118 of the Constitution. The Committee received memoranda from four (4) stakeholders. The Committee also wrote to the Principal Secretary for Shipping and Maritime Affairs inviting her for a meeting on 9th May, 2019.

The Committee is grateful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during the consideration of the Bill. Finally, I wish to express my appreciation to the Honorable Members of the Committee and all those who responded to the National Assembly's advert inviting the public to present their views on the Bill.

On behalf of the Departmental Committee on Transport, Public Works and Housing and pursuant to provisions of Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the report of the Committee on its consideration of the Statute Law (Miscellaneous Amendment) Bill, 2019.

THE HON. DAVID PKOSING, MP, CBS
CHAIRPERSON
DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS AND HOUSING

EXECUTIVE SUMMARY

The Statute Law (Miscellaneous Amendment) Bill, 2019 (National Assembly Bill No. 21) was published on **29th March, 2019**. The Bill was read a first time on **3rd April, 2019** and thereafter committed to respective Departmental Committees (Justice and Legal Affairs, Administration and National Security, Finance and National Planning, Environment and Natural Resources, Sports Culture and Tourism, and Transport, Public Works and Housing) that were expected to process the amendments of the respective Statutes that fall within their purview. The Departmental Committee on Transport, Public Works and Housing considered amendments to the Merchant Shipping Act, 2009.

The Bill seeks to amend the Merchant Shipping Act, 2009 in order to exempt any Government entity or enterprise from any provision of this Act where such exemption is in the public interest and in furtherance of Government policy.

In order to fulfill the requirements of Article 118 of the Constitution, the Clerk of the National Assembly placed an advertisement in the print media on **10th April, 2019** requesting for comments from the general public on the Bill. The Committee received memoranda from five (7) stakeholders.

The Committee received memoranda from the following stakeholders:-

1. The Task Catering Institute;
2. The Coast Parliamentary Group;
3. Mr. Nyainda Paul Henry;
4. Seafarers Union of Kenya;
5. Hon. Mohamed Faki, Senator Mombasa County;
6. Maritime Industry Associations ;and
7. The State Department for Shipping and Maritime Affairs.

The Committee considered all the submissions before making its recommendation.

1 PREFACE

1.1 Establishment of the Committee

1. The Departmental Committee on Transport, Public Works and Housing is established under Standing Order 216(1) whose mandate, pursuant to the Standing Order 216 (5), is as follows;

a. investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;
b. study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation;
c. study and review all legislation referred to it;
d. study, assess and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
e. investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
f. to vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (*Committee on Appointments*);
g. examine treaties, agreements and conventions;
h. make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
i. make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
j. consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
k. examine any questions raised by Members on a matter within its mandate.

1.2 Mandate of the Committee

2. The Second Schedule to the Standing Orders mandates the Committee to consider matters relating to the following subjects:-

a) Transport;
b) Roads;
c) Public works;
d) Construction and maintenance of roads, rails and buildings;
e) Air and seaports; and
f) Housing.

3. In executing this mandate, the Committee oversees various State Departments, namely:

i. The State Department of Transport;
ii. The State Department of Infrastructure;
iii. The State Department of Housing and Urban Development;
iv. The State Department of Public Works; and

v. The State Department of Shipping and Maritime Affairs.

1.3 Committee Membership

The Departmental Committee on Transport, Public Works & Housing was constituted by the House on Thursday 14th December 2017 comprising of the following Members:-

	Names	Party	Constituency
1.	Hon. David Pkosing (Chairman)	Jubilee	Pokot South
2.	Hon. Moses Kuria (Vice Chair)	Jubilee	Gatundu South
3.	Hon. Dominic Kipkoech Koskei	Jubilee	Sotik
4.	Hon. Peris Pesi Tobiko	Jubilee	Kajiado East
5.	Hon. Kulow Maalim Hassan	EFP	Banissa
6.	Hon. Mugambi Murwithania Rindikiri	Jubilee	Buuri
7.	Hon. Samuel Arama	Jubilee	Nakuru Town West
8.	Hon. Shadrack John Mose	Jubilee	Kitutu Masaba
9.	Hon. Rigathi Gachagua	Jubilee	Mathira
10.	Hon. Rehema Dida Jaldesa	Jubilee	Isiolo
11.	Hon. Ahmed Bashane Gaal	PDP	Tarbaj
12.	Hon. David Njuguna Kiaraho	Jubilee	Ol Kalou
13.	Hon. Johnson Manya Naicca	ODM	Mumias West
14.	Hon. Tom Mboya Odege	ODM	Nyatike
15.	Hon. Suleiman Dori Ramadhani	ODM	Msambweni
16.	Hon. Ahmed Abdisalan Ibrahim	ODM	Wajir North
17.	Hon. Gideon Mutemi Mulyungi	WDP	Mwingi Central
18.	Hon. Savula Ayub Angatia	ANC	Lugari
19.	Hon. Vincent Kemosi Mogaka	Ford K	West Mugirango

A. Committee Secretariat:

1.	Ms. Chelagat Tungo Aaron	First Clerk Assistant
2.	Mr. Ahmed Salim Abdalla	Third Clerk Assistant
3.	Ms. Mercy Wanyonyi	Legal Counsel
4.	Mr. James Muguna	Research Officer
5.	Mr. Abdinasir Moge Yusuf	Fiscal Analyst
7.	Mr. Collins Mahamba	Audio Officer
8.	Ms. Zainab Wario	Sergeant-at-Arms

2 CONSIDERATION OF THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 2019

2.1 Background Information

4. The Statute Law (Miscellaneous Amendment) Bill, 2019 seeks to among other Statutes, amend the Merchant Shipping Act, No.4 of 2009 by inserting a new section 4A immediately after section 4.

2.2 Summary of the Bill

5. The Bill seeks to amend the Merchant Shipping Act, 2009 in order to exempt any Government entity or enterprise from any provision of this Act where such exemption is in the public interest and in furtherance of Government policy.

6. **Proposed amendment to section 4 of the Act**
Insert the following new section immediately after section 4—

4A. Notwithstanding any other provision of this Act, the Cabinet Secretary may, on the recommendation of the Authority, by notice in the Gazette and subject to such conditions as may be appropriate, exempt any Government entity or enterprise from any provision of this Act where such exemption is in the public interest and in furtherance of Government policy.

3 PUBLIC PARTICIPATION IN THE REVIEW OF THE BILL

7. 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''

8. In line with the Constitution and Standing Orders, the National Assembly in the local daily newspapers of April 10th 2019 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 written submissions on the proposed amendments to the Merchant Shipping Act, 2009 Act.

The written submissions received are contained in Annexure 3 of the report.

9. The following stakeholders submitted their memoranda to the Committee:-
    a. The Task Catering Institute;
    b. The Coast Parliamentary Group;
    c. Mr. Nyainda Paul Henry;
    d. Seafarers Union of Kenya;
    e. Hon. Mohamed Faki, Senator Mombasa County;
    f. Maritime Industry Associations ;and
    g. The State Department for Shipping and Maritime Affairs.

3.1 Task Catering Institute

10. In their memorandum to the Committee, the Institute submitted that they supported the proposed amendment because it will lead to the MSC Cruise Ships to be given a berth by Kenya National Shipping Line under Kenya Ports Authority in the port of Mombasa. Further, that the proposed amendment will have a ripple effect in terms of opening up employment opportunities for Kenyans and enhancing capacity for locals.

3.2 Coast Parliamentary Group

11. The Members of the Coast Parliamentary Group requested that the public participation through the Departmental Committee on Transport, Public Works and Housing be done in Mombasa County (Coast Region).

3.3 Mr. Nyainda Paul Henry

12. In his submission, he stated that he supported the amendment on the basis that thousands of unemployed Kenyan youth in the maritime sector will finally gain meaningful employment on board ocean-going vessels.

3.4 Seafarers Union of Kenya

13. In their written submissions, the Seafarers Union of Kenya supported the proposed amendments because in their view, there is urgent need to revive, build and strengthen the Kenya National Shipping Line. That this would be in line with the Blue Economy which will provide employment and training opportunities to thousands of Kenyan seafarers. That since 2014 to date, Kenya has been training youths in marine engineering and nautical science from certificates to degrees.
14. It was their further submission that as a long term plan, Kenya must own and run its own ships through the Kenya National Shipping Line. That in order to get there, laws and policies must be developed to facilitate and enhance the process hence the need to amend the Merchant Shipping Act, 2009.
15. It was also submitted that about 80% of the cargo that goes through the port of Mombasa is owned by the Government of Kenya and that in shipping transport, whoever has the cargo controls the ships. That once the Kenya National Shipping Line is empowered to handle all government owned cargo, it will be in a position to control and actually own ships.

3.5 Hon. Mohamed Faki, Senator Mombasa County

16. In his submission to the Committee, the Hon. Senator for Mombasa County submitted that the amendment as proposed, gave the Cabinet Secretary wide and unfettered powers to exempt any entity, a matter that was of great concern since the CS will have unchecked powers. He submitted to the Committee that it was a matter of great concern on how a Cabinet Secretary can solely determine what public interest without public participation is.

17. The Senator further submitted that whereas it was public knowledge that the intention was to exempt KNSL from the provisions of section 16, it was important to note that the KNSL had no capacity to operate berth C2 at the Mombasa Port. He noted that the KNSL was not wholly owned by the government with the government owning 53% while a private entity owning 47% of the shares. He submitted that any failure by the Kenya Maritime Authority to fully enforce the existing Act cannot be blamed on the people or the leaders. The Senator submitted that it was true people were being exploited and that it was the Cabinet Secretary who had the mandate and powers over the industry in general.

3.6 Maritime Industry Associations

18. The Committee received a delegation of representatives from different associations related to the maritime industry, all in support of the amendment. These include the Association for Women in the Maritime Sector in Eastern and Southern Africa (WOMESA), Mission to Seafarers, Homa Bay Boat Owners Association, Faza Isand Dwellers, Old Port Boat Owners Association, South Coast Windsurfing Association, Young Seafarers Workers Group, National Marine Cadets Association, Technical University of Mombasa Nautical Science Students Association (TUMNSA), among so many others, all of who submitted their written memoranda to the Committee.

19. The groups submitted that there was high and unfair exploitation of workers in the maritime sector, where foreign companies enrich themselves in the country at the expense of the poor workers. They submitted that the amendment will create job opportunities. The Secretary General of the Seafarers Union of Kenya submitted that Kenya has goods, has cargo but has no ships, making matters worse for the industry. He submitted that the revival of the KNSL will be very helpful for Kenya.

3.7 State Department for Shipping and Maritime Affairs.

20. In their written submissions, they stated that the State Department supported the amendment and further proposed that the Merchant Shipping Act be amended in section 16 by inserting the

words **"except the Kenya National Shipping Line" immediately after the words "shipping line".** ***Section 16*** **provides that-**

> *16. Restriction on ship owner*
> (1) ***No owner of a ship or person providing the service of a shipping line shall, either directly or indirectly, provide in the maritime industry the service of crewing agencies, pilotage, clearing and forwarding agent, port facility operator, shipping agent, terminal operator, container freight station, quay side service provider, general ship contractor, haulage, empty container depots, ship chandler or such other service as the Minister may appoint under section.***

21. The rationale for the proposed amendment to section 16 of the Merchant Shipping Act is that the section as currently worded shuts out any national shipping aspirations. The revival of the Kenya National Shipping Line is now a part of the Medium-Term Plan III of Vision 2030 and as part of support to the "Big 4" Agenda particularly as regards to Manufacturing, Food security as well as agro-processing. That further, it will enable the KNSL take pride of its place as a national carrier of local imports and exports as well as create the catalytic impact of developing a full blown Blue Economy with the full participation of Kenyans in the sector while reducing the maritime transport burden on the national economy. That restriction of international companies in certain aspects of marine transportation logistics is a global practice aimed at encouraging participation of locals in segments where capacities can easily be created.

4 COMMITTEE OBSERVATIONS

The Committee while considering the Bill made the following key observations;

1) The proposed amendment is substantive in nature since it seeks to allow the Cabinet Secretary to exempt an organization from the application of the Act hence ought not to be contained in a Statute Law (Miscellaneous) Amendment Bill, whose purpose is to make minor amendments to existing statutes. The merits of the proposed amendment should be considered in a substantive amendment Bill to the Merchant Shipping Act, No.4 of 2009.

2) The proposed amendments gives draconian powers to the Cabinet Secretary to exempt any government entity or enterprise from the provisions of the Merchant Shipping Act and thus, the said powers may be abused.

3) The import of the proposed amendment is to revive the Kenya National Shipping Line by ensuring that the Kenya National Shipping Line provides the service of crewing agencies, pilotage, clearing and forwarding agent, port facility operator, shipping agent, terminal operator,

container freight station, quay side service provider, general ship contractor, haulage, empty container depots, ship chandler or such other service as the Minister may appoint under section 16 of the Merchant Shipping Act, No.4 of 2009.

5 COMMITTEE STAGE AMENDMENTS

Having considered the Bill and the views by different stakeholders, the Committee proposed that:

SCHEDULE

THAT the Schedule to the Bill be amended by deleting the proposed amendment to section 4 of the Merchant Shipping Act,No.4 of 2009 and substituting therefore the following new amendments—

s.2	Insert the following new definition in its proper alphabetical order— "national shipping line" means the Kenya National Shipping Line;
s.16(1)	Insert the words "except a national shipping line" immediately after the words "shipping line".

SIGNED..... **DATE**.....05/06/2019.

THE HON. DAVID PKOSING, MP, CBS

CHAIRPERSON

DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS AND HOUSING

Annexure 1:

Minutes of Committee sittings on the consideration of the Bill (Volume I Report)

MINUTES OF THE THIRTY SIXTH (36TH) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON THURSDAY, 9TH MAY 2019 AT 11.30 A.M. IN 5TH FLOOR, CONTINENTAL HOUSE

MEMBERS PRESENT

1. Hon. David Pkosing, M.P. - Chairperson
2. Hon. Samuel Arama, M.P.
3. Hon. Savula Ayub Angatia, M.P.
4. Hon. Johnson Manya Naicca, M.P.
5. Hon. Dominic Kipkoech Koskei, M.P.
6. Hon. Ahmed Abdisalan Ibrahim, M.P.
7. Hon. Kulow Maalim Hassan, M.P.
8. Hon. Mugambi Murwithania Rindikiri, M.P.
9. Hon. Peris Pesi Tobiko, M.P.

MEMBERS ABSENT WITH APOLOGY

1. Hon. Moses Kuria, M.P. - Vice Chairperson
2. Hon. Suleiman Dori Ramadhani, M.P.
3. Hon. David Njuguna Kiaraho, M.P.
4. Hon. Ahmed Bashane Gaal, M.P.
5. Hon. Gideon Mutemi Mulyungi, M.P.
6. Hon. Rigathi Gachagua, M.P.
7. Hon. Shadrack John Mose, M.P.
8. Hon. Tom Mboya Odege, M.P.
9. Hon. Vincent Kemosi Mogaka, M.P.
10. Hon. Rehema Dida Jaldesa, M.P.

SECRETARIAT

1. Ms. Chelagat Aaron Tungo - Clerk Assistant I/Lead Clerk
2. Mr. Ahmed Salim - Clerk Assistant III
3. Ms. Mercy Wanyonyi - Legal Counsel

4. Mr. Collins Mahambe - Audio Officer
5. Ms. Zainab Wario - Sergeant-at-arm

IN ATTENDANCE

1. Mrs. Nancy Karigithu, CBS - Principal Secretary, Maritime and Shipping A.
2. Mr. Joseph Joma - Ag. MD, KNSL
3. Maj. (Rtd) George Okong'o - DG, KMA
4. Mr. John Omingo - Head, Commercial of Shipping, KMA
5. Mr. Simon Mungai - Senior Economist, Shipping and Maritime

MIN No. TPWH 160/2019: PRELIMINARIES

The meeting was called to order at ten o'clock, with a word of prayer from the Chairperson. Members confirmed the agenda as consideration of the proposed amendment to the Merchant Shipping Act, No.4 of 2009 as contained in the Statute Law (Miscellaneous Amendments) Bill, 2019 where the Principal Secretary for Maritime and Shipping Affairs was invited to present her views.

MIN No. TPWH 161/2019: CONFIRMATION OF MINUTES OF THE PREVIOUS

Confirmation of minutes of the previous sitting was deferred to the next sitting of the Committee.

MIN No. TPWH 162/2019: CONSIDERATION OF THE PROPOSED AMENDMENT TO THE MERCHANT SHIPPING ACT, NO.4 OF 2009 – MEETING WITH THE PRINCIPAL SECRETARY FOR MARITIME

The Principal Secretary submitted her written presentation before Members sought clarification on whether the Kenya National Shipping Line was under the State Department for Maritime and Shipping Affairs or it was under Transport. The Principal Secretary explained that the Act proposed to be amended is under her docket even though Kenya National Shipping Line was transferred to the State Department for Transport. Members noted that since the expected beneficiary of the proposed amendment was the Kenya National Shipping Line, it was then in

order that the Principal Secretary for Transport was the one who should be executing the support submissions for the Ministry. The Committee resolved that the Cabinet Secretary for the Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works, the Principal Secretary for Transport and the Principal Secretary for Maritime and Shipping Affairs be invited on Thursday, 16th May 2019 at 10am to submit the Ministry's views on the proposed amendment and to afford both the Ministry and the Committee a single platform to clear any questions that may arise. The Committee further resolved to invite the Coast Parliamentary Group on the same day at 12 noon and the Kenya Ports Authority at 2pm. Agenda for the meetings is consideration of the proposed amendment to the Merchant Shipping Act, No.4 of 2009 as contained in the Statute Law (Miscellaneous Amendments) Bill, 2019.

MIN No. TPWH 163/2019: ADJOURNMENT

There being no other business, the sitting was adjourned at thirty minutes past twelve noon. The next meeting to be held on Thursday, 16th May 2019 at 10:00am.

Signed.....

(Chairperson)

Date.....23/5/19.....

MINUTES OF THE THIRTY SEVENTH (37TH) SITTING OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING HELD ON THURSDAY, 16TH MAY 2019 AT 10.15 A.M. IN COMMITTEE ROOM 7, MAIN PARLIAMENT BUILDING

MEMBERS PRESENT

1. Hon. David Pkosing, M.P. - Chairperson
2. Hon. Samuel Arama, M.P.
3. Hon. Ahmed Abdisalan Ibrahim, M.P.
4. Hon. Dominic Kipkoech Koskei, M.P.
5. Hon. Johnson Manya Naicca, M.P.
6. Hon. Mugambi Murwithania Rindikiri, M.P.
7. Hon. Tom Mboya Odege, M.P.
8. Hon. Vincent Kemosi Mogaka, M.P.

MEMBERS ABSENT WITH APOLOGY

1. Hon. Moses Kuria, M.P. - Vice Chairperson
2. Hon. Suleiman Dori Ramadhani, M.P.
3. Hon. David Njuguna Kiaraho, M.P.
4. Hon. Ahmed Bashane Gaal, M.P.
5. Hon. Gideon Mutemi Mulyungi, M.P.
6. Hon. Kulow Maalim Hassan, M.P.
7. Hon. Peris Pesi Tobiko, M.P.
8. Hon. Rehema Dida Jaldesa, M.P.
9. Hon. Shadrack John Mose, M.P.
10. Hon. Savula Ayub Angatia, M.P.
11. Hon. Rigathi Gachagua, M.P.

SECRETARIAT

1. Ms. Chelagat Aaron Tungo - Clerk Assistant I/Lead Clerk
2. Mr. Ahmed Salim - Clerk Assistant III
3. Ms. Mercy Wanyonyi - Legal Counsel

4.	Mr. Collins Mahamba	-	Audio Officer
5.	Mr. Bernard Omondi	-	Sergeant-at-arm

IN ATTENDANCE

1.	Sen. Mohamed Faki, M.P.	-	Senator, Mombasa County
2.	Mrs. Nancy Karigithu, CBS	-	PS Shipping and Maritime Affairs (SDSMA)
3.	Mr. Daniel Manduku	-	Managing Director, Kenya Ports Authority
4.	Maj. (Rtd) George N. Okong'o	-	Director General, Kenya Maritime Authority
5.	Mr. Joseph Juma	-	Ag. MD, KNSL
6.	Capt. W. Ruto	-	GM Operations, KPA
7.	Mr. Julius Segera	-	Dep. Director, Maritime Transport
8.	Affraya E. Dena	-	Gen. Man. Boar and Legal Services
9.	Mr. John Omingo	-	Head, Comm. Shipping, KMA
10.	Mr. Steve Owaki	-	Sec. General, Seafarers Union of Kenya
11.	Mr. Zablon Mwangagi	-	Secretary, Kenya Ship Contractors Association
12.	Mr. Daudi Haji	-	Chairman, Seafarers Union of Kenya
13.	Mr. Sammy Mwendar	-	Chairman, Kenya Seafarers Welfare Association
14.	Mr. Mohamed Sebe	-	Committee, Seafarers Workers Union
15.	Ms. Fatuma M. Kisiwa	-	Cadet, Jomo Kenyatta Uni. of Agric. & Technology
16.	Ms. Janet W. Mirobi	-	Co-ordinator, Seafarers Union of Kenya
17.	Mr. Paul Nyainda Henry	-	Marine Engineer Class III
18.	Dr. Christiaan Adika Adenya	-	Chairman, Marine Engineering Dept. JKUAT
19.	Ms. Florence Wanjiku Njau	-	Ag. Gen. Manager, Utalii Hotel
20.	Mr. Sadiq Feysal Abdi	-	Unemployed Youth, Unemployed Seafarers
21.	Mr. Samuel Wabuke	-	Consultant, Blue Economy
22.	Mr. Joshua Kiminza	-	Coordinator, Blue Economy Stakeholders Forum
23.	Ms. Betty Makena	-	ITF Inspector, Internation Transport Workers Fed.
24.	Ms. Emma Nkirote	-	Rep. Family, Parents Association

MIN No. TPWH 164/2019: PRELIMINARIES

The meeting was called to order at fifteen minutes past ten o'clock, with a word of prayer from the Chairperson. Members confirmed the agenda as meeting with the Ministry and other stakeholders to receive views on the Statute Law (Miscellaneous Amendments) Bill, 2019.

MIN No. TPWH 165/2019: CONFIRMATION OF MINUTES OF THE PREVIOUS

Confirmation of minutes of the previous sitting was deferred to the next sitting of the Committee.

MIN No. TPWH 166/2019: SUBMISSION FROM THE MINISTRY ON THE PROPOSED AMENDMENT TO THE MERCHANT SHIPPING ACT, 2009 AS CONTAINED IN THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019

The Principal Secretary for Shipping and Maritime Affairs conveyed the apologies of the Cabinet Secretary for Transport and the Principal Secretary for Transport, both of whom were away on official duties. The Principal Secretary submitted that the Ministry was fully in support of the amendments to the Merchant Shipping Act 2009. She gave a historical account of the Kenya National Shipping Line (KNSL), informing the Committee that the government f Kenya through the Kenya Ports Authority owns 53% of the shares while the Mediterranean Shipping Company S.A. (MSC), the world's second-largest shipping line in terms of container vessel capacity, owns 47% of the shares in the KNSL.

The Principal Secretary further asserted that no private company will take over the port of Mombasa, a position confirmed by the Managing Director, Kenya Ports Authority (KPA). It was submitted that the KNSL was a subsidiary which was under government oversight and that KPA- just like the Attorney General, the National Treasury, the PS transport and other four independent directors- has a seat in the board of KNSL. The Ministry further submitted that no staff of KPA will lose their jobs as a result of the expected revival and restructuring plans of the KNSL.

While noting the concerns that the scope of powers as proposed in the amendment was too wide, the Ministry submitted that that the proposed amendment was only aimed at exempting the

Kenya National Shipping Line from the provisions of section 16 of the Merchant Shipping Act 2009 and no other party. In the alternative, the Ministry proposed that instead of amending section 4 of the Act, the National Assembly may opt to amend section 16 of the Act by adding the words "provided that the above provisions will not apply to the National Shipping Line" immediately after section 16. The meeting noted that the second option was better, provided that a definition of "National Shipping Line" was also included in the Act.

The Ministry submitted that the intention for the revival and empowering of a national shipping line was to create employment and other opportunities in the maritime sector for the youth.

MIN No. TPWH 167/2019: SUBMISSIONS FROM STAKEHOLDERS IN THE MARITIME SECTOR ON THE PROPOSED AMENDMENT TO THE MERCHANT SHIPPING ACT, 2009 AS CONTAINED IN THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019

The Committee received a delegation of representatives from different associations related to the maritime industry, all in support of the amendment. These include the Association for Women in the Maritime Sector in Eastern and Southern Africa (WOMESA), Mission to Seafarers, Homa Bay Boat Owners Association, Faza Isand Dwellers, Old Port Boat Owners Association, South Coast Windsurfing Association, Young Seafarers Workers Group, National Marine Cadets Association, Technical University of Mombasa Nautical Science Students Association (TUMNSA), among so many others, all of who submitted their written memoranda to the Committee.

The groups submitted that there was high and unfair exploitation of workers in the maritime sector, where foreign companies enrich themselves in the country at the expense of the poor workers. They submitted that the amendment will create job opportunities. The Secretary General of the Seafarers Union of Kenya submitted that Kenya has goods, has cargo but has no ships, making matters worse for the industry. He submitted that the revival of the KNSL will be very helpful for Kenya.

MIN No. TPWH 168/2019: **SUBMISSION FROM THE SENATOR OF MOMBASA COUNTY ON THE PROPOSED AMENDMENT TO THE MERCHANT SHIPPING ACT, 2009 AS CONTAINED IN THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019**

In his submission to the Committee, the Hon. Senator for Mombasa County submitted that the amendment as proposed, gave the Cabinet Secretary wide and unfettered powers to exempt any entity, a matter that was of great concern since the CS will have unchecked powers. He submitted to the Committee that it was a matter of great concern on how a Cabinet Secretary can solely determine what public interest without public participation is.

The Senator further submitted that whereas it was public knowledge that the intention was to exempt KNSL from the provisions of section 16, it was important to note that the KNSL had no capacity to operate berth C2 at the Mombasa Port. He further submitted that the KNSL was not wholly owned by the government with the government owning 53% while a private entity owning 47% of the shares. He further asserted that any failure by the Kenya Maritime Authority to fully enforce the existing Act cannot be blamed on the people or the leaders. The Senator submitted that it was true people were being exploited and that it was the Cabinet Secretary who had the mandate and powers over the industry in general.

MIN No. TPWH 169/2019: **ADJOURNMENT**

There being no other business, the sitting was adjourned at fifteen minutes past two o'clock. The next meeting to be held on Monday, 20th May 2019 at 9:30am.

Signed.....

(Chairperson)

Date.....23/5/2019.....

Annexure 2:

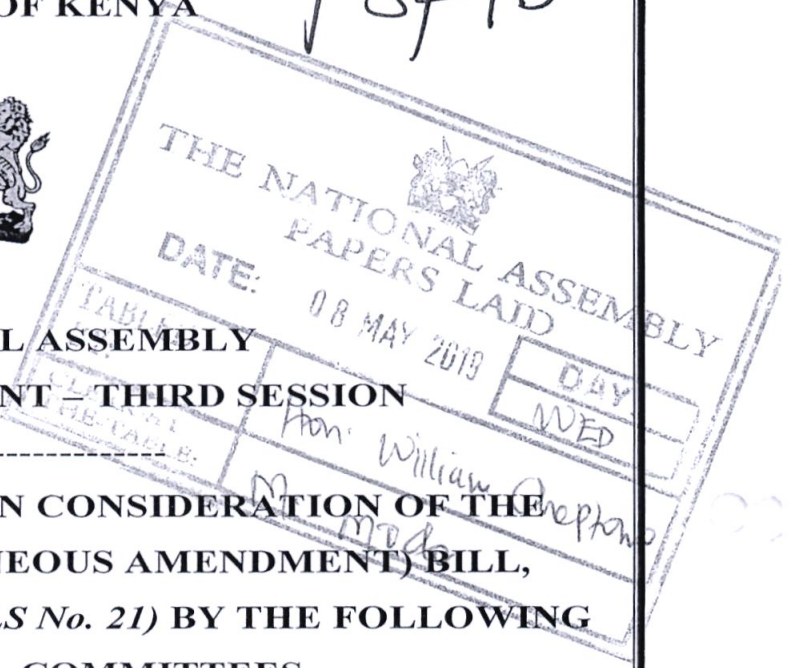
Newspaper advertisement inviting the public to submit memoranda on the Bill.

(Volume I Report)

Approved for tabling.
BA
CNA
8/5/19

REPUBLIC OF KENYA





THE NATIONAL ASSEMBLY
TWELFTH PARLIAMENT – THIRD SESSION

CONSOLIDATED REPORTS ON CONSIDERATION OF THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 2019 *(NATIONAL ASSEMBLY BILLS No. 21)* BY THE FOLLOWING DEPARTMENTAL COMMITTEES

1. ADMINISTRATION AND NATIONAL SECURITY
2. ENVIRONMENT AND NATURAL RESOURCES
3. FINANCE AND NATIONAL PLANNING
4. SPORTS, CULTURE AND TOURISM

VOLUME II

DIRECTORATE OF COMMITTEE SERVICES
CLERK'S CHAMBERS
PARLIAMENT BUILDINGSNAIROBI

MAY, 2019

REPUBLIC OF KENYA



NATIONAL ASSEMBLY

TWELFTH PARLIAMENT– THIRD SESSION

THE DEPARTMENTAL COMMITTEE ON ADMINISTRATION & NATIONAL SECURITY

REPORT ON THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 2019

DIRECTORATE COMMITTEE SERVICES
THE NATIONAL ASSEMBLY
PARLIAMENT BUILDINGS
NAIROBI

MAY, 2019

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CHAIRPERSON'S FOREWARD

The Statute Law (Miscellaneous Amendment) Bill, 2019 was published and read the first time. The bill is in keeping with the practice of making amendments which do not merit the publication of separate Bills and consolidating them to one Bill. The bill therefore proposes amendments to various Acts of Parliament. Pursuant to the provisions of Standing Order 127 (1), of the National Assembly Standing Orders which provides *that a Bill having been read a first time shall stand committed to the relevant Departmental Committee* it is on this basis that the Committee makes this Report.

I take this opportunity to thank all Members of the Committee for their input in the consideration of the Statute Law (Miscellaneous Amendment) Bill, 2019. The Committee also takes this opportunity to thank the Offices of the Speaker and of the Clerk of the National Assembly for the logistical support accorded to it during the exercise. The Committee also appreciates the role played by the media following its coverage of the proceedings, thus enhancing accountability and transparency.

Pursuant to provisions of Standing Order 199 (6), and on behalf of the Departmental Committee on Administration and National Security, it is my pleasant privilege and honor to present to this House the Report of the Committee on the Statute Law (Miscellaneous Amendments) Bill, 2019.

SIGNED.....

HON. (HON. PAUL KOINANGE, MP)
(CHAIRPERSON)
DEPARTMENTAL COMMITTEE ON ADMINISTRATION & NATIONAL SECURITY

DATE..... 7th May 2019 .....

1.0 PREFACE

The Departmental Committee on Administration and National Security was constituted on 14th December 2017 pursuant to provisions of Standing Orders 216(1).

1. The Committee executes its mandate in accordance with the provisions of Standing Order 216 (5), from which it draws its mandate to, inter alia;

   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; and
   b) study and review all legislation referred to it;
   c) To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204.

Honorable Speaker,

2. In executing its mandate, the Committee oversees the following Ministries and Departments:

   i) The Ministry of Interior & Coordination of National Government
      a) State Department of Interior
      b) State Department of Border Control, Immigration and Registration of Persons.
      c) State Department of Correctional Services
   ii) The National Police Service Commission
   iii) The Independent Policing Oversight Authority
   iv) The Public Service Commission

3. According to Schedule II of the Standing Orders, the Committee is mandated to

   Consider the following subjects:

   i) National Security;
   ii) Police Services;
   iii) Home Affairs;
   iv)Public Administration;
   v) Public Service,
   vi)Prisons;
   vii) Immigration

2.0 COMMITTEE MEMBERS

1. Hon. Paul Koinange, MP (Chairperson)
2. Hon. John Waluke, MP (Vice-Chairperson)
3. Hon. Athanas Wamunyinyi, MP
4. Hon. Peter Kaluma, MP

5. Hon. Makali Mulu, MP
6. Hon. Didmus Wekesa Barasa Mutua, MP
7. Hon. Geoffrey Kingagi Muturi, MP
8. Hon. Marselino Malimo Arbelle, MP
9. Hon. Tecla Chebet Tum, MP
10. Hon. Josphat Kabinga Wachira, MP
11. Hon. Nimrod Mbithuka Mbai, MP
12. Hon. George Theuri, MP
13. Hon. Martin Deric Ngunjiri Wambugu, MP
14. Hon. Abdi Omar Shurie, MP
15. Hon.Halima Mucheke, MP
16. Hon. Peter Masara, MP
17. Hon. Aduma Owuor, MP
18. Hon. Edward Oku Kaunya,MP

2.1 COMMITTEE SECRETARIAT

1.	Mr. Abdullahi Aden	-	Senior Clerk Assistant
2.	Mr. Joshua Ondari	-	Clerk Assistant
3.	Ms. Brigitta Mati	-	Legal Counsel
4.	Mr. Donald Manyala	-	Researcher Officer III
5.	Mr. Edison Odhiambo	-	Fiscal Analyst III

List of Recommendations

The Committee having considered the Statute Law (Miscellaneous Amendments) Bill, 2019 recommends the following:

1. **The Districts and Provinces Act, 1992 (No. 5 of 1992)**

   The Committee agreed to the Proposed Amendments

The implication of the amendment is to give power to the Cabinet Secretary responsible for internal affairs to make regulations for the better implementation of the provisions of the Act;

2. **The Alcoholic Drinks Control Act, 2010 (No. 4 of 2010)**

   The Committee resolved to delete the Proposed Amendments

   Justification

   The implication is to allow all cadres of Magistrates to try offences under the Act. The The Committee further observed that all cadre may not have the requisite experience to try offences under the Act;

3. **The Prevention of Terrorism Act, 2012 (Act No. 30 of 2012)**

Amendments

(a) in the proposed amendments to the Prevention of Terrorism Act, 2012, (No.30 of 2012)—

(i) by deleting the proposed amendments to section 40A (2) and substituting therefore the following—

s.40A(2) Delete paragraph (e) and substitute therefor the following new paragraph—

"(e) the Directorate of Immigration;

Insert the following new paragraphs immediately after paragraph (e)—

"(ea) the National Police Service;

(eb) the Kenya Coast Guard Service;"

40A (3) the Committee agreed to the proposed Amendments

Justification

The implication of the amendment is to increase the term of the members of the Centre to be cumulative six years to enhance continuity of the centre.

40B (2) the Committee agreed to the proposed amendments

Justification

The implication of the amendment is to provide for additional responsibilities to the centre

40C the Committee agreed to the proposed amendments

Justification

The implication of the amendment is to also provide for additional responsibilities with regard to approving all civil society organizations and international non-governmental organizations engaged in preventing and countering violent extremism and radicalization. The amendment is important as there is need to further vet or interrogate the operations of the above organizations.

3.0 BACKGROUND

The Statute Law (Miscellaneous Amendments) Bill, 2019 was read first time and subsequently committed to the Committee pursuant to the provisions of Standing Order 127 (1) and there after report to the House.

The bill is in keeping with the practice of making amendments which do not merit the publication of separate Bills and consolidating them to one Bill. The bill therefore proposes amendments to the following Acts of Parliament.

I. The Districts and Provinces Act, 1992 (No. 5 of 1992)
II. The Alcoholic Drinks Control Act, (No. 4 of 2010)
III. The Prevention of Terrorism Act, 2012 (No. 30 of 2012)

4.0 SUBMISSION OF MEMORANDA

Article 118 of the Constitution provides that, ''Parliament shall facilitate public participation and involvement in the Legislative and other business of Parliament and its committees

Standing order 127 (3) provides that, '' the Departmental Committee to which a bill is committed shall facilitate public participation and shall take in to account views and recommendations of the public when the committee makes its report to the House.

In the Consideration of the Bill, the committee invited memoranda from the public vide a notice in the local dailies Pursuant to Article 118 of the Constitution and Standing order 127 (3).

1. The Committee received memoranda from the public pursuant to Standing Order 127 (3) from the following two entities:
    a) Bowmans Coulson Harney LLP)
    b) Coast Civil Society Network
    c) The Kenya Association of Manufacturers

Bowmans (Coulson Harney LLP)

The Memoranda by **Bowmans (Coulson Harney LLP)** sates as follows;

The **Bowmans (Coulson Harney LLP)** reviewed the Alcoholic Drinks Control Act, 2010 (No.4 of 2010) and noted that the Act effectively placed offences under the Act outside the jurisdiction of the resident magistrate by defining magistrate as a magistrate above the rank of a resident magistrate.

The Committee observed that;

The implication of the amendment is to open up all cadres of magistrates to try offences under the Act. It further observed that the intention of National Assembly is to restrict some cadres of magistrates who are to hear cases under the Act due to lack of experience in handling such matters.

Coast Civil Society Network

The Memoranda by the Coast Based Civil Society Organization working around preventing and countering Violent Extremism stated as follows;

a) The Institution reviewed the Prevention of Terrorism Act, 2012 (No.30 of 2012) and noted the following
b) that the proposed amendments to the above mentioned statute raises concern amongst coast based civil society organisations engaged in preventing and countering violent extremism (PCVE);

c) the proposed amendment to Section 40 C is against the spirit of collective responsibility and the tenets of the Public Benefit Organisation Act;

d) that the CSO (Civil based organisations) have clear monitoring and evaluation framework in responding to issues around PCVE and as such the issues will not be well attended by the centre;

e) the CSOs doubt the capacity of the Centre in approving and reviewing the work of CSO advocating for PCVE;

f) the CSOs are mandated to carry out their roles pursuant to registration by the NGO board of Kenya and in their view subjecting them to another processes equivalent to double registration.

The Committee observed that

a. Registration of NGOs is an activity undertaken by the NGO Board of Kenya. The function of the Board inter alia, is to ***advise the Government on the activities of the Non-Governmental Organizations and their role in development within Kenya;***

b. The Act provides that Board is to work in harmony with Non-Governmental Organizations Council. This is provided for under Section 24 (1) which states ***"The Council shall advise the Board with respect to the code of conduct and such other statutes as***

*may facilitate the regulation of Non-Governmental Organizations on matters of their activities, national security, training, the development of national manpower, institutional building, scientific and technological development and such other matters of national interest."*The inference of this section is that in terms of the regulation of non- governmental organisations in their activities, national security e.t.c other statutes may provide for a code of conduct or other additional measures that an NGO may be subjected to. In this case, the Council shall advise the Board on such additional measure. In this instance, section 40 C provides for such additional measures that CSOs and NGOs dealing with PCVE are to be subjected to that is further registration and further report to the centre on their daily activities.

c. It is important to note that Public Benefit Organisations Act 2013 is a law seeking to provide a more enabling environment for NGOs, with clear criteria regarding NGOs' registration, enhanced accountability, set timelines for processing applications, as well as tax incentives and benefits for organisations conducting "public benefit activities". It was passed by the Parliament in 2012 and signed into law by the then President Mwai Kibaki on January 14, 2013, but has not been operationalized yet.

d. The Public Benefit Organisations (Amendment) Bill, 2016 was to amend the Public Benefits Organizations Act, No. 18 of 2013 to operationalize the Act in accordance with the law. The Bill proposed to amend the Act by removing the powers conferred upon the Cabinet Secretary to determine the date or time at which this Act will come into force. The Bill lapsed at the end of the 11th Parliament.

The Kenya Association of Manufacturers

The Committed received Memoranda from the Kenya Association of Manufacturers that intended to amend section 32 (3) of the Alcoholics Drinks Act No. 4 of 2010 which provides the statement and health warning referred to in section (2) shall comprise not less than 30% of the total surface area of the package.

The amendment was to delete the word *package* and substitute it with the word *label*

The committee observed that, this proposed amendment was opening the scope of the Statue Law (Miscellaneous Amendment) Bill 2019, in that, it expanded the subject matter at hand contrary to the standing order 133 (5) of the National Assembly.

The Committee further sought comments on the Statute (Law Miscellaneous Amendment) Bill, 2019 from the Ministry of Interior & Coordination of National Government, the Office of the Attorney General and the Kenya Law Reform Commission to be submitted on or before Tuesday 23rd April 2019.

The Committee did not receive any comments from the Office of the Attorney General and the Kenya Law Reform Commission

The Committee received a letter from the Ministry of Interior and Coordination of National Government requesting for time to consolidate their comments on the Bill. **(Copy of the letter attached)**

5.0 SITTINGS

The Committee considered the Statute Law (Miscellaneous Amendments) Bill, 2019 in its sittings held on Tuesday 23rd April 2019 and Thursday 2nd May 2019 Respectively and adopted its report on Tuesday 7th May, 2019

6.0 CONSIDERATION OF THE STATUTE LAW (MISCELLANEOUS AMENDMENTS BILL, 2019

The Legal Counsel took the Members through the Statute law Miscellaneous Amendments Bill, 2019 on Tuesday 23rd April 2019 explaining the amendments to the various Acts and their effect and informed the committee as follows;

The Statute Law (Miscellaneous Amendment) Bill, 2019 (National Assembly Bill No. 21 of 2019) was read a first time in the House on 3rd April, 2019.
The Bill seeks to make various amendments to several laws as specified. The Committee is tasked with conducting public participation on the following statutes which are proposed to be amended—

(1) The Districts and Provinces Act, 1992 (No. 5 of 1992);
(2) The Alcoholic Drinks Control Act, 2010 (No. 4 of 2010); and
(3) The Prevention of Terrorism Act, 2012 (Act No. 30 of 2012).

LAW	PROPOSED AMENDMENT	JUSTIFICATION
The Districts and Provinces Act, 1992 (No. 5 of 1992)	Insert the following new section immediately after	The principal object of the Districts and Provinces Act is to establish provinces and

(The Act of Parliament is to prescribe the districts and provinces into which Kenya is divided) *Repeal of section 4 of Act No. 16 of 1968* *5. Section 4 of the Constitution of Kenya (Amendment) Act, 1968 is repealed.*	section 5— **Regulations.** 6. The Cabinet Secretary of the Ministry for the time being responsible for internal affairs may make regulations for the better carrying into effect the provisions of this Act.	districts in Kenya. To restructure the system to fit devolved governance in terms of realigning the old structure to the new structure
The Alcoholic Drinks Control Act, 2010 (No. 4 of 2010) Section 2 **"magistrate"** means a magistrate above the rank of resident magistrate;	Delete the definition of the word "magistrate" and substitute therefor the following- **"magistrate"** has the meaning assigned to it in the Magistrates' Court Act, 2015 (No. 26 of 2015).	To eliminate inconsistencies between the Acts.
The Prevention of Terrorism Act, 2012 (Act No. 30 of 2012) **40A. Establishment of a counter-terrorism Centre** (1) There is established a National Counter-Terrorism Centre, hereinafter referred to as the "Centre" which shall be an inter-agency body. (2)The Centre shall consist of offices from the following organisations— (a)the Director appointed by the National Security	Delete paragraph (e) and substitute therefor the following new paragraph — "(e) the Directorate of Immigration;" Insert the following new paragraphs immediately after paragraph (e)— (f) the National Police Service; (g) the Ministry for the time being responsible for foreign affairs; (h) the Office of the Director	To rectify the drafting error in paragraph (e); To include other relevant agencies that acquire vital information that may assist in the prevention of terrorism. To extend the period the officers seconded may serve at the Centre.

Council; (b)the National Intelligence Service; (c) the Kenya Defence Forces; (d)the Attorney-General; (e)Directorate of Immigration and Registration; the National Police Service; and (f) such other national agencies as may be determined by the National Security Council. (3)The members of the Centre specified under subsection (2) shall be seconded to the Centre for a period not exceeding three years. (4)The Director shall be responsible for the management and implementation of the functions of the Centre.	of Public Prosecutions; (i) the Kenya Wildlife Services; (j) the Probation and Aftercare Services Department; (k) the Kenya Prisons Service; (l)the Kenya Civil Aviation Authority; and" Renumber paragraph (f) as paragraph (m).	
40B. Responsibilities of the Centre	Insert the following new paragraph immediately	To align new developments in prevention of terrorism to existing policy and legal

(1)The Centre shall be responsible for the co-ordination of national counter-terrorism efforts in order to detect, deter and disrupt terrorism acts. (2)Without prejudice to the provisions of subsection (1) the Centre shall— (a)establish a database to assist law enforcement agencies; (b)conduct public awareness on prevention of terrorism; (c)develop strategies such as counter and de-radicalization; (d)facilitate capacity building for counter-terrorism stakeholders ; (e)co-ordinate with other government agencies to provide security certification for aviation schools or companies.	after paragraph (e)— "(f) analyse all information and intelligence on terrorism and counterterrorism for purposes of proposing policy and legal adjustments to the National Security Council and other national security leadership."	structures. Policy and law on terrorism to adapt to new development on terrorism and counterterrorism
40C.Responsibility of the public and government bodies	Renumber the existing provisions as subsections (2) and (3) respectively and	To task the centre with the role of approving all civil societies and NGOs

(1)The Centre may request any person or government body for any information relating to terrorism. (2)Members of the public have a responsibility to furnish the Centre with any information relating to terrorism which is within their knowledge.	insert the following new subsection immediately before the renumbered subsections— "(1) The Centre shall be an approving and reporting institution for all civil society organisations andinternational non-governmental organisations engaged in preventing and countering violent extremism and radicalisation through counter-messaging or public outreach, and disengagement and reintegration of radicalised individuals."	conducting activities related to counterterrorism. The same organisations are to report to the centre of their daily operations. The Non-Governmental Organizations Co-Ordination Act provides for the registration of all civil societies and non-governmental organisations in Kenya. Section 12 (2) provides that "A certificate of registration shall be conclusive evidence of authority to operate throughout Kenya or such parts of the country as are specified therein." In this case, there is need for guidelines for the centre in approving, rejecting an application or appeals of the same

7.0 COMMITTEE OBSERVATIONS

The Committee observed the following—

(1) THAT,the proposed amendments to the Districts and Provinces Act, 1992 (No.5 of 1992), are in order as the implication of the amendment is to give power to the Cabinet Secretary responsible for internal affairs to make regulations for the better implementation of the provisions of the Act;

(2) THAT, in the proposed amendments to the Alcoholics Drinks Control Act, 2010 (No.4 of 2010) the implication is to allow all cadres of Magistrates to try offences

under the Act. The Committee observed that all cadre may not have the requisite experience to try offences under the Act;

(3) THAT, in the proposed amendments to the Prevention of Terrorism Act, 2012 (No.30 of 2012) —

(a) in the proposed amendment to section 40A (2),

(i) the proposed amendment is to correct a drafting error;

(ii) to insert new paragraphs immediately after paragraph (e), which include the the Ministry for the time being responsible for foreign affairs, the Office of the Director of Public Prosecutions, the Kenya Wildlife Services, the Probation and Aftercare Services Department, the Kenya Prisons Service and the Kenya Civil Aviation Authority. The Committee observed that these agencies are covered under paragraph 2(f) which provides "***The centre shall consist of offices from such other national agencies as may be determined by the National Security Council.***" The Committee further observed that there is need to include the Kenya Coast Guard Services the maritime security organ with the mandate to protect Kenya's territorial waters against terrorism, piracy among others. The Committee proposed to delete paragraphs (g) – (l) and insert a new paragraph (g) to read as "(g) the Kenya Coast Guard Service:

(iii)to delete the amendment to renumber the paragraph (f) as paragraph (m). the amendment has been rendered nugatory because of the deletion of the proposed paragraphs (g)- (l).

(b) in the proposed amendment to 40A(3), the Committee observed that the implication of the amendment is to increase the term of the members of the Centre to be cumulative six years. It was further observed that the term of the members of the Centre needs to be reconsidered to enhance continuity of the centre.

(c) in the proposed amendments to 40B (2), the Committee observed that the implication of the amendment is to provide for additional responsibilities to the centre;

(d) in the proposed amendments to 40C, the Committee observed that the implication of the amendment is to also provide for additional responsibilities with regard to

approving and all civil society organisations and international non-governmental organisations engaged in preventing and countering violent extremism and radicalisation. It was further observed that the amendment is important as there is need to further vet or interrogate the operations of the above organisations.

8.0 COMMITTEE RECOMMENDATIONS

The Committee having considered the Statute Law (Miscellaneous Amendments) Bill, 2019 recommends the following:

The Districts and Provinces Act, 1992 (No. 5 of 1992)

The Committee agreed to the Proposed Amendments

The implication of the amendment is to give power to the Cabinet Secretary responsible for internal affairs to make regulations for the better implementation of the provisions of the Act;

The Alcoholic Drinks Control Act, 2010 (No. 4 of 2010)

The Committee resolved to delete the Proposed Amendments

Justification

The implication is to allow all cadres of Magistrates to try offences under the Act. The Committee further observed that all cadre may not have the requisite experience to try offences under the Act;

The Prevention of Terrorism Act, 2012 (Act No. 30 of 2012)

Amendments

(b) in the proposed amendments to the Prevention of Terrorism Act, 2012, (No.30 of 2012)—

(ii) by deleting the proposed amendments to section 40A (2) and substituting therefore the following—

s.40A(2) Delete paragraph (e) and substitute therefor the following new paragraph—

"(e) the Directorate of Immigration;

Insert the following new paragraphs immediately after paragraph (e)—

"(ea) the National Police Service;

(eb) the Kenya Coast Guard Service;"

40A (3) the Committee agreed to the proposed Amendments

Justification

The implication of the amendment is to increase the term of the members of the Centre to be cumulative six years to enhance continuity of the centre.

40B (2) the Committee agreed to the proposed amendments

Justification

The implication of the amendment is to provide for additional responsibilities to the centre

40C the Committee agreed to the proposed amendments

Justification

The implication of the amendment is to also provide for additional responsibilities with regard to approving and all civil society organizations and international non-governmental organizations engaged in preventing and countering violent extremism and radicalization. The amendment is important as there is need to approve and report the operations of the above organizations.

Signed.....Date 7th May 2019

Hon. Paul Koinange, MP
Chairman, Departmental Committee on Administration and National Security

MINUTES OF THE 15TH SITTING OF DEPARTMENTAL COMMITTEE ON ADMINISTRATION AND NATIONAL SECURITY HELD ON TUESDAY 23RD APRIL 2019 IN 4TH FLOOR, CONTINENTAL HOUSE, MAIN PARLIAMENT BUILDINGS AT 10:00 AM

PRESENT

1. The Hon. Paul Koinange, MP - **Chairperson**
2. The Hon. WafulaWamunyinyi, MP
3. The Hon. Peter George Kaluma, MP
4. The Hon. George Theuri, MP
5. The Hon. MarselinoMalimoArbelle, MP
6. The Hon. Halima Mucheke, MP
7. The Hon. Dr. Tecla Chebet Tum, MP
8. The Hon. Peter Francis Masara, MP
9. The Hon. Abdi Omar Shurie, MP

APOLOGIES

1. The Hon. John Waluke, MP **Vice-Chairperson**
2. The Hon. Dr. MakaliMulu, MP
3. The Hon. Oku Kaunya, MP
4. The Hon. AdumaOwour, MP
5. The Hon. JosphatKabingaWachira, MP
6. The Hon. DidmusWekesaBarasaMutua, MP
7. The Hon. Geoffrey KingagiMuturi, MP
8. The Hon. NgunjiriWambugu, MP
9. The Hon. Nimrod MbithukaMbai, MP

IN-ATTENDANCE

NATIONAL ASSEMBLY

1. Mr. Abdullahi Aden - Senior Clerk Assistant
2. Mr. Joshua Ondari - Clerk Assistant
3. Ms. Brigitta Mati - Legal Counsel

MIN.NO. NA/ANS/2019/40 PRELIMINARIES

The Chairperson called the meeting to order at 10.20 am the agenda was adopted by the members present.

MIN.NO. NA/ANS/2019/41: CONSIDERATION OF THE STATUTE LAW MISCELLANEOUS AMENDMENT BILL 2019

The Legal Counsel took the Members through the Statute law Miscellaneous Amendments Bill, 2019 on Tuesday 23rd April 2019 explaining the amendments to the various Acts and their effect and informed the committee as follows;

The Statute Law (Miscellaneous Amendment) Bill, 2019 (National Assembly Bill No. 21 of 2019) was read a first time in the House on 3rd April, 2019.

The Bill seeks to make various amendments to several laws as specified. The Committee is tasked with conducting public participation on the following statutes which are proposed to be amended—

(1) The Districts and Provinces Act, 1992 (No. 5 of 1992);
(2) The Alcoholic Drinks Control Act, 2010 (No. 4 of 2010); and
(3) The Prevention of Terrorism Act, 2012 (Act No. 30 of 2012).

LAW	PROPOSED AMENDMENT	JUSTIFICATION
The Districts and Provinces Act, 1992 (No. 5 of 1992) *(The Act of Parliament is to prescribe the districts and provinces into which Kenya is divided)* *Repeal of section 4 of Act No. 16 of 1968* *5. Section 4 of the Constitution of Kenya (Amendment) Act, 1968 is repealed.*	Insert the following new section immediately after section 5— **Regulations.** 6. The Cabinet Secretary of the Ministry for the time being responsible for internal affairs may make regulations for the better carrying into effect the provisions of this Act.	The principal object of the Districts and Provinces Act is to establish provinces and districts in Kenya. To restructure the system to fit devolved governance in terms of realigning the old structure to the new structure

The Alcoholic Drinks Control Act, 2010 (No. 4 of 2010) Section 2 **"magistrate"** means a magistrate above the rank of resident magistrate;	Delete the definition of the word "magistrate" and substitute therefor the following- **"magistrate"** has the meaning assigned to it in the Magistrates' Court Act, 2015 (No. 26 of 2015).	To eliminate inconsistencies between the Acts.
The Prevention of Terrorism Act, 2012 (Act No. 30 of 2012) **40A. Establishment of a counter-terrorism Centre** (1) There is established a National Counter-Terrorism Centre, hereinafter referred to as the "Centre" which shall be an inter-agency body. (2)The Centre shall consist of offices from the following organisations— (a)the Director appointed by the National Security Council; (b)the National Intelligence Service; (c) the Kenya Defence Forces;	Delete paragraph (e) and substitute therefor the following new paragraph— "(e) the Directorate of Immigration;" Insert the following new paragraphs immediately after paragraph (e)— (f) the National Police Service; (g) the Ministry for the time being responsible for foreign affairs; (h) the Office of the Director of Public Prosecutions; (i) the Kenya Wildlife Services; (j) the Probation and Aftercare Services Department; (k) the Kenya Prisons Service; (l)the Kenya Civil Aviation	To rectify the drafting error in paragraph (e); To include other relevant agencies that acquire vital information that may assist in the prevention of terrorism. To extend the period the officers seconded may serve at the Centre.

(d)the Attorney-General; (e)Directorate of Immigration and Registration; the National Police Service; and (f) such other national agencies as may be determined by the National Security Council. (3)The members of the Centre specified under subsection (2) shall be seconded to the Centre for a period not exceeding three years. (4)The Director shall be responsible for the management and implementation of the functions of the Centre.	Authority; and" Renumber paragraph (f) as paragraph (m).	
40B. Responsibilities of the Centre (1)The Centre shall be responsible for the co-ordination of national counter-terrorism efforts in order to detect, deter and disrupt terrorism acts.	Insert the following new paragraph immediately after paragraph (e)— "(f) analyse all information and intelligence on terrorism and counterterrorism for purposes of proposing policy and legal adjustments to the National Security Council	To align new developments in prevention of terrorism to existing policy and legal structures. Policy and law on terrorism to adapt to new development on terrorism and counterterrorism

(2)Without prejudice to the provisions of subsection (1) the Centre shall— (a)establish a database to assist law enforcement agencies; (b)conduct public awareness on prevention of terrorism; (c)develop strategies such as counter and de-radicalization; (d)facilitate capacity building for counter-terrorism stakeholders ; (e)co-ordinate with other government agencies to provide security certification for aviation schools or companies.	and other national security leadership."	
40C.Responsibility of the public and government bodies (1)The Centre may request any person or government body for any information relating to terrorism.	Renumber the existing provisions as subsections (2) and (3) respectively and insert the following new subsection immediately before the renumbered subsections— "(1) The Centre shall be an approving and reporting	To task the centre with the role of approving all civil societies and NGOs conducting activities related to counterterrorism. The same organisations are to report to the centre of their daily operations.

(2)Members of the public have a responsibility to furnish the Centre with any information relating to terrorism which is within their knowledge.	institution for all civil society organisations andinternational non-governmental organisations engaged in preventing and countering violent extremism and radicalisation through counter-messaging or public outreach, and disengagement and reintegration of radicalised individuals."	The Non-Governmental Organizations Co-Ordination Act provides for the registration of all civil societies and non-governmental organisations in Kenya. Section 12 (2) provides that "A certificate of registration shall be conclusive evidence of authority to operate throughout Kenya or such parts of the country as are specified therein." In this case, there is need for guidelines for the centre in approving, rejecting an application or appeals of the same

MIN.NO. NA/ANS/2019/42:. **COMMITTEE OBSERVATIONS**

The Committee observed the following—

(1) THAT,the proposed amendments to the Districts and Provinces Act, 1992 (No.5 of 1992), are in order as the implication of the amendment is to give power to the Cabinet Secretary responsible for internal affairs to make regulations for the better implementation of the provisions of the Act;

(2) THAT, in the proposed amendments to the Alcoholics Drinks Control Act, 2010 (No.4 of 2010) the implication is to allow all cadres of Magistrates to try offences under the Act. The Committee observed that all cadre may not have the requisite experience to try offences under the Act;

(3) THAT, in the proposed amendments to the Prevention of Terrorism Act, 2012 (No.30 of 2012) —

(a) in the proposed amendment to section 40A (2),

(i) the proposed amendment is to correct a drafting error;

(ii) to insert new paragraphs immediately after paragraph (e), which include the the Ministry for the time being responsible for foreign affairs, the Office of the Director of Public Prosecutions, the Kenya Wildlife Services, the Probation and Aftercare Services Department, the Kenya Prisons Service and the Kenya Civil Aviation Authority. The Committee observed that these agencies are covered under paragraph 2(f) which provides "***The centre shall consist of offices from such other national agencies as may be determined by the National Security Council.***" The Committee further observed that there is need to include the Kenya Coast Guard Services the maritime security organ with the mandate to protect Kenya's territorial waters against terrorism, piracy among others. The Committee proposed to delete paragraphs (g) – (l) and insert a new paragraph (g) to read as "(g) the Kenya Coast Guard Service;

(iii)to delete the amendment to renumber the paragraph (f) as paragraph (m). the amendment has been rendered nugatory because of the deletion of the proposed paragraphs (g)- (l).

(b) in the proposed amendment to 40A(3), the Committee observed that the implication of the amendment is to increase the term of the members of the Centre to be cumulative six years. It was further observed that the term of the members of the Centre needs to be reconsidered to enhance continuity of the centre.

(c) in the proposed amendments to 40B (2), the Committee observed that the implication of the amendment is to provide for additional responsibilities to the centre;

(d) in the proposed amendments to 40C, the Committee observed that the implication of the amendment is to also provide for additional responsibilities with regard to approving and all civil society organisations and international non-governmental organisations engaged in preventing and countering violent extremism and radicalisation. It was further

observed that the amendment is important as there is need to further vet or interrogate the operations of the above organizations.

