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**PARLIAMENT OF KENYA
THE NATIONAL ASSEMBLY
TWELFTH PARLIAMENT – SECOND SESSION**

**DEPARTMENTAL COMMITTEE ON JUSTICE AND
LEGAL AFFAIRS**

**REPORT ON:
THE STATUTE LAW (MISCELLANEOUS
AMENDMENTS) BILL, 2018**

(NATIONAL ASSEMBLY BILLS No. 12)

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

June, 2018

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LIST OF ABBREVIATIONS AND ACRONYMS

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

LIST OF ANNEXURES

VOLUME 1 OF THE REPORT

- Annexure 1:** Minutes of Committee sittings on the consideration of the Bill
- Annexure 2:** Newspaper advertisement inviting the public to submit memoranda on the Bill
- Annexure 3:** Written submission received from stakeholders following newspaper advertisement

CHAIRPERSON’S FOREWORD

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

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

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

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

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

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

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

Signed.....

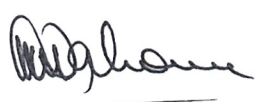
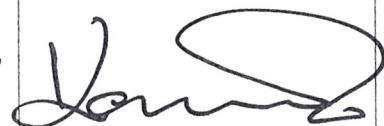
HON WILLIAM CHEPTUMO, M.P.

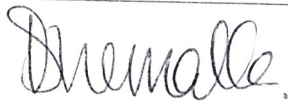
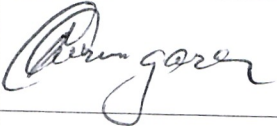
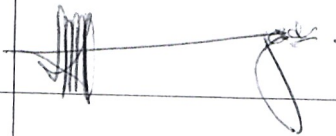
Chairperson, Departmental Committee on Justice and Legal Affairs

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

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

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

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

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

PART 1

1. PREFACE

1.1. Mandate of the Committee

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

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

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

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

1.2. Committee Membership

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

Hon. William Cheptumo, M.P.	–	<i>Chairperson</i>
Hon. Alice Muthoni Wahome, M.P.	–	<i>Vice Chairperson</i>
Hon. John Olago Aluoch, M.P.		
Hon. Roselinda Soipan Tuya, M.P.		
Hon. Charles Gimose, M.P.		
Hon. Johana Ng'eno, M.P.		
Hon. William Kamoti Mwamkale, M.P.		
Hon. Ben Orori Momanyi, M.P.		
Hon. Peter Opondo Kaluma, M.P.		
Hon. Jennifer Shamalla, M.P.		
Hon. Beatrice Adagala, M.P.		
Hon. Gladys Boss Shollei, CBS, M.P.		
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Hon. John Kiarie Waweru, M.P.		
Hon. Japheth Mutai, M.P.		
Hon. Adan Haji Yussuf, M.P.		
Hon. Zuleikha Hassan, M.P.		

1.3. Committee Secretariat

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

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

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

PART 2

2. INTRODUCTION AND BACKGROUND

2.1 Memorandum of objects and reasons of the Bill

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

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

(i) The Judicature Act, (Cap 8)

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

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

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

(iii) The Advocates Act (Cap 16)

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

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

(iv) The Civil Procedure Act (Cap 21)

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

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

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

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

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

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

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

(vii) The Criminal Procedure Code (Cap 75)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(xvii) Other statutes

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

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

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

2.2 PUBLIC PARTICIPATION IN THE REVIEW OF THE BILL

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

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

Standing Order 127(3) provides as follows-

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

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

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

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

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

The following stakeholders submitted written submissions –

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

(xvii) Ms. Annah Konuche

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

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

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

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

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

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

PART 3

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

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

3.1 THE JUDICATURE ACT (CAP 8)

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

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

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

(i) Stakeholders’ submissions

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

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

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

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

(ii) Observations

The Committee observed as follows-

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

(iii) Recommendation

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

(iv) Rationale for the proposed amendment

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

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

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

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

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

(i) Stakeholders’ submissions

The Committee did not receive any views from stakeholders.

(ii) Observations

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

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

(iii) Recommendation

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

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

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

(i) Stakeholders’ submissions

The Judiciary supported the proposed amendments.

(ii) Observations

The Committee observed that-

- (a) The amendments aim to include the Employment and Labour Relations Court and the Environment and Land Court in the Act in line with Chapter 10 of the Constitution.
- (b) Section 3(1), which makes reference to the mode of exercise of jurisdiction by Courts, makes reference to all courts in Kenya except the Supreme Court, the Environment and Land Court and the Employment and Labour Relations Court. These Courts were established in 2010 on the enactment of the Constitution. In particular, the Supreme Court of Kenya which is the highest-ranked Court in Kenya and an integral part of the Kenyan Judicial structure is not mentioned.

(iii) Recommendation

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

(iv) Rationale for the amendment

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

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

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

(i) Stakeholders’ submissions

The Judiciary supported the amendments.

(ii) Observations

The Committee observed as follows-

- (a) The amendments aim to include the Employment and Labour Relations Court and the Environment and Land Court in the Act in line with Chapter 10 of the Constitution.
- (b) Section 3(2), which makes reference to the mode of exercise of jurisdiction by Courts, makes reference to all courts in Kenya except the Supreme Court, the Environment and Land Court and the Employment and Labour Relations Court. These Courts were established in 2010 on the enactment of the Constitution. In particular, the Supreme Court of, which is the highest-ranking Court in Kenya and an integral part of the Kenyan Judicial structure, is not mentioned.

(iii) Recommendation

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

(iv) Rationale for the amendment

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

3.2 THE OATHS AND STATUTORY DECLARATIONS ACT (CAP 16)

3.2.1 Proposed amendment to section 12 of the Act

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

(i) Stakeholders’ submissions

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

(ii) Observations

The committee observed as follows-

- (a) the amendments seek to remove references to offices and terminologies which have been rendered obsolete;
- (b) the Deputy Registrars in the Employment and Labour Relations Court and Environment and Labour Relations Court have similar ranking to deputy registrars of the High Court and also administer oaths.

(iii) Recommendation

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

(iv) Rationale for the amendment

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

3.2.2 Proposed amendment to section 13 of the Act

The section be deleted.

(i) Stakeholders’ submissions

The Committee did not receive any views from stakeholders

(ii) Observations

The Committee observed that-

- (a) Section 13 which the subject of deletion refers to the taking of oaths by Africans not being Christians or Muslims in the manner prescribed by the person's tribe;
- (b) the amendment takes cognizance of social changes that have taken place in the society over the years and seeks to align the Act with current times.

(iii) Recommendation

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

3.3. THE ADVOCATES ACT (CAP 16)

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

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

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders

(ii) Observation

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

(iii) Recommendation

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

3.3.2 Proposed amendment to section 19 of the Act

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

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders

(ii) Observation

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

(iii) Recommendation

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

3.3.3 Proposed amendment to section 23 of the Act

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

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

(i) Stakeholders' submissions

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

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

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

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

(ii) Observations

The Committee observed as follows-

- (a) the amendment seeks to prescribe the requirements that advocates must meet when drawing legal documents and pleadings to be lodged in registries. The requirement to include name, admission number and signature of the advocate who draws the documents is intended to prevent unqualified persons from drawing legal documents.
- (b) Subsection 2A as it is in the Advocates Act presently provides for the inclusion of details of the advocate who draws a legal document and also reference to issuance of a different stamp to practising advocates annually by the Law Society of Kenya.
- (c) The proposed amendment makes reference to “advocates issued with a practising certificate”. As pointed out by Kaplan and Stratton Advocates, there is often delay in issuance of practising certificates and the provision as drafted may be misconstrued to the effect that advocates may only draw instruments and pleadings after receiving the practising certificates. This could give rise to real and practical challenges to the work and business of advocates where issuance of certificates is delayed at no fault of the advocate.

(iii) Recommendation

The Committee recommends as follows-

- (a) That section 23A of the Advocates Act be amended by deleting subsection 2A;
- (b) The proposed amendment in the Bill be amended by deleting the words “to whom a practicing certificate has been issued and”

(iv) Rationale for the amendment

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

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

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

3.3.4 Proposed amendment to section 25 of the Act

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

Stakeholders’ submissions

The Committee did not receive any views from stakeholders

(i) Observation

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

(ii) Recommendation

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

3.3.5 Proposed amendment to section 27 of the Act

Delete the expression “Disciplinary Committee” and substitute therefor the expression “Disciplinary Tribunal”.

(i) Stakeholders’ submissions

The Committee did not receive any views from stakeholders

(ii) Observation

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

(iii) Recommendation

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

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

The section be deleted.

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

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

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

(i) Stakeholders’ submissions

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

(ii) Observations

The Committee observed as follows-

- (a) the amendment in the Bill is a redraft of the current provision on the Act that seeks to offer clarity by separating the ideas in two short paragraphs in line with the House drafting style;
- (b) the proposal to delete the provision on fees from the Act and subsequent repeal of the Advocates Remuneration Order is a substantive amendment that ought not to be moved in this Bill to require further input from Advocates and more stakeholders.

(iii) Recommendation

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

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

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

(i) Stakeholders’ submissions

The Committee did not receive any views from stakeholders

(ii) Observation

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

(iii) Recommendation

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

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

Delete and substitute thereof the following new sub section-

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

(i) Observation

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

(ii) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(iii) Recommendation

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

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

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

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

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

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

(i) Observations

The Committee observed as follows—

(a) that the amendments seek to-

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

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

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

- (b) Section 57(1) (b) empowers the Attorney-General to depute a person to serve on the Solicitor-General's behalf. Following the amendment to enable the Attorney General appoint a representative, there is need to have a consequential amendment to paragraph (b) empower the Solicitor-General to nominate his/her own representative.
- (c) As it is presently in the law, Section 57(1) (c) provides that one out of the six members nominated by LSK to the Disciplinary Tribunal should be an advocate who does not ordinarily practice in Nairobi. Since the advent of devolution, it has been observed that more advocates have also opened up businesses in areas outside Nairobi. The allowance of only one advocate to represent a significantly large number of advocates practising outside Nairobi does not take cognisance of these changes that have occurred in the past few years. There is therefore need to provide for more representation by increasing the number of "upcountry representative" to two advocates.

(ii) Stakeholders' submissions

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

(iii) Recommendation

The Committee recommends that –

- (a) Section 57(1)(b) be amended by deleting the words "a person deputed by the Attorney-General" and substituting therefor the words "or his representative";
- (b) Section 57 (1)(c) be amended by deleting the proposed amendment in the Bill relating to paragraph (c);
- (c) Section 57 (1)(c) be amended deleting the word "one" and substituting therefore the word "two".

(iv) Rationale for the amendment

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

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

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

(i) Observation

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

(ii) Stakeholders’ submissions

The Committee did not receive any views from stakeholders.

(iii) Recommendation

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

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

Delete and substitute therefor the following new subsections-

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

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

(i) Stakeholders’ submissions

The Committee did not receive any views from stakeholders.

(ii) Observation

- (a) The amendment seeks to offer clarity on the presiding officer at the meetings of the Tribunal;
- (b) The provision needs to be amended to align it with the amendments to section 57(1)(b).

(iii) Recommendation

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

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

(iv) Rationale for the amendment

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

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

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

(i) Stakeholders’ submissions

The Committee did not receive any views from stakeholders.

(ii) Observation

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

(iii) Recommendation

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

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

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

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Observation

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

(iii) Recommendation

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

3.3.13 Proposed amendment to section 80 of the Act

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

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Observation

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

(iii) Recommendation

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

3.4 THE CIVIL PROCEDURE ACT (CAP 21)

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

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

(i) Observation

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

(ii) Stakeholders’ submissions

The Committee did not receive any views from stakeholders.

(iii) Recommendation

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

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

Delete the words “other than a magistrate’s court of the third class”

(i) Observations

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

(ii) Stakeholders’ submissions

The Committee did not receive any views from the public.

(iii) Recommendation

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

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

Delete and substitute therefor the following new subsection–

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

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

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

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

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Observations

The Committee observed as follows-

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

(iii) Recommendation

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

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

(iv) Rationale for the amendment

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

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

Delete and substitute therefor the following new subsection—

- “(1A) A person shall be qualified to be nominated to the Committee by the Law Society of Kenya if that person-
- (a) has been a member in good standing of the Law Society of Kenya for at least ten years; and
 - (b) holds a current practising certificate at the time of his or her nomination”

New subsection

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

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

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

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

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

- (a) propose rules not inconsistent with this Act or any other written law to provide for any matters relating to the procedure before courts and tribunals; and
- (b) advise the Chief Justice on such rules as may be necessary under this section’’

(i) Stakeholders’ submissions

The Committee did not receive any views from stakeholders.

(ii) Observation

The committee observed as follows-

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

(iii) Recommendation

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

3.5 THE LAW OF CONTRACT ACT (CAP 23)

3.5.1 Proposed amendment to section 3 of the Act

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

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

(i) Stakeholders’ submissions

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

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

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

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

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

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

- (b) Once a demand guarantee is called up, the limitation may expire if the security isn't sold on account of pending litigation hence prevents sale of the security. It would cause a substantial loss of additional security to the lender;
- (c) Various factors may prevent the sale of security e.g. negligent valuation, market depression or need to file urgent suit for recovery against guarantors before they transfer their properties to defeat the anticipated rights of a lender
- (d) It contradicts the provisions of the Land Act relating to chargee's power of sale.

(ii) Observations

The Committee observed as follows-

- (i) The proposed amendment to the Law of Contract Act seeks to introduce a new condition to be met by a plaintiff where a defendant is charged for the debt of another person;
- (ii) It would be a popular provision with the *mwanauchi* who would see it as a way to protect citizens from the predatory tactics of banks who have caused suffering to the citizens;
- (iii) It would be seen as a move to also protect innocent guarantors from potential (and allegedly real) collusion between the principal debtor and the bank to sell the guarantor's assets so that the principal debtor goes scot free;
- (iv) The proposed amendment will add only a little difficulty to the banks (slightly delaying action against guarantors). In any event, the loss from the delay in enforcement of the guarantee will be compensated by way of interest on the loan to be recovered;
- (v) The banks need to initiate a public campaign to win the hearts of the public by showing the benefit to the common man of the role the banks play in the economy;

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

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

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

(iii) Recommendations

The committee rejected the proposal in the Bill.

(iv) Rationale for the rejection

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

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

3.6.1 Proposed amendment to section 2 of the Act

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

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

(i) Stakeholders’ submissions

The Committee did not receive any views from stakeholders.

(ii) Observation

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

(iii) **Recommendation**

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

3.7 THE PROBATION OF OFFENDERS ACT (CAP 64)

3.7.1 Proposed amendment to section 2 of the Act

Insert the following new definitions in their proper alphabetical sequence—

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

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

(i) Stakeholders’ submissions

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

Justification

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

(ii) Observation

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

(iii) Recommendation

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

(iv) Rationale for the amendment

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

3.7.2 Proposed amendment to section 4 of the Act

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

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

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

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

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

(i) Observation

- (a) The amendment introduces new sub-sections (5), (6) and (8) to require the presentation of a pre-sentence report by a probation officer before a Court makes a Probation Order. It also gives a probation officer authority to access records and other necessary information for the purpose of making a report.
- (b) The term “social inquiry” in the proposed subsection (7) should be accordingly rectified to read “pre-sentence”
- (c) As it is presently, section 4 provides for the courts powers to permit conditional release of offenders upon taking consideration of various factors such as youth, character, antecedents, home surroundings, health or mental condition. The committee was of the view that the term “age” would be more suitable term as a factor of consideration instead of “youth”.

(ii) Stakeholders’ submissions

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

(iii) Recommendation

The Committee recommends –

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

(iv) Rationale for the amendment

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

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

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

3.7.3 Proposed amendment to section 5 of the Act

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

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

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

(i) Stakeholders’ submissions

The Committee did not receive any views from stakeholders.

(ii) Observations

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

(iii) Recommendation

The Committee recommends that-

(a) section 5(1) by deleting the word “district” and substituting therefor the word “County” in view of the changes by the constitution.

(iv) Rationale for the amendment

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

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

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

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Observations

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

(iii) Recommendation

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

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

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

(i) Stakeholders' submissions

The Committee did not receive any views from stakeholders.

(ii) Observations

The Committee observed as follows-

- (a) The amendment seeks to allow for payment or remuneration of volunteer probation officers.
- (b) Volunteers should not be facilitated using public funds as they are rendering services without any promise of remuneration. Such a practice would discourage the institution from engaging officers in full time employment.

(iii) Recommendation

The proposed amendment to section 17(f) be rejected

(iv) Rationale for the rejection

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

3.7.6 Proposed amendments to other sections of the Act

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

- (a) Section 11(1) Replace “Principal Probation Officer” with “Director” wherever it appears;
- (b) Section 11 (3) Replace Principal Probation Officer with “Director” wherever it appears. Delete ‘District’ and replace with ‘county’ wherever it appears;
- (c) Section 11 (5) Delete ‘District’ wherever it appears and replace with “County”;
- (d) Section 16 (a) Repeat the same with respect to changing the word “principal probation officer” with “Director”;
- (e) Section 18 Repeat the same with respect to changing the word “principal probation” officer with “Director”;

Reasons

- (a) The Bill proposes a definition of the term ‘Director’.
- (b) The Director is the current head of department bestowed with the responsibility of overseeing the implementation of the Act and not the Principal Probation officer;
- (c) The Director supervises several officers below him, one of whom is the Principal Probation officer in job Group ‘N’;
- (d) As was the case originally (1946-1993), the Department was headed by a Principal Probation officer but this was changed and a new designation for the head of the department is the Director;
- (e) Leaving the term the “Principal Probation officer” in the aforementioned sections of the Act unchanged would mean that even the Director now would be subordinate to the Principal Probation officer.

(i) Observations

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

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

(ii) Recommendation

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

3.8 THE CRIMINAL PROCEDURE CODE (CAP 75)

3.8.1 Proposed amendment to section 2 of the Act

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

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

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

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

(i) Observations

The rationale for the amendment is as follows-

- (i) To replace the Attorney General with the Inspector-General of Police as the right person to give directions as to the person to serve as the officer in charge of a police station. This is in view of the Inspector General of Police’s powers under section 245 to exercise independent command over the National Police Service; and
- (ii) To ensure uniformity of definitions of terms used in similar context across the statute book. Section 40 of the National Police Service Act empowers the Inspector General of Police to gazette police stations.

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

(ii) Stakeholders’ submissions

The Committee did not get any views from stakeholders

(ii) Recommendation

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

(iii) Rationale for the amendment

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

3.8.2 Proposed further amendment to the Criminal Procedure Code

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

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

Reasons

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

- (b) The clause will anchor in law the current practice on bail information reports prepared by probation officers and used by the courts for bail decision-making.
- (c) It will establish the basis upon which the court can rely on in granting or denying bail and thus note leaving this decision to the discretion of the court alone.
- (d) The current practice of bail information reports or pre-bail reports are based on court precedents and on Bail and Bond Policy Guidelines (2015) developed by the National Council on the Administration of Justice (NCAJ).
- (e) It will establish means through which Victims concerns can be brought to the attention of the court before bail is issued. It will also help address the burgeoning Pre-trial/remand population with the resultant effect of reducing overall prison population especially of non-serious offenders.
- (f) It will ensure efficient operation of the Probation Department since anchoring in law the requirement to produce the Bail information reports will result in resource allocation specific for preparation of the Reports.

(iv) Observation

The committee observed as follows-

- (a) the decision to grant or decline to grant bail should be left to the Court's discretion;
- (b) the preparation of bail information report may be left to policy directions and not anchored in law so as to allow the court discretion to make a determination based on his/ her judgment and not influenced by a mandatory report;
- (c) the proposed practice may be subject to abuse; and
- (d) in light of the fact that the proposal is not part of the amendments proposed in the Bill, it is advisable that the proposal be brought in future by way of a substantive amendment and not through the miscellaneous amendments in order to facilitate more engagements with stakeholders.

(iii) Recommendation

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

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

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

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

(i) Stakeholders’ submissions

The Committee did not get any views from stakeholders.

(ii) Observation

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

(iii) Recommendation

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

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

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

(i) Stakeholders’ submissions

The Committee did not get any views from stakeholders.

(ii) Observation

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

(iii) Recommendation

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

3.10. THE LAW OF SUCCESSION ACT (CAP 160)

3.10.1 Proposed new section of the Act

Insert the following new section immediately after section 49 -

Power to clear court

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

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

(i) Stakeholders' submissions

The Judiciary supported the amendment.

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

(ii) Observation

The amendment seeks-

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

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

(iv) Recommendation

The Committee recommends that the amendment be rejected

(v) Rationale

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

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

3.11.1 Proposed amendment to section 2 of the Act

Insert the following new subsection after subsection (3) –

“(4) The Council is the body under the Office of the Attorney-General”

(i) Stakeholders' submissions

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

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

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

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

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

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

(iii) Recommendation

The Committee recommends that the amendment be rejected.

(iv) Rationale for the amendment

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

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

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

3.12.1 Proposed amendment to section 2 of the Act

Delete the definition of the word “Minister”.

(i) Stakeholders’ submissions

The Committee did not get any views from stakeholders.

(ii) Rationale for the amendment

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

(iii) Recommendation

The Committee recommends that the amendments be agreed to.

3.12.2 Proposed amendment to section 3E of the Act

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

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

(i) Stakeholders’ submissions

The Committee did not get any views from stakeholders.

(ii) Rationale for the amendment

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

(iii) Recommendation

The Committee recommends that the amendment be agreed to.

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

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

(i) Stakeholders’ submissions

The Committee did not receive any views from stakeholders.

(ii) Rationale for the amendment

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

(iii) Recommendation

The Committee recommends that the amendments be agreed to.

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

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

(i) Stakeholders’ submissions

The Committee did not get any views from stakeholders.

(ii) Observation

The Committee observed that-

- (a) This provision as it is presently relates to the establishment of a social security scheme for the staff of the Agency with the approval of the Minister responsible for Finance.
- (b) The proposed amendment seeks to replace the term “Minister” with “Cabinet Secretary”. However, the amendment proposed as drafted would mean that the words “responsible for Finance” would be repeated hence the phrase should be amended to avoid repetition.

(iii) Recommendation

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

(iv) Rationale for the amendment

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

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

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

(i) Stakeholders’ submissions

The Committee did not get any views from stakeholders.

(ii) Recommendation

The Committee recommends that the amendment be deleted

(iii) Rationale for the amendment

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

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

Delete the word “Minister” and substitute therefor the expression “Attorney-General”.

(i) Stakeholders’ submissions

The Committee did not get any views from stakeholders.

(ii) Rationale for the amendment

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

(iii) Recommendation

The Committee recommends that the amendment be agreed to.

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

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

(i) Stakeholders' submissions

The Committee did not get any views from stakeholders.

(ii) Rationale for the amendment

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

(iii) Recommendation

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

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

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

(i) Stakeholders' submissions

The Committee did not get any views from stakeholders.

(ii) Rationale for the amendment

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

(iii) Recommendation

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

3.12.9 Proposed amendment to section 3K of the Act

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

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

(i) Stakeholders' submissions

The Committee did not get any views from stakeholders.

(ii) Rationale for the amendment

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

(iii) Recommendation

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

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

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

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

(i) Stakeholders’ submissions

The Committee did not receive any views from stakeholders.

(ii) Rationale for the amendment

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

iii) Recommendation

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

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

Delete the word “Minister” and substitute therefor the expression “Cabinet Secretary”.

(i) Stakeholders’ submissions

The Committee did not get any views from stakeholders.

(ii) Rationale for the amendment

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

(iii) Recommendation

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

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

3.13.1 Proposed amendment to section 2 and 48 of the Act

Section (2)

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

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

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

(fa) advocates, notaries and other legal professionals who are sole practitioners’ partners, or employees within professional firms;

(fb) trust and company service providers.

Section 48

Delete and substitute therefor the following new section –

Application of reporting obligations

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

(a) advocates, notaries, other independent legal professionals and accountants when preparing or carrying out transactions for their clients in the following situations-

(i) buying and selling of real estate;

(ii) managing of client money, securities or other assets;

- (iii) management of bank, savings or securities accounts;
 - (iv) organisation of contributions for the creation, operation or management of companies; or
 - (v) creation, operation or management of buying and selling of business entities or legal arrangements; or
- (b) a trust or company service provider not otherwise covered elsewhere in this Act, which as a business, provides any of the following services to third parties—
 - (i) acting as formation agent of legal persons;
 - (ii) acting as or arranging for another person to act as, a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;
 - (iii) Providing registered office business address or accommodation, correspondence or administrative address for a company, partnership or any other legal person or arrangement;
 - (iv) acting as, or arranging for another person to act as trustee of an express trust; and
 - (v) acting as or arranging for another person to act as a nominee shareholder for another person.

(i) Stakeholders' submissions

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

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

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

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

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

(ii) Observation

The Committee observed as follows–

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

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

(iii) Recommendation

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

(iv) Rationale for the amendment

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

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

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

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

Delete the word “seven” and substitute therefor the word “fourteen”

(i) Stakeholders’ submissions

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

(ii) Rationale for the amendment

The Committee observed as follows –

- (a) This Amendment seeks to increase the duration for the National assembly to consider appointment of members of the JSC under Article 171(2)(h) (those who represent the public) from 7days to 14 days.
- (b) This amendment will align the same with the provisions under the Public Appointments (Parliamentary Approvals) Act.
- (c) The references to the consultations under the National Accord and Reconciliation Act are spent and require to be removed from the law.

(iii) Recommendation

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

(iv) Rationale

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

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

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

(i) Stakeholders’ submissions

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

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

The Kenya Magistrates and Judges Association opposed the amendment and submitted that it was unconstitutional as it violated Article 171 of the Constitution of Kenya.

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

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

(ii) Observations

The Committee observed that-

- (a) The amendment seeks to provide for approval by the National Assembly prior to appointment by the President, of nominees to the Judicial Service Commission;
- (b) Following the enactment of the Constitution in 2010, the first members of the Judicial Service Commission under the Constitution were approved by the National Assembly in the 10th Parliament. As such, the precedent has been set with regard to the vetting of all members of the Judicial Service Commission. Indeed, the Attorney General and Chief Justice, who are members of the Commission by virtue of the offices they hold are also vetted and approved by the National Assembly for appointment;
- (c) The process of election of members of the Judicial Service Commission to represent the Judges of the Supreme Court, Court of Appeal, High Court and Magistrates and Advocates is a process of “identification and recommendation” in other words “nomination”, similar to the one undertaken by the President when identifying suitable nominees to be appointed;
- (d) Article 250(2)(b) stipulates that –

250(2) The Chairperson and each member of a commission and independent office shall be-

- (a) Identified and recommended for appointment in a manner prescribed by national legislation;*
- (b) Approved by the National Assembly;*
- (c) Appointed by the President.*

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

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

- (f) There is no express provision to oust the jurisdiction of Parliament to vet members of the Judicial Service Commission;
- (g) Notwithstanding that the issue of constitutionality of the vetting of JSC commissioners was not canvassed during the 10th Parliament when the commissioners under Article 171 were vetted, Parliament is a House that follows precedent and is bound by its customs, practices, usages and traditions and as such, it does not easily deviate from its own practices and precedent unless there is a compelling justification to do so.
- (h) Article 259(1) of the Constitution provides that the Constitution is to be interpreted in a manner that promotes its purposes and values, advances the rule of law, contributes to good governance among other things. Article 259(3) of the Constitution provides that every provision of the Constitution shall be construed according to the doctrine that the law is always speaking. In light of the foregoing, the drafters of the Constitution, and Kenyans generally, intended for a mechanism that would ensure a transparent process whereby the appointment of State Officers and public officers whose suitability meets the constitutional test of integrity. The provisions under article 250(2)(b) allows for the people's elected representatives to the persons proposed to hold certain offices, in this case members of the Judicial Service Commission. Indeed the doctrine of separation of powers underscores the independence of each arm of Government but there is no absolute separation as the three arms put in place mechanisms that check and balance each other against excesses.
- (i) In the past, it has been alleged that the election of members to represent judges and magistrates has been marred by electoral malpractices such as voter bribery as was alleged in 2016 and indeed alluded to by the former Chief Justice, Willy Mutunga, who stated that even the election of judges' and magistrates' representatives to the JSC were riddled with corruption, with the officials bribing others to vote for them. These issues were never addressed by the JSC or the

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

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

(iii) Recommendation

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

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

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

Section 4(2)

Delete and substitute therefor the following new subsection-

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

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

Section 16

The section be deleted.

Second Schedule

Delete paragraphs (a) and (b).

(i) Stakeholders’ submissions

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

- (a) the proposed amendments were of substantive nature and not miscellaneous hence should be subjected to proper public participation;
- (b) The liberalization of training is the sole mandate of Kenya School of Law and a viable option would be to devolve the school to reduce the cost element.
- (c) The issues which were subject to amendment were being handled by the Taskforce on legal sector reforms, and these amendments pre-empt the report.
- (d) The amendment in (a) would convert Kenya School of Law to a provider of continuous professional development.

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

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

(v)Observation

The Committee observed that-

- (a) The amendments seek to liberalize the training of Advocates at post-graduate level, a responsibility currently vested in KSL.
- (b) The provision in section 16 and the second schedule relating to admission requirements contradict those of the Council for Legal Education.

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

(iv) Recommendation

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

(v) Rationale for the rejection

The Committee was of the opinion that-

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

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

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

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

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

(i) Stakeholders’ submissions

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

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

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

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

(i) Stakeholders' submissions

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

(ii) Rationale for the amendment

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

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

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

(i) Stakeholders' submissions

The Committee did not receive any representations from the public.

(ii) Rationale for the amendment

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

Recommendation on all amendments relating to the Legal Education Act

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

(iii) Rationale for the rejection

The Committee was of the opinion that-

- (a) The amendments are substantive in nature and should not be moved by way of a miscellaneous amendment.
- (b) The Attorney General has constituted a Taskforce on legal sector reforms that is to address the challenges on liberalisation of training of Advocates and admission requirements, which the Bill seeks to address are part of

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

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

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

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

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

(i) Stakeholders’ submissions

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

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

- (a) It will curtail the powers of DPP to prosecute matters relating to corruption in that the DPP cannot direct or request for information from EACC if the amendment is effected. Section 5 of the ODPP Act empowers the DPP to, in exercise of State powers of prosecution, direct an investigative agency to conduct an investigation;
- (b) It will adversely affect cases under investigation;
- (c) The Office was not aware of the origin and intention of the amendment.
- (d) The amendments are not of a miscellaneous nature and ought to be effected through substantive amendments after exhaustive consultations.

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

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

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

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

(ii) Observation

The committee observed as follows-

- (a) the amendment will remove the EACC from the investigative agencies under the purview of the DPP.
- (b) The Anti-Corruption and Economic Crimes Act (ACECA) and the Ethics and Anti-corruption Commission Act mandate the EACC to implement the two Acts and accordingly empower it to carry out investigations and submit reports on the investigations to the DPP.
- (c) The amendment will interfere with provisions in other Acts significantly.

(iii) Recommendation

The Committee recommends that the amendments be rejected.

(iv) Rationale for rejection of amendment

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

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

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

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

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

“(v) that the public is informed of review or proposed reviews of any laws”

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

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

(i) Stakeholders submissions

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

- (a) Kenya Law maintains a comprehensive and up to date database of all the Laws of Kenya. This was developed and is maintained as part of the delegated mandate of the preparation of the annual supplement under the Revision of Laws Act (Cap 1).
- (b) The apprehension is that the amendment may be construed to mean that Kenya Law is not allowed to maintain a database of the Laws of Kenya if the Kenya Law Reform Commission should only maintain this.

(iii) Observation

The Committee observed-

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

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

(iv) Recommendation

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

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

Delete and substitute therefor the following new subsection-

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

(i) Stakeholders submissions

The Committee did not receive any representations on the amendment.

(iii) Rationale for the amendment

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

(iv) Recommendation

The Committee recommends that the proposed amendment be agreed to.

3.18.3 Proposed amendment to section 11 of the Act

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

Subsection 8- Delete.

(i) Stakeholders submissions

The Committee did not receive any representations on the amendment.

(i) Rationale for the amendment

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

(ii) Recommendation

The Committee recommends that the proposed amendments be agreed to.

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

Delete and substitute therefor the following new subsection-

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

(i) Stakeholders submissions

The Committee did not receive any representations on the amendment.

(ii) Rationale for the amendment

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

(iii) Recommendation

The Committee recommends that the proposed amendments be agreed to.

3.18.5 Proposed amendment to the second schedule paragraph (5)

Delete the word “three” and substitute therefor the word “five”.

(i) Stakeholders submissions

The Committee did not receive any representations on the amendment.

(ii) Rationale for the amendment

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

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

(iii) Recommendation

The Committee recommends that the proposed amendment be agreed to.

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

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

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

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

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

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

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

(i) Stakeholders submissions

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

The Law Society of Kenya proposed as follows-

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

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

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

(ii) Observations

The Committee observed that the amendments-

- (a) Under paragraph (c) seek to include the Principal Secretary, National Treasury and not the Principal Secretary of the Ministry of Justice as the Ministry no longer exists. The Principal Secretary Treasury is represented in semi-autonomous institutions that receive public funds.
- (b) Under paragraph (e) aim to reduce the number of persons from domestic arbitration bodies in East Africa from five to three.
- (c) Under paragraph (f) aim to reduce the number of bodies nominating board members by removing the representative from Kenya Private Sector Alliance and Chartered Institute of Arbitrators and replacing them with Kenya Association of Manufacturers.

(iii) Recommendation

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

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

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

(iv) Rationale for the rejection

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

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

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

3.19.2 Proposed amendments to section 9 of the Act

Delete the word “Board” and substitute therefor the word “Centre”.

Delete and substitute therefor the following new subsection-

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

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

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

(i) Stakeholders submissions

The Committee did not receive any views from stakeholders.

(ii) Rationale for the amendment

The provisions clarify -

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

(iii) Recommendation

The Committee recommends that the proposed amendments be agreed to.

3.19.3 Proposed amendments to section 21 of the Act

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

“(b) a Deputy President”

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

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

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

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

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

(i) Stakeholders submissions

The Committee did not receive any views from stakeholders.

(ii) Rationale for the amendments

- (a) The proposed amendment to subsection 2(b) aims to reduce the deputies to one;
- (b) The proposed amendment to subsection 2 (c) seeks to provide clarity that persons appointed under paragraph (c) should not exceed fifteen.
- (c) The proposed amendment to sub section (4) seeks to allow the President of the Centre to serve on part time basis. The word “deputy” however requires to be aligned from plural to singular if the amendment to have one deputy president is agreed to;
- (d) The proposed amendment is misplaced as it should be under subsection (4);

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

(iii) Recommendations

The Committee recommends as follows-

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

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

Delete and substitute therefor the following new subsection-

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

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

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

(iii) Recommendation

The Committee recommends that the amendment be agreed to.

3.19.5 Proposed amendments to section 23 of the Act

The section be deleted.

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

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

(iii) Recommendation

The Committee recommends that the amendment be agreed to.

3.19.6 Proposed amendments to section 24 of the Act

Delete and substitute therefor the following new subsection-

“Alternative Dispute Resolution

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

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

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

(iii) Recommendation

The Committee recommends that the amendment be agreed to.

3.19.7 Proposed amendments to section 25 of the Act

Delete and substitute therefor the following new section –

“25. The Board may make rules for —

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

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

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

(iii) Recommendation

The Committee recommends that the proposed amendment be agreed to.

3.19.8 Proposed amendments to schedule paragraph 1

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

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

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

To provide for a term of office for the chairperson

(iii) Recommendation

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

3.19.9 Proposed new paragraph

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

SECOND SCHEDULE (s.21(6))

CONDUCT OF THE AFFAIRS OF THE ARBITRAL COURT

1. The President of the Court shall co-ordinate and supervise the management of the affairs of the Court.
2. The President shall constitute panels consisting of an odd number of members and allocate matters to such panels for the better performance of the functions of the Court.
3. A matter referred to the Court may be heard and determined by one member or a panel of not less than three members in accordance with the court rules of procedure made under section 25 of this Act.
4. The President of the Court shall submit quarterly progress reports to the Board setting out the activities of the Court during the period covered by the report.
5. The President of the Court may delegate any of his duties to the Deputy President.

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

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

(iii) Recommendation

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

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

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

Insert the words “external and independent” immediately after the words “certified by the company’s”.

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

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

(iii) Recommendation

The Committee recommends that the proposed amendment be agreed to.

3.20.2 Proposed amendment to section 258 of the Act

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

“(5) If the number of votes for and against a proposal are equal, the Members shall refer to the Memorandum and Articles of Association or the Shareholders’ Agreement.

(6) Where neither the Memorandum and Articles of Association nor the Shareholders’ Agreement have provisions relating to equality of votes, the person presiding at the meeting shall have a casting vote.”

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

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

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

(iii) Recommendation

The Committee recommends that the proposed amendment be agreed to.

3.20.3 Proposed new section to the Act

Insert the following new section immediately after section 275—

“Annual General Meeting”

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

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

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

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

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

The Committee observed that-

- (a) Provision relates to the convening of an Annual General Meeting and proposes to penalise companies that fail to convene an AGM every year as required;
- (b) Section 310 of the Companies Act provides for convening of meetings as mandatory for Public companies and penalty a defaulting company and its officers is set at one million shillings.
- (c) The rules and standards expected of public companies, is higher and more stringent than those applicable to private companies and single member companies;
- (d) A review of other comparative jurisdictions such as Australia and UK reveal that private companies are not compelled to call for Annual General Meetings. Public companies on the other hand must hold annual general meetings and as such, the filing of annual returns with the Registrar of companies is sufficient proof of compliance with the law.

(iii) Recommendation

The Committee recommends that the provision be rejected

(iv) Rationale for the rejection

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

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

Delete the word “general” appearing in paragraph (b).

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

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

(iii) Recommendation

The Committee recommends that the proposed amendment be agreed to.

3.20.5 Proposed amendment to section 329 of the Act

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

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

(a) allot shares in the company;

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

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

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

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Observation

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

(iii) Recommendation

The Committee recommends that the amendment be rejected.

(iv) Rationale for rejection of the amendment

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

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

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

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

- (a) at any time before the general meeting at which the company's first financial statement is presented;
- (b) following a period during which the company, being exempt from audit, did not have any auditor, at any time before the next general meeting at which the company's annual financial statement is to be presented; or
- (c) to fill a casual vacancy in the office of the auditor, but while any such vacancy continues, the surviving or continuing auditor or auditors, if any, may act:

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

(i) Stakeholders' submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale of the amendment

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

(iii) Recommendation

The Committee recommends that the amendment be agreed to.

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

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

Delete paragraph (2)

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

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

(iii) Recommendation

The Committee recommends that the amendment be agreed to.

3.21 THE BRIBERY ACT (NO. 47 OF 2016)

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

Insert the word “acquiring” immediately before the word “property”.

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

The amendment is proposed to make minor clarifications and corrections.

(iii) Recommendation

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

3.21.2 Proposed amendment to section 16 of the Act

Delete the expressions “7” and “12” wherever they appear.

(i) Stakeholders submissions

The Committee did not receive any representations from stakeholders.

(ii) Rationale for the amendment

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

(iii) Recommendation

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

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

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

(i) Stakeholders submissions

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

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

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

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

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

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

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

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

71. Offences under the repealed Act

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

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

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

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

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

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

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

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

(ii) Recommendation

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

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

(iii) Rationale for the amendment

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

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

.....

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

(i) a offence in Kenya; or

(ii) a crime under international law''

ANNEXURE 1

(Minutes of Committee sittings)

**MINUTES OF THE FIFTY-FIRST SITTING OF THE DEPARTMENTAL
COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON
WEDNESDAY, 13TH JUNE 2018 AT 11:30 A.M. IN COMMITTEE ROOM 9,
MAIN PARLIAMENT BUILDING**

PRESENT-

Hon. William Cheptumo, M.P.	-	Chairperson
Hon. Alice Muthoni Wahome, M.P.	-	Vice Chairperson
Hon. John Olago Aluoch, M.P.		
Hon. William K. Mwamkale, M.P.		
Hon. Charles Gimose, M.P.		
Hon. John M. Wambugu, M.P.		
Hon. George G. Murugara, M.P.		
Hon. Jennifer Shamalla, M.P.		
Hon. Beatrice Adagala, M.P.		
Hon. Anthony G. Kiai, M.P.		
Hon. Gladys Boss Shollei, CBS, M.P.		
Hon. Adan Haji Yussuf, M.P.		

ABSENT WITH APOLOGIES-

Hon. Ben Momanyi, MP.
Hon. Roselinda Soipan Tuya, M.P.
Hon. Peter O. Kaluma, M.P.
Hon. John Kiarie Waweru, M.P.
Hon. Johana Ng'eno, M.P.
Hon. Zuleikha Hassan, M.P.
Hon. Japheth Mutai, M.P.

IN ATTENDANCE

COMMITTEE SECRETARIAT

Mr. George Gazemba	-	Senior Clerk Assistant
Ms. Doreen Karani	-	Legal Counsel II
Ms. Halima Hussein	-	Third Clerk Assistant
Ms. Fiona Musili	-	Research Officer
Mr. Omar Abdirahim	-	Fiscal Analyst

MIN No. 177 /2018:

PRELIMINARIES

The Chairperson called the meeting to order at 10:00 a.m. which was followed by a word of prayer from Hon. Alice Wahome, M.P.

MIN No. 178/2018:

**CONSIDERATION AND ADOPTION OF THE
DRAFT REPORT ON THE STATUTE LAW
(MISCELLANEOUS AMENDMENTS) BILL, 2018**

The Committee considered and adopted its report on the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bills No. 12). The adoption of the report was proposed by Hon. George Murugara and seconded by Hon Jennifer Shamalla. Hon John Olago Aluoch dissented to the proposed amendment to section 15(1) of the Judicial Service Act, 2011. The amendment provides for approval of members of the Judicial Service Commission by the National Assembly prior to their appointment by the President.

MIN No. 179/2018:

**CONSIDERATION AND ADOPTION OF REPORT
ON A PETITION BY MR. PETER GITHAIGA
MUNYEKI ON PROPOSED AMENDMENTS TO
THE KENYA SCHOOL OF LAW ACT**

The Committee considered and adopted its report on a petition by Mr. Peter Githaiga Munyeki on proposed amendments to the Kenya School of Law Act, 2012 (No. 26 of 2012) and unanimously adopted it. The adoption of the report was proposed by Hon. George Murugara and seconded by Hon. Beatrice Adagala.

In the report, the Committee observed and recommended as follows-

1. The Petition had merit in that there is a conflict between the Kenya School of Law Act and the Legal Education Act and Regulations made thereunder. The Committee however noted that the Attorney-General had constituted a Taskforce on legal sector reforms whose mandate was to address the challenges on training of Advocates and admission requirements. The Committee was of the considered opinion that the Taskforce should be allowed to complete its work and report to the Attorney-General and Parliament on the proposed amendments to be effected;
2. Taking into cognizance that the Council for Legal Education plays a regulatory and supervisory role in the legal education sector, there is urgent need to harmonise the Kenya School of Law Act and the Legal Education Act

and any conflicting laws and regulations relating to legal education in Kenya to avert a crisis in the sector;

3. The Attorney-General had constituted a Taskforce on legal sector reforms that was required to address the challenges on training of Advocates and admission requirements as part of its terms of reference. The Taskforce should be allowed to complete its work and report to the Attorney-General and Parliament on the proposed amendments to be effected;
4. There was need to urgently address the issues raised in the Petition through substantive amendments to be effected once the Taskforce discharges its mandate.

MIN No. 181/2018: **CONSIDERATION AND ADOPTION OF REPORT
ON A PETITION BY MR. EZEKIEL NJERU NAMU
TO AMEND VARIOUS ARTICLES OF THE
CONSTITUTION OF KENYA**

The Committee considered and unanimously adopted its report on a petition by Mr. Ezekiel Njeru Namu to amend various Articles of the constitution of Kenya. The adoption of the report was proposed by Hon. William Kamoti Mwamkale and seconded by Hon. John Wambugu.

The Committee observed that the petition lacked merit and rejected it.

MIN No. 182/2018: **CONSIDERATION AND ADOPTION OF REPORT
ON A PETITION BY MR. MOHAMED MOHAMUD
SHEIKH TO SET AGE LIMIT FOR CONTESTING
FOR THE SEAT OF PRESIDENT AT SEVENTY (70)
YEARS**

The Committee considered and unanimously adopted its report on a petition by Mr. Mohamed Mohamud Sheikh proposing to set age limit for contesting for the seat of President at seventy (70) years. The adoption of the report was proposed by Hon. Jennifer Shamalla and seconded by Hon. John Olago Aluoch.

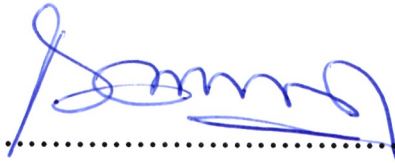
The Committee observed that the petition lacked merit and rejected it.

MIN No 182/2018:

ADJOURNMENT

There being no other business to transact, the Chairperson adjourned the meeting at 12.55 p.m. until Thursday, 14th June, 2018 at 10 a.m. in the Boardroom on 2nd Floor, Continental House, Parliament Buildings.

Signed.....



Chairperson

Date.....

19/6/18

**MINUTES OF THE FORTY-EIGHTH SITTING OF THE
DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS
HELD ON THURSDAY, 7TH JUNE 2018 AT 12:00 P.M. AT THE MEDIA
CENTRE, MAIN PARLIAMENT BUILDING**

PRESENT-

Hon. William Cheptumo, M.P.	-	Chairperson
Hon. Alice Wahome, M.P.	-	Vice Chairperson
Hon. John Olago Aluoch, M.P.		
Hon. Ben Momanyi, MP.		
Hon. William K. Mwamkale, M.P.		
Hon. Charles Gimose, M.P.		
Hon. Jennifer Shamalla, M.P.		
Hon. Japheth Mutai, M.P.		
Hon. Beatrice Adagala, M.P.		
Hon. Anthony G. Kiai, M.P.		
Hon. Gladys Boss Shollei, CBS, M.P.		
Hon. Adan Haji Yussuf, M.P.		

ABSENT WITH APOLOGIES-

Hon. Roselinda Soipan Tuya, M.P.
Hon. Peter O. Kaluma, M.P.
Hon. John M. Wambugu, M.P.
Hon. George G. Murugara, M.P.
Hon. John Kiarie Waweru, M.P.
Hon. Johana Ng'eno, M.P.
Hon. Zuleikha Hassan, M.P.

IN ATTENDANCE

AGENCIES/INSTITUTIONS

Mr. Noordin Haji, OGW	-	Director of Public Prosecutions
Ms. Sophia Lepuchirit	-	Commissioner and Vice Chairperson, EACC
Mr. Paul Mwaniki Gachoka	-	Commissioner, EACC
Mr Waweru Mathenge	-	Kenya Bankers Association
Mr Clement Okech	-	Assistant Director, Probation and Aftercare Services

Mr. Jacob Ondari	-	Deputy, Director of Office of the Director of Public Prosecutions (ODPP)
Mr. Paul Ndemo	-	Senior Public Prosecutor, ODDP
Mr. David K. Too	-	Director Legal Services, EACC

COMMITTEE SECRETARIAT

Mr. George Gazemba	-	Senior Clerk Assistant
Ms. Doreen Karani	-	Legal Counsel II
Ms. Halima Hussein	-	Third Clerk Assistant

MIN No. 170/2018: PRELIMINARIES

The Chairperson called the meeting to order at 10:00 a.m. which was followed by a word of prayer from Hon. Beatrice Adagala.

MIN No. 171/2018: CONSIDERATION OF THE STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 2018 (NATIONAL ASSEMBLY BILLS No. 12)

The following Agencies/Institutions appeared before the Committee and made submissions on the Statute Law (Miscellaneous Amendment) Bill, 2018-

a) Office of the Director of Public Prosecutions

Mr. Noordin Haji, Director of Public Prosecutions (DPP) appeared before the Committee with regards to the proposed amendment to section 2(1) of the (Office of Director of Public Prosecutions (ODPP) Act to delete Ethics and Anti-Corruption Commission as an investigative Agency. He submitted that ODPP was opposed to the amendments on account of the following-

- (i) Section 5 of the ODPP Act empowers the DPP to, in exercise of State powers of prosecution, direct an investigative agency to conduct an investigation as such if the proposed amendment is passed it will curtail the powers of DPP to prosecute corruption matters since the DPP cannot direct or request for information from EACC;
- (ii) The proposed amendments if passed will adversely affect cases under investigation;

- (iii) There is no rationale given in the Bill for the proposed amendments
- (iv) The Office was not aware of the origin and intention of the amendment and the amendments are not of a miscellaneous nature and ought to be effected through substantive amendments after exhaustive consultations

b) Ethics and Anti-Corruption Commission

A team led by Commissioner Sophia Lepuchirit, Vice Chairperson of the Ethics and Anti-Corruption Commission appeared before the Committee with regards to the proposed amendment to section 2(1) of the ODPP Act to delete Ethics and Anti-Corruption Commission as an investigative Agency and informed the meeting that the Commission was opposed to the amendment on account of the following-

- (i) Section 11 of the Ethics and Anti-Corruption Commission Act mandates the EACC to investigate and recommend to the DPP the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or any law enacted pursuant to Chapter six of the Constitution. The Anti-Corruption and Economic Crimes Act does also empower the EACC to investigate and mandates it to report to the DPP on the results of an investigation (section 550).
- (ii) There is no rationale given in the Bill for the proposed amendments and that the Commission is not aware of the origin and intention of the amendment and further the amendments are not of a miscellaneous nature.

The Vice Chairperson further submitted that EACC was opposed to the proposed amendment to section 13(1)(c) of the Bribery Act as the proposed provision bears retroactive application of the provisions of the Bribery Act to offences committed before its enactment and courts had given an interpretation on the same.

c) Kenya Bankers Association

Mr. Waweru Mathenge, member of Legal and Compliance Committee of the Association appeared before the Committee and submitted that the Association was opposed to the proposed amendment to section 3 of the Law of Contract Act for the following reasons-

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

d) Probation and Aftercare Services

Mr. Clement Okech, Assistant Director, Probation and Aftercare Services appeared before the Committee with regards to proposed amendments to the to section 2 of the Probation of Offenders Act and informed the meeting that the Department of Probation and Aftercare Services proposed that the section be amended in the proposed definition of the term ‘social inquiry report’ by deleting the word “social inquiry” and substituting therefor the words “pre-sentence” and he gave his justification for the proposal as there were many types of reports being done by probation officers but the intention in the Bill related to those prepared before and for the purpose of sentencing.

MIN No. 172/2018:

ADJOURNMENT

There being no other business to transact, the Chairperson adjourned the meeting at 12.00 p.m.

Signed.....

Chairperson

Date.....

**MINUTES OF THE FORTY-SEVENTH SITTING OF THE
DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS
HELD ON WEDNESDAY, 6TH JUNE 2018 AT 10:00 A.M. IN CPA ROOM,
MAIN PARLIAMENT BUILDING**

PRESENT-

Hon. William Cheptumo, M.P.	-	Chairperson
Hon. Alice Muthoni Wahome, M.P.	-	Vice Chairperson
Hon. John Olago Aluoch, M.P.		
Hon. Roselinda Soipan Tuya, M.P.		
Hon. George G. Murugara, M.P.		
Hon. William K. Mwamkale, M.P.		
Hon. Adan Haji Yussuf, M.P.		
Hon. John M. Wambugu, M.P.		
Hon. Gladys Boss Shollei, CBS, M.P.		
Hon. Jennifer Shamalla, M.P.		
Hon. Japheth Mutai, M.P.		

ABSENT WITH APOLOGIES-

Hon. Peter O. Kaluma, M.P.
Hon. Ben Momanyi, MP.
Hon. John Kiarie Waweru, M.P.
Hon. Johana Ng'eno, M.P.
Hon. Zuleikha Hassan, M.P.
Hon. Charles Gimose, M.P.
Hon. Beatrice Adagala, M.P.
Hon. Anthony G. Kiai, M.P.

IN ATTENDANCE

COMMITTEE SECRETARIAT

Mr. George Gazemba	-	Senior Clerk Assistant
Ms. Doreen Karani	-	Legal Counsel II
Ms. Halima Hussein	-	Third Clerk Assistant
Mr. Omar Abdirahim	-	Fiscal Analyst

GOVERNMENT AGENCIES/INSTITUTIONS

(i) Office of the Attorney-General and Department of Justice

Margaret Nduku Nzioka	-	Chief Parliamentary Counsel
Elizabeth Ngángá	-	Chief State Counsel
Emmanuel Gichohi	-	Senior State Counsel

(ii) Judiciary

Sharon Mwayuli	-	Resident Magistrate
Isaac Wamaasa	-	Senior Legal Counsel

(iii) National Council for Law Reporting

Edna Muthaura	-	Head of Strategy
Linda Awour Ochieng	-	Head of Research and Development

MIN No.167/2018:

PRELIMINARIES

The Chairperson called the meeting to order at 10:00 a.m. which was followed by a word of prayer from Hon. Alice Wahome.

MIN No.168/2018:

CONSIDERATION OF THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2018

The Judiciary, Office of the Attorney General and Department of Justice appeared before the Committee and made submission on the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bills No. 12).

(i) The Judiciary

The Judiciary opposed the amendment of section 2(a) of the Judicature Act (Cap 8) on grounds that it violates the constitution in Articles 161, 166 and 168. The Constitution doesn't contemplate the position of acting judge. It further argued that the proposed amendment would violate the principle of security of tenure of judges and independence of the Judiciary.

The Judiciary proposed deletion of section 15(2) of the Judicial Service Act (No. 1 of 2011) as in its view, it was unconstitutional because it violated Articles 171 and 248. It argued that Article 250(2) (b) does not apply to the appointment of members of the Judicial Service Commission. Further, the Parliamentary Service Commission, the Salaries and Remuneration Commission and the Judicial

Service Commission were special Constitutional Commissions whose members were neither vetted nor approved by Parliament hence this amendment would be discriminatory against the Judicial Service Commission. It drew the attention of the Committee to the Justice Mohamed Warsame case and argued that the amendment if passed would lead to inconsistency in the application of section 15 of the Act.

(ii) Office of the Attorney General and Department of Justice

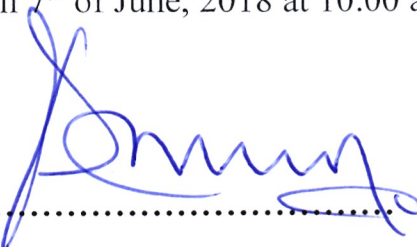
The Office opposed proposed amendments to the Law of Contract Act (Cap 23), the National Council for Law Reporting Act (No.11 of 1994) and the Office of the Director of Public Prosecutions Act, 2013 (No. 2 of 2013). The Office submitted that the amendments were part of the Bill it had prepared and approved

MIN No.169/2018:

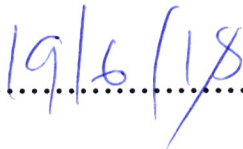
ADJOURNMENT

There being no other business to transact, the Chairperson adjourned the meeting at 12.40 p.m. till 7th of June, 2018 at 10.00 a.m.

Signed.....


Chairperson

Date.....



MINUTES OF THE FORTY-THIRD SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON SATURDAY, 19TH MAY 2018 AT 10:00 A.M. IN THE BOARDROOM, ENGLISH POINT MARINA HOTEL, MOMBASA

PRESENT-

Hon. George G. Murugara, M.P.	-	Chairing
Hon. John Olago Aluoch, M.P.		
Hon. Ben Momanyi Orori, M.P.		
Hon. William K. Mwamkale, M.P.		
Hon. Charles Gimose, M.P.		
Hon. Beatrice Adagala, M.P.		
Hon. Adan Haji Yussuf, M.P.		
Hon. Anthony G. Kiai, M.P.		
Hon. Japheth Mutai, M.P.		