MIN.NO. NA/ANS/2019/43: COMMITTEE RECOMMENDATIONS

The Committee having considered the Statute Law (Miscellaneous Amendments) Bill, 2019 recommends the following;

The Districts and Provinces Act, 1992 (No. 5 of 1992)

The Committee agreed to the Proposed Amendments

The implication of the amendment is to give power to the Cabinet Secretary responsible for internal affairs to make regulations for the better implementation of the provisions of the Act;

The Alcoholic Drinks Control Act, 2010 (No. 4 of 2010)

The Committee resolved to delete the Proposed Amendments

Justification

The implication is to allow all cadres of Magistrates to try offences under the Act. The Committee further observed that all cadre may not have the requisite experience to try offences under the Act;

The Prevention of Terrorism Act, 2012 (Act No. 30 of 2012)

Amendments

(a) in the proposed amendments to the Prevention of Terrorism Act, 2012, (No.30 of 2012)—

(i) by deleting the proposed amendments to section 40A (2) and substituting therefore the following—

s.40A(2) Delete paragraph (e) and substitute therefor the following new paragraph—

"(e) the Directorate of Immigration;

Insert the following new paragraphs immediately after paragraph (e)—

"(ea) the National Police Service;

(eb) the Kenya Coast Guard Service;"

40A (3) the Committee agreed to the proposed Amendments

Justification

The implication of the amendment is to increase the term of the members of the Centre to be cumulative six years to enhance continuity of the centre.

40B (2) the Committee agreed to the proposed amendments

Justification

The implication of the amendment is to provide for additional responsibilities to the centre

40C the Committee agreed to the proposed amendments

Justification

The implication of the amendment is to also provide for additional responsibilities with regard to approving and all civil society organizations and international non-governmental organizations engaged in preventing and countering violent extremism and radicalization. The amendment is important as there is need to further vet or interrogate the operations of the above organizations.

MIN.NO. NA/ANS/2019/44: ADJOURNMENT

There being no other business the meeting was adjourned at thirty Minutes past twelve O'clock.

SIGNED_____ **DATE:** 7th May 2019

HON. PAUL KOINANGE, M.P.
(CHAIRPERSON)

MINUTES OF THE 16TH SITTING OF DEPARTMENTAL COMMITTEE ON ADMINISTRATION AND NATIONAL SECURITY HELD ON THURSDAY 2nd MAY, 2019 IN 4TH FLOOR, CONTINENTAL HOUSE, MAIN PARLIAMENT BUILDINGS AT 10:00 AM

PRESENT

1. The Hon. Paul Koinange, MP - **Chairperson**
2. The Hon. WafulaWamunyinyi, MP
3. The Hon. Dr. MakaliMulu, MP
4. The Hon. Oku Kaunya, MP
5. The Hon. AdumaOwour, MP
6. The Hon. MarselinoMalimoArbelle, MP
7. The Hon. Halima Mucheke, MP
8. The Hon. Dr. Tecla Chebet Tum, MP

APOLOGIES

1. The Hon. John Waluke, MP **Vice-Chairperson**
2. The Hon. Peter George Kaluma, MP
3. The Hon. George Theuri, MP
4. The Hon. Peter Francis Masara, MP
5. The Hon. Abdi Omar Shurie, MP
6. The Hon. JosphatKabingaWachira, MP
7. The Hon. DidmusWekesaBarasaMutua, MP
8. The Hon. Geoffrey KingagiMuturi, MP
9. The Hon. NgunjiriWambugu, MP
10. The Hon. Nimrod MbithukaMbai, MP

IN-ATTENDANCE

NATIONAL ASSEMBLY

1. Mr. Abdullahi Aden - Senior Clerk Assistant
2. Mr. Joshua Ondari - Clerk Assistant

MIN.NO. NA/ANS/2019/45: PRELIMINARIES

The Chairperson called the meeting to order at 10.15 am the agenda was adopted by the members present.

MIN.NO. NA/ANS/2019/46: CONSIDERATION OF MEMO'RANDA ON THE STATUTE LAW MISCELLANEOUS AMENDMENT BILL 2019

1. The Committee received memoranda from the public pursuant to Standing Order 127 (3) from the following two entities:

    a) Bowmans Coulson Harney LLP)
    b) Coast Civil Society Network

Bowmans (Coulson Harney LLP)

The Memoranda by **Bowmans (Coulson Harney LLP)**

The **Bowmans (Coulson Harney LLP)** reviewed the Alcoholic Drinks Control Act, 2010 (No.4 of 2010) and noted that the Act effectively placed offences under the Act outside the jurisdiction of the resident magistrate by defining magistrate as a magistrate above the rank of a resident magistrate.

The Committee observed that;

The implication of the amendment is to open up all cadres of magistrates to try offences under the Act. It further observed that the intention of National Assembly is to restrict some cadres of magistrates who are to hear cases under the Act due to lack of experience in handling such matters.

Coast Civil Society Network

The Memoranda by the Coast Based Civil Society Organization working around preventing and countering Violent Extremism stated as follows;

a) The Institution reviewed the Prevention of Terrorism Act, 2012 (No.30 of 2012) and noted the following
b) that the proposed amendments to the above mentioned statute raises concern amongst coast based civil society organisations engaged in preventing and countering violent extremism (PCVE);

c) the proposed amendment to Section 40 C is against the spirit of collective responsibility and the tenets of the Public Benefit Organisation Act;

d) that the CSO (Civil based organisations) have clear monitoring and evaluation framework in responding to issues around PCVE and as such the issues will not be well attended by the centre;

e) the CSOs doubt the capacity of the Centre in approving and reviewing the work of CSO advocating for PCVE;

f) the CSOs are mandated to carry out their roles pursuant to registration by the NGO board of Kenya and in their view subjecting them to another processes equivalent to double registration.

The Committee observed that

a. Registration of NGOs is an activity undertaken by the NGO Board of Kenya. The function of the Board inter alia, is to ***advise the Government on the activities of the Non-Governmental Organizations and their role in development within Kenya;***

b. The Act provides that Board is to work in harmony with Non-Governmental Organizations Council. This is provided for under Section 24 (1) which states ***"The Council shall advise the Board with respect to the code of conduct and such other statutes as may facilitate the regulation of Non-Governmental Organizations on matters of their activities, national security, training, the development of national manpower, institutional building, scientific and technological development and such other matters of national interest."***The inference of this section is that in terms of the regulation of non- governmental organisations in their activities, national security e.t.c other statutes may provide for a code of conduct or other additional measures that an NGO may be subjected to. In this case, the Council shall advise the Board on such additional measure. In this instance, section 40 C provides for such additional measures that CSOs and NGOs dealing with PCVE are to be subjected to that is further registration and further report to the centre on their daily activities.

c. It is important to note that Public Benefit Organisations Act 2013 is a law seeking to provide a more enabling environment for NGOs, with clear criteria regarding NGOs' registration, enhanced accountability, set timelines for processing applications, as well as tax incentives and benefits for organisations conducting "public benefit activities". It was passed by the Parliament in 2012 and signed into law by the then President Mwai Kibaki on January 14, 2013, but has not been operationalized yet.

d. The Public Benefit Organisations (Amendment) Bill, 2016 was to amend the Public Benefits Organizations Act, No. 18 of 2013 to operationalize the Act in accordance with the law. The Bill proposed to amend the Act by removing the powers conferred upon the Cabinet Secretary to determine the date or time at which this Act will come into force. The Bill lapsed at the end of the 11th Parliament.

MIN.NO. NA/ANS/2019/47: ADJOURNMENT

There being no other business the meeting was adjourned at twelve O'clock.

SIGNED_____ **DATE:** 7th March 2019

HON. PAUL KOINANGE, M.P. (CHAIRPERSON)

BOWMANS (1) D/Cmtes 25/4/19

COULSON HARNEY LLP
5th Floor, West Wing, ICEA Lion Centre
Riverside Park, Chiromo Road
PO Box 10643-00100, Nairobi, Kenya
+254 20 289 9000 | +254 709 966 000
+254 20 444 8614 | +254 734 993 739
PIN No. P051229962P | VAT No. 0191639L

www.bowmanslaw.com

Our Reference: RTH/SLMAB/2019
Direct Line: +254 20 289 9000
Email Address: richard.harney@bowmanslaw.com

Your Reference: TBA
Date: 23 April 2019

The Office of the Clerk of the National Assembly
Clerk's Chambers
The National Assembly
Parliament Buildings
P. O. Box 41842 – 00100
Nairobi, Kenya
For the kind attention of: Mr. Michael Sialai, EBS

RECEIVED
24 APR 2019
CLERK'S OFFICE

CONFIDENTIAL
via hand delivery and email

Dear Sirs

REVIEW OF THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL 2019

We refer to the Statute Law (Miscellaneous Amendments) Bill 2019 (the **Bill**) which seeks to amend several pieces of Kenyan legislation.

We have conducted a review of the Bill, specifically, the amendments it proposes to make to the following legislation:

1. the Companies Act 2015;
2. the Value Added Tax Act (No. 5 of 2013);
3. the Alcoholic Drinks Control Act (No. 4 of 2010);
4. the Wildlife Conservation and Management Act (no. 47 of 2013);
5. the Microfinance Act (No. 19 of 2006); and
6. the Public Finance Management Act (No. 18 of 2012)

Our review is enclosed with this letter as Annexure 1. We appreciate the opportunity to voice our opinions and comments regarding the above legislation and we look forward to further discussions on the same. Please contact the undersigned if you have any queries on the same.

Yours faithfully
COULSON HARNEY LLP

RICHARD HARNEY

1. CIAZGWIZA
2. LEAH
3. ANGEN
4. ESTHER

pls deal

25/4/19

Partners RT St A Harney | JSP Coulson | JW Karanja | KC Michira | JN Syekei | AG Njage | CK Kigera | PV Shah | EN Monari | A Njogu | N Mukuha | SM Omondi | TA Mwango | AN Mathini | M Runji | J Mbui | DO Indokhomi | VS Shah | CL Kuyo | **Directors** R Field | KO Evans | SJ Matthews

KENYA SOUTH AFRICA TANZANIA UGANDA

				Likewise, registered persons who make both standard rated supplies and zero-rated supplies and are perpetually in a VAT credit position, ordinarily include the WHVAT element in a VAT refund claim to the Commissioner. Therefore, The proposed amendment attempts to bring clarity to what was poor law. It remains to be seen if the amendment will achieve this.
3.	**THE ALCOHOLIC DRINKS CONTROL ACT NO. 4 of 2010**	Delete the definition of the word "magistrate" and substitute therefor the following "magistrate" has the meaning assigned to it in the Magistrates' Court Act.	The Alcoholic Drinks Act effectively placed offences under the Act outside the jurisdiction of the resident magistrate by defining magistrate as a magistrate above the rank of resident magistrate.	All cadres of magistrates will try offences under the Act.
4.	**THE WILDLIFE CONSERVATION AND MANAGEMENT ACT (NO. 47 OF 2013)**	**23. Establishment of Endowment Fund** 23. (1) There is established a Wildlife Conservation Trust Fund that shall be vested in a governing body established in accordance with subsection (2)- (2) The governing body referred to in subsection (1) shall serve as a public-private partnership and comprise - a) a Chairperson being appointed the Cabinet Secretary;	Deletion of the word "being" appearing in paragraph 23(2)(a). The sub-section if amended with then read: ***"a) a Chairperson appointed the Cabinet Secretary"*** Deletion of the words "who shall be the Chairperson" appearing in paragraph 23b). The sub-section if amended with then read:	***Note: The substantial change to section 23 resulted from the enactment of The Statute Law (Miscellaneous Amendment) Act 2018 which, when it came into force, repealed the entire section 23 of the Wildlife Conservation and Management Act.*** The change proposed by The Statute Law (Amendment) Bill 2019 seeks to remove ambiguity that arose from the 2018 amendment to section 23.

URGENT

The Clerk, National Assembly
KICC Building, 1st Floor
P. O. Box 41842-00100, Nairobi
Tel: (254-2) 2221291 or 2848000
Fax: 254 2 2243694
E-mail: clerk@parliament.go.ke

MEMORANDUM PURSUANT TO THE PROPOSED AMENDMENTS TO THE PREVENTION OF TERRORISM ACT VIDE THE STATUTE LAW (MISCELLENEOUS AMMENDMENT) BILL, 2019 – Kenya Gazette Supplement No.33

WE the undersigned Coast Based Civil Society Organizations working around Preventing and Countering Violent Extremism.

RECOGNIZING the role of Government and the National Counter-Terrorism Centre in coordinating PCVE work.

AFFIRMING our commitment and responsibility to Preventing and Countering Violent Extremism

ACKNOWLEDGING the dynamic and evolving nature of Violent Extremism phenomenon;

HEREBY **DRAW** the attention of the house to the following:

1. THAT the proposed amendments to POTA by the State Laws Miscellaneous Amendments Bill, 2019 raises grave concerns among Coast based civil society organisations working around PCVE with regards to their daily operations.

2. THAT the proposed Amendment to S 40C by inserting Subsection (1) to provide the Centre with the mandate to approve and receive reports of all CSOs and International Non-Governmental Organizations engaging in preventing and countering violent extremism and radicalization through counter-messaging or public outreach and disengagement and reintegration of radicalized individuals is against the spirit of collective responsibility and the tenets of the Public Benefit Organisation Act which is the core legislation governing the operation of CSOs.

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17 APR 2019
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11. THAT CSOs have a clear monitoring and evaluation framework in responding to issues of PCVE which will not be well attended to by the Centre hence the CSOs are in a better position to continue with their mandate.

12. THAT CSOs doubt the capacity of the Centre to approve and review CSOs work around PCVE.

13. THAT the enforcement of the proposed amendment will result to loss of gains by the CSOs actively involved in PCVE.

14. THAT previous efforts to have a resolution bringing on board CSOs to actively participate in the Multi -Agency Anti -Terror Body have not been successful.

15. THAT the CSOs are fully mandated to carry out their roles in lieu of registration by the NGO Coordination Board and other relevant bodies hence subjecting them to another process of seeking approval from the Centre is tantamount to double registration.

THEREFORE Your Humble Petitioners Pray that Parliament:

1. Disregard the proposed amendment to the Prevention of Terrorism Act S 40C (1) in totality.
2. Allow CSOs to actively participate in the Multi-Agency Anti-Terror Body's Activities.
3. Uphold the independence of CSOs working on PCVE to be able to also check the State and its institutions including the NCTC
4. Uphold the role and mandate of CSOs in advising the centre and criticising.

And Your Petitioners will ever Pray.

CC: Senate's Committee of Legal and Human Rights Affairs

On behalf of Coast Civil Society Network

Signed by:

PETITIONERS	NATIONAL ID NO.	SIGNATURE
Yusuf Lule Mwatsefu	21870676	
Amon Mwanongwa Kaise	11872064	
Hussein Khalid	14449668	

KAM MEMORANDUM

ON

THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL 2019

SUBMITTED TO

THE CLERK, NATIONAL ASSEMBLY

BY

PHYLLIS WAKIAGA, THE CHIEF EXECUTIVE, KENYA ASSOCIATION OF MANUFACTURERS (KAM)

2.	**Clause 2 – Schedule** **Section 32 (3)** **The Alcoholic Drinks Act No. 4 of 2010**	Section 32 (3) of the Alcoholic Drinks Act No. 4 of 2010: The statement and health warning referred to in subsection (2) shall comprise not less than 30% of the total surface area of the package.	Delete the word "package" appearing at the end of section 32(3) and substitute thereof with the word "label". The Clause will read as follows: 'Section 32 (3) ***The statement and health warning referred to in subsection (2) shall comprise not less than 30% of the total surface area of the label.'***	This provision requires the statement and health warning to comprise not less than 30% of the total surface area of the package. This is onerous on the manufacturers of alcoholic beverages for the following reasons: - a) The provisions require an investment on labels which usually does not cover the total surface area of the package. This will require an investment on specialised machinery and applicators to enable compliance with the provisions requiring that the statement and health warning comprising not less than 30% of the total surface area of the package. b) There will be increased costs in respect of returnable packaging which require cleaning and removing of labels prior to subsequent use. The cost of cleaning the returnable packaging will increase due to the coverage of the total surface area of the package.

ADMINISTRATION

c) There is also a concern on the disposal of the labels covering the total surface area of the packaging. The current efforts by the government in environmental conservation will be thwarted if the labels are disposed of in an irregular manner.

The amendment of the Section is necessary to manufacturers of alcoholic drinks for the following reasons: -

1) Manufacturing is a key pillar for the Big 4 agenda with the government setting out to incentivise and ease the cost of investment for manufacturers in the country. The provision has a countervailing effect in that it increases the costs of goods produced as it has a capital investment component.
2) The increased costs of goods produced will be passed on to the ultimate consumer and thus affect the affordability of alcoholic drinks. In turn, some consumers will opt for illicit and counterfeit alcoholic

drinks which tend to be cheaper. This impacts on health of the consumers as there is no quality assurance in respect of illicit and counterfeit goods. Ultimately, this will also impact a key government initiative of addressing issues with respect to illicit and counterfeit goods.

REPUBLIC OF KENYA

NATIONAL ASSEMBLY

DEPARTMENTAL COMMITTEE ON ADMINISTRATION & NATIONAL SECURITY

ATTENDANCE SCHEDULE

ADOPTION OF THE REPORT ON THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 21 OF 2019)

VENUE: COMMITTEE ROOM ON 2ND FLOOR, PROTECTION HOUSE

DATE : 7TH MAY, 2019

TIME : 9.30 AM

NO.	NAME	SIGNATURE
1.	Hon. Paul Koinange, MP - Chairperson	
2.	Hon. John Waluke, MP - Vice – Chairperson	
3.	Hon. Wafula Wamunyinyi, MP	
4.	Hon. George Peter Kaluma, MP	
5.	Hon. Dr. Makali Mulu,MP	
6.	Hon. George Theuri, MP	
7.	Hon. Aduma Owuor, MP	
8.	Hon. Didmus Wekesa Barasa Mutua, MP	
9.	Hon. Geoffrey Kingagi Muturi, MP	
10.	Hon. Marselino Malimo Arbelle, MP	
11.	Hon. Dr. Tecla Chebet Tum, MP	
12.	Hon. Josphat Kabinga Wachira, MP	
13.	Hon. Nimrod Mbithuka Mbai, MP	
14.	Hon. Ngunjiri Wambugu, MP	
15.	Hon. Abdi Omar Shurie, MP	
16.	Hon. Halima Mucheke, MP	
17.	Hon. Peter Masara, MP	
18.	Hon. Oku Kaunya, MP	

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – THIRD SESSION

THE DEPARTMENTAL COMMITTEE
ON
ENVIRONMENT AND NATURAL RESOURCES

REPORT ON THE CONSIDERATION OF THE STATUE LAW (MISCELLANEOUS AMENDMENT)(NO. 21) BILL, 2019

DIRECTORATE OF COMMITTEE SERVICES
CLERK'S CHAMBER
PARLIAMENT BUILDINGS
NAIROBI

MAY, 2019

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CHAIRPERSON'S FOREWORD

The Statute Law (Miscellaneous Amendment)(No.21) Bill, 2019 is a Bill sponsored by Hon. Aden Duale, Leader of the Majority Party, and it seeks to amend many other laws but the ones relevant to the Committee is:

- The Wildlife Conservation and Management Act (No. 47 of 2013)

.

The Committee considered the proposed amendments to the Act above for submission to the Departmental Committee on Justice and Legal Affairs pursuant to the Communication by the Hon. Speaker issued on 3rd April, 2019.

> In the Memorandum of Objects and Reasons, the Statute Law (Miscellaneous Amendments) (No. 21) Bill, 2019 seeks to amend the **Wildlife Conservation and Management Act, 2013 (No. 47 of 2013)**
> s to remove ambiguities currently existing in the Act.

The Committee is thankful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during its sitting. Further, I wish to express my appreciation to the Committee Members for the immense contributions towards the preparation and production of the report.

It is therefore my pleasant duty and privilege, on behalf of the Departmental Committee on Environment and Natural Resources, to submit its report on the consideration of the Statute Law (Miscellaneous Amendment) No. 21 Bill, 2019 for consideration Pursuant to Standing Order 127

Signed.....**Date**.....7/5/2019.....

HON. KAREKE MBIUKI, MP
CHAIRPERSON,
DEPARTMENTAL COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

EXECUTIVE SUMMARY

On 3rd April, 2019, the Statute Law (Miscellaneous Amendments) (No. 21) Bill, 2019 was read a First Time and thereafter committed to the various Departmental Committees for consideration pursuant to Standing Order No. 127. The Departmental Committee on Environment and Natural Resources held one meeting to consider the Bill.

On 10th April, 2019, the National Assembly placed advertisements on the Local Dailies calling for views from the general public on the Bill pursuant to Article 118 of the Constitution. The Committee received submissions from: Nature Kenya, Bowmans and Taita Taveta County Civil Society Network. The Committee also sought for views from the Ministry of Tourism and Wildlife and from the Kenya Law Reform Commission.

The Committee observed that:

1. The proposed amendments to the Wildlife Conservation and Management Act (No. 47 of 2013) were mainly meant to correct typographical errors.

The Committee having considered the proposed amendments to the Wildlife Conservation and Management Act, 2013 and the views from all the stakeholders, resolved that to move the amendments to the Wildlife Conservation and Management Act, 2013 as contained in the recommendation part of this report.

1.0 PREFACE

1.1 Establishment of the Committee

The Departmental Committee on Environment and Natural Resources is one of the fifteen (15) Departmental Committees of the National Assembly established under ***Standing Order 216*** whose mandate, pursuant to the ***Standing Order 216 (5,)*** is as follows:

a) To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
b) To study the programme and policy objectives of Ministries and departments and the effectiveness of their implementation;
c) To study and review all the legislation referred to it;
d) To study, assess and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
e) To investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
f) To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order No.204 (Committee on appointments);
(fa) To examine treaties, agreements and conventions;
g) To make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
h) To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
i) To examine any questions raised by Members on a matter within its mandate.

1.2 Mandate of the Committee

In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider matters related to:

i) Climate Change
ii) Environment Management and Conservation
iii) Forestry
iv) Water Resource Management
v) Wildlife
vi) Mining and Natural Resources
vii) Pollution and Waste Management

In executing its mandate, the Committee oversees the following State Departments, namely:

- Ministry of Water and Sanitation;

- Ministry of Environment and Forestry;
- The State Department for Wildlife; and
- The State Department for Mining.

1.3 Committee Membership

The Committee on Environment and Natural Resources was constituted by the House in December, 2017 and comprises of the following Members: -

No.	Name	Constituency	Party
1.	**The Hon. Kareke Mbiuki, M.P.,** Chairperson	Maara	Jubilee Party
2.	**The Hon. Sophia Abdi Noor, M.P.** Vice Chairperson	Ijaara	PDR
3.	The Hon. Benjamin JomoWashiali, M.P., CBS	Mumias East	Jubilee Party
4.	The Hon. David Kangogo Bowen, M.P.	Marakwet East	Jubilee Party
5.	The Hon. Francis Chachu Ganya, M.P.	North Horr	FAP
6.	The Hon. Ali Wario Guyo, M.P.	Garsen	Wiper Party
7.	The Hon. Beatrice Cherono Kones, M.P.	Bomet East	Jubilee Party
8.	The Hon. Charity Kathambi Chepkwony, M.P	Njoro	Jubilee Party
9.	The Hon. Hilary Kiplang'at Kosgei, M.P.	Kipkelion West	Jubilee Party
10.	The Hon. Peter Kimari Kihara, M.P	Mathioya	Jubilee Party
11.	The Hon. Benjamin Dalu Tayari, MP.	Kinango	ODM
12.	The Hon. Charles Ong'ondo Were, M.P.	Kasipul	ODM
13.	The Hon. Nasri Sahal Ibrahim, M.P.	Nominated	FORD K
14.	The Hon. Rozaah Buyu. M.P.	Kisumu County	ODM
15.	The Hon. Said Hiribae, M.P.	Galole	FORD K
16.	The Hon. Hassan Oda Hulufo, M.P.	Isiolo North	KPP
17.	The Hon. Amin Deddy Mohamed Ali, M.P.	Laikipia East	Jubilee Party
18.	The Hon. Rehema Hassan, M.P.	Tana River County	MCC
19.	The Hon. (Eng.) Paul Musyimi Nzengu, M.P.	Mwingi North	Wiper Party

1.4 Committee Secretariat

1. Ms. Esther Nginyo - Clerk Assistant II/Lead Clerk
2. Mr. Dennis Mogare Ogechi - Clerk Assistant III
3. Mr. Sidney Lugaga - Legal Counsel I
4. Ms. Winnie Kulei - Research Officer III
5. Ms. Yunis Amran - Fiscal Analyst III

2.0 BACKGROUND

The Statute Law (Miscellaneous Amendments) (No. 21) Bill, 2019 is a Bill sponsored by Hon. Aden Duale, Leader of the Majority Party. It was read a First Time on 3rd April, 2019 and thereafter committed to the various Departmental Committees for consideration pursuant to Standing Order No. 127. It seeks to amend the following laws under the Environment and Natural Resources sector, the Wildlife Conservation and Management Act (No. 47 of 2013).

The Departmental Committee on Environment and Natural Resources considered the amendments as contained in the Statute Law (Miscellaneous Amendment) No. 21, Bill, 2019 for submission to the Departmental Committee on Justice and Legal Affairs pursuant to the Communication by the Hon. Speaker issued on 3rd April, 2019.

The Statute Law (Miscellaneous Amendment) No. 21, Bill, 2019 seeks to amend the Wildlife Conservation and Management Act (No. 47 of 2013) so as to remove the ambiguities that are in the Act.

On 10th April, 2019, the National Assembly placed advertisements on the Local Dailies calling for views from the general public on the Bill pursuant to Article 118 of the Constitution. The Committee received submissions from the following stakeholders:-

a) Nature Kenya;
b) Taita Taveta County Civil Society Network; and
c) Bowmans.

The Committee also sought for views from the Ministry of Tourism and Wildlife and from the Kenya Law Reform Commission through a Letter dated 24th April, 2019.

2.1 Clause by Clause Analysis

The following is clause by Clause analysis of the proposed amendments to the Wildlife Conservation and Management Act (No. 47 of 2013):

1. CLAUSE: s. 23(2)
   PROPOSAL: "Delete the word "being" appearing in paragraph (a)."

   SECTION: 23 (1). There is established a Wildlife Conservation Trust Fund that shall be vested in a governing body established in accordance with subsection (2).
   (2) The governing body referred to in subsection (1) shall serve as a public-private partnership and comprise -
   (a) a Chairperson ***being*** appointed the Cabinet Secretary;

EFFECT/ OBSERVATION: The amendment proposes to delete the word "being". The amendment appears to address a syntax error where the word is not placed in the right order in the sentence structure.

OBSERVATION
Upon deletion of the word "being" appearing in section 23(2)(a), the section if amended shall read:
"A chairperson appointed the Cabinet Secretary"
The resulting amendment shall be ambiguous and ungrammatical.

RECOMMENDATION
The Committee should introduce an amendment during the Committee stage to correct the ambiguity by inserting the word "by" immediately after the word "appointed" so that the paragraph will read:

"(a) A chairperson appointed by the Cabinet Secretary

2. CLAUSE: Delete the words "who shall be the Chairperson "appearing in paragraph (b)."
SECTION: (b) the Principal Secretary in the State Department for the time being responsible for matters relating to wildlife ***who shall be the Chairperson***;

EFFECT/ OBSERVATION: The amendment proposes to delete the words "who shall be the Chairperson" appearing in paragraph (b).

Paragraph (a) already provides for the appointment of a Chairperson and thus the need for this amendment.

3.0 SUBMISSION FROM THE STAKEHOLDERS (PUBLIC PARTICIPATION)

The Committee received memoranda from the following:

i. Nature Kenya
ii. Taita Taveta County Civil Society Network; and
iii. Bowmans

The following matrix indicates the proposals from the various stakeholders and our analysis.

3.1The Wildlife Conservation and Management Act, 2013

CLAUSE	GROUP/ PERSON	PROPOSAL/ AMENDMENT	COMMITTEE'S RECOMMENDATIONS
23(2)	**Nature Kenya**	The Sponsor proposes that Committee inserts a new amendment under section 23(2)(e) to include at least one representative from local communities and civil society organizations in the governing body. **RATIONALE** The objectives of the fund are designed to ensure that beneficiaries and contributors aredrawn from a wide spectrum of stakeholders.	**The Committee agreed to the proposal, however, it proposed to include one community conservancy representative under 23(2)(e).**
23(2)(a)	**Bowmans**	The Sponsor proposes that Committee inserts a new amendment under section 23(2)(a) to read "The Cabinet Secretary who will be the Chairperson" RATIONALE Upon deletion of the word "being" appearing in section23(2)(a) if amended shall read: "23(2)(a) A chairperson appointed the Cabinet Secretary" Therefore if the intention is to appoint the Cabinet Secretary as the Chairperson then the wording should be clear and communicate the latter intention.	**The Committee noted that it had proposed to insert the word "by" immediately before the words "the Cabinet Secretary" to address the ambiguity in this paragraph.**

25/ Third Schedule	**Taita Taveta County Civil Society Network**	The sponsor appears to have submitted a memoranda/petition with proposals against proposals submitted under Statute law (Miscellaneous Amendments) Act, No. 18 of 2018. The submissions in the memorandum are not addressed to SLMAB Bill. No. 21/2019	**The proposals were addressing the** Statute law (Miscellaneous Amendment) Act, No. 18 of 2018. The Committee therefore did not address the section addressed as it had been overtaken by event.

3.2 Submission by the Ministry of Tourism and Wildlife

The Cabinet Secretary, Ministry of Tourism and Wildlife appeared before the Committee on Thursday, 2nd May, 2019 and submitted on the Statute Law (Miscellaneous Amendment) Bill, 2019 as follows, that:

i. The Ministry had written to the Attorney General requesting for amendments of Section 23(1) and 23(2) of the Wildlife Conservation and Management Act No. 47 of 2013 as was amended by the Statute Law (Miscellaneous Amendments) Act No. 18 of 2018 which came into force on the 18th January, 2019;
ii. The Ministry had observed that the new section 23(2) paragraph (a) and (b) provided for two chairpersons of the Wildlife Conservation Trust Fund and this would make the establishment of the Endowment Fund untenable;
iii. The Ministry therefore proposed that the appointment of the Chairperson be made by the Cabinet Secretary and remove the Principal Secretary for Wildlife as a Chairperson too;
iv. With the amendments in place, it would be possible to establish the Wildlife Conservation Trust Fund and put a Board of Directors in place.

3.3 Submission by the Kenya Law Reform Commission

The Kenya Law Reform Commission submitted on the Statute Law (Miscellaneous Amendment) Bill, 2019 as follows, that:

1. That deletion of the word "being" appearing in paragraph(a) of section 23 (2),
   Under Section 23 (2) (a), the deletion of the word "being" will amount to an ambiguity because the sequence of words and phrases may give rise to an improper legislative

sentence. Accordingly, we propose textual amendment by inserting the word "by" between "appointed" and "the Cabinet Secretary" to have a clear legislative sentence.

2. The deletion of the phrase "who shall be the chairperson..." appearing in paragraph (b) of Section 23 (2).

   By deleting the phrase"who shall be the chairperson" under Section 23 (2) (b) is appropriate. Retaining it alters the original meaning as per the principal Act because the section states the distinct members who shall comprise the body established under subsection (2). Including the phrase will create an ambiguity on who really is the chairperson.

3. Effectively, the amendments under discussion seem to rebut previous amendments that had been enacted under Statute Law (Miscellaneous Amendment) Act, 2018.

4.0 COMMITTEE'S OBSERVATIONS

The Committee made the following observations, that;

i. The Marginal note 'The Wildlife Endowment Fund' needed to be amended to read 'The Wildlife Conservation Trust Fund' as the Endowment Fund is limiting.

ii. There was need to effect the amendments as proposed in the Statute Law (Miscellaneous Amendment) Bill, 2019 so as to cure the ambiguities that were existing in the Wildlife Conservation and Management Act, 2013.

iii. There was need to include a representative of community conservancy in the body governing the Trust Fund for it to be more inclusive. However, there was need to ensure that the numbers are within the *mwongozo* principles on leadership.

5.0 COMMITTEE'S RECOMMENDATION

The Committee having considered the Bill and the submissions from the stakeholders makes the following recommendations;

SCHEDULE

THAT the Schedule to the Bill be amended in the proposed amendments to the **Wildlife Conservation and Management Act, 2013** -

(a) by inserting the following new amendment in its proper numerical sequence –

23(1) Delete the word "Endowment" in the marginal note and substitute therefor the words "Conservation Trust";

Justification

The Endowment Fund is limiting and therefore the need to make a conservation trust fund.

(b) by deleting the proposed amendments to section 23 (2) (a) and substituting therefor the following new amendments –

23(2) Delete paragraph (a) and substitute therefor the following new paragraph –

"(a) a Chairperson appointed by the Cabinet Secretary;"

Justification

This is to correct ambiguities and syntax error.

Insert the words "and one of whom shall be a representative nominated by an umbrella wildlife conservancy body" immediately after the word "matters" appearing in paragraph (e);

Justification

This will make the conservancy fund to be more inclusive.

ANNEXTURES

1. ADOPTION LIST
2. MINUTES
3. STAKEHOLDERS'SUBMISSIONS
4. NEWSPAPER ADVERT ON PUBLIC PARTICIPATION

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DC-ENR: DEPARTMENTAL COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

ATTENDANCE REGISTER

AGENDA:

1. **MEETING WITH THE CABINET SECRETARY FOR WATER AND SANITATION TO RESPOND TO QUESTIONS ASKED BY THE FOLLOWING MEMBERS: - (I) HON. BABU OWINO, MP (II) HON. ANDREW MWADIME, MP (III) HON. JOSEPH MANJE, MP (IV) HON. BENJAMIN TAYARI, MP (V) HON. JOSEPH OYULA MAERO, MP**

2. **REPORT ON THE CONSIDERATION OF THE STATUE LAW (MISCELLANEOUS AMENDMENTS) (NO. 21) BILL, 2019.**

DATE: 07/05/2019. **VENUE:** 2nd Flr, Continental Hse.

	NAME	SIGNATURE
1.	**The Hon. Kareke Mbiuki, M.P. - Chairperson**	
2.	**The Hon. Sophia Abdi Noor, M.P. – Vice Chairperson**	
3.	The Hon. David Kangogo Bowen, M.P.	
4.	The Hon. Benjamin Jomo Washiali, M.P.	
5.	The Hon. Francis Chachu Ganya, M.P.	
6.	The Hon. Beatrice Cherono Kones, M.P.	
7.	The Hon. Benjamin Dalu Tayari, MP.	
8.	The Hon. Amin Deddy Mohamed Ali, M.P.	
9.	The Hon. Charity Kathambi Chepkwony, M.P	
10.	The Hon. Charles Ong'ondo Were, M.P.	
11.	The Hon. Hassan Oda Hulufo, M.P.	
12.	The Hon. Hilary Kiplang'at Kosgei, M.P.	
13.	The Hon. Ali Wario Guyo, M.P.	
14.	The Hon. Nasri Sahal Ibrahim, M.P.	
15.	The Hon. Peter Kimari Kihara, M.P	
16.	The Hon. (Eng.) Paul Musyimi Nzengu, M.P.	
17.	The Hon. Rehema Hassan, M.P.	
18.	The Hon. Rozaah Buyu. M.P.	
19.	The Hon. Said Hiribae, M.P.	

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MINUTES

MINUTES OF THE 29TH SITTING OF THE DEPARTMENTAL COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES HELD ON TUESDAY 7TH MAY, 2019 AT 11:30 AM IN THE 2ND FLOOR BOARDROOM, CONTINENTAL HOUSE, PARLIAMENT BUILDINGS.

PRESENT

1. **The Hon. Kareke Mbiuki, M.P.** **Chairperson**
2. The Hon. Benjamin Jomo Washiali, M.P., CBS
3. The Hon. Charles Ong'ondo Were, M.P.
4. The Hon. Nasri Sahal Ibrahim, M.P.
5. The Hon. Hilary Kiplang'at Kosgei, M.P.
6. The Hon. Hassan Oda Hulufo, M.P
7. The Hon. Benjamin Dalu Tayari, MP
8. The Hon. David Kangogo Bowen, M.P.
9. The Hon. Rehema Hassan, M.P.
10. The Hon. Rozaah Buyu. M.P.

APOLOGIES

1. **The Hon. Sophia Abdi Noor, M.P.** **Vice Chairperson**
2. The Hon. (Eng.) Paul Musyimi Nzengu, M.P.
3. The Hon. Beatrice Cherono Kones, M.P.
4. The Hon. Francis Chachu Ganya, M.P.
5. The Hon. Said Hiribae, M.P.
6. The Hon. Amin Deddy Mohamed Ali, M.P.
7. The Hon. Peter Kimari Kihara, M.P
8. The Hon. Charity Kathambi Chepkwony, M.P
9. The Hon. Ali Wario Guyo, M.P.

IN ATTENDANCE

THE NATIONAL ASSEMBLY

1.Ms. Esther Nginyo	-	Clerk Assistant II
2.Mr. Dennis Mogare	-	Clerk Assistant III
3.Mr. Stanley Lagat	-	Serjeant At Arm I
4.Mr. Eugene Luteshi	-	Audio Recording Officer

AGENDA

i) Prayers

ii) Confirmation of Minutes
iii) Matters Arising
iv) **Consideration and Adoption of the Report on the Statute Law(Amendment) Bill, 2019**
v) Any Other Business
vi) Date of the next Sitting

MIN.NO. DC/ENR/138/2019: - PRELIMINARIES

The meeting was called to order at 11.32 a.m. after which prayers were said. The Chairperson stated that the main agenda of the meeting was Consideration and Adoption of a Report on the Statute Law (Miscellaneous Amendments) Bill, 2019

MIN.NO.DC/ENR/139/2019: - CONFIRMATION OF MINUTES

Confirmation of Minutes of the previous Sittings was deferred to the next sitting.

MIN.NO. DC/ENR/140/2019:- CONSIDERATION AND ADOPTION OF A REPORT ON THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 2019

The Report on Report on the Statute Law (Miscellaneous Amendments) Bill, 2019 was considered and adopted after being proposed and seconded by the Hon. Hassan Oda Hulufo, M.P and the Hon. Benjamin Dalu Tayari, M.P. respectively.

It was adopted with the following recommendations:

SCHEDULE

THAT the Schedule to the Bill be amended in the proposed amendments to the **Wildlife Conservation and Management Act, 2013** -

(a) by inserting the following new amendment in its proper numerical sequence –

23(1) Delete the word "Endowment" in the marginal note and substitute therefor the words "Conservation Trust";

Justification

The Endowment Fund is limiting and therefore the need to make a conservation trust fund.

(b) by deleting the proposed amendments to section 23 (2) (a) and substituting therefor the following new amendments –

23(2) Delete paragraph (a) and substitute therefor the following new paragraph –

"(a) a Chairperson appointed by the Cabinet Secretary;"

Justification

This is to correct ambiguities and syntax error.

Insert the words "and one of whom shall be a representative nominated by an umbrella wildlife conservancy body" immediately after the word "matters" appearing in paragraph (e);

Justification

This will make the conservancy fund to be more inclusive.

MIN.NO. DC/ENR/141/2019: - ADJOURNMENT

There being no other business the meeting was adjourned at 12.07 Pm.

SIGNED: .....
THE HON. KAREKE MBIUKI, M.P.
CHAIRPERSON,
DEPARTMENTAL COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

DATE: 7/5/2019

MINUTES OF THE 27TH SITTING OF THE DEPARTMENTAL COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES HELD ON TUESDAY 30TH APRIL, 2019 AT 9:30 AM IN THE 2ND FLOOR BOARDROOM, PROTECTION HOUSE, PARLIAMENT BUILDINGS.

PRESENT

1. **The Hon. Kareke Mbiuki, M.P.** **Chairperson**
2. The Hon. Charles Ong'ondo Were, M.P.
3. The Hon. Peter Kimari Kihara, M.P
4. The Hon. Nasri Sahal Ibrahim, M.P.
5. The Hon. Charity Kathambi Chepkwony, M.P
6. The Hon. Benjamin Jomo Washiali, M.P., CBS
7. The Hon. Ali Wario Guyo, M.P.
8. The Hon. Hilary Kiplang'at Kosgei, M.P.
9. The Hon. Hassan Oda Hulufo, M.P
10. The Hon. Benjamin Dalu Tayari, MP

APOLOGIES

1. **The Hon. Sophia Abdi Noor, M.P.** **Vice Chairperson**
2. The Hon. (Eng.) Paul Musyimi Nzengu, M.P.
3. The Hon. Beatrice Cherono Kones, M.P.
4. The Hon. Francis Chachu Ganya, M.P.
5. The Hon. David Kangogo Bowen, M.P.
6. The Hon. Rehema Hassan, M.P.
7. The Hon. Said Hiribae, M.P.
8. The Hon. Rozaah Buyu. M.P.
9. The Hon. Amin Deddy Mohamed Ali, M.P.

FRIEND OF THE COMMITTEE

The Hon. Kubai Iringo, MP

IN ATTENDANCE

MINISTRY OF ENVIRONMENT AND FORESTY

1. Hon. Mohamed Elmi - Chief Administrative Secretary

THE NATIONAL ASSEMBLY

1.Ms. Esther Nginyo - Clerk Assistant II
2.Mr. Dennis Mogare - Clerk Assistant III

3.Ms. Emmah Esendi	-	Legal Counsel I
4.Ms. Winnie Kulei	-	Research Officer III
5.Mr. Eugene Luteshi	-	Audio Recording Officer

AGENDA

i) Prayers
ii) Confirmation of Minutes
iii) Matters Arising
iv) **Consideration and Adoption of a Report on a Petition Regarding the Demolition Notice Issued by NEMA and WRA to Home Owners at Seefar Apartments.**
v) **Meeting with the Cabinet Secretary for Environment and Forestry to Respond to Questions Asked by the Following Members: - (I) Hon. Jessica Mbalu, MP (II) Hon. Hon. Kubai Iringo, MP.**
vi) **Consideration of the Statute Law (Miscellaneous Amendments) Bill, 2019**
vii) Any Other Business
viii) Date of the next Sitting

MIN.NO. DC/ENR/127/2019: - PRELIMINARIES

The meeting was called to order at 9.32 a.m. after which prayers were said. The Chairperson then asked all those present to introduce themselves. He then stated that the main agenda of the meeting was:

i) Consideration and Adoption of a Report on a Petition Regarding the Demolition Notice Issued by NEMA and WRA to Home Owners at Seefar Apartments.
ii) Meeting with the Cabinet Secretary for Environment and Forestry to Respond to Questions Asked by the Following Members: - (I) Hon. Jessica Mbalu, MP (II) Hon. Hon. Kubai Iringo, MP.
iii) Consideration of the Statute Law (Miscellaneous Amendments) Bill, 2019

The Members adopted the Agenda of the meeting.

MIN.NO.DC/ENR/128/2019: - CONFIRMATION OF MINUTES

Confirmation of Minutes of the previous Sittings was deferred to the next sitting.

MIN.NO. DC/ENR/129/2019: - CONSIDERATION AND ADOPTION OF A REPORT ON A PETITION REGARDING THE DEMOLITION NOTICE ISSUED BY NEMA AND WRA TO HOME OWNERS AT SEEFAR APARTMENTS.

The Report on a Petition Regarding the Demolition Notice Issued by NEMA and WRA to Home Owners at Seefar Apartments was considered and adopted after being proposed and seconded by the Hon. Peter Kimari Kihara, M.P and the Hon. Nasri Sahal Ibrahim, M.P. respectively.

It was adopted with the following recommendations:

1. **Prayer One:** The Committee intervenes and causes stay of the earmarked demolition pending conclusive investigations.

   The Committee recommended that the Water Resources Authority (WRA) and the National Environment Management Authority (NEMA), ***should indefinitely*** extend the suspension of demolition orders of Seefar Apartments until submission to the Committee of:

   (a) the report of the Multi-Agency Technical Team relating to a comprehensive study on the safety of the Nairobi Dam, its potential and the socio-economic implications of rehabilitating or decommissioning it as agreed upon during the meeting held between the Ministry of Environment and Forestry and the Committee on 4th December, 2018; and

   (b) the report of dam safety analysis commissioned by WRA on the 25th October, 2018,

2. **Prayer Two:** The Committee makes any other order or direction that it deems fit in the circumstance of the matter.

   The Committee recommended that:

I. NEMA and WRA undertakes an audit of all the licences issued across the country to verify the levels of compliance with licence conditions, the extent and reasons for causes of non-compliance, if any, with a view to taking appropriate action against any person whose actions are established to be inconsistent with the law, and table a report before the National Assembly within three months of the tabling of the Report.

II. The Ministry of Environment and Forestry, the Ministry of Water and Sanitation and the County Government of Nairobi should set up a taskforce to undertake a comprehensive study on the safety of the Nairobi Dam, its potential and the socio-economic implications of rehabilitating or decommissioning it, and table a report before the National Assembly within three months of the tabling of the Report.

III. The Inter-Agency Technical Team commissioned to assess the safety and viability of the dam should expedite its report to facilitate for further discussion between the home owners and the government to determine the way forward. In the meantime, the Team should address any immediate safety concerns.

IV. The Ministry of Water and Sanitation and the Ministry of Environment and Forestry should spearhead consultations with the Ministry of Lands and Ministry of Agriculture

to harmonize the definition of the riparian land and subsequently submit an amendment to Parliament for consideration and enactment, and table a report before the National Assembly within three months of the tabling of the Report.

V. The Government should adopt a harmonized position relating to the principles and process of the demolition exercise so as to assure the investors that the exercise is being undertaken in a manner that is not discriminatory.

VI. The Ministry of Water and Sanitation should expedite the installation of sewer line/facilities under the Nairobi Regeneration Programme to mitigate the pollution of the Nairobi Dam by effluent from the neighbouring residential areas.

MIN.NO. DC/ENR/130/2019: - **MEETING WITH THE CABINET SECRETARY FOR ENVIRONMENT AND FORESTRY TO RESPOND TO QUESTIONS ASKED BY THE FOLLOWING MEMBERS: - (I) HON. JESSICA MBALU, MP (II) HON. HON. KUBAI IRINGO, MP.**

The Hon. Mohamed Elmi, Chief Administrative Secretary, Ministry of Environment and Forestry, appeared before the Committee on behalf of the Cabinet Secretary.

The Hon. Kubai Iringo, MP posed his question as follows:

a) *Is the Cabinet Secretary aware that trees and other vegetation including indigenous trees were either destroyed or taken away as wood and timber by a contactor installing a power line at the Nyambene Repeater Station in Nyambene Forest?*
b) *Could the Cabinet Secretary state the amount of money allocated for the contract and when the installation of the power line is expected to be completed?*

The Hon. Mohamed Elmi asked more time (one week) in order to prepare a comprehensive response. He however noted that the second part of the question wasn't within the purview of his ministry and requested that the same be directed to the Ministry responsible for energy.

Resolution

It was resolved that:

1. The Ministry of Environment and Forestry avails a comprehensive response on Thursday 9th May, 2019 and that the second part of the question be directed by the member to the Ministry of Energy.
2. The Ministry of Environment and Forestry equally prepares a comprehensive response to the question by the Hon. Jessica Mbalu, MP, who wasn't available to pose her question.

MIN.NO. DC/ENR/131/2019: - **CONSIDERATION OF THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019**

The legal counsel briefed the committee on the Statute Law (Miscellaneous Amendments) Bill, 2019 on the as follows:

1. CLAUSE: s. 23(2)
   PROPOSAL: "Delete the word "being" appearing in paragraph (a)."

   SECTION: 23 (1). There is established a Wildlife Conservation Trust Fund that shall be vested in a governing body established in accordance with subsection (2).
   (2) The governing body referred to in subsection (1) shall serve as a public-private partnership and comprise -
   (a) a Chairperson ***being*** appointed the Cabinet Secretary;

   EFFECT/ OBSERVATION: The amendment proposes to delete the word "being". The amendment appears to address a syntax error where the word is not placed in the right order in the sentence structure.

   OBSERVATION
   Upon deletion of the word "being" appearing in section 23(2)(a) if amended shall read:
   "A chairperson appointed the Cabinet Secretary"
   The resulting amendment shall be ambiguous and ungrammatical.

   RECOMMENDATION
   Therefore, the Committee should introduce an amendment during the Committee stage to correct the ambiguity by inserting the word "by" immediately after the word "appointed" so that the paragraph will read:

   "(a) A chairperson appointed by the Cabinet Secretary

   COMMITTEE RESOLUTION: Committee agreed to the amendment.

2. CLAUSE: Delete the words "who shall be the Chairperson "appearing in paragraph (b)."
   SECTION: (b) the Principal Secretary in the State Department for the time being responsible for matters relating to wildlife ***who shall be the Chairperson***;

(c) the Principal Secretary in the State Department for the time being responsible for matters relating to finance;
(d) the Director General of the Service who shall be the Secretary;
(e) four representatives from the private sector, who shall have technical experience in either philanthropy, law, natural resources, finance, business and investment matters; and
(f) a representative from the office of the Attorney General.

(3) There shall be paid into the Wildlife Conservation Trust Fund-
(a) moneys appropriated by Parliament;
(b) a proportion of such moneys as may be levied for payment of environmental services by beneficiaries in productive and service sectors, and for biodiversity offset schemes that compensate for conservation impacts as a contribution towards the Wildlife Conservation Trust Fund as the Cabinet Secretary may, upon the recommendation of the governing board, determine;
(c) moneys for payment of environmental services and biodiversity offset schemes in which entities make payments directly to the Wildlife Conservation Trust Fund;
(d) moneys from debt-for- nature transactions;
(e) income from investments made by the governing board;
(f) such grants, donations, bequests or other gifts as may be made to the Fund.
(4) The purpose shall be to provide funds in order to-
(a) develop wildlife conservation initiatives;
(b) manage protected and restore areas and conservancies;
(c) protect endangered species, habitats and ecosystems;
(d) support wildlife security operations;
(e) facilitate community based wildlife initiatives;
(f) award wildlife conservation grants based on criteria to be established by the governing board; and
(g) such other purposes as may be provided by the governing board.
(5) The Cabinet Secretary may, on recommendation of the Service, by notice in the Gazette, issue regulations and guidelines necessary and appropriate for the carrying out of the purposes of this section.

EFFECT/ OBSERVATION: The amendment proposes to delete the words "who shall be the Chairperson" appearing in paragraph (b).

Paragraph (a) already provides for the appointment of a Chairperson and thus the need for this amendment.

COMMITTEE RESOLUTION: Committee agreed to the amendment.

The Committee further considered memoranda from the following entities: Nature Kenya, Taita Taveta County, Civil Society Network and Bowmans. The proposals therein coincided with the Committee position above.

MIN.NO. DC/ENR/132/2019: - ANY OTHER BUSINESS

It was reported that a report on the pollution at Kibos Facility in Kisumu county had been submitted as resolved in an earlier meeting with the Ministry of Environment and Forestry.

Resolution: It was resolved that the report be considered by the committee in a future sitting.

MIN.NO. DC/ENR/133/2019: - ADJOURNMENT

There being no other business the meeting was adjourned at 11.15 am.

SIGNED: .....

THE HON. KAREKE MBIUKI, M.P.
CHAIRPERSON,
DEPARTMENTAL COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

DATE: 7/2/2019

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BOWMANS D/Courts 25/4/19

COULSON HARNEY LLP
5th Floor, West Wing, ICEA Lion Centre
Riverside Park, Chiromo Road
PO Box 10643-00100, Nairobi, Kenya
+254 20 289 9000 | +254 709 966 000
+254 20 444 8614 | +254 734 993 739
PIN No. P051229962P | VAT No. 0191639L

www.bowmanslaw.com

Our Reference: RTH/SLMAB/2019 Your Reference: TBA
Direct Line: +254 20 289 9000 Date: 23 April 2019
Email Address: richard.harney@bowmanslaw.com

The Office of the Clerk of the National Assembly
Clerk's Chambers
The National Assembly
Parliament Buildings
P. O. Box 41842 – 00100
Nairobi, Kenya
For the kind attention of: Mr. Michael Sialai, EBS

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24 APR 2019
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via hand delivery and email

Dear Sirs

REVIEW OF THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL 2019

We refer to the Statute Law (Miscellaneous Amendments) Bill 2019 (the **Bill**) which seeks to amend several pieces of Kenyan legislation.

We have conducted a review of the Bill, specifically, the amendments it proposes to make to the following legislation:

1. the Companies Act 2015;
2. the Value Added Tax Act (No. 5 of 2013);
3. the Alcoholic Drinks Control Act (No. 4 of 2010);
4. the Wildlife Conservation and Management Act (no. 47 of 2013);
5. the Microfinance Act (No. 19 of 2006); and
6. the Public Finance Management Act (No. 18 of 2012)

Our review is enclosed with this letter as Annexure 1. We appreciate the opportunity to voice our opinions and comments regarding the above legislation and we look forward to further discussions on the same. Please contact the undersigned if you have any queries on the same.

1. CIAZEMUZA
2. LEAH
3. ASLAN
4. ESTHER

Pls deal

Yours faithfully
COULSON HARNEY LLP

RICHARD HARNEY

25/4/19

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ANNEXURE 1

THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL 2019

The Statute Law (Amendment) Bill 2019 (the Bill) proposes make amendments to various statutes as follows.

	STATUTE	CURRENT LAW	PROPOSED AMENDMENT	COMMENTS/IMPLICATIONS (IF ANY)
1.	THE COMPANIES ACT 2015			
	Private Companies			
		Section 9 (1)(a) Definition of private company- For the purposes of this Act, a company is a private company if – (a) its articles – (i) restrict a member's right to transfer shares; (ii) limit the number of members to fifty; and (iii) prohibit invitations to the public to subscribe for shares or debentures of the company	For the purposes of this Act, a company is a private company if – (a) its articles – (i) restrict a member's right to transfer shares; (ii) limit the number of members to fifty; (iii) prohibit invitations to the public to subscribe for shares or debentures of the company; and (iv) requires the consent of all members to add a new member.	**Contentious** The proposed new extension to the definition of a private company is unconventional and impractical. The onus for the determination of the type of consent (ordinary, special or unanimous) required to effect an admission of a new member/investor by way of transfer of shares or subscription for shares/equity is a matter solely to be determined by a company's members in its articles of association. Private companies opted to delegate that power to their boards of directors. This practice has found a place in companies' legislation since it is now very prevalent in Commonwealth nations for the board to retain the power to

				approve transfers and allotments to new members. The Companies Act, 2015 (**Companies Act**) cannot purport to legislate the internal workings of a company to the exclusion of the doctrines of freedom of association and privity of contract that have underpinned private company formation for centuries. This amendment also vacates the power of the board of directors, if given the authority by the Articles of Association or by resolution of the members (as currently provided in the Companies Act) to approve transfers of shares and allotment of shares to a new member by requiring that the company at general meeting must unanimously approve that transfer or allotment of shares to a new member. Large portions of the powers of directors will become redundant and unworkable in the Companies Act if this new definition is approved. It also has the practical and legal effect that one person holding only one share can veto the admission of new members who may be intending to invest large sums for the development of the company. The situation

				where members of a private company disappear or die would greatly complicate this – making it impossible to develop the company while this subsists. Where shares are held by nominees or by other companies this would require that consent of persons in those entities must be obtained before the right can be exercised – again greatly and unnecessarily complicating the operation of private companies. This kind of a provision is a deterrent to investment and will be harmful to Kenya's economic and development agenda.
	Company to keep register of beneficial owners			
		Section 93 (1) Every company shall keep a register of its members which shall include information relating to beneficial owners of the company, if any.	Every company shall keep a register of its members ~~which shall include information relating to beneficial owners of the company, if any~~.	**Acceptable** as this section reverts to the original wording of section 93|(1) under the Companies Act.
		Section 93(2)(c) A company shall enter in its register of members – (c) the date on which any person ceased to be a member;	Delete (c) ~~the date on which any person ceased to be a member~~	**Contentious** The removal of the requirement to enter the date on which a shareholder ceases to be a shareholder in the register of records will create disparity in the company's books that

				are unclear. The register of members is relied upon by the Registrar of Companies, the courts, officers, members of the company and members of the public who may rely on the register to determine who the current members of the company are. It must be noted that the register of members is *prima facie* evidence of all matters stated therein – section 105, Companies Act 2015 – including title to the shares. This, therefore, requires that the register of members should be a complete record and a 'one-stop shop' record for all matters relating to the shareholding of the company.
		Section 93(8) A company shall lodge with the Registrar a copy of its register of members including information relating to beneficial owners, if any, within thirty days after completing its preparation	A company shall lodge with the Registrar a copy of its register of ~~members including information relating to beneficial owners, if any,~~ within thirty days after completing its preparation	**Acceptable** as this section reverts to the original wording of section 93 under the Companies Act.
		New section 93A	Division 2A – Register of Beneficial Owners 93A (1) Every company shall keep a register of its beneficial owners. (2) A company shall enter in its register of beneficial owner, information relating to its	**Acceptable.** This section creates a different regime for the register of beneficial ownership from the general register of members under section 93 under the Companies Act.

			beneficial owners as prescribed in the regulations. (3) A company shall lodge with the Registrar a copy of its register of beneficial owners, within thirty days after completing its preparation. (4) A company other than a public listed company shall lodge with the Registrar a copy of any amendment to its register of beneficial owners within 14 days after making the amendment. (5) If a company fails to comply with the requirement of this section, the company, and each officer of the company who is in default, commit[s] an offence and on conviction are each liable to a fine not exceeding KES 500,000. (6) If, after a company or any of its officers is convicted under subsection (5), the company continues to fail to comply with the relevant requirement, the company, and each officer of the company who is in default, commit a further offence on each day on which the failure continues and on conviction are each liable to a fine not exceeding KES 50,000 each for such offence.	However, sub-section (2) requires there to be Regulations – these have not been published and until they are the section should be suspended. The draft Regulations should be provided for comment. This new section in the law as well as the regulations should be introduced in a measured manner as there are still a number of concerns around the draft regulations being considered. Some of these concerns include: - the non-inclusive nature of the definition of a beneficial owner which does not consider listed companies; - the level of disclosure and who it is applicable to needs to be carefully considered (disclosure of private information which is protected under the Constitution, data of children and foreign citizens); - disclosure thresholds; - capacity of the Companies Registry to enforce the proposed provisions as it is not a law enforcement agency but a collator of information; - adequacy of information requested. It is not possible for the law to fully define what information is needed for law

				enforcement agencies to effect investigations on beneficial ownership; - lack of clarity with respect to the information requested in the draft forms; - duplicity of information; and - the possible extraterritorial effect of the law.
	Annual General Meeting			
		New section 275A	275A (1) Every company shall convene a general meeting once a year. (2) Subsection (1) does not apply to single member companies. (3) The Registrar may, on the application of the company or for any other reason the Registrar thinks fit, extend the period referred to in subsection (1) even if, as a result, the period is extended beyond the calendar year. (4) A company that fails to comply with this section commits an offence and is liable to a fine not exceeding KES 100,000.	**Contentious** The Companies Act at present does not compel private companies to hold an annual general meeting in every year. A private company is at liberty to call for a general meeting and/or create a requirement to have the general meeting in every year under its articles of association. The requirement for a general meeting was repealed by the Companies Act when the compulsory business to be transacted at the annual general meeting, which was a mainstay under the repealed Companies Act Cap 486, was no longer required under the Companies Act. There is no longer compulsory

				business to be transacted at a general meeting for a private company. (As would be the case if the small companies exception on preparing annual accounts were to be applied). Only public companies are mandated to have the general meeting because the Companies Act prescribes mandatory business that must be transacted at the general meeting including the appointment of directors, approval of financials, fixing remuneration of auditors, considering auditors report, directors report etc. This requirement for private companies to have a general meeting also fell away when the written resolutions of shareholders were recognized under the Companies Act which suffice for the shareholders to pass any business they wish in the interests of the company. This ensures that the management of the company as a private enterprise is retained by its members and management. The original intention behind the Companies Act not requiring an annual general meeting or compulsory business to be transacted at an annual general meeting was to ease the cost and administrative burden on private

				companies and promote ease of doing business in Kenya. There is still no practical efficacy to legislate annual general meetings in a private company. It reintroduces cost and delay for private business. As such, this amendment should be resisted and struck from the bill.
	Power of directors to allot shares etc. authorization by company			
		Section 329(1) (1) The directors of a company may exercise a power of the company – (a) to allot shares in the company; or (b) to grant rights to subscribe for or to convert any security into shares in the company, only if they are authorized to do so by the company's articles or by a resolution of the company.	(1) The directors of a company may exercise a power of the company to – (a) allot shares in the company; or (b) grant rights to subscribe for or to convert any security into shares in the company, only if they are authorized to do so ~~by the company's articles or~~ by a resolution of the company.	**Contentious** There is no apparent or immediate need to delete the authorization for allotment from the articles of association. Most companies formed in Kenya, including those that have adopted the Model Articles of Association in the Companies Act 2015, make provision for allotment by directors. Again it allows for expediency in the management of the company by giving the directors authority to issue and allot shares as per the articles of association without having to revert to the shareholders for authority to issue and allot further shares.