ABSENT WITH APOLOGIES-

Hon. William Cheptumo, M.P.	-	Chairperson
Hon. Alice Muthoni Wahome, M.P.	-	Vice Chairperson
Hon. Roselinda Soipan Tuya, M.P.		
Hon. Peter O. Kaluma, M.P.		
Hon. John M. Wambugu, M.P.		
Hon. Gladys Boss Shollei, CBS, M.P.		
Hon. Jennifer Shamalla, M.P.		
Hon. Johana Ng'eno, M.P.		
Hon. Zuleikha Hassan, M.P.		
Hon. John Kiarie Waweru, M.P.		

IN ATTENDANCE

COMMITTEE SECRETARIAT

Denis Abisai	-	Principal Legal Counsel
Halima Hussein	-	Third Clerk Assistant
Doreen Karani	-	Legal Counsel
Fiona Musili	-	Research Officer
Abdirahim Omar	-	Fiscal Analyst

MIN No.155/2018:

PRELIMINARIES

The Chairperson called the meeting to order at 10:00a.m which was followed by a word of prayer from Hon. John Olago Aluoch.

MIN No.156/2018:

**CONSIDERATION OF THE STATUTE LAW
(MISCELLANEOUS AMENDMENTS) BILL, 2018
(NATIONAL ASSEMBLY BILLS No. 12)**

Ms. Doreen Karani, Legal Counsel II took the meeting through a brief on the Statute Law Miscellaneous (Amendments) Bill, 2018 which proposed several amendments to the following Acts-

- i. The Judicature Act (Cap 8)
- ii. Oaths and Statutory Declarations Act (Cap 15)
- iii. The Advocates Act (Cap 16)
- iv. The Civil Procedure Act (Cap 21)
- v. The Law of Contract Act (Cap 38)
- vi. The Foreign (Reciprocal Enforcement) Act (Cap 43)
- vii. The Probation of Offenders Act (Cap 64)
- viii. The Law of Succession Act (Cap 160)
- ix. The Criminal Procedure Code (Cap 75)
- x. The Extradition (Contiguous and Foreign Countries) Act (Cap 76)
- xi. The National Council for Law Reporting Act 1994
- xii. The Witness Protection Act No. 16 of 2006
- xiii. The Anti-Counterfeit Act No. 13 of 2008
- xiv. The Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009
- xv. The Judicial Service Act No. 1 of 2011
- xvi. The Office of the Director of Public Prosecutions Act No. 2 of 2012
- xvii. The Kenya Law Reform Commission Act No. 19 of 2013
- xviii. The Nairobi Centre for International Arbitration Act No. 26 of 2013
- xix. The Companies Act No. 17 of 2015
- xx. The Bribery Act No. 47 of 2016
- xxi. Kenya School of Law Act No. 26 of 2012
- xxii. Legal Education Act No 27 of 2012

The Committee resolved as follows-

- a) Section 3 (1) of the Judicature Act should include the Supreme Court.
- b) Section 3 on the Law of Contract required consultation with the Kenya

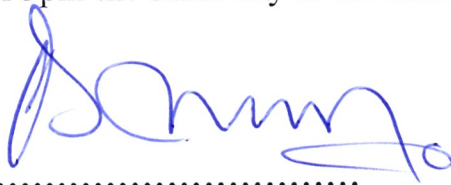
Bankers Association, the Attorney General, the Kenya Private Sector alliance and the Consumers Federation of Kenya (COFek).

- c) Section 123 of the Criminal Procedure Code required clarification by the Probation and Aftercare Services.
- d) Section 2 of the National Council for Law reporting Act, 1994 to be clarified further by the Attorney General, the Judiciary and the National Council for Law Reporting.
- e) Section 3P (4) of the Witness protection Act to read director with a small cap.
- f) Section 2 fa of the Proceeds of Crime and Anti-money Laundering Act to be deleted from the proposed amendments.
- g) Section 4 (2) of the Kenya School of Law Act to be deliberated further after receiving submissions from the Taskforce on Legal Sector Reforms in Kenya.
- h) Section 2(1) of the Office of the Director for Public Prosecution Act to be agreed on after meeting with the EACC and the Office of the Director of Public Prosecutions.

MIN No. 157/2018:

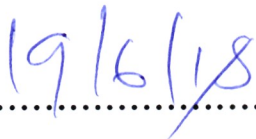
ADJOURNMENT

There being no other business to transact, the Chairperson adjourned the meeting at 12.00 p.m. until 3pm the same day at the same venue.



Signed.....

Chairperson



Date.....

ANNEXURE 2

(Copy of newspaper advertisement
inviting the public to submit memoranda
on the Bill)

REPUBLIC OF KENYA


NATIONAL ASSEMBLY
TWELFTH PARLIAMENT – SECOND SESSION

In the matter of consideration by the National Assembly of the Statute Law [Miscellaneous Amendments] Bill, 2018
[National Assembly Bill No. 12 of 2018]

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) 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 Statute Law [Miscellaneous Amendments] Bill, 2018 National Assembly Bill No. 12 of 2018 was published on 10th April, 2018 and read a First Time 18th April, 2018. The Bill is in keeping with the practice of making various amendments which do not merit the publication of separate Bills and consolidating them into 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, the proposed amendments to various Acts of Parliament stand committed to the following Departmental Committees of the National Assembly:-

NO.	ACT TO BE AMENDED	COMMITTEE	NO.	ACT TO BE AMENDED	COMMITTEE
1.	The Judicature Act (Cap 8)	Justice and Legal Affairs	35.	The Higher Education Loans Board Act, 1995	Education and Research
2.	Oaths and Statutory Declarations Act (Cap 15)		36.	The Kenya School of Law Act No. 26 of 2012	
3.	The Advocates Act (Cap 16)		37.	The Legal Education Act No. 27 of 2012	
4.	The Civil Procedure Act (Cap 21)		38.	The Kenya Institute of Curriculum Development Act No. 4 of 2013	
5.	The Law of Contract Act (Cap 38)		39.	The Universities Act No. 42 of 2012	
6.	The Foreign (Reciprocal Enforcement) Act (Cap 43)		40.	The Science, Technology and Innovation Act No. 28 of 2013	Trade, Industry and Cooperatives
7.	The Probation of Offenders Act (Cap 64)		41.	The Industrial Property Act No. 3 of 2001	
8.	The Criminal Procedure Code (cap 75)		42.	The Export Processing Zones Act, 1990	
9.	The Extradition (Contiguous & Foreign Countries) Act (Cap 76)		43.	The Privatization Act No. 2 of 2005	
10.	The National Council for Law Reporting Act 1994		44.	The Competition Act No. 12 of 2010	
11.	The Witness Protection Act No. 16 of 2006		45.	The Children Act No. 8 of 2001	Labour and Social Welfare
12.	The Anti-Counterfeit Act No. 13 of 2008		46.	The Employment Act No. 11 of 2007	
13.	The Proceeds of Crime & Anti-Money Laundering Act No. 9 of 2009		47.	The Labour Institutions Act No. 12 of 2007	
14.	The Judicial Service Act No. 1 of 2011	Administration and National Security	48.	The Labour Relations Act No. 14 of 2007	
15.	The Office of the Director of Public Prosecutions Act No. 2 of 2012		49.	The National Youth Council Act No. 10 of 2009	
16.	The Kenya Law Reform Commission Act No. 19 of 2013		50.	The National Social Security Fund Act No. 45 of 2013	Environment and Natural Resources
17.	The Nairobi Centre for International Arbitration Act No. 26 of 2013		51.	The Wildlife Conservation and Management Act No. 47 of 2013	
18.	The Companies Act No. 17 of 2015		52.	The Forest Conservation and Management Act No. 34 of 2016	
19.	The Bribery Act No. 47 of 2016		53.	The National Drought Management Authority Act No. 4 of 2016	
20.	The Law of Succession Act (Cap 160)		54.	The Environmental Management and Coordination Act No. 8 of 1999	Finance and National Planning
21.	The Registration of Persons Act (Cap 107)		55.	The Retirement Benefits (Deputy President and Designated State Officers) Act No. 8 of 2015	
22.	The Public Holidays Act (Cap 110)	Transport, Public Works and Housing	56.	The Kenya Post Office Savings Bank Act Cap 243	Lands
23.	The Community Service Order Act No. 10 of 1998		57.	The Land Act No. 6 of 2012	
24.	The Alcoholic Drinks Control Act No. 4 of 2010		58.	The Land Registration Act No. 3 of 2012	Sports, Culture and Tourism
25.	The Independent Police Oversight Authority Act No. 35 of 2011		59.	The Tourism Act No. 28 of 2011	
26.	The National Authority for the Campaign Against Alcohol and Drug Abuse Act No. 14 of 2012		60.	The National Youth Service Act Cap 208	Defence and Foreign Relations
27.	The Housing Act (Cap 117)		61.	The Protection of Traditional Knowledge and Cultural Expressions Act No. 33 of 2016	
28.	The Kenya Ports Authority Act (Cap 391)		62.	The Public Archives and Documentation Service Act (Cap 19)	Agriculture and Livestock
29.	The Kenya Airports Authority Act Cap. 395		63.	The Kenya Defence Forces Act No. 25 of 2012	
30.	The Traffic Act (Cap 403)		64.	The Treaty Making and Ratification Act No. 45 of 2012	Communication, Information and Innovation
31.	The Kenya Roads Board Act No. 7 of 1999		65.	The Kenya Agricultural and Livestock Research Act No. 17 of 2013	
32.	The National Construction Authority Act No. 41 of 2011		66.	The Biosafety Act No. 2 of 2009	
33.	The Engineers Act No. 43 of 2011		67.	The Kenya Information and Communication Act No. 2 of 1998	
34.	The National Transport and Safety Authority No. 33 of 2012		68.	The Copyright Act No. 12 of 2001	

Pursuant to Article 118(1)(b) and Standing Order 127(3), the Clerk of the National Assembly invites members of the Public to submit any representations they may have on the Statute Law [Miscellaneous Amendments] Bill, 2018. 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 Monday, 14th May, 2018 at 5:00 pm. The Bill may be found on the Parliament website at <http://www.parliament.go.ke> or <http://www.kenyalaw.org>.

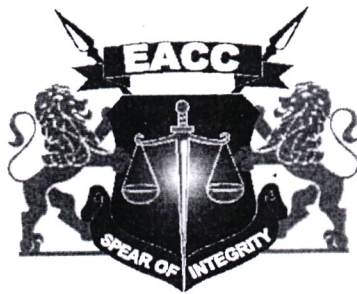
MICHAEL SIALAI, EBS
 CLERK OF THE NATIONAL ASSEMBLY

ANNEXURE 3

(Stakeholders' submissions)

LIST OF WRITTEN SUBMISSIONS ON THE BILL AS RECIEVED
FROM STAKEHOLDERS

1. Ethics and Anti-Corruption Commission (EACC)
2. Ms. Annah Konuche
3. Mr. Clement Okech
4. The Judiciary
5. Kenya Bankers Association
6. Law Society of Kenya
7. National Council for Law Reporting
8. Office of the Attorney General and Department of Justice
9. Muturi S.K. & Co Advocates
10. National Association of Private Universities in Kenya
11. The Kenya Magistrates and Judges Association
12. Transparency International
13. Office of the Director of Public Prosecutions
14. Chartered Institute of Arbitrators
15. Anjarwalla & Khanna Advocate
16. International Commission of Jurists



1. D/Units.
8/6/18

ETHICS AND ANTI-CORRUPTION COMMISSION

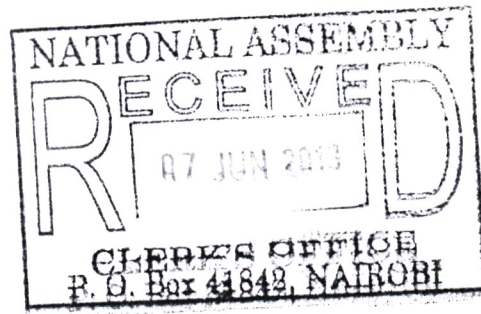
INTEGRITY CENTRE (Valley Rd. /Jakaya Kikwete Rd. Junction) P.O. Box 61130 – 00200, NAIROBI, Kenya
TEL.: 254 (020) 2717318/ 2720722, MOBILE: 0729 888881/2/3
Fax: 254 (020) 2717473 Email: eacc@integrity.go.ke Website: www.eacc.go.ke

When replying please quote:

Our Ref: EACC/LEG 8/16

7th June, 2018

Michael Sialai,
Clerk of the National Assembly,
Clerks Chambers,
National Assembly,
Parliament Buildings,
P.O. Box 41842, 00100,
NAIROBI



Dear Sir,

**SUBJECT : PROPOSED MISCELLANEOUS AMMENDMENT OF SECTION 27 (2) OF
THE BRIBERY ACT 2016**

Reference is made to the above, our letter dated 25.04.2018 and appearance before the Justice and Legal Affairs Committee on 07.06.2018.

During the appearance before the Committee, the Commission was requested to submit on the rationale to the objection to the amendment of Section 27(2) as proposed in the Statute Law (Miscellaneous Amendment) Bill, 2018 as published in the Kenya Gazette Supplement No. 35(National Assembly Bills No. 12).

The proposed amendment to Section 27(2) as proposed in the Statute Law (Miscellaneous Amendment) Bill, 2018 does not cure the anomaly pointed out in our letter dated 21.02.2018 (Copy attached).

Section 23 of the Bribery Act states that **"the Anti-Corruption and Economic Crimes Act, 2003 is amended by deleting Section 39."**

There were however investigations, prosecutions or court proceedings (based on the offence under the repealed section 39 of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA), actively on course before the commencement of the Bribery Act.

2. George Garambo
For consideration
by committee
8/6/18

It is apparent therefore that intention of Parliament in enacting section 27 of Bribery Act, wanted to safeguard those investigations and or proceedings instituted under section 39 of ACECA.

Section 27 of the Bribery Act as originally framed reads:

"(1) This section applies with respect to bribery offences or suspected bribery offences under the Anti-corruption and Economic Crimes Act 2003.

(2) Any investigation or prosecution or court proceedings instituted before the commencement of this Act based on an offence under this Act shall, with the necessary modifications, be treated or continued as if they were instituted under this Act".

The courts however have given an interpretation to the effect that this section has an retrospective application. For example, Hon. Justice Ong'udi sitting in the High Court of Kenya at Nairobi in **REPUBLIC V HENRY NGUGI NJERU alias PATRICK HENRY NGUGI NJERU alias PATRICK HENRY NGUGI DOUGLAS Revision Application No. 7 of 2017**, in interpreting section 27 of the Bribery Act held that this section is a transitional provision that covers bribery related offences before the enactment of the Bribery Act, 2016.

The Court held that a charge for an offence under the repealed section 39 of ACECA should therefore cater for:

- i) The repealed section 39 of ACECA since that is what covers the particulars
- ii) Section 6 of the Bribery Act since that is what covers the offence
- iii) Finally, section 27(2) of the Bribery Act as that is the provision that directs on how matters investigated and or prosecuted and court proceedings commenced prior to the new Act would be concluded.

The Judge then went on to advise that charging a suspect of a bribery offence "**under the repealed section 39 of ACECA only or under section 6 of the Bribery Act only would cause challenges**". The Hon Judge finally upheld the lower court's decision dismissing a charge sheet that had set out bribery offence under the repealed section 39 of ACECA, for being incompetent by virtue of section 89 (5) of the Criminal Procedure Code.

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

2. A decision of the Review Board shall be by a majority of the members present and voting and, in the case of an equality of votes, the person presiding at the meeting shall have a second or casting vote.

3. (1) The Review Board shall elect one of its nominated members to be the Chairperson of the Review Board and another of its nominated members to be its Vice-chairperson.

(2) Subject to an earlier resignation or termination, the Chairperson and Vice-chairperson shall each hold office until their current term as a member of the Review Board expires

4. Minutes of all meetings shall be kept and entered in books kept for that purpose.

THIRD SCHEDULE

[section 183, Corr. No. 60/2016, Corr. No. 73/2016.]

TRANSITIONAL PROVISIONS

1. Existing procurement proceedings continued under repealed Act

(1) Procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with the law applicable before the commencement date of this Act.

(2) For the purposes of subparagraph (1), procurement proceeding commences when the first advertisement relating to the procurement proceeding is published or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding.

2. Confidentiality in relation to past proceedings

Section 66 of this Act shall apply with respect to procurement proceedings completed before the commencement date of this Act.

3. Records of past procurements

Section 67 of this Act shall apply with respect to—

- (a) a procurement that took place before the commencement date of this Act; or
- (b) a procurement, the procurement proceeding for which was terminated before the commencement date of this Act.

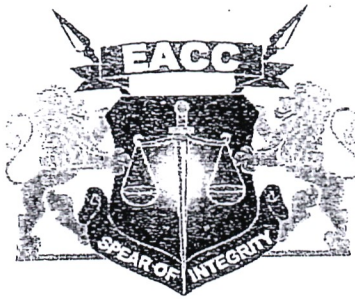
(2) Section 51(2) of the Act, as it applies under subparagraph (1), does not require the record of a procurement to include anything that was not required before the commencement date of this Act.

4. Publication of existing contracts

Section 67 of this Act shall apply with respect to a contract formed before the commencement date of this Act comes.

5. Amendments to existing contracts

Section 139 of this Act shall apply with respect to a contract formed before the commencement date of this Act but not to an amendment to such a contract made before the commencement date of this Act.



ETHICS AND ANTI-CORRUPTION COMMISSION

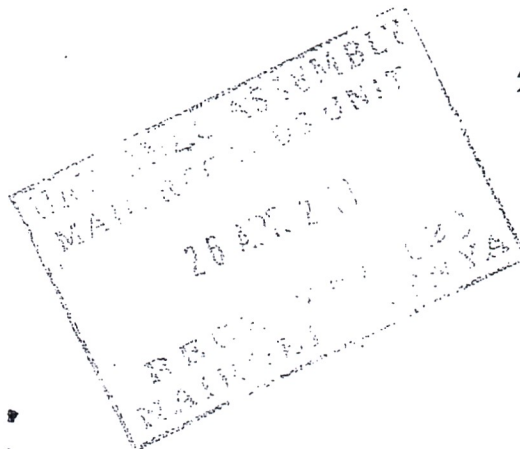
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Fax: 254 (020) 2717473 Email: eacc@integrity.go.ke Website: www.eacc.go.ke

When replying please quote:

Our Ref: EACC/LEG 8/16

25th April, 2018

Michael Sialai,
Clerk of the National Assembly,
Clerks Chambers,
National Assembly,
Parliament Buildings,
P.O. Box 41842, 00100,
NAIROBI



Dear

**SUBJECT : PROPOSED MISCELLANEOUS AMMENDMENT OF SECTION 27 (2) OF THE
BRIBERY ACT 2016**

Reference is made to Kenya Gazette Supplement No. 35 (National Assembly Bills No. 12) dated 10th April 2018 and our letter Ref: **EACC/LEG 8/16** dated 21st February 2018 which was copied to you. A copy is attached for ease of your reference.

While we appreciate the proposed Miscellaneous Amendments Bill in response to our request, we have realized that the anomaly has not been fully addressed as it still offends Section 50 (2) (n) of the Constitution which provides that;

"Every accused person has the right to a fair trial, which includes the right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya".

Further Subsection (p) of Section 50 provides that;

"Every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing".

To fully cure this inconsistency, we propose that Section 27 (2) be deleted and substituted with the following:

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

This proposed amendment will fully address the challenges we are facing in prosecution of bribery cases.

Yours



HALAKE D. WAQO, CBS, MCI Arb
SECRETARY /CHIEF EXECUTIVE OFFICER
DT/en

Copy to: Hon. Aden Bare Duale,
Leader of Majority,
National Assembly,
Parliament Buildings,
P.O. Box 41842, 00100,
NAIROBI



2

ETHICS AND ANTI-CORRUPTION COMMISSION

INTEGRITY CENTRE (Valley Rd. /Jakaya Kikwete Rd. P.O. Box 61130-00200, NAIROBI, Kenya
Junction) TEL.: 254 (020) 2717318/ 310722, MOBILE: 0729 888881/2/3
Fax: 254 (020) 2719757 Email: eacc@integrity.go.ke Website: www.eacc.go.ke

When replying please quote:

Our Ref: EACC/LEG 8/16

Date: 21st February 2018

Michael Sialai

Clerk of the National Assembly
Clerks Chambers,
National Assembly
Parliament Buildings
P.O. Box 41842, 00100

NAIROBI

**SUBJECT : PROPOSED MISCELLANEOUS AMMENDMENT OF SECTION 27 (2) OF THE
BRIBRY ACT 2016**

The above subject refers.

Prior to the commencement of the Bribery Act 2016, Bribery involving Agents was provided in Section 39 of The Anti-Corruption and Economic Crimes Act 2003. Section 23 of the Bribery Act 2016 amended The Anti-Corruption and Economic Crimes Act 2003 by deleting Section 39 of The Anti-Corruption and Economic Crimes Act 2003.

By 2016 when the said Section 39 was deleted, there were many investigations, prosecutions and court proceedings that were ongoing. The said investigations, prosecutions and court proceedings were saved by the section 27 of the Bribery Act which is headed - **PENDING BRIBERY CASES**. Section 27 (2) provides:

Any investigation or prosecution or court proceedings instituted before the commencement of this Act based on an offence under this Act shall, with the necessary modifications, be treated or continued as if they were instituted under this Act.

This transition section is anomalous and it has been subject to diverse interpretations which have had negative implications in the fight against corruption.

In the matter of Republic Versus Henry Ngugi Njeru, Anti-Corruption Court at Nairobi; case no. 15 of 2017, the investigations were commenced under The Anti-Corruption and Economic Crimes Act before the commencement of the Bribery Act. The investigations were completed after commencement of the Bribery Act and consequently the accused was charged under the repealed Section 39 of The Anti-Corruption and

Tukomeshe Ujiscadi, Tuijenge Kenya

Economic Crimes Act. The Magistrate declined to accept charges and discharged the accused for the reason that the accused should have been charged under the Bribery Act.

In a ruling by the High Court on a revision of the above decision, the High Court held that the charge sheet must be crafted in such a way so as to cater for:-

- i) The repealed Section since that is what covers the particulars
- ii) Section 6 of the Bribery Act since that is what covers the offence
- iii) Section 27 (2) of the Bribery Act because it is the provision that directs on how matters investigated, prosecuted and court proceedings instituted before the new Act would be conducted.

The unanswered question remains, what sentence will be passed upon conviction? There is a principle of criminal law that one cannot be subjected to a sentence which is heavier than that prevailing when the offence was committed.

The Court interpretation has been as a result of the ambiguity of Section 27 (2) of the Bribery Act and this has caused numerous challenges in drafting of charges against accused persons.

To remove the inconsistency, our proposal is to have an urgent miscellaneous amendment of Section 27 (2) of the Bribery Act to read as follows

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



HALAKE D. WAQO, CBS, MCI Arb
SECRETARY / CHIEF EXECUTIVE OFFICER

Copy to: Hon. Aden Bare Duale
Leader of Majority
National Assembly
Parliament Buildings
P.O. Box 41842, 00100
NAIROBI

REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT
IN THE ANTI-CORRUPTION COURT AT NAIROBI
ANTI-CORRUPTION CASE NO.15 OF 2017

REPUBLIC PROSECUTOR
VERSUS
HENRY NGUGI NJERU ACCUSED

PROCEEDINGS

24.8.2017

Coram: L.N. Mugambi [Mr.]CM

Prosecutor – Karuri for the state

Court Clerk – Isaac

Interpretation – English

Accused – Present

Represented by Cliff Ombeta

Court – RULING

The charges against the accused for which he is before me for plea are expressed to be brought under section 39 [3] [a] as read with section 48[1] of Anti-Corruption & Economic Crimes Act No.3 of 2003.

The offence is alleged to have been committed on 5.11.2016. The new Bribery Act No.47 of 2016 took effect from 13.1.2017. It repealed Section 39 of Anti-Corruption & Economic Crime Act by dint of Section 23 of the Act.

Of concern to this court however, is reference to the present charges is Section 27 [2] which addresses the issue of pending cases or investigations that were being under taken under Anti-Corruption & Economic Crimes Act, 2033.

In particular, Section 27 [2] reads:-

"Any investigation or prosecution or court proceedings instituted before the commencement of this Act, based on an offence under this Act shall, with necessary modifications, be treated or continued as if they were instituted under this Act"

In essence therefore, it means if an investigation was commenced under the old Act, but by the time Section 39 of ACECA was being repealed, it was not yet completed, then following the commencement of the Bribery Act, the new Act takes over and such charges or report of that investigations can only be expressed to be under the new Act and not the old provision, of ACECA as the prosecution attempts to do in this case.

Consequently, I decline to accept the charges as framed *suo moto* for non

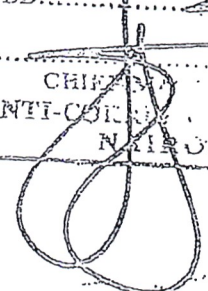
compliance with the law as clearly expressed. I discharge the accused under section 89 [5] of the Criminal Procedure Code.

L.N. MUGAMBI [MR]

CHIEF MAGISTRATE

24.8.2017

I CERTIFY THIS IS TRUE COPY OF THE ORIGINAL.	
DATED:.....	28/8/17
CHIEF MAGISTRATE ANTI-CORRUPTION COURT NAIROBI	



REPUBLIC OF KENYA

ANTI-CORRUPTION & ECONOMIC CRIMES

COURT AT NAIROBI

ANTI-CORRUPTION CASE NO. 7 OF 2017

REPUBLIC.....PETITIONER

VERSUS

HENRY NGUGI NJERU alias

PATRICK HENRY NGUGI NJERU alias

PATRICK HENRY NGUGI DOUGLAS.....RESPONDENT

RULING ON REVISION

1. This court was moved by the Applicant for revision under Sections 362 & 364 of the Criminal Procedure Code Cap. 75. Section 362 Criminal Procedure Code provides:-

"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court".

Section 364 Criminal Procedure Code provides:-

"In the case of a proceeding in a subordinate court the record of which has been called for or which has been

reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a).....

(b).....

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

2. The application was made on the ground that the orders made by Hon. L.N. Mugariboi (Mr) Chief Magistrate on 24th August 2017 in ACC No 15 of 2017 are illegal, incorrect and improper.
3. This court called for the lower court file for perusal and the applicant was directed to serve the respondent with the application. The respondent was served for hearing for 9th October 2017 through his advocate Mr. Ombeta on 18th September 2017. Neither the respondent nor his counsel appeared for the hearing of this application.
4. In her submissions Miss Ndambiri for the applicant told the court that the Hon. Chief Magistrate rejected the charge sheet and discharged the respondent under the mistaken belief that the respondent ought to have been charged under the Bribery

Act. Relying on Section 27(2) of the Bribery Act and Section 23(3) (e) of the Interpretation of General Provisions Act (Cap 2 Laws of Kenya) it was her submission that the charges before the court were properly before the said court. She further submitted that count 3 of the charge sheet had been brought under the National Police Service Act and there was no reason why he rejected it.

5. I have before me the lower court record. When rejecting the charge the Hon. Chief Magistrate had this to say:

"In essence therefore, it means if an investigation was commenced under the old Act but at the time Section 39 of ACECA was being repealed, it was not yet completed, then following the commencement of the Bribery Act, the new Act takes over and such charges or report of that investigations (sic) can only be expressed to be under the new Act and not the old provision, of ACECA as the prosecution attempted to do in this case. Consequently, I decline to accept the charges as framed *suo moto* for non-compliance with the law as clearly expressed. I discharge the accused under section 89(5) of the Criminal Procedure Code"

6. The Bribery Act No. 47 of 2016 became operational on 13th January 2017. Section 23 of the said Act repealed Section 39 of the Anti-Corruption & Economic Crimes Act (ACECA).