		Section 329(2) An authorisation under subsection (1) may be given for a particular exercise of the power or for its exercise generally, and may be unconditional or subject to conditions.	An authorisation under subsection (1) may be given for a particular exercise of the power or for its exercise generally~~, and may be unconditional or subject to conditions~~.	**Contentious** The shareholders of a company, as the owners of the company, are allowed to delegate any power or action to the board as well as direct the conditions (if any) under which shares in the company may be allotted by the board of directors. This power cannot be derogated by statute and therefore this, deletion, is not well considered and should be struck from the bill.
	"Squeeze in" and "Sell out" provisions.			
		Section 611(2)(a) (2)An offeror who has, as a result of acceptances of the offer, acquired or unconditionally contracted to acquire: (a) not less than ninety percent value of the shares to which the offer relates;	An offeror who has, as a result of acceptances of the offer, acquired or unconditionally contracted to acquire: (a) not less than ~~ninety~~ fifty percent value of the shares to which the offer relates.	**Contentious** The provisions with respect to squeeze in and sell out are a key minority shareholder protection mechanism to prevent majority shareholders from oppressing minority shareholders in a company in the event of a buy-out. Ideally, squeeze-out and sell-out rights cannot be exercised until a bidder holds both 90% of the shares to which an offer relates, and 90% of the voting rights carried by those shares. The acquisition process is only triggered if 10% or less of the minority shareholders do not wish to sell their shares to the offeror. This ensures that the largest
		Section 611(2) (b) (2)An offeror who has, as a result of acceptances of the offer, acquired or unconditionally contracted to acquire: (b) if the shares to which the offer relates are voting shares – not less than ninety percent of the voting rights conferred by those shares, may give notice to the holder of any shares	(2)An offeror who has, as a result of acceptances of the offer, acquired or unconditionally contracted to acquire: (b) if the shares to which the offer relates are voting shares – not less than ~~ninety~~ fifty percent of the voting rights conferred by those shares, may give notice to the holder of any shares to which the offer relates to that the offeror has not	

		to which the offer relates to that the offeror has not acquired or unconditionally contracted to acquire that the offeror intends to acquire those shares.	acquired or unconditionally contracted to acquire that the offeror intends to acquire those shares.	possible opportunity is afforded to minority shareholders to sell-out. This proposed amendment now seeks to trigger an acquisition if 50% or less of the shareholders of the shares on offer do not wish to sell their shares to the offeror. This vacates any minority protections under the Companies Act. The new provisions will most likely lead to abuse of rights of the minority shareholders- and would likely be challenged under law as oppression. The minority protection rights have long been protected by the courts and these principles have developed over many years of practice and court interpretation. This proposed amendment will be liable to challenge in the courts. English, Candaian, common law and indeed most legal systems in the world set a threshold at 90% and there is no justification in reducing the level. The Capital Markets Authority would object to re-basing to 50%. The provisions are likely to make schemes of arrangement and other thresholds in the law that are set at 75% redundant.
		Section 611(4)(a) (4) An offeror who has, as a result of acceptances of the offer, acquired of unconditionally contracted acquire – (a) not less than ninety percent in value of the shares to which the offer relates;	(4) An offeror who has, as a result of acceptances of the offer, acquired of unconditionally contracted acquire – (a) not less than ~~ninety~~ fifty percent in value of the shares to which the offer relates;	
		Section 611 (4)(b) (4) An offeror who has, as a result of acceptances of the offer, acquired of unconditionally contracted acquire – (b) if the shares of that class are voting shares – not less than ninety percent of the voting rights conferred by those shares.	(4) An offeror who has, as a result of acceptances of the offer, acquired of unconditionally contracted acquire – (b) if the shares of that class are voting shares – not less than ~~ninety~~ fifty percent of the voting rights conferred by those shares.	

				The provisionsare unworkable and will seriously undermine Kenya's attractiveness as a investment destination. Unworkable and Unacceptable proposal and we recommend that this amendment be struck from the bill.
		Section 615(3)(a)(i)		This section does not exist in the Companies Act. *We have assumed that the Bill proposes to amend section 615 (3)(b)(i)*
		Section 615(3)(b)(i) *The holder of voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquired or contracted to acquire, whether unconditionally, or subject to conditions being satisfied – (i) amount to not less than ninety percent in value of all the voting shares in the company or would do so but for subsection (1) of section 590;*	*The holder of voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquired or contracted to acquire, whether unconditionally, or subject to conditions being satisfied – (i) amount to not less than ~~ninety~~ fifty percent in value of all the voting shares in the company or would do so but for subsection (1) of section 590;*	See above commentary under paragraph 9 above. This is an unworkable and unacceptable proposal and should be struck from the bill.

		Section 615(3)(a)(ii)		This section does not exist in the Companies Act. *We have assumed that the Bill proposes to amend section 615 (3)(b)(ii)*
		Section 615(3)(b)(ii) *The holder of voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquired or contracted to acquire, whether unconditionally, or subject to conditions being satisfied – (ii) confer not less than ninety percent of the voting rights in the company or would do so but for that subsection.*	*The holder of voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquired or contracted to acquire, whether unconditionally, or subject to conditions being satisfied – (ii) confer not less than ~~ninety~~ fifty percent of the voting rights in the company or would do so but for that subsection.*	Same comment as in paragraph 9 above. Unworkable and unacceptable proposal and we recommend that this amendment be struck from the bill.
		Section 615 (4)(b)(i) The holder of the voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquire or contracted to acquire, whether unconditionally or subject to	The holder of the voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquire or contracted to acquire, whether unconditionally or subject to conditions being satisfied – (i) amount not less than fifty ~~ninety~~	Same comment as in paragraph 9 above. Unworkable and unacceptable proposal and we recommend that this amendment be struck from the bill.

		conditions being satisfied – (i) amount not less than ninety percent in value of all the voting shares in the company or would do so for subsection (1) of section 590;	percent in value of all the voting shares in the company or would do so for subsection (1) of section 590;	
		Section 615 (5)(a)(i)		This section does not exist in the Companies Act. *It is possible that the section to be amended may have been Section 615 (5)(b)(i):*
		It is possible that the section to be amended may have been Section 615 (5)(b)(i): *(5) If a takeover offer relates to shares of one classes and at any time before the end of the offer period – (b) those shares, with or without any other shares of that class that the offeror has acquired or contracted to acquire, whether unconditionally or subject to conditions being satisfied – (i) amount not less than ninety percent in value of all the shares of that class;*	*(5) If a takeover offer relates to shares of one classes and at any time before the end of the offer period – (b) those shares, with or without any other shares of that class that the offeror has acquired or contracted to acquire, whether unconditionally or subject to conditions being satisfied – (i) amount not less than fifty ~~ninety~~ percent in value of all the shares of that class;*	Same comment as in paragraph 9 above. Unworkable and unacceptable proposal and we recommend that this amendment be struck from the bill.
		Section 615 (5)(a)(ii)		This section does not exist in the Companies Act. *It is possible that the section to be amended may have been Section 615 (5)(b)(ii)*

		It is possible that the section to be amended may have been Section 615 (5)(b)(ii): *(5) If a takeover offer relates to shares of one classes and at any time before the end of the offer period – (b) those shares, with or without any other shares of that class that the offeror has acquired or contracted to acquire, whether unconditionally or subject to conditions being satisfied –(ii) if the shares of that class are voting shares, confer not less than ninety percent of the voting rights carried by the shares of that class*	*(5) If a takeover offer relates to shares of one classes and at any time before the end of the offer period – (b) those shares, with or without any other shares of that class that the offeror has acquired or contracted to acquire, whether unconditionally or subject to conditions being satisfied –(ii) if the shares of that class are voting shares, confer not less than fifty ~~ninety~~ percent of the voting rights carried by the shares of that class.*	Same comment as in paragraph 9 above. Unworkable and Unacceptable proposal and we recommend that this amendment be struck from the bill.
	Companies qualifying as small: general rules			
		Section 624 (3)(c) The qualifying conditions are satisfied by a company in a year in which it satisfied two or more of the following requirements - (c) it does not have more than fifty employees.	The qualifying conditions are satisfied by a company in a year in which it satisfied two or more of the following requirements - (c) it does not have more than ~~fifty~~ twenty-five employees.	**Acceptable** The proposal to reduce the number of employees that a company should have in order to qualify as a small company in the small companies regime to 25 employees may reflect the economy at present.
2.	**THE VALUE ADDED TAX ACT (NO. 5 OF 2013)**	**Section 17 (5)** "Where the amount of input tax that may be deducted by a registered person under subsection (1) in respect of a tax period exceeds the amount of output tax due for the	**Insertion of sub-section 17(5)(c) &(d)** c) the Commissioner is satisfied that such excess arises from tax withheld by appointed withholding agents;	The VAT Act 2013, only permits refunds where there is excess input tax as a result of making zero rated supplies; refund for tax paid in error; or on bad debts subject to certain conditions.

		period, the amount of the excess shall be carried forward as input tax deductible in the next tax period: Provided that any such excess shall be paid to the registered person by the Commissioner where- a) the Commissioner is satisfied that such excess arises from making zero-rated supplies; and b) the registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax becomes due and payable."	d) the Commissioner is satisfied that such excess arising out of tax withheld by appointed tax withholding agents may be applied any tax payable under this Act.	The amendment proposes two things; a) to provide that one can utilize Withholding VAT (**WHVAT**) credits against any VAT payable in the Act; and b) to provide that WHVAT credits can be part of a refund claim to the Commissioner in VAT refund application. WHVAT is VAT withheld by a recipient of taxable supplies who is appointed by the KRA to deduct VAT and remit the same to the KRA against a supplier. The Withholding VAT rate is 6%. The VAT withholding Agent is expected to remit the WHVAT (6%) to the KRA and remit the balance (10%) to the supplier of taxable supplies. From a legislative perspective, it is not clear how a registered person could utilize the VAT credits arising from WHVAT. We note that in practice, suppliers utilize the VAT credit arising from the WHVAT against VAT payable when accounting for VAT.

				Likewise, registered persons who make both standard rated supplies and zero-rated supplies and are perpetually in a VAT credit position, ordinarily include the WHVAT element in a VAT refund claim to the Commissioner. Therefore, The proposed amendment attempts to bring clarity to what was poor law. It remains to be seen if the amendment will achieve this.
3.	**THE ALCOHOLIC DRINKS CONTROL ACT NO. 4 of 2010**	Delete the definition of the word "magistrate" and substitute therefor the following "magistrate" has the meaning assigned to it in the Magistrates' Court Act.	The Alcoholic Drinks Act effectively placed offences under the Act outside the jurisdiction of the resident magistrate by defining magistrate as a magistrate above the rank of resident magistrate.	All cadres of magistrates will try offences under the Act.
4.	**THE WILDLIFE CONSERVATION AND MANAGEMENT ACT (NO. 47 OF 2013)**	**23. Establishment of Endowment Fund** 23. (1) There is established a Wildlife Conservation Trust Fund that shall be vested in a governing body established in accordance with subsection (2)- (2) The governing body referred to in subsection (1) shall serve as a public-private partnership and comprise - a) a Chairperson being appointed the Cabinet Secretary;	Deletion of the word "being" appearing in paragraph 23(2)(a). The sub-section if amended with then read: ***"a) a Chairperson appointed the Cabinet Secretary"*** Deletion of the words "who shall be the Chairperson" appearing in paragraph 23b). The sub-section if amended with then read:	***Note: The substantial change to section 23 resulted from the enactment of The Statute Law (Miscellaneous Amendment) Act 2018 which, when it came into force, repealed the entire section 23 of the Wildlife Conservation and Management Act.*** The change proposed by The Statute Law (Amendment) Bill 2019 seeks to remove ambiguity that arose from the 2018 amendment to section 23.

		b) the Principal Secretary in the State Department for the time being responsible for matters relating to wildlife who shall be the Chairperson; c) the Principal Secretary in the State Department for the time being responsible for matters relating to finance; d) the Director General of the Service who shall be the Secretary; e) four representatives from the private sector, who shall have technical experience in either philanthropy, law, natural resources, finance, business and investment matters; and f) a representative from the office of the Attorney General.	***"b) the Principal Secretary in the State Department for the time being responsible for matters relating to wildlife."***	In our view, however, the proposed amendment to subsection 23(2)(a) is still ambiguous as the proposed amendment could mean that the Chairperson of the Wildlife Endowment Fund would be appointed as Cabinet Secretary for the time being responsible for matters relating to wildlife (the "**CS**"). The alternate meaning, which we believe is the intention of the provision and of the proposed amendment, is that the CS will be the Chairperson of the Wildlife Endowment Fund. A more suitable amendment to sub-section 23(2)(a) would therefore be to word the sub-section as "the Cabinet Secretary who will be the Chairperson".
5.	**THE MICROFINANCE ACT NO. 19 OF 2006**	Section 14(1) (f) prohibits Microfinance Institutions from engaging in wholesale and retail trade.	Microfinance institutions can engage in wholesale and retail trade to the extent strictly necessary for the conduct of business by sharia compliant microfinance institutions.	Sharia compliant microfinance institutions will be able to engage in wholesale and retail trade in line with the Sharia law restrictions against interests (*Riba*). This amendment follows the amendments to the SACCO Societies Act (No.14 of 2008) by the Finance Act 2017 providing that the CS in consultation with SASRA shall create

				regulations for the licensing and supervision of Sharia compliant SACCO societies. These amendments may be the first stepping stones towards the establishment of suitable regulatory framework for Sharia compliant finance institutions.
6.	**THE PUBLIC FINANCE MANAGEMENT ACT NO 18 OF 2012**	Section 2(1) (d) defines an accounting officer in the case of the Parliamentary Service Commission (PSC) as the clerk of the Senate in respect of the Senate and the Clerk of the National Assembly in respect of the National Assembly.	An accounting officer in respect of the (PSC) will also include such other officer in respect of any other office in the parliamentary service as the CS shall, within 14 days of the PSC's resolution, designate.	Empowers the PSC to designate accounting officers in the parliamentary service in addition to the two clerks of the Houses of Parliament. This amendment seeks to actualize the resolution already made by PSC on 14 February 2019.

Coulson Harney LLP Advocates

Nairobi

April 2019

Written memoranda/Petition on the Statute Law (Miscellaneous Amendments) Act, 2018 by Taita Taveta County Civil Society Network.

To the Clerk of the National Assembly of The Republic of Kenya.

Copied to the Office of;

Clerk, Taita Taveta County Assembly;

MP Voi;

MP Mwatate;

MP Wundanyi;

MP Taveta;

County Women Representative;

Senator; and

Governor Taita Taveta County.

RECEIVED
16 APR 2019
CLERK'S OFFICE

Preamble:

This written memorandum, by and on behalf of the Taita Taveta Civil Society Organizations, is presented before the Kenyan National Assembly with respect to the Statute Law (Miscellaneous Amendments) Act, 2018 and specifically, with reference to the Wildlife Conservation and Management Act, 2013.

The undersigned met on 15th April 2019 at The Silent Resort in Voi Town under the aegis of Taita Taveta County Civil Society Network. The Network is the umbrella body for all Civil Society Organizations operating in Taita Taveta County.

The objective of the strategic engagement was to deliberate, prepare and submit written petition on the amendments as per Gazette Supplement No. 161 (Acts No. 18) dated 4th January, 2019.

Taita Taveta County hosts the largest conservation area in Kenya. 86% of the county is either wildlife conservation or wildlife dispersal area. Therefore, any attempt at changing legislation governing wildlife conservation will be hideous if the Taita Taveta community is not allowed to actively participate. For this reason, The County Civil Society Network takes great exception with the manner in which these amendments were made and consequently gazetted without any community participation.

After daylong deliberations which included a run-through of the amended Act, the following observations were made:

- There is a sinister attempt at blocking community participation in wildlife conservation and management through the blatant changes made in the structure and functioning of the County Wildlife Conservation Committees.

- The amendment of the third schedule with regard to the expunging of Poisonous Snakes and Wild pigs was ill intended and unsympathetic to the plight of local communities.
- Once again there is no attempt by the Act to address the long-standing issue of benefit sharing which for Taita Taveta Community has been a long-drawn battle.
- The scrapping of CWCCCs defeats the letter and spirit of the constitution which promotes devolution. That the committees are to be Chaired by County Commissioners equally defeats the very meaning of the title "Community Conservation Committee".
- KWS has failed in its mandate of sustainably managing and conserving protected areas if the degradation of Tsavo National Parks is anything to go by. Therefore, the representation in the committee of the Land Use/Physical Planning and Environment Offices is critical.
- Mining is a key economic activity in Taita Taveta County and that it should be allowed in select locations within protected areas in line with Area Management Plans with approval of the Committee.
- There are several Conservation Bodies that operate within the Tsavo Conservation area with little benefit to local communities. There is need for regulations and coordination by the County Conservation Committees.
- This window to submit written memoranda/petitions provides the community with a rare opportunity to amend the 3rd Schedule to include Baboons and monkeys and snakes (non-poisonous e.g. python, which can cause grievous bodily harm and/or death).

Resolutions

Compensation

1. Retain the entire Section 25 as in the current Act
2. Amend the Third Schedule to include poisonous snakes, dangerous snakes, baboons and monkeys. However, compensation under this list should only be limited to grievous bodily harm or death.
3. Introduce a section on Benefit share in which 25% of the gross annual income of National Parks Shall go to Park adjacent Communities especially HWC hotspots.
4. Determine and fix a percentage of KWS earnings that should go towards CSR in Wildlife rich counties.

The Establishment of Community Wildlife Conservation Committees

1. Retain the County Wildlife Conservation and Compensation Committees in their earlier form and composition, where the Chairperson is a member of the local community who is competitively selected from among qualified persons as envisaged in the original Act (WCMA, 2013).
2. To retain section 19 as was in the WCMA, 2013.

3. Community representation in Taita Taveta County shall be per Sub County to allow for effective representation.

Undertaking Extractive Activities inside Protected Areas

1. Local Artisanal Miners be allowed to engage in extractive actives as shall be guided by Area Management Plans and as approved by the respective County Conservation Committee.

Signed on this 15th day of April 2019 by the following;

Name	ID No.	Signature
Ezra Mdam	8947492	
Abdulrahman Farouk	11655737	
Joseph Apamo	13788830	
Rev. Jaxon Shako Mtoto	13269690	
Johnstone Mwamodo	9983065	
John M. Mlamba	11311613	
Grace Mwamachi	10395336	
Juliet Mwadime	21279191	
Beatrice Mjomba	11372046	
Wabosha Kamata	16327831	Kamata
Makrina Mwamburi	11312040	Makrina
Rose Mwachoki	22345678	Rose

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BOX 44486, 00100 GPO NAIROBI
TEL: (254 20) 3537568 / 0771343138
0780149200
office@naturekenya.org
www.naturekenya.org



(3) Enclosed pls note FIT 24/4/19 (2) Letter pls deal FIT 24/4/19 (1) Dlc with & 16/04

The Clerk of the National Assembly.
P.O Box 41842 -00100,
Nairobi

15th April 2019

Dear Mr. Michael Sialai.

RE: In the matter of consideration by the National Assembly of the Statutes Law (Miscellaneous Amendment) Bill (National Assembly Bill No.21 of 2019).

Submission of Memoranda on the Wildlife Conservation and Management Act, 2013 (No 47 of 2013) amendments.

Nature Kenya – the East Africa Natural History Society – appreciates and support the efforts by the National Assembly to create a Wildlife Conservation Trust Fund under the Section 23 of the Wildlife Conservation and Management Act, 2013. The fund we believe will greatly enhance sustainable wildlife conservation efforts in Kenya.

We note that the objectives of the fund are designed to ensure that beneficiaries and contributors are drawn from a wide spectrum of stakeholders. Key among them are local communities and Civil Society organizations who play an important role in wildlife conservation and management in Kenya.

However, the Fund's governing body as proposed under Section 23 (2) has overlooked the representation of local communities and civil society organizations. We request the Committee to consider **amending** Section 23 (2) **to include at least one representative from local communities and civil society organizations** in the governing body.

(Please also note that Section 23 is titled "The Wildlife Endowment Fund" but sub-section (1) and the rest of the amendment refer to a "Wildlife Conservation Trust Fund".)

A short history of Nature Kenya is attached for your information.

Sincerely,

Dr. Paul Matiku
Executive Director, **Nature Kenya**

NATIONAL ASSEMBLY
RECEIVED
16 APR 2019
DEPUTY CLERK
J.W.N
P. O. Box 418422-00100, NAIROBI

Background information about Nature Kenya

Nature Kenya—the East Africa Natural History Society (EANHS)—is Africa's oldest environmental Society, established in 1909 to promote the study and conservation of nature in eastern Africa. We remain a non-political and not for profit membership Society. Our mission is connecting nature and people. Our work is firmly based on partnership, science and action. We use the best available science to inspire positive action for biodiversity by and for partners—Government, local communities and private sector.

Nature Kenya takes practical action. We work with and for people – to improve their quality of life alongside, and as a result of, nature conservation. We collaborate with others wherever possible, at local, national, regional or global levels, linking with community groups, governments, businesses, universities and civil society groups to increase the impacts of our efforts.

Some of our achievements include:

- Founded the National Museums of Kenya, now a world-renowned institution for research and education.
- Published, since 1910, the *Journal of East African Natural History*, a respected scientific journal now jointly produced with the National Museums.
- Established and maintained, with the National Museums of Kenya, a comprehensive natural history library.
- Engaged its members in the study, enjoyment and conservation of nature in Eastern Africa, through field trips, lectures, publications, and opportunities to take part in research activities since 1909.
- Identified and designated Important Bird Areas (IBAs) for Kenya, in collaboration with the National Museums; and documented the plants, animals and other biodiversity of Eastern Africa as a contribution to expanding the taxonomic scope of priority setting from IBAs to Key Biodiversity Areas (KBAs). Since IBAs are KBAs based on birds, they are today referred to as Important Bird and Biodiversity Areas.
- Encouraged and supported community-based organizations to become Site Support Groups (SSGs) promoting conservation and alternative livelihoods at Important Bird Areas, especially those without official protection status.
- Developed partnerships among Government and non-government organizations for sustainable conservation action at IBAs through the Important Bird Areas National Liaison Committee (IBA-NLC). We work with others in the development of policies, legislation and institutional frameworks that safeguard the ecological sustainability of IBAs in Kenya
- Mobilized resources to connect nature and people to take action for biodiversity conservation through development and implementation of donor funded projects at priority IBAs in Kenya.
- Work globally through the BirdLife International Partnership and its network of like-minded organizations in Eastern Africa and beyond in 117 countries and territories.

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However, the Fund's governing body as proposed under Section 23 (2) has overlooked the representation of local communities and civil society organizations. We request the Committee to consider **amending** Section 23 (2) **to include at least one representative from local communities and civil society organizations** in the governing body.

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We note that the objectives of the fund are designed to ensure that beneficiaries and contributors are drawn from a wide spectrum of stakeholders. Key among them are local communities and Civil Society organizations who play an important role in wildlife conservation and management in Kenya.

However, the Fund's governing body as proposed under Section 23 (2) has overlooked the representation of local communities and civil society organizations. We request the Committee to consider **amending** Section 23 (2) **to include at least one representative from local communities and civil society organizations** in the governing body.

(Please also note that Section 23 is titled "The Wildlife Endowment Fund" but sub-section (1) and the rest of the amendment refer to a "Wildlife Conservation Trust Fund".)

A short history of Nature Kenya is attached for your information.

Sincerely,

Dr. Paul Matiku
Executive Director, **Nature Kenya**

Encl:

Background information about Nature Kenya

Nature Kenya—the East Africa Natural History Society (EANHS)—is Africa's oldest environmental Society, established in 1909 to promote the study and conservation of nature in eastern Africa. We remain a non-political and not for profit membership Society. Our mission is connecting nature and people. Our work is firmly based on partnership, science and action. We use the best available science to inspire positive action for biodiversity by and for partners—Government, local communities and private sector.

Nature Kenya takes practical action. We work with and for people – to improve their quality of life alongside, and as a result of, nature conservation. We collaborate with others wherever possible, at local, national, regional or global levels, linking with community groups, governments, businesses, universities and civil society groups to increase the impacts of our efforts.

Some of our achievements include:

- Founded the National Museums of Kenya, now a world-renowned institution for research and education.
- Published, since 1910, the *Journal of East African Natural History*, a respected scientific journal now jointly produced with the National Museums.
- Established and maintained, with the National Museums of Kenya, a comprehensive natural history library.
- Engaged its members in the study, enjoyment and conservation of nature in Eastern Africa, through field trips, lectures, publications, and opportunities to take part in research activities since 1909.
- Identified and designated Important Bird Areas (IBAs) for Kenya, in collaboration with the National Museums; and documented the plants, animals and other biodiversity of Eastern Africa as a contribution to expanding the taxonomic scope of priority setting from IBAs to Key Biodiversity Areas (KBAs). Since IBAs are KBAs based on birds, they are today referred to as Important Bird and Biodiversity Areas.
- Encouraged and supported community-based organizations to become Site Support Groups (SSGs) promoting conservation and alternative livelihoods at Important Bird Areas, especially those without official protection status.
- Developed partnerships among Government and non-government organizations for sustainable conservation action at IBAs through the Important Bird Areas National Liaison Committee (IBA-NLC). We work with others in the development of policies, legislation and institutional frameworks that safeguard the ecological sustainability of IBAs in Kenya
- Mobilized resources to connect nature and people to take action for biodiversity conservation through development and implementation of donor funded projects at priority IBAs in Kenya.
- Work globally through the BirdLife International Partnership and its network of like-minded organizations in Eastern Africa and beyond in 117 countries and territories.

For more information visit our website at www.naturekenya.org.

A x B C

where—

A is the total amount of input tax payable by the person during the tax period on acquisitions that relate partly to making taxable supplies and partly for another use;

B is the value of all taxable supplies made by the registered person during the period; and

C is the value of all supplies made by the registered person during the period in Kenya.

(7) If the fraction of the formula in subsection (6) for a tax period—

(a) is more than 0.90, the registered person shall be allowed an input tax credit for all of the input tax comprising component A of the formula; or

(b) is less than 0.10, the registered person shall not be allowed any input tax credit for the input tax comprising component A of the formula.

Section 23 of No. 47 of 2013 which it is proposed to amend—

23. The Wildlife Endowment Fund (Wildlife Conservation Trust Fund)

(1) There is established a Wildlife Conservation Trust Fund that shall be vested in a governing body established in accordance with subsection (2).

(2) The governing body referred to in subsection (1) shall serve as a public-private partnership and comprise—

(a) a Chairperson being appointed the Cabinet Secretary;

(b) the Principal Secretary in the State Department for the time being responsible for matters relating to wildlife who shall be the Chairperson;

(c) the Principal Secretary in the State Department for the time being responsible for matters relating to finance;

(d) the Director-General of the Service who shall be the Secretary;

(e) ~~four~~ Two representatives from the private sector, who shall have technical experience in either philanthropy, law, natural resources, finance, business and investment matters; and

(f) a representative from the office of the Attorney-General.

(g) two representatives of Civil Society

(3) There shall be paid into the Wildlife Conservation Trust Fund—

(a) moneys appropriated by Parliament;

(b) a proportion of such moneys as may be levied for payment of environmental services by beneficiaries in productive and service sectors, and for biodiversity offset schemes that compensate for conservation impacts as a contribution towards the Wildlife Conservation Trust Fund as the Cabinet Secretary may, upon the recommendation of the governing board, determine;

(c) moneys for payment of environmental services and biodiversity offset schemes in which entities make payments directly to the Wildlife Conservation Trust Fund;

(d) moneys from debt-for- nature transactions;

(e) income from investments made by the governing board;

(f) such grants, donations, bequests or other gifts as may be made to the Fund.

(4) The, purpose shall be to provide funds in order to—

(a) develop wildlife conservation initiatives;

(b) manage and restore protected areas and conservancies;

(c) protect endangered species, habitats and ecosystems;

(d) support wildlife security operations;

(e) facilitate community based wildlife initiatives;

(f) award wildlife conservation grants based on criteria to be established by the governing board; and

(g) such other purposes as may be provided by the governing board.

(5) The Cabinet Secretary may, on recommendation of the Service, by notice in the *Gazette*, issue regulations and guidelines necessary and appropriate for the carrying out of the purposes of this section.

Section 9 of No. 17 of 2015 which it is proposed to amend—

9. Private companies

(1) For the purposes of this Act, a company is a private company if—

(a) its articles—

(i) restrict a member's right to transfer shares;

(ii) limit the number of members to fifty; and

(iii) prohibit invitations to the public to subscribe for shares or debentures of the company;

community and on the basis of that disclosure has obtained the prior consent of the community to use any of the stockholder's discoveries about the indigenous wildlife resources for the proposed bio-prospecting; and

(b) the applicant and the community have entered into a benefit-sharing agreement that provides for sharing by the community in any future benefits that may be derived from the relevant bio-prospecting.

(6) The Service shall, in all bio-prospecting involving any wildlife resources, be a joint partner on behalf of the people of Kenya.

(7) The Cabinet Secretary shall, on the recommendation of the Service, require that a particular per centum of the proceeds from the bio-prospecting is contributed to the Wildlife Endowment Fund established under the provisions of this Act.

(8) The Cabinet Secretary may, on recommendation of the Service, by notice in the Gazette, promulgate rules, regulations and guidelines as are necessary and appropriate to carry out the purposes of this section.

(9) Any person who contravenes any provisions of this section or the rules made there-under commits an offence.

PART V—ESTABLISHMENT OF WILDLIFE ENDOWMENT FUND

The Wildlife Endowment Fund.

23. (1) The Service shall establish a Wildlife Endowment Fund and which shall be vested in the Board of Trustees.

(2) There shall be paid into the Endowment Fund –

(a) moneys appropriated by Parliament for purposes of the Endowment Fund;

(b) a proportion of such moneys as may be levied for payment of environmental services by beneficiaries in productive and service sectors as a contribution

towards the Endowment Fund as the Cabinet Secretary may, upon the recommendation of the Service, determine;

(c) income from investments made by the Board of Trustees of the Endowment Fund; and such grants, donations, bequests or other gifts as may be made to the Endowment Fund; and

(d) such grants, donations, bequests or other gifts as may be made to the Endowment Fund.

(3) The functions of the Wildlife Endowment Fund shall be to-

(a) develop wildlife conservation initiatives;

(b) manage and restore protected areas and conservancies;

(c) protect endangered species, habitats and ecosystems;

(d) support wildlife security operations;

(e) facilitate community based wildlife initiatives; and

(f) such other purposes as may be provided for by rules made under this Act.

The Wildlife Compensation Scheme.

24. The Government shall establish a Wildlife Compensation Scheme that shall consist of—

(a) monies specifically allocated for this purpose through the budget process;

(b) an insurance scheme to be established by the Cabinet Secretary responsible for matters relating to finance; and

(c) monies from any other source approved by the Cabinet Secretary for the time being responsible for matters relating to finance; and

(2) The Wildlife Compensation Scheme shall be used for financing compensation claims for human death or

REPUBLIC OF KENYA

MINISTRY OF TOURISM AND WILDLIFE

State Department for Wildlife
Office of the Principal Secretary

Telephone: 254-20-2724725/2724646
Email.pswildlife@tourism.go.ke
When replying please quote

NSSF Building, Block A 21st Floor
P.O. Box 30430-00100
NAIROBI

Ref : SDW/1/49

30th April 2019

Mr. Michael Sialai , EBS
Clerk of the National Assembly
National Assembly
Parliament Buildings
P. O. Box 41842-00100
NAIROBI

Dear Mr. Sialai

REQUEST FOR SUBMISSIONS ON THE PROVISIONS OF THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 2019 RELATING TO THE WILDLIFE CONSERVATION AND MANAGEMENT ACT, 2013 (NO. 47 OF 2013)

I refer to the above subject matter and your letter dated 24th April 2019 Ref: NA/DCS/ENR/2019 (028).

We have gone through the proposed statue law (Miscellaneous Amendment) Bill, 2019 and agree with the proposed amendments as per our request on the appointment of the Chairperson of the Wildlife Conservation Trust Fund being appointed by the Cabinet Secretary.

These amendments will enable us to proceed with Establishment of the Wildlife Conservation Trust Fund and implementation of the Law.

Yours Sincerely

Dr. Susan J. Kaaria
PRINCIPAL SECRETARY

Copy To: Cabinet Secretary
Ministry of Tourism and Wildlife

NATIONAL ASSEMBLY RECEIVED 02 MAY 2019 LEGISLATIVE & PROCEDURAL DEPUTY CLERK P.O. Box

RECEIVED 02 MAY 2019 CLERK'S OFFICE

AMENDMENTS TO THE WILDLIFE CONSERVATION AND MANAGEMENT ACT NO. 47 OF 2013 AS AMENDED BY THE STATUE LAW MISCELLANEOUS ACT 2018 NO. 161 (ACTS NO. 18) DATED 4TH JANUARY, 2019

On the 20th day of March 2019, we wrote to the Attorney General requesting for amendments of section 23 (1) and 23 (2) of the wildlife conservation and management Act No. 47 of 2013 as amended by the Statue Law Miscellaneous Amendments) Act No. 18 of 2018 which came into force on the 18th January 2019.

It had been noted that the new section 23 (21) paragraph A and B provided for two Chairpersons of the Wildlife Conservation Trust Fund and this would make the establishment of the Endowment Fund tenable.

We proposed that the appointment of the chairperson to be made by the Cabinet Secretary and to remove the Principal Secretary as being a chairperson too.

The amendments have already gone to Parliament and read First Time in the House pursuant to the Provision of Standing order 127. The Clerk asked for our concurrence with the proposed amendments as required which we have already done.

With the amendments in place, it will be possible to establish the Wildlife Conservation Trust Fund and put a Board of Directors in place.

Wildlife Associations, mechanisms for mitigation of human wildlife conflict;

(c) bring together relevant stakeholders to harness participation in conservation and management programmes of wildlife; and

(d) perform such other functions as the Service may require or delegate to it.

s.23. Delete and substitute therefor the following new section-

The Wildlife Endowment Fund.

23. (1) There is established a Wildlife Conservation Trust Fund that shall be vested in a governing body established in accordance with subsection (2)-

(2) The governing body referred to in subsection (1) shall serve as a public-private partnership and comprise –

(a) a Chairperson being appointed the Cabinet Secretary;

(b) the Principal Secretary in the State Department for the time being responsible for matters relating to wildlife who shall be the Chairperson;

(c) the Principal Secretary in the State Department for the time being responsible for matters relating to finance;

(d) the Director General of the Service who shall be the Secretary;

A vibrant agency for law reform

SUBMISSIONS ON THE PROPOSED STATUTE LAW (MISCELLENEOUS AMMENDMENT) BILL, 2019 RELATING TO THE WILDLIFE CONSERVATION AND MANAGEMENT ACT, 2013 (NO.47 OF 2013).

Introduction

Pursuant to the provision of Standing Order 216, the Departmental Committee on Environment and Natural Resources received proposed amendments to the Wildlife Conservation and Management Act, 2013 from the Principal Secretary of the State Department on Wildlife.

The proposed amendments were incorporated into the statute (miscellaneous amendment) Bill of 2019. Kenya Law Reform Commission has received the said Legislative Proposal and proceeds to offer the following observations.

Objectives

The Statute Law (Miscellaneous Amendment) Bill, 2019 has already been tabled in Parliament for its first reading pursuant to the provisions of Standing Order 127. The Bill proposes, *inter* alia, to amend the wildlife Conservation and Management Act, (No. 47 of 2013).

Under the Statutes Law (Miscellaneous Amendment) Bill, 2019 two amendments have been proposed as follows:

1. That deletion of the word "being" appearing in paragraph (a) of section 23 (2),

2. The deletion of the phrase "who shall be the chairperson..." appearing in paragraph (b) of Section 23 (2).

Comments

Under Section 23 (2) (a), the deletion of the word "being" will amount to an ambiguity because the sequence of words and phrases may give rise to an improper legislative sentence. Accordingly, we propose textual amendment by inserting the word "by" between "appointed" and "the Cabinet Secretary" to have a clear legislative sentence.

Further, deleting the phrase "who shall be the chairperson" under Section 23 (2) (b) is appropriate. Retaining it alters the original meaning as per the principal Act because the section states the distinct members who shall comprise the body established under subsection (2). Including the phrase will create an ambiguity on who really is the chairperson.

Effectively, the amendments under discussion seem to rebut previous amendments that had been enacted under Statute Law (Miscellaneous Amendment) Act, 2018.

SPECIAL ISSUE

Kenya Gazette Supplement No. 33 (National Assembly Bills No. 21)

REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

NATIONAL ASSEMBLY BILLS, 2019

NAIROBI, 29th March, 2019

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PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

Commission Act, 2013 (No. 19 of 2013)		General". Delete and substitute therefor the following new paragraphs—
	s. 8(1)(c)	"(c) one member, being an Advocate of the High Court of Kenya, nominated by the Law Society of Kenya and appointed by the Attorney-General; (ca) one member, being an officer in the Office of the Attorney-General, appointed by the Attorney-General."
	s.8(4)	Delete.
	s.11(9)	Delete.
The Value Added Tax Act, 2013 (No. 35 of 2013)	s.17(5)	Insert the word "or" at the end of paragraph (b). Insert the following new paragraphs immediately after paragraph (b) in the proviso— "(c) the Commissioner is satisfied that such excess arises from tax withheld by appointed tax withholding agents; (d) the Commissioner is satisfied that such excess arising out of tax withheld by appointed tax withholding agents may be applied against any tax payable under this Act."
The Wildlife Conservation and Management Act, 2013 (No. 47 of 2013)	s.23(2)	Delete the word "being" appearing in paragraph (a). Delete the words "who shall be the

		Chairperson" appearing in paragraph (b).
The Companies Act, 2015 (No. 17 of 2015)	s.9(1)(a)	Insert the following new sub-paragraph immediately after sub-paragraph (iii) — "(iv) requires the consent of all members to add a new member."
	s.93(1)	Delete the expression "which shall include information relating to beneficial owners of the company, if any".
	s.93(2)(c)	Delete.
	s.93(8)	Delete the expression "including information relating to beneficial owners, if any".
	New.	Insert the following new section immediately after section 93—

Division 2A — Register of Beneficial Owners

Company to keep register of beneficial owners.

93A. (1) Every company shall keep a register of its beneficial owners.

(2) A company shall enter in its register of beneficial owners, information relating to its beneficial owners as prescribed in the regulations.

(3) A company shall lodge with the Registrar a copy of its register of beneficial owners, within thirty days after completing its preparation.

(4) A company other than a public listed company shall lodge with the Registrar a copy of any amendment to its register of beneficial owners within fourteen days after making the amendment.

(5) If a company fails to comply with a requirement of this section, the company, and each officer of the company who is in default, commit an offence and on conviction are each liable to a fine not exceeding five hundred thousand shillings.

(6) If, after a company or any of its

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

The Bill proposes 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 of the Advocates Training Programme in order to open allow other institutions to offer the programme.

The Prevention of Terrorism Act, 2012 (No. 30 of 2012)

The Bill seeks to amend the Act to clear some ambiguities currently existing in the Act on the membership of the National Counter-Terrorism Centre, and to include other government agencies as additional members of the Centre.

It also seeks to provide for the term of office for persons nominated to represent various agencies in the Centre. It further seeks to provide for additional responsibilities of the Centre.

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

The Bill seeks to amend the Act to give clarification on the composition of the Kenya Law Reform Commission, and on the authority mandated to appoint members of the Commission.

The Value Added Tax Act, 2013 (No. 35 of 2013)

The Bill seeks to amend the Act to provide for a taxpayer to apply any withheld tax to his credit to offset any other tax liability due from the taxpayer.

The Wildlife Conservation and Management Act, 2013 (No. 47 of 2013)

The Bill seeks to amend the Act to remove ambiguities currently existing in the Act.

The Companies Act, 2015 (No. 17 of 2015)

The Bill seeks to amend the Act to require companies to keep a register of beneficial owners, and to provide for the particulars to be included in the register. The Bill further seeks to provide for the convening of annual general meetings by registered companies, and for the manner in which directors of a company may allot shares in a company or convert shares of the company into security.

The Bill further seeks to amend the Act to reduce the percentage of shares which may be offered for sale from ninety to fifty per cent.

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A x B C

where—

A is the total amount of input tax payable by the person during the tax period on acquisitions that relate partly to making taxable supplies and partly for another use;

B is the value of all taxable supplies made by the registered person during the period; and

C is the value of all supplies made by the registered person during the period in Kenya.

(7) If the fraction of the formula in subsection (6) for a tax period—

(a) is more than 0.90, the registered person shall be allowed an input tax credit for all of the input tax comprising component A of the formula; or

(b) is less than 0.10, the registered person shall not be allowed any input tax credit for the input tax comprising component A of the formula.

Section 23 of No. 47 of 2013 which it is proposed to amend—

23. The Wildlife Endowment Fund

(1) There is established a Wildlife Conservation Trust Fund that shall be vested in a governing body established in accordance with subsection (2).

(2) The governing body referred to in subsection (1) shall serve as a public-private partnership and comprise—

(a) a Chairperson being appointed the Cabinet Secretary;

(b) the Principal Secretary in the State Department for the time being responsible for matters relating to wildlife who shall be the Chairperson;

(c) the Principal Secretary in the State Department for the time being responsible for matters relating to finance;

(d) the Director-General of the Service who shall be the Secretary;

(e) four representatives from the private sector, who shall have technical experience in either philanthropy, law, natural resources, finance, business and investment matters; and

(f) a representative from the office of the Attorney-General.

(3) There shall be paid into the Wildlife Conservation Trust Fund—

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(a) moneys appropriated by Parliament;

(b) a proportion of such moneys as may be levied for payment of environmental services by beneficiaries in productive and service sectors, and for biodiversity offset schemes that compensate for conservation impacts as a contribution towards the Wildlife Conservation Trust Fund as the Cabinet Secretary may, upon the recommendation of the governing board, determine;

(c) moneys for payment of environmental services and biodiversity offset schemes in which entities make payments directly to the Wildlife Conservation Trust Fund;

(d) moneys from debt-for-nature transactions;

(e) income from investments made by the governing board;

(f) such grants, donations, bequests or other gifts as may be made to the Fund.

(4) The, purpose shall be to provide funds in order to—

(a) develop wildlife conservation initiatives;

(b) manage and restore protected areas and conservancies;

(c) protect endangered species, habitats and ecosystems;

(d) support wildlife security operations;

(e) facilitate community based wildlife initiatives;

(f) award wildlife conservation grants based on criteria to be established by the governing board; and

(g) such other purposes as may be provided by the governing board.

(5) The Cabinet Secretary may, on recommendation of the Service, by notice in the *Gazette*, issue regulations and guidelines necessary and appropriate for the carrying out of the purposes of this section.

Section 9 of No. 17 of 2015 which it is proposed to amend

9. Private companies

(1) For the purposes of this Act, a company is a private company if—

(a) its articles—

(i) restrict a member's right to transfer shares;

(ii) limit the number of members to fifty; and

(iii) prohibit invitations to the public to subscribe for shares or debentures of the company;

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NEWSPAPER ADVERTISEMENT

NC - ENVIRONMENT & NATURAL RESOURCES

REPUBLIC OF KENYA

NATIONAL ASSEMBLY
TWELFTH PARLIAMENT – THIRD SESSION

the matter of consideration by the National Assembly of the Statue Law (Miscellaneous Amendment) Bill (National Assembly Bill No. 21 of 2019)

SUBMISSION OF MEMORANDA

cle 118(1)(b) of the Constitution provides that, *"Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees"*. The National Assembly Standing Order 127(3) provides that, *"the Departmental Committee to which a Bill is committed shall facilitate public participation and shall take into account views and recommendations the public when the Committee makes its report to the House"*.

Statue Law (Miscellaneous Amendment) Bill, 2019 seeks to make various amendments to the statutes, which is in keeping with the practice of making various amendments that do not merit the publication of separate Bills and consolidating them into one Bill:-

Bill has undergone First Reading and pursuant to the provisions of Standing Order 127(1) of the onal Assembly Standing Orders which provides that, *"a Bill having been read a First Time shall d committed to the relevant Departmental Committee"*, the proposed amendments to various Acts f Parliament stand committed to the following Departmental Committees of the National Assembly:-

	Act to be amended	Relevant Committee
	The District and Provinces Act, 1992 (No. 9 of 1992)	Administration and National Security
	Alcoholic Drinks Control Act, 2010 (No. 4 of 2010)	
3.	revention of Terrorism Act, 2012 (No. 30 of 2012)	
4.	The Companies Act, 2015 (No. 17 of 2015)	Justice and Legal Affairs
5.	The Insolvency Act, 2015 (No. 18 of 2015)	
	The Court of Appeal (Organization and Administration) Act, 2015 (No. 28 of 2015)	
	The Kenya Law Reform Commission Act, 2013 (No. 19 of 2013)	
8.	The Legal Education Act, 2012 (No. 27 of 2012)	
9.	The Kenya School of Law Act, 2012 (No. 26 of 2012)	
	The Value Added Tax Act, 2013 (No. 35 of 2013)	Finance and National Planning
	The Microfinance Act, 2006 (No. 19 of 2006)	
	The Public Finance Management Act, 2012 (No. 18 of 2012)	
13.	The Tourism Act, 2011 (No. 28 of 2011)	Sports, Culture and Tourism
	The Merchant Shipping Act, 2009 (No. 4 of 2009)	Transport, Public Works and Housing
	The Wildlife Conversation and Management Act, 2013 (No. 47 of 2013)	Environment and Natural Resources

ollowing public participation and consideration by the respective Committees, the **Departmental mittee on Justice and Legal Affairs** shall thereafter consolidate the reports of the respective mittees and compile one report to the House on the said Bill.

uant to the provisions of Article 118(1) (b) of the Constitution and Standing Order 127(3), the ommittee invites members of the Public to submit representations they may have on the said Bill. he representations may be forwarded to the **Clerk of the National Assembly, P.O. Box 41842-0, Nairobi;** hand-delivered to the **Office of the Clerk, Main Parliament Buildings, Nairobi;** nailed to **clerk@parliament.go.ke;** to be received **not later than Tuesday, 16th April, 2019 at pm.**

MICHAEL R. SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY



REPUBLIC OF KENYA

TWELFTH PARLIAMENT
THE SENATE

SESSIONAL COMMITTEE ON COUNTY PUBLIC ACCOUNTS AND INVESTMENTS

NOTICE OF SITTINGS FOR THE MONTHS OF APRIL AND MAY, 2019

Pursuant to the provisions of Articles 96 (3) and 229 (7) and (8) of the Constitution and standing order 220 of the Senate Standing Orders, in exercise of its mandate of oversight over county public accounts and investments, the Senate Sessional Committee on County Public Accounts and Investments informs and invites the Chief Executives of the entities listed in the Schedule below of the sittings for the months of April and May, 2019.

CONSIDERATION OF THE REPORT OF THE AUDITOR- GENERAL ON THE FINANCIAL STATEMENTS FOR THE FINANCIAL YEAR 2017/2018

DAY/ DATE	TIME	ENTITY
Thursday, 25th April, 2019	9.30am	Embu County Excutive
Friday, 26th April, 2019	9.30am	Lamu County Executive
Monday, 29th & Tuesday, 30th April, 2019	9.30am	Nairobi County Executive
Thursday, 2nd May, 2019	9.30am	Kiambu County Executive
Friday, 3rd May, 2019	9.30am	Wajir County Executive
Monday, 13th May, 2019	9.30am	Migori County Executive
Tuesday, 14th May, 2019	9.30am	Homabay County Executive
Wednesday, 15th May, 2019	9.30am	Kisii County Executive
Thursday, 16th May, 2019	9.30am	Taita- Taveta County Executive
Friday, 17th May, 2019	9.30am	Murangá County Executive
Monday, 20th May, 2019	9.30am	Tana River County Executive
Tuesday, 21st May, 2019	9.30am	Meru County Executive
Wednesday, 22nd May, 2019	9.30am	Isiolo County Executive
Thursday, 23rd May, 2019	9.30am	Turkana County Executive
Monday, 27th May, 2019	9.30am	Kirinyaga County Executive
Tuesday, 28th May, 2019	9.30am	Mombasa County Executive
Wednesday, 29th May, 2019	9.30am	West Pokot County Executive
Thursday 30th, May, 2019	9.30am	Kilifi County Executive

NOTES:

1. All County Executives are requested to submit written responses (in hard and soft copy) and all supporting documents to the specific issues raised in the Auditor General's Report on Financial Operations of the respective County Executive for the Financial Year 2017/2018 to the relevant Auditor-General, Regional Hub Offices and to the Office of the Clerk of the Senate, First Floor, Main Parliament Buildings, within the timelines communicated in our previous letters; and
2. Meetings will be held in Committee Room 5, First Floor, Main Parliament Buildings, Nairobi or such other venue as shall be communicated.

CLERK OF THE SENATE/ SECRETARY,
PARLIAMENTARY SERVICE COMMISSION.

REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT - THIRD SESSION

In the matters of consideration by the National Assembly:-

1. **The Narcotics Drugs and Psychotropic Substances (Control) (Amendment) Bill (National Assembly Bill, 2019)**
2. **The National Disaster Management (Authority) Bill (National Assembly Bill, 2019)**

SUBMISSION OF MEMORANDA

ticle 118(1)(b) of the Constitution provides that, *"Parliament shall facilitate public par-ipation and involvement in the legislative and of Parliament and its Committees"*. The National Assembly Standing Order 127(3) provides that, *"the Departmental Committee to which a Bill is committed shall facilitate public participation and take into account the views and recommendations of the public when the Committee makes its report to the House"*.

The Narcotics Drugs and Psychotropic Substances (Control) (Amendment) Bill, 2019 seeks to a mend the Narcotics Drugs and Psychotropic Substances (Control) Act. No. 4 of 1994 in order to:- enhance the penalties of the offence of trafficking narcotic drugs; define who law enforce officers are in respect to the Act; and prescribe offences for a law enforcement officer who aids or abets or is an accessory to any offence under the Act.

The National Disaster Management (Authority) Bill (National Assembly Bill, 2019) seeks to establish a centralized system of responding to and managing disasters in the country.

The above mentioned Bills have undergone First Reading pursuant to Standing Order 127(3) and stands committed to the **Departmental Committee on Administration and National Security** for consideration and thereafter report to the House.

Pursuant to Article 118 (1)(b) of the Constitution and Standing Order 127, the Committee invites interested members of the public to submit any representations they may have on the said Bills. The Submissions may be forwarded to the **Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi**; hand-delivered to the **Office of the Clerk, Main Parliament Building, Nairobi**; or emailed to **clerk@parliament.go.ke**; to be received **on or before Tuesday, 16th April, 2019 at 5:00 pm.**

MICHAEL SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY

REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT - THIRD SESSION

In the matters of consideration by the National Assembly:-

1. **The Employment (Amendment) Bill (National Assembly Bill, 2019)**
2. **The National Cohesion and Integration (Amendment) Bill (National Assembly Bill, 2019)**

SUBMISSION OF MEMORANDA

Article 118(1)(b) of the Constitution provides that, *"Parliament shall facilitate public participation and involvement in the legislative and of Parliament and its Committees"*. The National Assembly Standing Order 127(3) provides that, *"the Departmental Committee to which a Bill is committed shall facilitate public participation and take into account the views and recommendations of the public when the Committee makes its report to the House"*.

The Employment (Amendment) Bill (National Assembly Bill, 2019) seeks to amend the Employment Act, 2007 in order to afford pre-adoptive leave to parents who apply for the adoption of children who are not their natural children born to them by birth.

The National Cohesion and Integration (Amendment) Bill (National Assembly Bill, 2019) seeks to amend section 17 of the National Cohesion and Integration Act, 2008 which deals with the procedure of appointing Commissioners.

The above mentioned Bills have undergone First Reading pursuant to Standing Order 127(3) and stands committed to the **Departmental Committee on Labour & Social Welfare** and the **Select Committee on National Cohesion & Equal Opportunity** respectively for consideration and thereafter report to the House.

Pursuant to the provisions of Article 118(1)(b) of the Constitution and Standing Order 127(3), the respective Committees invite members of the Public to submit representations they may have on the said Bills. The representations may be forwarded to the **Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi**; hand-delivered to the **Office of the Clerk, Main Parliament Buildings, Nairobi**; or emailed to **clerk@parliament.go.ke**; to be received **on or before Tuesday, 16th April, 2019 at 5.00 pm.**

MICHAEL SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY

REPUBLIC OF KENYA

NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – THIRD SESSION

In the matter of consideration by the National Assembly of the Statue Law (Miscellaneous Amendment) Bill (National Assembly Bill No. 21 of 2019)

SUBMISSION OF MEMORANDA

Article 118(1)(b) of the Constitution provides that, *"Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees"*. The National Assembly Standing Order 127(3) provides that, *"the Departmental Committee to which a Bill is committed shall facilitate public participation and shall take into account views and recommendations of the public when the Committee makes its report to the House"*.

The Statue Law (Miscellaneous Amendment) Bill, 2019 seeks to make various amendments to the statutes, which is in keeping with the practice of making various amendments that do not merit the publication of separate Bills and consolidating them into one Bill:-

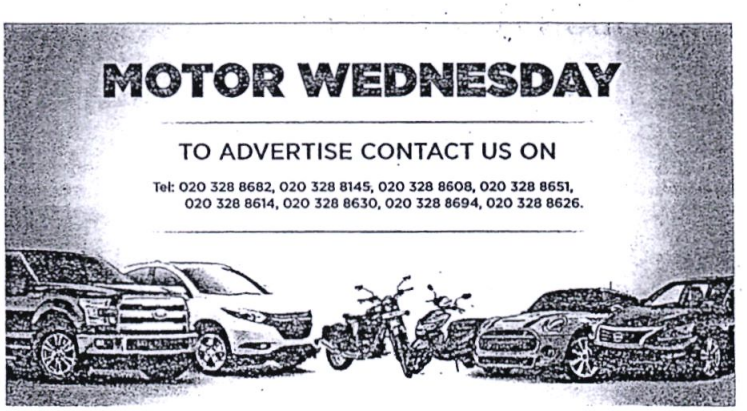
The Bill has undergone First Reading and pursuant to the provisions of Standing Order 127(1) of the National Assembly Standing Orders which provides that, *"a Bill having been read a First Time shall stand committed to the relevant Departmental Committee"*, the proposed amendments to various Acts of Parliament stand committed to the following Departmental Committees of the National Assembly:-

No.	Act to be amended	Relevant Committee
1.	The District and Provinces Act, 1992 (No. 9 of 1992)	Administration and National Security
2.	The Alcoholic Drinks Control Act, 2010 (No. 4 of 2010)	
3.	The Prevention of Terrorism Act, 2012 (No. 30 of 2012)	
4.	The Companies Act, 2015 (No. 17 of 2015)	Justice and Legal Affairs
5.	The Insolvency Act, 2015 (No. 18 of 2015)	
6.	The Court of Appeal (Organization and Administration) Act, 2015 (No. 28 of 2015)	
7.	The Kenya Law Reform Commission Act, 2013 (No. 19 of 2013)	
8.	The Legal Education Act, 2012 (No. 27 of 2012)	
9.	The Kenya School of Law Act, 2012 (No. 26 of 2012)	
10.	The Value Added Tax Act, 2013 (No. 35 of 2013)	Finance and National Planning
11.	The Microfinance Act, 2006 (No. 19 of 2006)	
12.	The Public Finance Management Act, 2012 (No. 18 of 2012)	
13.	The Tourism Act, 2011 (No. 28 of 2011)	Sports, Culture and Tourism
14.	The Merchant Shipping Act, 2009 (No. 4 of 2009)	Transport, Public Works and Housing
15.	The Wildlife Conversation and Management Act, 2013 (No. 47 of 2013)	Environment and Natural Resources

Following public participation and consideration by the respective Committees, the **Departmental Committee on Justice and Legal Affairs** shall thereafter consolidate the reports of the respective Committees and compile one report to the House on the said Bill.

Pursuant to the provisions of Article 118(1) (b) of the Constitution and Standing Order 127(3), the Committee invites members of the Public to submit representations they may have on the said Bill. The representations may be forwarded to the **Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi**; hand-delivered to the **Office of the Clerk, Main Parliament Buildings, Nairobi**; or emailed to **clerk@parliament.go.ke**; to be received **not later than Tuesday, 16th April, 2019 at 5.00 pm.**

MICHAEL R. SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY



REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – THIRD SESSION – 2019

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

.....

REPORT ON THE STATUTE LAW MISCELLENOUS AMENDMENT BILL, 2019 (NATIONAL ASSEMBLY BILL NO. 21)

CLERKS CHAMBERS
DIRECTORATE OF COMMITTEE SERVICES
PARLIAMENT BUILDINGS
NAIROBI

MAY, 2019

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CHAIRPERSON'S FOREWORD

This report contains the Committee's proceedings on the consideration of the Statute Law (Miscellaneous Amendment) Bill, 2019 (National Assembly Bill No. 21). The Bill was read a first time on **3rd April, 2019** and was subsequently committed to respective Departmental Committees i.e. Justice and Legal Affairs, Administration and National Security, Finance and National Planning, Environment and Natural Resources, Sports Culture and Tourism and Transport, Public Works and Housing for consideration and facilitation of public participation pursuant to Standing Order 127. The Bill seeks to amend, among other Statutes; the Microfinance Act, 2006 (No. 19 of 2006), the Public Finance Management Act, 2012, (No. 18 of 2012) and the Value Added Tax Act, 2013 (No. 35 of 2013).

In processing the Bill, the Clerk of the National Assembly placed adverts in the print media on **10th April, 2019** seeking for comments from the public on the Bill pursuant to Article 118 of the Constitution. The Committee received memoranda from fourteen (14) stakeholders. The Committee also wrote to the Parliamentary Service Commission, Kenya Revenue Authority, Institute of Certified Public Accountants of Kenya and National Treasury and Ministry of Planning vide letters **Ref.NA/DCS/F&NP/2019/033** dated **16th April, 2019** seeking for their comments on the Bill. The Committee held a stakeholder engagement workshop at Hilton Garden Inn Hotel on 3rd and 4th May, 2019.

The Committee is grateful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during the consideration of the Bill. Finally, I wish to express my appreciation to the Honorable Members of the Committee and all the stakeholders who made useful contributions towards the preparation and production of this report.

On behalf of the Departmental Committee on Finance and National Planning and pursuant to provisions of Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the report of the Committee on its consideration of the Statute Law (Miscellaneous Amendment) Bill, 2019.