Section 27 of the Bribery Act is the one dealing with pending cases instituted under ACECA. At Section 27(1) it provides:-

"This Section applies with respect to bribery offences or suspected bribery offences under the Anti-Corruption & Economic Crimes Act 2003.

(2)- "Any investigation or prosecution or court proceedings instituted before the commencement of this Act based on an offence under this Act shall, with the necessary modifications, be treated or continued as if they were instituted under this Act."

7. On the interpretation of repealed laws and the repealing written laws Section 23(3) (c) of the Interpretation & General Provisions Act provides that:-

"where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment was aforesaid, and any such investigation, legal proceeding or remedy may be instituted continued, or enforced, and any such penalty forfeiture or punishment may be imposed, as if the repealing written law had not been made."

8. Article 50(2) (a) of the Constitution of Kenya 2010 provides:-

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

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

(i) An offence in Kenya; or

(ii) A crime under international law."

9. There is no dispute that corruptly soliciting a benefit was an offence under the repealed Section 39 of Anti-Corruption & Economic Crimes Act. Receiving a bribe upon requests is

similarly an offence, under the Bribery Act. The two are one and the same offence, and cannot be said to have been introduced under the Bribery Act. Section 27 (2) of the Bribery Act is specific that such offences which were committed, investigated and instituted before the commencement of the Bribery Act ought to be treated or continued with necessary modifications as if they were instituted under the new Act.

10. Section 27 (2) of the Bribery Act has thus specifically made provision for these pending classes. Would section 23(3) (e) of the Interpretation General Provisions Act be applicable in the circumstances of this case? A reading of the said section 23(3) (e) (supra) shows its intention to be the preservation of investigations and proceedings of a repealed written law upto the conclusion of the matter under the said law. On the other hand the intention of section 27 (2) of the Bribery Act is to have the investigations and proceedings continue under the new Act and not the repealed section 39 of the ACECA.

11. My view is that section 23 (3) (c) (Cap. 2 Laws of Kenya) being a provision of general application would not apply where there is a specific provision dealing with the repealed law. I find no ambiguity in Section 27(2) of the Bribery Act hence the inapplicability of Section 23(3) (e) of the Interpretation & General Provisions Act.

12. The Hon. Chief Magistrate may have been right in his decision to some extent but not wholly. If his line of thinking was

adopted the charge would have been under the Bribery Act but the particulars in the charge sheet would show that the offence was committed under the regime of the repealed law. This would cause challenges.

13. On the other hand, the State may also to some extent be correct. From the Director Public Prosecutions the challenge would however be, reconciling the offence under the repealed law so as to proceed as if it was instituted under the new Act, in line with Section 27 (2) of the Bribery Act.

14. As stated earlier the offence stated in the 1st & 2nd counts of the charge sheet is clearly set out in the repealed section 39 of Anti-Corruption & Economic Crimes Act and section 6 of the Bribery Act. My view is that the charge sheet must be crafted in such a way so as to cater for:

(i) the repealed section 39 (ACECA) since that is what covers the particulars; (ii) section 6 of the (Bribery Act) since that is what covers the offence; (iii) finally section 27(2) of the (Bribery Act) as that is the provision that directs on how matters investigated and/or prosecuted and court proceedings commenced prior to the new Act would be conducted.

15. Once this is done then the respondent should be arraigned in court to answer to the appropriate charges. Otherwise charging him under either section 39 (repealed) of ACECA only or under section 6 of the Bribery Act only would cause challenges. Count 3 of the charge sheet was not affected by section 39 Anti-Corruption & Economic Crimes Act or the

Bribery Act and plea on it ought to have been taken by the learned Magistrate.

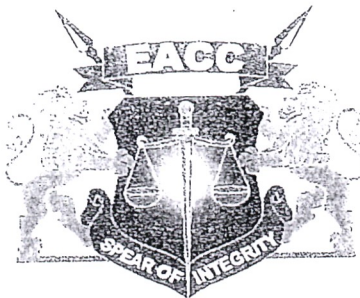
16. I therefore find that the charge in respect of Counts 1 & 2 was not properly drafted and the Hon. Chief Magistrate was right in rejecting it and discharging the respondent under Section 89 (5) Criminal Procedure Code but only as far as counts 1 & 2 were concerned. He erred in rejecting count 3 and discharging the respondent on the same. The Order rejecting count 3 and discharging the respondent is therefore set aside, and substituted with an order reinstating it with directions that plea be taken on it.

17. A rejected charge sheet is however not a bar to further proceedings. I therefore direct the State through the Office of the Director of Public Prosecutions to prepare and register a fresh charge sheet as per the direction at paragraph 14 of this Ruling within the next 21 days. Thereafter the respondent to be served to appear for plea on the 3 counts before a competent Magistrate other than Mr. L.N. Mugambi Chief Magistrate.

Dated, Signed and delivered this 13th day of October, 2017 in open court at Nairobi

.....
H.I. ONG'UDI

JUDGE



ETHICS AND ANTI-CORRUPTION COMMISSION

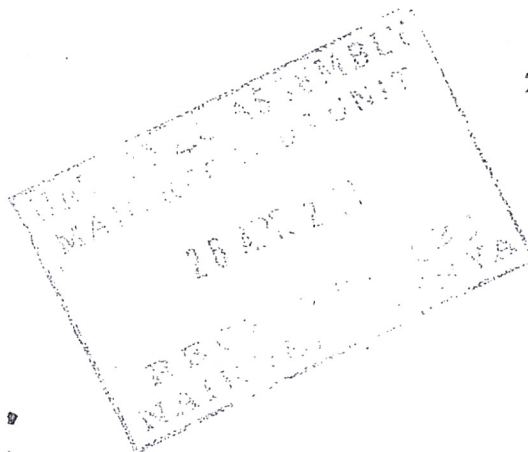
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When replying please quote:

Our Ref: EACC/LEG 8/16

25th April, 2018

Michael Sialai,
Clerk of the National Assembly,
Clerks Chambers,
National Assembly,
Parliament Buildings,
P.O. Box 41842, 00100,
NAIROBI



Dear

Mr Sialai,

**SUBJECT : PROPOSED MISCELLANEOUS AMMENDMENT OF SECTION 27 (2) OF THE
BRIBERY ACT 2016**

Reference is made to Kenya Gazette Supplement No. 35 (National Assembly Bills No. 12) dated 10th April 2018 and our letter Ref: **EACC/LEG 8/16** dated 21st February 2018 which was copied to you. A copy is attached for ease of your reference.

While we appreciate the proposed Miscellaneous Amendments Bill in response to our request, we have realized that the anomaly has not been fully addressed as it still offends Section 50 (2) (n) of the Constitution which provides that;

"Every accused person has the right to a fair trial, which includes the right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya".

Further Subsection (p) of Section 50 provides that;

"Every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing".

To fully cure this inconsistency, we propose that Section 27 (2) be deleted and substituted with the following:

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

This proposed amendment will fully address the challenges we are facing in prosecution of bribery cases.

Yours



HALAKE D. WAQO, CBS, MCI Arb
SECRETARY / CHIEF EXECUTIVE OFFICER
DT/en

Copy to: Hon. Aden Bare Duale,
Leader of Majority,
National Assembly,
Parliament Buildings,
P.O. Box 41842, 00100,
NAIROBI



2

ETHICS AND ANTI-CORRUPTION COMMISSION

INTEGRITY CENTRE (Valley Rd. /Jakaya Kikwete Rd. P.O. Box 61130-00200, NAIROBI, Kenya
Junction) TEL.: 254 (020) 2717318/ 310722, MOBILE: 0729 888881/2/3
Fax: 254 (020) 2719757 Email: eacc@integrity.go.ke Website: www.eacc.go.ke

When replying please quote:

Our Ref: EACC/LEG 8/16

Date: 21st February 2018

Michael Sialai

Clerk of the National Assembly

Clerks Chambers,

National Assembly

Parliament Buildings

P.O. Box 41842, 00100

NAIROBI

**SUBJECT : PROPOSED MISCELLANEOUS AMMENDMENT OF SECTION 27 (2) OF THE
BRIBRY ACT 2016**

The above subject refers.

Prior to the commencement of the Bribery Act 2016, Bribery involving Agents was provided in Section 39 of The Anti-Corruption and Economic Crimes Act 2003. Section 23 of the Bribery Act 2016 amended The Anti-Corruption and Economic Crimes Act 2003 by deleting Section 39 of The Anti-Corruption and Economic Crimes Act 2003.

By 2016 when the said Section 39 was deleted, there were many investigations, prosecutions and court proceedings that were ongoing. The said investigations, prosecutions and court proceedings were saved by the section 27 of the Bribery Act which is headed - **PENDING BRIBERY CASES**. Section 27 (2) provides

Any investigation or prosecution or court proceedings instituted before the commencement of this Act based on an offence under this Act shall, with the necessary modifications, be treated or continued as if they were instituted under this Act.

This transition section is anomalous and it has been subject to diverse interpretations which have had negative implications in the fight against corruption.

In the matter of Republic Versus Henry Ngugi Njeru, Anti-Corruption Court at Nairobi; case no. 15 of 2017, the investigations were commenced under The Anti-Corruption and Economic Crimes Act before the commencement of the Bribery Act. The investigations were completed after commencement of the Bribery Act and consequently the accused was charged under the repealed Section 39 of The Anti-Corruption and

Tukomeshe Ujuzidi. Tuijenge Kenya

Economic Crimes Act. The Magistrate declined to accept charges and discharged the accused for the reason that the accused should have been charged under the Bribery Act.

In a ruling by the High Court on a revision of the above decision, the High Court held that the charge sheet must be crafted in such a way so as to cater for:-

- i) The repealed Section since that is what covers the particulars
- ii) Section 6 of the Bribery Act since that is what covers the offence
- iii) Section 27 (2) of the Bribery Act because it is the provision that directs on how matters investigated, prosecuted and court proceedings instituted before the new Act would be conducted.

The unanswered question remains, what sentence will be passed upon conviction? There is a principle of criminal law that one cannot be subjected to a sentence which is heavier than that prevailing when the offence was committed.

The Court interpretation has been as a result of the ambiguity of Section 27 (2) of the Bribery Act and this has caused numerous challenges in drafting of charges against accused persons.

To remove the inconsistency, our proposal is to have an urgent miscellaneous amendment of Section 27 (2) of the Bribery Act to read as follows

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



HALAKE D. WAQO, CBS, MCI Arb
SECRETARY /CHIEF EXECUTIVE OFFICER

Copy to: Hon. Aden Bare Duale
Leader of Majority
National Assembly
Parliament Buildings
P.O. Box 41842, 00100
NAIROBI

REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT
IN THE ANTI-CORRUPTION COURT AT NAIROBI
ANTI-CORRUPTION CASE NO.15 OF 2017

REPUBLIC PROSECUTOR
VERSUS
HENRY NGUGI NJERU ACCUSED

PROCEEDINGS

24.8.2017

Coram: L.N. Mugambi [Mr.]CM

Prosecutor – Karuri for the state

Court Clerk – Isaac

Interpretation – English

Accused – Present

Represented by Cliff Ombeta

Court – RULING

The charges against the accused for which he is before me for plea are expressed to be brought under section 39 [3] [a] as read with section 48[1] of Anti-Corruption & Economic Crimes Act No.3 of 2003.

The offence is alleged to have been committed on 5.11.2016. The new bribery Act No.47 of 2016 took effect from 13.1.2017. It repealed Section 39 of Anti-Corruption & Economic Crime Act by dint of Section 23 of the Act.

Of concern to this court however, in reference to the present charges is Section 27 [2] which addresses the issue of pending cases or investigations that were being under taken under Anti-Corruption & Economic Crimes Act, 2033.

In particular, Section 27 [2] reads:-

"Any investigation or prosecution or court proceedings instituted before the commencement of this Act, based on an offence under this Act shall, with necessary modifications, be treated or continued as if they were instituted under this Act"

In essence therefore, it means if an investigation was commenced under the old Act, but by the time Section 39 of ACECA was being repealed, it was not yet completed, then following the commencement of the Bribery Act, the new Act takes over and such charges or report of that investigations can only be expressed to be under the new Act and not the old provision, of ACECA as the prosecution attempts to do in this case.

Consequently, I decline to accept the charges as framed *suo moto* for non

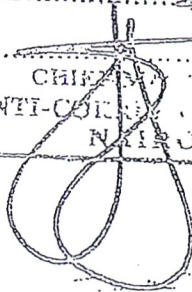
compliance with the law as clearly expressed. I discharge the accused under section 89 [5] of the Criminal Procedure Code.

L.N. MUGAMBI [MR]

CHIEF MAGISTRATE

24.8.2017

I CERTIFY THIS IS TRUE COPY OF THE ORIGINAL.	
DATED:.....	28/8/17
CHIEF MAGISTRATE ANTI-CORRUPTION COURT Nairobi	



REPUBLIC OF KENYA
ANTI-CORRUPTION & ECONOMIC CRIMES
COURT AT NAIROBI
ANTI-CORRUPTION CASE NO. 7 OF 2017

REPUBLIC.....PETITIONER

VERSUS

HENRY NGUGI NJERU alias
PATRICK HENRY NGUGI NJERU alias
PATRICK HENRY NGUGI DOUGLAS.....RESPONDENT

RULING ON REVISION

1. This court was moved by the Applicant for revision under Sections 362 & 364 of the Criminal Procedure Code Cap. 75. Section 362 Criminal Procedure Code provides:-

"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court".

Section 364 Criminal Procedure Code provides:-

"In the case of a proceeding in a subordinate court the record of which has been called for or which has been

reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a).....

(b).....

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

2. The application was made on the ground that the orders made by Hon. L.N. Mugambi (Mr) Chief Magistrate on 24th August 2017 in ACC No 15 of 2017 are illegal, incorrect and improper.
3. This court called for the lower court file for perusal and the applicant was directed to serve the respondent with the application. The respondent was served for hearing for 9th October 2017 through his advocate Mr. Ombeta on 18th September 2017. Neither the respondent nor his counsel appeared for the hearing of this application.
4. In her submissions Miss Ndambiri for the applicant told the court that the Hon. Chief Magistrate rejected the charge sheet and discharged the respondent under the mistaken belief that the respondent ought to have been charged under the Bribery

Act. Relying on Section 27(2) of the Bribery Act and Section 23(3) (e) of the Interpretation of General Provisions Act (Cap 2 Laws of Kenya) it was her submission that the charges before the court were properly before the said court. She further submitted that count 3 of the charge sheet had been brought under the National Police Service Act and there was no reason why he rejected it.

5. I have before me the lower court record. When rejecting the charge the Hon. Chief Magistrate had this to say:

"In essence therefore, it means if an investigation was commenced under the old Act but at the time Section 39 of ACECA was being repealed, it was not yet completed, then following the commencement of the Bribery Act, the new Act takes over such charges or report of that investigations (sic) can only be expressed to be under the new Act and not the old provision, of ACECA as the prosecution attempted to do in this case. Consequently, I decline to accept the charges as framed *suo moto* for non-compliance with the law as clearly expressed. I discharge the accused under section 89(5) of the Criminal Procedure Code"

6. The Bribery Act No. 47 of 2016 became operational on 13th January 2017. Section 23 of the said Act repealed Section 39 of the Anti-Corruption & Economic Crimes Act (ACECA).

Section 27 of the Bribery Act is the one dealing with pending cases instituted under ACECA. At Section 27(1) it provides:-

"This Section applies with respect to bribery offences or suspected bribery offences under the Anti-Corruption & Economic Crimes Act 2003.

(2)- "Any investigation or prosecution or court proceedings instituted before the commencement of this Act based on an offence under this Act shall, with the necessary modifications, be treated or continued as if they were instituted under this Act."

7. On the interpretation of repealed laws and the repealing written laws Section 23(3) (c) of the Interpretation & General Provisions Act provides that:-

"where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment was aforesaid, and any such investigation, legal proceeding or remedy may be instituted continued, or enforced, and any such penalty forfeiture or punishment may be imposed, as if the repealing written law had not been made."

8. Article 50(2) (a) of the Constitution of Kenya 2010 provides:-

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

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

- (i) An offence in Kenya; or
- (ii) A crime under international law."

9. There is no dispute that corruptly soliciting a benefit was an offence under the repealed Section 39 of Anti-Corruption & Economic Crimes Act. Receiving a bribe upon requests is

similarly an offence, under the Bribery Act. The two are one and the same offence, and cannot be said to have been introduced under the Bribery Act. Section 27 (2) of the Bribery Act is specific that such offences which were committed, investigated and instituted before the commencement of the Bribery Act ought to be treated or continued with necessary modifications as if they were instituted under the new Act.

10. Section 27 (2) of the Bribery Act has thus specifically made provision for these pending classes. Would section 23(3) (e) of the Interpretation General Provisions Act be applicable in the circumstances of this case? A reading of the said section 23(3) (e) (supra) shows its intention to be the preservation of investigations and proceedings of a repealed written law upto the conclusion of the matter under the said law. On the other hand the intention of section 27 (2) of the Bribery Act is to have the investigations and proceedings continue under the new Act and not the repealed section 39 of the ACECA.

11. My view is that section 23 (3) (c) (Cap. 2 Laws of Kenya) being a provision of general application would not apply where there is a specific provision dealing with the repealed law. I find no ambiguity in Section 27(2) of the Bribery Act hence the inapplicability of Section 23(3) (c) of the Interpretation & General Provisions Act.

12. The Hon. Chief Magistrate may have been right in his decision to some extent but not wholly. If his line of thinking was

adopted the charge would have been under the Bribery Act but the particulars in the charge sheet would show that the offence was committed under the regime of the repealed law. This would cause challenges.

13. On the other hand, the State may also to some extent be correct. From the Director Public Prosecutions the challenge would however be, reconciling the offence under the repealed law so as to proceed as if it was instituted under the new Act, in line with Section 27 (2) of the Bribery Act.

14. As stated earlier the offence stated in the 1st & 2nd counts of the charge sheet is clearly set out in the repealed section 39 of Anti-Corruption & Economic Crimes Act and section 6 of the Bribery Act. My view is that the charge sheet must be crafted in such a way so as to cater for:

(i) the repealed section 39 (ACECA) since that is what covers the particulars; (ii) section 6 of the (Bribery Act) since that is what covers the offence; (iii) finally section 27(2) of the (Bribery Act) as that is the provision that directs on how matters investigated and/or prosecuted and court proceedings commenced prior to the new Act would be conducted.

15. Once this is done then the respondent should be arraigned in court to answer to the appropriate charges. Otherwise charging him under either section 39 (repealed) of ACECA only or under section 6 of the Bribery Act only would cause challenges. Count 3 of the charge sheet was not affected by section 39 Anti-Corruption & Economic Crimes Act or the

Bribery Act and plea on it ought to have been taken by the learned Magistrate.

16. I therefore find that the charge in respect of Counts 1 & 2 was not properly drafted and the Hon. Chief Magistrate was right in rejecting it and discharging the respondent under Section 89 (5) Criminal Procedure Code but only as far as counts 1 & 2 were concerned. He erred in rejecting count 3 and discharging the respondent on the same. The Order rejecting count 3 and discharging the respondent is therefore set aside, and substituted with an order reinstating it with directions that plea be taken on it.

17. A rejected charge sheet is however not a bar to further proceedings. I therefore direct the State through the Office of the Director of Public Prosecutions to prepare and register a fresh charge sheet as per the direction at paragraph 14 of this Ruling within the next 21 days. Thereafter the respondent to be served to appear for plea on the 3 counts before a competent Magistrate other than Mr. L.N. Mugambi Chief Magistrate.

Dated, Signed and delivered this 13th day of October, 2017 in open court at Nairobi

.....
H.I. ONG'UDI

JUDGE

ACECA.REV.NO.7/17

lwm

D/Committee 14/4
8/5

**SUBMISSION OF A MEMORANDUM ON THE STATUTE LAW
(MISCELLANEOUS) BILL, 2018**

NATIONAL ASSEMBLY BILL NO. 12 OF 2018

BY ANNAH KONUCHE

This memorandum is in response to the call for submission of memoranda for the above captioned Bill due for passing by the National Assembly. I present this memorandum in my individual capacity as a Kenyan citizen and as a lawyer and advocate of the High Court of Kenya.

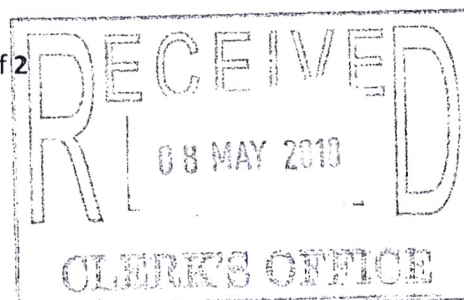
My comments are restricted to three Acts of Parliament namely, the Kenya School of Law Act (*Sections 4, 16 and second schedule*), the Legal Education Act (*Section 8*) and the Universities Act. My comments are as follows;

1. The proposed amendments to the three Acts named above are **too substantive** to be made through an omnibus Miscellaneous Amendment Act. The proposed amendment to the Kenya School of Law Act and the Legal Education Act seeks to open up the training of Advocates under the Advocates Training Program to other entities. This liberalization is not good since currently the Kenya School of Law is mandated by statute to do that and is partly funded by government. A viable option would have been to require the devolution of the Kenya School of Law services to other parts of the country so that they are easily accessible by law students and reduce the cost element or provide the Kenya School of Law students with loans to cover their training.
2. The proposed amendments being of a substantive nature, require the **input of stakeholders** in the legal profession. Granted, Kenya School of Law has had its fair share of challenges but piecemeal and haphazard amendments will drive the legal education sector into muddier waters than it already is. A structured approach is necessary in the circumstances and the current proposed amendments will not help matters, they are more of an ambush than well thought out process.
3. The issue of changes to the legal education sector is one that is currently being handled by the **Taskforce of Legal Sector Reforms** that is about to complete its work. The Taskforce was constituted by the Attorney General and part of its recommendations, although yet to be presented, touch on the very subject of the proposed amendments and therefore these amendment preempt the findings of the Taskforce. The Taskforce should be allowed to complete its work and submit its report before any changes to the law on any part of the legal sector can be attempted.

Philip Lekas Kar
Pls TNA

Page 1 of 2

10/05/2018



4. The proposed amendment introduced under section 4 (2)(a) to wit '***the object of the School shall be to...ensure the continuity of professional development for all cadres of the legal profession***' is likely to convert the Kenya School of Law into a Continuous Professional Development (CPD) provider and take away its main mandate being the training of advocates for admission to the Bar. CPD is a function of a professional body and in the case of lawyers, the Law Society of Kenya and other entities such as the Judicial Training Institute in the case of the Judiciary, the Kenya School of Government for lawyers employed by government and so on.
5. Council for Legal Education being a regulator, should not at the same time administer both the pre bar and the bar examinations.
6. The Proposed amendment to the Universities Act to have the Vice Chancellors of Universities appointed by the PSC is ridiculous to say the least. The University is an academic institution and it is doubtful whether PSC has capacity to recruit academic staff let alone the heads of academic institutions!

In conclusion, I urge and caution the National Assembly of Kenya against introducing substantive amendments by way of an omnibus miscellaneous Bill without subjecting the contents to strict and rigorous discussions by stakeholders. The Kenyan education sector in general and legal education sector in particular, are in shambles because of these kind of changes to the law that have no blessings of the people of Kenya.

Thank you,


Annah Konuche

akonuche@yahoo.com

**MEMORANDUM TO THE JUSTICE AND LEGAL AFFAIRS COMMITTEE ON THE STATUTE LAW
MISCELLANEOUS AMENDMENT BILL 2018**

Preamble

This submission is made in consideration of the law, policy and practice related to probation officer work in the court on matters touching on pre-trial services and specifically on bail and bond administration. These services are increasingly evident both at the law courts and the High Court. The memorandum seeks to propose amendment to section 123A of the Criminal Procedure Code (see below). It is also made in considerations that there is no single Ministry, Department or Agency solely responsible for gate-keeping matters arising from the Criminal Procedure Code Cap 75 laws of Kenya as it is cross cutting to all criminal justice agencies.

Proposal

That a new clause crafted as section 3 of section 123A to read

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

Justification

- The clause will make legal and legitimise the current practice on bail information reports prepared by probation officers and used by the courts both at the High Court and Lower courts for bail decision making
- It will establish the basis upon which the court can rely on in granting or denying bail and thus note leaving it to the discretion of the court alone
- The current practice of bail information reports or pre-bail reports are based on court precedents and on Bail and Bond Policy Guidelines (2015) developed by the National Council on the Administration of Justice (NCAJ)
- Further to the foregoing, it will establish means through which Victim(s) concerns can be brought to the attention of the court before bail is issued
- It will also help address the burgeoning Pre-trial/remand population with the resultant effect of reducing overall prison population especially of non-serious offenders
- It will help protect the public especially the victim, become the foundation for future bail supervision and help improve the administration of justice

123A.	Joinder of two or more accused in one charge or information (1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—
-------	--

	(a) the nature or seriousness of the offence; (b) the character, antecedents, associations and community ties of the accused person; (c) the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and; (d) the strength of the evidence of his having committed the offence; (2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person— (a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody; (b) should be kept in custody for his own protection. [Act No. 18 of 2014, Sch.]
--	--

Submitted by



Clement Okech

Tel: 0726702434, Email clement.okech@probation.go.ke, clemokech@yahoo.com

Probation and Aftercare Service

14th May 2018

**FURTHER PROPOSED ADJUSTMENTS TO THE STATUTE LAW
MISCELLANEOUS AMENDMENT BILL 2018 WITH REGARD TO AMENDING
THE PROBATION OF OFFENDER ACT CAP 64**

1. Definition of 'Social inquiry report' (Section 2)

The term '**Social inquiry report**' should be deleted and replaced with '**Presentence report**'.
The other wordings to remain the same.

Section 4(7) replace the words Social inquiry reports with **Presentence reports**

Justification

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

2. Principal probation officer (various sections)

- Section 11(1) Replace Principal Probation Officer with **Director** wherever it appears.
- Section 11 (3) Replace Principal Probation Officer with **Director** wherever it appears. And Delete 'District' and replace with '**county**' wherever it appears
- Section 11 (5) Delete 'District' wherever it appears and replace with **County**. And Replace Minister with '**Cabinet Secretary**'
- Section 16 (a) Repeat the same with respect to changing the word principal probation officer with **Director**
- Section 18 Repeat the same with respect to changing the word principal probation officer with **Director**

Justification

- The Word '**Director**' is proposed and already defined in the amendment Bill.
- The current office holder is designated as a Director with several officers below one of which is the Principal Probation officer in job Group 'N'
- As was the case originally (1946-1993), the department was headed by a Principal Probation officer but this was changed and a new designation for the head of the department is the **Director**.
- The **Director** is the current head of department bestowed with the responsibility of overseeing the implementation of the Act and **not** the Principal Probation officer
- Leaving the term the Principal Probation officer unchanged would mean that even the director as structured now would be subordinate to the Principal Probation officer

② CHIEF REGISTRAR
pls send
FA 15/5/18

Telephone Nairobi 2221221

Email: chiefregistrar@judiciary.go.ke

When replying please quote



REPUBLIC OF KENYA

CHIEF REGISTRAR'S CHAMBERS, JUDICIARY
SUPREME COURT BUILDING
P.O. Box 30041 - 00100
NAIROBI

THE JUDICIARY

May 9, 2018

① D/Mutter
15/5/18

The Clerk of the National Assembly
Office of the Clerk
Main Parliament Building
NAIROBI

Dear

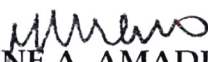
RE: **IN THE MATTER OF CONSIDERATION BY THE NATIONAL ASSEMBLY
OF THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL 2018
(NATIONAL ASSEMBLY BILL NO. 12 2018)**

I refer to the Notice appearing in the Standard Newspaper of 7th May, 2018 and enclose herewith a self-explanatory Memorandum for your onward transmission to the Legal and Justice Affairs Committee for consideration.