EXECUTIVE SUMMARY

The Statute Law (Miscellaneous Amendment) Bill, 2019 (National Assembly Bill No. 21) was published on **29th March, 2019**. The Bill was read a first time on **3rd April, 2019** and thereafter committed to respective Departmental Committees (Justice and Legal Affairs, Administration and National Security, Finance and National Planning, Environment and Natural Resources, Sports Culture and Tourism, and Transport, Public Works and Housing) that were expected to process the amendments of the respective Statutes that fall within their purview. The Departmental Committee on Finance and National Planning considered amendments to the Microfinance Act, 2006 (No. 19 of 2006), the Public Finance Management Act, 2012 (No. 18 of 2012) and the Value added Tax Act, 2013 (No. 35 of 2013).

The proposed amendment to the Microfinance Act, 2006 seeks to provide for the conduct of business by sharia compliant microfinance businesses. It seeks to remove sharia compliant microfinance businesses from the list of prohibited activities. The proposed amendment to the Public Finance Management Act, 2012 seeks to empower the Parliamentary Service Commission to designate by resolution additional accounting officers in the Parliamentary Service Commission in addition to the Clerks of the two Houses of Parliament. The proposed amendment to the Value Added Tax Act, 2013 provides for a taxpayer to apply any withheld tax to his credit to offset any other tax liability due from the taxpayer.

In order to fulfill the requirements of Article 118 of the Constitution, the Clerk of the National Assembly placed an advertisement in the print media on **10th April, 2019** requesting for comments from the general public on the Bill. The Committee received memoranda from fourteen (14) stakeholders. The Committee also identified stakeholders that would be affected by the proposed amendments and wrote to them vide letters **Ref.NA/DCS/F&NP/2019/33** dated **16th April, 2019** seeking for their comments on the Bill. The stakeholders that the Committee wrote to are the Parliamentary Service Commission on the Public Finance Management Act, 2012, Kenya Revenue Authority on the Value Added Tax Act, 2013, the Institute of Certified Public Accountants of Kenya and the National Treasury and Planning on all the three proposed amendments.

The Committee received memoranda from the following stakeholders: -

1. Petroleum Institute of East Africa on the proposed amendment to the Value Added Tax Act, 2013
2. GC Retail Limited on the proposed amendment to the Value Added Tax Act, 2013

3. Tsavo Power Company Limited and other Independent Power Producers on the Value Added Tax Act, 2013
4. PKF in East Africa on the proposed amendment to the Value Added Tax Act, 2013
5. Agrochemicals Association of Kenya on the proposed amendment to the Value Added Tax Act, 2013
6. PricewaterhouseCoopers Limited on the proposed amendment to the Value Added Tax Act, 2013
7. KPMG Advisory Services Limited on the proposed amendment to the Value added Tax Act, 2013
8. Coulson Harney LLP on all the proposed amendments
9. Kenya Manufacturer's Association on the proposed amendment to the Value Added Tax Act, 2013
10. Private sector on the proposed amendment to the Value Added Tax Act, 2013
11. Anonymous on the proposed amendment to the Value Added Tax Act, 2013 and the Public Finance Management Act, 2012
12. Amolo and Kibanya Co. Advocates on the proposed amendment to the Public Finance Management Act, 2012
13. Njoroge Wachira & Co. Advocates on the proposed amendment to the Microfinance Act, 2006
14. Central Bank of Kenya on the proposed amendment to the Microfinance Act, 2006

The Committee invited all the stakeholders that had submitted written memoranda on the Bill for a stakeholder engagement workshop at the Hilton Garden Inn Hotel in Machakos County on **Friday 3rd** and **Saturday 4th May, 2019**.

1 PREFACE

1.1 ESTABLISHMENT OF THE COMMITTEE

1. The Departmental Committee on Finance & National Planning is one of the fifteen Departmental Committees of the National Assembly established under ***Standing Order 216*** whose mandates pursuant to the ***Standing Order 216 (5)*** are as follows:
   (i) To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
   (ii) To study the programme and policy objectives of Ministries and departments and the effectiveness of their implementation;
   (iii)To study and review all the legislation referred to it;
   (iv) To study, access and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
   (v) To investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
   (vi) To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order No.204 (Committee on appointments);
   (vii) To examine treaties, agreements and conventions;
   (viii) To make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
   (ix) To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
   (x) To examine any questions raised by Members on a matter within its mandate.

1.2 MANDATE OF THE COMMITTEE

2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider, Public finance, Monetary policies, Public debt, Financial institutions (excluding those in securities exchange), Investment and divestiture policies, Pricing policies, Banking, Insurance, Population revenue policies including taxation and National planning and development.

3. In executing its mandate, the Committee oversees the following government Ministries;

1. The NT and Ministry of Planning
2. Ministry of Devolution and ASAL
3. The Commission on Revenue Allocation
4. Office of the Controller of Budget
5. Salaries and Remuneration Commission

1.3 COMMITTEE MEMBERSHIP

4. The Committee was constituted by the House in December, 2017 and comprises of the following Members:-

1. The Hon. Joseph K. Limo, MP – **Chairperson** – Kipkelion East Constituency – Jubilee Party
2. The Hon. Isaac W. Ndirangu – **Vice-Chairperson** – Roysambu Constituency – Jubilee Party
3. The Hon. Jimmy O. Angwenyi, MP – Kitutu Chache North Constituency – Jubilee Party
4. The Hon. Christopher Omulele, MP – Luanda Constituency – ODM Party
5. The Hon. Dr. Enoch Kibunguchy, MP – Likuyani Constituency – FORD-K
6. The Hon. Shakeel Shabbir Ahmed, MP – Kisumu Town East – Independent
7. The Hon. Abdul Rahim Dawood, MP – North Imenti Constituency – Jubilee Party
8. The Hon. Daniel E. Nanok, MP – Turkana West Constituency – Jubilee Party
9. The Hon. Andrew A. Okuome, MP – Karachuonyo Constituency – ODM Party
10. The Hon. David M. Mboni, MP – Kitui Rural Constituency – CCU Party
11. The Hon. Francis K. Kimani, MP – Molo Constituency – Jubilee Party
12. The Hon. Joseph M. Oyula, MP – Butula Constituency – ODM Party
13. The Hon. Joshua C. Kandie, MP – Baringo Central Constituency – MCC Party
14. The Hon. Lydia H. Mizighi, MP – Taita Taveta County – Jubilee Party
15. The Hon. Mohamed A. Mohamed, MP – Nyali Constituency – Independent
16. The Hon. Purity W. Ngirici, MP – Kirinyaga County – Jubilee Party
17. The Hon. Samuel Atandi, MP – Alego Usonga Constituency – ODM Party
18. The Hon. Stanley M. Muthama, MP – Lamu West Constituency – MCC Party
19. The Hon. Edith Nyenze, MP – Kitui West Constituency – WDM-K

1.4 COMMITTEE SECRETARIAT

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

1. Ms. Leah W. Mwaura - **Senior Clerk Assistant/Lead Clerk**
2. Ms. Jennifer Ndeto - **Principal Legal Counsel I**
3. Ms. Laureen Wesonga - **Clerk Assistant III**
4. Mr. Josephat Motonu - **Fiscal Analyst I**
5. Mr. Chelang'a Maiyo - **Research Assistant III**

2 CONSIDERATION OF THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 2019

2.1 BACKGROUND INFORMATION

6. The Statute Law (Miscellaneous Amendment) Bill, 2019 seeks to among other Statutes, amend the Microfinance Act, 2006 (No. 19 of 2006), the Public Finance Management Act, 2012 (No. 18 of 2012) and the Value Added Tax Act, 2013 (No. 35 of 2013).

2.2 SUMMARY OF THE STATUTES

7. The Bill seeks to amend the **Microfinance Act, 2006 (No. 19 of 2006)** to provide for the conduct of business by sharia compliant microfinance businesses. The Bill seeks to remove sharia compliant microfinance businesses from the list of prohibited activities.

8. The Bill also seeks to amend the **Public Finance Management Act, 2012 (No. 18 of 2012)** to empower the Parliamentary Service Commission to designate by resolution, additional accounting officers in the parliamentary service, in addition to the Clerks of the two Houses of Parliament. The amendment seeks to actualize the resolution by the Commission at its 256th meeting held on 14th February, 2019.

9. The Bill further seeks to amend the **Value Added Tax Act, 2013 (No. 35 of 2013)** to provide for a taxpayer to apply any withheld tax to his/her credit to offset any other tax liability due from the taxpayer. This is intended to make tax administration process easier.

3 PUBLIC PARTICIPATION ON THE STATUTE LAW MISCELLANEOUS AMENDMENT BILL, 2019 (NATIONAL ASSEMBLY BILL NO. 21 OF 2019)

10. Pursuant to Article 118 of the Constitution, the Clerk of the National Assembly placed an advertisement in the Daily Nation and Standard newspapers on **10th April, 2019** requesting for comments from the general public and or interested individuals/organizations. By the close of the deadline and by the time the Committee was considering the Bill, the Committee had received memoranda from eighteen (18) stakeholders. The Committee held a stakeholder engagement workshop at Hilton Garden Inn Hotel on **Friday, 3rd and Saturday, 5th May, 2019**.

11. The following stakeholders submitted their memoranda to the Committee:-

    a. Petroleum Institute of East Africa

    b. GC Retail Limited

    c. Tsavo Power Company Limited and other Independent Power Producers

    d. PKF in East Africa

    e. Agrochemicals Association of Kenya

    f. PricewaterhouseCoopers Limited

    g. KPMG Advisory Services Limited

    h. Coulson Harney LLP

    i. Njoroge Wachira & Co. Advocates

    j. Amolo and Kibanya Co. Advocates

    k. Anonymous

    l. Kenya Association of Manufacturers

    m. Private Sector

    n. Institute of Certified Public Accountants of Kenya

    o. Central Bank of Kenya

    p. Parliamentary Service Commission

q. Kenya Revenue Authority

r. National Treasury and Ministry of Planning

The stakeholders made the following submissions:-

3.1 PETROLEUM INSTITUTE OF EAST AFRICA AND ERNST AND YOUNG

The Chief Executive Officer of the Institute submitted that:-

Withholding Value Added Tax refunds and amendment of section 17(5) of the Value Added Tax Act, 2013

Problem Statement

12. The Finance Act, 2014 reintroduced Withholding Value Added Tax (VAT) in Kenya and requires Withholding VAT agents to withhold 6% of the value of taxable supplies on payment to suppliers and remit the same directly to the Commissioner of KRA. The Commissioner is empowered under section 42A(1) of the Tax Procedures Act to appoint any person as a withholding VAT agent.

13. The VAT Act, 2013 exempted white petroleum products (Petrol, Diesel & Kerosene) from VAT for a period of three years. The Finance Act, 2016 extended the exemption for a further two-year period to 1st September, 2018. Since there was no further extension, white petroleum products became vatable at 16% from 1st September, 2018. However, the Finance Act, 2018 introduced a concessionary 8% VAT rate.

Challenges

14. Members of PIEA supply customers who have been withholding VAT agents such as KENGEN and other IPPs as well as many large industrial customers. These customers withhold 6% VAT as required under the law. This has resulted in a VAT credit to their members of approximately Kshs. 4 billion. The withholding VAT of 6% is very high as compared to the base rate of 8% VAT rate on petroleum products. As a result, the VAT credit cannot be reduced and will keep growing as the industry input will always exceed the output by far.

15. The industry being highly capital intensive has suffered from severe cash crunch as a result of a majority of its capital being held up in VAT credit from the government. The law as presently written has no mechanism for refund of Withholding VAT. This has slowed down the growth of the industry and impacted the growth of the country's economy negatively.

Proposal

16. As a result of the challenges faced by members of PIEA, Parliament should create a mechanism in law to address the issue of the VAT credits. They supported the amendment to section 17(5) of the VAT Act, 2013 as contained in the Statute Law (Miscellaneous amendment) Bill, 2019 to allow taxpayers to claim refunds arising from withheld VAT.

3.2 GC RETAIL LIMITED

Representatives of the company submitted that:-

Withholding VAT Refunds

Background

17. GC Retail Limited undertook the construction of the Garden City Mall at a cost of approximately Kshs. 4 billion and at present, the companying is carrying a significant Input VAT credit of approximately Kshs. 400 million in its VAT Returns. Noting that the Mall is offering commercial rental space, GC Retail charges VAT on the rent supply, which VAT is offset against the Input VAT credit over time.

Appointment of VAT Withholding Agents

18. The Finance Act, 2016 introduced the provision for the appointment of VAT withholding agents via an amendment to the Tax Procedures Act, 2015 through section 42A. The Commissioner has so far appointed forty five (45) of the tenants at the mall as withholding VAT agents.

19. The Finance Act, 2017 subsequently amended section 42A of the Tax Procedures Act, 2015 by introducing a new subsection (4A) which states that *"The Commissioner may at any time exempt any supplier from the provisions of this section if such a supplier has sufficiently demonstrated that due to the nature of his business and due to the application of this section, he is going to be in a continuous credit position for a period of not less than twenty four (24) month."*

20. In this regard, the forty five (45) tenants do not pay to GC Retail all the VAT charged due to their appointed withholding agent obligation. As such, the output VAT collected by GC Retail is less than its claimable position (Input VAT). This perpetual credit position arising from high input taxes owing to the withheld VAT has subsisted for a period exceeding twenty four (24) months.

21. They are unable to seek a refund of the excess input tax as the excess credit does not arise from zero rated supplies which is currently the only qualification for the application for refund of excess input tax as provided under section 17(5) of the VAT Act No. 35 of 2013. They anticipate that more of their tenants will be appointed as withholding VAT agents and as such the VAT credit offset previously anticipated will take much longer to materialise. This has had a direct adverse impact on their business and cash flows.

22. KRA issued "Guidelines to Taxpayers on Exemption from Withholding VAT" on 14th December, 2017. GC Retail made an application for exemption in accordance with the guidelines and they are pursuing the same with KRA.

Proposed Amendment

23. The proposed amendment in the Statute Law (Miscellaneous Amendment) Bill, 2019 on Section 17(5) of the Value Added Tax Act, 2013 will enable taxpayers on whom withholding VAT has had a negative cashflow impact like GC Retail, seek a refund for the VAT that is withheld by appointed agents from the Commissioner for VAT.

Conclusion

24. They supported the proposed amendment as it will have a direct impact on their investment.

3.3 INDEPENDENT POWER PRODUCERS

In their submission, representatives of IPPs stated that:-

Amendment of section 17(5) of the Value Added Tax Act, 2013

Background

25. Kenya Power Company Limited (KPLC), the only customer of the Independent Power producers (IPPs) is a withholding VAT agent appointed by KRA. Therefore, KPLC is under obligation to withhold VAT of 6% from payment made to various suppliers including suppliers of electrical power.

Challenges

26. Withholding 6% of the VAT payable to IPPs, specifically those using fossil fuels like diesel, results in the accumulation of significant VAT refunds in the books of these companies. This is because a significant component of the total amount payable by KPLC for supply of electricity constitutes fuel cost reimbursements (up to 65% during peak capacity - with the balance represented by energy and capacity charges). IPPs incur 16% input VAT on heavy fuel oils and 8% VAT on automotive gas oil which is subsequently reimbursed by KPLC at a cost. Resultantly, the output VAT payable to KRA each month tends to be less than the 6% that KPLC currently withholds directly. This locks up the cash flow of the IPPs with no prospect of getting a refund as they are not making zero-rated supplies.

27. Most of the thermal powered (especially diesel) IPPs are already in a VAT refundable position as at April 2019. Despite the fact that since the re-introduction of the withholding VAT in January 2015, they have been operating at a very low capacity factor (in many cases minimum) and thus very low input VAT due to minimal fuel purchases. This position will quickly escalate should there be an increase in operational capacity plunging the entities into impossible negative cash flow positions.

28. Moreover, the withheld VAT has resulted in accumulated irrecoverable VAT for IPPs which keeps building up and which cannot be refunded due to lack of enabling withholding VAT refund provisions under the Act.

29. Accordingly, the IPPs have no choice but to pass this cost to KPLC through a tariff adjustment in accordance with the Power Purchase Agreements which will eventually be passed to the final consumer. This is contrary to the government's aim of reducing the cost of power in order to increase competitiveness in the Kenyan economy.

Recommendation

30. Due to the challenges highlighted above, they proposed that Parliament should create a mechanism in law to address the problems associated with accumulation of the VAT credit by IPPs. To this end, they supported the provision that the excess arising out of tax withheld by appointed tax withholding agents may be applied against any tax payable under this act.

31. They supported the amendment of section 17(5) of the VAT Act, 2013 as contained in the Bill and proposed that it should be enacted as is.

3.4 COULSON HARNEY LLP

Ms. Rosemary Maina stated as follows on behalf of the Company. That:-

The Value Added Tax Act (No. 5 of 2013)

32. The VAT Act, 2013 only permits refunds where there is excess input tax as a result of making zero rated supplies; refund for tax paid in error; or on bad debts subject to certain conditions.

33. The amendment proposes two things:-
    a) To provide that one can utilize Withholding VAT (WHVAT) credits against any VAT payable in the Act and;
    b) To provide that WHVAT credits can be part of a refund claim to the Commissioner in VAT refund application.

34. WHVAT is VAT withheld by a recipient of taxable supplies who is appointed by the KRA to deduct VAT and remit the same to KRA against a supplier. The WHVAT rate is 6%. The VAT withholding agent is expected to remit the WHVAT (6%) to the KRA and remit the balance (10%) to the supplier of taxable supplies.

35. From a legislative perspective, it is not clear how a registered person could utilize the VAT credits arising from WHVAT. They noted that in the practice, suppliers utilize the VAT credit arising from the WHVAT against VAT payable when accounting for VAT.

36. Likewise, registered persons who make both standard rated supplies and zero-rated supplies and are perpetually in a VAT credit position, ordinarily include the WHVAT element in a VAT refund claim to the Commissioner.

37. The proposed amendment therefore attempts to bring clarity to what was poor law. It remains to be seen if the amendment will achieve this.

The Microfinance Act, 2006 (No. 19 of 2006)

38. Sharia compliant microfinance institutions will be able to engage in wholesale and retail trade in line with the Sharia law restrictions against interests (Riba). This amendment follows the amendments to the SACCO Societies Act, 2008 (No. 14 of 2008) by the Finance Act, 2017 providing that the CS in consultation with SASRA shall create regulations for the licensing and supervision of Sharia compliant SACCO societies. These amendments may be first stepping stones towards the establishment of suitable regulatory framework for Sharia compliant finance institutions.

The Public Finance Management Act, 2012 (No. 18 of 2012)

39. Empowers the PSC to designate accounting officers in the parliamentary service in addition to the two clerks of the Houses of Parliament. This amendment seeks to actualize the resolution already made by PSC on 14th February, 2019.

3.5 KPMG ADVISORY SERVICES LIMITED

Representatives of KPMG submitted that:-

Value Added Tax Act, 2013 (No. 35 of 2013)

40. The proposed amendment is welcome and will have an impact in releasing the working capital locked in WHVAT credits that would never be utilized. Generally, WHVAT are usually significant amounts. In light of the focus on manufacturing and agricultural value addition as key

elements of the Big 4 Agenda, it is critical that KRA implements a quicker and practical solution to WHVAT refund claims given the current backlog for VAT refunds at KRA.

41. One solution would be to allow taxpayers to set off approved claims against other tax obligations such as corporation tax, Pay As You Earn (PAYE) or even withholding tax rather than waiting for actual cash refunds. This has worked well in the past and can help to cushion businesses against the cash flow constraints and interest costs associated with refund delays.

Issue with the Clause

42. While paragraph (c) is a welcome amendment, the proposed proviso under paragraph (d) is unclear and may negate the proposed change since the excess tax credit arises because there is no tax payable by the taxpayer under the VAT Act.

43. In addition, such a proviso would give KRA a lee way to reject applications for WHVAT refunds.

Proposed Amendment

They proposed that:-

44. (d) Where in relation to an application for a refund made under subsection (c) above, the Commissioner is satisfied that the tax is refundable, the Commissioner shall authorize the crediting of the taxpayer's iTax ledger with amount of the approved tax credit to be utilized against any other tax obligations by the taxpayer. Provided that a person who, prior to the commencement of this subsection, had excess tax credit arising from tax withheld by appointed withholding agents may apply for a refund under this section.

Justification

45. The Bill seeks to amend the VAT Act to provide for a taxpayer to apply any withheld tax credit to offset any other tax liability due from them. Their proposal effectively clarifies this position as this is unclear as currently worded from the Bill.

46. The proposal allows the amount approved for refund to be available to be utilized against any other tax obligations that the taxpayer may have instead of waiting for tax refunds that presently take too long to be approved. In addition, there are taxpayers who already have excess VAT credit arising from WHVAT who will not be able to utilize them unless the provision is allowed to apply retrospectively.

3.6 PKF IN EAST AFRICA

In their memorandum to the Committee, PKF submitted that:-

Withholding VAT Refunds

47. The Bill proposes to amend section 17(5) of the VAT Act, 2013 by introducing VAT refunds. Many suppliers who have their customers appointed as withholding VAT agents have ended up being in VAT credit positions. For some suppliers, the VAT credits are accumulating very fast due to the nature of their businesses. Currently VAT Act, 2013 and the Tax Procedures Act, 2015 do not have explicit provisions on refund of withheld VAT, a fact that KRA has been relying on and not processing any VAT refund applications resulting from withholding VAT.

48. In actual sense, VAT credits resulting from withholding VAT amount to overpaid tax which should be refunded to the suppliers in accordance with section 47 of the Tax Procedures Act, 2015. Unfortunately, VAT refunds arising from withholding VAT have not been processed in accordance with section 47 of the Tax Procedures Act, 2015. Through the Finance Act, 2017, section 42A of the Tax Procedures Act, 2015 was amended to give the Commissioner of KRA powers to exempt suppliers in continuous VAT credit positions for over twenty four months from the withholding VAT provisions. Some suppliers have managed to secure these exemptions which have enabled their customers who are appointed as agents not to withhold VAT when

making payments to them. However, these exemptions approvals from KRA take a long time to be processed which has frustrated many suppliers because it affects their cash flows.

49. They stated that the proposed amendment is commendable if passed into law as it will have given a clear legal provision for VAT refunds arising from withholding VAT.

3.7 AGROCHEMICALS ASSOCIATION OF KENYA

Representatives of the Association submitted that:-

50. The introduction of 16% VAT on agricultural pest control products has resulted to the increase in cost of such products which has led to food insecurity/increased consumer prices, increase in cost of production for farmers, influx of counterfeit and illegal pesticides from neighboring countries, loss of competitiveness in the global horticultural market, reduced employment, reduced tax revenue and negative impact on the Big Four Agenda.

51. In view of the above, they proposed that zero rating of agricultural pest control products be re-instated in Part A of the Second Schedule of the Value Added Tax Act, 2013 as this will enable the industry to survive against external competition and assist Kenya to achieve the objectives of the Big Four Agenda.

3.8 PRICEWATERHOUSECOOPERS LIMITED

Representatives of PWC proposed that the following matters should be included in the Statute Law (Miscellaneous Amendment) Bill, 2019:-

Refund of VAT credits arising from Withholding VAT

52. They supported the amendment to section 17(5) to the VAT Act, 2013 to introduce paragraphs (c) and (d). Once the proposed amendments are passed, registered persons will have an opportunity to either apply for a refund of VAT credits as a result of WH VAT or utilize it to offset any tax payable. The proposed amendment is a welcome move and it is expected to address cash flow challenges experienced by taxpayers following the introduction of WH VAT.

Refund of VAT credits under special circumstances

53. Section 17 of the VAT Act, 2013 provides for VAT refunds to registered persons who are in a VAT credit position as a result of making zero rated supplies. However, there are other special circumstances in which registered persons accumulate VAT credits and are not entitled to VAT refunds under the current VAT legislation. As a result of the restrictive VAT refund regime, businesses have encountered cash flow challenges. Below are some of the scenarios that can result in huge VAT credits and their proposed amendment to the VAT Act, 2013:-

54. **VAT credit on liquidation of an entity** – some businesses have significantly high VAT credits in their VAT returns at the time of closing the operations or liquidation. Currently, there are no guidelines on the treatment of such VAT credits and from a strict interpretation of the VAT Act, such entities would not be entitled to a refund of the excess input VAT credit owing to the fact that the credits did not arise from making zero rated supplies.

55. **Changes in market strategy** – external environmental factors such as competition in the market may force businesses to make changes to their strategy and operations e.g. where a business changes its model by expanding its market outside Kenya in a bid to grow and generate foreign exchange. The expansion of a business' export market impacts the generation of output VAT as export sales are zero rated. For businesses that have accumulated VAT credits that would ideally have been off-set against future output VAT, a change to zero rated sales translates to inability to utilize or apply for a refund of the historical VAT credit.

56. **Capital investment** – businesses accrue significant VAT credits as a result of major capital investments which can only be offset against future output VAT. In some instances, the VAT on capital investments may take up to five years to be fully utilized. In such cases, the businesses may end up with cash flow constraints since they are not entitled to refunds. Where a business under this situation is unable to generate sufficient output tax to offset the inbuilt input tax, either due to the operating model or other business circumstances, the VAT credit in the company's VAT returns will not be offset in the foreseeable future and the impact would generally be on the company's cash flow and ability to continue as a going concern.

Proposed Amendment

57. In the light of the above impact of cumulative VAT credits, they proposed that section 17(5) of the VAT Act, 2013 be amended by inserting the following paragraph, *"(e) the Commissioner is satisfied that such excess tax arises from special circumstances of the registered person's business and the registered person has sufficiently demonstrated that due to such circumstances, the excess input tax will not be recovered as output VAT for a period of not less than 12 months"*.

Justification

58. The amendment will address the cash flow challenges by businesses who have significantly high VAT credits without sufficient output VAT to offset the credit due to various factors some of which have been enumerated above. As a result of improved cash flows, such taxpayers will be able to undertake more investments which will spur the economic growth. This is in addition to making Kenya an attractive investment destination for companies undertaking significant capital investments.

3.9 KENYA ASSOCIATION OF MANUFACTURERS

Mr. Bharat Shah proposed the following amendments on behalf of the Association:-

Proposed amendment

59. Delete the proviso to section 17(5) and insert the following new paragraph; "*Provided that any such excess shall be paid to the registered person the Commissioner where-*

    a) *the Commissioner is satisfied that such excess arises from making zero rated supplies; or*

    b) *the Commissioner is satisfied that such excess arises from tax withheld by appointed tax withholding agents; and*

    c) *the registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax becomes due and payable;*

d) *the Commissioner is satisfied that such excesses arising out of tax withheld by appointed tax withholding agents may be applied as provided for under section 47(4) of the Tax Procedures Act".*

Justification

60. Manufacturers commend the Government for initiating the proposal to allow for initiating the proposal to allow for refund and offset of WH VAT. The proposed amendments are timely due to the existing challenges that manufacturers have been faced with in the absence of the proposed amendments. The challenges include:-

    i. Lack of legal provisions and basis to provide for refund of offsetting excess arising from WH VAT.

    ii. Increasing accumulated backlog of payments owed to manufacturers by the Government arising from such credit situations. This has caused constrained cash flows required in the economy.

61. However, the proposed amendment requires to be further amended to ensure that it is effective in addressing the stated challenges.

Proposed amendment

62. The numbering sequence of the paragraphs under section 17(5) should be amended as follows:-

    i. Retain paragraph "a" as it is in the Act and add the proposed word "or";

    ii. Insert the new proposed paragraph "c" to be paragraph "b" and adding the words "and";

    iii. Insert the original paragraph "b" under section 17(5) of the VAT Act to paragraph "c";

    iv. Retain the proposed amendment as paragraph "d".

Justification

63. This will ensure sequence coherence of the provisions

Reference to the accurate legislation

64. Under the new proposed paragraph 17(5)(d), reference has been made to the VAT Act, 2013. The provision on withholding VAT are under the Tax Procedures Act, 2015 specifically section 47(4).

Justification

65. Reference to the VAT Act, 2013 is erroneous and should be rectified.

Introduce a new section 68A

66. *"That any registered person who at the date of commencement of section 17(5)(b) and (d) has a credit arising from withholding VAT may within 12 months make an application for a refund or offset, notwithstanding the 12 month limitation provided under section 17(5)(c)."*

Justification

67. Introduce retrospective provisions to address existing outstanding credit. This is proposed through introducing a new section 68A that has taken into account:-

    i. The relevant section that the retrospective provisions will apply to under the VAT i.e. proposed section 17(5)(c). this will ensure that there is no ambiguity on its scope.

    ii. The limitation of the time period to make claims of the outstanding credit excess, by amending section 68A to include a twelve months period.

Proposed Amendment

68. Delete the word "package" appearing at the end of section 32(3) and substitute thereof with the word "label". The clause will read as follows, *"The statement and health warning referred to in subsection (2) shall comprise not less than 30% of the total surface area of the label"*.

Justification

69. This provision requires the statement and health warning to comprise not less than 30% of the total surface area of the package. This is onerous on the manufacturers of alcoholic beverages for the following reasons:-

    i. The provisions require an investment on labels which usually does not cover the total surface area of the package. This will require an investment on specialized machinery and applicators to enable compliance with the provisions requiring that the statement and health warning comprising not less than 30% of the total surface area of the package.

    ii. There will be increased costs in respect of returnable packaging which require cleaning and removing of labels prior to subsequent use. The cost of cleaning the returnable packaging will increase due to the coverage of the total surface area of the package.

    iii. There is also a concern on the disposal of the labels covering the total surface area of the packaging. The current efforts by the government in environmental conservation will be thwarted if the labels are disposed off in an irregular manner.

70. The amendment of the section is necessary to manufacturers of alcoholic drinks for the following reasons:-

    i. Manufacturing is a key pillar for the Big 4 Agenda with the government setting out to incentivize and ease the cost of investment for manufacturers in the country. The provision has a countervailing effect in that it increases the costs of goods produced as it has a capital investment component.

    ii. The increased costs of goods produced will be passed on to the ultimate consumer and thus affect the affordability of alcoholic drinks. In turn, the consumers will opt for illicit and counterfeit alcoholic drinks which tend to be cheaper. This impacts on the health of the consumers as there is no quality assurance in respect of illicit and counterfeit goods. Ultimately, this will also impact a key government initiative of addressing issues with respect to illicit and counterfeit goods.

3.10 ANONYMOUS

The Committee also received a memorandum from an unnamed member of the public stating that:-

Background

71. The VAT of Goods and Services Tax (GST) was first introduced in France in 1948 (Yesegat, 2016). Since its introduction, VAT/GST has spread around the world and has been adopted in more than 160 countries. According to Yesegat, 2016 withholding excess tax can result in an increased VAT burden for the registered person that never has access to or use of the VAT payment system which may encounter difficulties in getting any refund of excess tax hence the amendment (d) is inadequate.

72. The Act is about recovery of excess VAT to a registered person. The Principle Act states that where excess input over output is due to making zero rated supplies, then VAT refund is due and should be lodged within 12 months from the date that the tax was payable. The amendment proposes that when the registered person is over taxed in the tax period, the excess amount shall be paid back to the registered person by the Commissioner in cases where the excess arises from tax withheld by appointed tax withholding agents. When such excesses arise from tax withheld by tax withholding agents, this excess may be ploughed back against any tax payable under the Act.

Shortcomings of the Amendment

73. Part (c) of the amendment has failed to state the requirement for a withholding agent which may include who is a withholding agent, how much a withholding agent is expected to hold and when to withhold. In addition, the amendment does not inform the registered person why the tax withholding agent must withhold taxes.

74. The amendment does not specify the specific timeframe for the refunds to be made, the mode of payment and the penalties it has put in place in case the refund is not done within the stipulated time frame. For instance, Burundi's VAT Act states that the refunds are done within 90 days from the time of application and failure to refund within the period a penalty of 1% per month of

the amount will be paid. In Burundi, excess VAT is refunded by cheque after clearance of tax debts by the taxpayer.

75. The withholding system can lead to confusion among taxable persons who consider that they are freed from further VAT obligations when VAT has been withheld by their clients and who thus fail to subsequently declare the taxable supplies they have made. WH VAT scheme can lead to several problems like an increased tax burden for the supplier that never has access to or use of the VAT payment and which may encounter difficulties in getting any refund of excess input tax.

Conclusion

76. They supported the amendment to section 17(5) of the VAT Act, 2013.

Public Finance Management Act, 2012

77. Currently, the Parliamentary Service Commission (PSC) consists of the Speaker of the National Assembly as the Chairman, seven members appointed by Parliament and one woman and man appointed by Parliament from persons with experience in public affairs but are not Members of Parliament. The Clerk of the Senate is the Secretary to the PSC.

Possible Rationale for the amendment

78. The UK which practices bicameralism, both Houses have an accounting officer. The accounting officer is the clerk of each respective House. The United States of America Congress is also bicameral and is made up of the House of Representatives and the Senate. Both Houses have different accounting officers, the Chief Administrative Officer for the House and the Secretary of the Senate serves the Senate. These Houses are autonomous in their duties.

Weaknesses of the Proposed Amendment

79. The proposed amendment will alter financial reporting in the PSC by creating an additional accounting officer. The amendment also seems to aim at reducing the powers of the Clerk of the Senate from being an accounting officer for both Houses of Parliament to being an accounting officer for the Senate only.

80. Section 66(1) of the Public Finance Management Act, 2012 states that, *"subject to the Constitution, the accounting officer of the Judiciary, PSC, Constitutional Commissions and Independent Offices shall monitor, evaluate and oversee the management of public finances in their respective entities including other duties"*.

81. The accounting officer of the PSC is the Clerk of the Senate. The amendments further indicate that PSC will have powers to designate by a resolution additional accounting in respect of any other office in the Parliamentary Service as the Cabinet Secretary shall, upon a resolution by the PSC designate within 14 days of the resolution. In their view, this was a huge deviation from what is practiced in other commissions and independent officers contained in Chapter 15 of the Constitution.

82. All Constitutional Commissions in the country have one accounting officer. It is therefore illogical that the PSC is seeking to have additional accounting officers. It is even confusing when the amendments seek not to specify the maximum number of accounting officers that the PSC can designate.

83. It was further their submission that designating additional accounting officers in the PSC will result in distorting the membership of the PSC and water down the level of accountability in public financial management. They therefore submitted that the amendment should be rejected.

3.11 KENYA REVENUE AUTHORITY

Ms. Elizabeth Meyo submitted as follows on behalf of Kenya Revenue Authority. That:-

Value Added Tax Act, 2013

Proposed Amendment

84. Delete the proposed paragraph (c)

Justification

85. The purpose of WH VAT is to enhance tax compliance by ensuring that suppliers of goods and services to withholding VAT agents who include the government pay the VAT due on those supplies. It was introduced as a measure of curbing the challenge of persons supplying taxable supplies especially to government entities but not accounting for the VAT charged. When VAT is withheld, KRA then has information that a taxable supply has been made and is therefore able to ensure that the supplier fully accounts for the taxes.

86. The WH VAT of 6% of the taxable value as provided under section 42A of the Tax Procedures Act, is less than the VAT rate of 16% as it takes into account the input VAT that is deductible from output VAT and is therefore not intended to result in excess credit that would lead to refund claims.

87. However, there are unique cases where due to the nature of the activities of certain taxpayers, the application of WH VAT could result in excess credits. To address this, the law was amended vide the Finance Act, 2017 by introducing section 42A(4A) of the Tax Procedures Act which provides that the Commissioner may exempt from WH VAT, taxpayers/suppliers who demonstrate that they are in a continuous credit position as a result of withholding VAT.

88. The law therefore already provides an avenue to address the challenge of perpetual credits arising from WH VAT. Taxpayers can apply to the Commissioner to exempt them from WH VAT where it gives rise to perpetual credits. They submitted that the law adequately addresses

the excess credits that may arise from WH VAT and as such the refund proposal is not necessary and should be dropped.

Proposed Amendment

89. Delete the proposed paragraph (d)

Justification

90. Insertion of paragraph (d) should be deleted as it is not feasible for a taxpayer to be in both credit and payment position at the same time. It is therefore contradictory.

3.12 NJOROGE WACHIRA AND COMPANY ADVOCATES

They submitted as follows in their memorandum, that:-

Microfinance Act, 2006

They presented the memorandum on behalf of their client Mr. Abdi Said. They submitted as follows:-

91. Islamic Finance, commonly known as sharia compliant financing model, is one of the recognized models of financial systems in the International Financial Services Regulation worldwide.

92. The Islamic Finance system is geared towards promoting fairness and equity in financial transactions by avoiding payment of interest, what is commonly known as haram in the Islamic faith.

93. The Islamic Finance system applies to banking and insurance products in the country. In particular, the Barclays Bank of Kenya was the first to introduce Sharia compliant banking products. In relation to insurance, Takaful Insurance Africa was the first Sharia compliant Takaful operator. Savings and Credit Cooperative Organizations (SACCOS) have also launched Sharia compliant products in response to the growing demand from members.

94. With the growing number of Islamic Finance service providers, the market has grown which has also increased the tax base for the government to collect revenue, noting many persons from the Islamic faith were previously shying away from purchasing Islamic financial products due to their unavailability in the Kenyan market.

95. The uptake of Sharia compliant financial products in the microfinance sector has however been hampered due to barriers created by the legal regimes that exist.

96. A casing point is section 14 of the Microfinance Act, 2006 which completely prohibits microfinance banks from engaging in the wholesale and retail trade of all products including Sharia compliant products.

97. They supported the proposed amendment to section 14(1)(f) of the Microfinance Act, 2006 on behalf of their client as this will allow microfinance banks which are sharia compliant to engage in wholesale and retail trade.

98. This will in turn grow the customer base for such products, increase the tax base and eventually grow government revenue targets in terms of tax collected from such businesses.

3.13 AMOLO AND KIBANYA COMPANY ADVOCATES

Mr. Neville Omolo submitted that:-

Public Finance Management Act, 2012

99. The framers of the Constitution of Kenya as adopted by the people of Kenya in a Nationwide Referendum contemplated in Chapter 15 thereof the number of Constitutional Commissions and independent Offices specified in Article 248(2) and (3). The Parliamentary Service Commission (PSC) is a creature of Article 127of the Constitution. The officers in the PSC are the chairperson (Speaker of the National Assembly), the Vice Chairperson (elected by the Members of the PSC

from among members), seven members (appointed by Parliament from among its members i.e. the National Assembly and Senate) and the secretary (Clerk of the Senate).

100. The PSC is also addressed in Article 248(2)(d). the objects, authority and funding of the Constitutional Commissions and Independent Offices are specified in great detail by Article 249 and the composition, appointment and terms of office are specified in Article 250 and Sub-Article 12 thereof proceeds in very clear terms. However, Article 250(12)(b) is otiose and indeed superfluous considering that Article 127(3) already designates the Clerk of the Senate to be the Secretary of the PSC.

101. Since Article 233(5) and (6) of the Constitution provides that the secretary of the Public Service Commission is the Chief Executive Officer (CEO). There is therefore nothing wrong with the Constitutional requirement that the secretary of the PSC is the CEO.

Observation

102. By reason of Constitutional fiat and imperatives, the Clerk of the Senate is the Secretary/CEO of the PSC and is designated the accounting officer by the provisions of section 2 of the Public Finance Management Act.

103. The proposed amendment in the Bill seeks to dilute the authority of the office and that of the Secretary/CEO of the PSC by creating two accounting officers who shall not consider themselves obliged to defer with the authority of the Secretary/CEO. The proposed amendment to section 2(1) of the Public Finance Management Act shall be inconsistent with and offend the Constitution and it is therefore unconstitutional for seeking to derogate from the Constitution.

104. He implored upon the Committee to decline to amend the Public Finance Management Act, 2012 as proposed in the Bill.

3.14 PRIVATE SECTOR

They submitted as follows in their memorandum to the Committee:-

Value Added Tax Act, 2013

Outstanding credit amounts arising from Withholding VAT

105. Withholding VAT was introduced in the country where the Commissioner of tax appoints withholding VAT agents. Businesses in perpetual credit positions can apply for exemptions. Exemption process has not happened and refunds have not been made due to absence of legal provisions on the same.

Recommendation

106. Withholding VAT refunds and off set are not provided for under the law. The proposed amendments under the Bill seeks to address this. There is need to however include provisions on retrospective application and limit the claim period. Refund and off set is allowed under section 17(5) of the VAT Act, 2013.

3.15 CENTRAL BANK OF KENYA

In their memorandum, CBK submitted that:-

Microfinance Act, 2006

107. CBK supports the expansion of Sharia compliant finance and financial products, including Sharia compliant microfinance banking as a channel for financial inclusion. As a matter of fact, consistent with the government's vision of the financial sector, CBK has been working over the last year to finalize a draft legal and regulatory framework for Sharia compliant banking and microfinance banking. He stated that they have benefitted tremendously from experiences of other jurisdictions and interacted closely with the international standard setter, the Islamic Financial Services Board.

108. They made the following observations on the specific proposal in the Bill:-

i. The proposed amendment is inadequate for purposes of Sharia compliant microfinance Banking. This is in view of the fact that trade and investment, which

are key cogs in Sharia compliant banking are still prohibited under section 14(1)(a) to (e) of the Microfinance Act. An amendment to section 14(1)(f) alone will therefore not suffice.

ii. The proposed amendment will restrict CBK's residual power to prohibit microfinance banks from engaging in risky Sharia compliant microfinance banking business. This effectively means that so long as a microfinance bank is licensed as a Sharia compliant bank, then any activity that furthers its business will be permissible, notwithstanding the fact that the activity or business may be inherently risky and a threat to financial stability.

iii. The proposed amendment does not address other important aspects of Sharia compliant microfinance banking such as liquidity, risk management, capital adequacy and governance. Experiences elsewhere indicate that these are elements of a sound framework.

109. In their view therefore, the proposed amendment will not deliver on its intention of enabling Sharia compliant microfinance business. It was CBK's opinion that it would be more appropriate to focus on a comprehensive framework for Sharia compliant microfinance banking as opposed to the proposed amendment to the Microfinance Act. It was their expectation that the draft revised Microfinance Act and Regulations that CBK has been working on would be ready for public and stakeholder comments and submission to Parliament in the next three months. They believed that this will provide a robust legal and regulatory framework for Sharia compliant microfinance banking in Kenya that is consistent with international standards and comparable to practices in other jurisdictions.

3.16 INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA

Mr. Fredrick Riaga submitted as follows on behalf of ICPAK. That: -

The Public Finance Management Act, 2012

Proposed Amendment

110. Delete the amendment and retain the current definition.

Justification

111. For clarity in responsibility, order and accountability in the management of public finances.

New Proposal to amend section 187(1)

112. Amend section 187(1) by inserting a new paragraph after (h), *"(i) the Institute of Certified Public Accountants"*.

Justification

113. The Institute by virtue of its expertise and mandate on public finance and accountability as stipulated by the Accountants Act, 2008 will add value to the Intergovernmental Budget and Economic Council.

Value Added Tax Act, 2013

Proposed Amendment

114. They proposed the following amendment under section 17(5):-

i. Delete the word "and" at the end of paragraph (a) so that the refund is not tied to the zero-rated supplies only.

ii. Delete the words ".....under this Act...." in paragraph (d) and replace with the words ".....as defined under the Tax Procedures Act."

Justification

115. To avoid inconsistency that may be brought by the amendment.

3.17 PARLIAMENTARY SERVICE COMMISSION

The Chairperson of the Finance Committee of the Parliamentary Service Commission, Hon. Adan Keynan, MP submitted that: -

116. Article 93 of the Constitution of Kenya, 2010 establishes the Parliament of Kenya which consists of the National Assembly and the Senate. Article 94 of the Constitution then vests legislative making authority in Parliament. Article 95 of the Constitution then sets out the role of the National Assembly which includes representing the people in the constituencies, legislation, budget making, exercising oversight over State Organs and approving declarations of war and extensions of states of emergency. Article 96 of the Constitution provides for the role of the Senate which includes representing the counties, participating in the law making function of Parliament, determining the allocation of national revenue among the counties and participating in the oversight of State Officers.

117. Article 127 of the Constitution establishes a single Parliamentary Service Commission for the Parliamentary Service that is responsible for the provision of such services and facilities to ensure the efficient and effective functioning of Parliament. The Parliamentary Service Commission is comprised of the following:

(a) The Speaker of the National Assembly as chairperson;
(b) Seven members appointed by Parliament from among its members of whom-
    (i) Four shall be nominated equally from both Houses by the party or coalition of parties forming the national government, of whom at least two shall be women; and
    (ii) Three nominated by the parties not forming the national government, at least one of whom shall be nominated from each House and at least one of whom shall be a woman; and
(c) One man and one woman appointed by Parliament from among persons who are experienced in public affairs, but are not members of Parliament.
(d) The vice-chairperson is elected from among the above seven (7) Members of Parliament.
(e) The Clerk of the Senate is the Secretary to the Commission.

118 It is important to recall that prior to the year 2000 there was no Parliamentary Service Commission and Parliament relied on the Office of the President to provide it with services and

facilities. This was an unfortunate situation which led to Parliament not being properly facilitated to perform its constitutional duties and further infringed on the principle of separation of powers.

119 The Parliamentary Service Commission was established by an amendment to Section 45 of the former Constitution of Kenya in the year 1999 and operationalized by the enactment of the Parliamentary Service Act in 2000. The Commission has been re-established by Article 127 of the Constitution of Kenya, 2010.

120 The Parliamentary Service is organized into the following-

(a) The National Assembly Service which is responsible for the provision of services and facilities to the National Assembly;

(b) The Senate Service which is responsible for the provision of services and facilities to the Senate;

(c) The Parliamentary Joint Services which is responsible for the provision of services and facilities to both Houses of Parliament that are cross-cutting in nature and whose duplication in each House would not be prudent use of resources;

(d) The Centre for Parliamentary Studies and Training which is a semi-autonomous institution responsible for the provision of training services to Members and staff of Parliament and the County Assemblies.

121 Following the promulgation of the new Constitution, the Clerk of the National Assembly continued as the Accounting Officer for the Parliamentary Service Commission until the appointment of a Clerk to the Senate/Secretary of the Parliamentary Service Commission as the Commission's sole Accounting Officer in July 2013.

122 As the realities and challenges of managing a bi-cameral Parliament became apparent, the Parliamentary Service Commission became concerned that the activities of the National Assembly required the approval, and were accounted for, by the Clerk of the Senate despite the fact that the National Assembly had its own Clerk appointed under Article 128 of the Constitution. The Commission therefore considers that the most appropriate manner of handling the issue is to have the law provide that the Cabinet Secretary in the National Treasury shall designate as an accounting officer such other officer in the parliamentary service as the Commission may resolve.

123 The National Assembly in 2014 amended Section 2(1) of the Public Finance Management Act to have two Accounting Officers with the Clerk of the National Assembly being the additional Accounting Officer.

124 The Commission took the considered view that to enhance service delivery it would be more appropriate that those services provided jointly and equally to the Houses be under the accounting superintendence of an Accounting Officer or Accounting Officers as the Parliamentary Service Commission may deem necessary.

125 They stated that it is important to note that Section 2(1)(c) of the Public Finance Management Act provides that the accounting officer in the case of the Judiciary is the Chief Registrar of the Judiciary. The Judicial Service Commission therefore informs the Cabinet Secretary in the National Treasury who is the holder of the office of Chief Registrar of the Judiciary for purposes of formal appointment of the accounting officer for the Judiciary.

126 In respect of the national government, the Cabinet Secretary in the National Treasury designates in writing accounting officers for the various national government entities and ensures that there is an accounting officer in each national government entity.

127 The Commission is convinced that the proposed amendment to Section 2(1) of the Public Finance Management Act shall enhance service delivery as well as accountability and responsibility in the administration of Parliament.

128 The Parliamentary Service Commission therefore supported the proposed amendment.

3.18 NATIONAL TREASURY

Mr. Albert Mwenda submitted as follows on behalf of the National Treasury. That: -

Microfinance Act, 2006

129 The proposed amendment is inadequate for the purposes of facilitating the sharia-compliant microfinance banking. This is in view of the fact that trade and investment, which are key components of sharia-compliant banking are still prohibited under Section 14(1)(a) to (e) of the Act. The amendment will therefore not be adequate.

130 Further, the proposed amendment will restrict Central Bank's residual power to prohibit microfinance banks from engaging in risky sharia-compliant microfinance bank business.

131 It was their opinion that CBK should be given a chance to finalise the regulations they are working on in order to properly anchor sharia-compliant banking.

Public Finance Management Act, 2012

132 The accounting function can only be performed by an accounting officer as provided for under Article 226(2) of the Constitution. In addition, this position is also consistent with section 67 of the PFM Act and the two votes in the budget.

133 Further, the National Assembly proposed to amend the Public Finance Management Act, 2012 and insert a New Section 39A to read as follows: -

39A. (1) Not later than seven days after the estimates of revenue and expenditure are submitted to the National Assembly, the Cabinet Secretary shall submit to National Assembly a legislative proposal for the Finance Bill, setting out the revenue raising measures for the National Government.

(2) Following submission of the legislative proposal for Finance Bill by the Cabinet Secretary, the relevant committee of the National Assembly shall introduce the Bill in the National Assembly, together with the report of the Committee on the Bill.

(3) The National Assembly shall consider and pass the Finance Bill, with or without amendments, before the end of the financial year.

(4) Any recommendations made by the relevant committee of the National Assembly or adopted by the National Assembly on revenue matters shall-

(a) ensure that the total amount of revenue raised is consistent with the approved fiscal framework and the Division of Revenue Act;

(b) take into account the principles of equity, certainty and ease of collection;

(c) consider the impact of the proposed changes on the composition of the tax revenue with reference to direct and indirect taxes;

(d) consider domestic, regional and international tax trends;

(e) consider the impact on development, investment, employment and economic growth;

(f) take into account the recommendations of the Cabinet Secretary as provided under Article 114 of the Constitution; and

(g) take into account the taxation and other tariff arrangements and obligations that Kenya has ratified, including taxation and tariff arrangements under the East African Community Treaty.

(5) The recommendation of the Cabinet Secretary in subsection (4) (f) shall be included in the report and tabled in the National Assembly.

134 The National Treasury did not support this amendment given that the Finance Bill carries tax revenue raising measures which affect the entire East African Community countries. Towards this end, sharing the tax revenue raising measures may lead to holding of goods or distortion of the market forces within the East African Region.

Value Added Tax Act, 2013

135 In the National Treasury's view, the proposed amendment was taken care of in the amendment made to the Tax Procedures Act in the Finance Act of 2017 where the Commissioner was given powers to exempt supplies to a taxpayer who may be in perpetual credit position from the withholding of the VAT.

136 It was therefore their opinion that the issue intended to be addressed by the proposed amendment is adequately covered and they therefore did not support the proposed amendments to the VAT Act, 2013.

4 PROPOSED COMMITTEE AMENDMENTS

Having considered the Bill and after engaging with the stakeholders, the Committee proposed the following amendments: -

Microfinance Act, 2006 (No. 19 of 2006)

137 The Committee proposed that the proposed amendment to Section 14(1) of the Microfinance Act, 2006 should be deleted.

Justification

138 To allow the Central Bank of Kenya to come up with a comprehensive framework for Sharia-compliant microfinance banking. CBK has been working on draft revised Microfinance Act and Regulations and they expect to present them to Parliament for consideration in the next three months.

Public Finance Management Act, 2012 (No. 18 of 2012)

139 The proposed amendment on the Public Finance Management Act, 2012 in the Bill was agreed to by the Committee.

140 They proposed the following amendments to section 39 of the PFM Act, 2012:-

Delete the words "except the Finance Bill" appearing immediately after the words "relevant Bills" in section 39.

New Clauses

141 Insert the following new clauses immediately after section 39:-

39A. (1) The Cabinet Secretary shall submit to the National Assembly, on or before 30th April, the Finance Bill setting out the revenue raising measures for the National Government.

(2) Following submission of the Finance Bill by the Cabinet Secretary, the relevant committee of the National Assembly shall introduce the Bill in the National Assembly.

(3) The National Assembly shall consider and pass the Finance Bill, with or without amendments, in time for it to be assented to by 30th June each year.

(4) Any recommendations made by the relevant committee of the National Assembly or adopted by the National Assembly on revenue matters shall-

(a) ensure that the total amount of revenue raised is consistent with the approved fiscal framework and the Division of Revenue Act;

(b) take into account the principles of equity, certainty and ease of collection;

(c) consider the impact of the proposed changes on the composition of the tax revenue with reference to direct and indirect taxes;

(d) consider domestic, regional and international tax trends;

(e) consider the impact on development, investment, employment and economic growth;

(f) take into account the recommendations of the Cabinet Secretary as provided under Article 114 of the Constitution; and

(g) take into account the taxation and other tariff arrangements and obligations that Kenya has ratified, including taxation and tariff arrangements under the East African Community Treaty.

(5) The recommendation of the Cabinet Secretary in subsection (4) (f) shall be included in the report and tabled in the National Assembly.

142 Delete section 41 of the Act.

Justification

143 The amendment will ensure that the Budget is concluded by approving the revenue raising measures, tax incentives and appropriations before the beginning of the relevant financial year. This is in an attempt to avoid the necessity of a supplementary budget that may arise on account of a possible distortion of the fiscal framework when the Finance Bill is enacted after the annual Appropriations Bill.

The Value Added Tax Act, 2013 (No. 35 of 2013)

144 The Committee proposed the following amendment: -

THAT, the Schedule be amended, in the provisions relating to the Value Added Tax, 2013, by deleting the proposed amendments to section 17(5) and substituting therefor the following new amendments—

Provision	*Amendment*
17(5)	Delete the proviso and substitute therefor the following new provisos— "Provided that any such excess shall be paid to the registered person by the Commissioner where— (a) the Commissioner is satisfied that such excess arises from making zero rated supplies; or (b) the Commissioner is satisfied that such excess arises from tax withheld by appointed tax withholding agents; and (c) the Commissioner is satisfied that such excess arising out of tax withheld by appointed tax withholding agents may be applied against any tax payable under this Act or any other written law, or is due for refund pursuant to section 47(4) of the Tax Procedures Act, 2015; and (d) the registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax becomes due and payable. "Provided further that, notwithstanding section 17(5)(d), a registered person who, within a period of eighteen months prior to the commencement of section 17(5)(b) and (c), has a credit arising from withholding tax, may make an application for a refund of the excess tax within twelve months from the commencement date.

Justification

145 The amendment is intended to address a renumbering issue to ensure sequence coherence of the provisions in Section 17 (5) of the VAT Act and to also include a reference to the Tax Procedures Act. Further, the proposed Committee's amendment intends to introduce a proviso on the commencement of section 17 (5) (b) and (c) in order to address the existing outstanding credit excesses. The amendment will ensure that there is no ambiguity and there is limitation of the time period to make claims of the outstanding credit excess.

146 The Committee proposed the following amendment to the Second Schedule:-

Insert the following new paragraph immediately after paragraph 16-

17A. Agricultural Pest Control Products.

Justification

147 Making agricultural pest control products vatable has made them expensive and therefore unaffordable to many people. The proposed amendment will help the industry survive against external competition and in the process increase food security in the country.

SIGNED.....DATE.....7/5/19.....

THE HON. JOSEPH LIMO, MP

CHAIRPERSON

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

5 ANNEXTURES

Adoption schedule

Minutes

REPUBLIC OF KENYA

NATIONAL ASSEMBLY
DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING
ADOPTION SCHEDULE

ADOPTION OF THE REPORT ON THE CONSIDERATION OF THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019

DATE: 4TH MAY, 2019

NAME	SIGNATURE
1. HON. JOSEPH K. LIMO, MP – CHAIRMAN	
2. HON. ISAAC W. NDIRANGU – VICE-CHAIRMAN	
3. HON. JIMMY O. ANGWENYI, MP	
4. HON. CHRISTOPHER OMULELE, MP	
5. HON. SHAKEEL SHABBIR AHMED, MP	
6. HON. DR. ENOCH KIBUNGUCHY, MP	
7. HON. ABDUL RAHIM DAWOOD, MP	
8. HON. DANIEL E. NANOK, MP	
9. HON. ANDREW A. OKUOME, MP	
10. HON. DAVID M. MBONI, MP	
11. HON. KUKIA KIMANI, MP	
12. HON. JOSEPH M. OYULA, MP	
13. HON. JOSHUA KANDIE, MP	
14. HON. LYDIA H. MIZIGHI, MP	
15. HON. MOHAMED ALI, MP	
16. HON. PURITY NGIRICI, MP	
17. HON. SAMUEL ATANDI, MP	
18. HON. STANLEY M. MUTHAMA, MP	
19. HON EDITH NYENZE, MP	

MINUTES OF THE 4TH SITTING OF THE STAKEHOLDER ENGAGEMENT WORKSHOP OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING HELD ON SATURDAY, 4TH MAY, 2019 AT HILTON GARDEN INN HOTEL AT 2.00PM

PRESENT

1. Hon. Joseph K. Limo, MP - **Chairperson**
2. Hon. Jimmy O. Angwenyi, MGH, MP
3. Hon. Daniel E. Nanok, MP
4. Hon. Andrew A. Okuome, MP
5. Hon. David M. Mboni, MP
6. Hon. Joseph M. Oyula, MP
7. Hon. Mohamed A. Mohamed, MP
8. Hon. Joshua C. Kandie, MP
9. Hon. Lydia H. Mizighi, MP
10. Hon. Purity W. Ngirici, MP
11. Hon. Stanley M. Muthama, MP

APOLOGY

1. Hon. Isaac W. Ndirangu, MP- **Vice Chairperson**
2. Hon. Christopher Omulele, MP
3. Hon. Shakeel Shabbir Ahmed, CBS, MP
4. Hon. Abdul Rahim Dawood, MP
5. Hon. Dr. Enoch Kibunguchy, MP
6. Hon. Francis K. Kimani, MP
7. Hon. Samuel Atandi, MP
8. Hon. Edith Nyenze, MP

INATTENDANCE

SECRETARIAT

1.	Mr. Nicholas Emejen	–	Deputy Director, DCS
2.	Ms. Leah Mwaura	–	Senior Clerk Assistant/Lead Clerk
3.	Ms. Jennifer Ndeto	–	Principal Legal Counsel 1
4.	Ms. Laureen Wesonga	–	Clerk Assistant III
5.	Mr. Josephat Motonu	–	Fiscal Analyst
6.	Mr. Chelang'a Maiyo	–	Research Officer
7.	Mr. Robert Rop	–	Audio Officer
8.	Ms. Beatrice Auma	–	Administrative Assistant
9.	Mr. John Njoro	–	Serjeant-At-Arms

MIN.NO.NA/F&NP/2019/023: PRELIMINARIES/COMMUNICATION FROM THE CHAIRPERSON

The meeting was called to order at 02:05 pm and a prayer was said. The Chairperson then welcomed the meeting to deliberate on the day's agenda.

MIN.NO.NA/F&NP/2019/024: CONFIRMATION OF MINUTES

Agenda deferred.

MIN.NO.NA/F&NP/2019/025: MEETING TO ADOPT THE REPORT ON THE CONSIDERATION OF THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019

The Committee adopted the report on the consideration of the Statute Law (Miscellaneous Amendments) Bill, 2019 having proposed and seconded by Hon. David Mboni, MP and Hon. Jimmy Angwenyi, MP respectively.

The Committee proposed the following amendments:-

Microfinance Act, 2006 (No. 19 of 2006)

The Committee proposed that the proposed amendment to Section 14(1) of the Microfinance Act, 2006 should be deleted.

Justification

To allow the Central Bank of Kenya to come up with a comprehensive framework for Sharia-compliant microfinance banking. CBK has been working on draft revised Microfinance Act and Regulations and they expect to present them to Parliament for consideration in the next three months.

Public Finance Management Act, 2012 (No. 18 of 2012)

The proposed amendment on the Public Finance Management Act, 2012 in the Bill was agreed to by the Committee.