This Memorandum is submitted pursuant to Article 118(1)(b) of the Constitution and Standing Orders 127(3) on behalf of the Judiciary as a stakeholder pursuant to the Notice aforesaid.

The contents of this Memorandum are also submitted to the National Assembly pursuant to the dictates of the Constitution regarding public participation and the right of affected institutions to participate in the legislative process. It is also submitted without prejudice and should not be taken to affect the independence of any Judicial Officer handling any possible litigation brought before any court regarding the Bill under consideration or any Act enacted pursuant to the said Bill.

Yours faithfully,


ANNE A. AMADI, CBS
CHIEF REGISTRAR OF THE JUDICIARY



**IN THE MATTER OF CONSIDERATION BY THE NATIONAL
ASSEMBLY OF THE STATUTE LAW (MISCELLANEOUS
AMENDMENTS) BILL, 2018 (NATIONAL ASSEMBLY BILL NO.12 OF
2018)**

MEMORANDUM

1. The Judicature Act (Cap 8).

The Recommendation to **delete** the word 'Judge' and substitute therefor the following new definition, 'judge' means the Chief Justice or any other judge appointed under Article 166 of the Constitution and includes a judge serving in an acting capacity".

Recommendation – **Delete**

Reasons:

- (a) The original provision and the definition of the word "Judge" under Section 3 of the Interpretation and General Provisions Act (Cap 2) are unconstitutional.
- (b) The proposed amendment is unconstitutional as it violates the provisions of Articles 161, 166 and 168 of the Constitution.
- (c) The Constitution neither provides nor contemplates the position of acting judge.
- (d) The proposed amendment violates the principle of independence of the Judiciary.
- (e) The proposed amendment violates the principle of security of tenure of judges including the causes of removal of judges.

2. The Oaths and Statutory Declarations Act (Cap 15)

The Recommendation to delete the words "a deputy registrar and district registrar" and substitute therefor the expression "and a Deputy registrar".

Recommendation – **Retain** the amendment but add the expression "a Deputy Registrar Employment and Labour Relations Court" and "a Deputy Registrar Environment and Land Court".

3. *Civil Procedure Act (cap 21).*

The Recommendation to amend sections 11,21,40,65 and 81 of the Civil Procedure Act.

Recommendation- **Retain** the amendment.

4. *The Law of Succession Act (cap 160)*

The Recommendation to amend section 49 of the Act by inserting section 49A.

Recommendation- **Retain** the amendment.

5. *The Judicial Service Commission Act. 2011.*

The Recommendation to delete the expression “within three days of receipt of the names” and substitute therefor the expression “within three days after approval by the National Assembly as contemplated under Article 250 (2)(b) of the Constitution”.

Recommendation- **Delete**

Reasons.

It is important to note that the Judicial Service Commission has already taken a position on this issue and there is also a pending case at the High Court involving the election of Justice Mohammed Warsame, the duly elected member of the JSC to represent the Court of Appeal (**Nbi Petition No. 84 of 2018, Katiba Institute v A.G & others**). However, these facts notwithstanding we wish to state as follows:

- a) The proposed amendment is unconstitutional as it violates the provisions of Articles 171 and 248 of the Constitution.
- b) Article 250 (2)(b) does not provide for the appointment of the Commissioners of the Judicial Service Commission.
- c) There are serving Commissioners of Judicial Service Commission who were neither vetted nor approved by Parliament prior to their appointment.
- d) The proposed amendment will lead to inconsistencies in the application of Section 15 of the Act.
- e) The Judicial Service Commission (Article 171), the Parliamentary Service Commission (Article 127) and the Salaries and Remuneration Commission (Article 230) are special Commissions whose Commissioners are neither

vetted nor approved by Parliament except those Commissioners who are appointed by the President and therefore the proposed amendment is discriminatory as against the Judicial Service Commission.

- f) The proposed amendment, if retained, shall necessarily lead to the vetting and approval of the Commissioners of Parliamentary Service Commission and the Salaries and Remuneration Commission by the National Assembly thus compounding the unconstitutional proposal.

6. *The National Council for Law Reporting Act 1994 (No. 11 of 1994)*

The Recommendation to insert the following new subsection after subsection (3) “(4) The Council is a body under the office of the Attorney General”

Recommendation – **Delete**

Reasons

- (a) There is no justification for the proposed amendments in the Memorandum of Objects and Reasons.
- (b) The Recommendation violates the principle of Independence of the Judiciary.
- (c) The Council is domiciled within the Judiciary and as Law reporting is a judicial function, the office of the Attorney General has no role in it.
- (d) The Chief Justice is the Chairman of the Council and should not be subordinated to the Attorney General or his office.
- (e) The Chief Registrar of the Judiciary is the Accounting officer.
- (f) The Attorney General is a member of the Council and a party in some of the matters being litigated before the Courts and cannot assume the role of a reporter.

7. *The Land Act 2012 (No.6 of 2012)*

The Recommendation to delete the definition of the term “court” and substitute therefor the following definition: “court” means the High Court established by Article 165 of the Constitution and the Environment and Land Court established under the Environment and Land Court Act, 2011”

Recommendation – **Delete**

Reasons

- (a) It is unconstitutional as it violates Articles 162 (2)(b) as read with Article 165(5) of the Constitution.

(b) The Supreme Court has already interpreted the Constitution and the issue of jurisdiction of the Environment and Land Court vis-à-vis other courts in **S.C Petition No. 5 of 2015, R v Karisa Chengo & 2 others.**

8. *The Land Registration Act, 2012 (No.3 of 2012)*

The Recommendation to amend section 2 by inserting the words “the High Court established under Article 165 of the Constitution the Environment and Land Court appearing in the definition of the term “Court”.

Recommendation – **Delete**

Reasons

(a) It is unconstitutional as it violates Articles 162 (2)(b) as read with Article 165 (5) of the Constitution

(b) The Supreme Court has already interpreted the Constitution and the issue of jurisdiction of the Environment and Land Court vis-à-vis other courts in S.C Petition No. 5 of 2015, R v Karisa Chengo & 2 others

9. *The Retirement Benefits (Deputy President and Designated State Officers) Act, 2015*

The Recommendation to amend the First Schedule and insert the new paragraph immediately after paragraph k “(l) Office and office equipment”.

Recommendation – **Retain** the amendment.

In conclusion, it is important to note that the Court of Appeal sitting in Mombasa in **R v Danson Mgunya [2016] eKLR** made the following observations in relation to Statutes Law (Amendment) Bills.

“It seems to us totally undesirable that fundamental changes in the law, such as the ones involved in this appeal, should be effected through miscellaneous statute law amendments, which is what, for all intents and purposes, the Security Law (Amendment) Act, 2014, is. As we understand it, the device of miscellaneous statute law amendments is intended to effect minor rather than fundamental and far-fetching amendments to legislation. Ordinarily it will seek to correct any errors, anomalies or inconsistencies in legislation. It is completely ill

**suites to settle controversial or highly contested issues of the day,
which may require deep reflection and careful consideration.”**

We commend the above caveat to members of the esteemed Committee

Dated and signed at Nairobi this ^{14th}..... day of ^{May}.....2018.

.....*A. Amadi*.....

**ANNE A. AMADI, CBS
THE CHIEF REGISTRAR OF THE JUDICIARY**

**IN THE MATTER OF CONSIDERATION BY THE NATIONAL
ASSEMBLY OF THE STATUTE LAW (MISCELLANEOUS
AMENDMENTS) BILL, 2018 (NATIONAL ASSEMBLY BILL NO.12 OF
2018)**

MEMORANDUM

NO.	STATUTES	RECOMMENDATION	REASONS
1	<i>The Judicature Act (Cap 8)</i> The Proposal to delete the word 'Judge' and substitute therefor the following new definition "'judge' means the Chief Justice or any other judge appointed under Article 166 of the Constitution and includes a judge serving in an acting capacity".	Delete	(a) The original provision and the definition of the word "Judge" under Section 3 of the Interpretation and General Provisions Act (Cap 2) are unconstitutional. (b) The proposed amendment is unconstitutional as it violates the provisions of Articles 161, 166 and 168 of the Constitution. (c) The Constitution neither provides nor contemplates the position of acting judge. (d) The proposed amendment violates the principle of independence of the Judiciary. (e) The proposed amendment violates the principle of security of tenure of judges including the causes of removal of judges.
2	<i>The Oaths and Statutory Declarations Act (Cap 15)</i> The proposal to delete the words "a deputy registrar and district	Retain the amendment but add the expression "a Deputy Registrar Employment and Labour Relations Court" and "a Deputy Registrar	

	registrar” and substitute therefor the expression “and a Deputy Registrar”.	Environment and Land Court”.	
3	<i>Civil Procedure Act (Cap 21)</i> The proposal to amend sections 11, 21,40,65 and 81 of the Civil Procedure Act.	Retain the amendment	
4	<i>The Law of Succession Act (Cap 160)</i> The proposal to amend section 49 of the Act by inserting section 49A.	Retain the amendment	
5	<i>The Judicial Service Commission Act. 2011</i> The proposal to delete the expression “within three days of receipt of the names” and substitute therefor the expression “within three days after approval by the National Assembly as contemplated under Article 250(2)(b) of the Constitution”.	Delete	(a) It is unconstitutional as it violates the provisions of Articles 171 and 248 of the Constitution. (b) Article 250(2)(b) does not provide for the appointment of the Commissioners of the Judicial Service Commission as they are appointed under Article 171. (c) There are elected serving Commissioners of JSC who were neither vetted nor approved by Parliament prior to their appointment. (d) The proposed amendment will lead to inconsistencies in the application of Section 15

			of the Judicial Service Act. (e) The Judicial Service Commission (Article 171), the Parliamentary Service Commission (Article 127) and the Salaries and Remuneration Commission (Article 230) are special Commissions whose Commissioners are neither vetted nor approved by Parliament except those Commissioners who are appointed by the President and the proposed amendment is therefore discriminatory as against the Judicial Service Commission. (f) The proposed amendment, if retained, shall necessarily lead to the vetting and approval of the Commissioners of Parliamentary Service Commission and the Salaries and Remuneration Commission by the National Assembly thus compounding the unconstitutional proposal.
6	<i>The National Council for Law Reporting Act 1994 (No.11 of 1994)</i>	Delete	(a) There is no justification for the proposed amendment in the

	The proposal to insert the following new subsection after subsection (3) “(4) The Council is a body under the office of the Attorney General”		Memorandum of Objects and Reasons. (b) The Recommendation violates the Principle of Independence of the Judiciary. (c) The Council is domiciled within the Judiciary and Law reporting is a judicial function, the office of the Attorney General has no role in it. (d) The Chief Justice is the Chairman of the Council and should not be subordinated to the Attorney General or his office. (e) The Chief Registrar of the Judiciary is the Accounting officer. (f) The Attorney General is a member of the Council and a party in some of the matters being litigated before the Courts and cannot assume the role of a reporter.
7	<i>The Land Act 2012 (No.6 of 2012)</i> The proposal to delete the definition of the term “court” and substitute therefor the following definition – “court” means the High Court established by Article 165 of the Constitution and the	Delete	(a) It is unconstitutional as it violates Articles 162 (2)(b) as read with Article 165(5) of the Constitution. (b) The Supreme Court has already interpreted the Constitution and the issue of jurisdiction of the Environment and Land Court vis-à-vis other courts in S.C Petition No.

	Environment and Land Court established under the Environment and Land Court Act, 2011”		5 of 2015, R v Karisa Chengo & 2 others,
8	<i>The Land Registration Act, 2012 (No.3 of 2012)</i> The proposal to amend section 2 by inserting the words “the High Court established 165 of the Constitution the Environment and Land Court appearing in the definition of the term “Court”.	Delete	(a) It is unconstitutional as it violates Articles 162 (2)(b) as read with Article 165 (5) of the Constitution (b) The Supreme Court has already interpreted the Constitution and the issue of jurisdiction of the Environment and Land Court vis-à-vis other courts in S.C Petition No. 5 of 2015, R v Karisa Chengo & 2 others.
9	<i>The Retirement Benefits (Deputy President and Designated State Officers) Act 2015</i> The proposal to amend the First Schedule and insert the new paragraph immediately after paragraph k “(l) Office and office equipment”.	Retain the amendment	

Dated this 14th day of May.....2018.

.....
ANNE A. AMADI, CBS
CHIEF REGISTRAR OF THE JUDICIARY



1. GAZEMBA
2. MUTUNGA
3. GINDICHA
plb deep
FA
22/5/18

14th May 2018

The Clerk Kenya National Assembly,
Parliament Buildings,
P.O Box 41842 - 00100,
Nairobi, Kenya.

Attention: Hon. Michael Sialai, EBS

Dear Sir,

RE: REQUEST FOR SUBMISSION OF MEMORANDA: THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2018 NATIONAL ASSEMBLY BIL NO. 12 OF 2018

Reference is made to the above that was published in the Daily Nation newspaper dated the 7th of May 2018, pursuant to Article 118(1) (b) and Standing Order 127(3) inviting members of the public to submit feedback on the proposed amendments on the above mentioned Bill.

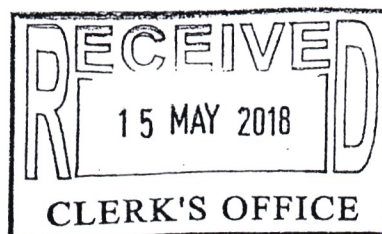
Enclosed is our feedback on specific areas of concern in the proposed amendments. You can reach the undersigned where further clarity is sought.

Yours faithfully,

Dr. Habil Olaka

CHIEF EXECUTIVE OFFICER

Encls.



KENYA BANKERS ASSOCIATION

MEMORANDA ON PROPOSED AMENDMENTS TO SPECIFIC ACTS

No.	ACT	SPECIFIC PROVISION	FEEDBACK
1.	Advocates Act, Cap.16	The proposed s. 46(d) and (da) further invalidates agreements between clients and advocates for fees that are below the remuneration order or whose consideration / fee is more than 25% of the general damages recoverable in respect if that business.	We oppose the proposal on the following premise: 1. The Advocates Remuneration Order places a scale of fees that is anti-competitive in nature as it amounts to price fixing; 2. That further providing the ambit of operation of the scale, further perpetuates the anti-competitive stance of the scale. On this amendment, we propose a repeal of the Advocates Remuneration Order on the matter of fees.
2.	The Law of Contract Act, Cap. 23	The amendment (s.3) proposes to have beneficiaries of guarantees exhaust legal remedies against principal debtors before pursuing or filing enforcement proceeding against guarantors	The proposed change will adversely affect the efficacy and utility of guarantees in local and international trade and the borrowing and lending markets and further increase credit risk. A proposal for consideration may be to introduce a separate instrument that covers this approach.
3.	The Higher Education Loans Board Act, 1995 (No. 3 of 1995)	The amendment to the HELB Act seeks to remove the chairman of KBA as one of the HELB Board members.	We propose the retaining of the same to support the collection of repayments and facilitation of loan disbursements by the industry. We further propose that an amendment of the Act be considered to have an additional seat of the Board allocated to

			a representative of higher institutions of learning.
4.	The Labour Relations Act, 2007 (No. 14 of 2007)	The amendment in s. 48(1) seeks to introduce a provision that would compel employers to sign check-off agreements as per the Labour Commissioner's orders. The amendment in the proposed s.49 (1) proposes to apply the agency fee to a bargaining unit.	There is no need to compel employers for sign offs noting that the Employment Act provides for prior and explicit consent where employee deductions are made and to which the employers must comply. This provision is opposed on the premise that only employees that enjoy benefits from a registered trade union can the fee apply to, and not to all employees that may be deemed unionisable, and who may not be benefiting from the registered collective agreement.

- END -

KBA Submissions on the Statute Miscellaneous (Amendment) Bill, 2018

2 messages

Catherine Nadida <cnadida@kba.co.ke>

Fri, Jun 8, 2018 at 10:07 AM

To: karanidoreen@gmail.com, ggazemba@gmail.com

Cc: Habil Olaka <holaka@kba.co.ke>, Waweru Mathenge <Waweru.Mathenge@nicgroup.com>, Bonnie Okumu <bokumu@kcbgroup.com>, june.opiyo@stanbic.com

Good morning,

Thank you for giving audience to KBA yesterday to articulate our feedback on the above mentioned proposed amendments. As a follow up to the meeting, please note the contents below:

The main points your raised were as follows:

1. The proposed amendment to the Law of Contract Act would be very popular with the *mwanaanchi* who would see it as a way to protect citizens from the predatory tactics of banks who have caused suffering to the citizens;
2. It would also protect innocent guarantors from potential (and allegedly real) collusion between the principal debtor and the bank to sell the guarantor's assets so that the principal debtor goes scot free;
3. The arguments by the KBA against the amendment make sense logically and economically and legally but this may not carry favour with the public;
4. The proposed amendment will add only a little difficulty to the banks (slightly delaying action against guarantors) which difficulty is outweighed by the benefit to the public. In any event, the loss from the delay in enforcement of the guarantee will be compensated by way of interest on the loan to be recovered; and
5. The banks need to initiate a public campaign to win the hearts of the public by showing the benefit to the common man of the role the banks play in the economy.

Upon further review of your pointers above, we are of the considered view that the proposed amendment will;

1. Inhibit credit to the ordinary man and to small businesses that are seeking to grow;
2. Increase the cost of doing business, which cost can only be passed on to the customer of the bank thereby reducing his welfare; and
3. Further inhibit recovery efforts leading to losses and weakening of banks, which is bad for the financial system and the economy as a whole. The ordinary person and struggling businessperson will bear the brunt of the resultant poorly performing economy.

Lastly, one additional proposal on our part would be to include a requirement that lenders must explain effects of guarantees to would-be-guarantors and make it a requirement that they obtain independent legal advice on the same (similar to a charging clause).

Attached is the original submissions we made to the Clerk of The National Assembly.

Kind regards,

Catherine Nadida,
Head of Legal, HR and Industrial Relations,
Kenya Bankers Association.

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147K

Doreen Karani <karanidoreen@gmail.com>

Fri, Jun 8, 2018 at 3:36 PM

To: George Jusa <ggazemba@gmail.com>, Halimaa Absiye <halimabsiye@gmail.com>

Dear colleagues,

Attached are the submissions from Kenya Bankers Association.

Regards

Doreen

[Quoted text hidden]

--

Doreen Karani

 **NT_Submissions_052018.pdf**
147K



LAW SOCIETY OF KENYA
Lavington, Opposite Valley Arcade
Gitanga Road
P.O.Box 72219-00200
NAIROBI
Tel. 387 4664
0720 904983

MEMORANDUM

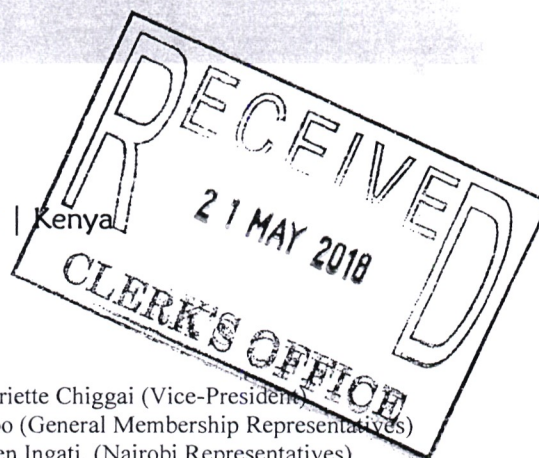
TO

THE NATIONAL ASSEMBLY

ON

THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) NATIONAL ASSEMBLY BILL
NO. 12 OF 2018

Mercy K. Wambua
Chief Executive Officer/Secretary
Law Society of Kenya
Lavington, opp Valley Arcade,
Gitanga Road P.O Box 72219 - 00200 Nairobi | Kenya
Tel: +254 20 387 4664
Email: lsk@lsk.or.ke Website: www.lsk.or.ke



Allen Waiyaki Gichuhi (President), Harriette Chiggai (Vice-President)
Herine Akoth, Maria Mbeneka, Roseline Odhiambo (General Membership Representatives)
Boniface Akusala, Carolyne Kamende, Aileen Ingati, (Nairobi Representatives)
Damaris Ndinda, Bernhard Kipkoech, David Njoroge, Jane Masai, (Upcountry Representatives)
Eric Wafula (Coast Representative)

The Law Society of Kenya

The Law Society of Kenya is 15,000 member body corporate established by the Law Society of Kenya Act, 21 of 2014. One of its statutory objects as provided for in section 4 of the Act is to assist the Government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya.

Pursuant to this mandate, the Law Society among other things circulates Bills to its members for comments, collates those comments and engages with relevant arms of the Government including Ministries and Departmental Committees of Parliament with a view to ensuring that any proposed legislation is drafted to achieve its desired goal of promoting the Rule of Law.

The Council is the governing body of the Law Society of Kenya. It comprises a President, a Vice- President and ten other members, all of whom must be members of the Law Society of Kenya. Council members are elected every two years by the members of the Society by means of a secret ballot conducted in accordance with the Law Society of Kenya Act. Currently the Council comprise of:

- I. Allen Waiyaki Gichuhi (President),
- II. Harriette Chiggai (Vice-President)
- III. Herine Akoth (General Membership Representatives)
- IV. Maria Mbeneka (General Membership Representatives)
- V. Roseline Odhiambo (General Membership Representatives- Senior Advocate)
- VI. Boniface Akusala, (Nairobi Representatives)
- VII. Carolyne Kamende (Nairobi Representatives),
- VIII. Aluso Ingati, (Nairobi Representatives)
- IX. Ndinda Kinyili (Upcountry Representatives)
- X. Bernhard Kipkoech (Upcountry Representatives)

Allen Waiyaki Gichuhi (President), Harriette Chiggai (Vice-President)
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Ndinda Kinyili, Bernhard Kipkoech, David Njoroge, Jane Masai, (Upcountry Representatives)
Eric Wafula (Coast Representative)

- XI. David Njoroge (Upcountry Representatives)
- XII. Jane Masai, (Upcountry Representatives)
- XIII. Eric Wafula (Coast Representative)

In the performance of its mandate, the Law Society of Kenya circulates Bills, Legislation and Regulations made pursuant thereto to its members for comments, collates those comments before engaging with relevant arms of government and other stakeholders.

The Law Society of Kenya has prepared observation on the Statute Law (Miscellaneous Amendments) National Assembly Bill No. 12 of 2018.

GENERAL COMMENTS

The Proceeds of Crime and Anti Money Laundering Act, 2009 (No. 9 of 2009) proposes various amendments to:

1. To include employees of accountants, advocates and notaries or their employees, trust and company service providers in the definition of the expression "designated non-financial businesses or professions" for purposes of the Act.
2. To expand the reporting obligations to include employees of accountants, advocates and notaries or their employees, trust and company service providers.

The effect of the amendment will substantively affect the well settled principle of advocate-client or legal professional privilege which is applicable to advocates. The subject of advocate-client privilege is cemented under professional conduct of confidentiality, the evidentiary rule of privilege and the common law principle of advocate client principle.

Confidentiality

Confidentiality is an ethical duty in which an advocate must keep confidential all information related to the representation of a client. It is defined as the relation between lawyer and client, guardian and ward or between spouses with regards to the trust one place on another.¹

¹ Black's law Dictionary, 8th Edition

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Eric Wafula (Coast Representative)

There is an imposed a duty of confidentiality on every Advocate to eternally protect their client's secrets.

Generally, the law protects confidentiality and in particular the confidential communication from disclosure in numerous cases. It offers protection to information that clients have given to their advocate. Confidentiality is very broad in that it covers all types of communication and information between the advocate and the client.

Privilege

Privilege is defined as special legal right, exemption or immunity granted to a person or group of persons. It gives the freedom to do or not to do an act and gives immunity in otherwise liable circumstances.

Privilege is a rule of evidence that protects the information that an advocate acquires from their client. Privilege prevents the disclosure of such information by the advocate when compelled to testify as a witness or to produce as a witness in an official proceeding.

Advocate-client or Legal professional Privilege

Advocate-client privilege is the oldest privilege recognized by Anglo-American jurisprudence. The privilege worked to bar any testimony by the attorney against the client and ensures "that one who seeks advice or aid from a lawyer should be completely free of any fear that his secrets will be uncovered. The underlying principle of the privilege is to provide for "sound legal advice and advocacy" and with security of the privilege, the client may speak frankly and openly to legal counsel, disclosing all relevant information to the attorney and creating a "zone of privacy." This in turn will assist the attorney in providing more accurate, well-reasoned professional advice, and the client can be secure in the knowledge that the statements to their lawyer will not be taken as an adverse admission or used against their interest. With this full knowledge counsellors at law are better equipped to "satisfy all of their professional responsibilities, uphold their duties of good faith and loyalty to the client, and contribute to the efficient administration of justice."

The attorney-client privilege has a very real practical consequence: the attorney may neither be compelled to nor may he or she voluntarily disclose matters conveyed in confidence by the client for the purpose of seeking legal counsel. Likewise, the client may not be compelled to testify regarding matters communicated to the lawyer for the purpose of seeking legal counsel.]he privilege applies only if:(1) the asserted holder of the privilege is or sought to

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professional privilege is evidentiary privilege that protects an Advocate from being compelled to disclose certain communications between the Advocate and client in a judicial or other proceeding where the Advocate may be called as a witness. Legal professional privilege acts to protect the Advocate. It is not designed for the benefit of the Advocate but for the benefit of the client and public interest in ensuring access to legal services.” The rule on confidentiality of Advocate-client communication, on the other hand, covers all communication between the Advocate and the client relating to the advice given to the client and representation of the client by the Advocate. The obligation to keep Advocate client communication confidential also applies to the support staff in the Advocate’s office. The Advocate has a duty to ensure that such staff members maintain the obligation of confidentiality and professional secrecy. In this respect the general rule is that any information known by the Advocate is deemed to be known by the entire law firm.

The Code also reiterates the Evidence Act where privilege is waived and protection cannot be claimed when an Advocate assists and abets the unlawful conduct of their clients.

Case law

The Courts have weighed in the matter of advocates-client, legal professional privilege in Petition 122 of 2015: Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] eKLR. Court recognized the waiver of the privilege and in what instances as it referred to various supportive cases:

The court referred to the case of *Mohammed Salim Balala & Anor vs Tor Allan Safaris Ltd* (2015) e KLR where the Court of Appeal held that advocate-client privilege can only be breached where the communication between an advocate and the client furthers an illegal p It also established that the legal principle that advocate-client privilege can only be waived by a client was upheld in the case of *Conlons vs Conlons* (1952) 2 ALL ER 462 in the following terms; *“What is the rule [as to privilege] and what is the meaning of the rule? ...The object and meaning of the rule is this; that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to*

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Eric Wafula (Coast Representative)

become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by the client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.”

Rationale of Legal Professional Privilege

The Advocate-client privilege has a more profound basis than just communication. There is a public interest and fundamental constitutional basis as enumerated by numerous cases. In *Ventouris vs Mountain* (1991) W.L.R (607) it was stated ‘the rationale behind legal professional privilege was public interest consideration in relation to actual and contemplated litigation requiring actual and potential litigants to be able to speak freely to their legal advisors and for legal advisors to be able to give candid legal advice without disclosure”.

In the case of *Fisher v United States* 425 U.S 391, 403(1976) it was stated: ‘The attorney client privilege as it exists today, is based on two related principles. The first is that it is an intrinsic part and a necessary incident of the attorney client relationship. The Legal relationship has an intimate relationship with its clients and an important role in the administration of our system of justice. Privacy is the necessary context on the relationship between the individual and his lawyer. The second principle is that the principle encourages the clients make full disclosure to their attorneys. This policy of promoting full disclosure to counsel serves to implement the notion inherent in first principle, that finding the truth and achieving justice in an adversary system are best served by fully informed advocates loyal to their client’s interests’.