They proposed the following amendments to section 39 of the PFM Act, 2012 subject to further consultation with the House Leadership:-

> Delete the words "except the Finance Bill" appearing immediately after the words "relevant Bills" in section 39.

New Clauses

Insert the following new clauses immediately after section 39:-

39A. (1) The Cabinet Secretary shall submit to the National Assembly, on or before 30th April, the Finance Bill setting out the revenue raising measures for the National Government.

(2) Following submission of the Finance Bill by the Cabinet Secretary, the relevant committee of the National Assembly shall introduce the Bill in the National Assembly.

(3) The National Assembly shall consider and pass the Finance Bill, with or without amendments, in time for it to be assented to by 30th June each year.

(4) Any recommendations made by the relevant committee of the National Assembly or adopted by the National Assembly on revenue matters shall-

(a) ensure that the total amount of revenue raised is consistent with the approved fiscal framework and the Division of Revenue Act;

(b) take into account the principles of equity, certainty and ease of collection;

(c) consider the impact of the proposed changes on the composition of the tax revenue with reference to direct and indirect taxes;

(d) consider domestic, regional and international tax trends;

(e) consider the impact on development, investment, employment and economic growth;

(f) take into account the recommendations of the Cabinet Secretary as provided under Article 114 of the Constitution; and

(g) take into account the taxation and other tariff arrangements and obligations that Kenya has ratified, including taxation and tariff arrangements under the East African Community Treaty.

(5) The recommendation of the Cabinet Secretary in subsection (4) (f) shall be included in the report and tabled in the National Assembly.

Delete section 41 of the Act.

Justification

The amendment will ensure that the Budget is concluded by approving the revenue raising measures, tax incentives and appropriations before the beginning of the relevant financial year. This is in an attempt to avoid the necessity of a supplementary budget that may arise on account of a possible distortion of the fiscal framework when the Finance Bill is enacted after the annual Appropriations Bill.

The Value Added Tax Act, 2013 (No. 35 of 2013)

THAT, the Schedule be amended, in the provisions relating to the Value Added Tax, 2013, by deleting the proposed amendments to section 17(5) and substituting therefor the following new amendments—

Delete the proviso and substitute therefor the following new provisos—

"Provided that any such excess shall be paid to the registered person by the Commissioner where—

(a) the Commissioner is satisfied that such excess arises from making zero rated supplies; or

(b) the Commissioner is satisfied that such excess arises from tax withheld by appointed tax withholding agents; and

(c) the Commissioner is satisfied that such excess arising out of tax withheld by appointed tax withholding agents may be applied against any tax payable under this Act or any other written law, or is due for refund pursuant to section 47(4) of the Tax Procedures Act, 2015; and

(d) the registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax becomes due and payable.

"Provided further that, notwithstanding section 17(5)(d), a registered person who, within a period of eighteen months prior to the commencement of section 17(5)(b) and (c), has a credit arising from withholding tax, may make an application for a refund of the excess tax within twelve months from the commencement date.

Justification

The amendment is intended to address a renumbering issue to ensure sequence coherence of the provisions in Section 17 (5) of the VAT Act and to also include a reference to the Tax Procedures Act. Further, the proposed Committee's amendment intends to introduce a proviso on the commencement of section 17 (5) (b) and (c) in order to address the existing outstanding credit excesses. The amendment will ensure that there is no ambiguity and there is limitation of the time period to make claims of the outstanding credit excess.

The Committee proposed the following amendment to the Second Schedule:-

Insert the following new paragraph immediately after paragraph 16-

17A. Agricultural Pest Control Products.

Justification

Making agricultural pest control products vatable has made them expensive and therefore unaffordable to many people. The proposed amendment will help the industry survive against external competition and in the process increase food security in the country.

MIN.NO.NA/F&NP/2019/026: ADJOURNMENT

There being no other business to deliberate on, the meeting was adjourned at 4.05pm. The next meeting will be held on notice.

HON. JOSEPH K. LIMO, MP

(CHAIRPERSON)

SIGNED .....**DATE**.....7/5/19.....

MINUTES OF THE 3RD SITTING OF THE STAKEHOLDER ENGAGEMENT WORKSHOP OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING HELD ON SATURDAY, 4TH MAY, 2019 AT HILTON GARDEN INN HOTEL AT 9.00AM

PRESENT

1. Hon. Joseph K. Limo, MP - **Chairperson**
2. Hon. Jimmy O. Angwenyi, MGH, MP
3. Hon. Daniel E. Nanok, MP
4. Hon. Andrew A. Okuome, MP
5. Hon. David M. Mboni, MP
6. Hon. Joseph M. Oyula, MP
7. Hon. Mohamed A. Mohamed, MP
8. Hon. Joshua C. Kandie, MP
9. Hon. Lydia H. Mizighi, MP
10. Hon. Purity W. Ngirici, MP
11. Hon. Stanley M. Muthama, MP

APOLOGY

1. Hon. Isaac W. Ndirangu, MP- **Vice Chairperson**
2. Hon. Christopher Omulele, MP
3. Hon. Shakeel Shabbir Ahmed, CBS, MP
4. Hon. Abdul Rahim Dawood, MP
5. Hon. Dr. Enoch Kibunguchy, MP
6. Hon. Francis K. Kimani, MP
7. Hon. Samuel Atandi, MP
8. Hon. Edith Nyenze, MP

INATTENDANCE

SECRETARIAT

1.	Mr. Nicholas Emejen	–	Deputy Director, DCS
2.	Ms. Leah Mwaura	–	Senior Clerk Assistant/Lead Clerk
3.	Ms. Jennifer Ndeto	–	Principal Legal Counsel 1
4.	Ms. Laureen Wesonga	–	Clerk Assistant III
5.	Mr. Josephat Motonu	–	Fiscal Analyst
6.	Mr. Chelang'a Maiyo	–	Research Officer
7.	Mr. Robert Rop	–	Audio Officer
8.	Ms. Beatrice Auma	–	Administrative Assistant
9.	Mr. John Njoro	–	Serjeant-At-Arms

NATIONAL TREASURY

Mr. Albert Mwenda

MIN.NO.NA/F&NP/2019/019: PRELIMINARIES/COMMUNICATION FROM THE CHAIRPERSON

The meeting was called to order at 9:15 am and a prayer was said. The Chairperson then welcomed the meeting to deliberate on the day's agenda.

MIN.NO.NA/F&NP/2019/020: CONFIRMATION OF MINUTES

Agenda deferred.

MIN.NO.NA/F&NP/2019/021: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH THE NATIONAL TREASURY

Mr. Albert Mwenda submitted that:-

Microfinance Act, 2006

The proposed amendment is inadequate for the purposes of facilitating the sharia-compliant microfinance banking. This is in view of the fact that trade and investment, which are key components of sharia-compliant banking are still prohibited under section 14(1)(a) to (e) of the Act. The amendment will therefore not be adequate.

Further, the proposed amendment will restrict Central Bank's residual power to prohibit microfinance banks from engaging in risky sharia-compliant microfinance bank business.

It was the National Treasury's opinion that CBK should be given a chance to finalize the regulations they are working on in order to properly anchor sharia-compliant banking.

Public Finance Management Act, 2012

The accounting function can only be performed by an accounting officer as provided for under Article 226(2) of the Constitution. In addition, this position is also consistent with section 67 of the PFM Act and the two votes in the budget.

Further, the National Assembly proposed to amend the Public Finance Management Act, 2012 and insert a New Section 39A to read as follows:-

> **39A**. (1) Not later than seven days after the estimates of revenue and expenditure are submitted to the National Assembly, the Cabinet Secretary shall submit to National

Assembly a legislative proposal for the Finance Bill, setting out the revenue raising measures for the National Government.

(2) Following submission of the legislative proposal for Finance Bill by the Cabinet Secretary, the relevant committee of the National Assembly shall introduce the Bill in the National Assembly, together with the report of the Committee on the Bill.

(3) The National Assembly shall consider and pass the Finance Bill, with or without amendments, before the end of the financial year.

(4) Any recommendations made by the relevant committee of the National Assembly or adopted by the National Assembly on revenue matters shall-

(a) ensure that the total amount of revenue raised is consistent with the approved fiscal framework and the Division of Revenue Act;

(b) take into account the principles of equity, certainty and ease of collection;

(c) consider the impact of the proposed changes on the composition of the tax revenue with reference to direct and indirect taxes;

(d) consider domestic, regional and international tax trends;

(e) consider the impact on development, investment, employment and economic growth;

(f) take into account the recommendations of the Cabinet Secretary as provided under Article 114 of the Constitution; and

(g) take into account the taxation and other tariff arrangements and obligations that Kenya has ratified, including taxation and tariff arrangements under the East African Community Treaty.

(5) The recommendation of the Cabinet Secretary in subsection (4) (f) shall be included in the report and tabled in the National Assembly.

The National Treasury did not support this amendment given that the Finance Bill carries tax revenue raising measures which affect the entire East African Community countries. Towards

this end, sharing the tax revenue raising measures may lead to holding of goods or distortion of the market forces within the East African Region.

Value Added Tax Act, 2013

In the National Treasury's view, the proposed amendment was taken care of in the amendment made to the Tax Procedures Act in the Finance Act of 2017 where the Commissioner was given powers to exempt supplies to a taxpayer who may be in perpetual credit position from the withholding of the VAT.

It was therefore their opinion that the issue intended to be addressed by the proposed amendment is adequately covered and they therefore did not support the proposed amendments to the VAT Act, 2013.

DELIBERATIONS

Members were concerned that the National Treasury was opposed to all the proposed amendments proposed in the Bill yet they are the originators of the Bill. Mr. Mwenda informed the meeting that the National Treasury were not aware of the origin of the proposed amendments.

The Fiscal Analyst informed the meeting that the Finance Bill provides for additional revenue raising measures, identify incentives in order to generate more revenue and to state administrative changes in the financial sector of the country. He stated that it does not therefore matter at what point the Finance Bill is presented to Parliament.

MIN.NO.NA/F&NP/2019/022: ADJOURNMENT/ NEXT MEETING

The meeting was adjourned at 12.45pm. The next meeting will be held at 02.00pm that day.

HON. JOSEPH K. LIMO, MP

(CHAIRPERSON)

SIGNED .....**DATE**.....7/5/19.....

MINUTES OF THE 2ND SITTING OF THE STAKEHOLDER ENGAGEMENT WORKSHOP OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING HELD ON FRIDAY, 3RD MAY, 2019 AT HILTON GARDEN INN HOTEL AT 2.00PM

PRESENT

1. Hon. Joseph K. Limo, MP - **Chairperson**
2. Hon. Isaac W. Ndirangu, MP- **Vice Chairperson**
3. Hon. Jimmy O. Angwenyi, MGH, MP
4. Hon. Daniel E. Nanok, MP
5. Hon. Andrew A. Okuome, MP
6. Hon. David M. Mboni, MP
7. Hon. Joseph M. Oyula, MP
8. Hon. Mohamed A. Mohamed, MP
9. Hon. Joshua C. Kandie, MP
10. Hon. Lydia H. Mizighi, MP
11. Hon. Purity W. Ngirici, MP
12. Hon. Stanley M. Muthama, MP
13. Hon. Edith Nyenze, MP

APOLOGY

1. Hon. Christopher Omulele, MP
2. Hon. Shakeel Shabbir Ahmed, CBS, MP
3. Hon. Abdul Rahim Dawood, MP
4. Hon. Dr. Enoch Kibunguchy, MP
5. Hon. Samuel Atandi, MP
6. Hon. Francis K. Kimani, MP

INATTENDANCE

SECRETARIAT

1.	Mr. Nicholas Emejen	–	Deputy Director, DCS
2.	Ms. Leah Mwaura	–	Senior Clerk Assistant/Lead Clerk
3.	Ms. Jennifer Ndeto	–	Principal Legal Counsel 1
4.	Ms. Laureen Wesonga	–	Clerk Assistant III
5.	Mr. Josephat Motonu	–	Fiscal Analyst
6.	Mr. Chelang'a Maiyo	–	Research Officer
7.	Mr. Robert Rop	–	Audio Officer
8.	Ms. Beatrice Auma	–	Administrative Assistant
9.	Mr. John Njoro	–	Serjeant-At-Arms

KPMG ADVISORY SERVICES LIMITED

1. Mr. Peter Kinuthia
2. Mr. Clive Akora
3. Ms. Phoebe Njoga
4. Mr. Kenneth Maina

INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA

1. Mr. Fredrick Riaga
2. Mr. Muthoni Wangai
3. Mr. Elias Wakhisi
4. Mr. Nelson Ogallo
5. Mr. David Isinye

KENYA ASSOCIATION OF MANUFACTURERS

1. Mr. Bharat Shah
2. Mr. Erick Opondo
3. Mr. Dipah Shah
4. Ms. Miriam Bomett
5. Mr. Paul Mutegi – Anjarwalla and Khanna
6. Mr. Benson Kyalo – Stratten Consulting

KENYA REVENUE AUTHORITY

1. Ms. Elizabeth Meyo
2. Mr. Moses Maina
3. Mr. Caxton Ngeywo
4. Ms. Sharon Kirai
5. Ms. Hannah Gakuo
6. Ms. Faith Ndanu
7. Ms. Beatrice Mundia

AMOLO AND KIBANYA COMPANY ADVOCATES

Mr. Neville W. Amolo

MIN.NO.NA/F&NP/2019/011: PRELIMINARIES/COMMUNICATION FROM THE CHAIRPERSON

The meeting was called to order at 2:20 pm and a prayer was said. The Chairperson then welcomed the meeting to deliberate on the day's agenda.

MIN.NO.NA/F&NP/2019/012: CONFIRMATION OF MINUTES

Agenda deferred.

MIN.NO.NA/F&NP/2019/013: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH KPMG ADVISORY SERVICES LIMITED

Representatives of KPMG submitted that:-

Value Added Tax Act, 2013 (No. 35 of 2013)

The proposed amendment is welcome and will have an impact in releasing the working capital locked in WHVAT credits that would never be utilized. Generally, WHVAT are usually significant amounts. In light of the focus on manufacturing and agricultural value addition as key elements of the Big 4 Agenda, it is critical that KRA implements a quicker and practical solution to WHVAT refund claims given the current backlog for VAT refunds at KRA.

One solution would be to allow taxpayers to set off approved claims against other tax obligations such as corporation tax, Pay As You Earn (PAYE) or even withholding tax rather than waiting for actual cash refunds. This has worked well in the past and can help to cushion businesses against the cash flow constraints and interest costs associated with refund delays.

Issue with the Clause

While paragraph (c) is a welcome amendment, the proposed proviso under paragraph (d) is unclear and may negate the proposed change since the excess tax credit arises because there is no tax payable by the taxpayer under the VAT Act. In addition, such a proviso would give KRA a lee way to reject applications for WHVAT refunds.

Proposed Amendment

They proposed that:-

(d) where in relation to an application for a refund made under subsection (c) above, the Commissioner is satisfied that the tax is refundable, the Commissioner shall authorize the crediting of the taxpayer's iTax ledger with amount of the approved tax credit to be utilized against any other tax obligations by the taxpayer. Provided that a person who, prior to the commencement of this subsection, had excess tax credit arising from tax withheld by appointed withholding agents may apply for a refund under this section.

Justification

The Bill seeks to amend the VAT Act to provide for a taxpayer to apply any withheld tax credit to offset any other tax liability due from them. Their proposal effectively clarifies this position as this is unclear as currently worded from the Bill.

The proposal allows the amount approved for refund to be available to be utilized against any other tax obligations that the taxpayer may have instead of waiting for tax refunds that presently take too long to be approved. In addition, there are taxpayers who already have excess VAT credit arising from WHVAT who will not be able to utilize them unless the provision is allowed to apply retrospectively.

MIN.NO.NA/F&NP/2019/014: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA

Representatives of the Institute submitted that:-
The Public Finance Management Act, 2012

Proposed Amendment

Delete the amendment and retain the current definition.

Justification

For clarity in responsibility, order and accountability in the management of public finances.

New Proposal to amend section 187(1)

Amend section 187(1) by inserting a new paragraph after (h), *"(i) the Institute of Certified Public Accountants"*.

Justification

The Institute by virtue of its expertise and mandate on public finance and accountability as stipulated by the Accountants Act, 2008 will add value to the Intergovernmental Budget and Economic Council.

Value Added Tax Act, 2013

Proposed Amendment

They proposed the following amendment under section 17(5):-

i. Delete the word "and" at the end of paragraph (a) so that the refund is not tied to the zero-rated supplies only.

ii. Delete the words ".....under this Act...." in paragraph (d) and replace with the words ".....as defined under the Tax Procedures Act."

Justification

To avoid inconsistency that may be brought by the amendment.

DELIBERATIONS

1. On why ICPAK want to be represented in IBEC, they stated that they will be able to offer technical input before proposals are finalized as opposed to advising after a decision has already been made.
2. They said that they were opposed to the proposed amendment to the Public Finance Management Act, 2012 because there might be a problem of control if people who are under the accounting officer designated by the Constitution are made accounting officers. They also stated that matters of finance should be solely under the accounting officer designated by the Constitution.

MIN.NO.NA/F&NP/2019/015: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH KENYA ASSOCIATION OF MANUFACTURERS

Mr. Bharat Shah proposed the following amendments on behalf of the Association:-

Proposed amendment

Delete the proviso to section 17(5) and insert the following new paragraph; "*Provided that any such excess shall be paid to the registered person by the Commissioner where-*

a) the Commissioner is satisfied that such excess arises from making zero rated supplies; or

b) *the Commissioner is satisfied that such excess arises from tax withheld by appointed tax withholding agents; and*

c) *the registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax becomes due and payable;*

d) *the Commissioner is satisfied that such excesses arising out of tax withheld by appointed tax withholding agents may be applied as provided for under section 47(4) of the Tax Procedures Act".*

Justification

Manufacturers commend the Government for initiating the proposal to allow for initiating the proposal to allow for refund and offset of WH VAT. The proposed amendments are timely due to the existing challenges that manufacturers have been faced with in the absence of the proposed amendments. The challenges include:-

i. Lack of legal provisions and basis to provide for refund of offsetting excess arising from WH VAT.

ii. Increasing accumulated backlog of payments owed to manufacturers by the Government arising from such credit situations. This has caused constrained cash flows required in the economy.

However, the proposed amendment requires to be further amended to ensure that it is effective in addressing the stated challenges.

Proposed amendment

The numbering sequence of the paragraphs under section 17(5) should be amended as follows:-

i. Retain paragraph "a" as it is in the Act and add the proposed word "or";

ii. Insert the new proposed paragraph "c" to be paragraph "b" and adding the words "and";

iii. Insert the original paragraph "b" under section 17(5) of the VAT Act to paragraph "c";

iv. Retain the proposed amendment as paragraph "d".

Justification

This will ensure sequence coherence of the provisions

Reference to the accurate legislation

Under the new proposed paragraph 17(5)(d), reference has been made to the VAT Act, 2013. The provision on withholding VAT are under the Tax Procedures Act, 2015 specifically section 47(4).

Justification

Reference to the VAT Act, 2013 is erroneous and should be rectified.

Introduce a new section 68A

"That any registered person who at the date of commencement of section 17(5)(b) and (d) has a credit arising from withholding VAT may within 12 months make an application for a refund or offset, notwithstanding the 12 month limitation provided under section 17(5)(c)."

Justification

Introduce retrospective provisions to address existing outstanding credit. This is proposed through introducing a new section 68A that has taken into account:-

i. The relevant section that the retrospective provisions will apply to under the VAT i.e. proposed section 17(5)(c). this will ensure that there is no ambiguity on its scope.

ii. The limitation of the time period to make claims of the outstanding credit excess, by amending section 68A to include a twelve months period.

Proposed Amendment

Delete the word "package" appearing at the end of section 32(3) and substitute thereof with the word "label". The clause will read as follows, *"The statement and health warning referred to in subsection (2) shall comprise not less than 30% of the total surface area of the label"*.

Justification

This provision requires the statement and health warning to comprise not less than 30% of the total surface area of the package. This is onerous on the manufacturers of alcoholic beverages for the following reasons:-

i. The provisions require an investment on labels which usually does not cover the total surface area of the package. This will require an investment on specialized machinery and applicators to enable compliance with the provisions requiring that the statement and health warning comprising not less than 30% of the total surface area of the package.

ii. There will be increased costs in respect of returnable packaging which require cleaning and removing of labels prior to subsequent use. The cost of cleaning the returnable packaging will increase due to the coverage of the total surface area of the package.

iii. There is also a concern on the disposal of the labels covering the total surface area of the packaging. The current efforts by the government in environmental conservation will be thwarted if the labels are disposed off in an irregular manner.

The amendment of the section is necessary to manufacturers of alcoholic drinks for the following reasons:-

i. Manufacturing is a key pillar for the Big 4 Agenda with the government setting out to incentivize and ease the cost of investment for manufacturers in the country. The provision has a countervailing effect in that it increases the costs of goods produced as it has a capital investment component.

ii. The increased costs of goods produced will be passed on to the ultimate consumer and thus affect the affordability of alcoholic drinks. In turn, the consumers will opt for illicit and counterfeit alcoholic drinks which tend to be cheaper. This impacts on the health of the consumers as there is no quality assurance in respect of illicit and counterfeit goods. Ultimately, this will also impact a key government initiative of addressing issues with respect to illicit and counterfeit goods.

DELIBERATIONS

On what they were doing to actualize the Government's manufacturing agenda, they stated that they had presented their proposals on how to improve the industry and actualize the Agenda to the Government for consideration.

MIN.NO.NA/F&NP/2019/016: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH KENYA REVENUE AUTHORITY

Ms. Elizabeth Meyo submitted that:-

Value Added Tax Act, 2013

Proposed Amendment

Delete the proposed paragraph (c)

Justification

The purpose of WH VAT is to enhance tax compliance by ensuring that suppliers of goods and services to withholding VAT agents who include the government pay the VAT due on those supplies. It was introduced as a measure of curbing the challenge of persons supplying taxable supplies especially to government entities but not accounting for the VAT charged. When VAT is withheld, KRA then has information that a taxable supply has been made and is therefore able to ensure that the supplier fully accounts for the taxes.

The WH VAT of 6% of the taxable value as provided under section 42A of the Tax Procedures Act, is less than the VAT rate of 16% as it takes into account the input VAT that is deductible from output VAT and is therefore not intended to result in excess credit that would lead to refund claims.

However, there are unique cases where due to the nature of the activities of certain taxpayers, the application of WH VAT could result in excess credits. To address this, the law was amended vide the Finance Act, 2017 by introducing section 42A(4A) of the Tax Procedures Act which provides that the Commissioner may exempt from WH VAT, taxpayers/suppliers who demonstrate that they are in a continuous credit position as a result of withholding VAT.

The law therefore already provides an avenue to address the challenge of perpetual credits arising from WH VAT. Taxpayers can apply to the Commissioner to exempt them from WH

VAT where it gives rise to perpetual credits. They submitted that the law adequately addresses the excess credits that may arise from WH VAT and as such the refund proposal is not necessary and should be dropped.

Proposed Amendment

Delete the proposed paragraph (d)

Justification

Insertion of paragraph (d) should be deleted as it is not feasible for a taxpayer to be in both credit and payment position at the same time. It is therefore contradictory.

DELIBERATIONS

1. On how much WH VAT KRA had refunded, they stated that they had refunded Kshs. 2.4 billion last month and they were hoping to refund Kshs. 4 billion this month.
2. The purpose of WH VAT is to give information on who is supposed to pay VAT. Members wanted to know why the rate cannot be reduced from 6%. KRA stated that they had submitted proposals in the Finance Bill, 2019 to reduce the rate from 6% to 2%. They further stated that since they have automated their systems, all data will have been captured in the next one year and there will therefore be no need for WH VAT.
3. On the unstable tax system in the country that was leading to the relocation of investors, KRA stated that the tax policy is under the mandate of the National Treasury and that Kenya's tax regime is under the range of other East African countries. Investors could be relocating because of incentives in other countries and not taxes.
4. On whether KRA invests the money collected from WH VAT, they stated that they do not invest taxpayer's money. The money goes to the exchequer.
5. On who between the country of export and the country of destination issues the certificate of export, the meeting was informed that the country of destination issues the certificate.

MIN.NO.NA/F&NP/2019/017: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH AMOLO AND KIBANYA COMPANY ADVOCATES

Mr. Neville Omolo submitted that:-

The framers of the Constitution of Kenya as adopted by the people of Kenya in a Nationwide Referendum contemplated in Chapter 15 thereof the number of Constitutional Commissions and independent Offices specified in Article 248(2) and (3). The Parliamentary Service Commission (PSC) is a creature of Article 127of the Constitution. The officers in the PSC are the chairperson (Speaker of the National Assembly), the Vice Chairperson (elected by the Members of the PSC from among members), seven members (appointed by Parliament from among its members i.e. the National Assembly and Senate) and the secretary (Clerk of the Senate).

The PSC is also addressed in Article 248(2)(d). the objects, authority and funding of the Constitutional Commissions and Independent Offices are specified in great detail by Article 249 and the composition, appointment and terms of office are specified in Article 250 and Sub-Article 12 thereof proceeds in very clear terms. However, Article 250(12)(b) is otiose and indeed superfluous considering that Article 127(3) already designates the Clerk of the Senate to be the Secretary of the PSC.

Since Article 233(5) and (6) of the Constitution provides that the secretary of the Public Service Commission is the Chief Executive Officer (CEO). There is therefore nothing wrong with the Constitutional requirement that the secretary of the PSC is the CEO.

Observation

By reason of Constitutional fiat and imperatives, the Clerk of the Senate is the Secretary/CEO of the PSC and is designated the accounting officer by the provisions of section 2 of the Public Finance Management Act.

The proposed amendment in the Bill seeks to dilute the authority of the office and that of the Secretary/CEO of the PSC by creating two accounting officers who shall not consider themselves obliged to defer with the authority of the Secretary/CEO. The proposed amendment to section 2(1) of the Public Finance Management Act shall be inconsistent with and offend the Constitution and it is therefore unconstitutional for seeking to derogate from the Constitution.

He implored upon the Committee to decline to amend the Public Finance Management Act, 2012 as proposed in the Bill.

MIN.NO.NA/F&NP/2019/018: ADJOURNMENT

There being no other business to deliberate on, the meeting was adjourned at 6.35pm. The next meeting will be held at 9.00am the next day.

HON. JOSEPH K. LIMO, MP

(CHAIRPERSON)

SIGNED .....**DATE**.....7/5/19.....

MINUTES OF THE 1ST SITTING OF THE STAKEHOLDER ENGAGEMENT WORKSHOP OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING HELD ON FRIDAY, 3RD MAY, 2019 AT HILTON GARDEN INN HOTEL AT 9.00AM

PRESENT

1. Hon. Joseph K. Limo, MP - **Chairperson**
2. Hon. Isaac W. Ndirangu, MP- **Vice Chairperson**
3. Hon. Jimmy O. Angwenyi, MGH, MP
4. Hon. Shakeel Shabbir Ahmed, CBS, MP
5. Hon. Daniel E. Nanok, MP
6. Hon. Andrew A. Okuome, MP
7. Hon. David M. Mboni, MP
8. Hon. Joseph M. Oyula, MP
9. Hon. Mohamed A. Mohamed, MP
10. Hon. Joshua C. Kandie, MP
11. Hon. Lydia H. Mizighi, MP
12. Hon. Purity W. Ngirici, MP
13. Hon. Samuel Atandi, MP
14. Hon. Stanley M. Muthama, MP
15. Hon. Edith Nyenze, MP

APOLOGY

1. Hon. Christopher Omulele, MP
2. Hon. Abdul Rahim Dawood, MP
3. Hon. Dr. Enoch Kibunguchy, MP
4. Hon. Francis K. Kimani, MP

INATTENDANCE

SECRETARIAT

1.	Mr. Nicholas Emejen	–	Deputy Director, DCS
2.	Ms. Leah Mwaura	–	Senior Clerk Assistant/Lead Clerk
3.	Ms. Jennifer Ndeto	–	Principal Legal Counsel 1
4.	Ms. Laureen Wesonga	–	Clerk Assistant III
5.	Mr. Josephat Motonu	–	Fiscal Analyst
6.	Mr. Chelang'a Maiyo	–	Research Officer
7.	Mr. Robert Rop	–	Audio Officer
8.	Ms. Beatrice Auma	–	Administrative Assistant
9.	Mr. John Njoro	–	Serjeant-At-Arms

PETROLEUM INSTITUTE OF EAST AFRICA

1. Ms. Wanjiku Manyara
2. Mr. John Githiomi
3. Mr. Nathan Korir
4. Ms. Susan Mwende
5. Mr. Isaac Maina
6. Mr. Paul Limoh
7. Mr. Hezekiah Muleshe
8. Ms. Jean Lopy
9. Ms. Rachel Njuguna
10. Mr. John Gikima
11. Ms. Anne Mubia-Murungi

GC RETAIL LIMITED

Mr. Anthony Kambiriri

INDEPENDENT POWER PRODUCERS

1. Mr. Gerald Ngugi
2. Mr. Norman Wanyiri
3. Mr. Abubakar Ali

AGROCHEMICAL ASSOCIATION OF KENYA

1. Mr. Eric Kimunguyi
2. Mr. Joel Muturi
3. Mr. Okisegere Ojepat

PARLIAMENTARY SERVICE COMMISSION

1. Hon. Adan Keynan, MP
2. Hon. Aaron Cheruiyot
3. Mr. Michael Sialai
4. Mr. Clement Nyandiere
5. Mr. M.A. Mohamed
6. Mr. Anthony Njoroge
7. Dr. George Wakah
8. Ms. Noor Galgan
9. Mr. Crispus Tima

PRICEWATERHOUSECOOPERS LIMITED

1. Ms. Charlene Cheruiyot
2. Mr. Maurice Mwaniki

1. Mr. Richard Harney
2. Ms. Rosemary Maina

MIN.NO.NA/F&NP/2019/001: PRELIMINARIES/COMMUNICATION FROM THE CHAIRPERSON

The meeting was called to order at 9:25 am and a prayer was said. The Chairperson then welcomed Members to the two day stakeholder engagement workshop on the Statute Law (Miscellaneous Amendments) Bill, 2019. He called for introduction of those present before welcoming the meeting to deliberate on the day's agenda.

MIN.NO.NA/F&NP/2019/002: CONFIRMATION OF MINUTES

There were no minutes to be confirmed.

MIN.NO.NA/F&NP/2019/003: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH PETROLEUM INSTITUTE OF EAST AFRICA

The CEO of the Petroleum Institute of East Africa, Ms. Wanjiku Manyara submitted that:-

Withholding Value Added Tax refunds and amendment of section 17(5) of the Value Added Tax Act, 2013

Problem Statement

The Finance Act, 2014 reintroduced Withholding Value Added Tax (VAT) in Kenya and requires Withholding VAT agents to withhold 6% of the value of taxable supplies on payment to suppliers and remit the same directly to the Commissioner of KRA is empowered under section 42A(1) of the Tax Procedures Act to appoint any person as a withholding VAT agent.

The VAT Act, 2013 exempted white petroleum products (Petrol, Diesel & Kerosene) from VAT for a period of three years. The Finance Act, 2016 extended the exemption for a further two-year period to 1st September, 2018. Since there was no further extension, white petroleum products became vatable at 16% from 1st September, 2018. However, the Finance Act, 2018 introduced a concessionary 8% VAT rate.

Challenges

Members of PIEA supply customers who have been withholding VAT agents such as KENGEN and other IPPs as well as many large industrial customers. These customers withhold 6% VAT as

required under the law. This has resulted in a VAT credit to their members of approximately Kshs. 4 billion. The withholding VAT of 6% is very high as compared to the base rate of 8% VAT rate on petroleum products. As a result, the VAT credit cannot be reduced and will keep growing as the industry input will always exceed the output by far.

The industry being highly capital intensive has suffered from severe cash crunch as a result of a majority of its capital being held up in VAT credit from the government. The law as presently written has no mechanism for refund of Withholding VAT. This has slowed down the growth of the industry and impacted the growth of the country's economy negatively.

Proposal

As a result of the challenges faced by members of PIEA, Parliament should create a mechanism in law to address the issue of the VAT credits. They supported the amendment to section 17(5) of the VAT Act, 2013 as contained in the Statute Law (Miscellaneous amendment) Bill, 2019 to allow taxpayers to claim refunds arising from withheld VAT.

DELIBERATIONS

On how they had arrived at 1%, Ms. Manyara explained that they did not want to be excluded from withholding VAT but 6% is very high and therefore 1% is the best rate for them. In addition, the VAT for the oil industry is 8% thus WH VAT of 6% is quite high. The profit margins are very low and the business is very cash intensive.

MIN.NO.NA/F&NP/2019/004: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH GC RETAIL LIMITED

The representative of the company submitted that:-

Withholding VAT Refunds

Background

GC Retail Limited undertook the construction of the Garden City Mall at a cost of approximately Kshs. 4 billion and at present, the companying is carrying a significant Input VAT credit of approximately Kshs. 400 million in its VAT Returns. Noting that the Mall is offering commercial rental space, GC Retail charges VAT on the rent supply, which VAT is offset against the Input VAT credit over time.

Appointment of VAT Withholding Agents

The Finance Act, 2016 introduced the provision for the appointment of VAT withholding agents via an amendment to the Tax Procedures Act, 2015 through section 42A. The Commissioner has so far appointed forty five (45) of the tenants at the mall as withholding VAT agents.

The Finance Act, 2017 subsequently amended section 42A of the Tax Procedures Act, 2015 by introducing a new subsection (4A) which states that *"The Commissioner may at any time exempt any supplier from the provisions of this section if such a supplier has sufficiently demonstrated that due to the nature of his business and due to the application of this section, he is going to be in a continuous credit position for a period of not less than twenty four (24) month."*

In this regard, the forty five (45) tenants do not pay to GC Retail all the VAT charged due to their appointed withholding agent obligation. As such, the output VAT collected by GC Retail is less than its claimable position (Input VAT). This perpetual credit position arising from high input taxes owing to the withheld VAT has subsisted for a period exceeding twenty four (24) months.

They are unable to seek a refund of the excess input tax as the excess credit does not arise from zero rated supplies which is currently the only qualification for the application for refund of excess input tax as provided under section 17(5) of the VAT Act No. 35 of 2013. They anticipate that more of their tenants will be appointed as withholding VAT agents and as such the VAT credit offset previously anticipated will take much longer to materialise. This has had a direct adverse impact on their business and cash flows.

KRA issued "Guidelines to Taxpayers on Exemption from Withholding VAT" on 14th December, 2017. GC Retail made an application for exemption in accordance with the guidelines and they are pursuing the same with KRA.

Proposed Amendment

The proposed amendment in the Statute Law (Miscellaneous Amendment) Bill, 2019 on Section 17(5) of the Value Added Tax Act, 2013 will enable taxpayers on whom withholding VAT has

had a negative cashflow impact like GC Retail, seek a refund for the VAT that is withheld by appointed agents from the Commissioner for VAT.

Conclusion

They supported the proposed amendment as it will have a direct impact on their investment.

MIN.NO.NA/F&NP/2019/005: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH INDEPENDENT POWER PRODUCERS

Representatives of the IPPs submitted that:-

Amendment of section 17(5) of the Value Added Tax Act, 2013

Background

Kenya Power Company Limited (KPLC), the only customer of the Independent Power producers (IPPs) is a withholding VAT agent appointed by KRA. Therefore, KPLC is under obligation to withhold VAT of 6% from payment made to various suppliers including suppliers of electrical power.

Challenges

Withholding 6% of the VAT payable to IPPs, specifically those using fossil fuels like diesel, results in the accumulation of significant VAT refunds in the books of these companies. This is because a significant component of the total amount payable by KPLC for supply of electricity constitutes fuel cost reimbursements (up to 65% during peak capacity - with the balance represented by energy and capacity charges). IPPs incur 16% input VAT on heavy fuel oils and 8% VAT on automotive gas oil which is subsequently reimbursed by KPLC at a cost. Resultantly, the output VAT payable to KRA each month tends to be less than the 6% that KPLC currently withholds directly. This locks up the cash flow of the IPPs with no prospect of getting a refund as they are not making zero-rated supplies.

Most of the thermal powered (especially diesel) IPPs are already in a VAT refundable position as at April 2019. Despite the fact that since the re-introduction of the withholding VAT in January 2015, they have been operating at a very low capacity factor (in many cases minimum) and thus

very low input VAT due to minimal fuel purchases. This position will quickly escalate should there be an increase in operational capacity plunging the entities into impossible negative cash flow positions.

Moreover, the withheld VAT has resulted in accumulated irrecoverable VAT for IPPs which keeps building up and which cannot be refunded due to lack of enabling withholding VAT refund provisions under the Act.

Accordingly, the IPPs have no choice but to pass this cost to KPLC through a tariff adjustment in accordance with the Power Purchase Agreements which will eventually be passed to the final consumer. This is contrary to the government's aim of reducing the cost of power in order to increase competitiveness in the Kenyan economy.

Recommendation

Due to the challenges highlighted above, they proposed that Parliament should create a mechanism in law to address the problems associated with accumulation of the VAT credit by IPPs. To this end, they supported the provision that the excess arising out of tax withheld by appointed tax withholding agents may be applied against any tax payable under this act.

They supported the amendment of section 17(5) of the VAT Act, 2013 as contained in the Bill and proposed that it should be enacted as is.

DELIBERATIONS

1. On why the WH VAT should be scrapped, they stated that KRA systems are now automated and hence all taxpayers can be netted.
2. On the impact of the amendment to the tax revenue, the meeting was informed that the amendment does not impact tax revenue in any way because it is an administrative function of KRA and not a way to collect tax revenue.

MIN.NO.NA/F&NP/2019/006: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH AGROCHEMICALS ASSOCIATION OF KENYA

Representatives of the Association stated that:-

The introduction of 16% VAT on agricultural pest control products has resulted to the increase in cost of such products which has led to food insecurity/increased consumer prices, increase in cost of production for farmers, influx of counterfeit and illegal pesticides from neighboring countries, loss of competitiveness in the global horticultural market, reduced employment, reduced tax revenue and negative impact on the Big Four Agenda.

In view of the above, they proposed that zero rating of agricultural pest control products be re-instated in Part A of the Second Schedule of the Value Added Tax Act, 2013 as this will enable the industry to survive against external competition and assist Kenya to achieve the objectives of the Big Four Agenda.

DELIBERATIONS

On what the Association is doing with regards to poor quality of pest control products in the country, the meeting was informed that it is the duty of the Pest Control Products Board to check the quality of the products in the country and not the Association's.

MIN.NO.NA/F&NP/2019/007: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH THE PARLIAMENTARY SERVICE COMMISSION

PSC, led by the Chairperson of the Finance Committee of the Commission, Hon. Adan Keynan, MP submitted that:-

Article 93 of the Constitution of Kenya, 2010 establishes the Parliament of Kenya which consists of the National Assembly and the Senate. Article 94 of the Constitution then vests legislative making authority in Parliament. Article 95 of the Constitution then sets out the role of the National Assembly which includes representing the people in the constituencies, legislation, budget making, exercising oversight over State Organs and approving declarations of war and extensions of states of emergency. Article 96 of the Constitution provides for the role of the Senate which includes representing the counties, participating in the law making function of Parliament, determining the allocation of national revenue among the counties and participating in the oversight of State Officers.

Article 127 of the Constitution establishes a single Parliamentary Service Commission for the Parliamentary Service that is responsible for the provision of such services and facilities to

ensure the efficient and effective functioning of Parliament. The Parliamentary Service Commission is comprised of the following:

(a) The Speaker of the National Assembly as chairperson;

(b) Seven members appointed by Parliament from among its members of whom-

(i) Four shall be nominated equally from both Houses by the party or coalition of parties forming the national government, of whom at least two shall be women; and

(ii) Three nominated by the parties not forming the national government, at least one of whom shall be nominated from each House and at least one of whom shall be a woman; and

(c) One man and one woman appointed by Parliament from among persons who are experienced in public affairs, but are not members of Parliament.

(d) The vice-chairperson is elected from among the above seven (7) Members of Parliament.

(e) The Clerk of the Senate is the Secretary to the Commission.

It is important to recall that prior to the year 2000 there was no Parliamentary Service Commission and Parliament relied on the Office of the President to provide it with services and facilities. This was an unfortunate situation which led to Parliament not being properly facilitated to perform its constitutional duties and further infringed on the principle of separation of powers.

The Parliamentary Service Commission was established by an amendment to section 45 of the former Constitution of Kenya in the year 1999 and operationalized by the enactment of the Parliamentary Service Act in 2000. The Commission has been re-established by Article 127 of the Constitution of Kenya, 2010.

The Parliamentary Service is organized into the following-

(a) The National Assembly Service which is responsible for the provision of services and facilities to the National Assembly;

(b) The Senate Service which is responsible for the provision of services and facilities to the Senate;

(c) The Parliamentary Joint Services which is responsible for the provision of services and facilities to both Houses of Parliament that are cross-cutting in nature and whose duplication in each House would not be prudent use of resources;

(d) The Centre for Parliamentary Studies and Training which is a semi-autonomous institution responsible for the provision of training services to Members and staff of Parliament and the County Assemblies.

Following the promulgation of the new Constitution, the Clerk of the National Assembly continued as the Accounting Officer for the Parliamentary Service Commission until the appointment of a Clerk to the Senate/Secretary of the Parliamentary Service Commission as the Commission's sole Accounting Officer in July 2013.

As the realities and challenges of managing a bi-cameral Parliament became apparent, the Parliamentary Service Commission became concerned that the activities of the National Assembly required the approval, and were accounted for, by the Clerk of the Senate despite the fact that the National Assembly had its own Clerk appointed under Article 128 of the Constitution. The Commission therefore considers that the most appropriate manner of handling the issue is to have the law provide that the Cabinet Secretary in the National Treasury shall designate as an accounting officer such other officer in the parliamentary service as the Commission may resolve.

The National Assembly in 2014 amended section 2(1) of the Public Finance Management Act to have two Accounting Officers with the Clerk of the National Assembly being the additional Accounting Officer.

The Commission has taken the considered view that to enhance service delivery it would be more appropriate that those services provided jointly and equally to the Houses be under the accounting superintendence of an Accounting Officer or Accounting Officers as the Parliamentary Service Commission may deem necessary.

It is important to note that section 2(1)(c) of the Public Finance Management Act provides that the accounting officer in the case of the Judiciary is the Chief Registrar of the Judiciary. The Judicial Service Commission therefore informs the Cabinet Secretary in the National Treasury who is the holder of the office of Chief Registrar of the Judiciary for purposes of formal appointment of the accounting officer for the Judiciary.

In respect of the national government, the Cabinet Secretary in the National Treasury designates in writing accounting officers for the various national government entities and ensures that there is an accounting officer in each national government entity.

The Commission is convinced that the proposed amendment to section 2(1) of the Public Finance Management Act shall enhance service delivery as well as accountability and responsibility in the administration of Parliament.

The Parliamentary Service Commission supported the proposed amendment.

DELIBERATIONS

1. On whom the PSC accounts to, the meeting was informed that PSC just like other Commissions is accountable to Kenyans through Parliament. PSC is accountable to all Committees of Parliament depending on the matter under interrogation.
2. On why a specific officer could not be assigned the role of accounting officer, the meeting was informed that the position will be assigned on need basis and thus different officers will be assigned as accounting officers depending on the matter.
3. The meeting was also informed that the essence of the amendment is to create ownership of services in Parliament hence enhancing accountability.

MIN.NO.NA/F&NP/2019/008: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH PRICEWATERHOUSECOOPERS LIMITED

Representatives of PWC submitted that:-

Refund of VAT credits arising from Withholding VAT

They supported the amendment to section 17(5) to the VAT Act, 2013 to introduce paragraphs (c) and (d). Once the proposed amendments are passed, registered persons will have an opportunity to either apply for a refund of VAT credits as a result of WH VAT or utilize it to offset any tax payable. The proposed amendment is a welcome move and it is expected to address cash flow challenges experienced by taxpayers following the introduction of WH VAT.

Refund of VAT credits under special circumstances

Section 17 of the VAT Act, 2013 provides for VAT refunds to registered persons who are in a VAT credit position as a result of making zero rated supplies. However, there are other special circumstances in which registered persons accumulate VAT credits and are not entitled to VAT refunds under the current VAT legislation. As a result of the restrictive VAT refund regime, businesses have encountered cash flow challenges. Below are some of the scenarios that can result in huge VAT credits and their proposed amendment to the VAT Act, 2013:-

VAT credit on liquidation of an entity – some businesses have significantly high VAT credits in their VAT returns at the time of closing the operations or liquidation. Currently, there are no

guidelines on the treatment of such VAT credits and from a strict interpretation of the VAT Act, such entities would not be entitled to a refund of the excess input VAT credit owing to the fact that the credits did not arise from making zero rated supplies.

Changes in market strategy – external environmental factors such as competition in the market may force businesses to make changes to their strategy and operations e.g. where a business changes its model by expanding its market outside Kenya in a bid to grow and generate foreign exchange. The expansion of a business' export market impacts the generation of output VAT as export sales are zero rated. For businesses that have accumulated VAT credits that would ideally have been off-set against future output VAT, a change to zero rated sales translates to inability to utilize or apply for a refund of the historical VAT credit.

Capital investment – businesses accrue significant VAT credits as a result of major capital investments which can only be offset against future output VAT. In some instances, the VAT on capital investments may take up to five years to be fully utilized. In such cases, the businesses may end up with cash flow constraints since they are not entitled to refunds. Where a business under this situation is unable to generate sufficient output tax to offset the inbuilt input tax, either due to the operating model or other business circumstances, the VAT credit in the company's VAT returns will not be offset in the foreseeable future and the impact would generally be on the company's cash flow and ability to continue as a going concern.

Proposed Amendment

In the light of the above impact of cumulative VAT credits, they proposed that section 17(5) of the VAT Act, 2013 be amended by inserting the following paragraph, *"(e) the Commissioner is satisfied that such excess tax arises from special circumstances of the registered person's business and the registered person has sufficiently demonstrated that due to such circumstances, the excess input tax will not be recovered as output VAT for a period of not less than 12 months"*.

Justification

The amendment will address the cash flow challenges by businesses who have significantly high VAT credits without sufficient output VAT to offset the credit due to various factors some of

which have been enumerated above. As a result of improved cash flows, such taxpayers will be able to undertake more investments which will spur the economic growth. This is in addition to making Kenya an attractive investment destination for companies undertaking significant capital investments.

MIN.NO.NA/F&NP/2019/009: MEETING TO DELIBERATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 WITH COULSON HARNEY LLP

Representatives of the Company submitted that:-

The VAT Act, 2013 only permits refunds where there is excess input tax as a result of making zero rated supplies; refund for tax paid in error; or on bad debts subject to certain conditions.

The amendment proposes two things:-

a) To provide that one can utilize Withholding VAT (WHVAT) credits against any VAT payable in the Act and;

b) To provide that WHVAT credits can be part of a refund claim to the Commissioner in VAT refund application.

WHVAT is VAT withheld by a recipient of taxable supplies who is appointed by the KRA to deduct VAT and remit the same to KRA against a supplier. The WHVAT rate is 6%. The VAT withholding agent is expected to remit the WHVAT (6%) to the KRA and remit the balance (10%) to the supplier of taxable supplies.

From a legislative perspective, it is not clear how a registered person could utilize the VAT credits arising from WHVAT. They noted that in the practice, suppliers utilize the VAT credit arising from the WHVAT against VAT payable when accounting for VAT.

Likewise, registered persons who make both standard rated supplies and zero-rated supplies and are perpetually in a VAT credit position, ordinarily include the WHVAT element in a VAT refund claim to the Commissioner.

The proposed amendment therefore attempts to bring clarity to what was poor law. It remains to be seen if the amendment will achieve this.

The Microfinance Act, 2006 (No. 19 of 2006)

Sharia compliant microfinance institutions will be able to engage in wholesale and retail trade in line with the Sharia law restrictions against interests (Riba). This amendment follows the amendments to the SACCO Societies Act, 2008 (No. 14 of 2008) by the Finance Act, 2017 providing that the CS in consultation with SASRA shall create regulations for the licensing and supervision of Sharia compliant SACCO societies. These amendments may be first stepping stones towards the establishment of suitable regulatory framework for Sharia compliant finance institutions.

The Public Finance Management Act, 2012 (No. 18 of 2012)

Empowers the PSC to designate accounting officers in the parliamentary service in addition to the two clerks of the Houses of Parliament. This amendment seeks to actualize the resolution already made by PSC on 14th February, 2019.

MIN.NO.NA/F&NP/2019/010: ADJOURNMENT/ NEXT MEETING

The meeting was adjourned at 1.20pm. The next meeting will be held at 2.15 pm that day.

HON. JOSEPH K. LIMO, MP

(CHAIRPERSON)

SIGNED .....**DATE**.....7/5/19.....

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KENYA REVENUE AUTHORITY
ISO 9001:2015 CERTIFIED

(1) Dlaws 29/4/19

NATIONAL ASSEMBLY
MAIN RECORDS UNIT
29 APR 2019
RECEIVED (3)
NAIROBI - KENYA

KRA/M&C/SEEM/PARL/2019/003

25th April, 2019

Mr. Michael Sialai, EBS
Clerk of the National Assembly
Parliament Buildings
P. O. Box 41842-00100
NAIROBI

Dear Mr. Sialai,

SUBMISSION OF COMMENTS ON THE STATUTE LAW (MISC. AMENDMENTS) BILL, 2019

We acknowledge receipt of your letter **Ref: NA/DCS/F&NP/2019/033** dated 17th April, requesting KRA to submit a comprehensive analysis and comments on the amendment of the Statute Law (Miscellaneous Amendment) Bill, 2019 in regards to the Value Added Tax Act, 2013 (No. 35 of 2013).

Enclosed please find our submission for consideration by the Committee.

Yours Sincerely,

(2) LEGAL
pls deal
FA
30/4/19

Gwandera.

GRACE WANDERA
FOR: COMMISSIONER GENERAL

RECEIVED
29 APR 2019
CLERK'S OFFICE

(3) EMBOSS
pls note
FA
30/4/19

KENYA REVENUE AUTHORITY

ISO 9001:2015 CERTIFIED

KENYA REVENUE AUTHORITY'S SUBMISSION TO THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL ON THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 2019.

25TH APRIL 2019

KENYA REVENUE AUTHORITY
Confirmed
P. O. Box 48240 - 00100, NAIROBI
Date: 26/04/19
Sign:

1.0 INTRODUCTION

The Departmental Committee on Finance and National Planning through their letter Ref: **NA/DCS/F&NP/2019/033** dated 17th April, requesting KRA to submit a comprehensive analysis and comments on the amendment of the Statute Law (Miscellaneous Amendment) Bill, 2019 in regards to the Value Added Tax Act, 2013 (No. 35 of 2013).

2.0 SUBMISSION OF COMMENTS ON THE STATUTE LAW (THE MISCELLANEOUS AMENDMENT) BILL, 2019.

We have reviewed the bill and below are our comments:

Proposed Amendments to Value Added Tax Act, 2013 (No. 35 of 2013)			
S/No.	**Section**	**Recommendation**	**Rationale/Justification**
1.	Section 17(5) of the VAT Act – It is proposed that a new paragraph (c) be inserted in the proviso as follows– "(c) the Commissioner is satisfied that such excess arises from tax withheld by appointed tax withholding agents;"	Delete proposed paragraph (c)	The purpose of withholding VAT is to enhance tax compliance by ensuring that suppliers of goods and services to withholding VAT agents who include the government pay the VAT due on those supplies. It was introduced as measure of curbing the challenge of persons supplying taxable supplies especially to government entities but not accounting for the VAT charged. When VAT is withheld, KRA then has information that a taxable supply has been made and is therefore able to ensure that the supplier fully accounts for the taxes. The withholding VAT of 6% of the taxable value, as provided under **Section 42A of the Tax Procedures Act,** is less than the VAT rate of 16% as it takes into account the input VAT that is deductible from output VAT and is therefore not intended to result in excess credit that would lead to refund claims. However, there are unique cases where due to the nature of the activities of certain taxpayers, the application of withholding VAT could result in excess credits. To address this, the law was amended vide the Finance Act, 2017 by introducing **Section 42A (4A) of the Tax Procedures Act** which provides that the Commissioner may exempt, from withholding VAT, taxpayers/suppliers who demonstrate that they are in a continuous credit position as a result of the withholding VAT.

KENYA REVENUE AUTHORITY
Confirmed
P. O. Box 48240 - 00100, NAIROBI
Date: 26/4/19
Sign:

			The law therefore already provides an avenue to address the challenge of perpetual credits arising from withholding VAT. Taxpayers can apply to the Commissioner to exempt them from withholding VAT where it gives rise to perpetual credits. It is therefore our submission that the law adequately addresses the excess credits that may arise from withholding VAT and as such the refund proposal is not necessary and should be dropped.
2.	Insert new paragraph d in the proviso – "(d) the Commissioner is satisfied that such excess arises from tax withheld by appointed tax withholding agents may be applied against any tax payable under this Act".	Delete proposed paragraph (d)	Insertion of paragraph 'd' should be deleted as it is not feasible for a taxpayer to be in both credit and payment position at the same time. It is therefore contradictory.

3.0 CONCLUSION

The above comments are hereby submitted for your consideration and should the committee require further clarifications, KRA is ready to provide the same.

KENYA REVENUE AUTHORITY
Confirmed
P. O. Box 48240 - 00100, NAIROBI
Date: 26/4/19
Sign:

KAM/10/27/mb/PW/2019

24th April 2019

Mr. Michael Sialai
Clerk of the National Assembly
Parliament of Kenya, Parliament Buildings
P.O Box 41842 - 00100
NAIROBI

Dear Sir,

RE: SUBMISSION OF MEMORANDUM ON THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL 2019

Reference is made to the afore-referenced matter and our letter dates 12th April 2019.

Following the call for memoranda published in the local newspapers on the **Statute Law (Miscellaneous Amendment) Bill 2019.** The contents of the Bill has implications to the manufacturing sector and the Association has prepared its submission for the Assembly's consideration.

The purpose of this Letter is to therefore submit our Memorandum on the Statute Law (Miscellaneous Amendment) Bill 2019.

Feedback can be sent through our physical address and through email at ceo@kam.co.ke or call +254721303335/ +254 20 2324817/8.

Thank you for the continued support.

Yours Sincerely,

Phyllis Wakiaga
Chief Executive

RECEIVED
29 APR 2019
CLERK'S OFFICE

ox 30225 - 00100 Nairobi, Kenya
ite: www.kam.co.ke
il: info@kam.co.ke
tion: 15 Mwanzi Road, Opposite Westgate Shopping Mall
nds, Nairobi

Tel: +254 20 2324817/8; 020 8155531/2, 020 2166657
Mobile: +254 722 201368, 0706 612384
Chairman: Sachen Gudka, CEO: Phyllis Wakiaga

KAM MEMORANDUM

ON

THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL 2019

SUBMITTED TO

THE CLERK, NATIONAL ASSEMBLY

BY

PHYLLIS WAKIAGA, THE CHIEF EXECUTIVE, KENYA ASSOCIATION OF MANUFACTURERS (KAM)

NAIROBI, KENYA

1.0 INTRODUCTION

Kenya Association of Manufacturers (KAM) is the umbrella body for manufacturing value add industries in Kenya. Established in 1959, the organization has over the years, prided itself as the premier business membership organization in policy analysis and advocacy, with a growing membership, now with over 1000 members in the value add industries.

2.0 BACKGROUND

The current Government has prioritized manufacturing as one of their big four agenda to be purposed within the five year period. This is in line with the priorities the Country has set out in its development blue print document Vision 2030, to grow manufacturing sector to 15% of GDP.

The Bill will affect all industrial sectors across the country and therefore of key importance to the manufacturers.

3.0 KAM PROPOSAL AND RECOMMENDATIONS

The following are KAM proposals on the **Memorandum on the Statute Law (Miscellaneous Amendment) Bill 2019** for your consideration and adoption:

KAM Memorandum

The Statute Law (Miscellaneous Amendment) Bill 2019

	Clause in Bill	Section provision to be amended	KAM Proposal	Reasons for Change/Justification
1.	**Clause 2 – Schedule Value Added Act, 2013** **Insert the word "or" at the end of paragraph (b).** **Insert the following new paragraphs immediately after paragraph (b) in the provision;**	**Section 17 (5) of the** Value Added Act, 2013 provides as follows; Where the amount of input tax that may be deducted by a registered person under subsection (1)in respect of a tax period exceeds the amount of output tax due for the period, the amount of the excess shall be carried forward as input tax deductible in the next tax period: Provided that any such excess shall be paid to the registered person by the Commissioner where— (a) the Commissioner is satisfied that such excess arises from making zero rated supplies; and (b) the registered person lodges the claim for the refund of the excess tax within twelve months	**1) Delete the proviso to Section 17 (5) and insert the following new paragraph;** *Provided that any such excess shall be paid to the registered person by the Commissioner where—* *a) the Commissioner is satisfied that such excess arises from making zero rated supplies; or* *b) the Commissioner is satisfied that such excess arises from tax withheld by appointed tax withholding agents; and* *c) the registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax becomes due and payable;*	Manufacturers commend the Government for initiating the proposal to allow for refund and off set of withholding value added tax (VAT). The proposed amendments are timely due to the existing challenges that manufacturers have been faced with in the absence of the proposed amendments. The challenges include; • The lack of legal provisions and basis to provide for refund or offsetting excess credit arising from Withholding VAT. • Increased accumulated backlog of payments owed to manufacturers by the Government arising from such credit situations. This has caused constrained cash flows required in the economy. However, the proposed amendment requires to be further amended to

from the date the tax becomes due and payable.

d) the Commissioner is satisfied that such excesses arising out of tax withheld by appointed tax withholding agents may be applied as provided for under Section 47 (4) of the Tax Procedures Act."

2) Introduce a new Section 68A

"that any registered person who at the date of commencement of section 17 (5) (b) and (d) has a credit arising from withholding VAT may within 12 months make an application for a refund or offset, notwithstanding the 12 month limitation provided under section 17 (5) (c)."

ensure it is effective in addressing the existing challenges stated.

The Association proposes the following amendments to be made:

- **The numbering sequence of the paragraphs under Section 17 (5) of the VAT Act;**
  - Retain paragraph "a" as it is in the Act and add the proposed word "or";
  - Insert the new proposed paragraph "c" to be paragraph "b" and adding the words "and";
  - Insert the original paragraph "b" under Section 17 (5) of the VAT Act to be paragraph "c"
  - Retain the proposed amendment as paragraph "d".

This will ensure sequence coherence of the provisions.

- **Reference to the Tax Procedures Act;**
  - Under the new proposed paragraph 17 (5) (d), reference has been made to the VAT Act.

The provision on Withholding VAT are under the Tax Procedures Act, specifically Section 47 (4). Reference to the VAT Act will be erroneous and should be rectified.

- **The treatment of existing outstanding credit excesses;**

- Introduce retrospective provisions to address existing outstanding credit. This is proposed to be through introducing a new section 68A that has taken into account:
  (i) The relevant Section that the retrospective provisions will apply to under the value added tax ie. Proposed Section 17 (5) (c). This will ensure there is no ambiguity on its scope.
  (ii) The limitation of the time period to make claims of the outstanding credit excess, by amending Section 68A to include a twelve months period.

2.	**Clause 2 – Schedule** **Section 32 (3)** **The Alcoholic Drinks Act No. 4 of 2010**	Section 32 (3) of the Alcoholic Drinks Act No. 4 of 2010: The statement and health warning referred to in subsection (2) shall comprise not less than 30% of the total surface area of the package.	Delete the word "package" appearing at the end of section 32(3) and substitute thereof with the word "label". The Clause will read as follows: 'Section 32 (3) ***The statement and health warning referred to in subsection (2) shall comprise not less than 30% of the total surface area of the label.'***	This provision requires the statement and health warning to comprise not less than 30% of the total surface area of the package. This is onerous on the manufacturers of alcoholic beverages for the following reasons: - a) The provisions require an investment on labels which usually does not cover the total surface area of the package. This will require an investment on specialised machinery and applicators to enable compliance with the provisions requiring that the statement and health warning comprising not less than 30% of the total surface area of the package. b) There will be increased costs in respect of returnable packaging which require cleaning and removing of labels prior to subsequent use. The cost of cleaning the returnable packaging will increase due to the coverage of

the total surface area of the package.

c) There is also a concern on the disposal of the labels covering the total surface area of the packaging. The current efforts by the government in environmental conservation will be thwarted if the labels are disposed of in an irregular manner.

The amendment of the Section is necessary to manufacturers of alcoholic drinks for the following reasons: -

1) Manufacturing is a key pillar for the Big 4 agenda with the government setting out to incentivise and ease the cost of investment for manufacturers in the country. The provision has a countervailing effect in that it increases the costs of goods produced as it has a capital investment component.
2) The increased costs of goods produced will be passed on to the ultimate consumer and thus affect

			the affordability of alcoholic drinks. In turn, some consumers will opt for illicit and counterfeit alcoholic drinks which tend to be cheaper. This impacts on health of the consumers as there is no quality assurance in respect of illicit and counterfeit goods. Ultimately, this will also impact a key government initiative of addressing issues with respect to illicit and counterfeit goods.

In response to your advertisement in the local newspapers c
interested members of the public to submit any represer
statute (miscellaneous amendment) Bill, 2019, Agrochemicals
(AAK) wishes to make this submission requesting that zero rat
control products be re-instated in Part A of the Second Schedule c
Act 2013.

1. BACKGROUND.

Established in 1958, AAK is an umbrella organization of supp
technologies for agricultural production in Kenya. The association
main objective of product stewardship which includes training farn
of the pest control technologies and protection of the environment,
that all suppliers follow the code of conduct that ensures self-regula
is in this capacity that AAK has been concerned by the negative
taxation of the Agrochemical industry in Kenya. In particular, AA
frequent changes of the VAT rate on agricultural pest control pro
years starting from the implementation of The Value Added Ta

on government to develop competitive strategies that increase in
(foreign and local investment) so as to increase the value of pro
addition industries. From this enlarged "cake", shall the govern
revenues arising from the multiplier effects.

We know that the technocrats argue that the introduction of 16% V
increase the cost of manufacturing agricultural pest control produ
self-crediting system. However, it should be understood that the fi
to the farmers who cannot benefit from the VAT system because u
produce are VAT exempted. Ultimately, the tax is passed to the
through increased prices of farm produce.

The effect of high prices of pest control products have been mani
areas:

i. **Food insecurity/increased consumer prices:**

Farmers of maize, potato, rice and local vegetables rely on pes
Losses that result from inadequate pest control as a conseq
pesticides have risen from the current 30-40% to upwards of 7C
farmers. Such losses are unacceptable for farmers who are barely t
a situation has culminated in shortages and increased consumer

iv. **Competitiveness in the Global Horticultural market:**

Kenya has in the recent past ***lost 13% of the fresh produce mark*** such as Ethiopia, Rwanda and some South American Countries. This among other things, increasing production costs. A larger marke relinquished since more companies are likely to divest from conducive alternative capital bases. This shrinkage shall affect Fore employment and related support services. A corresponding shrink ***200 Billion horticulture sector***, would mean that the governmen ***annually*** from fresh produce exports.

A case in point; New sanitary and phytosanitary measures institut has seen over 30 companies and their numerous small scale outgr due to the pest free zones required for False codling Moth mana pesticide cost would further make the market inaccessible for e players and outcompete Kenya from this lucrative market segment.

v. **Reduced employment**

Employment in the agricultural and rural economy has been adv yields which reduces the income to the farmer. Reduced income de

Tax Act 2013

4. **Conclusion**

AAK requests the National Treasury and the Departmental Committ and Trade to adopt this proposal so that the industry can st competition and assist Kenya to achieve the objectives of Big 4 enjoy high quality life.

Eric Kimunguyi.

Chief Executive Officer
Agrochemicals Association of Kenya

cc: Patrick Amuyunzu - Chairman AAK

CropLife KENYA

Dear Mr. Speaker,

THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 201

Thank you for your letter dated April 17, 2019, inviting comment: (Miscellaneous Amendment) Bill, 2019 (the Bill). We note that th amendments to various Acts of Parliament, including the Microfir under the purview of the Central Bank of Kenya (CBK).

CBK supports the expansion of Sharia-Compliant finance and fina including Sharia-Compliant microfinance banking, as a channel fc a matter of fact, consistent with the Government's vision of the fir been working over the last year to finalise a draft legal and regulat Sharia Compliant banking and microfinance banking. In this regar tremendously from experiences of other jurisdictions and interacte international standard setter, the Islamic Financial Services Board.

On the specific proposal in the Bill, we have the following observa

1. The proposed amendment is inadequate for purposes of Sharia

Sincerely,

Patrick Njoroge

Dr. Patrick Njoroge

cc: Mr. Henry Rotich, EGH
Cabinet Secretary/The National Treasury
NAIROBI

Hon. Justice Paul Kariuki
Attorney General
Sheria House, Harambee Avenue
NAIROBI

Mr. Kennedy Ogeto
Solicitor General/Sheria House
NAIROBI

327

(1) D/Coms
Please deal.
02/05/19

(2) LEGAL
pls deal
FA
02/5/19

(3) EMEG
pls note
FA 02/5/19

CPAK
Uphold Public Interest

Our Ref: ICPAK0/26/2019

26th April 2019

Mr. Michael R. Sialai, EBS
Clerk of the National Assembly
Clerks' Chambers
National Assembly
Parliament Buildings
P.O Box 41842-00100
NAIROBI

RECEIVED
30 APR 2019
CLERK'S OFFICE

Dear Mr. Sialai,

RE: ICPAK SUBMISSION ON THE STATUTE LAW (MISC.AMENDMENTS) BILL, 2019

The Institute of Certified Public Accountants of Kenya (ICPAK) is a statutory body of accountants with the mandate to develop and regulate accountancy profession in Kenya. The Institute is further mandated under Sec 8 of the Accountants' Act of 2008 to advise the Cabinet Secretary for Finance on matters relating to governance and accountability in all sectors of the economy.

Your letter dated 17th April 2019, Ref: NA/DCS/F&NP/2019/033 refers.

The Institute of Certified Public Accountants of Kenya (ICPAK) has reviewed the Statute Law (Miscellaneous Amendment) Bill, 2019 and developed a position paper detailing its proposals for your consideration. Attached herein, please find a copy of the Institute's submission.

In case of need for clarification, please do not hesitate to contact the undersigned on ceo@icpak.com or CPA Fredrick Riaga on fredrick.riaga@icpak.com

We look forward to your response and appearance before the Committee if accorded an opportunity.

Yours Sincerely,

CPA Edwin Makori
CHIEF EXECUTIVE OFFICER

Institute of Certified Public Accountants of Kenya
CPA Centre, 10th Floor, Ruaraka, Thika Road
P.O. Box 59963 - 00200
Nairobi Kenya

Tel: +254 (020) 2304226, 2304227
Cell: +254 727 531006 / 733 856262
+254 721 469796 / 721 469169

Web: www.icpak.com
Drop in box no. 164
Revlon Professional Plaza



SUBMISSIONS

ON

THE STATUTE LAW [MISCELLANEOUS AMENDMENT] BILL, 2019

The Institute of Certified Public Accountants of Kenya

	ISSUE OF CONCERN	RECOMMENDATION	LIKELY IMPACT
1.	**The Public Finance Management Act, 2012**		
	The amendment to Sec 2(1) iii reading (iii) such other officer in the parliamentary service in respect of any other office in the parliamentary service as the Cabinet Secretary shall, upon resolution by the Commission, designate, within fourteen days of the resolution". Accounting Officers are bestowed with significant responsibility for management of public assets and liabilities. The proviso inserted is vague and ambiguous with no rationale nor justification for additional accounting officers apart from the unspecified resolution by the Commission. Besides, appointing unspecified personnel at the discretion of the Commission may abrogate the powers of the accounting officer and sets a precedent that other entities may wish to follow. Having one person in whom the buck stops at, ensures that the person is ultimately responsible for every aspect of the broadcast.	Delete the amendment and retain the current definition	For clarity in responsibility, order and accountability in the management of public finances.
	New Proposals to amend section 187(1) We propose an additional amendment to include the Institute as a member of the Intergovernmental Budget and Economic Council. Since the main purpose of the Council is to provide consultation on matters relating to budgeting, the economy and financial management it makes sense to incorporate the Institute by virtue of its expertise and mandate on public finance and accountability as stipulated by the Accountants Act 2008.	Amend 187(1) by inserting a new paragraph after (h) (i) The Institute of Certified Public Accountants of Kenya	The Institute by virtue of its expertise and mandate on public finance and accountability as stipulated by the Accountants Act 2008 will add value to the Intergovernmental Budget and Economic Council.

2.	**The Kenya Law Reform Commission Act, 2013 (No. 19 of 2013)**		
	The bill deletes Section 8(1)(c) and substitutes therefor the following new paragraphs— "(c) one member, being an Advocate of the High Court of Kenya, nominated by the Law Society of Kenya and appointed by the Attorney-General; (ca) one member, being an officer in the Office of the Attorney-General, appointed by the Attorney-General." This Provision ring fences governance of the Commission to the legal profession leaving out other professionals. This process may not yield requisite mix of professionals especially if other professional bodies are not involved.	Amend Section 8(1)(c) to be more specific on the professions and expertise to the Commission to read as follows, "c) "three other persons nominated by Law Society of Kenya (LSK), Institute of Certified Public Accountants of Kenya (ICPAK) and the other an officer in the Office of the Attorney General one of whom shall be a woman, appointed by the Attorney General"	This will ensure appropriate skills mix by bringing on board both legal and financial aspects in the general governance of the Commission.
3.	**Value Added Tax (VAT)**		
	Section 17 (5) – Credit for input tax against output tax Section 17 (5) to be amended by inserting paragraph (d) in the proviso - (d) the Commissioner is satisfied that such excess arising out of tax withheld by appointed tax withholding agents may be applied against any tax payable **under this Act** The proposed paragraph is not practical as a business cannot have both VAT recoverable and payable at the same time. Further, the appropriation of tax refunds is already provided under Section 47 (4) of the Tax Procedures Act.	We propose the following under section 17 (5) ▪ delete the word "and" at the end of paragraph (a) - so that the refund is not tied to the zero-rated supplies only. ▪ Paragraph (d) .....delete the words ".... under this Act".... - and replace with the words "....as defined under the Tax Procedure Act.	To avoid inconsistency that may be brought by the amendment.

4.	**The Companies Act, 2015 (No. 17 of 2015)**		
	The Bill inserts a new section on Beneficial Ownership. This is a progressive proposal. However, we note the following concerns: The terms "owns" and "controls" need to be properly defined. Section 93(1) of the Company's Act now refers to the beneficial owners of the company, not of the shares. However, no one shareholder 'owns' the company, and probably no more than one (if any) shareholder controls the company. Moreover, the form does not ask how many shares the 'beneficial owner' holds, but asks for a description of the "Nature of control", suggesting that it is only those that control a company that have to disclose who their beneficial owners are. Equally, the definition fails to address the issue of shares held in trust. Shares in a company can be held by one individual in trust for another individual.	We propose addition of the following under Beneficial Ownership The terms "owns" and "controls" need to be properly defined. Most Anti-Money Laundering legislations define as follows "Control" as either ownership of the majority of the voting shares or control of the composition of the board of directors or in case of an individual, whether or not a person's holding meets the threshold of more than 25% of shares or voting rights. Consider customizing FATF definition of a beneficial owner that reads as follows: "Beneficial owner refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise	Proper definition of "Beneficial ownership", ''own'' and "control" will offer clarity and ease implementation

		ultimate effective control over a legal person or arrangement. Reference to "ultimately owns or controls" and "ultimate effective control" refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.	



SUBMISSIONS

ON

THE STATUTE LAW [MISCELLANEOUS AMENDMENT] BILL, 2019

The Institute of Certified Public Accountants of Kenya

	ISSUE OF CONCERN	RECOMMENDATION	LIKELY IMPACT
1.	**The Public Finance Management Act, 2012**		
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	New Proposals to amend section 187(1) We propose an additional amendment to include the Institute as a member of the Intergovernmental Budget and Economic Council. Since the main purpose of the Council is to provide consultation on matters relating to budgeting, the economy and financial management it makes sense to incorporate the Institute by virtue of its expertise and mandate on public finance and accountability as stipulated by the Accountants Act 2008.	Amend 187(1) by inserting a new paragraph after (h) (i) The Institute of Certified Public Accountants of Kenya	The Institute by virtue of its expertise and mandate on public finance and accountability as stipulated by the Accountants Act 2008 will add value to the Intergovernmental Budget and Economic Council.

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		ultimate effective control over a legal person or arrangement. Reference to "ultimately owns or controls" and "ultimate effective control" refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.	

249

Amolo & Kibanya

ADVOCATES & COMMISSIONERS FOR OATHS

N W AMOLO
W KIBANYA

ST. GEORGE'S HOUSE
2ND FLOOR, ROOM 214
PARLIAMENT ROAD

P.O. BOX 61203 - 00200
NAIROBI

TEL: 254 2227711
FAX: 254 20 211345

EMAIL: info@amolokibanya.com

YOUR REF:

OUR REF:

DATE 15TH April, 2019

1. The Clerk
   The Senate
   Parliament Building
   NAIROBI.

2. The Clerk
   The National Assembly
   Parliament Buildings
   NAIROBI.

RECEIVED
17 APR 2019
CLERK'S OFFICE

3. The Chairperson
   Departmental Committee of Finance and National Planning
   The National Assembly of Kenya
   Parliament Building
   NAIROBI.

Dear Sir/Madam,

Re: Memorandum on The Statute Law (Miscellaneous Amendment) Bill. Kenya Gazette Supplement No.33 (National Assembly Bills No. 21 of 2019)

Pursuant to the provisions of Article 118(1)(b) of the Constitution of Kenya the subjoined memorandum placed before you for your perusal and consideration.

1. The clerk to the National Assembly has caused to be published an invitation to the public to submit of Memoranda regarding the above referenced Bill relating to several Acts of Parliament and this Memorandum is with respect to the Public Finance Management Act No. 18 of 2012.

2. Honourable Members of the Departmental Committee are now invited to peruse and consider the representations made to The Clerk, National Assembly of Kenya dated 18th May, 2017 concerning the Parliamentary Service Bill 2017 (National Assembly Bills No. 18 of 2017) because those concerns apply with equal force with those relating to the above referenced Statute Law (Miscellaneous Amendment) Bill, 2019 which has already undergone the 1st Reading. *A copy is annexed as "Appendix A".*

3. The framers of the Constitution of Kenya 2010 as adopted by the people of

Kenya in a Nationwide Referendum contemplated, in Chapter 15 thereof, a number of Constitutional Commissions and Independent Offices as specified in Article 248 (2) and (3). The Parliamentary Service Commissio. (*The PSC*) is a creature of Article 127 of the Constitution of Kenya, 2010. The officers in the PSC are the Chairperson (the speaker of the National Assembly) SEE (Article 127 (2) (a)), The Vice-Chairperson (elected by the members of the Parliamentary Service Commission from among members appointed SEE Article 127 (2)(c), Seven (7) members (appointed by parliament from among its members who are members of the National Assembly and The Senate) Article 127 (2) (c), and The Secretary (The Clerk of The Senate) SEE Article 127 (2) (d),

4. The PSC is again addressed by Article 248 (2)(d). The objects, authority and funding of the Constitutional Commissions and Independent Office are specified in great detail by Article 249 and the composition, appointment and terms of office of the Constitutional Commissions and Independent Offices are specified in Article 250 and Sub-Article (12) thereof proceeds in very clear terms to provide:-

> *"2. There shall be a secretary to each commission who shall be-*
> *(a) appointed by the commission and,*
>
> *(b) the chief executive officer of the commission.*

however, Article 250 (12(b) is otiose and indeed superfluous considering that Article 127(3) already designates The Clerk of the Senate to be Secretary of The PSC.

5. Indeed, since Article 233 (5) and 6) of the Constitution provides that The Secretary to the Public Service Commission (yet another Constitutional Commission) is the Chief Executive Officer thereof, there is nothing wrong with the constitutional requirement that the Secretary of The Parliamentary Service Commission is the Chief Executive Officer.

OBSERVATION

By reason of Constitutional fiat and imperatives The Clerk of The Senate is the Secretary/Chief Executive Officer of the PSC and is designated the Accounting Officer by the provisions of Section 2 of the Public Finance Management Act.

The proposed amendment published by Statute Law (Miscellaneous Amendment) Bill, 2019 seeks to dilute the office and authority of the Secretary/Chief Executive Officer of the PSC by creating two accounting officers who shall not consider themselves obliged to defer to the authority

of the Secretary/Chief Executive Officer. Therefore the proposed amendment to Section 2(1) of the Public Finance Management Act shall be inconsistent with and offend The Constitution of Kenya, 2010 and it is in the circumstances unconstitutional for seeking to derogate from the clear constitutional provisions.

6. To underscore the above observations under Paragraph (4) above, The Constitution of Kenya, 2010 at Article 2 provides as follows:-

> *"2(1) This Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of Government.*
>
> *(4) any law, including Customary Law, that is inconsistent with this constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid"*

7. The words or phrase "state organ" is clearly interpreted vide Article 260 of the Constitution of Kenya 2010 as follows:-

> *"...a commission, Office, agency or other body established under this constitution..."*

and it cannot be argued that Parliament of Kenya, as constituted by The National Assembly of Kenya and The Senate of Kenya ARE NOT state organs. Article 93 of the Constitution of Kenya, 2010 establishes The Parliament of Kenya and the National Assembly being part and parcel of parliament has no authority to do anything derogating from what the Constitution of Kenya, 2010.

8. This petition is therefore an entreaty to the Departmental Committee of Finance and National Planning of the National Assembly, The Speaker of the National Assembly and the speaker of The Senate to decline to amend the Public Finance Management Act No. 18 of 2012 as proposed by the Statute Law (Miscellaneous Amendments) Bill, 2019.

Yours Faithfully,

Amolo & Kibanya

N.W Amolo

REPUBLIC OF KENYA

DN · 12/5/17
STD · 12/5/17

NATIONAL ASSEMBLY
ELEVENTH PARLIAMENT – FIFTH SESSION

In the Matter of consideration by the National Assembly -
The Parliamentary Service Commission Bill, 2017

SUBMISSION OF MEMORANDA

Article 118(1)(b) of the Constitution provides that *"Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees."* Standing Order 127(3) states that *"the Departmental Committee to which a Bill is committed shall facilitate public participation and shall take into account views and recommendations of the public when the Committee makes its report to the House"*.

The Parliamentary Service Commission Bill, 2017 seeks to repeal and replace the Parliamentary Service Act, No.10 of 2000. Article 127 of the Constitution of Kenya 2010 establishes a Parliamentary Service Commission and Article 128 of the Constitution provides for the offices of the Clerks of the Houses of Parliament and the offices of members of staff of the clerks as offices in the Parliamentary Service. The changes in the constitutional regime have made it necessary to review the Parliamentary Service Act 2000 in order to ensure that it complies with the provisions of the Constitution of Kenya 2010.

Comparing all the other constitutional Commissions and independent Offices referred to in Chapter Fifteen of the Constitution, which are independent entities that operate outside the national government and county government functional dichotomy, have enacted operational legislation that is in tandem with the new constitutional principles but the Parliamentary Service Commission is still operating under a legislation made under the old constitutional order.

The Parliamentary Service Bill, 2017 has undergone First Reading pursuant to Standing Orders 127 (3) and is now committed to the **Departmental Committee on Justice and Legal Affairs** for consideration and thereafter report to the House. Pursuant to Article 118(1) (b) and Standing Order 127(3), the Committee invites interested members of the Public to submit any representations they may have on the said Bill. The representations may be forwarded to the **Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi**; hand-delivered to the **Office of the Clerk, Main Parliament Buildings, Nairobi**; or emailed to **clerk@parliament.go.ke**; to be received **on or before Friday 19th May 18th, 2017 at 5.00 pm.**

MICHAEL R. SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY

AMOLO & KIBANYA

ADVOCATES AND COMMISSIONERS FOR OATHS

HEAD OFFICE
NAIROBI
Parliament Road
St George's House 2nd floor, Room 214
P.o Box 61203 - 00200
Tel: 020 2227711
Email:info@amolokibanya.com
Mobile: 0722 738100/0722704233

BRANCH
KERUGOYA
Co-operative Building (KIRICOP)
1st Floor, Room 241
P.O Box 1374 - 10300
Mobile: 0708-051252
Email:info@amolokibanya.com

OUR REF: YOUR REF: DATE

18thMAY 2017

RECEIVED
18 MAY 2017
CLERK'S OFFICE

THE SENATE CLERK'S OFFICE
RECEIVED
18 MAY 2017
P.O. Box 41842 - 00100, NAIROBI

The Clerk,
The National Assembly of Kenya,
Parliament Buildings,
NAIROBI.

The Clerk,
The Senate of Kenya,
Parliament Buildings,
NAIROBI.

REF:The Parliamentary Service Bill, 2017 (National Assembly Bills No. 18)

1. INTRODUCTION.

The Parliamentary Service Bill, 2017 which was published on 7th April 2017 and was first read on 9th may 2017 seeks to repeal the Parliamentary Service Act No. 10 of 2000 and make provisions regarding the Parliamentary Service Commission and Parliamentary Service as contemplated by the Constitution of Kenya 2010.

2. HISTORY OF THE PARLIAMENTARY SERVICE COMMISSION

The question of the independence of Parliament can be traced back to a Motion by Hon. Jean Marie Seroney moved on 20thMarch, 1970 proposing that the National Assembly be a self-accounting unit independent of any Government Ministry or

N.W AMOLO B.W KIBANYA M.N MANYASA

Department to ensure the supremacy and dignity of Parliament.It was resolved that the National Assembly should be a self-accounting unit[1].

Thereafter in 1993, in light of the repeal of section 2(A) of the former Constitution of Kenya, the National Assembly resolved to look into ways of establishing a Parliamentary Service Commission[2].it was not until the "Oloo-Aringo reforms' championed by Hon. OlooAringo did the establishment of the Parliamentary Service Commission become a reality. On 4th November, 1998, Hon.Oloo-Aringo moved a Motion in the National Assembly for the establishment of the Parliamentary Service Commission *"to promote and consolidate the dignity, independence and the supremacy of Parliament"* and which shall be directly responsible to the National Assembly. Hon.Oloo-Aringo, in his submissions to the House,recalled the 1993 Resolution and stated that the dignity, independence and supremacy of Parliament are derived from the premise that the people are collectively sovereign and that it is Parliament which exercises that sovereignty on behalf of the people.

Subsequently,Hon.Oloo-Aringo introduced a Constitution of Kenya (Amendment) Bill that sought to amend Sections 45 and 107 of the former Constitution to establish the Parliamentary Service Commission[3]. The Constitutional Amendment No.3 of 1999 was thereafter enacted.The Constitutional provisions were operationalized by the Parliamentary Service Commission Act, 2000 and the Standing Orders were amended to reflect the changes.

3. THE PARLIAMENTARY SERVICE COMMISSION UNDER THE CONSTITUTION OF KENYA, 2010

The Parliamentary Service Commission is a creature of Article 127 of the Constitution of Kenya, 2010. Article 127 (2) and (3)of the Constitution of Kenya, 2010 provides for the membership as follows-

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[1]Kenya National Assembly Official Record (Hansard), February 6- March 20, 1970, Parliamentary Debates, pg.1665 (Google Books) [accessed 11th May, 2017]

[2] Kenya National Assembly Record (Hansard), November, 4, 1998 , Parliamentary Debates ,pg. 2109 (Google Books) [accessed 11th May, 2017]

[3]Kenya National Assembly Record (Hansard), May, 12, 1999 , Parliamentary Debates ,pg. 2109

(2) The Commission consists of-

(a) the Speaker of the National Assembly, as chairperson;

(b) a vice-chairperson elected by the Commission from themembers appointed under paragraph (c);

(c) seven members appointed by Parliament from among itsmembers of whom—

(i) four shall be nominated equally from both Houses by theparty or coalition of parties forming the national government,of whom at least two shall be women; and

(ii) three shall be nominated by the parties not forminghe national government, at least one of whom shall benominated from each House and at least one of whomshall be a woman; and

(d) one man and one woman appointed by Parliament fromamong persons who are experienced in public affairs, butare not members of Parliament.

(3) The Clerk of the Senate shall be the Secretary to theCommission.

Article 127(4) provides for the vacation office of a Commissioner while Article 127 (5) provides for the term of officer of a Commissioner. Article 127 (6) provides for the responsibilities of the Commission as follows-

(a) providing services and facilities to ensure the efficient andeffective functioning of Parliament;

(b) constituting offices in the parliamentary service, andappointing and supervising office holders;

(c) preparing annual estimates of expenditure of the parliamentaryservice and submitting them to the National Assemblyfor approval, and exercising budgetary control over theservice;

(d) undertaking, singly or jointly with other relevantorganizations, programs to promote the ideals ofparliamentary democracy; and

(e) performing other functions-

(i) necessary for the well-being of the members and staff ofParliament; or

(ii) prescribed by national legislation.

Article 128 provides for the offices of the Clerk of the Senate and the National Assembly as follows-

(1) There shall be a Clerk for each House of Parliament, appointed by the Parliamentary Service Commission with the approval of the relevant House.

(2) The offices of the Clerks and offices of members of the staff of the Clerks shall be offices in the Parliamentary Service.

Over and above Articles 127 and 128 of the Constitution of Kenya, 2010The Parliamentary Service Commission is listed under Chapter 15 which provides for –

(a) the composition, appointment and terms of office of the Constitutional Commissions (Article 250);
(b) removal of office(Article 251);
(c) general functions and powers (Article (252)
(d) incorporation of commissions and independent offices ; and
(e) reporting by commissions and independent offices to Parliament and the President.

Administratively, the structures of the Parliamentary Service is divided into three services namely:-

(i) National Assembly Service,
(ii) Senate Service, and
(iii) Joint Services.

The composition of membership of the Parliamentary Service Commissionunder the Constitution of Kenya, 2010 embraced the bicameral nature of Kenya's Parliament. The distinct mandates of the National Assembly and the Senate implies that there was a deliberateintention by the drafters of the Constitution to create balanced representation in the Parliamentary Service Commission.. By virtue of Article 127(2)(a) the Speaker of the National Assembly is the Chairperson of the Commission, while by virtue of Article 127(3) the Clerk of the Senate is Secretary to

the Commission. The Speaker of the Senate and the Clerk of the National Assembly are by deliberate design not members of the Commission.

Due to the impartial and apolitical nature expected of the Staff of the Parliamentary Service, there is a clear separation between the administrative leadership and the political leadership of Parliament (represented by the leader of Majority Party and the leader of Minority party in both houses) which ensures the protection of the impartiality of staff from political interferences.

The anchoring of the Parliamentary Service Commission in the Constitution of Kenya, 2010 serves to address the independence of the Parliament. As the 11th Parliament approaches its twilight, it is prudent and necessary that it continues to promote development and evolution of parliamentary democracy. Consequently, the Parliamentary Service Bill, 2017 should put into considerationparliamentary jurisprudence and ensure the independence of the two Houses of Parliament and the need to have a balanced Parliamentary Service Commission.

4. THE PARLIAMENTARY SERVICE BILL, 2017

Some of the highlights of the Parliamentary Service Bill, 2017 include-

Clause 2of the Parliamentary Service Bill replaces the interpretation of several terms as follows-

- The Bill proposes use of the word "chairperson" in place of "chairperson"

- The term "Clerk" is unconstitutionally expanded to include both the Clerk of the National Assembly and the Clerk to the Senate

- Commission makes a conscious distinction between the Parliamentary Service Commission established under the Constitution of Kenya, 2010 from the one that had been established under Section 45B of the former Constitution

Clause 9 of the Bill provides for the qualifications and procedure for appointment for members of the Commission appointment of Article 127(2) (d) from appointees who are not members of Parliament.

Observation.

Article127 of the Constitution of Kenya, 2010 is quite elaborate on the composition of the Parliamentary Service Commission. Article 127 (2) ordains the Speaker of The National Assembly as the Chairman while Article 127 (4) ordains that the Clerk to the Senate shall be Secretary. Article 127(c) names Seven Members of Parliament – Four from the Government side and Three from the opposition side- shall be nominated due regard to the gender balance being observedas members of the Parliamentary Service Commission and from this a Vice-Chairperson is to be elected. The tragedy is that the Parliamentary service Bill purports to ignore and negate what the Constitution of Kenya has already put in place. It is unconstitutional.

Clause 16 provides for the role of the Secretary to the Commission.

Observation

(i) The role that Clause 16 purports to address serves to defeat Article 127(3) as read with Article 250(12) of the Constitution of Kenya, 2010. The former Article ordains that the Clerk to theSenate shall be Secretary to the Commission and the later Article ordains that the Secretary shall be the Chief Executive Officer. Article 250(12) of the Constitution states that-

"(12) There shall be a Secretary to each commission who shall be—

(a) Appointed by the commission; and

(b) The chief executive officer of the commission."

The duties of the CEO are known and that being so the Parliamentary Service Bill seeks to deliberately dilute those duties. In this regard please see Clause 16(e) of the Parliamentary Service Bill. The Commission has not been given any power by the Constitution of Kenya.

Clause 18 makes reference to "The Clerks..." and since the Constitution in its wisdom did not make any reference to the clerks of both the National Assembly and the

Senate, the said Clause 18 is in the circumstances unconstitutional. The provisions do not seem to be exhaustive of the scope of functions of the Secretary to the Commission. Specifically-

The duties of the Secretary to the commission in a sample of Constitutional Commissions is as follows-

No.	Constitutional Commission	Provision in the Statute	Functions of the Secretary
1.	Independent Electoral and Boundaries Commission	Section 10 (7) of the IEBC Act, 2011	(7) The secretary shall be— (a) the chief executive officer of the Commission; (b) head of the secretariat; (c) the accounting officer of the Commission; (d) custodian of all commission's records; (e) responsible for— (i) executing decisions of the Commission; (ii) assignment of duties and supervision of all employees of the Commission; (iii) facilitating, co-ordinating and ensuring execution of Commission's mandate; (iv) ensuring staff compliance with public ethics and values; and (v) the performance of such other duties as may be assigned by the law and Commission
2.	Salaries and Remuneration Commission	Section 16(3) of the SRC Act, 2011	(3) As the chief executive officer, the secretary shall be responsible to the Commission for— (a) the implementation of functions of the Commission; (b) the formation and development of an efficient administration; and (c) the organization, control and management of staff
3.	Judicial Service Commission	Section 21 of the JSC Act, 2011	(1) As Secretary to the Commission, the Chief Registrar shall, in relation to the proceedings before the Commission, act in accordance with the provisions of the Constitution, this Act and any other written law and shall, in particular, be responsible for— (a) the acceptance, transmission, service and custody of documents in accordance with this Act;

			(b) the enforcement of decisions of the Commission; (c) certifying that any order, direction or decision is an order, direction or decision of the Commission, the Chairperson or a member, as the case may be; (d) causing to be kept records of the proceedings and minutes of the meeting and such other records as the Commission may direct; and (e) undertaking any duties assigned by the Commission. (2) With the authorisation of the Commission, the Secretary may consider and dispose of procedural or administrative matters in accordance with this Act. (3) Any administrative function of the Secretary under this Act may in the Secretary's absence, be performed by any member of staff of the Commission whom the Chairperson may authorise for that purpose.
4.	Kenyan National Commission on Human Rights	Section 21 (3) of the KNCHR Act, 2011	(3) The secretary shall be the chief executive officer of the Commission and head of the secretariat and shall be responsible to the Commission.
5.	Public Service Commission	Section16 (7) PSC Act, 2012	7) The secretary shall be- (a) the chief executive officer of the Commission; (b) head of the secretariat; (c) the accounting officer of the Commission; (d) custodian of the commission's records; (e) responsible for— (i) the execution of the decisions of the Commission; (ii) assignment of duties and supervision of the staff of the Commission; (iii) facilitating, co-ordinating and ensuring the execution of Commission's mandate; (iv) the preparation and submission of the programmes necessary for the achievement of the Commission's mandate for approval by the Commission; (v) ensuring staff compliance with public service values, principles and ethics; and (vi) the performance of such other duties as may be assigned by the Commission or any other written law.

The practice in Constitutional Commissions is that the Secretary is the head of the Secretariat which constitutes all staff that are employed/appointed under the

Commission.This clause seems to limit, and undesirably so, the constitutional mandate of the Secretary(see Articles 127(3) and 250(12)(b) of the Constitution of Kenya, 2010 to the extent of equating and reducing it to minute-taking exercise.

Clause 17 provides for the procedure for appointment for the Clerk of each House pursuant to Article 128 of the Constitution and THIS IS FINE as long as no move is made to confuse the fact that the Clerk to the Senate is the Constitutional office-holder of Secretary of the Parliamentary Service Commission. **Clause 18** provides for the administrative functions of the Clerk in the capacity of clerk and no more.

Observation

Clause 18 of the Bill provides that the Clerks of either House shall be responsible for the overall management of staff under their respective control including appointment, promotion and discipline of the members of staff. Regard ought to be had to the Clerk of the Senate who wears two constitutional hats, the Secretary to the Commission and the Clerk of the Senate and plays overall role in both Houses and care needs to be taken not to derogate on that reality, and not to confer upon the Clerk of the National Assembly a position which is reserved for the Clerk of the Senate.

Further observing that all employees appointed to both Houses are under the Parliamentary Service Commission and that the respective Houses are not the employing entity, it would be fitting to have the Secretary to the Commission to oversee and be in-charge of the execution of all the Commissions decisions with regard to the management of staff specifically, the appointment, promotion, discipline and deployment of staff to serve in any other area in the parliamentary service the Commission deems fit. The Secretary may in Consultation with the Commission assign or delegate any of the functions to an employee of the Commission

Clause 21 of the Bill provides for the suspension or the removal of a Clerk.

Observation

Clause 21(3) provides that that if the Clerk does not furnish a reply to the charge or charges within the period specified, or if in the opinion of the Commission the Clerk fails to exculpate himself or herself, the Commission shall remove the Clerk from office. The clause is ambiguous as to the threshold of evidence or the criteria that the Commission would use to determine evidence that would satisfy exoneration. Further, noting that the office of the Clerk is a constitutionally mandated office under Article 128, the threshold for removal should be in tandem with Article 251 of the Constitution of Kenya, 2010 and the neglect to observe this irreducible minimum renders the Bill unconstitutional .Noting that the appointment as a Clerk is approved by the relevant House and further noting the peculiarity and the importance of the functions of a Clerk of a House given that parliament is a political environment, dismissal/ removal from office requires approval by the relevant House.

Clause 22 provides for the offices in the Parliamentary Service.

Observation

Clause 22(5) specifies that in establishing the offices of the Parliamentary Service, the Commission should have regard to strengthening the offices under Article 108(1) namely the office of the Leader of the Majority Party and Leader of the Minority Party. The Bill is silent on other offices such as the Offices of the respective Speakers of the House of Parliament, the Speakers Panel and Whips in both Houses and any other office that may come to exist in the future. The Parliamentary Service Commission is constitutionally empowered to rationalize the deployment of staff to meet any identified need. The Bill should also set out the pecking order to be in sync with the reality that the Clerk to the Senate is the Chief Executive Officer and the responsibilities set ot in Article 127(6) of the Constitution of Kenya, 2010.to do otherwise would be to mutilate that Constitution.

Clause 23 seeks to anchor the Office of the Joint Services in legislation which shall be headed by the Director-General.

Observation

The Parliamentary Joint Services provide shared services to both Houses of Parliament. Observing that the Joint Services is already administratively established and the head of the joint services is a staff of the Clerks of the Houses pursuant to Article 128(2) of the Constitution, establishing it as an independent office in the statute shall offend the provisions of this article of the Constitution unless those offices report to theSecretary of the Parliamentary Service Commission.

Further, it needs to be noted that ultimately the joint services serve the Houses of Parliament and the head of the joint services performs functions and duties delegated to him by Secretary to the Commission. It is also to be noted that thisprovision may be contradicting clause 18(c) of the Bill which provides that all staff should be under the management of either Clerks of the Houses. It may seem therefore that the staff assigned to the Joint Services under the management of the Director-General will be outside the jurisdiction of the Clerks of the Houses.

Clause 24 of the Billestablishes a center for Parliamentary Studies and Training.The Centre for Parliamentary Studies and Training (CPST) was established by the Parliamentary Service Commission (PSC) in December 2008. It is provided for in law under theParliamentary Service (Centre for Parliamentary Studies and Training) Regulations, 2011(Legal Notice No. 95 of July 22, 2011). It is currently one of the Directorates of the Parliamentary Service Commission.In addition to serving the members and staff of Kenya Parliament, Commission Paper No. 286 of September 26, 2009, expands its objectives and mandate, to serve other stakeholders, who may be interested in gaining an appreciable understanding of Parliament, to also serve the Parliaments of the East African Community, the Great Lakes Region and the Continent of Africa at large but not limiting ourselves from engagement with other global Parliamentary institutions.The purpose and objective of establishing CPST, was to have a one-stop specialized Resource Centre for the training and capacity

development of both the members and staff of Parliament of Kenya, County Assemblies and other Legislatures[4].

Observation

Noting the shared role to serve the Houses of Parliament, there is need to specify the scope of the roles functions of the Executive Director vis-à-vis the Board of the Centre provided under Section 5 of the CPST Regulations , resource allocation to CPST and the reporting lines with the Clerks and the Commission. The provision of the clause should conform to the provisions of Article 128(2) of the Constitution.

Clause 47 of the Bill proposes to amend Section 2(1) of thePublic Finance Management Act, 2012 on the interpretation of '***...accounting officer...***' to allow the Parliamentary Service Commission to designate another office within its edifice as an accounting officer over and above the Clerk to the Senate.

Observation

Clause 47 of the Bill does not specify who the additional accounting officer should be. Noting that resources allocated to Parliament are derived from the Consolidated Fund, there is need to ensure accountability and prudent use of public resources by limiting the number of accounting officers. An accounting officer should be a definite officer recognized under the law and the Constitution has already done by providing that the Secretary shall be the Chief Executive Officer. Where the law does not recognize the accounting officer and attendant accounting unit, it may give room to discretion, arbitrariness and ambiguity a state of affairs that shall erode confidence in public resources management.It is noteworthy that Parliament already has two accounting officers, the Clerk of the Senate and the Clerk of the National Assembly which appears was necessary to ensure the independent roles of the two Houses of Parliament under Article 95 and 96 the Constitution. This was however a departure from other Constitutional Commissions which have only one accounting officer who is also the CEO of the Commission. A proposal to create additional accountingunits within the service may be inessential.

[4] http://www.parliament.go.ke/cpst/management.html [accessed 9th May, 2017]

Clause 48 of the Bill proposes to amend the Third Schedule of the Kenya Citizenship and Immigration Act, 2011 to entitle Members of Parliament to diplomatic passports.

Observation

Section 14 of the Kenya Citizenship and Immigration Act, 2011 states as follows with regard to persons entitled to hold diplomatic passports-

(1) The persons occupying the offices or having status set out in the Third Schedule together with the members of their families specified, with respect to each category, shall be entitled, upon application, to be issued with diplomatic passports.

(2) The Cabinet Secretary may, where he considers it necessary, authorize the issuance of a diplomatic passport to a person who does not fall in any of the categories set out in the Third Schedule.

(3) The holder of a diplomatic passport shall, upon ceasing to hold the office or having the status specified in the Third Schedule, surrender the diplomatic passport.

(4) Any passport that has not been surrendered in accordance with paragraph (3) shall cease to be valid, with effect from the date of ceasing to hold the office or having the status specified in the Third Schedule.

The following persons are entitled to hold diplomatic passports under the Third Schedule-

1. President and immediate family members
2. Prime Minister and immediate family members
3. Vice President/Deputy president and immediate family members
4. Cabinet Secretary and spouse(s)
5. Secretary to the Cabinet and spouse(s)
6. Principal Secretaries and spouse(s)
7. Speakers of National Assembly and the Senate and spouse(s)
8. Chief Justice and spouse(s)
9. Deputy Chief Justice and spouse(s)

10. Justices of Supreme Court and spouse(s)
11. Justices of Court of Appeal and spouse(s)
12. Attorney General and spouse(s)
13. Director of Public Prosecutions and spouse(s)
14. Solicitor General and spouse(s)
15. Controller of Budget and spouse(s)
16. Auditor General and spouse(s)
17. Governor of the Central Bank and spouse(s)
18. Clerk of the National Assembly and spouse(s)
19. Chief of the Kenya Defence Forces and spouse(s)
20. Service Commanders of the Kenya Defence Forces and spouse(s)
21. Director-General of the National Intelligence Service and spouse(s
22. Inspector General of the National Police Service and spouse(s)
23. County Governor and spouse(s)
24. Aide-De-Camp to the President
25. Former Presidents and spouse(s)
26. Former Prime Minister and spouse(s)
27. Former Vice Presidents and spouse(s)
28. Foreign Service Officer, spouse and dependent children below the age of 19 years

The status of diplomatic persons is recognized under international law in treaties such as the Vienna Convention on Diplomatic Relations, 1961. Though not automatically conferred by a diplomatic passport, accredited diplomats are may also be granted diplomatic immunity.

Persons entitled to a diplomatic passport are those occupying an office which is required to carry out frequent foreign assignments on behalf of the government or official duty abroad.

In many jurisdictions, due to the status accorded to the passport internationally, diplomatic passports are restricted to a specific category of offices and persons who

have foreign assignments. Proof of an official diplomatic appointment is a prerequisite for being granted a diplomatic passport in countries such as **South Africa**[5]

In **Canada** under the Order in Council P.C. 2005-2216, the Minister of Citizenship and Immigration may, in his or her discretion, authorize the issuance of a diplomatic passport. The persons entitled to a diplomatic passport are specified under the law.Parliamentary Officers entitled to diplomatic passports include-

(i) the Speakers of the Senate and the Speakers of the House of Commons;

(ii) The Leader of the Opposition in the Senate and the Leader of the Opposition in the House of Commons.

However, in Canadathe Minister of Citizenship and Immigration has the discretion to authorize the issuance of a special passport (not a diplomatic passport) to members of the Senate and members of the House of Commons for the duration of that they hold the office[6].

On the other hand, a number of countries issue diplomatic passport to members of parliament. These include Armenia, Algeria, Benin, Cameroon, Cape Verde, Mali, Togo, Chile, Ecuador, Czech Republic, Hungary, Romania, Slovakia, Greece and Turkey. Germany also issues diplomatic passports to members of Parliament; however, the use of a diplomatic passport is restricted to travel in connection with parliamentary business[7].

Some jurisdictions such as Canada and Belgium also have a third category of passports which is a special passport which may cater for MPs, senators, governors, and non-diplomats employed by the government who are travelling on an official

[5] http://www.visasouthafrica.org/blog/diplomatic-passports/ [accessed 10th May, 2017]

[6] Government of Canada Website , http://www.cic.gc.ca/english/passport/officialtravel/eligibility.asp [accessed 10th May, 2017]

[7] Marc van der Hulst , The Parliamentary Mandate: A Global Comparative Study , Inter-Parliamentary Union, Geneva, 2000 https://books.google.co.ke/books?id=NG6hOvzActoC&pg=PP2&dq=Diplomatic+passports+for+members+of+parliament+comparative&source=gbs_selected_pages&cad=2#v=onepage&q=Diplomatic%20passports%20&f=false [accessed 11th may, 2017]

mission abroad. Similarly, an official passport (which holds less protection than a special passport) is issued in countries such as Finland, Israel, Jordan and Poland. However, the United States and Japan restrict official passport only for official business.

Some countries like the United Kingdom and Spain, diplomatic passports are only issued to the Speaker of the Assembly and members of parliament use ordinary passports[8].

Considering the large number of Members of Parliament (416 members, their spouses and children), it would be difficult to determine whether the passports would be used for official business or for personal business. However, diplomatic passports can still be issued at the discretion of the Cabinet Secretary, where he considers it necessary as provided under Section 14 (2) of the Kenya Citizenship and Immigration Act, 2011.

WALUSALA AMOLO
ADVOCATE
P. O. Box 61203,
NAIROBI.
18.5.2017

[8] Ibid.

(3) Cmeeting 255 pls note FA 24/4/19 (2) LGATH ✓ pls deal FA 24/4/19 (1) blanks 24/4/19

SUBMISSION ON THE PROPOSED AMENDMENT OF SECTION 17(5) of the value added tax, act 2013 (no. 35 of 2013) THROUGH THE KENYA GAZETTE SUPPLEMENT NO. 33 (NATIONAL ASSEMBLY BILLS NO. 21) AND THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019

The bill seeks to amend the act to provide for a taxpayer to apply any withheld tax to his credit to offset any other tax liability due from the taxpayer.

Current Act	Proposed Amendment
S. 17(5) Where the amount of input tax that may be deducted by a registered person under subsection (1) in respect of a tax period exceeds the amount of output tax due for the period, the amount of the excess shall be carried forward as input tax deductible in the next tax period: Provided that any such excess shall be paid to the registered person by the Commissioner where— (a) the Commissioner is satisfied that such excess arises from making zero rated supplies; and (b) the registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax becomes due and payable.	Insert the word "or" at the end of paragraph (b). Insert the following new paragraphs immediately after paragraph (b) in the proviso- "(c) the commissioner is satisfied that such excess arises from tax withheld by appointed tax withholding agents; (d) the commissioner is satisfied that such excess arising out of tax withheld by appointed tax withholding agents may be applied against any tax payable under this act."

THE NATIONAL ASSEMBLY
RECEIVED
24 APR 2019
DIRECTOR COMMITTEE SERVICES
Time:.....

RECEIVED
23 APR 2019
CLERK'S OFFICE

The rational of the amendment

The Value Added Tax (VAT) of Goods and Services Tax (GST) was first introduced in France in 1948 (Yesegat, 2016). Since its introduction, VAT/GST has spread around the world and has been adopted in more than 160 countries worldwide. According to (Yesegat, 2016) indicates that this withholding excess tax can result in an increased VAT burden for the registered person that never has access to or use of the VAT payment system and which may encounter difficulties in getting any refund of excess tax hence amendment (d) stand inadequate.

The act is about recovery of excess value added tax to the registered person. The principle act states that where excess input over output is due to making zero rated supplies, then VAT refund is due and should be lodged within 12 months from the date the tax was payable. The amendment proposes that when the registered person is overtaxed in the tax period the excess amount shall be paid back to the registered person by the commission in cases where (c) the excess arises from tax withheld by appointed tax withholding agent, (d) when such excess arises from tax withheld by tax withholding agents, this excess may be ploughed back against any tax payable under the act. In the United States of America, value added tax act on chapter 4 states the requirements for withholding agents including who is a withholding agent, how much a withholding agent is expected to hold and when to withhold (IRS., 2019).

In sub-Saharan Africa, most countries such as South Africa have embraced revenue systems and how the excess tax is refunded (EastAfricanCommunity, "n.d") however most of them including those in East and Central Africa have not developed a clear cut rational of the tax withholding agent.

What are the shortcomings or limitations of the amendment?

Part (c) of the amendment has failed to state the requirement for a withholding agent which may include who is a withholding agent, how much a withholding agent is expected to hold and when to withhold as in the case of United States of America value added tax act chapter 4. In addition, the amendment does not inform the registered person why the tax withholding agent must withhold taxes.

The amendment has failed to specify a specific timeframe when refunds are made and what penalties it has put in place in case it does not refund during the stipulated timeframe for instance Burundi's VAT act states that Refund are done within 90 days from the time of application and Failure to refund within that period, a penalty of 1% per month of delay will be paid. In addition Burundi also has its excess VAT refunded by cheque after clearance of tax debts by the taxpayer (EastAfricanCommunity, "n.d")therefore the amendment has failed to stipulate the mode of payment of any excess VAT.

The withholding system can lead to confusion among taxable persons who consider that they are freed from further VAT obligations when VAT has been withheld by their clients and who thus fail to subsequently declare the taxable supplies they have made. VAT withholding scheme can lead to several problems. (Yesegat, 2016) indicates that this scheme can result in an increased VAT burden for the supplier that never has access to or use of the VAT payment and which may encounter difficulties in getting any refund of excess input tax.

The weaknesses or inadequacy of the act hence need for amendment

The act has failed to state the requirement for a withholding agent which may include who is a withholding agent, how much a withholding agent is expected to hold and when to withhold as in the case of United States of America value added tax act chapter 4. Further the act does not inform the registered person why the tax withholding agent must withhold taxes hence need for amendment of part (c).

The act has failed to specify a specific timeframe when refunds are made and what penalties it has put in place in case it does not refund during the stipulated timeframe for instance Burundi's VAT act states that Refund are done within 90 days from the time of application and Failure to refund within that period, a penalty of 1% per month of delay will be paid. In addition Burundi also has its excess VAT refunded by cheque after clearance of tax debts by the taxpayer (EastAfricanCommunity, "n.d") also the act has failed to stipulate the mode of payment of any excess VAT hence need for further amendment.

Recommendations

It is on the basis of the above premises that we support the proposed amendments

SUBMISSION ON THE PROPOSED AMENDMENT OF SECTION 2 (1) (D) OF THE PUBLIC FINANCE MANAGEMENT ACT, 2012 (NO. 18 OF 2012) THROUGH THE KENYA GAZETTE SUPPLEMENT NO. 33 (NATIONAL ASSEMBLY BILLS NO. 21) AND THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019

Principle Public Finance Management Act	Proposed Amendment
Section 2(1) In this Act, unless the context otherwise requires— "accounting officer" means— d) In the case of the Parliamentary Service Commission, the Clerk of the Senate;	Delete paragraph (d) in the definition of 'accounting officer' and replace therefore the following new paragraph (d) In the case of the Parliamentary Service Commission; i. The clerk of the senate in respect to the senate ii. The clerk of the National Assembly in respect to the National Assembly iii. Such other officer in the Parliamentary Service Commission in respect of any other office in the Parliamentary Service as the Cabinet Secretary shall, upon a resolution by the commission designate, within 14 days of the resolution.

The bill seeks to amend Section 2(1) of the Public Finance Management Act, 2012 (NO. 18 of 2012) to empower the parliamentary service commission to designate, by a resolution additional accounting officers in parliamentary service commission, in addition to the clerks of the two houses as shown below.

Currently, the Commission consists of the Speaker of the National Assembly, as the Chairman, seven Members appointed by Parliament and one Woman and one Man appointed by Parliament

from persons who are experienced in Public affairs but are not Members of Parliament. The Clerk of the Senate is the Secretary to the Commission.

Possible rationale for the amendment

Borrowing from the UK which practices bicameralism- the House of Commons and the House of Lords, both houses have an accounting officer. The accounting officer is the clerk of each respective house. (mps and lords/principal/clerk-commons, n.d.). The United States Congress is also bicameral and is made up of the House of Representatives and the Senate. Both Houses have different accounting officers, the Chief Administrative Officer serves the house while the secretary of the senate serves the Senate. These houses are autonomous in the duties.

In Africa, particularly, Southern Africa, the Public Finance Management Act 1999, chapter 5, part 1 s.1 states that 'Every department and every constitutional institution must have an accounting officer (TREASURY., (1999).)

Weaknesses of the proposed amendments

Therefore, the question is, does it mean that there will be restructuring in the composition of the

The proposed amendments will alter financial reporting in the Parliamentary Service Commission by creating additional accounting officers

The amendments also seem to aim at reducing the powers of the clerk of the senate from being an accounting officer for both houses of parliament to being an accounting officer to the senate only.

Section 66 (1) of the Public Finance Management Act, 2012 states,

'Subject to the Constitution, the accounting officer of the Judiciary, Parliamentary Service Commission, constitutional commissions and independent offices shall monitor, evaluate and oversee the management of public finances in their respective entities, including' – other duties.

The accounting officer of the Parliamentary Service Commission is the Clerk of the Senate

The amendments further indicate that Parliamentary Service Commission will have powers to designate, by a resolution additional accounting in respect of any other office in the Parliamentary Service as the Cabinet Secretary shall, upon a resolution by the commission designate, within 14 days of the resolution.

This, in our view is a huge deviation from what is the practice in other COMMISSIONS AND INDEPENDENT OFFICES contained in CHAPTER FIFTEEN of our constitution. The commissions are:

1. The Kenya National Human Rights and Equality Commission;
2. The National Land Commission;
3. The Independent Electoral and Boundaries Commission;
4. The Parliamentary Service Commission;
5. The Judicial Service Commission;
6. The Commission on Revenue Allocation;
7. The Public Service Commission;
8. The Salaries and Remuneration Commission;
9. The Teachers Service Commission; And
10. The National Police Service Commission.

All the above commissions have one accounting officer, it therefore illogical that the Parliamentary Service Commission is seeking to have additional accounting officers. It is even confusing when the amendments seek not to specify the maximum number of accounting officers that the parliamentary service commission can designate.

It is further our submission that designating additional accounting officers in the parliamentary service commission will result in distorting the membership of the commission and water down the level of accountability in public financial management. We therefore submit that the amendments be rejected.

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The Chairman and Members
Departmental Committee on Finance and National Planning
Main Parliament Building
Parliament Road
Nairobi

Attention: The Clerk of the National Assembly
Office of the Clerk

16 April 2019

Dear Sirs,

Re: In the matters under consideration by the National Assembly – The Statute Law (Miscellaneous Amendment) Bill, 2019

Memorandum of Representation

Pursuant to Article 118(1)(b) of the Constitution of Kenya and pursuant further to Standing Order 127(3), The Departmental Committee of Finance and National Planning, now considering the Statute Law (Miscellaneous Amendment) Bill, 2019 have called for participation and involvement in the legislative process by the public. PricewaterhouseCoopers Limited ("PwC", "Us", "We") are pleased to submit a memorandum containing our views on the proposed amendments contained in the Statute Law (Miscellaneous Amendment) Bill, 2019.

We would be grateful for an opportunity to appear before the Committee to further deliberate with your members on our proposal and recommendations.

Matters for inclusion in the Statute Law (Miscellaneous Amendment) Bill, 2019

We set out below our recommendations for amendment to the Value Added Tax Act, 2013 (VAT Act, 2013) which, if adopted will have the potential to transform the Kenyan economy.

1. Refund of VAT credits arising from Withholding VAT

We support the proposed amendment to Section 17 (5) to the VAT Act, 2013 to introduce paragraphs (c) and (d). Once the proposed amendments are passed, registered persons will have an opportunity to either apply for a refund of VAT credits as a result of Withholding VAT (WH VAT) or utilise it to offset any tax payable. The proposed amendment is a welcome move and it is expected to address cash flow challenges experienced by taxpayers following the introduction of WH VAT.

2. Refund of VAT credits under special circumstances

Section 17 of the VAT Act 2013, provides for VAT refunds to registered persons who are in a VAT credit position as a result of making zero rated supplies.

However, there are other special circumstances in which registered persons accumulate VAT credits

PricewaterhouseCoopers Limited. PwC Tower, Waiyaki Way/Chiromo Road, Westlands
P O Box 43963 – 00100 Nairobi, Kenya
T: +254 (20)285 5000 F: +254 (20)285 5001 www.pwc.com/ke

Directors: U Akpata* S Cheruiyot J Kabochi E Kerich B Kimacia M Mugasa T Mukora A Murage F Muriu S Mutinda P Ngahu R Njoroge S O Norbert's O Nyambego S Okello B Okundi K Saiti M Thoithi (* Nigerian)

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and are not entitled to VAT refunds under the current VAT legislation. As a result of the restrictive VAT refund regime, businesses have encountered cash flow challenges. We highlight below some of the scenarios which can result in huge VAT credits and our proposed amendment to the VAT Act, 2013.

- **VAT credit on liquidation of an entity** - Some businesses have significantly high VAT credits in their VAT returns at the time of closing the operations or liquidation. Currently, there are no guidelines on the treatment of such VAT credits and from a strict interpretation of the VAT Act, such entities would not be entitled to a refund of the excess input VAT credit owing to the fact that the credits did not arise from making zero rated supplies.

- **Changes in market strategy** - External environmental factors such as competition in the market may force businesses to make changes to their strategy and operations, e.g. where a business changes its model by expanding its market outside Kenya in a bid to grow and generate foreign exchange. The expansion of a business's export market impacts the generation of output VAT as export sales are zero rated.

  For businesses that have accumulated VAT credits that would ideally have been off-set against future output VAT, a change to zero rated sales translates to inability to utilize or apply for a refund of the historical VAT credit.

- **Capital investment** - Businesses accrue significant VAT credits as a result of major capital investments which can only be offset against future output VAT. In some instances, the VAT on capital investments may take up to five years to be fully utilized. In such cases, the businesses may end up with cash flow constraints since they are not entitled to refunds.

  Where a business under this situation is unable to generate sufficient output tax to offset the in-built input tax, either due to the operating model or other business circumstances, the VAT credit in the company's VAT returns will not be offset in the foreseeable future and the impact would generally be on the company's cash flow and ability to continue as a going concern.

Proposed Amendment:

- In light of the above impact of cumulative VAT credits, we propose that Section 17 (5) of the VAT Act, 2013 be amended by inserting the following paragraph:

(e) "*the Commissioner is satisfied that such excess tax arises from special circumstances of the registered person's business and the registered person has sufficiently demonstrated that due to such circumstances, the excess input tax will not be recovered as output VAT for a period of not less than 12 months*"

Justification and benefits:

It is our view that this amendment will address the cash flow challenges by businesses who have significantly high VAT credits without sufficient output VAT to offset the credit due to various factors some of which have been enumerated above. As a result of improved cash flows, such taxpayers will be able to undertake more investments which will spur the economic growth. This is in addition to making Kenya an attractive investment destination for companies undertaking significant capital investments.

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Conclusion

We are happy to provide additional information, clarification or submission to you as appropriate. We would also appreciate an opportunity to discuss our proposal with your office.

Yours sincerely
For: PricewaterhouseCoopers Limited

Maurice Mwaniki
Associate Director

cc:

Director - Phyllis Makau
The Parliamentary Budgetary Office
Protection House, 10th Floor
Parliament Road
Nairobi

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NJOROGE WACHIRA & CO.

Advocates, Commissioners for Oaths & Notaries Public

NJOROGE WACHIRA B. COM., LLB
TRANSNATIONAL PLAZA, 7TH FLOOR
MAMA NGINA STREET
P.O. BOX 10016-00400
NAIROBI, KENYA

TEL: 2222204
2222205
FAX: 2222206
MOBILE: 0729 852164

(3) Guests pls note FT 24/4/19

Our Ref: SAB/001/COM/2017

Your Ref: TBA

Date: 25th March 2019

(1) Director's 16/04

(5) Legal's pls deal FT 24/4/19

The Clerk to the National Assembly
The National Assembly of the Republic of Kenya
Kenya Parliament Buildings
Parliament Road
Nairobi

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CLERK'S OFFICE

RE: SUBMISSION OF MEMORANDUM: PROPOSED AMENDMENTS TO THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019

We act for ABDI SAID (hereinafter referred to as our "client"), upon whose instructions we address you as hereafter.

Following your advertisement in the local dailies inviting the members of the public to submit memorandum on the Statute Law (Miscellaneous Amendments) Bill, 2019 we wish to submit as follows:-

1. Islamic Finance, commonly known as sharia compliant financing model, is one of the recognised models of financial systems in the International Financial Services Regulation worldwide.