In *Grant v Downs*: “The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of fair

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trial litigation should be conducted on the footing that all relevant documentary evidence is available.”

Difference between Legal Professional Advice and other Professional Advice.

What distinguishes legal advice from other kinds of professional advice is that it is concerned exclusively with rights and liabilities enforceable in law, i.e. in the ultimate resort by litigation in the courts or in some administrative tribunal. It is, of course, true that on many matters on which a client consults their lawyer they do not expect litigation and certainly hopes that it will not occur; but there would be no need for them to consult their lawyer to obtain legal advice unless there were some risk of litigation in the future in connection with the matter upon which advice is sought. Lord Brougham pointed out, ‘ it is to minimise that risk by ensuring that he so conducts his affairs as to make it reasonably certain that he would succeed in any litigation which might be brought in connection with them, that the client consults his solicitor at all’.

it is sometimes argued that if the confidential communication between lawyer and client is to be protected then other confidential communications should also be protected—e.g. the cleric and communicant. The policy justifications, however, go beyond the protection of confidences. The restriction of the privilege to the legal profession serves to emphasize that the relationship between a client and his legal adviser had a special significance because it is part of the functioning of the law itself. Communications which establish and arise out of that relationship are of their very nature of legal significance, something which would be coincidental in the case of other confidential relationships. Whether he gives advice, represents a person or helps the citizen to understand what is or is not permitted in our complex legal system, the lawyer is seen as part of the process of the administration of the law. The privilege must, however, extend no further than is necessary. It may adversely affect the fact-finding task and may ‘detract from the fairness of the trial by denying a party access to relevant documents or at least subjecting him to surprise’. The proposals, therefore, do not set out to extend the privilege but rather are directed to addressing deficiencies in the law

Fraud.

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Fraud is an instance of exception for privileged communication. Any communication or material made or prepared in furtherance of the commission of a crime or fraud should not be protected. Both issues—whether there was a crime or fraud, and the purpose of the communication—will be decided by applying the general evidentiary standard, the balance of probabilities. An exception to this will arise where, as is often the case, the crime or fraud is in issue in the case and ultimately an issue for the tribunal of fact. In that situation the test will be whether it is reasonably open to find that the crime or fraud occurred. It is also proposed that the judge be permitted to examine the communication in determining the issues.

However, In UK, the Proceeds of Crime Act 2002 (PoCA) requires solicitors (and accountants, insolvency practitioners, etc.) who suspect their clients of money laundering (in effect any handling or involvement with any proceeds of any crime, or monies or assets representing the proceeds of crime, can be a money laundering offence in English law) to report them to the authorities without telling the clients they have done so, subject to a maximum punishment of 5 years in jail.

However, the Court of Appeal confirmed in 2005 that PoCA does not override legal professional privilege. This protects confidential communications between a client and his or her legal adviser for the dominant purpose of legal advice. The rationale is that clients ought to be able to communicate freely with their lawyers, in order to facilitate the proper functioning of the legal system. The judgment in *Bowman v Fels* [2005] EWCA Civ 226 freed the lawyers of their duty to report suspicions of money laundering to the National Criminal Intelligence Service (NCIS) where litigation is concerned. The paramount importance of legal privilege and access to justice had effectively trumped their obligations under the Proceeds of Crime Act 2002 (POCA)².

In Kenya

The Evidence Act

Advocate-client privilege is governed under section 134 (1) of the Evidence Act: No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document

² <https://www.lawgazette.co.uk/>

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Eric Wafula (Coast Representative)

with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

It also provides exceptions to disclosure where disclosure is not protected when any communication made in furtherance of any illegal purpose and any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client. However, the protection continues even after the cessation of employment of the advocate.

The Act, under section 136 provides instances for waiver of privilege of advocates. This includes: If any party to a suit or proceeding gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 134(1) of this Act or If any party to a suit or proceeding calls any advocate, interpreter, clerk or servant as a witness, he shall be deemed to have consented to such disclosure as is mentioned in section 134(1) of this Act only if he questions such witness on matters which, but for such question, the witness would not be at liberty to disclose.

It also emphasizes the public interest function of confidential information under section 137 which states: No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his advocate unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

The Advocates Act

As the Proceeds of Crimes Act imposes duties and responsibilities to the lawyers and their agents, it is important to define a lawyer and a client. A lawyer means a barrister and solicitor employed or engaged by or for the client, and includes the lawyer's servants or agents. A client means the person (including a corporation) by or on whose behalf the lawyer is engaged and includes his or its servants or agents. Under the Advocates' Act an "advocate" is defined to mean any person whose name is duly entered upon the Roll of Advocates or upon the Roll of Advocates having the rank of Senior Counsel'Section 15 proscribes admission of

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advocates to the Bar by application to the Chief Justice. This means that the Courts and the Chief Justice has supervisory jurisdiction over advocates. Furthermore, Advocates become members of the Law Society which is seized of matters of professional ethics and conduct.

The proposals under the bill include lawyers who provide advice on none contentious business. Non contentious business is defined means any business done by an advocate other than contentious business. These are subject to the remuneration order which regulates the scope of work by an advocate. Section 34 sets out the non-contentious business of advocates which describes work that cannot be done by an unqualified person. This work entails: relating to the conveyancing of property, for, or in relation to, the formation of any limited liability company, whether private or public, for, or in relation to, an agreement of partnership or the dissolution thereof, for the purpose of filing or opposing a grant of probate or letters of administration; or for which a fee is prescribed by any order made by the Chief Justice under section 44, relating to any other legal proceedings. Consequently, such unqualified persons shall not accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:

The Law Society Code of conduct and Ethics

Confidentiality of Advocates Client communication is proscribed under the Law Society Code of Ethics and Conduct for advocates 2015 under rule 7. It provides: Communication between the Advocate and client is protected by the rule on confidentiality of Advocate-client communication. Consequently, the Advocate has a duty to keep confidential the information received from and advice given to the client. Unauthorized disclosure of client confidential information amounts to professional misconduct. The rationale for the rule is stated: is based on the doctrine of professional privilege. The Code states:” The protection accorded communication between the Advocate and client and advice given by the Advocate to the client through the doctrine of professional privilege is a crucial element of public trust and confidence in the administration of justice and the independence of the legal profession. The Advocate cannot render effective professional service to the client unless there is full and unreserved communication between them. The client is entitled to assume that, without his express consent or unless otherwise required by law, matters disclosed to or discussed with the Advocate will be held secret and confidential”. The Code further states: ‘Legal

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make a clean breast of it to the gentlemen whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communication he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule.” In the case of *King Woolen Mills Ltd & Another vs Kaplan & Stratton Advocates* (supra) it was held that; “... *the fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without that client’s consent. The fiduciary relationship exists even after conclusion of the matter for which the retainer was created.*”

Lastly, the Court pointed out the protection of the privilege under Section 28(10) of ACECA. The section protects disclosure of information relating to advocate-client privilege as provided for under Section 134 of the Evidence Act. For avoidance of doubt, this Section provides thus; (10) *No requirement under this section requires anything to be disclosed that is protected by the privilege of advocates including anything protected by section 134 or 137 of the Evidence Act.*” The principle emerging from the above decisions and provisions of the law is that communications passing between an advocate and client are privileged as they are necessary for the purposes of obtaining legal advice by a client and last throughout a particular transaction and even thereafter.

The Law of Contract

The proposal that requires that before a suit is brought against a defendant, the Plaintiff shall first release the Security of the Principal is problematic and should be deleted. The issue creates a problem particularly when the value of the Security is more than the principal interfering with the right to sue.

This proposed section fails to recognise that:

- i. An indemnity and a guarantee have different legal impositions and obligations and suit can be filed independent of the borrower in certain instances.
- ii. Once a demand guarantee has been called up, the limitation period may expire if the security is not sold on account of pending litigation that prevents the sale

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of the security. This will cause substantial loss of additional security to the lender.

- iii. Various factors may arise that may prevent the sale of the security e.g the valuation was negligent and the real market value may never be achieved, the property market gets depressed and a sale cannot be realised, there is urgent need to file suit for recovery against the guarantors before they transfer their properties to defeat the anticipated rights of the lender.
- iv. The proposed amendment will conflict with various provisions of the Land Act concerned with the chargee's power of sale.

The Office of D.P.P Act

The proposed deletion of Section 2(1) which essentially removes the Ethics and Anti-Corruption as an Investigative Agency contravenes Section 11 of the EACC Act which sets out the function of the EACC to investigate acts of corruption. The functions of the Office of DPP are to prosecute matters and not to investigate. Investigative powers on matters of corruption should remain with the EACC.

The Labour Relations Act.

The proposed amendment to Section 81 of the Act to limit the right to go on strike is unconstitutional under Article 41 (2) (d) of the Constitution. Additionally, Section 81 (E)(a) proposes a penalty to anyone who procures or counsels an employee engaged in an essential service is equally unconstitutional and limits the right to legal counsel.

Bribery Act, 2016

The proposed amendment of section 27 (2) of the Bribery Act, 2016 seems to be a rectification of a presumed reference error to the Bribery Act, 2016 instead of the Anti-corruption and Economic Crimes Act 2003. The amendment, however, does not address concerns on the retrospective application of section 27 of the Bribery Act, 2016.

Public Procurement and Asset Disposal Act, No. 3 of 2015

The proposed changes to section 9(1)(k) of the PPOA Act has the effect of exonerating the Public Procurement Regulatory Authority from any obligation to develop and manage the State portal on procurement and asset disposal and ensure that it is available and easily accessible.

If the Public Procurement Regulatory Authority is exempted from developing and managing the state portal on procurement and asset disposal, it is likely that there would be reduced transparency regarding the processes surrounding procurement and

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asset disposal, thereby contravening the principle of transparency as set out under Article 10 (2) (c) of the Constitution of Kenya, 2010.

The failure to have a statutory body as the primary person responsible for ensuring the State portal is easily accessible will lead to a lack of transparency and accountability as nobody will be charged for ensuring transparency surrounding the procurement process. Therefore the current provision should be retained.

**SPECIFIC COMMENTS ON THE AMENDMENTS TO THE PROCEEDS OF CRIME
AMENDMENT BILL 2018**

Section	Issues	Proposal	Justification
2(fa,fb)	Designated non-financial businesses or professionals.	Delete the phrases 'advocates, notaries and other legal professionals' wherever they are found.	The matter of fraud is already proscribed under section 134 of the Evidence Act Cap 26 of the Laws of Kenya matter is already covered.
48	Reporting obligations	Delete the phrases 'advocates, notaries and other legal professionals' wherever they are found.	The matter of fraud is already proscribed under section 134 of the Evidence Act Cap 26 of the Laws of Kenya matter is already covered.

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1	The Statute	Sections	Issue	Problem	Remedies
	Children Act	SS 2, 15(1), 157(1) 163 (1) (f) , 177 (1)	Seeks to create a new category of adoption society (the national Adoption Society) and designate the Child welfare Society of Kenya (CWSK) as such national Adoption Society.	• Unjustifiable and has not been subjected to Public Participation. • The definition and Mandate of the National Adoption Society is neither defined in the Children Act nor the Children Bill currently under process of public participation and validation by stakeholders. • Elevates the status of CWSK to exempt it from the scrutiny and supervision of the National Adoption Committee imposed by the Children Act on Adoption Societies. • Duplicates the mandate of the National Adoption Committee as established and set out under S.155 of the Children Act. • In Child Welfare Society of Kenya v Republic & 2 others Ex-parte Child in Family Focus Kenya [2017] eKLR the High Court found that the Cabinet Secretary's exemption of CWSK from supervision and annual registration by the National	Withdraw proposed amendments.

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2	The Children Act	SS. 72 A, 72B	Empowers the Cabinet Secretary to close and open Charitable Children's Institutions.	Adoption Committee was abuse of power by the Cabinet Secretary. Fetters discretion of National Council for Children Services set up under Section 30 of the Children Act and concentrates power in the hands of the Cabinet Secretary in a manner not envisaged by the Children Act or the Children Bill currently undergoing public participation and validation by stakeholders. Has not been submitted to public participation and goes against the national values and principles set out in The Constitution.	Withdraw proposed amendments.
3	The Children Act	S.183 A	Provides for the Cabinet Secretary to give directions to the National Adoption Committee on deregistration of Adoption Societies	- Fetters discretion of the National Adoption Committee established under S155 (1) Children Act. - Is not envisaged by the Children Act or the Children's Bill currently in the process of public participation and validation by stakeholders - Goes against the principles of public participations set out in the Constitution of Kenya.	Withdraw proposed amendments.
	Advocates Act (Cap16)	S.23A	Seeks to address remedy the existing s.23(2)(A)	The new remedy is practical and resolves the problem of using a stamp	Delete the existing S.23(A) and replace with

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		s. 57(1)(C)	of the Advocates that could not be implemented. Extension of term limits for advocates elected to the Disciplinary Tribunal	annually. Term limits provide an important check on the removal of an inefficient member, strengthen the impartiality of the tribunal and our democracy in LSK and ensures long-term stability of the reputation of the tribunal. Whilst I understand we may want to extend the mandate of a popular tribunal member, the fact that they may be re-elected should serve that purpose.	the new proposed s. 23(A) to avoid confusion when the new section is inserted without deleting the previous section. Let it remain at 3 years
The Law of Succession Act (Cap160)	S 49A		Restriction of coverage relating to a deceased person's estate	In this country, we have seen many instances where it is only upon death, that the real wealth of, especially those who had held positions of authority in government, is discovered, and many a times it may be wealth obtained through corruption. The public should rightfully be interested in the proceedings of such a person. In addition, it may be the case that only through such publications that a deceased's legitimate beneficiaries or other interested persons may come	Remove this new section

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			forward to demand a portion of the deceased's estate. As with most other matters before the Courts, these should remain public records, and the public should be allowed to attend these proceedings.	
The Environmental Management and Coordination Act, 1999 (No. 8 of 1999)	S.32(1) and 36(1)	Replacement of the Council with the Cabinet Secretary, as regards reporting of complaints and instances of environmental degradation, and powers to determine remuneration for the National Environmental Department	These amendments serve to increase the powers of the Cabinet Secretary, which is not a good thing. The council here, serve as an impartial and independent agency, outside the purview of the Ministry and the Cabinet Secretary. Where the ministry and the cabinet secretary have been found wanting, how can one then report to the same institutions or personage? This is improper.	It is imperative that an impartial agency do this work, kindly consider the Non-Governmental Organizations Council or the National Federation of Public Benefit Organizations, from the Public Benefit Organizations Act, No. 18 of 2013, to take over this role.
Judicature Act (Cap 8)	Section 2	Definition of judge to include a judge serving in acting capacity	Unconstitutional and an illegality Breached Article 167 and 166 of the Constitution - No security of tenure hence prone to political manipulation and horse trading. - See S, 34 of the PSC Act as comparison. Acting cannot exceed 6 months. Judiciary is not an	Reject alternatively appoint commissioner of assize

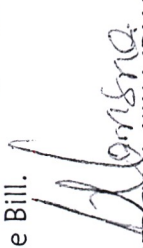
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	Nairobi Centre for International Arbitration Act (No. 26 of 2013)	6(1) (e) and (f)	- Proposed reduction of board members under paragraph (e) from 5 to 3 and;	- exception - Nairobi Centre is a unique body that being promoted as the preferred destination for international arbitration & Mediation. The East Africa region has 5 member states each making use of commercial Arbitration and currently only Uganda and Tanzania have representation on the board. - Being the only arbitral institution in Kenya, Chartered Institute of Arbitrators is a major stakeholder in this sector and ought to be retained as a nominator under paragraph (f)	- Retain the 5 directorships under this clause
			- Proposed removal of Chartered Institute of Arbitrators as a nominating body under paragraph (f)		- Retain the Chartered Institute of Arbitrators as a nominating body under paragraph (e) but amend the clause to read Chartered Institute of Arbitrators (Kenya Branch)

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CONCLUSION

From the foregoing, the Law Society of Kenya requests that these amendments need to be reconsidered urgently before enactment of the Bill.


MERCY K. WAMBUA

CHIEF EXECUTIVE OFFICER/SECRETARY

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Eric Wafula (Coast Representative)

National Council for Law Reporting

The Justice and Legal Affairs Committee,

The National Assembly,

**RE: MEMORANDUM FROM THE NATIONAL COUNCIL FOR LAW
REPORTING ON THE PROPOSED AMENDMENTS TO THE
NATIONAL COUNCIL FOR LAW REPORTING ACT**

Following the publication of the Statute Miscellaneous Amendment Bill, 2018; we wish to make the following submissions on the Bill with regards to the proposed transfer of Kenya Law as an institution under the Judiciary to the Office of the Attorney General.

We wish to humbly submit our views that we prefer the placement of Kenya Law to remain within the Judiciary as opposed to the proposal for transfer to Office of the Attorney General for the following reasons:

a) Historical placement of Kenya Law within the Kenyan Judiciary

Ever since the establishment of the National Council for Law Reporting (Kenya Law) as a semi-autonomous state corporation *vide* the National Council for Law Reporting Act, No. 11 of 1994, it has been an institution under the Judiciary. But even long before the enactment of the NCLR Act No. 11 of 1994, the law reporting function in Kenya had been done by persons and/ or institutions affiliated to the Judiciary.

The first ever series of Kenya law reports were published between the year 1897 – 1922. They were compiled and edited by Justice R W Hamilton who was a Principal Judge of the High Court of Kenya. Those law reports contained judicial decisions from all over the East Africa Protectorate. They included decisions of the then High Court of East Africa, the Court of Appeal for Eastern Africa and the Judicial Committee of the Privy Council on appeal from the Court of Appeal for Eastern Africa.

From the year 1934 to 1956, the East Africa Law Reports were published by Judges, Magistrates and Registrars of the High Court and the Court of Appeal for Eastern Africa. This series reported decisions of the then Court of Appeal for Eastern Africa and the Privy Council.

Subsequently, a series of the Kenya Law Reports covering decisions from 1976 – 1980 were published in six volumes. They included decisions of the High Court and the Court of Appeal of Kenya. They were compiled by the late Hon. Mr. Justice Sachdeva and were edited by Mr. Paul H Njekirk and the Hon. Mr. Justice Richard Kuloba. From 1982 – 1992, the Kenya Law Reports were published under the Editorship of the then Chief Justice A R W Hancox.

b) Law Reporting as a function of the Judiciary

World over, law reporting is a function of the judiciary. This is so because, law reporting is the technique of recording, preserving and documenting judicial decisions from the superior courts of records. It does that by compiling, indexing and publishing judicial decisions into law reports. Law reporting is an aspect of the doctrine of precedent which is otherwise captured in the Latin expression of “*stare decisis et non quieta movere*” (herein after referred to simply as stare decisis). That doctrine of stare decisis flows from English Law which had two sets of laws which are the written and unwritten English laws. The unwritten English laws include the common law that solely relies on the doctrine of precedent. Thus, a precedent is a judgment or decision of the court which is usually recorded in a law report. The import of the doctrine of precedent is that similar cases involving similar circumstances should be decided by the application of similar principles of law. The doctrine of precedent also applies in a hierarchical manner in that decisions of superior courts are binding the other courts below which are bound to apply the decisions from the superior courts of record.

Further, section 19 of the Act mandates judges to supply their decisions/ rulings and judgments to the Editor of the National Council for Law Reporting. On the other hand, section 20 of the Act requires Registrars of the Superior Courts of Record to at the end of each month to furnish the Editor of Kenya Law with a list of all judgments, rulings or opinions delivered by the Superior Courts of Records.

c) Judiciary as the main stakeholder of the National Council for Law Reporting

The language and spirit of the National Council for Law Reporting Act, No. 11 of 1994 makes Kenya Law a primary stakeholder of the Judiciary. For instance at section 4 of the Act, the Council of NCLR is chaired by the Chief Justice and is also composed of other judges of the Court of Appeal and the High Court as well as the Registrar of the Judiciary. In total, membership of the Board members from the Judiciary comprises almost 30% (4 out of the total 13 members). This is the highest percentage of board members from a single institution. The second highest composition from a single institution is the office of the Attorney General and the Law Society of Kenya at 15% (they both have 2 out of the total 13 members). Other representatives of the Board each have 1% representation from their organizations.

Section 7(2) of the Act on the appointment of the Editor and section 9 on the appointment of assistant editors and reporters makes appointment of officers to those positions comparable to officers within the Judiciary. For instance, the qualifications for one to be appointed as the Editor is comparable to that of a Judge of the High Court while those of the Assistant Editor and Reporters are comparable to Principal Magistrates and Resident Magistrates respectively.

d) Independence of the judiciary

The architecture of the Constitution of Kenya, 2010 places the independence of the Judiciary at a very high pedestal. It implies that the operations of the Judiciary should not be interfered with or infringed by other arms and/ or organs of government. The the Judiciary being an arm of government is distinct and therefore any movements of organizations within the judiciary is tantamount to infringing on the independence of the judiciary.

e) Technology as an enabler of justice pillar

The Judiciary Transformation Framework (JTF) and the subsequent Sustaining Judiciary Transformation Framework (SJTF) identifies technology as an enabler of justice as one of the key pillars for the transformation of the Judiciary. Kenya Law has been the flagship project with regards to use of technology in the judiciary through our robust website www.kenyalaw.org. Therefore the transfer of Kenya Law to any other arm of government is likely to have an adverse effect on the implementation of the SJTF.

Conclusion:

We humbly urge you to delete the proposed amendment from the Statute Miscellaneous Bill purporting to transfer the National Council for Law Reporting from the Judiciary to the Office of Attorney General.

Yours Sincerely,

Cornelius W. Lupao,
Council Secretary (ag)

National Council for Law Reporting.



REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

AG/LDD/190/1/80

30th April, 2018

Hon. Justin Muturi, EGH
Speaker of the National Assembly
Parliament Building
NAIROBI.

Halima
DSues
8/5

RE: CLARIFICATION OF CONTENT –

1. THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2018
2. THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) (NO.2) BILL, 2018

Subsequent to our letter of even reference dated 27th April, we have further noted the following additional proposals in the above Bills:

1. Statute Law (Miscellaneous Amendments) Bill 2018 (Kenya Gazette Supplement No. 35) (National Assembly Bills No. 12)
 - (a) The Law of Contract Act (Cap. 23)

On page 267 of the Bill, there is a new proposal to amend section 3 of the Act to introduce a new condition to be met by a plaintiff where a defendant is charged for the debt, default or miscarriage of another person.
 - (b) The National Council for Law Reporting Act (No. 11 of 1994)

On page 280 of the Bill, there is a proposal to amend section 2 of the Act to bring the Council under the Office of the Attorney-General.
 - (c) The Kenya Information and Communications Act, 1998 (No. 2 of 1998)

On page 285 of the Bill, there is a proposal to introduce amendments to various sections of the Act relating to

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

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the appointment of the members of the Board of the Commission.

- (d) **The Kenya Roads Board Act, 1999 (No. 7 of 1999)**
On page 287 of the Bill, there is a new proposal to amend section 12 of the Act on the qualifications of the Chief Executive Officer of the Board.
- (e) **The Alcoholic Drinks Control Act, 2010 (No. 4 of 2010)**
On page 338 of the Bill, there is a new proposal to amend section 2 of the Act to align the definition of "magistrate" with the Magistrate Courts Act, 2015.
- (f) **The Judicial Service Act, 2011 (No. 1 of 2011)**
On page 338 of the Bill, there is a new proposal to amend two sections of the Act on the procedure for appointing the members of the Judicial Service Commission.
- (g) **The Independent Police Oversight Authority Act, 2011 (No. 35 of 2011)**
On page 339 of the Bill, there is a new proposal to amend section 11 and 12 of the Act on the appointment of the Chairperson and members of the Authority and also their replacement.
- (h) **The National Authority for the Campaign Against Alcohol and Drug Abuse Act, 2012 (No. 14 of 2012)**
On page 341 of the Bill, there is a new proposal to amend section 6(1)(a) of the Act on the appointment of the Chairperson of the Authority.
- (i) **The Office of the Director of Public Prosecutions Act, 2013 (No. 2 of 2013)**
On page 345 of the Bill, there is a new proposal to amend section 2 of the Act to remove the Ethics and Anti-Corruption Commission from the definition of "investigative agency".

2. **The Statute Law (Miscellaneous Amendments) (No. 2) Bill (Kenya Gazette Supplement No. 13) Bill No. 13**

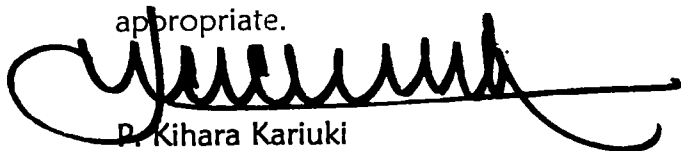
- (a) **The Dairy Industry Act (Cap. 336)**
On page 411 of the Bill, there is a new proposal to amend the Dairy Industry Act to broaden the definition of certain terms and also to enhance the penalties under the Act, and to provide for the making of regulations relating to milk dispensers.

On page 449 of the Bill, there is a new proposal to amend the Act, to make provision in relation to the welfare of Kenyan migrant workers, and also on membership on the Board of the Authority.

As we pointed out in respect of the proposals set out in our last letter, of the 27th April 2081 referenced AG/LDD/190/180, copy herewith attached, none of these amendments were part of the Bill prepared by ourselves and approved by Cabinet for publication. The source of the instructions for their inclusion in the above Bills is therefore unclear.

Further, most of the amendments have far reaching policy implications and legal consequences and ought to have been processed in consultation with the responsible Ministries and ourselves as is the procedure. However, judging from the number of objections we have received from affected Ministries and other government agencies since the publication of the Bills, it is clear that majority of them were not consulted.

Consequently, we write to request clarification on the source of these additional proposals as well as their rationale to facilitate our proper scrutiny of their content in order to enable us advise the responsible Ministries and other affected parties as appropriate.



Dr. Kihara Kariuki
ATTORNEY GENERAL

Copy to:

Hon. William Cheptumo Kipkorir, M.P
Chairperson
Justice and legal Affairs Committee
Parliament Buildings
NAIROBI.

The Solicitor-General,
Office of the Attorney-General and
Department of Justice
NAIROBI.





MUTURI S. K.
& CO. ADVOCATES

Commissioner for Oaths & Notaries Public

Utalii House, Uhuru Highway, 10th Flr. Suite 1026

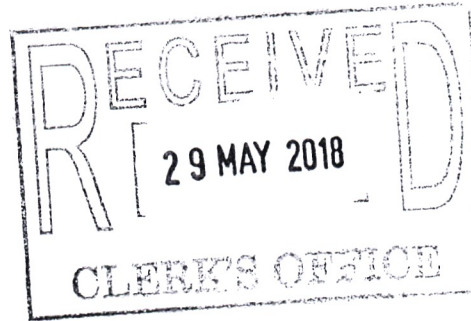
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28th May, 2018

OUR REF: SK/2017/001A

YOUR REF: T.B.A

CLERK OF THE NATIONAL ASSEMBLY
PARLIAMENT BUILDINGS
P.O BOX 41842-00100
NAIROBI.

1. D. Muturi
29/5/18

Dear Sir,

RE: MEMORANDUM ON THE STATUTE LAW (MISCELLANEOUS AMENDMENT)
BILL, 2018: JUDICIAL SERVICE COMMISSION

The above matter refers.

We are delighted to submit the following memorandum on the Judicial Service Act No. 1 of 2011.

We hereby observe as follows-

1. The amendments will ensure that the provisions of Article 95 as read with Article 250(2)(b) of the Constitution are upheld and implemented.
2. The lack of clarity in the law has led to confusion and misinterpretation of the law on the oversight approval mechanisms in built in the Constitution which applies to all state offices or constitutional offices created by the Constitution.
3. The drafters of the Constitution could not have envisaged that where there is election of persons to be members of constitutional commission then the check and balances provisions are suspended and to interpret so would contradict Article 259 of the Constitution which provides

2. Anne Angira
Bay to all the
Committee
3-5/18

that the constitution is to be interpreted in a manner that promotes good governance.

4. In this case the elected members of the JSC under Article 171(2)(b), (c), (d), (f) and (g) should be vetted and approved by the National Assembly in accordance with the requirements of Article 250(2)(b) of the Constitution as it is only then that the parameters of competence, suitability and integrity can be guaranteed.
5. To argue that once an election of a Member of the Commission takes place that comes with finality would give rise to absurd results where provided an election has been done even where a candidate is unsuitable such would end up being a member of JSC. Certainly, this is not the manner in which our Constitution is structured. However, to remove the ambiguity for those who choose to apply the Constitution in a manner that does not promote its purposes, there is need to create clarity in the Judicial Service Act and the amendments are therefore welcome.
6. In addition, we propose that the Committee on Justice and Legal Affairs also considers further amending the JSC Act to implement the access to information provisions provided for in Article 35 of the Constitution and the Access to Information Act, 2016.
7. We submit that the manner in which JSC has been operated has been crowded in lack of transparency and accountability especially on the issue of backlog of cases which has delayed justice for many Kenyans and the amount of money they collect from Kenyans as court fines and receive as donations or gifts from various persons.
8. We therefore propose that the Judicial Service Act be amended to provide-
9. That the JSC shall publish in at least two daily newspapers of local circulation and on a quarterly basis the list of all pending cases indicating also the cases which have been concluded;

(a) The amount collected from the public including fines and or donations, gifts received as contributions to the purposes of the Commission from any person.

(b) We pray and we will ever pray that you consider our amendments.

Yours Faithfully
Muturi S.K & Co. Advocates

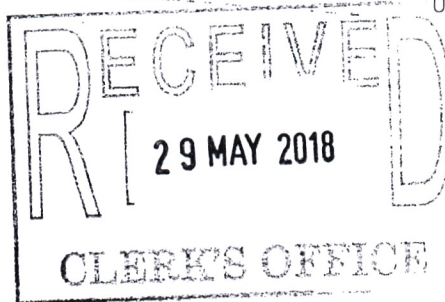


MUTURI KARIUKI



MUTURI S. K.
& CO. ADVOCATES

Commissioner for Oaths & Notaries Public



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P.O. House, 17874-00100, Nairobi.
Tel: +254 020 440 5276
Office Cell: +254 719 431 034
+254 739 644 960
Email: muturisklaw@gmail.com

28th May, 2018

OUR REF: SK/2017/001A

YOUR REF: T.B.A

THE CLERK OF THE NATIONAL ASSEMBLY
PARLIAMENT BUILDINGS
P.O BOX 41842-00100
NAIROBI.

Dear Sir,

[Handwritten signature: D. Muturi]
[Handwritten date: 29/5/18]

RE: MEMORANDUM ON THE STATUTE LAW MISCELLANEOUS (AMENDMENT)
BILL, 2018

We are a firm of Advocates and we submit as follows on the proposed amendments to the Kenya School of Law Act, 2012.

The Kenya School of Law Act is mandated under sections 4, 16 and the Second Schedule to the Act to undertake the training of advocates. The Kenya School of Law was established in 1963 and a total of 11 students were admitted that year. The School of Law has been in operation for fifty-five years and it has overseen the training of many lawyers including most of the top lawyers in this country. Over the years, the School has been known for its professionalism in training lawyers and despite the recent news of students failing exams, many legal scholars and practitioners have explained as being as a result of poor training at the universities and lauds the school for ensuring only those who meet the requirements of the school as to merit are admitted to the bar.

Consistency and track record is key in training of advocates and by allowing other new providers/entrants to be involved in training of lawyers, this will be the surest way of diluting

[Handwritten signature: George Amube]
[Handwritten text: Committee to Counsel]
[Handwritten date: 29/5/18]

standards already set and killing the coveted legal profession in terms of credibility. We however note that there is need to confer upon the Council of Legal Education as the regulator with the responsibility of defining the admission requirements which every student seeking to join the school should meet. In this regard we propose the following amendments-

PROPOSAL FOR AMENDMENTS: KENYA SCHOOL OF LAW

- a) **THAT** the proposed amendment to section 4 be deleted.

Reason: This will ensure that the Kenya School of Law continues to undertake the advocates Training Programme which will safeguard against diluting the gains already made in terms of standards.

- b) **THAT** the proposed amendment to section 16 be deleted and substituted with the following amendment-

Section 16 of the Kenya School of Law Act be amended by deleting the words "set out in the Second Schedule for that course" and substituted with the words "prescribed by the Council of Legal Education".

Reason: The amendment will confer upon CLE which is the regulatory body in legal education with the power to prescribe the admission requirements.

As result of the above amendments and if the Committee accepts the amendments there would be a need to also delete the amendments proposed to the Legal Education Act as the role of training advocates lies with the Kenya School of Law.

In this regard, we propose the following amendment to the Legal Education Act-

PROPOSAL FOR AMENDMENTS: LEGAL EDUCATION ACT

a. THAT the proposed amendment to section 8(1) be deleted.

Reason: It is the role of the Kenya School of Law to administer the advocates Training Programme.

b. THAT the proposed amendment to section 8(2) be deleted.

Reason: It is the role of the Kenya School of Law to undertake the Advocates Training Programme.

Yours Faithfully
Muturi S.K & Co. Advocates



MUTURI KARIUKI



NATIONAL ASSOCIATION OF PRIVATE UNIVERSITIES IN KENYA (NAPUK)

Bank House, Moi avenue, 5th Floor • P.O Box 13495-00100 NAIROBI
Tel + 254(0) 733 183355 • Email: napuk.kenya@gmail.com

OFFICE OF THE SECRETARY GENERAL

OUR REF: NAPUK/01/2018/04

28th May, 2018

THE CLERK OF THE NATIONAL ASSEMBLY,
PARLIAMENT BUILDINGS,
P.O BOX 41842-00100,
NAIROBI.

RE: MEMORANDUM ON THE STATUTE LAW MISCELLANEOUS (AMENDMENT) BILL, 2018

We refer to the above matter.

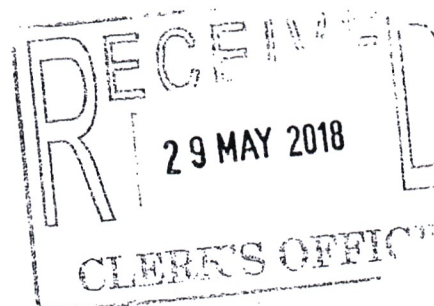
Following the recent advertisement in the Daily Nation inviting persons to submit memorandum on the above-mentioned Bill, we wish to make the following submissions-

KENYA SCHOOL OF LAW ACT 2012 AND THE LEGAL EDUCATION ACT, 2012.

Section 4(2) of the Kenya School of Law Act provides as follows-

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

- (a) train persons to be advocates under the Advocates Act (Cap. 16);
- (b) ensure continuing professional development for all cadres of the legal profession;
- (c) provide para-legal training;



(d) provide other specialized training in the legal sector;

(e) develop curricular, training manuals, conduct examinations and confer academic awards; and

(f) undertake projects, research and consultancies.

From a reading of this section, it is clear that the Kenya School of Law is the only institution in the country which is mandated to undertake the training of advocates. As witnessed in the recent reports on the School including claims of corrupt practices and massive failure of students, it is time to rethink on the functions of the School relating to the training of lawyers. The legal system of a country defines how far a country can move in terms of the economic, social and political development. In fact it is often said show me a working legal system including judiciary and I will show you a country whose growth is pegged on justice and fairness. The vice-versa is also true as when the legal system of a country breaks down all other systems breakdown leading to failed nation. It is the need to realize that the effectiveness of a legal system is also pegged on the nature of advocates in terms of their competence in legal matters. The need to ensure effective training of advocates need not be overstated. One of the reasons why the KSL has been rocked with claims of inefficiency is the fact that there is no liberalization in the sector. Without liberalization inefficiency crops in due to lack of competition. Comparing this with other countries which have robust frameworks for training Advocates, you will observe that most of the jurisdictions have liberalize the training of Advocates to various providers. The following is a comparable analysis of training of advocates-

Country	Institution undertaking training of Advocates
United States of America	Various law schools approved in every State. Training of lawyers involves a character and fitness evaluation, which includes

	a background check.
Australia	Various Universities offer the training programme prior to a lawyer being admitted to the bar.
Canada	Various Universities offer the training programme prior to a lawyer being admitted to the bar.
United Kingdom	Solicitors Regulatory Authority approves various Providers to provide legal training of lawyers.
South Africa	One Law School with nine centers all over the country offer training.

From a reading of the above, it is clear that in most comparable jurisdictions training of lawyers is liberalized. The benefit of liberalizing the training of lawyers would be-

- (a) increase in efficiency;
- (b) Professional management;
- (c) Increase in competition;
- (d) In line with international trends;
- (e) Foster economic, political and social development of the country due to an efficient judicial/ legal system;
- (f) Increase in foreign investment as investors will be encouraged to invest in the country due to a robust legal system;
- (g) Encourage new legal innovation.

It is for these reasons that we submit that the amendments being proposed to liberalize the training of advocates in the country are in order. In this regard, we support the amendments proposed to sections 4, 16 and the Second Schedule to

the Kenya School of Law. This is premised on the fact that the Council of Legal Education will be conferred with the responsibility of accrediting legal education providers for the purpose of licensing of the Advocates Training Programme hence liberalizing the training of advocates. This will catapult the training of advocates in the country to the levels of the United States and United Kingdom which are known to have the most efficient and vigorous legal systems. With training liberalized and opened up to other providers, the Kenya School of law will also focus on its key and critical functions such as ensuring the continuity of professional development of all cadres of the legal profession. We therefore support the amendments proposed to the Kenya School of Law Act and the Legal Education Act.

Yours Sincerely

A handwritten signature in black ink, appearing to read 'Vincent Gaitho', with a stylized flourish at the end.

**DR. VINCENT GAITHO, Ph.D,
SECRETARY GENERAL,
NATIONAL ASSOCIATION OF PRIVATE UNIVERSITIES IN KENYA
(NAPUK)**

Kenya Magistrates and Judges Association

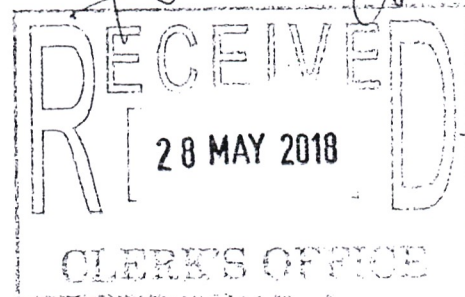


The Secretariat
Kenya Magistrates and Judges Association
Mumani Law Courts, 2nd Floor, Rm No. 244
P.O. Box 30041-00100
Nairobi, Kenya
Telephone Number: 3588237
Email: info@kmja.or.ke

21st May, 2018

Our Ref: KMJA/CKNA/05/18

Hon. Michael Sialai Rotich
The Clerk Kenya National Assembly
Parliament Buildings
P.O Box 41842 - 00100
Nairobi



Your Honour,

Re: The Opinion of the Kenya Magistrates And Judges Association
(KMJA) on the Statute Law (Miscellaneous Amendments) Bill, 2018
(National Assembly Bill No.12 of 2018)

On behalf of all members of the Kenya Magistrates and Judges Association (KMJA), please accept my kind regards and permit me to address your Honour as hereunder;

As an association, we had the opportunity to look at the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No.12 of 2018) and formed the opinion that this is a timely document that is rich in content and appropriate, especially to Judges and Judicial Officers and the Judiciary as an institution.

The next four (4) paragraphs describe KMJA's opinions on some proposed provisions that our institution feels may interfere with the independence of the Judiciary and/ or that may violate the constitution and/ or other laws, which proposals we feel should be deleted;

Executive Council Members:

Hon. Lady Justice Jacqueline Kariuki - President, Hon. Derrick Kuto - Secretary General, Hon. Ben Mark Ekhuli - Treasurer,

Hon. Evelyn Ombao - Vice President, Hon. Mukhtar Bilow Salim - Vice Secretary General, Hon. Charles Oudiki - Vice Treasurer

Hon. Charity Olupch - Chief Executive Officer, Daniel Sam - Executive Director

2. George Aramb
Bring to the attention
of the committee

(1) The definition of a 'judge' in the *Judicature Act (Cap 8)* which includes a judge "serving in an acting capacity" and yet this is not provided for by the Constitution and may tamper with the independence of the Judiciary;

(2) The provisions of the *Judicial Service Commission Act, 2011* which seem to conclude that Article 250 (2)(b) of the Constitution provides for the appointment of the Commissioners of the JSC, which conclusion may bring inconsistencies in section 15 of the same act and may violate articles 171 and 248 of the constitution;

(3) the introduced provisions in the *National Council for Law Reporting Act 1994 (No.11 of 1994)* which indicate that the Council is a body under the office of the Attorney General, and which may interfere with the independence of the judiciary as the Council performs a judicial function, is domiciled within the judiciary with the Hon Chief Justice as the chairman and the Chief Registrar of the Judiciary as its accounting officer; and

(4) the proposed definition of 'court' in the *Land Act 2012 (No.6 of 2012)* as well as in the *Land Registration Act, 2012 (No.3 of 2012)* to mean the High Court established by Article 165 of the Constitution and the Environment and Land Court established under the Environment and Land Court Act, 2011, and which definition may be inconsistent with Articles 162 (2)(b) and 165 (5) of the Constitution, as well as the Supreme Court's pronouncements on jurisdiction in the Karisa Chengo Case.

We are happy with the timely proposal under the *Oaths and Statutory Declarations Act (Cap 15)* and the addition of the expression "a Deputy Registrar Employment and Labour Relations Court" and "a Deputy Registrar Environment and Land Court" which would reflect the existing frameworks and structures.

Please note that the foregoing is the opinion of the KMJA as an institution, and should not in any way be considered as opinions of individual Judges who may have opportunities to hear and determine matters brought before them, which matters may touch on the substance of this law. All individual judges and / or judicial officers enjoy decisional independence and are not subject to the opinions of their Association.

Yours Sincerely,



Hon. Lady Justice Jacqueline Kamau
President, KMJA

② LAZEMB A
pls check

① D/Committee

FA

18/5



TRANSPARENCY
INTERNATIONAL
KENYA

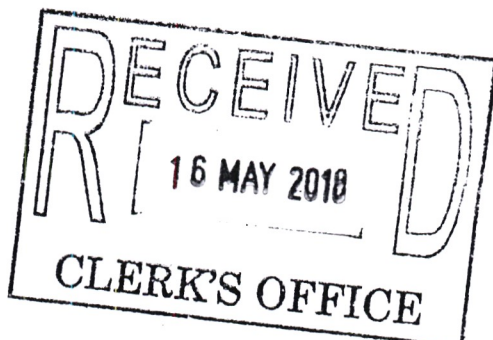
17/5/18

**TRANSPARENCY INTERNATIONAL KENYA MEMORANDUM ON THE
STATUTE LAW (MISCELLANEOUS AMENDMENT) BILL, 2018**

Transparency International–Kenya (TI-Kenya) is a not-for-profit organization founded in 1999 in Kenya with the aim of developing a transparent and corruption free society through good governance and social justice initiatives. TI-Kenya is one of the autonomous chapters of the global Transparency International movement that are all bound by a common vision of a corruption-free world. The global movement provides a platform for sharing knowledge and experience, developing strategies to respond to regionally distinct patterns of corruption and initiating advocacy campaigns at both the regional and sub-regional level. The vision of TI Kenya is that of a transparent, accountable and corruption-free Kenya and the mission is to transform the society and institutions by supporting the development of high integrity leadership in all sectors and at all levels.

In April 2018, an Omnibus bill- The Statute Law (Miscellaneous Amendment) Bill 2018, National Assembly Bill No. 12 of 2018 was tabled in the National Assembly for consideration by the Leader of Majority, Hon Aden Duale. Among the legislations the Bill seeks to amend and relevant to TI Kenya work are; the National Council for Reporting Act, Witness Protection Act, the Proceeds of Crime and Anti Money Laundering Act, Independent Police Oversight Authority, Land Act, Land Registration Act and the Bribery Act.

TI Kenya has reviewed the draft legislative proposals and proposes as follows;



8-

The Statute Law (Miscellaneous Amendment), 2018 Memorandum

Principal Act/ Amended Clause(s)	Provision	Comment/Rationale/recommendation
National Council for Law Reporting Act. Clause 2.	<i>The Amendment introduces S.2 (4) Council is a body under 1994 (No. 11 of the Office of the Attorney-General".</i> The Proposal brings the National Council for Law Reporting under the administrative ambit of the Attorney General Office.	The proposal is sound administratively since the AG is a member of the Council and the functions could be streamlined to ensure there is no duplication between the two offices on drafting and legal reporting.
Witness Protection Act, 2006 <i>Amends Clause 2 of the definition Section</i>	- The Amendments all through the various Clauses in the legislation replace the word 'Minister' with the 'Cabinet Secretary'. - The Bill proposes to amend the Act, to require that the Director be given an opportunity to defend himself where a petition seeking his dismissal has been presented to the Board.	The aligning of the word Minister to CS is in line with the Constitution. While the amendment to allow a Director and opportunity to defend himself is good practice and a requirement under the rules of natural justice.
Proceeds of Crime and Anti Money Laundering Act.	The Bill proposes to amend the Definition Section, to include employees of accountants, advocates and notaries or their employees, trust and company service providers in the definition of the	This proposal is welcome since currently lawyers are not under any obligation under the POCAMLA to disclose the beneficial owners of their clients under the relevant money laundering Regulations. The proposal would go a long way in ensuring transparency in beneficial ownership.

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	expression "<i>designated non-financial businesses or professions</i>". It also seeks to amend Sec. 48 of the Act to expand the reporting obligations and disclosures to include employees of accountants, advocates and notaries or their employees, trust and company service providers.	
<i>Land Registration Act, 2012</i>	The Bill seeks to amend the Definition Section to define High Court to be the High Court as stipulated under Art. 165 and as stipulated under the Environment and Land Court Act, 2011.	This is in line with the Constitution 2010 and the Environment and Land Court.
<i>Land Act, 2012</i>	The Bill proposes to amend the Act to introduce a provision which provides that incases of private land; leases and licenses shall be issued by the Cabinet Secretary and registered by the Chief Land Registrar.	- The Act was silent on private land since it had provided for issuance of licenses and leases for public land which are within the ambit of National Land Commission. - This is will be good as it will cure the infighting between National Land Commission and the CS Lands.
<i>The Office of the Director of Public Prosecutions Act, 2013 (No.2 of 2013). S.2</i>	The Bill amends S.2 (1) In the definition of "<i>investigative Agency</i>", deletes the expression "<i>Ethics and Anti-Corruption Commission</i>".	To understand the import of this intended amendment, the functions of the two bodies that is the office of the DPP and EACC must be appreciated. Sect. 5 (2) (b) of the ODPP Act provides that the Director (DPP), shall exercise State powers of prosecution and may direct that

		investigations be conducted by an investigative agency named in the direction. The EACC on the other hand, is an independent Constitutional body that derives its mandate from the Constitution and the EACC Act No 22 of 2011. Under Article 252 (1) (a), the EACC has powers to conduct investigations on its own initiative or on a complaint made by a member of the public. Under Section 11 of the EACC Act, the Commission has additional powers including: Investigating and recommending to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of the Constitution. The office of the ODPP is the only sole body mandated to prosecute criminal matters in the country. Whereas other bodies have the mandate to investigate complaints, their function ends at the point of tabling their recommendations to the DPP for sanctioning and prosecution. The import of the proposed amendments is that the DPP will no longer direct the EACC to carry out investigations in all matters relating to public prosecutions. De-linking the EACC from the crucial role played by the office of the Director of Public Prosecutions would be a blow to the work against graft. It would have the effect of placing a Constitutional office on the same rank with the Director of Public Prosecution who are among the investigative agencies. This is further likely to affect inter agency coordination in investigation and prosecution of anti-corruption cases.
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<i>Bribery Act, 2016</i>	The Bill, proposes very minor amendments and corrections largely syntax.	On the Bribery Act, we recommend amendment of the following Clauses; • Sec. 7(1)(a) of the BA, which defines relevant function or activity a key ingredient to proving the offences of giving and receiving a bribe, by amending by deletion the word 'includes' to make the provision have clarity. • Sec. 7(1) (b) of the BA be amended by inserting a conjunctive in order to link sub-section (a) and (b). Section 7 (1) (b) lists conditions that are key in defining the conditions for a relevant function. • Sec. 8(4)(a) be amended to insert the words <u>'then the written law applicable shall be the law of Kenya'</u> after the words <u>'law of Kenya'</u>. • Sec. 8(4) (b) and (c) of the BA, which prohibits bribing foreign public officials, be amended by deletion as they create an unreasonable burden for the prosecution for confirming that conduct not only contravenes the BA but also the laws of a foreign country or rules of a public international organisation. It ought to be enough that the bribery offence is an offence under Kenyan law where the prosecution has expertise and jurisdiction • Amend Sec 14(1) of the BA. This provision should be amended by inserting the word 'reasonable' before suspicion so that there will be a duty to report to the Commission within a period of 24 hours any knowledge or reasonable suspicion of instances of bribery. This will bring the BA in line with other criminal law statutes, offences and case law
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It is our sincere view that the above proposals will be factored in the deliberations of the Statute Law (Miscellaneous Amendment) Bill, 2018.



.....
Samuel Kimeu
Executive Director

CONTACT INFORMATION:

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OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Telegraphic address: "Personnel", Nairobi
Telephone: Nairobi 2732090/2732240
Mobile: 0723202888/ 0787880580
Fax: 2243524/2251808
Email: info@odpp.go.ke
When Replying please quote

NSSF Building, Block 'A'
19th Floor, NSSF Building
P.O. BOX 30701 – 100
NAIROBI, KENYA

ODPP/CONF/6/73A

26th April, 2018

Hon. William K. Cheptumo
Chairman
Justice & Legal Affairs Committee
Parliament Buildings
NAIROBI

George *Halima*
DBW
8/5

Dear Sir,

**RE: MEMORANDUM OF OBJECTION TO THE PROPOSED STATUTE MISCELLANEOUS AMENDMENTS BILL
2018 NATIONAL ASSEMBLY BILL NO. 12 OF 2018**

I write in reference to the above subject matter and I would like to make the following comments on the proposed miscellaneous amendments;

1. Article 157 of the Constitution gives the DPP the sole mandate to prosecute Criminal Matters based on investigations carried out by investigative agencies. Removing EACC as an investigative Agency will curtail the powers of the DPP under Article 157 of the Constitution.
2. The EACC has been given investigative powers by ACECA and LIA. Section 35 of ACECA requires EACC to forward the investigative reports to the DPP. On receipt of these reports, the DPP may order prosecution to ensue or direct further investigations. By amending ODPP Act to remove EACC as an investigative agency would affect DPP's powers to effectively prosecute.
3. The ODPP Act was intended to give effect to Articles 157 and 158 of the Constitution. The proposed amendment of the ODPP Act is being done without the Consultation and /or participation of the ODPP as a key stakeholder.
4. The intended amendment will affect cases already before court and those pending investigations.
5. The ODPP is not seized with the details of the objects and intentions of the proposed amendments.

6. To our understanding miscellaneous amendments are intended for minor operational issues. However the proposed amendments are substantive and would have far reaching implications on the provisions of the constitution and powers of independent agencies.

I would appreciate if the above issues raised are taken into consideration before the Bill is passed into law by parliament.

I will be available, should you deem it necessary, to have a face-to-face engagement with you or your officers regarding this subject matter.

I thank you for your continued support.

Yours faithfully,



MR. NOORDIN M. HAJI, OGW
DIRECTOR OF PUBLIC PROSECUTIONS

Copy to:

Hon. Justice Paul Kihara Kariuki
Attorney General
Office of the Attorney-General & Department of Justice,
Sheria House
NAIROBI

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Tel: +254 722200496, +254 734652205
info@ciarbkkenya.org
www.ciarbkkenya.org

GAZEMBA
pls deed
FA
22/5/18



CI Arb
evolving to resolve
Kenya Branch

15th May 2018

The Clerk of the National Assembly
Parliament Building
Parliament Road
P.O. Box 41842
NAIROBI

RE: COMMITTEE STAGE AMMENDMENTS TO THE STATUTE LAW (MISCELLENEUOS AMMENDMENTS) BILL NO. 12 OF 2018

Notice is given that the Chartered Institute of Arbitrators (Kenya Branch) intends to move the following amendments to the statute law (miscellaneous Amendments) Bill No. 12 of 2018 at the Committee Stage.

INSERTION OF AMMENDMENT TO SECTION 6(1) OF THE NAIROBI CENTRE FOR INTERNATIONAL ARBITRATION ACT NO. 26 OF 2013

THAT the Bill be amended by deleting the proposed amendment to section 6(1) of the Nairobi Centre for International Arbitration act no. 26 of 2013 and inserting the following new clauses

The Nairobi Centre for International Arbitration Act No. 26 of 2013	S.6(1)	The word 'five' appearing in paragraph (e) be retained Delete paragraph (f) and substitute therefore the following new paragraph- f) one person each nominated by the following bodies respectively- (i) the Kenya National Chamber of Commerce and Industry (ii) the Law Society of Kenya (iii) the Kenya Association of Manufacturers (iv) the Chartered Institute of Arbitrators Kenya Branch
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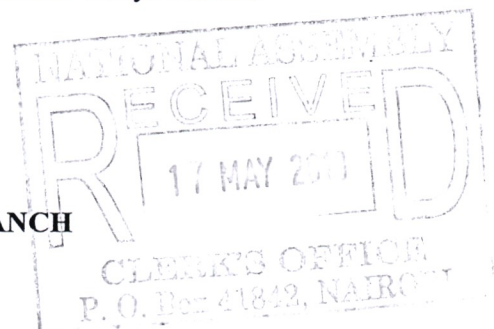
The Institute presents this position with the confirmation that the Chartered Institute of Arbitrators Kenya Branch is the only institution in Kenya that trains and certifies Arbitrators and maintains the membership of the membership in practice.

The same had been submitted through the Nairobi Centre for International Arbitration and the Law Society of Kenya on the inclusion of the Chartered Institute of Arbitrators- Kenya Branch.

Yours sincerely,

CALVIN NYACHOTI, C. Arb.
CHAIRMAN

CHARTERED INSTITUTE OF ARBITRATORS KENYA BRANCH





15th May 2018

The Clerk of the National Assembly
Parliament Building
Parliament Road
P.O. Box 41842
NAIROBI

RE: COMMITTEE STAGE AMMENDMENTS TO THE STATUTE LAW (MISCELLENEUOS AMMENDMENTS) BILL NO. 12 OF 2018

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Yours sincerely,

CALVIN NYACHOTI, C. Arb.

CHAIRMAN

CHARTERED INSTITUTE OF ARBITRATORS KENYA BRANCH

From: "Shem Otanga" <soo@africalegalnetwork.com>
To: clerk@parliament.go.ke
Cc: "Anne Kiunuhe" <AK@africalegalnetwork.com>, "Milly Minayo" <mmm@africalegalnetwork.com>, "Victor Nduse Mailu" <vnm@africalegalnetwork.com>, "Faith M. Macharia" <fm@africalegalnetwork.com>, "Mohamed Amani Karega" <mak@africalegalnetwork.com>, "Fridah Ndinda Mutiso" <fnm@africalegalnetwork.com>, "Ondati P. Mogaka" <omp@africalegalnetwork.com>, "Aisha Abdallah" <aa@africalegalnetwork.com>
Sent: Tuesday, May 15, 2018 4:26:39 PM
Subject: RE: Statute Law (Miscellaneous Amendments) Bill, 2018 - Comments

Our Ref: AQ/Gen
Your Ref: TBA
Date: 15th May, 2018

The Clerk of the National Assembly,
Parliament,
Parliament Road
Nairobi

Attention: Michael .R. Sialai, EBS

Dear Sir,

Statute Law (Miscellaneous Amendments) Bill, 2018

We refer to the above matter and our email of 14th May, 2018 below.