2. The Islamic Finance system is geared towards promoting fairness and equity in financial transactions by avoiding payment of interest, what is commonly known as haram in the Islamic faith.

3. The Islamic Finance system applies to banking and insurance products in the country. In particular, the Barclays Bank of Kenya was the first to introduce Shariah compliant banking products. In relation to insurance, Takaful Insurance Africa was the first Shariah compliant Takaful operator. Savings and Credit Cooperative Organisations (Saccos) have also launched Shariah compliant products in response to the growing demands from members.

4. With the growing number of Islamic finance service providers, the market has grown which has also increased the tax base for the government to collect revenue, noting many persons from the Islamic faith were previously shying away from purchasing Islamic financial products due to their unavailability in the Kenyan market.

5. The uptake of Shariah compliant financial products in the microfinance sector has however been hampered due to barriers created by the legal regimes that exist.

6. A case in point is **Section 14** of the **Microfinance Act, 2006** which completely prohibits microfinance banks from engaging in the wholesale and retail trade of all products including sharia compliant products.

7. We, on behalf of our client, therefore support the proposed amendment to **Section 14(1)(f)** of the **Microfinance Act, 2006** as this will allow microfinance banks which are sharia compliant to engage in wholesale and retail trade.

8. This will in turn grow the customer base for such products, increase the tax base and eventually grow government revenue targets in terms of tax collected from such businesses.

We appreciate your kind proposal.

Yours Faithfully
NJOROGE WACHIRA & COMPANY

Diana Waititu
waititudiana@gmail.com

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KPMG

KPMG Advisory Services Limited
8th Floor, ABC Towers
Waiyaki Way
PO Box 40612 00100 GPO
Nairobi, Kenya

Telephone +254 20 2806000
Email info@kpmg.co.ke
Website www.kpmg.com/eastafrica

(3) Emelia
pls note FA 24/4/19

(1) Letter
pls deal
FA
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Clerk of the National Assembly
Parliament Buildings
Parliament Road
P.O Box 41842 - 00100
Nairobi, Kenya

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16 April 2019

Dear Sir

Memorandum: In the Matter for Consideration by the National Assembly of the Statute Law (Miscellaneous Amendment) Bill, 2019

The Memorandum on Statute Law (Miscellaneous Amendment) Bill, 2019 (the Bill) seeks to make amendments to various statutes including the Value Added Tax Act, 2013 (No. 35 of 2013) (VAT Act).

The Bill proposes to amend Section 17(5) of the VAT Act to allow taxpayers from whom VAT has been withheld to claim a refund from the Kenya Revenue Authority (KRA) where the Commissioner is satisfied that such excess arising out of tax withheld by appointed tax withholding agents may be applied against any tax payable under the VAT Act.

It is our understanding that the Bill seeks to amend the VAT Act to provide for a taxpayer to apply any withheld tax credit to offset any other tax liability due from them. We note that while the proposed amendment is welcome and will have an impact in releasing the working capital locked in WHVAT credits that would never be utilised.

Generally, WHVAT are usually significant amounts. In light of the focus on manufacturing and agricultural value addition as key elements of the Big 4 Agenda, it is critical that the KRA implements a quicker and practical solution to WHVAT refund claims given the current backlog for VAT refunds at the KRA.

One solution would be to allow taxpayers to set-off approved claims against other tax obligations such as corporation tax, Pay As You Earn (PAYE or even withholding tax rather than waiting for actual cash refunds. This has worked well in the past and can help to cushion businesses against the cash flow constraints and interest costs associated with refund delays.

We have therefore summarised in the Appendix to this leter our proposal to the Bill to allow the implementation of the above in line with the achievement of the Big 4 Agenda. We trust that our submissions as stated above will receive a positive consideration. We are available to make clarifications on the above submissions and to engage further at a time and place of your choosing. In the meantime, please do not hesitate to contact us for any clarification and/or additional information.

Yours sincerely

Clive Akora
Director – Tax & Regulatory Services

KPMG Advisory Services Limited is a registered company and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity.

Directors
(British*)
(Canadian**)
(Spanish***)
(Ghanaian****)

EE Aholi
BC D'Souza
JM Gathecha
S Gill
JI Kariuki
GM Kasimu
PI Kinuthia
DA Leahy**
G Manu****

AM Mbai
JG Mirapeix***
NN Mosa
JN Mugo
JL Mwaura
BM Ndung'u
JM Ndunyu
AW Pringle*
S Sanghrajka

Appendix I: Proposed changes to the Value Added Tax Act (No. 35 of 2013) – VAT Act

Proposal	Issue with the clause	Proposed amendment	Justification
The Bill proposes to allow a taxpayer to apply for a refund for excess value added tax (VAT) arising from tax withheld by appointed withholding agents (WHVAT). Paragraph (d) however provides that the Commissioner must be satisfied that such excess may be applied against any tax payable under the VAT Act.	While paragraph (c) is a welcome amendment, the proposed proviso under paragraph (d) is unclear and may negate the proposed change since the excess tax credit arises because there is no tax payable by the taxpayer under the VAT Act. In addition, such a proviso would give the Kenya Revenue Authority (KRA) a lee way to reject applications for WHVAT refunds.	We request that paragraph (d) be amended follows: *(d) Where, in relation to an application for a refund made under subsection (c) above, the Commissioner is satisfied that the tax is refundable, the Commissioner shall authorise the crediting of the taxpayer's iTax ledger with amount of the approved tax credit to be utilised against any other tax obligations by the taxpayer.* *Provided that a person who, prior to the commencement of this subsection, had excess tax credit arising from tax withheld by appointed withholding agents may apply for a refund under this section.*	It is our understanding that the Bill seeks to amend the VAT Act to provide for a taxpayer to apply any withheld tax credit to offset any other tax liability due from them. Our proposal effectively clarifies this position as this is unclear as currently worded from the Bill. The proposal allows the amount approved for refund to be available to be utilised against any other tax obligations that the taxpayer may have instead of waiting for tax refunds that presently take too long to be approved. In addition, there are taxpayers who already have excess VAT credit arising from WHVAT who will not be able to utilize them unless the provision is allowed to apply retrospectively.

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COULSON HARNEY LLP
5th Floor, West Wing, ICEA Lion Centre
Riverside Park, Chiromo Road
PO Box 10643-00100, Nairobi, Kenya
+254 20 289 9000 | +254 709 966 000
+254 20 444 8614 | +254 734 993 739
PIN No. P051229962P | VAT No. 0191639L

www.bowmanslaw.com

Our Reference: RTH/SLMAB/2019 Your Reference: TBA
Direct Line: +254 20 289 9000 Date: 23 April 2019
Email Address: richard.harney@bowmanslaw.com

The Office of the Clerk of the National Assembly
Clerk's Chambers
The National Assembly
Parliament Buildings
P. O. Box 41842 – 00100
Nairobi, Kenya
For the kind attention of: Mr. Michael Sialai, EBS

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Dear Sirs

REVIEW OF THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL 2019

We refer to the Statute Law (Miscellaneous Amendments) Bill 2019 (the **Bill**) which seeks to amend several pieces of Kenyan legislation.

We have conducted a review of the Bill, specifically, the amendments it proposes to make to the following legislation:

1. the Companies Act 2015;
2. the Value Added Tax Act (No. 5 of 2013);
3. the Alcoholic Drinks Control Act (No. 4 of 2010);
4. the Wildlife Conservation and Management Act (no. 47 of 2013);
5. the Microfinance Act (No. 19 of 2006); and
6. the Public Finance Management Act (No. 18 of 2012)

Our review is enclosed with this letter as Annexure 1. We appreciate the opportunity to voice our opinions and comments regarding the above legislation and we look forward to further discussions on the same. Please contact the undersigned if you have any queries on the same.

1. CIAZEMIZA
2. LEATH
3. ADEN
4. ESTHER

Pls deal

Yours faithfully
COULSON HARNEY LLP

RICHARD HARNEY

Partners RT St A Harney | JSP Coulson | JW Karanja | KC Michira | JN Syekei | AG Njage | CK Kigera | PV Shah | EN Monari | A Njogu | N Mukuha | SM Omondi | TA Mwango | AN Mathini | M Runji | J Mbui | DO Indokhomi | VS Shah | CL Kuyo | **Directors** R Field | KO Evans | SJ Matthews

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ANNEXURE 1

THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL 2019

The Statute Law (Amendment) Bill 2019 (the Bill) proposes make amendments to various statutes as follows.

	STATUTE	CURRENT LAW	PROPOSED AMENDMENT	COMMENTS/IMPLICATIONS (IF ANY)
1.	THE COMPANIES ACT 2015			
	Private Companies			
		Section 9 (1)(a) Definition of private company- For the purposes of this Act, a company is a private company if – (a) its articles – (i) restrict a member's right to transfer shares; (ii) limit the number of members to fifty; and (iii) prohibit invitations to the public to subscribe for shares or debentures of the company	For the purposes of this Act, a company is a private company if – (a) its articles – (i) restrict a member's right to transfer shares; (ii) limit the number of members to fifty; (iii) prohibit invitations to the public to subscribe for shares or debentures of the company; and (iv) requires the consent of all members to add a new member.	**Contentious** The proposed new extension to the definition of a private company is unconventional and impractical. The onus for the determination of the type of consent (ordinary, special or unanimous) required to effect an admission of a new member/investor by way of transfer of shares or subscription for shares/equity is a matter solely to be determined by a company's members in its articles of association. Private companies opted to delegate that power to their boards of directors. This practice has found a place in companies' legislation since it is now very prevalent in Commonwealth nations for the board to retain the power to

				approve transfers and allotments to new members. The Companies Act, 2015 (**Companies Act**) cannot purport to legislate the internal workings of a company to the exclusion of the doctrines of freedom of association and privity of contract that have underpinned private company formation for centuries. This amendment also vacates the power of the board of directors, if given the authority by the Articles of Association or by resolution of the members (as currently provided in the Companies Act) to approve transfers of shares and allotment of shares to a new member by requiring that the company at general meeting must unanimously approve that transfer or allotment of shares to a new member. Large portions of the powers of directors will become redundant and unworkable in the Companies Act if this new definition is approved. It also has the practical and legal effect that one person holding only one share can veto the admission of new members who may be intending to invest large sums for the development of the company. The situation

				where members of a private company disappear or die would greatly complicate this – making it impossible to develop the company while this subsists. Where shares are held by nominees or by other companies this would require that consent of persons in those entities must be obtained before the right can be exercised – again greatly and unnecessarily complicating the operation of private companies. This kind of a provision is a deterrent to investment and will be harmful to Kenya's economic and development agenda.
	Company to keep register of beneficial owners			
		Section 93 (1) Every company shall keep a register of its members which shall include information relating to beneficial owners of the company, if any.	Every company shall keep a register of its members ~~which shall include information relating to beneficial owners of the company, if any~~.	**Acceptable** as this section reverts to the original wording of section 93 (1) under the Companies Act.
		Section 93(2)(c) A company shall enter in its register of members – (c) the date on which any person ceased to be a member;	Delete (c) ~~the date on which any person ceased to be a member~~	**Contentious** The removal of the requirement to enter the date on which a shareholder ceases to be a shareholder in the register of records will create disparity in the company's books that

				are unclear. The register of members is relied upon by the Registrar of Companies, the courts, officers, members of the company and members of the public who may rely on the register to determine who the current members of the company are. It must be noted that the register of members is *prima facie* evidence of all matters stated therein – section 105, Companies Act 2015 – including title to the shares. This, therefore, requires that the register of members should be a complete record and a 'one-stop shop' record for all matters relating to the shareholding of the company.
		Section 93(8) A company shall lodge with the Registrar a copy of its register of members including information relating to beneficial owners, if any, within thirty days after completing its preparation	A company shall lodge with the Registrar a copy of its register of ~~members including information relating to beneficial owners, if any,~~ within thirty days after completing its preparation	**Acceptable** as this section reverts to the original wording of section 93 under the Companies Act.
		New section 93A	Division 2A – Register of Beneficial Owners 93A (1) Every company shall keep a register of its beneficial owners. (2) A company shall enter in its register of beneficial owner, information relating to its	**Acceptable.** This section creates a different regime for the register of beneficial ownership from the general register of members under section 93 under the Companies Act.

			beneficial owners as prescribed in the regulations. (3) A company shall lodge with the Registrar a copy of its register of beneficial owners, within thirty days after completing its preparation. (4) A company other than a public listed company shall lodge with the Registrar a copy of any amendment to its register of beneficial owners within 14 days after making the amendment. (5) If a company fails to comply with the requirement of this section, the company, and each officer of the company who is in default, commit[s] an offence and on conviction are each liable to a fine not exceeding KES 500,000. (6) If, after a company or any of its officers is convicted under subsection (5), the company continues to fail to comply with the relevant requirement, the company, and each officer of the company who is in default, commit a further offence on each day on which the failure continues and on conviction are each liable to a fine not exceeding KES 50,000 each for such offence.	However, sub-section (2) requires there to be Regulations – these have not been published and until they are the section should be suspended. The draft Regulations should be provided for comment. This new section in the law as well as the regulations should be introduced in a measured manner as there are still a number of concerns around the draft regulations being considered. Some of these concerns include: - the non-inclusive nature of the definition of a beneficial owner which does not consider listed companies; - the level of disclosure and who it is applicable to needs to be carefully considered (disclosure of private information which is protected under the Constitution, data of children and foreign citizens); - disclosure thresholds; - capacity of the Companies Registry to enforce the proposed provisions as it is not a law enforcement agency but a collator of information; - adequacy of information requested. It is not possible for the law to fully define what information is needed for law

				enforcement agencies to effect investigations on beneficial ownership; - lack of clarity with respect to the information requested in the draft forms; - duplicity of information; and - the possible extraterritorial effect of the law.
	Annual General Meeting			
		New section 275A	275A (1) Every company shall convene a general meeting once a year. (2) Subsection (1) does not apply to single member companies. (3) The Registrar may, on the application of the company or for any other reason the Registrar thinks fit, extend the period referred to in subsection (1) even if, as a result, the period is extended beyond the calendar year. (4) A company that fails to comply with this section commits an offence and is liable to a fine not exceeding KES 100,000.	**Contentious** The Companies Act at present does not compel private companies to hold an annual general meeting in every year. A private company is at liberty to call for a general meeting and/or create a requirement to have the general meeting in every year under its articles of association. The requirement for a general meeting was repealed by the Companies Act when the compulsory business to be transacted at the annual general meeting, which was a mainstay under the repealed Companies Act Cap 486, was no longer required under the Companies Act. There is no longer compulsory

				business to be transacted at a general meeting for a private company. (As would be the case if the small companies exception on preparing annual accounts were to be applied). Only public companies are mandated to have the general meeting because the Companies Act prescribes mandatory business that must be transacted at the general meeting including the appointment of directors, approval of financials, fixing remuneration of auditors, considering auditors report, directors report etc. This requirement for private companies to have a general meeting also fell away when the written resolutions of shareholders were recognized under the Companies Act which suffice for the shareholders to pass any business they wish in the interests of the company. This ensures that the management of the company as a private enterprise is retained by its members and management. The original intention behind the Companies Act not requiring an annual general meeting or compulsory business to be transacted at an annual general meeting was to ease the cost and administrative burden on private

				companies and promote ease of doing business in Kenya. There is still no practical efficacy to legislate annual general meetings in a private company. It reintroduces cost and delay for private business. As such, this amendment should be resisted and struck from the bill.
	Power of directors to allot shares etc. authorization by company			
		Section 329(1) (1) The directors of a company may exercise a power of the company – (a) to allot shares in the company; or (b) to grant rights to subscribe for or to convert any security into shares in the company, only if they are authorized to do so by the company's articles or by a resolution of the company.	(1) The directors of a company may exercise a power of the company to – (a) allot shares in the company; or (b) grant rights to subscribe for or to convert any security into shares in the company, only if they are authorized to do so ~~by the company's articles or~~ by a resolution of the company.	**Contentious** There is no apparent or immediate need to delete the authorization for allotment from the articles of association. Most companies formed in Kenya, including those that have adopted the Model Articles of Association in the Companies Act 2015, make provision for allotment by directors. Again it allows for expediency in the management of the company by giving the directors authority to issue and allot shares as per the articles of association without having to revert to the shareholders for authority to issue and allot further shares.

		Section 329(2) An authorisation under subsection (1) may be given for a particular exercise of the power or for its exercise generally, and may be unconditional or subject to conditions.	An authorisation under subsection (1) may be given for a particular exercise of the power or for its exercise generally~~, and may be unconditional or subject to conditions~~.	**Contentious** The shareholders of a company, as the owners of the company, are allowed to delegate any power or action to the board as well as direct the conditions (if any) under which shares in the company may be allotted by the board of directors. This power cannot be derogated by statute and therefore this, deletion, is not well considered and should be struck from the bill.
	"Squeeze in" and "Sell out" provisions.			
		Section 611(2)(a) (2)An offeror who has, as a result of acceptances of the offer, acquired or unconditionally contracted to acquire: (a) not less than ninety percent value of the shares to which the offer relates;	An offeror who has, as a result of acceptances of the offer, acquired or unconditionally contracted to acquire: (a) not less than ~~ninety~~ fifty percent value of the shares to which the offer relates.	**Contentious** The provisions with respect to squeeze in and sell out are a key minority shareholder protection mechanism to prevent majority shareholders from oppressing minority shareholders in a company in the event of a buy-out. Ideally, squeeze-out and sell-out rights cannot be exercised until a bidder holds both 90% of the shares to which an offer relates, and 90% of the voting rights carried by those shares. The acquisition process is only triggered if 10% or less of the minority shareholders do not wish to sell their shares to the offeror. This ensures that the largest
		Section 611(2) (b) (2)An offeror who has, as a result of acceptances of the offer, acquired or unconditionally contracted to acquire: (b) if the shares to which the offer relates are voting shares – not less than ninety percent of the voting rights conferred by those shares, may give notice to the holder of any shares	(2)An offeror who has, as a result of acceptances of the offer, acquired or unconditionally contracted to acquire: (b) if the shares to which the offer relates are voting shares – not less than ~~ninety~~ fifty percent of the voting rights conferred by those shares, may give notice to the holder of any shares to which the offer relates to that the offeror has not	

		to which the offer relates to that the offeror has not acquired or unconditionally contracted to acquire that the offeror intends to acquire those shares.	acquired or unconditionally contracted to acquire that the offeror intends to acquire those shares.	possible opportunity is afforded to minority shareholders to sell-out. This proposed amendment now seeks to trigger an acquisition if 50% or less of the shareholders of the shares on offer do not wish to sell their shares to the offeror. This vacates any minority protections under the Companies Act. The new provisions will most likely lead to abuse of rights of the minority shareholders- and would likely be challenged under law as oppression. The minority protection rights have long been protected by the courts and these principles have developed over many years of practice and court interpretation. This proposed amendment will be liable to challenge in the courts. English, Candaian, common law and indeed most legal systems in the world set a threshold at 90% and there is no justification in reducing the level. The Capital Markets Authority would object to re-basing to 50%. The provisions are likely to make schemes of arrangement and other thresholds in the law that are set at 75% redundant.
		Section 611(4)(a) (4) An offeror who has, as a result of acceptances of the offer, acquired of unconditionally contracted acquire – (a) not less than ninety percent in value of the shares to which the offer relates;	(4) An offeror who has, as a result of acceptances of the offer, acquired of unconditionally contracted acquire – (a) not less than ~~ninety~~ fifty percent in value of the shares to which the offer relates;	
		Section 611 (4)(b) (4) An offeror who has, as a result of acceptances of the offer, acquired of unconditionally contracted acquire – (b) if the shares of that class are voting shares – not less than ninety percent of the voting rights conferred by those shares.	(4) An offeror who has, as a result of acceptances of the offer, acquired of unconditionally contracted acquire – (b) if the shares of that class are voting shares – not less than ~~ninety~~ fifty percent of the voting rights conferred by those shares.	

				The provisionsare unworkable and will seriously undermine Kenya's attractiveness as a investment destination. Unworkable and Unacceptable proposal and we recommend that this amendment be struck from the bill.
		Section 615(3)(a)(i)		This section does not exist in the Companies Act. *We have assumed that the Bill proposes to amend section 615 (3)(b)(i)*
		Section 615(3)(b)(i) *The holder of voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquired or contracted to acquire, whether unconditionally, or subject to conditions being satisfied – (i) amount to not less than ninety percent in value of all the voting shares in the company or would do so but for subsection (1) of section 590;*	*The holder of voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquired or contracted to acquire, whether unconditionally, or subject to conditions being satisfied – (i) amount to not less than ~~ninety~~ fifty percent in value of all the voting shares in the company or would do so but for subsection (1) of section 590;*	See above commentary under paragraph 9 above. This is an unworkable and unacceptable proposal and should be struck from the bill.

		Section 615(3)(a)(ii)		This section does not exist in the Companies Act. *We have assumed that the Bill proposes to amend section 615 (3)(b)(ii)*
		Section 615(3)(b)(ii) *The holder of voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquired or contracted to acquire, whether unconditionally, or subject to conditions being satisfied – (ii) confer not less than ninety percent of the voting rights in the company or would do so but for that subsection.*	*The holder of voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquired or contracted to acquire, whether unconditionally, or subject to conditions being satisfied – (ii) confer not less than ~~ninety~~ fifty percent of the voting rights in the company or would do so but for that subsection.*	Same comment as in paragraph 9 above. Unworkable and unacceptable proposal and we recommend that this amendment be struck from the bill.
		Section 615 (4)(b)(i) The holder of the voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquire or contracted to acquire, whether unconditionally or subject to	The holder of the voting shares to which the offer relates who has not accepted the offer may require the offeror to acquire those shares if, at any time before the end of the offer period – (b) those shares, with or without any other shares in the company that the offeror has acquire or contracted to acquire, whether unconditionally or subject to conditions being satisfied – (i) amount not less than fifty ~~ninety~~	Same comment as in paragraph 9 above. Unworkable and unacceptable proposal and we recommend that this amendment be struck from the bill.

		conditions being satisfied – (i) amount not less than ninety percent in value of all the voting shares in the company or would do so for subsection (1) of section 590;	percent in value of all the voting shares in the company or would do so for subsection (1) of section 590;	
		Section 615 (5)(a)(i)		This section does not exist in the Companies Act. *It is possible that the section to be amended may have been Section 615 (5)(b)(i):*
		It is possible that the section to be amended may have been Section 615 (5)(b)(i): *(5) If a takeover offer relates to shares of one classes and at any time before the end of the offer period – (b) those shares, with or without any other shares of that class that the offeror has acquired or contracted to acquire, whether unconditionally or subject to conditions being satisfied – (i) amount not less than ninety percent in value of all the shares of that class;*	*(5) If a takeover offer relates to shares of one classes and at any time before the end of the offer period – (b) those shares, with or without any other shares of that class that the offeror has acquired or contracted to acquire, whether unconditionally or subject to conditions being satisfied – (i) amount not less than fifty ~~ninety~~ percent in value of all the shares of that class;*	Same comment as in paragraph 9 above. Unworkable and unacceptable proposal and we recommend that this amendment be struck from the bill.
		Section 615 (5)(a)(ii)		This section does not exist in the Companies Act. *It is possible that the section to be amended may have been Section 615 (5)(b)(ii)*

		It is possible that the section to be amended may have been Section 615 (5)(b)(ii): *(5) If a takeover offer relates to shares of one classes and at any time before the end of the offer period – (b) those shares, with or without any other shares of that class that the offeror has acquired or contracted to acquire, whether unconditionally or subject to conditions being satisfied –(ii) if the shares of that class are voting shares, confer not less than ninety percent of the voting rights carried by the shares of that class*	*(5) If a takeover offer relates to shares of one classes and at any time before the end of the offer period – (b) those shares, with or without any other shares of that class that the offeror has acquired or contracted to acquire, whether unconditionally or subject to conditions being satisfied –(ii) if the shares of that class are voting shares, confer not less than fifty ~~ninety~~ percent of the voting rights carried by the shares of that class.*	Same comment as in paragraph 9 above. Unworkable and Unacceptable proposal and we recommend that this amendment be struck from the bill.
	Companies qualifying as small: general rules			
		Section 624 (3)(c) The qualifying conditions are satisfied by a company in a year in which it satisfied two or more of the following requirements - (c) it does not have more than fifty employees.	The qualifying conditions are satisfied by a company in a year in which it satisfied two or more of the following requirements - (c) it does not have more than ~~fifty~~ twenty-five employees.	**Acceptable** The proposal to reduce the number of employees that a company should have in order to qualify as a small company in the small companies regime to 25 employees may reflect the economy at present.
2.	**THE VALUE ADDED TAX ACT (NO. 5 OF 2013)**	**Section 17 (5)** "Where the amount of input tax that may be deducted by a registered person under subsection (1) in respect of a tax period exceeds the amount of output tax due for the	**Insertion of sub-section 17(5)(c) &(d)** c) the Commissioner is satisfied that such excess arises from tax withheld by appointed withholding agents;	The VAT Act 2013, only permits refunds where there is excess input tax as a result of making zero rated supplies; refund for tax paid in error; or on bad debts subject to certain conditions.

		period, the amount of the excess shall be carried forward as input tax deductible in the next tax period: Provided that any such excess shall be paid to the registered person by the Commissioner where- a) the Commissioner is satisfied that such excess arises from making zero-rated supplies; and b) the registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax becomes due and payable."	d) the Commissioner is satisfied that such excess arising out of tax withheld by appointed tax withholding agents may be applied any tax payable under this Act.	The amendment proposes two things; a) to provide that one can utilize Withholding VAT (**WHVAT**) credits against any VAT payable in the Act; and b) to provide that WHVAT credits can be part of a refund claim to the Commissioner in VAT refund application. WHVAT is VAT withheld by a recipient of taxable supplies who is appointed by the KRA to deduct VAT and remit the same to the KRA against a supplier. The Withholding VAT rate is 6%. The VAT withholding Agent is expected to remit the WHVAT (6%) to the KRA and remit the balance (10%) to the supplier of taxable supplies. From a legislative perspective, it is not clear how a registered person could utilize the VAT credits arising from WHVAT. We note that in practice, suppliers utilize the VAT credit arising from the WHVAT against VAT payable when accounting for VAT.

				Likewise, registered persons who make both standard rated supplies and zero-rated supplies and are perpetually in a VAT credit position, ordinarily include the WHVAT element in a VAT refund claim to the Commissioner. Therefore, The proposed amendment attempts to bring clarity to what was poor law. It remains to be seen if the amendment will achieve this.
3.	**THE ALCOHOLIC DRINKS CONTROL ACT NO. 4 of 2010**	Delete the definition of the word "magistrate" and substitute therefor the following "magistrate" has the meaning assigned to it in the Magistrates' Court Act.	The Alcoholic Drinks Act effectively placed offences under the Act outside the jurisdiction of the resident magistrate by defining magistrate as a magistrate above the rank of resident magistrate.	All cadres of magistrates will try offences under the Act.
4.	**THE WILDLIFE CONSERVATION AND MANAGEMENT ACT (NO. 47 OF 2013)**	**23. Establishment of Endowment Fund** 23. (1) There is established a Wildlife Conservation Trust Fund that shall be vested in a governing body established in accordance with subsection (2)- (2) The governing body referred to in subsection (1) shall serve as a public-private partnership and comprise - a) a Chairperson being appointed the Cabinet Secretary;	Deletion of the word "being" appearing in paragraph 23(2)(a). The sub-section if amended with then read: ***"a) a Chairperson appointed the Cabinet Secretary"*** Deletion of the words "who shall be the Chairperson" appearing in paragraph 23b). The sub-section if amended with then read:	***Note: The substantial change to section 23 resulted from the enactment of The Statute Law (Miscellaneous Amendment) Act 2018 which, when it came into force, repealed the entire section 23 of the Wildlife Conservation and Management Act.*** The change proposed by The Statute Law (Amendment) Bill 2019 seeks to remove ambiguity that arose from the 2018 amendment to section 23.

		b) the Principal Secretary in the State Department for the time being responsible for matters relating to wildlife who shall be the Chairperson; c) the Principal Secretary in the State Department for the time being responsible for matters relating to finance; d) the Director General of the Service who shall be the Secretary; e) four representatives from the private sector, who shall have technical experience in either philanthropy, law, natural resources, finance, business and investment matters; and f) a representative from the office of the Attorney General.	***"b) the Principal Secretary in the State Department for the time being responsible for matters relating to wildlife."***	In our view, however, the proposed amendment to subsection 23(2)(a) is still ambiguous as the proposed amendment could mean that the Chairperson of the Wildlife Endowment Fund would be appointed as Cabinet Secretary for the time being responsible for matters relating to wildlife (the "**CS**"). The alternate meaning, which we believe is the intention of the provision and of the proposed amendment, is that the CS will be the Chairperson of the Wildlife Endowment Fund. A more suitable amendment to sub-section 23(2)(a) would therefore be to word the sub-section as "the Cabinet Secretary who will be the Chairperson".
5.	**THE MICROFINANCE ACT NO. 19 OF 2006**	Section 14(1) (f) prohibits Microfinance Institutions from engaging in wholesale and retail trade.	Microfinance institutions can engage in wholesale and retail trade to the extent strictly necessary for the conduct of business by sharia compliant microfinance institutions.	Sharia compliant microfinance institutions will be able to engage in wholesale and retail trade in line with the Sharia law restrictions against interests (*Riba*). This amendment follows the amendments to the SACCO Societies Act (No.14 of 2008) by the Finance Act 2017 providing that the CS in consultation with SASRA shall create

				regulations for the licensing and supervision of Sharia compliant SACCO societies. These amendments may be the first stepping stones towards the establishment of suitable regulatory framework for Sharia compliant finance institutions.
6.	**THE PUBLIC FINANCE MANAGEMENT ACT NO 18 OF 2012**	Section 2(1) (d) defines an accounting officer in the case of the Parliamentary Service Commission (PSC) as the clerk of the Senate in respect of the Senate and the Clerk of the National Assembly in respect of the National Assembly.	An accounting officer in respect of the (PSC) will also include such other officer in respect of any other office in the parliamentary service as the CS shall, within 14 days of the PSC's resolution, designate.	Empowers the PSC to designate accounting officers in the parliamentary service in addition to the two clerks of the Houses of Parliament. This amendment seeks to actualize the resolution already made by PSC on 14 February 2019.

Coulson Harney LLP Advocates

Nairobi

April 2019

253

(3) Finance
pls note
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24/4/19

(2) Legal ✓
pls deal
FA
24/4/19

(1) Director
&
17/4

RECEIVED
17 APR 2019
CLERK'S OFFICE

April 12, 2019

Clerk Of The National Assembly,
Office of the Clerk,
Main Parliament Buildings
P.O. Box 41842 Nairobi 00100

Attn: Michael R. Sialai

Dear Sir,

Re: AMENDMENT OF SECTION 17(5) THE VALUE ADDED TAX ACT, 2013

We refer to the above matter and to the invitation by the National Assembly for public participation on the Statute Law (Miscellaneous Amendment) Bill, 2019 (Bill Number 21 of 2019) (***"the Bill"***).

Specifically, we write in reference to the proposal to amend Section 17(5) of the Value Added Tax Act ,2013 ("*the VAT Act*") as provided in the Schedule to the Bill.

Background

Kenya Power and Company Limited ("*KPLC*") the only customer of the Independent Power Producers ("IPPs") is a Withholding ("*WH*") Value Added Tax ("*VAT*") agent appointed by the Kenya Revenue Authority ("*KRA*") Therefore, KPLC is under obligation to withhold VAT of 6% from payment made to various suppliers (including suppliers of electrical power).

Challenges

Withholding 6% of the VAT payable to IPPs, specifically those using fossil fuels (such as diesel), results in the accumulation of significant VAT refunds in the books of these companies.

This is because a significant component of the total amount payable by KPLC for supply of electricity constitutes fuel cost reimbursements (up to 65% during peak capacity - with the balance represented by energy and capacity charges). IPPs incur 16% input VAT on heavy fuel oils and 8% VAT on automotive gas oil which is subsequently reimbursed by KPLC at cost. As a result, the output VAT payable to the KRA each month tends to be less than the 6% that KPLC currently withholds directly.

This locks up the cash flow of the IPPs with no prospect of getting a refund as they are not making zero-rated supplies.

Most of the thermal powered (especially diesel) IPPs are already in a VAT refundable position as at April 2019, despite the fact that since the re-introduction of the WH VAT in January 2015, they have been operating at a very low capacity factor (in many cases minimum), and thus very low input VAT due to minimal fuel purchases. This position will quickly escalate should there be an increase in operational capacity, plunging the entities into impossible negative cash flow positions.

Moreover, the withheld VAT has resulted in accumulated irrecoverable VAT for IPPs, which keeps building up and which cannot be refunded due to lack of enabling WH VAT refund provisions under the Act.

Accordingly, the IPPs will have no choice but to pass this cost to KPLC through a tariff adjustment in accordance with the Power Purchase Agreements, which will eventually be passed to the final consumer — a scenario contrary to the Government's aim of reducing the cost of power in order to increase competitiveness for the Kenyan economy.

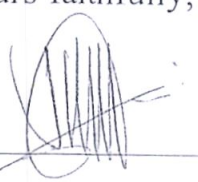
Recommendations

As a result of the challenges faced by IPPs an enumerated above, we propose that Parliament should create a mechanism in law to address the problems associated with accumulation of the VAT credit by IPPs. To this end, we support the provision that the excess arising out of tax withheld by appointed tax withholding agents, may be applied against any tax payable under this Act.

To this end, we support the amendment of Section 17(5) of the VAT Act, 2013 as contained in the Statute Law (Miscellaneous Amendment) Bill, 2019 and propose that it be enacted as is.

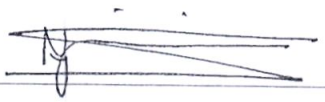
We trust you will find our recommendation in order. In the interim, should you need further information or clarification, please do not hesitate to contact the undersigned.

Yours faithfully,



Henry Muthanji
General Manager & CEO
Iberafrica Power Limited

Seeman Seeman
Plant Manager
Thika Power Limited



Norman Wanyiri
General Manager
Gulf Power Limited

Eng. Julius Riungu
Chief Executive Officer
Tsavo Power Company Limited

Lars Kjaer Olesen
General Manager
Rabai Power

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General Manager
Gulf Power Limited

Eng. Julius Riungu
Chief Executive Officer
Tsavo Power Company Limited

General Manager
Rabai Power

Siva K. Shankar
General Manager
Triumph Power Generating Co. Ltd.

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PETROLEUM INSTITUTE OF EAST AFRICA
PIEA
Bruce House, 4th Floor, Standard Street ▪P.O. Box 8936, 00200 Nairobi ▪Tel: 2249081/3313046/7
Fax: 3313048 ▪Mobile: 0722 221120 ▪Website: www.petroleum.co.ke ▪E-mail: admin@petroleum.co.ke

(1) Oil-Fees 8,1604

PIEA/ADMIN /27

April 12, 2019

(3) Budget pls note FA 24/4/19

(2) LCAH pls deal FA 24/4/19

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16 APR 2019
CLERK'S OFFICE

Clerk of The National Assembly,
Office of the Clerk
Main Parliament Buildings
P.O. Box 41842-00100
NAIROBI

ATTN: MICHAEL R. SIALAI

Dear Sir,

WITHHOLDING VALUE ADDED TAX REFUNDS AND AMENDMENT OF SECTION 17(5) THE VALUE ADDED TAX ACT, 2013

We refer to the above matter and to the invitation by the house for public participation on the Statute Law (Miscellaneous Amendment) Bill, 2019.

The Petroleum Institute of East Africa (PIEA) is the professional body for the oil and gas industry in the East African region. Presently, PIEA membership constitutes over 90% of all oil industry players in Kenya. The PIEA mission is to provide a forum for expertise and excellence in the oil industry, promote professionalism and free enterprise in the petroleum business supported by the highest operations and business standards in order to contribute to the East African region's economic growth.

Problem Statement

The Finance Act 2014 reintroduced Withholding Value Added Tax (*VAT*) in Kenya and requires Withholding VAT agents to withhold 6% of the value of taxable supplies on payment to suppliers and remit the same directly to the Commissioner of the Kenya Revenue Authority (hereinafter "*the Commissioner*"). In addition to government agencies, the Commissioner of KRA is empowered under Section 42A (1) of the Tax Procedures Act to appoint any person as a withholding VAT agent.

The VAT Act, 2013 exempted white petroleum products (Petrol, Diesel & Kerosene) from VAT for a period of three years. The Finance Act 2016 extended the exemption for a further two-year period to 1 September 2018. As there was no further extension, with effect from 1 September 2018, the white petroleum products became Vatable at 16%. However, the Finance Act 2018 introduced a concessionary 8% VAT rate.

Challenges

PIEA members supply customers who have been Withholding VAT agent such as KENGEN and other IPPs, as well as many large industrial customers. These Customers withhold 6% VAT as required under the law. This has resulted in a VAT credit to our members of approximately [4 Billion] Kenya Shillings. The Withholding VAT (6%) is very high as compared to the base rate of 8% VAT rate on the petroleum products. As a resuit, the VAT credit cannot be reduced and will keep growing as the industry input will always far exceed the output.

The industry, being highly capital intensive, has suffered from severe cash crunch as a result of a majority of its capital being held up in VAT credit from the government. The law as presently written has no mechanism for refund of Withholding VAT. This has slowed down the growth of the industry and impacted the growth of the country's economy negatively.

Our Proposal

As a result of the challenges faced by the PIEA members, Parliament should create a mechanism in law to address the issue of the VAT credits. To this end, we support the amendment of Section 17(5) of the VAT Act, 2013 as contained in the Statute Law (Miscellaneous Amendment) Bill, 2019 to allow taxpayers claim refund arising from withheld VAT.

Conclusion

We trust you will find our requests in order and we hope that the amendment will be fast-tracked into law. In the interim, should you need further information or clarification, please do not hesitate to contact the undersigned.

Yours Faithfully,

Wanjiku Manyara
General Manager

254

GC RETAIL LIMITED

2ND FLOOR, THE COURTYARD, GENERAL MATHENGE DRIVE

P.O BOX 43233-00100 NAIROBI

16 April 2019

The Clerk of the National Assembly
Office of the Clerk
Main Parliament Buildings
Parliament Road
Nairobi

Dear Sir,

REQUEST FOR PUBLIC PARTICIPATION – WITHHOLDING VAT REFUNDS
STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL (NATIONAL BILL NO.21 OF 2019)

We refer to the above matter.

We submit this letter in support of the proposed amendment to Section 17(5) of the Value Added Tax (VAT) Act as set out in the Statute Law (Miscellaneous Amendment) Bill 2019.

Background

GC Retail is a company registered in Kenya. It has undertaken the construction of a mall situated along the Thika Superhighway, which mall has been branded, Garden City Mall. The mall which was officially opened on 28th May 2015 has over one hundred defined spaces which have been rented out as shops to various tenants for commercial activities.

The mall was constructed at a cost of approximately KShs.4 Billion and at present GC Retail is carrying a significant Input VAT credit of approximately KShs.400 Million in its VAT Returns. Noting that the mall is offering commercial rental space, GC Retail charges VAT on the rent supply, which VAT is offset against the Input VAT credit over time.

Appointment of VAT Withholding Agents

The Finance Act, 2016 introduced the provision for the appointment of VAT withholding agents via an amendment to the Tax Procedures Act, 2015 through Section 42A which subsection (1) states: -

> *"The Commissioner may appoint a person to withhold six per cent of the taxable value on purchasing taxable supplies at the time of paying for the supplies and remit the same directly to the Commissioner."*

The Commissioner has so far appointed forty-five of the tenants at the mall as withholding VAT agents.

The Finance Act, 2017 subsequently amended Section 42A of the Tax Procedures Act, 2015 by introducing a new subsection (4A) which states: -

> *"The Commissioner may at any time exempt any supplier from the provisions of this section if such supplier has sufficiently demonstrated that due to the nature of his business, and due to*

THE NATIONAL ASSEMBLY
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DIRECTOR COMMITTEE SERVICES
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the application of this section, he is going to be in a continuous credit position for a period of not less than twenty-four months."

In this regard, the forty-five tenants do not pay to GC Retail all the VAT charged due to their appointed withholding agent obligation. As such, the output VAT collected by GC Retail is less than its claimable position (input VAT). This perpetual credit position arising from high input taxes owing to the withheld VAT has subsisted for a period exceeding twenty-four months.

We are unfortunately unable to seek a refund of the excess input tax, as the excess credit does not arise from zero rated supplies, which is currently the only qualification for the application for refund of excess input tax as provided under Section 17(5) of the VAT Act No.35 of 2013. We anticipate that more of our tenants will be appointed as withholding VAT agents by the Commissioner and as such the VAT credit offset previously anticipated will take much longer to materialize. This has had a direct adverse impact on our business and cash flows.

The Kenya Revenue Authority (KRA) issued guidelines (*"Guidelines to Taxpayers on Exemption from Withholding VAT")* on 14th December 2017. We made an application for exemption in accordance with these guidelines and are pursuing the same with the KRA.

The Proposed Amendment

Once amended, Section 17(5) will read as follows: -

"Where the amount of input tax that may be deducted by a registered person under subsection (1) in respect of a tax period exceeds the amount of output tax due for the period, the amount of the excess shall be carried forward as input tax deductible in the next tax period:

Provided that any such excess shall be paid to the registered person by the Commissioner where –

a) *the Commissioner is satisfied that such excess arises from making zero-rated supplies; and*
b) *the registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax becomes due and payable;* ***or***
c) ***the Commissioner is satisfied that such excess arises from tax withheld by appointed tax withholding agents;***
d) ***the Commissioner is satisfied that such excess arising out of tax withheld by appointed tax withholding agents may be applied against any tax payable under this Act."***

The Statute Law (Miscellaneous Amendment) Bill 2019 seeks to introduce the paragraphs in **bold** above. The effect of the proposed changes will be to enable taxpayers on whom withholding VAT has had a negative cashflow impact, such as GC Retail, seek a refund for the VAT that is withheld by appointed agents from the Commissioner for VAT.

Conclusion

We write this letter in support of the proposed amendment as it will have a direct impact on our investment and in response to the call for public participation on the Bill as published in the local dailies.

Please feel free to come back to us should you require any clarifications.

Yours faithfully,



Antony Kambiriri
Finance Director

(3) Kindly pls note FA 24/4/19

(2) Legal pls deal FA 24/4/19

April 12, 2019

(1) D/Courts | DLS 24/4/19

Clerk Of The National Assembly,
Office of the Clerk,
Main Parliament Buildings
P.O. Box 41842 Nairobi 00100

Attn: Michael R. Sialai

Dear Sir,

Re: AMENDMENT OF SECTION 17(5) THE VALUE ADDED TAX ACT, 2013

We refer to the above matter and to the invitation by the National Assembly for public participation on the Statute Law (Miscellaneous Amendment) Bill, 2019 (Bill Number 21 of 2019) (***"the Bill"***).

Specifically, we write in reference to the proposal to amend Section 17(5) of the Value Added Tax Act ,2013 ("*the VAT Act*") as provided in the Schedule to the Bill.

Background

Kenya Power and Company Limited ("*KPLC*") the only customer of the Independent Power Producers ("IPPs") is a Withholding ("*WH*") Value Added Tax ("*VAT*") agent appointed by the Kenya Revenue Authority ("*KRA*") Therefore, KPLC is under obligation to withhold VAT of 6% from payment made to various suppliers (including suppliers of electrical power).

Challenges

Withholding 6% of the VAT payable to IPPs, specifically those using fossil fuels (such as diesel), results in the accumulation of significant VAT refunds in the books of these companies.



This is because a significant component of the total amount payable by KPLC for supply of electricity constitutes fuel cost reimbursements (up to 65% during peak capacity - with the balance represented by energy and capacity charges). IPPs incur 16% input VAT on heavy fuel oils and 8% VAT on automotive gas oil which is subsequently reimbursed by KPLC at cost. As a result, the output VAT payable to the KRA each month tends to be less than the 6% that KPLC currently withholds directly.

This locks up the cash flow of the IPPs with no prospect of getting a refund as they are not making zero-rated supplies.

Most of the thermal powered (especially diesel) IPPs are already in a VAT refundable position as at April 2019, despite the fact that since the re-introduction of the WH VAT in January 2015, they have been operating at a very low capacity factor (in many cases minimum), and thus very low input VAT due to minimal fuel purchases. This position will quickly escalate should there be an increase in operational capacity, plunging the entities into impossible negative cash flow positions.

Moreover, the withheld VAT has resulted in accumulated irrecoverable VAT for IPPs, which keeps building up and which cannot be refunded due to lack of enabling WH VAT refund provisions under the Act.

Accordingly, the IPPs will have no choice but to pass this cost to KPLC through a tariff adjustment in accordance with the Power Purchase Agreements, which will eventually be passed to the final consumer — a scenario contrary to the Government's aim of reducing the cost of power in order to increase competitiveness for the Kenyan economy.

Recommendations

As a result of the challenges faced by IPPs an enumerated above, we propose that Parliament should create a mechanism in law to address the problems associated with accumulation of the VAT credit by IPPs. To this end, we support the provision that the excess arising out of tax withheld by appointed tax withholding agents, may be applied against any tax payable under this Act.

To this end, we support the amendment of Section 17(5) of the VAT Act, 2013 as contained in the Statute Law (Miscellaneous Amendment) Bill, 2019 and propose that it be enacted as is.

We trust you will find our recommendation in order. In the interim, should you need further information or clarification, please do not hesitate to contact the undersigned.

Yours faithfully,

Henry Muthanji
General Manager & CEO
Iberafrica Power Limited

Seeman Seeman
Plant Manager
Thika Power Limited



Norman Wanyiri
General Manager
Gulf Power Limited

Eng. Julius Riungu
Chief Executive Officer
Tsavo Power Company Limited

Lars Kjaer Olesen
General Manager
Rabai Power

April 12, 2019

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Office of the Clerk,
Main Parliament Buildings
P.O. Box 41842 Nairobi 00100

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Tsavo Power Company Limited

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General Manager
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MEMORANDUM OF THE PARLIAMENTARY SERVICE COMMISSION TO THE NATIONAL ASSEMBLY DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019

1. The Statute Law (Miscellaneous) Amendments Bill, 2019 was published on 29th March 2019. The National Assembly then called upon the public to give its views on the Bill via an advertisement placed in the Daily Newspapers on 10th April 2019. By a letter dated 2nd May 2019 the Clerk of the National Assembly invited the Parliamentary Service Commission to meet with the National Assembly Department Committee on Finance and National Planning to give its views on the proposal to amend section 2(1) of the Public Finance Management Act, 2012 at a meeting to be held on Friday, 3rd May 2019.

2. The Speaker of the National Assembly/Chairman, Parliamentary Service Commission directed the Finance Committee of the Commission to represent the Commission at the meeting with the National Assembly Department Committee on Finance and National Planning. This memorandum is therefore prepared by the Finance Committee of the Commission in response to the invitation letter of 2nd May 2019 and the directions of the Speaker of the National Assembly/Chairman, Parliamentary Service Commission.

3. Article 93 of the Constitution of Kenya, 2010 establishes the Parliament of Kenya which consists of the National Assembly and the Senate. Article 94 of the Constitution then vests legislative making authority in Parliament. Article 95 of the Constitution then sets out the role of the National Assembly which includes representing the people in the constituencies, legislation, budget making, exercising oversight over State Organs and approving declarations of war and extensions of states of emergency. Article 96 of the Constitution provides for the role of the Senate which includes representing

the counties, participating in the law making function of Parliament, determining the allocation of national revenue among the counties and participating in the oversight of State Officers.

4. Article 127 of the Constitution establishes a single Parliamentary Service Commission for the Parliamentary Service that is responsible for the provision of such services and facilities to ensure the efficient and effective functioning of Parliament. The Parliamentary Service Commission is comprised of the following:

   (a) The Speaker of the National Assembly as chairperson;
   (b) Seven members appointed by Parliament from among its members of whom-
      (i) Four shall be nominated equally from both Houses by the party or coalition of parties forming the national government, of whom at least two shall be women; and
      (ii) Three nominated by the parties not forming the national government, at least one of whom shall be nominated from each House and at least one of whom shall be a woman; and
   (c) One man and one woman appointed by Parliament from among persons who are experienced in public affairs, but are not members of Parliament.
   (d) The vice-chairperson is elected from among the above seven (7) Members of Parliament.
   (e) The Clerk of the Senate is the Secretary to the Commission.

5. It is important to recall that prior to the year 2000 there was no Parliamentary Service Commission and Parliament relied on the Office of the President to provide it with services and facilities. This was an unfortunate situation which led to Parliament not being properly facilitated to perform its constitutional duties and further infringed on the principle of separation of powers.

6. The Parliamentary Service Commission was established by an amendment to section 45 of the former Constitution of Kenya in the year 1999 and operationalized by the enactment of the Parliamentary Service Act in 2000. The Commission has been re-established by Article 127 of the Constitution of Kenya, 2010.

7. The Parliamentary Service is organized into the following-

   (a) The National Assembly Service which is responsible for the provision of services and facilities to the National Assembly;
   (b) The Senate Service which is responsible for the provision of services and facilities to the Senate;
   (c) The Parliamentary Joint Services which is responsible for the provision of services and facilities to both Houses of Parliament that are cross-cutting in nature and whose duplication in each House would not be prudent use of resources;
   (d) The Centre for Parliamentary Studies and Training which is a semi-autonomous institution responsible for the provision of training services to Members and staff of Parliament and the County Assemblies.

8. Following the promulgation of the new Constitution, the Clerk of the National Assembly continued as the Accounting Officer for the Parliamentary Service Commission until the appointment of a Clerk to the Senate/Secretary of the Parliamentary Service Commission as the Commission's sole Accounting Officer in July 2013.

9. As the realities and challenges of managing a bi-cameral Parliament became apparent, the Parliamentary Service Commission became concerned that the activities of the National Assembly required the approval, and were accounted for, by the Clerk of the Senate despite the fact that the National Assembly had its own Clerk appointed under Article 128 of the Constitution. The Commission therefore considers that the most appropriate manner of handling the issue is to have the law provide that the Cabinet Secretary in the National Treasury shall designate as an accounting officer such other officer in the parliamentary service as the Commission may resolve.

10. The National Assembly in 2014 amended section 2(1) of the Public Finance Management Act to have two Accounting Officers with the Clerk of the National Assembly being the additional Accounting Officer.

11. The Commission has taken the considered view that to enhance service delivery it would be more appropriate that those services provided jointly and equally to the Houses be under the accounting superintendence of an Accounting Officer or Accounting Officers as the Parliamentary Service Commission may deem necessary.

12. It is important to note that section 2(1)(c) of the Public Finance Management Act provides that the accounting officer in the case of the Judiciary is the Chief Registrar of the Judiciary. The Judicial Service Commission therefore informs the Cabinet Secretary in the National Treasury who is the holder of the office of Chief Registrar of the Judiciary for purposes of formal appointment of the accounting officer for the Judiciary.

13. In respect of the national government, the Cabinet Secretary in the National Treasury designates in writing accounting officers for the various national government entities and ensures that there is an accounting officer in each national government entity.

14. The Commission is convinced that the proposed amendment to section 2(1) of the Public Finance Management Act shall enhance service delivery as well as accountability and responsibility in the administration of Parliament.

15. The Parliamentary Service Commission therefore supports the proposed amendment.

HON. ADAN KEYNAN, CBS, MP,
CHAIRPERSON, COMMITTEE ON FINANCE,
FOR: PARLIAMENTARY SERVICE COMMISSION.

Tax Alert

Issue No. 3 of 2019

This Tax Alert highlights the facts of the recent High Court ruling on the Double Taxation Agreement between Kenya and Mauritius and the recent developments with respect to Value Added Tax ("VAT").

Double Taxation Agreement - Kenya and Mauritius

The High Court recently determined a petition filed by The Tax Justice Network-Africa ("TJNA") against the Double Taxation Agreement ("DTA") between Kenya and Mauritius. The TJNA is an independent international network involved in research, analysis and advocacy on international tax on financial regulation among others. The TJNA challenged the manner in which the DTA was ratified on 23 May 2014 and raised pertinent tax issues.

The Petition

The petition was filed on 3rd October 2014 against the Cabinet Secretary for National Treasury, The Kenya Revenue Authority, and the Attorney General ("respondents"). The TJNA challenged the constitutionality of the DTA and its nature of deflating Kenya's ability to raise tax revenues. The TJNA argued there are loopholes enabling the multinational entities operating in Kenya to shift profits from Kenya to tax havens through Mauritius. The petition focussed on:

The ratification process: The TJNA argued that the respondents failed to subject the DTA to ratification in line with the Treaty Making and Ratification Act, 2012 which require treaties to be approved by the Cabinet and Parliament. As a result, the respondents contravened the Kenyan Constitution in the manner the DTA was ratified.

Withholding tax on interest and royalties: The TJNA disputed the withholding tax on interest and royalties provided by the DTA at the rates of 10% in comparison to the current applicable rates of 15% and 20% respectively. Their submission was that Kenya's tax base will be adversely affected if the DTA is operationalised in its current state.

Taxation of other income: The TJNA submitted that the DTA reserves taxing rights to the resident state on other income not mentioned under the specific articles. As a result, withholding tax on services, management fees, and insurance commissions among others is reduced from the current 20% to 0%.

Depriving Kenya tax revenues: The TJNA submitted that the DTA will deprive Kenya tax revenues by allowing the foreign investors to buy the Kenyan companies through Mauritius holding companies thus dodging Kenyan tax through round tripping of their investments. They also argued that the DTA will aid tax avoidance on payments of dividends to foreign investors through share buy backs options.

The DTA does not comply with the United Nations ("UN") and the Organisation for Economic Cooperation ("OECD") models with respect to Capital Gain Tax on gains realised from sale of shares and reduces CGT from the current 5% to 0% thereby adversely affecting the Kenyan tax revenues.

Tax sparing: The TJNA submitted that the DTA allows tax sparing which enables Mauritius based entities tax credits for Kenyan tax reduced or waived as a tax incentive.

Termination of the DTA: The TJNA argues that the DTA does not require mandatory arbitration and restricts its termination until after the fifth year.

The Government's Response

The government submitted: the DTA was negotiated within the provisions of the law; the main objective of the DTA was to attract foreign investment: taxation of services and management fees provided under taxation of Permanent Establishments; CGT was suspended during the time of negotiations; the DTA provides mechanism of resolving disputes including mutual agreement; the DTA underwent the necessary approvals as demonstrated to the court; and the DTA was not subject to Ratification as stipulated by the Treaty Making and Ratification Act, 2012.

The Issues for Determination

Subsequent to hearing the parties, the High Court established issues for determination to be: whether the making of the DTA violated the Constitution; the laws governing making of DTA's; and whether the petition was merited.

Court Ruling

The High Court ruled that: TJNA failed to demonstrate how the Constitution was violated by the respondents with respect to ratification of the DTA; the DTA underwent some form of Ratification and was approved by the Cabinet as demonstrated by the respondents; TJNA did not show the specific law requiring the Parliament's involvement in the process of making or entering into bilateral agreements; and the petition lacked merit on the issue of constitutionality.

However, the Judge ruled that the Legal Notice No. 59 is a Statutory Instrument which ought to have been tabled before the Parliament for scrutiny within seven sitting days after its publication in line with the Statutory Instruments Act 2013. The fact that it was not tabled in Parliament, Legal Notice No. 59 was declared to be ineffective and void in accordance with the Statutory Instruments Act 2013.

Our Views

The Legal Notice No. 59 which gazetted the DTA was rendered futile and void as it was not tabled in Parliament as provided by the Statutory Instruments Act 2013. It is worth noting that the Judge did not give a ruling on the underlying tax issues raised by the TJNA and restricted his ruling on the legality of the process followed in ratifying the DTA. The Judge ruled that the DTA underwent through some form of Ratification to the extent of gazettement and the process was considered to be compliant with the applicable law.

Given the approach adopted by the High Court, the petition would have been dismissed safe for the Legal Notice 59 not being tabled in Parliament as required by the Statutory Instruments Act 2013.

It is clear that the TJNA raised underlying pertinent tax issues with views inclined towards the recommendations given by the OECD in relation to tackling the Base Erosion and Profit Shifting ("BEPS"). Whereas the Government's objective is to attract the much sought foreign direct investments, the relevant institutions need to be well informed of the tactics used by tax havens in negotiating harmful treaties.

The court ruling will act as a reference point in ratification of DTAs in future and the relevant institutions will be required to regularize Legal Notice No. 59 in line with the Statutory Instruments Act 2013 for the DTA to be effective.

VAT - Automated Verification of Returns

The KRA issued a public notice on 29 March 2019 concerning the VAT Auto Assessment commonly known as the VAA.

The notice informed taxpayers of improvements made on iTax VAT return verification module following various engagements with the stakeholders.

The module cross-validates invoice details in the buyers' and sellers' VAT returns then generates inconsistencies. The affected taxpayers are required to resolve the inconsistences within a given period from the date of notification.

The taxpayers affected by January 2018 VAA have been given 60 days from 29th March 2019 to resolve the identified inconsistencies to avoid disallowing of input VAT claimed.

As highlighted in our Tax Alert issue no 1 of 2019 and Tax Alert issue No. 6 of 2018, this exercise will continue and it is paramount for taxpayers to strictly follow the guidelines given by the KRA while filing their VAT returns.

The move is part of the KRA's efforts in promoting tax compliance and eradicating instances where taxpayers claim fictitious input VAT.

We recommend the affected client to proceed and file amended VAT returns and in the event iTax generates errors, then the same will be filed at the KRA's back office.

Please feel free to contact us for assistance with VAA related issues.

Withholding VAT Refunds

The Statute Law (Miscellaneous Amendment) Bill, 2019 that was published on 29 March 2019 proposes to amend Section 17(5) of the VAT Act, 2013 by introducing Withholding VAT refunds.

Many suppliers who have their customers appointed as Withholding VAT agents have ended up being in VAT credit positions. For some suppliers, the VAT credits are accumulating very fast due to the nature of their businesses. Currently, VAT Act, 2013 and the Tax Procedures Act, 2015 (TPA) do not have an explicit provision on refund of withheld VAT, a fact that Kenya Revenue Authority (KRA) has been relying on and not processing any VAT refund applications resulting from Withholding VAT. In actual sense, VAT credits resulting from Withholding VAT amount to overpaid tax which should be refunded to the suppliers in accordance with the Section 47 of the TPA. Unfortunately, VAT refunds arising from Withholding VAT have not been processed in accordance with Section 47 of the TPA. Through the Finance Act 2017, Section 42A of the TPA was amended to give the Commissioner of KRA powers to exempt suppliers in continuous VAT credit positions for over twenty four months from the Withholding VAT provisions. Some suppliers have managed to secure these exemptions which have enabled their customers who are appointed as agents not to withhold VAT when making payments to them. However, these exemptions approvals from KRA take a long time to be processed which has frustrated many suppliers because it affects their cash flows.

The proposed amendment is commendable if passed into law by the National Assembly as it will have given a clear legal provision for VAT refunds arising from Withholding VAT.



For more information or assistance with this matter or any tax advisory related matters contact us:

Michael Mburugu, Partner,
mmburugu@ke.pkfea.com

James Mulili, Director,
jmulili@ke.pkfea.com

Joseph Mwavua, Manager,
jmwavua@ke.pkfea.com

Tel: +254 20 4270 000 +254 732 144 000

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PKF Kenya: Your Trusted Business Advisors and Strategic Partners

Prompt Payments to Suppliers: Implication to the Velocity of Money, Economic Growth & Industrialization

Private Sector Perspectives

THE ISSUE

TREND OF LATE PAYMENT CULTURE

- The culture of late payment seems to be on the **increase at an alarming rate** thus making it an urgent matter that the Government needs to address.

- Both the **public** and **private sector are involved in delayed payments.**

MICRO, SMALL AND MEDIUM TERM (MSMEs)

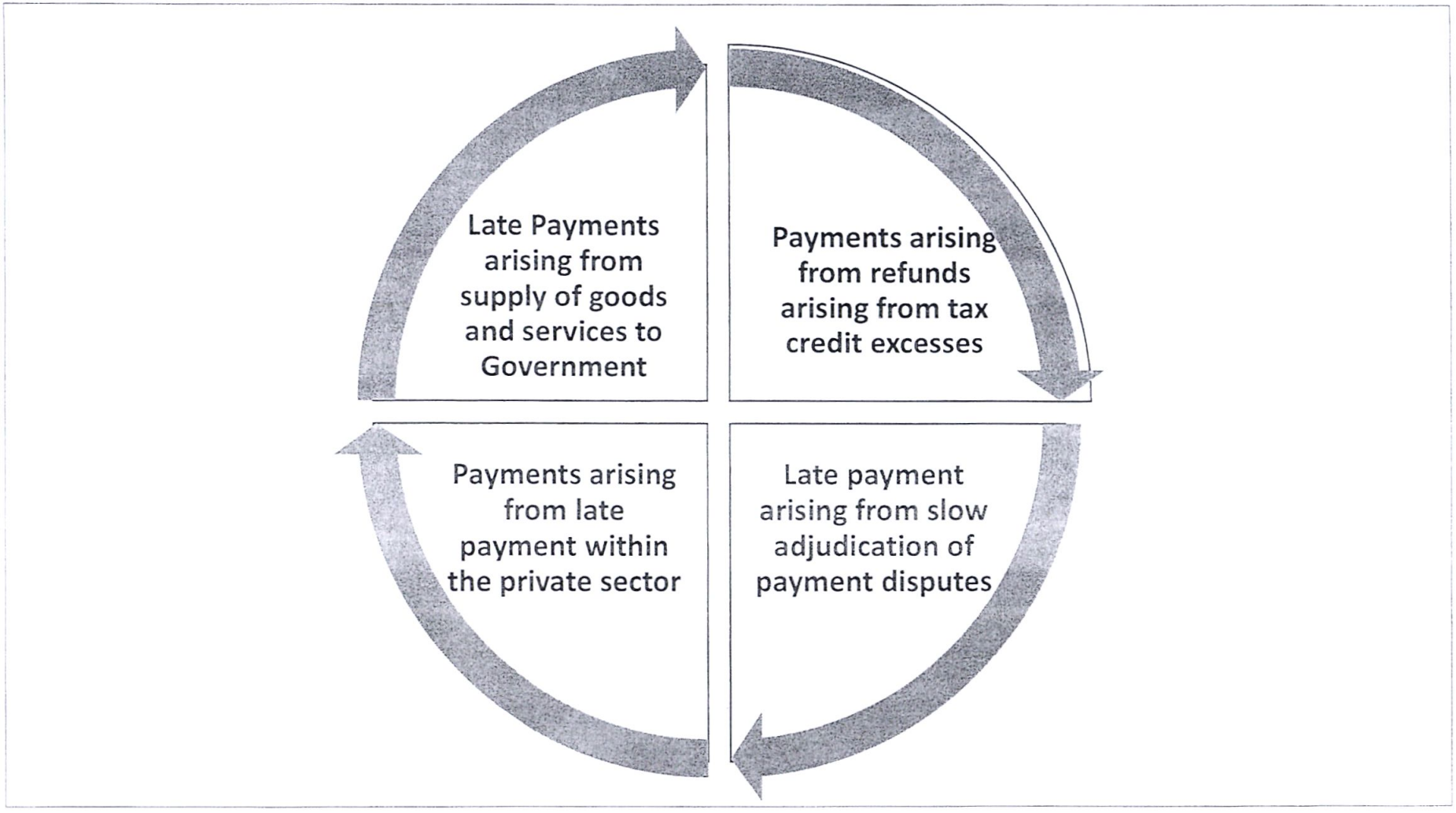
- The most affected businesses resulting from late payment in the private sector are the **small and medium sized enterprises (SMEs)**

- This is due to the constrained cash flows such businesses operate.

CASH FLOW CONSTRAINTS

- Prompt payment is critical to the **performance and operations** of any business and ensures the **necessary cash flo**ws are available for businesses to operate.

- Late payment causes **increased administrative and financial burden** to businesses. – debt collectors etc credit bureau/risk mitigation


Late Payments arising from supply of goods and services to Government
Payments arising from refunds arising from tax credit excesses
Late payment arising from slow adjudication of payment disputes
Payments arising from late payment within the private sector

FACTUAL EVIDENCE OF A LATE PAYMENT CULTURE IN KENYA

AUDITOR GENERAL REPORTS

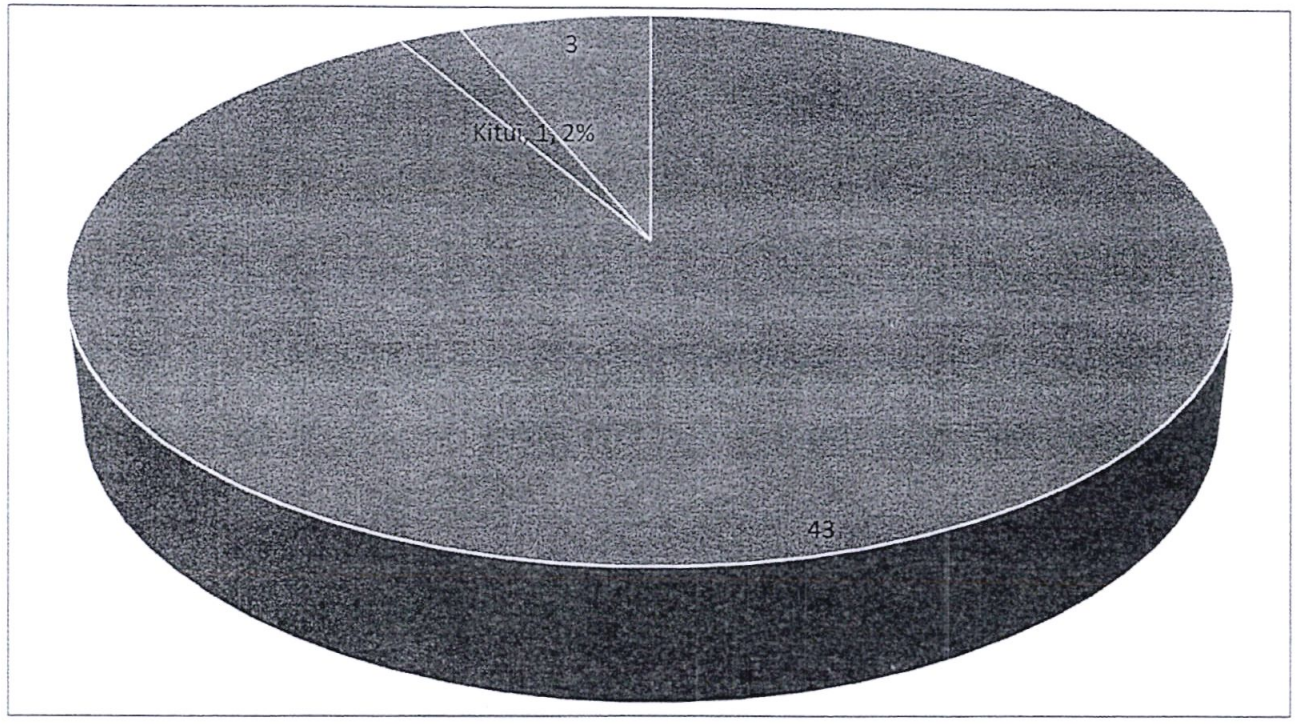
- Auditor General Reports continue to highlight the **increasing pending bills owed to suppliers** in the Country.
- Long outstanding balances and pending bill are among the top seven audit issues year on year.

- The Controller of Budget in their latest report on the spending in counties for the financial year 2016/17, listed **43 Counties out of the 47** as having accumulated pending bills amounting to **Sh35.84 billion.**

AUDITOR GENERAL REPORTS

- Auditor General Reports continue to highlight the **increasing pending bills owed to suppliers** in the Country.
- **Long outstanding balances** and **pending bills remain** among the top seven audit issues year on year.
- Report on the spending in Counties for the financial year 2016/17, listed **43 Counties out of the 47** as having accumulated pending bills amounting to **Sh35.84 billion owed to suppliers and contractors.**

2016/2017 Auditor General Report on pending bills



NATIONAL TREASURY

- In 2018, The National Treasury in their published Budget Policy Statement acknowledged the issue of **pending payments** as a problem and also noted that;

"the expenditure arrears have the potential of undermining budget execution in subsequent financial years"

"non-payment of suppliers and contractors had adverse effects to other sectors" of the economy, like the financial sector, by increasing non-performing loans.

NON-PERFORMING LOANS

- The ratio of gross **non-performing loans** to gross loans **increased from 10.66 percent** in December 2017 to **11.81 percent in March 2018**.

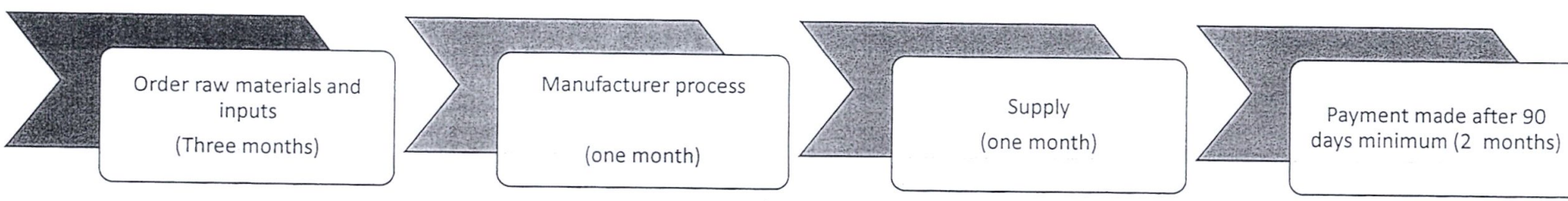
- This was attributed to a **slowdown in business activities.***(Central Bank of Kenya-2018, the Commercial Banks' Credit Officer Survey)*

IMPACT TO VELOCITY OF MONEY

PAYMENT PATTERNS

- The velocity of money is a measure of how fast money passes from one holder to the next.

- Coinage in Kenya is estimated to revolve once in a year. This is because, the process of production before supply takes up to three months.


Order raw materials and inputs
(Three months)
Manufacturer process
(one month)
Supply
(one month)
Payment made after 90 days minimum (2 months)

PAYMENT TREND

- Payment period **by Government** is estimated to be once in twenty four months.
- Payment period **by Private sector** is estimated to be within 60 to 180 days.

Payment Periods – Private Sector

- According to Kenya Association of Manufacturers data from in 2016-2017, **the late payment problem was been quite severe occasioned by the retail sector**. *(Study on Late Payment in the Retail Sector- published by State Department of Trade)*
- The **debt that is over 60 days due was estimated at KES 1.6 billion or 82% of total amount owed**. The rest, amounting to KES 351 million or 18% of the total amount owed being less than 60 days.
- The data KAM collected evidenced that, six local supermarkets account for 93% of the total debt that was owed for 60 days.

IMPACT TO ECONOMIC GROWTH AND INDUSTRY

Economic Performance in the Manufacturing Sector (KNBS 2018)

- Manufacturing Sector Growth in 2018 estimated to have increased by **4.2% from 0.5 in 2017.**
- **GDP** Contribution **declined to 7.7 % in 2018 from 8.4% in 2017.**
- Formal employment **increased** by **1.4 %** to **307, 592 persons accounting for 11.1%** from 303,300 in 2017. Manufacturing Sector is the 3rd largest contributor to employment in the country.

Outstanding credit amounts arising from the export refund formula (ksh)

- Estimated Manufacturers are owed over **10 Billion as at 31st December 2018** in **withholding VAT dues** and VAT credit excess arsing export refund claims.
- In 2017 the Government introduced VAT Regulations, which introduced a new formula meant to ensure businesses **only claim refunds for zero-rated supplies** (the ratio of zero-rated supplies to the total taxable sales revenue to arrive at refunds) as opposed to the previous system where it was based on difference between output and input tax.
- Witholding VAT was also introduced in the country where Commisioner of Tax appoints

Outstanding credit amounts arising from Withholding VAT (ksh)

- Withholding VAT was also introduced in the Country where Commissioner of Tax appoints withholding VAT Agents.

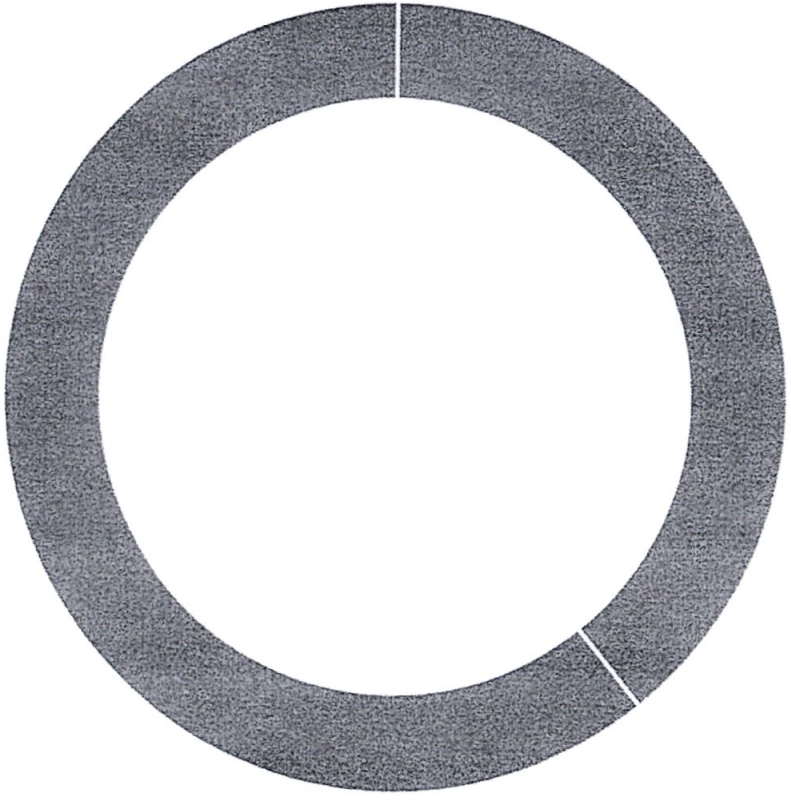
- Businesses in perpetual credit positions can apply for exemptions.

- Exemption process has not happened and refunds have not been made due to absence of legal provisions for the same.

Outstanding credit amounts arising from the export refund formula and whvat (ksh) (40 companies)

Outstanding credits as at 30th June 2018		Outstanding credits as at 31st December 2018	
Export Refund Formula	WHVAT	Export Refund Formula	WHVAT
775,463,436	2,686,837,814	2,105,749,313	3,283,655,869
Grand-total		3,462,301,250	5,389,405,181

VAT Refunds Owed to Manufacturers as at 31st December 2018



RECCOMENDATIONS ON THE WAY FORWARD

Recommendation on the Supply Of Goods and Services

- Passage of the proposed amendments to the PPAD Act to allow for **secured credit through bank** guarantees and letters of credit.
- Prompt payment Amendments/regulations under the PPAD to provide for **payment timelines and computing interest liquidated and ascertained damages**.
- Purposeful Reporting on progress of ensuring prompt payment in the country to Parliament.
- Automation of payment processeses.

Recommendation on the Supply Of Goods and Services

- Section 140 of the Pubic Procurement and Asset Disposal Act, (PPAD) 2015 **provides for interest on overdue amounts and liquidated damages with respect to delayed performance** and **overdue amounts owed** by a procuring entity and a contractor under a contract for a procurement.
- There are provisions making it an offence for a public officer to delay payment unnecessarily. This are under Section 157 (c) of the PPAD Act, 2015 and Section 47 (d) of the Public Finance and Management Act, (PFM).

Recommendation on Withholding VAT Refunds

- Withholding VAT refunds and off set are not provided for under the law.
- Proposed **amendments under the Statute Law Miscellaneous Amendment Bill 2019** seeks to address this.
- There is need to however include **provisions on retrospective application and limit the claim period**. Private sector has submitted its proposals on the same.
- Refund and off set is allowed under the value added tax, 2013 – Section 17 (5).

Recommendation on Export Formula Refunds

- The formula under the VAT Regulations continues to cause manufacturers who exporter to be in a perpetual credit position.
- There are provisions to exempt such manufacturers under the Tax Procedures Act by the Commissioner of Tax however this has never been effected.

Recommendation on late payment in the private sector

- Sector specific/dedicated legal framework to address late payment – Construction/retail.

- Codes of practice to be anchored under the Sale of Goods Act such as retail sector, construction sector etc

Recommendation on Adjudication of payment Disputes

- Operationalise the Small Claims Court to support Micro and Small enterprises to address adjudication of payment matters.

- Perhaps a Payment Tribunal for liquidated amounts?

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY

REPORT OF THE DEPARTMENTAL COMMITTEE ON SPORTS CULTURE AND TOURISM ON THE CONSIDERATION OF STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019 (NATIONAL ASSEMBLY BILLS NO. 21)

DIRECTORATE OF COMMITTEE SERVICES

CLERK'S CHAMBERS

NAIROBI

APRIL 2019

LIST OFABBREVIATIONS AND ACRONYMS

CUE	-	Commission for University Education
TPA	-	Tourism Professional Association,
NAPUK	-	National Association of Private Universities in Kenya

LIST OF ANNEXURES

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

On behalf of the Departmental Committee on Sports, Culture and Tourism and pursuant to provisions of Standing Order 207 (6), it is my pleasant privilege and honor to present to the Justice and Legal Affairs Committee the report of the Committee on its considerations of the Statute Law (Miscellaneous Amendments) Bill, 2019. The Bill was committed on 3rd April 2019, and it is on this basis that the Committee makes this report pursuant to Standing Order 127.

The Statute Law (Miscellaneous Amendments) Bill, 2019 (National Assembly Bills No. 21) was published on 29th March, 2019 and underwent First Reading in the National Assembly on 3rd April, 2019. 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)I.

The National Assembly through local daily newspapers of 10th April, 2019 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 one sitting considering the Bill. The Committee considered and unanimously adopted its report on 30th April, 2019. Minute of the sitting of the Committee on the review of the Bill is annexed to this report.

The Committee considered amendments to the Tourism Act (No. 28 of 2011) in the Statute Law (Miscellaneous Amendments) Bill, 2019 (National Assembly Bills No. 21).

I wish to appreciate the Committee Members for their valuable contributions in the consideration of the Bill. I also wish to thank the Speaker and Clerk of the National Assembly for facilitating the Committee during the process. Lastly, I thank the Committee's secretariat for their diligence in providing technical and logistical support to Committee.

Signed.....**Date**....2nd May 2019....

HON (DR.) VICTOR K, MUNYAKA, M.P.

CHAIRPERSON, DEPARTMENTAL COMMITTEE ON SPORTS, CULTURE AND TOURISM

PART 1

1. PREFACE

1.0 Mandate of the Committee

The Departmental Committee on Sports, Culture and Tourism is one of the fifteen departmental committees of the House established pursuant to Article 124 of the Constitution of Kenya 2010 and Standing Order 216 of the National Assembly and mandated to—

(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 programs and policy objectives of ministries and departments and the effectiveness of the implementation;

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

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

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

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

(g) Make reports and recommendations to the House as often as possible, including recommendation of proposed legislation.

The Departmental Committee on Sports, Culture and Tourism oversights the following Ministries/Departments/Agencies:

1. State Department of Sports Development
2. State Department of Heritage; and
3. State Department of Tourism

1.1 Committee Membership

The Committee comprises the following Honourable Members-

The Hon. (Dr.) Victor Kioko Munyaka, M.P.

Member of Parliament for Machakos Town Constituency

Chairperson Departmental Committee on Sports, Culture and Tourism

Jubilee Party

The Hon. (Dr.) Korei Ole Lemein, M.P.

Member of Parliament for Narok South Constituency

Vice-Chairperson Departmental Committee on Sports, Culture and Tourism

Jubilee Party

The Hon. Christopher Omulele, M.P.

Member of Parliament for Luanda Constituency

Member Departmental Committee on Sports, Culture and Tourism

Orange Democratic Movement Party (ODM)

The Hon. (Dr.) Christine Ombaka, M.P.

Member of Parliament for Siaya County

Member Departmental Committee on Sports, Culture and Tourism

Orange Democratic Movement Party (ODM)

The Hon. Cyprian Kubai Iringo, M.P.

Member of Parliament for Igembe Central Constituency

Member Departmental Committee on Sports, Culture and Tourism

Jubilee Party

The Hon. Jones Mlolwa, M.P.

Member of Parliament for Voi Constituency

Member Departmental Committee on Sports, Culture and Tourism

Orange Democratic Movement Party (ODM)

The Hon. Daniel Wanyama Sitati, M.P.
Member of Parliament for Webuye West Constituency
Member Departmental Committee on Sports, Culture and Tourism
Jubilee Party

The Hon. Benard Masaka Shinali, M.P.
Member of Parliament for Ikolomani Constituency
Member Departmental Committee on Sports, Culture and Tourism
Jubilee Party

The Hon. (Prof.) Jacqueline Oduol, M.P.
Nominated Member of Parliament
Member Departmental Committee on Sports, Culture and Tourism
Orange Democratic Movement Party (ODM)

The Hon. (Dr.) Tecla Chebet Tum, M.P.
Member of Parliament for Nandi County
Member Departmental Committee on Sports, Culture and Tourism
Jubilee Party

The Hon. Jane Jepkorir Kiptoo Chebaibai, M.P.
Member of Parliament for Elgeyo Marakwet County
Member Departmental Committee on Sports, Culture and Tourism
Jubilee Party

The Hon. Lydia Haika Mnene Mizighi, M.P.
Member of Parliament for Taita Taveta County
Member Departmental Committee on Sports, Culture and Tourism
Jubilee Party

The Hon. George Risa Sunkuyia, M.P.
Member of Parliament for Kajiado West Constituency
Member Departmental Committee on Sports, Culture and Tourism

Jubilee Party

The Hon. Annie Wanjiku Kibeh, M.P.
Member of Parliament for Gatundu North Constituency
Member Departmental Committee on Sports, Culture and Tourism
Jubilee Party

The Hon. Sylvanus Maritim, M.P.
Member of Parliament for Ainamoi Constituency
Member Departmental Committee on Sports, Culture and Tourism
Jubilee Party

The Hon. Jeremiah Lomorukai, M.P.
Member of Parliament for Loima Constituency
Member Departmental Committee on Sports, Culture and Tourism
Orange Democratic Movement Party (ODM)

The Hon. Charles Ngusya Nguna, M.P.
Member of Parliament for Mwingi West Constituency
Member Departmental Committee on Sports, Culture and Tourism
Wiper Democratic Party (WDP)

The Hon. Titus Mukhwana Khamala, M.P. (Bishop)
Member of Parliament for Lurambi Constituency
Member Departmental Committee on Sports, Culture and Tourism
Amani National Congress Party (ANC)

The Hon. Charles Kamuren, M.P.
Member of Parliament for Baringo South Constituency
Member Departmental Committee on Sports, Culture and Tourism
Jubilee Party

1.2 Committee Secretariat

Helen Kina	-	Second Clerk Assistant
Fredrick Otieno	-	Third Clerk Assistant
Salem Lorot	-	Legal Counsel II
Vitus P.O Owino	-	Research Officer III
Catherine Gati	-	Fiscal Analyst
Martin Mutua	-	Media Relations Officer
Sheila Chebotibin	-	Sergeant At-Arms

PART 2

2. INTRODUCTION AND BACKGROUND

2.1 MEMORANDUM OF OBJECTS AND REASONS ON THE BILL

The Bill seeks to amend various statutes but the one that falls within the mandate of the Committee is the proposed amendment to the Tourism Act (No. 28 of 2011).

The Tourism Act (No. 28 of 2011)

The Bill seeks to amend the Act to include universities among institutions offering tourism-related courses.

The Bill does not concern county governments within the meaning of Article 110 of the constitution.

The enactment of the Bill shall not occasion expenditure of public funds.

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 April 10th 2019 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 written submissions on the proposed amendments to the Tourism Act (No. 28 of 2011).

The following stakeholders submitted written submissions –

(i) Tourism Professional Association (TPA);
(ii) National Association of Private Universities in Kenya (NAPUK)

The written submissions received are contained in Annexure 3 of the report.

PART 3

3. CONSIDERATION OF THE BILL BY THE COMMITTEE

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

3.1 THE TOURISM ACT (NO. 28 OF 2011)

3.1.1 Proposed amendment to section 2 of the Act

Insert the following new definition in its proper alphabetical sequence—

"university" has the meaning assigned to it under the Universities Act, 2012 (No. 42 of 2012).

(i) Stakeholders' submissions

The National Association of Private Universities in Kenya proposed that section 2 of the Act be amended by deleting the definition of the term "College" and replace it with "institutions training hospitality and tourism". The justification for the amendment is that the term "College" discriminates against universities and other institutions accredited to train hospitality and tourism programmes.

The Association has also proposed deletion of the definition of the term "Council" and substitution with "Councils of Accredited Institutions training hospitality and tourism programmes. The justification for the amendment is that the Kenya Utalii College is not the single accredited institution in training hospitality and tourism programmes. Further, the proposed amendment will introduce and recognize councils and other governance authorities of institutions accredited to train hospitality and tourism programmes.

The Association has also proposed an amendment to the definition of the term "tourism agencies" by deleting the word "College" and replacing it with the words "universities and institutions accredited to train hospitality and tourism programmes. The justification for the amendment is that recognizing the College which the Act implies the Kenya Utalii College discriminates against universities accredited to train hospitality and tourism programmes.

The Association has also proposed an introduction of accrediting authorities of universities and institutions accredited to train hospitality and tourism programmes. The justification for this is that training hospitality and tourism programmes in higher education is accredited and

regulated by various authorities including the Commission for University Education (CUE).

(i) Observation

The Committee made the following observations:

(a) The purpose of the amendment is to define the term "University" since it is used in the subsequent proposed amendment to section 68(f) of the Act;

(b) Section 17 of the Tourism Act (No. 28 of 2011) establishes the Kenya Utalii College and pursuant to section 18 the College undertakes tourism and hospitality training and capacity building for the tourism sector;

(c) Universities and other colleges also offer tourism and hospitality training besides the Kenya Utalii College;

(d) The term "College" cannot be deleted as proposed by the National Association of Private Universities in Kenya but their concerns can be addressed by amending section 2 of the Act by defining the term "technical and vocational college" with the meaning assigned to it under the Technical and Vocational Education and Training Act (No. 29 of 2013);

(e) The proposal by the National Association of Private Universities in Kenya to delete the term "Council" and to substitute it with "Councils of Accredited Institutions training hospitality and tourism programmes" is a substantive amendment and will necessitate an amendment to section 20, 21, 22 and other similar provisions which falls outside the subject matter of the Bill contrary to standing order 133(5) and fundamentally alters the existing Act;

(f) There is need to define the term "tourism hospitality training institutions" in order to cater for other institutions that offer training in tourism and hospitality apart from the Kenya Utalii College, universities and technical and vocational colleges which will relate to amendments to section 68(f).

(iv) Recommendation

The Committee recommends that the proposed amendment to section 2 of the Act be agreed to for the following reasons:

(a) The purpose of the amendment is to define the term "University" since it is used in the subsequent proposed amendment to section 689f) of the Act;

(b) Universities and other colleges also offer tourism and hospitality training besides the Kenya Utalii College;

The Committee proposes an amendment to section 2 to insert the following new definitions in their proper alphabetical sequence-

"technical and vocational college" has the meaning assigned to it under the Technical and Vocational Education and Training Act (No. 29 of 2013);

"tourism hospitality training institutions" are institutions that are accredited to offer courses on tourism and hospitality and they don't include the Kenya Utalii College, universities or technical and vocational colleges.

3.1.2 Proposed amendment to section 68(f) of the Act

Insert the expression ", university offering training in tourism hospitality" immediately after the word "College".

Stakeholders' submissions

The National Association of Private Universities in Kenya proposed that section 68(f) be amended by deleting the word "College". The justification of the amendment is that the term "the College" implies "the Kenya Utalii College".

(i) Observation

The Committee made the following observations:

(a) Section 68 of the Act provides for the object and purpose of the Tourism Fund established under section 66 of the Act;

(b) Section 68(f) of the Act provides for one of the purposes of the Tourism Fund as to "finance training and capacity development activities of the College and of such other tourism hospitality training institutions as may be established under this Act";

(c) The amendment seeks to include universities offering training in tourism hospitality as beneficiaries of the Tourism Fund since the purpose of the Fund is to finance training and capacity development activities of institutions offering training in tourism hospitality;

(d) Owing to interpretational challenges that may arise on "tourism hospitality training institutions as may be established under this Act" as used in paragraph (f), an express inclusion of universities offering training in tourism hospitality cures the defect;

(e) The proposal by the National Association of Private Universities in Kenya to delete the word "College" in section 68(f) would have the consequence of locking out the Kenya Utalii College from receiving the Tourism Fund to finance its training and capacity development activities yet the proposal does not give a position on the intended inclusion of universities offering training in tourism hospitality;

(f) Section 68(f) needs to be amended—

(i) to include technical and vocational colleges offering training in tourism hospitality;

(ii) to delete the words "and of such other tourism hospitality training institutions as may be established under this Act" and substitute therefor with the words "and of tourism hospitality training institutions".

(iv) Recommendation

The Committee recommends that the amendment be agreed to.

General stakeholder submissions

The Tourism Professional Association proposed amendments to the Tourism Act (No. 28 of 2011) to entrench the Tourism Professional Associations in the Act and to expressly lay out its mandate as a separate entity with distinct functions from other players within the sector. They indicate that currently the requirement for the establishment of such an association is provided for in the Tourism Regulatory Authority Regulations 2014. They further indicate that the proposed development of a substantive provision in the Tourism Act is critical in order to enable TPA operation line with international best practice for professional associations as self-regulating entities.

(i) Committee's observations

The Committee made the following observations:

(a) The proposed amendments are substantive and its merits should be considered in a substantive amendment bill to the Tourism Act (No. 28 of 2011);

(b) The amendments expand the subject matter of the Bill contrary to Standing Order 133(5).

(ii) Committee's recommendation

The Committee recommends that the proposed amendment be rejected but be considered as a substantive amendment to the Tourism Act (No. 28 of 2011).

The National Association of Private Universities in Kenya has proposed amendments to section 67 (d) (ii) to provide as follows—

> 67. (d) (ii) four shall be persons qualified and competent in the field of tourism, financial accounting, management or marketing two of who shall be drawn from private universities.

The justification for the amendment is that private universities are significant players in human resource development and capacity building in the fields of hospitality and tourism. The absence of private universities representation in the Board of Trustees would negate their significance in training associated programmes and in contributing to prudent management of the Fund.

(iii) Committee's observations

The Committee made the following observations:

(a) The proposed amendment refers to section 67(d)(ii) which is non-existent in the Act;

(b) Despite the error in quoting the correct provision, the proposed amendments are substantive and its merits should be considered in a substantive amendment bill to the Tourism Act (No. 28 of 2011);

(c) The amendments expand the subject matter of the Bill contrary to Standing Order 133(5).

(iv) Committee's recommendation

The Committee recommends that the proposed amendment be rejected but be considered as a substantive amendment to the Tourism Act (No. 28 of 2011).

MINUTES OF THE 23RD SITTING OF THE DEPARTMENTAL COMMITTEE ON SPORTS, CULTURE AND TOURISM HELD ON TUESDAY 30TH APRIL, 2019 IN THE BOARD, 2ND FLOOR, PROTECTION HOUSE, PARLIAMENT BUILDINGS AT 10:15 AM

PRESENT

1. The Hon. (Dr.) Victor Kioko Munyaka, MP. - Chairperson
2. The Hon. (Dr.) Korei Ole Lemein, MP. - Vice Chairperson
3. The Hon. Christopher Omulele, MP
4. The Hon. Dr. Christine Ombaka, MP.
5. The Hon. Kubai Iringo, MP.
6. The Hon. Daniel Wanyama Sitati, MP.
7. The Hon. (Prof.) Jacqueline Oduol, MP.
8. The Hon. (Dr.) Tecla Chebet Tum, MP.
9. The Hon. Titus Mukhwana Khamala, MP.
10. The Hon. Charles Ngusya Nguna, MP.
11. The Hon. Sylvanus Maritim, MP.
12. The Hon. George Risa Sunkuyia, MP.
13. The Hon. Lydia Haika Mnene Mizighi, MP.
14. The Hon. Charles Kamuren, MP.

APOLOGY

1. The Hon. Jones Mlolwa, MP.
2. The Hon. Benard Masaka Shinali, MP.
3. The Hon. Jeremiah Lomorukai, MP.
4. The Hon. Annie Wanjiku Kibeh, MP.
5. The Hon. Jane Jepkorir Kiptoo Chebaibai, MP

IN-ATTENDANCE

NATIONAL ASSEMBLY

1. Ms. Helen Kina - Second Clerk Assistant
2. Mr. Fredrick Otieno - Third Clerk Assistant
3. Mr. Salem Lorot - Legal Counsel

4. Mr. Vitus Okech - Research Officer
5. Ms. Sheila Chebotibin - Sergeant At-Arms
6. Mr. Onesmus Kiragu - Sergeant At-Arms

MIN.NO.NA/SCT/2019/093: PRELIMINARIES

The Chairperson called the meeting to order at fifteen minutes past ten O'clock followed by a prayer.

MIN.NO.NA/SCT/2019/094: CONFIRMATION OF MINUTES

Confirmation of the minutes of the previous sitting was deferred to the next meeting

MIN.NO.NA/SCT/2019/095: CONSIDERATION OF THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 2019 AND ADOPTION OF ITS REPORT

The Committee considered the Bill and unanimously adopted its report with the following recommendations:

1. The Committee recommends that the proposed amendment to section 2 of the Act be agreed to for the following reasons:

   (a) The purpose of the amendment is to define the term "University" since it is used in the subsequent proposed amendment to section 689f) of the Act;

   (b) Universities and other colleges also offer tourism and hospitality training besides the Kenya Utalii College;

2. The Committee proposes an amendment to section 2 to insert the following new definitions in their proper alphabetical sequence-

   "technical and vocational college" has the meaning assigned to it under the Technical and Vocational Education and Training Act (No. 29 of 2013);

"tourism hospitality training institutions" are institutions that are accredited to offer courses on tourism and hospitality and they don't include the Kenya Utalii College, universities or technical and vocational colleges.

MIN.NO.NA/SCT/2019/096: ADJOURNMENT

There being no other business, the meeting was adjourned at eleven O'clock.

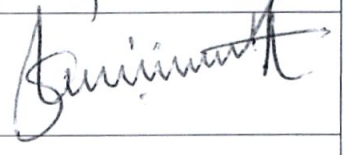
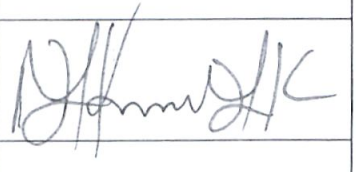
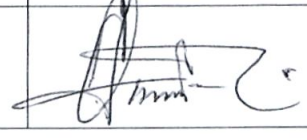
SIGN: ..... **DATE:** 2nd May 2019

CHAIRPERSON

ADOPTION OF THE REPORT OF THE DEPARTMENTAL COMMITTEE ON SPORTS, CULTURE AND TOURISM ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2019

We the Honourable Members of the Departmental Committee on Sports Culture and Tourism today Tuesday 30th day of April 2019, do hereby affix our signatures to this report on the Statute Law (Miscellaneous Amendments) Bill, 2019 (National Assembly Bills No. 21) to affirm our approval and support.

No.	NAME OF MEMBER	SIGNATURE
1.	Hon. (Dr.) Victor Kioko Munyaka, MP. – ***Chairperson***	
2.	Hon. (Dr.) Korei Ole Lemein, M.P, M.P. – ***Vice Chairperson***	
3.	Hon. Christopher Omulele, M.P.	
4.	Hon. (Dr.) Christine Ombaka, MP, M.P.	
5.	Hon. Cyprian Kubai Iringo, M.P.	
6.	Hon. Jones Mlolwa, M.P.	
7.	Hon. Daniel Wanyama Sitati, M.P.	
8.	Hon. Benard Masaka Shinali, M.P.	
9.	Hon. (Prof) Jacqueline Oduol, M.P.	
10.	Hon. (Dr.) Tecla Chebet Tum, M.P.	

11.	Hon. Jane Jepkorir Kiptoo Chebaibai, M.P.	
12.	Hon. Lydia Haika Mnene Mizighi, M.P.	
13.	Hon. George Risa Sunkuyia, M.P.	
14.	Hon. Annie Wanjiku Kibeh, M.P.	
15.	Hon. Sylvanus Maritim, M.P.	
16.	Hon. Jeremiah Lomurukai, M.P.	
17.	Hon. Charles Ngusya Nguna, M.P.	
18.	Hon. Titus Mukhawana Khamala, M.P.	
19.	Hon. Charles Kamuren, M.P.	

PC- SPORTS, CULTURE & TOURISM

REPUBLIC OF KENYA

NATIONAL ASSEMBLY
TWELFTH PARLIAMENT – THIRD SESSION

In the matter of consideration by the National Assembly of the Statue Law (Miscellaneous Amendment) Bill (National Assembly Bill No. 21 of 2019)

SUBMISSION OF MEMORANDA

Article 118(1)(b) of the Constitution provides that *"Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees"*. The National Assembly Standing Order 127(3) provides that, *"the Departmental Committee to which a Bill is committed shall facilitate public participation and shall take into account views and recommendations of the public when the Committee makes its report to the House"*.

The Statue Law (Miscellaneous Amendment) Bill, 2019 seeks to make various amendments to the statutes, which is in keeping with the practice of making various amendments that do not merit the publication of separate Bills and consolidating them into one Bill.

The Bill has undergone First Reading and pursuant to the provisions of Standing Order 127(1) of the National Assembly Standing Orders which provides that, *"a Bill having been read a First Time shall stand committed to the relevant Departmental Committee"*; the proposed amendments to various Acts of Parliament stand committed to the following Departmental Committees of the National Assembly:

No.	Act to be amended	Relevant Committee
1	The District and Provinces Act, 1992 (No. 9 of 1992)	Administration and National Security
2	The Alcoholic Drinks Control Act, 2010 (No. 4 of 2010)	
3	The Prevention of Terrorism Act, 2012 (No. 30 of 2012)	
4	The Companies Act, 2015 (No. 17 of 2015)	Justice and Legal Affairs
5	The Insolvency Act, 2015 (No. 18 of 2015)	
6	The Court of Appeal (Organization and Administration) Act, 2015 (No. 28 of 2015)	
7	The Kenya Law Reform Commission Act, 2013 (No. 19 of 2013)	
8	The Legal Education Act, 2012 (No. 27 of 2012)	
9	The Kenya School of Law Act, 2012 (No. 26 of 2012)	
10	The Value Added Tax Act, 2013 (No. 35 of 2013)	Finance and National Planning
11	The Microfinance Act, 2006 (No. 19 of 2006)	
12	The Public Finance Management Act, 2012 (No. 18 of 2012)	
13	The Tourism Act, 2011 (No. 28 of 2011)	Sports, Culture and Tourism
14	The Merchant Shipping Act, 2009 (No. 4 of 2009)	Transport, Public Works and Housing
15	The Wildlife Conservation and Management Act, 2013 (No. 47 of 2013)	Environment and Natural Resources

Following public participation and consideration by the respective Committees, the **Departmental Committee on Justice and Legal Affairs** shall thereafter consolidate the reports of the respective Committees and compile one report to the House on the said Bill.

Pursuant to the provisions of Article 118(1) (b) of the Constitution and Standing Order 127(3), the Committee invites members of the Public to submit representations they may have on the said Bill. The representations may be forwarded to the **Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi;** hand-delivered to the **Office of the Clerk, Main Parliament Buildings, Nairobi;** or emailed to **clerk@parliament.go.ke;** to be received **not later than Tuesday, 16th April, 2019 at 5.00 pm.**

MICHAEL R. SIALAL, EBS
CLERK OF THE NATIONAL ASSEMBLY



REPUBLIC OF KENYA

TWELFTH PARLIAMENT
THE SENATE

SESSIONAL COMMITTEE ON COUNTY PUBLIC ACCOUNTS AND INVESTMENTS

NOTICE OF SITTINGS FOR THE MONTHS OF APRIL AND MAY, 2019

Pursuant to the provisions of Articles 96 (3) and 229 (7) and (8) of the Constitution and standing order 220 of the Senate Standing Orders, in exercise of its mandate of oversight over county public accounts and investments, the Senate Sessional Committee on County Public Accounts and Investments informs and invites the Chief Executives of the entities listed in the Schedule below of the sittings for the months of April and May, 2019.

CONSIDERATION OF THE REPORT OF THE AUDITOR- GENERAL ON THE FINANCIAL STATEMENTS FOR THE FINANCIAL YEAR 2017/2018

DAY/ DATE	TIME	ENTITY
Thursday, 25th April, 2019	9.30am	Embu County Excutive
Friday, 26th April, 2019	9.30am	Lamu County Executive
Monday, 29th & Tuesday, 30th April, 2019	9.30am	Nairobi County Executive
Thursday, 2nd May, 2019	9.30am	Kiambu County Executive
Friday, 3rd May, 2019	9.30am	Wajir County Executive
Monday, 13th May, 2019	9.30am	Migori County Executive
Tuesday, 14th May, 2019	9.30am	Homabay County Executive
Wednesday, 15th May, 2019	9.30am	Kisii County Executive
Thursday, 16th May, 2019	9.30am	Taita- Taveta County Executive
Friday, 17th May, 2019	9.30am	Murangá County Executive
Monday, 20th May, 2019	9.30am	Tana River County Executive
Tuesday, 21st May, 2019	9.30am	Meru County Executive
Wednesday, 22nd May, 2019	9.30am	Isiolo County Executive
Thursday, 23rd May, 2019	9.30am	Turkana County Executive
Monday, 27th May, 2019	9.30am	Kirinyaga County Executive
Tuesday, 28th May, 2019	9.30am	Mombasa County Executive
Wednesday, 29th May, 2019	9.30am	West Pokot County Executive
Thursday 30th, May, 2019	9.30am	Kilifi County Executive

NOTES:

1. All County Executives are requested to submit written responses (in hard and soft copy) and all supporting documents to the specific issues raised in the Auditor General's Report on Financial Operations of the respective County Executive for the Financial Year 2017/2018 to the relevant Auditor-General, Regional Hub Offices and to the Office of the Clerk of the Senate, First Floor, Main Parliament Buildings, within the timelines communicated in our previous letters; and
2. Meetings will be held in Committee Room 5, First Floor, Main Parliament Buildings, Nairobi or such other venue as shall be communicated.

CLERK OF THE SENATE/ SECRETARY,
PARLIAMENTARY SERVICE COMMISSION.

REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT - THIRD SESSION

In the matters of consideration by the National Assembly:-

1. **The Narcotics Drugs and Psychotropic Substances (Control) (Amendment) Bill (National Assembly Bill, 2019)**
2. **The National Disaster Management (Authority) Bill (National Assembly Bill, 2019)**

SUBMISSION OF MEMORANDA

Article 118(1)(b) of the Constitution provides that, *"Parliament shall facilitate public participation and involvement in the legislative and of Parliament and its Committees"*. The National Assembly Standing Order 127(3) provides that, *"the Departmental Committee to which a Bill is committed shall facilitate public participation and take into account the views and recommendations of the public when the Committee makes its report to the House"*.

The Narcotics Drugs and Psychotropic Substances (Control) (Amendment) Bill, 2019 seeks to a mend the Narcotics Drugs and Psychotropic Substances (Control) Act No. 4 of 1994 in order to - enhance the penalties of the offence of trafficking narcotic drugs define who law enforce officers are in respect to the Act; and prescribe offences for a law enforcement officer who aids or abets or is an accessory to any offence under the Act.

The National Disaster Management (Authority) Bill (National Assembly Bill, 2019) seeks to establish a centralized system of responding to and managing disasters in the country.

The above mentioned Bills have undergone First Reading pursuant to Standing Order 127(3) and stands committed to the **Departmental Committee on Administration and National Security** for consideration and thereafter report to the House.

Pursuant to Article 118 (1)(b) of the Constitution and Standing Order 127, the Committee invites interested members of the public to submit any representations they may have on the said Bills. The Submissions may be forwarded to the Clerk of the National Assembly, **P.O. Box 41842-00100, Nairobi** hand-delivered to the Office of the Clerk, **Main Parliament Building, Nairobi;** or emailed to **clerk@parliament.go.ke;** to be received on or **before Tuesday, 16th April, 2019 at 5:00 pm.**

MICHAEL SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY

REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT - THIRD SESSION

In the matters of consideration by the National Assembly:-

1. **The Employment (Amendment) Bill (National Assembly Bill, 2019)**
2. **The National Cohesion and Integration (Amendment) Bill (National Assembly Bill, 2019)**

SUBMISSION OF MEMORANDA

Article 118(1)(b) of the Constitution provides that, *"Parliament shall facilitate public participation and involvement in the legislative and of Parliament and its Committees"*. The National Assembly Standing Order 127(3) provides that, *"the Departmental Committee to which a Bill is committed shall facilitate public participation and take into account the views and recommendations of the public when the Committee makes its report to the House"*.

The Employment (Amendment) Bill (National Assembly Bill, 2019) seeks to amend the Employment Act, 2007 in order to afford pre-adoptive leave to parents who apply for the adoption of children who are not their natural children born to them by birth.

The National Cohesion and Integration (Amendment) Bill (National Assembly Bill, 2019) seeks to amend section 17 of the National Cohesion and Integration Act, 2008 which deals with the procedure of appointing Commissioners.

The above mentioned Bills have undergone First Reading pursuant to Standing Order 127(3) and stands committed to the **Departmental Committee on Labour & Social Welfare** and the **Select Committee on National Cohesion & Equal Opportunity** respectively for consideration and thereafter report to the House.

Pursuant to the provisions of Article 118(1)(b) of the Constitution and Standing Order 127(3), the respective Committees invite members of the Public to submit representations they may have on the said Bills. The representations may be forwarded to the **Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi;** hand-delivered to the **Office of the Clerk, Main Parliament Buildings, Nairobi;** or emailed to **clerk@parliament.go.ke;** to be received **on or before Tuesday, 16th April, 2019 at 5.00 pm.**

MICHAEL SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY

REPUBLIC OF KENYA

NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – THIRD SESSION

In the matter of consideration by the National Assembly of the Statue Law (Miscellaneous Amendment) Bill (National Assembly Bill No. 21 of 2019)

SUBMISSION OF MEMORANDA

Article 118(1)(b) of the Constitution provides that, *"Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees"*. The National Assembly Standing Order 127(3) provides that, *"the Departmental Committee to which a Bill is committed shall facilitate public participation and shall take into account views and recommendations of the public when the Committee makes its report to the House"*.

The Statue Law (Miscellaneous Amendment) Bill, 2019 seeks to make various amendments to the statutes, which is in keeping with the practice of making various amendments that do not merit the publication of separate Bills and consolidating them into one Bill -

The Bill has undergone First Reading and pursuant to the provisions of Standing Order 127(1) of the National Assembly Standing Orders which provides that, *"a Bill having been read a First Time shall stand committed to the relevant Departmental Committee"*, the proposed amendments to various Acts of Parliament stand committed to the following Departmental Committees of the National Assembly: -

No.	Act to be amended	Relevant Committee
1.	The District and Provinces Act, 1992 (No. 9 of 1992)	Administration and National Security
2.	The Alcoholic Drinks Control Act, 2010 (No. 4 of 2010)	
3.	The Prevention of Terrorism Act, 2012 (No. 30 of 2012)	
4.	The Companies Act, 2015 (No. 17 of 2015)	Justice and Legal Affairs
5.	The Insolvency Act, 2015 (No. 18 of 2015)	
6.	The Court of Appeal (Organization and Administration) Act, 2015 (No. 28 of 2015)	
7.	The Kenya Law Reform Commission Act, 2013 (No. 19 of 2013)	
8.	The Legal Education Act, 2012 (No. 27 of 2012)	
9.	The Kenya School of Law Act, 2012 (No. 26 of 2012)	
10.	The Value Added Tax Act, 2013 (No. 35 of 2013)	Finance and National Planning
11.	The Microfinance Act, 2006 (No. 19 of 2006)	
12.	The Public Finance Management Act, 2012 (No. 18 of 2012)	
13.	The Tourism Act, 2011 (No. 28 of 2011)	Sports, Culture and Tourism
14.	The Merchant Shipping Act, 2009 (No. 4 of 2009)	Transport, Public Works and Housing
15.	The Wildlife Conversation and Management Act, 2013 (No. 47 of 2013)	Environment and Natural Resources

Following public participation and consideration by the respective Committees, the **Departmental Committee on Justice and Legal Affairs** shall thereafter consolidate the reports of the respective Committees and compile one report to the House on the said Bill.

Pursuant to the provisions of Article 118(1) (b) of the Constitution and Standing Order 127(3), the Committee invites members of the Public to submit representations they may have on the said Bill. The representations may be forwarded to the **Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi;** hand-delivered to the **Office of the Clerk, Main Parliament Buildings, Nairobi;** or emailed to **clerk@parliament.go.ke;** to be received **not later than Tuesday, 16th April, 2019 at 5.00 pm.**

MICHAEL R. SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY



NATIONAL ASSOCIATION OF PRIVATE UNIVERSITIES IN KENYA (NAPUK)

Laita Street, Uniafric House • 3rd Floor, Rm 317 • P.O. BOX 13495-001000 NAIROBI.
Tel: +254 (0) 739 331 899 • Email: napuk.kenya@gmail.com

RECEIVED
17 APR 2019
CLERK'S OFFICE

16th April 2019
Mr. Michael Sialai, EBS
The Clerk of the National Assembly
Office of the Clerk, Main Parliament Buildings
P.O. Box 41842-00100
Nairobi

Dear Mr. Michael Sialai, EBS

Submission of Memoranda in the Matter of Miscellaneous Amendment of Tourism Act NO. 28 of 2011

The above matter refers,

The National Association of Private Universities (NAPUK) in Kenya being a forum for Private Universities Founders/Sponsors wishes to introduce Miscellaneous Amendments in the Tourism Act NO. 28, of 2011.

The proposed Amendments are considered necessary for the purpose making the Act inclusive and nondiscriminatory among institutions accredited to train hospitality and tourism programmes in Kenya.

It is the prayer of NAPUK members that this proposal will receive the highest consideration possible

Yours sincerely,

Dr. Vincent G. Gaitho
Secretary General
National Association of Private Universities in Kenya
+254722536902
Ggaitho.foundation@gmail.com

THE NATIONAL ASSEMBLY
RECEIVED
24 APR 2019
DIRECTOR COMMITTEE SERVICES
Time:.....

MEMORANDUM ON THE PROPOSED MISCELLANEOUS AMENDMENT OF TOURISM ACT NO. 28 OF 2011

INTERPRETATION OF THE ACT		
The ACT	Proposed Amendments	Justification
'College'	Delete "college" Replace with "Institutions training Hospitality and Tourism"	The term "College" discriminates against "Universities" and other institutions accredited to train hospitality and tourism programmes
"College" means the Kenya Utalii College established by section 17 of this Act;	Delete "The Kenya Utalii College" to be consistent with proposed amendment above	The Kenya Utalii College is not the single accredited institution in training hospitality and tourism programmes
"Council" means the Council of the Kenya Utalii College established by section 20 of this Act;	"Delete" the Council of the Kenya Utalii College and replace with Councils of Accredited Institutions training hospitality and tourism programmes	Proposed amendment will introduce and recognize councils other governance authorities of institutions accredited to train hospitality and tourism programmes
"Tourism Agencies"	"Delete" the College by replacing with Universities and Institutions accredited to train hospitality and tourism programmes	Recognizing the College which in the Act implies the Kenya Utalii College discriminates against Universities accredited to train hospitality and tourism programmes
	Introduce :Accrediting Authorities of Universities and Institutions accredited to train hospitality and tourism programmes"	Training hospitality and tourism programmes in Higher Education is accredited and regulated by various authorities including the Commission for University Education (CUE)
ESTABLISHMENT OF BOARD OF TRUSTEES		
67 (d) (ii) four shall be persons qualified and competent in the field of tourism, financial accounting, management or marketing.	67 (d) (ii) four shall be persons qualified and competent in the field of tourism, financial accounting, management or marketing "two of who shall be drawn from private universities"	Private Universities are significant players in human resource development and capacity building in the fields of hospitality and tourism. The absence of private universities representation said Board would negate their significance in training associated programmes and in contributing to prudent management of the Fund
OBJECT AND PURPOSE OF THE FUND		
(f) finance training and capacity development	Delete "the College"	"the College" in the Act implies "the Kenya Utalii College".

activities of the College and of such other tourism hospitality training institutions as may be established under this Act;		Mobilize resources for capacity development activities for a single intuition in a field where universities and other institutions are accredited to train programmes is discriminative.

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TOURISM
PROFESSIONAL
ASSOCIATION

(1) D/Committees & 16/04

(2) Hello pls deal FT 24/4/19

15th April 2019

Tourism Professional Association,
P.O. Box 46987 - 00100
Nairobi, Kenya

The Clerk,
Kenya National Assembly
P.O. Box 41842 – 00100
NAIROBI, KENYA

RECEIVED
16 APR 2019
CLERK'S OFFICE

(3) Gutter- pls note FT 24/4/19

RE: SUBMISSION OF MEMORANDA ON THE TOURISM ACT, 2011 (No. 28 of 2011)

INTRODUCTION

Tourism Professional Association (TPA) is a self-regulating professional association for professionals in the Tourism and Hospitality sector. Drawing its membership from Tourism and Hospitality professionals both in practice and academia, TPA exists to promote the highest professional standards of Tourism and Hospitality Practice and Education in Kenya. It was officially registered under the Societies Act (section 10) on 29th July 2016 in fulfillment of Tourism Act 2011 and Tourism Regulations (TRA) Act. This was after complying with all the requirements of registration of an association. Like many professions the world over, this development is significant in realizing the full potential of the tourism industry in Kenya by getting the involvement of the professionals in the industry.

The Tourism Act 2011 is the legislation responsible for the development, management, marketing and regulation of sustainable tourism and tourism-related activities and services in Kenya. Section 3 of the aforesaid statute establishes the Tourism Regulatory Authority. In Section 11 of the Tourism Regulations Act- TRA, it further establishes a Tourism Professional and Practitioner's Body known as **Tourism Professional Association**. Though the move towards the establishment of TPA began way back before the enactment of these legislations, their enactment led to the realization of the dream to have a professional association for the industry.

Prior to registration of TPA, adequate public participation was undertaken through forums held in different regions within the country in which different stakeholder expressed support for establishment of a self-regulating professional body for Tourism and Hospitality sector. These forums were sponsored by the Ministry of Tourism and Wildlife through the Tourism fund. Upon registration, the association under the leadership of an interim executive committee launched an online platform www.tpa.co.ke for recruitment and registration of sector professionals. To date, a total of 400 professionals of different cadres have signed up as members. A number of students in different colleges and universities have also been recruited and linked to HOSCO-the largest international networking platform created in 2011 with one idea in mind: to unite, inspire, and provide opportunities to all hospitality professionals worldwide who have built a unique network that connects qualified talent, companies, and schools around the globe.

On 1st March 2018 TPA had its formal launch and first annual general meeting at Utalii College Nairobi. During the 1st AGM, an executive committee consisting of 6 officials was elected to steer the Association for three years in line with the association's constitution. To be able to serve its members more efficiently, a functioning secretariat is being set up and capacity built. The second AGM was held on 29th March 2019 at the Boma Hotel, Nairobi. TPA has also submitted its yearly returns to the AG as required by law.

TPA has sought formal recognition from a number of state and non-state actors with a view of establishing strategic partnerships aimed at enhancing a united platform for ALL tourism and hospitality professionals and practitioners. The concrete results of this phase of engagement are:

a) Establishment of programs that seeks to build a strong collaborative partnerships between government, industry and academia.
b) Realization of TRA's mandate through TPA as provided for in TRA Regulations Section 11.

The association has signed, registered and is now a Member of the Code. The Code (short for "The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism") is a multi-stakeholder initiative with the mission to provide awareness, tools and support to the tourism industry to prevent the sexual exploitation of children. This was necessitated by the need to position professionals at the centre of preservation of culture and community empowerment which is in itself a key pillar to the development of tourism and the destination Kenya.

To facilitate the realization of TPA's Mandate, the association established different levels of membership to represent the diversity of the sector. Continuous Professional Development (CPD) policy, was developed, approved by the board and has since been guiding the Association towards professional development programs for its membership. From November, 2018 over 200 professionals have undertaken the 1st CPD training in the coastal, Rift valley, Nyanza, Central and Nairobi regions of the country.

The issue: TPA's Proposals on the amendments of the Tourism Act 2011.

With these developments and many more that are anticipated, and after operating for the past two years, TPA is of the opinion that it is time for the association to be entrenched in the substantive Tourism Act. In amending the current Tourism Act, there is need to develop a substantive provision establishing the Tourism Professionals Association expressly laying out its mandate as a separate entity with distinct functions from other players within the sector. Currently, the requirement for the establishment of such an association is provided for in the Tourism Regulatory Authority Regulations 2014.The proposed development of a substantive provision in the Tourism Act is critical in order to enable TPA operation line with international best practice for professional associations as self-regulating entities.

It is in this regard that we write to request the committee of Sports, Culture and Tourism to consider, in the process of amending the Tourism Act 2011, to anchor TPA in the Tourism Act, with clear mandate of organizing sector professionals into a well-structured program for development and growth. This has been the missing link in the management of the diverse tourism sector in Kenya. For example, all other professions have a near definite knowledge of the number of its professionals locally and in diaspora. This has made planning and development of relevant policies and programs for these professions possible. However, in the tourism industry, which is one of the largest sectors, employing over 20,000 Kenyans directly and many more indirectly, this is missing. The sector probably having operated for so long without a professional body is not well organized, both at training and practice levels. Currently in Kenya, it is common to find tourism and hospitality training being offered at every corner college in all towns across the country. Worse, there is no standardized or agreed curriculum for the different levels of professional and manpower development. Then there are those training institutions including universities that ordinarily will never be allowed to offer certain programs if they lack specific training infrastructure including laboratories and practical facilities. In the case of tourism and hospitality training, we have many colleges and universities training for example in food production without kitchens and related requisite facilities. The presence of TPA with requisite legal backing will provide the requisite professional foundation for checking training standards and practice.

In addition, the sector is plagued by human capital management gaps in need of attention. Whereas, Kenya is considered one of the countries within the region and globally with some of the best human resource capacity credited for providing world class services locally, regionally and internationally, there are investors within the country who still prefer bringing in expatriates to engage in jobs that have adequate Kenyan capacity. This according to some observers has been attributed to lack of a clear human capital transfer policy framework. Currently, the agencies concerned appear to lack the level of engagements expected before expatriates are allowed in Kenya to serve in strict adherence to best practices. A self-regulating professional association would provide the required expertise thus the need to entrench TPA in the legislation.

While the existing legislation provided for the background and registration of TPA, we believe it is ill equipped to anchor the association as self-regulating professional association. *It is our hope that as you make provisions for amending the Tourism act 2011, we can take advantage of this timely process to institutionalize and facilitate the establishment of the instruments and subsequently facilitate the realization of the vision through the National Assembly. We are available to make any such presentations and expound on these proposals if called upon by the committee.*

Yours faithfully,

Sam Ikwaye
Secretary
TOURISM PROFESSIONAL ASSOCIATION