Further to our said email, please see the attached final version of our comments on the above Bill. The attached comments are intended to replace the comments that we submitted under our said email yesterday.

Please acknowledge receipt.

Regards,

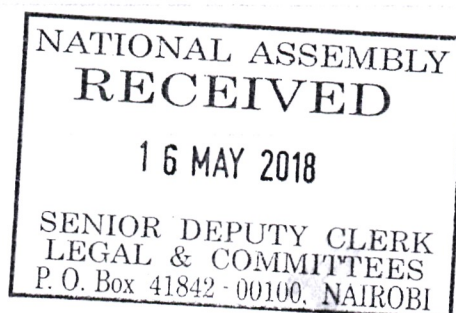
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ANJARWALLA & KHANNA



VISIONARY

AFRICAN LAW FIRM OF THE YEAR 2013, 2015, 2016

5/16/2018, 1:51 PM

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From: Shem Otanga

Sent: Monday, May 14, 2018 11:56 PM

To: clerk@parliament.go.ke

Cc: Anne Kiunuhe (AK@africalegalnetwork.com); Milly Minayo (mmm@africalegalnetwork.com); Victor Nduse Mailu

Subject: Statute Law (Miscellaneous Amendments) Act, 2018 - Comments

Our Ref: AQ/Gen

Your Ref: TBA

Date: 14th May, 2018

The Clerk of the National Assembly,
Parliament,
Parliament Road
Nairobi

Attention: Michael .R. Sialai, EBS

Dear Sir,

Statute Law (Miscellaneous Amendments) Bill, 2018

We refer to the above matter and the notice published at page 21 of the Standard Newspaper on 7th May, 2018 a copy of which is enclosed* for ease of reference.

We have perused the proposed **Statute Law (Miscellaneous Amendments) Bill, 2018** and have prepared the enclosed* first part of our memorandum of comments/recommendations for your consideration. We shall forward the second portion of the memorandum tomorrow.

Yours faithfully,

SHEM OTANGA | Senior Associate

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Our Ref: AQ/Gen
Your Ref: TBA
Date: 14th May, 2018

The Clerk of the National Assembly
Parliament
Parliament Road
Nairobi

Attention: Michael .R. Sialai, EBS

Dear Sir,

Statute Law (Miscellaneous Amendments) Bill, 2018

We refer to the above matter and the notice published at page 21 of the Standard Newspaper on 7th May, 2018 a copy of which is enclosed* for ease of reference.

We have perused the proposed **Statute Law (Miscellaneous Amendments) Bill, 2018** (National Assembly Bill No. 12 of 2018) and have prepared the enclosed* memorandum of comments/recommendations for your consideration.

Yours faithfully,

Anne Kiunuhe
For ANJARWALLA & KHANNA
*Encl**

REPUBLIC OF KENYA



**NATIONAL ASSEMBLY
TWELFTH PARLIAMENT – SECOND SESSION**

**In the matter of consideration by the National Assembly of the Statute Law
(Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12 of 2018)**

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) 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 Statute Law (Miscellaneous Amendments) Bill, 2018 National Assembly Bill No. 12 of 2018 was published on 10th April, 2018 and read a First Time 18th April, 2018. The Bill is in keeping with the practice of making various amendments which do not merit the publication of separate Bills and consolidating them into 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, the proposed amendments to various Acts of Parliament stand committed to the following Departmental Committees of the National Assembly:-

NO.	ACT TO BE AMENDED	COMMITTEE
1.	The Judicature Act (Cap.8)	Justice and Legal Affairs
2.	Oaths and Statutory Declarations Act (Cap 15)	
3.	The Advocates Act (Cap 16)	
4.	The Civil Procedure Act (Cap 21)	
5.	The Law of Contract Act (Cap 38)	
6.	The Foreign (Reciprocal Enforcement) Act (Cap 43)	
7.	The Probation of Offenders Act (Cap 64)	
8.	The Criminal Procedure Code (cap 75)	
9.	The Extradition (Contiguous & Foreign Countries) Act (Cap 76)	
10.	The National Council for Law Reporting Act 1994	
11.	The Witness Protection Act No. 16 of 2006	
12.	The Anti-Counterfeit Act No. 13 of 2008	
13.	The Proceeds of Crime & Anti-Money Laundering Act No. 9 of 2009	
14.	The Judicial Service Act No. 1 of 2011	
15.	The Office of the Director of Public Prosecutions Act No. 2 of 2012	
16.	The Kenya Law Reform Commission Act No. 19 of 2013	
17.	The Nairobi Centre for International Arbitration Act No. 26 of 2013	
18.	The Companies Act No. 17 of 2015	
19.	The Bribery Act No. 47 of 2016	
20.	The Law of Succession Act (Cap 160)	
21.	The Registration of Persons Act (Cap 107)	Administration and National Security
22.	The Public Holidays Act (Cap 110)	
23.	The Community Service Order Act No. 10 of 1998	
24.	The Alcoholic Drinks Control Act No. 4 of 2010	
25.	The Independent Police Oversight Authority Act No. 35 of 2011	
26.	The National Authority for the Campaign Against Alcohol and Drug Abuse Act No. 14 of 2012	
27.	The Housing Act (Cap 117)	Transport, Public Works and Housing
28.	The Kenya Ports Authority Act (Cap 391)	
29.	The Kenya Airports Authority Act Cap. 395	
30.	The Traffic Act (Cap 403)	
31.	The Kenya Roads Board Act No. 7 of 1999	
32.	The National Construction Authority Act No. 41 of 2011	
33.	The Engineers Act No. 43 of 2011	
34.	The National Transport and Safety Authority No. 33 of 2012	
35.	The Higher Education Loans Board Act 1995	Education and Research
36.	The Kenya School of Law Act No. 26 of 2012	
37.	The Legal Education Act No. 27 of 2012	
38.	The Kenya Institute of Curriculum Development Act No. 4 of 2013	
39.	The Universities Act No. 42 of 2012	
40.	The Science, Technology and Innovation Act No. 28 of 2013	
41.	The Industrial Property Act No. 3 of 2001	Trade, Industry and Cooperatives
42.	The Export Processing Zones Act, 1990	
43.	The Privatization Act No. 2 of 2005	
44.	The Competition Act No. 12 of 2010	
45.	The Children Act No. 8 of 2001	Labour and Social Welfare
46.	The Employment Act No. 11 of 2007	
47.	The Labour Institutions Act No. 12 of 2007	
48.	The Labour Relations Act No. 14 of 2007	
49.	The National Youth Council Act No. 10 of 2009	
50.	The National Social Security Fund Act No. 45 of 2013	
51.	The Wildlife Conservation and Management Act No. 47 of 2013	Environment and Natural Resources
52.	The Forest Conservation and Management Act No. 34 of 2016	
53.	The National Drought Management Authority Act No. 4 of 2016	
54.	The Environmental Management and Coordination Act No. 8 of 1999	
55.	The Retirement Benefits (Deputy President and Designated State Officers) Act No. 8 of 2015	Finance and National Planning
56.	The Kenya Post Office Savings Bank Act Cap 243	
57.	The Land Act No. 6 of 2012	Lands
58.	The Land Registration Act No. 5 of 2012	
59.	The Tourism Act No. 28 of 2011	Sports, Culture and Tourism
60.	The National Youth Service Act Cap 208	
61.	The Protection of Traditional Knowledge and Cultural Expressions Act No. 33 of 2016	
62.	The Public Archives and Documentation Service Act (Cap 19)	
63.	The Kenya Defence Forces Act No. 25 of 2012	Defence and Foreign Relations
64.	The Treaty Making and Ratification Act No.45 of 2012	
65.	The Kenya Agricultural and Livestock Research Act No. 17 of 2013	Agriculture and Livestock
66.	The Biosafety Act No. 2 of 2009	
67.	The Kenya Information and Communication Act No. 2 of 1998	Communication, Information and Innovation
68.	The Copyright Act No. 12 of 2001	

Pursuant to Article 118(1)(b) and Standing Order 127(3), the Clerk of the National Assembly invites members of the Public to submit any representations they may have on the Statute Law (Miscellaneous Amendments) Bill, 2018. 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 Monday, 14th May, 2018 at 5:00 pm. The Bill may be found on the Parliament website at <http://www.parliament.go.ke> or <http://www.kenyalaw.org>.

**MICHAEL SIALAL, EBS
CLERK OF THE NATIONAL ASSEMBLY**

Memorandum

To The Clerk of the National Assembly
From Anjarwalla and Khanna
Date 15th May, 2018
Subject Comments on some of the amendments proposed to be made through the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12 of 2018) (the Bill) to various Acts of Parliament

1. Comments on the proposed amendments to the Anti-Counterfeit Act, Number 13 of 2008, ("the Act")

A. References to "the Agency" in the Bill

Observation

We note that the Bill proposes the deletion of the term "Agency" (which refers to the Anti-Counterfeit Agency) throughout the Act and proposes to rename the Agency as the Anti-Counterfeit Authority and to refer to it as "the Authority" throughout the Act.

We note however that the Bill contains a number of the proposed provisions that still refer to regulator as "the Agency" rather than "the Authority". For instance, the proposed sections 16 (3B), 32 (j), 34B (1), (3), (8), (9), (10), (13) and (14) refer to "the Agency" instead of "the Authority".

Analysis

This is a minor error that can easily be amended to ensure consistency in the Bill.

Recommendation

We recommend that any references to "the Agency" throughout the Bill be replaced with "the Authority".

B. Proposed introduction of a new Section 23 (4) to the Act – Power to investigate unexpressed offences

Observation

The Bill proposes the introduction of a new section 23 (4) to the Act which would empower inspectors to investigate any offences related or connected to counterfeiting notwithstanding that such an offence is not expressed as such under the provisions of the Act.

Analysis

This clause appears to go against the general spirit of the well-established criminal law principle expressed in Latin as "nullum crimen sine lege" (that is "no crime without law"). This principle of criminal law prescribes that a crime ought not to be presumed to have been committed where there is no express law defining the offence. The intention of this principle is to create clarity on the sort of conduct that constitutes criminal actions and to erect a statutory safeguard against the arbitrary criminalisation of acts after they have already been carried out.

Further, if the investigations contemplated under this amendment lead to an arrest, charging and conviction in court, this provision could also fall foul of Article 50 (2) (n) of the Constitution of Kenya which states that:

“Every accused person has the right to a fair trial, which includes the right—

- n) not to be convicted for an act or omission that at the time it was committed or omitted was not—
 - i. an offence in Kenya; or
 - ii. a crime under international law”

Recommendation

In view of the above, we would recommend the deletion of the phrase “notwithstanding that such an offence is not expressed as such under the provisions of this Act” where it appears in the new section 23 (4) that is proposed under the Bill.

- C. **Proposed introduction of a new Section 32 (j) to the Act – Criminalisation of the importation into Kenya of goods bearing a trademark, trade name or copyright not recorded under the Act**

Observation

The Bill proposes to introduce a new section 32 (j) which would make it an offence for any person to import into Kenya any goods bearing a trademark, trade name or copyright that has not been recorded with the Anti-Counterfeit Agency.

Analysis

We are of the view that the enactment of this provision will be likely to hinder import trade in Kenya. Such a provision would compel importers to conduct searches with the Anti-Counterfeit Agency and to incur the attendant expenses so as to satisfy themselves that the intellectual property (IP) rights subsisting on the goods to be imported have been recorded with the Anti-Counterfeit Agency and that the importation of the same would therefore not contravene the law. The time spent waiting for the search results would further reduce the efficiency of the importation process and the ease of doing business for importers in Kenya.

Additionally, this clause is too wide in its application. It does not limit the offence to goods that are imported into Kenya in the course of trade. As such, if this provision were to be enacted as is, it would be an offence to import into Kenya any goods meant for personal use and bearing /consisting of a trademark, trade name or copyright that has not been recorded with the Anti-Counterfeit Agency.

Recommendation

We recommend the deletion of the proposed section 32 (j) from the Bill.

- D. **Proposed introduction of a new Section 34B (1) to the Act - Mandatory recordation of trademarks with the Anti-Counterfeit Agency**

Observation

Clause 34B (1) of the Bill proposes to require all owners of registered trademarks that are used on goods imported into Kenya to record such trademarks with the Anti-Counterfeit Agency.

Analysis

The registration of trademarks in Kenya is handled by the Kenya Industrial Property Institute (KIPI). The proposed requirement of recordation of trademarks with the Anti-Counterfeit Agency would amount to a duplication of tasks between government agencies. Any enactment of this proposed provision is likely to reduce the ease of doing business as an additional financial burden of registering the trademarks with the Anti-Counterfeit Agency would have to be borne by one of the parties to the import transaction (presumably the importer) if not by both.

By requiring owners of trademarks registered abroad to record the same with the Anti-Counterfeit Agency, the Bill purports to confer intellectual property rights in Kenya upon the owners of trademarks that are not registered in Kenya contrary to the well-established principle of territoriality of trademarks and IP rights.

Further, the amendment under the proposed section 34B (1), as read with the offence created under the proposed section 32 (j), implies a presumption that all IP rights applied to goods being imported into Kenya would generally have already been registered either in Kenya or abroad. This is not a feasible presumption as there is generally no legal obligation to register a trademark or copyright interest in Kenya or internationally and as such it is possible for such IP rights to be used in trade without being registered.

Recommendation

The recordation of trademarks under the proposed section 34B (1) should be subject to the discretion of the owners of the trademarks (as opposed to being a mandatory requirement). In this scenario, trademark owners who desire to take advantage of the proposed recordation system would then have the option of recording their trademarks with the Anti-Counterfeit Agency.

Further, in order to deal with the current disregard of the principle of territoriality of IP rights, the words "irrespective of the place of registration" should be deleted from the proposed section 34B (1).

Please note that we only make the above recommendation as a middle ground option. The ideal situation would be to delete the provisions on recordation of trademarks with the Anti-Counterfeit Agency and to require KIPI to digitise its database and to provide the Anti-Counterfeit Agency with direct access to the same.

E. Proposed introduction of a new section 34B (2) in the Act – Approval and denial of applications by the Anti-Counterfeit Agency

Observation

The proposed section 34B (2) suggests that the Anti-Counterfeit Agency will have the power to approve or deny applications for the recordation of trademarks. The criterion for such approval and denial is not stated.

Analysis

The conferring of the power of approval and denial of recordation applications on the Anti-Counterfeit Agency without clearly setting out the criteria for such approval or denial raises questions regarding the duplication of trademark examination roles. It is unclear whether the Anti-Counterfeit Agency would then have to examine the registrability of trademarks while assessing recordation applications made to it under the Act.

Recommendation

The criteria for the approval and denial of recordation applications should be clearly set out in the Bill to stipulate instances where an application can be denied by the Anti-Counterfeit Agency. We would propose that the criteria for approval be simple and limited to a mere confirmation that the documentary proof of current and valid trademark registration at KIPI has been provided.

F. Proposed introduction of a new section 34B (3) to the Act – Requirement to provide details of the citizenship of the owners of the trademark

Observation

The proposed section 34B (3) (a) requires applications for recordation of trademarks to include details of the citizenship of the trademark owner or owners, or the citizenship of each partner (if a partnership) or details of the State, country, or other political jurisdiction within which the trademark owner was organized, incorporated, or created (if an association or corporation).

Analysis

The regulation of ownership of trademarks and the details of owners falls within KIPI's mandate. As such, this proposal is likely to result in the duplication of KIPI's work. Further, the introduction of additional requirements such as supplying the details of the citizenship of the trademark owner is unnecessary as such details are not relevant to the issue of subsistence of a trademark. This proposed section 34B (3) would therefore only serve to increase bureaucracy and to reduce the ease of doing business.

Recommendation

We would recommend deletion of the requirement to state the citizenship of the trademark owner.

G. Proposed introduction of a new section 34B (6) to the Act- Validity period for the recordation of the trademarks with the Anti-Counterfeit Agency

Observation

The proposed section 34B (6) provides that the recordation of a trademark shall remain in force for a period of one year from the date of approval of the application for recordation or for the duration of the current registration period of the trademark, whichever is shorter.

Analysis

The period of one year is too short a time frame for validity of the recordation with the Anti-Counterfeit Agency. It would be cumbersome for importers of goods to have to ensure that the trademark recordations for each of the goods that they import are renewed every year. This is another proposal that is bound to reduce the ease of doing business in Kenya.

Recommendation

We recommend that the validity of the period of recordation of trademarks with the Anti-Counterfeit Agency be tied to the period of validity of the corresponding registration of the trademarks at KIPI (which is currently ten (10) years).

H. Proposed introduction of a new section 34B (10) to the Act - Minor amendments

Observation

The proposed section 34B (10) of the Bill provides that the owner of a recorded trademark shall submit a written application in the prescribed manner to the Anti-Counterfeit Agency not later than 30 days to the expiration of the current recordation.

Analysis

From the context in which this proposed provision sits, it appears that it was intended to regulate the renewal of the validity of the recordation with the Anti-Counterfeit Agency. The word "renewal" however appears to have been omitted from the wording of the section.

Recommendation

We propose that the phrase "for renewal of the recordation of the trademark" be included immediately after the words "written application" where they appear in the proposed section 34B (10).

Further, in line with our recommendation on the proposed section 34B (1) above, we recommend that the mandatory requirement for renewal of the recordation under the proposed section 34B (10) be removed and replaced by a discretionary option to renew on the part of the owner of the recorded trademark. This may be achieved by the replacement of the word "shall" with "may" where it appears in the wording of the proposed section 34B (10).

I. Proposed introduction of a new section 34B (13) to the Act – Requirement for the anti-counterfeit security device

Observation

The proposed section 34B (13) requires the Anti-Counterfeit Agency to issue a certification mark to importers of goods in the form of an anti-counterfeit security device at a fee to be prescribed under the Act provided that the Anti-Counterfeit Agency is satisfied that the imported goods have complied with the provisions of the proposed section 34B.

Analysis

The requirement for payment of an additional fee for issuance of the certification mark would, if passed into law, further increase the cost of doing business in Kenya for import traders who would already have incurred the cost of applying for the recordation of trademarks with the Anti-Counterfeit Agency.

Recommendation

We would recommend that the anti-counterfeit security device be issued at a nominal fee or for free.

J. Proposed introduction of a new section 34B (14) to the Act – Seizure and destruction of goods by the Anti-Counterfeit Agency

Observation

The proposed section 34B (14) of the Bill gives the Anti-Counterfeit Agency the power to seize and destroy any goods originally imported into Kenya that do not bear the anti-counterfeit security device.

Analysis

As a general rule, destruction of goods can only be done upon the issuance of a court order as set out under section 27 and 28 of the Act. This provision does not specify what the term “originally imported into Kenya” means and could as such be interpreted as having retrospective effect.

Recommendation

We recommend that this subsection be amended to qualify this power and make the destruction of the goods contingent upon:

- a) application by a person to whom a certification mark has been issued under the Act; and
- b) the issuance of a court order for the destruction of the goods in question.

2. Comments on the amendments proposed to be made to the Industrial Property Act, Chapter 509, Laws of Kenya

We do not have any comments to make on any of the amendments proposed to be made to the Industrial Property Act through the Bill.

3. Comments on the amendments proposed to be made to the Copyright Act, Chapter 130, Laws of Kenya

We do not have any comments to make on any of the amendments proposed to be made to the Copyright Act through the Bill.

4. Comments on the amendments proposed to be made to the Bribery Act, 2016

A. Retrospective application of the Bribery Act, 2016 – section 27 of the Bribery Act, 2016

Observation

The proposed amendment of section 27 (2) of the Bribery Act, 2016 deletes the word “this Act” appearing immediately after the words “offence under” and substitutes them with the words “the Act referred to in subsection (1)”.

Analysis

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

Recommendation

We recommend that section 27 (2) of the Bribery Act, 2016 is amended to read as follows:

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

5. **Proposed amendments to the Proceeds of Crime and Anti-Money Laundering Act, No 9 Of 2009 (the PROCAMLA Act)**
- A. **Proposed inclusion of legal professionals as designated as non-financial businesses or professionals by amendments to section 2 and 48**

Observation

We note the proposed amendment of sections 2 and 48 of the PROCAMLA Act is designed to include legal professionals as designated nonfinancial businesses or professionals so as to place on them an obligation to adhere to the reporting requirements under the PROCAMLA Act.

Analysis

The proposed amendment will allow the Financial Reporting Centre to carry out an inspection of the records held by an advocate in respect of clients as permitted under section 24 (c) of the PROCAMLA Act which provides that:

“The Centre –

may, at any time, cause an inspection to be made by an inspector authorised by the Director-General in writing and the inspector may enter the premises of any reporting institution during ordinary business hours to inspect any documents kept pursuant to the requirements of this Act, and ask any question relating to such documents, make notes and take copies of the whole or any part of such documents.” (Emphasis ours)

The proposed amendments are an affront to the constitutional rights to privacy and access to justice guaranteed under article 31 (c) and 48 (respectively) of the Constitution of Kenya, 2010 to every person. The limits proposed are neither fair nor reasonable in an open and democratic society.

The constitutional right to privacy between a client and an advocate is so sacrosanct that it has been afforded protection under common law and further protection under the Evidence Act, due to the central role it plays in ensuring access to justice which is another constitutional right.

Further, the provision encroaches on the legal privilege of advocate – client confidentiality provided under the Evidence Act (Cap 80 Laws of Kenya) (the **Evidence Act**) and the Advocates Act, Chapter 16 of the Laws of Kenya. Section 134 of the Evidence Act provides as follows:

- (1) No advocate shall at any time be permitted unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

- a) any communication made in furtherance of any illegal purpose;

- b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

This privilege subsists even after the advocate has ceased to act for their client.

The proposed amendment would gravely hinder the constitutional rights of access to justice and privacy without any proper justification for the limitation.

Recommendation

Section 2 and 48 should not be amended as proposed and should be maintained.

6. Proposed amendments to the Public Procurement and Asset Disposal Act, No. 3 of 2015 (the PPOA Act)

A. Proposed changes to section 9(1)(k) of the PPOA Act

Observation

The proposed amendment to section 9(1)(k) of the PPOA Act will exonerate the Public Procurement Regulatory Authority from any obligation to develop and manage the State portal on procurement and asset disposal and ensure that it is available and easily accessible.

Analysis

If the Public Procurement Regulatory Authority is exempted from developing and managing the state portal on procurement and asset disposal, it is likely that there would be reduced transparency regarding the processes surrounding procurement and asset disposal, thereby contravening the principle of transparency as set out under Article 10 (2) (c) of the Constitution of Kenya, 2010.

The failure to have a statutory body as the primary person responsible for ensuring the State portal is easily accessible will lead to a lack of transparency and accountability as nobody will be charged for ensuring transparency surrounding the procurement process.

Recommendation

Section 9(1) (k) of the PPOA Act should be maintained as is and the proposed amendment should be disregarded.

B. Proposed changes to section 43 of the PPOA Act

Observation

The proposed amendment of section 43 of the PPOA Act allows persons authorised by the Public Procurement Authority to enter any premises of a procuring entity, at a reasonable time and inspect the premises so as to make inquiries that maybe necessary for the collection of information.

Analysis

Persons who are authorised by the Authority to carry out investigations, inspections, assessments and reviews ought to present proof of such authorisation prior to their entry to make enquiries and carry out investigations.

Further, the inspection should be limited to the business premises of the procuring entity and ought to be carried out during work hours. This is to avoid the Authority accessing the procuring entity's premises at odd hours (likely to be by way of breaking in) and causing damage to property of the procuring entity.

Recommendation

The proposed amendment should be phrased as follows:

"When conducting Investigations, Inspections, Assessments and Reviews relating to contracts, procurement and asset disposal proceedings, any a person authorised by the Authority may enter any the business premises of a procuring entity during ordinary business hours, subject to issuance of prior notice to the said procuring entity and inspect the premises to make inquiries that maybe necessary for the collection of information."

7. Proposed amendments to the Labour Relations Act, 2007

Observation and recommendation

The proposed amendments to section 48 and 50(2) of the Labour Relations Act make reference to 'check off agreement'. We are of the view that there is need to define check off agreement so as to distinguish the term from other forms off agreements mentioned in the Labour Relations Act.

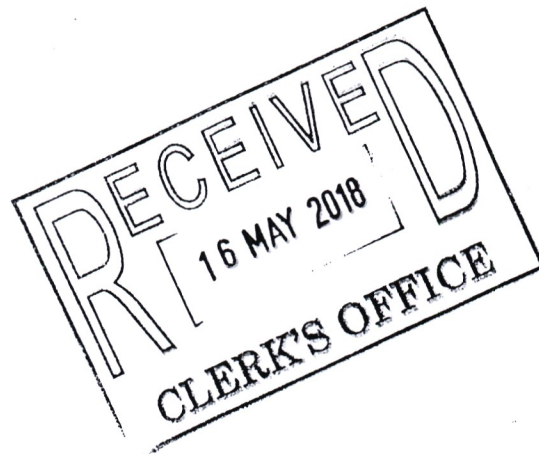
There also seems to be a typographical error in the proposed section 48(11) (a) that provides that "the trade union shall give written notice of such alternation to the employer", the correct word would be alteration. "The typographical error ought to be amended.

MEMORANDUM SUBMITTED TO THE CLERK OF THE KENYA NATIONAL ASSEMBLY
ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) ACT, 2018.

Monday, May 14, 2018

① D/Muthe
16/5/18

(11) ✓ GAZEMBA
- GURDICTA
pls deep
FA
17/5/18



SUBMITTED BY:

The Kenyan Section of the International Commission of Jurists (ICJ Kenya)
Laikipia Road, Laikipia Townhouses, Kileleshwa,
P.O BOX 59493 – 00200
NAIROBI
Email: info@icj-kenya.org/samwel.mohochi@icj-kenya.org

INTRODUCTION

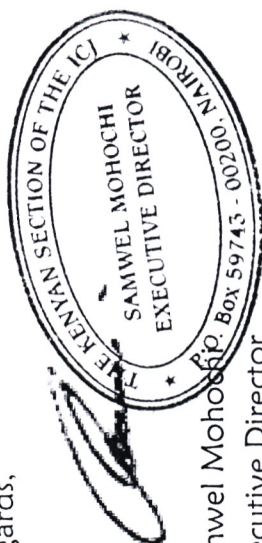
1. The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a non-governmental membership organization constituting of a body of jurists drawn from members of the Bench and Bar in Kenya and the region. It is the only autonomous national section of the International Commission of Jurist based in Geneva. ICJ Kenya has been working in Kenya and around Africa since 1959 and its mission is to promote human rights, justice and democracy in Kenya and around Africa through the application of legal expertise and international best practices.
2. ICJ Kenya wishes to address and present this Memorandum of Views to the Clerk of the National Assembly, Parliament of Kenya.
3. Based on ICJ Kenya's observations, while most of the amendments have an advantage and would provide the citizenry with better service delivery, access to justice, and democratic space, we note with great concern that some of the amendments presented before the Clerk are unconstitutional, illegal and breach principles of separation of powers.
4. In ICJ Kenya's considered opinion, these amendments will undermine the principle of Separation of Powers embedded in the Constitution of Kenya 2010 intended to ensure checks and balances between the three organs of the government and in the independence of the Judiciary.
5. We are cognizant of the fact that separation of powers refers to the division of government responsibilities into distinct branches to limit any one branch from exercising the core functions of another and delimits mandate and responsibilities. The intent is to prevent the concentration of power and provide for checks and balances.
6. In sum, this Memorandum provides a table of insights into the procedural and substantive implications in respect of the subject matter before the Clerk of the National Assembly.

COMMENTS AND PROPOSALS

	The Statute	Section	Issue	Problem	Remedies
1	Judicature Act (Cap 8)	2	Definition of judge to include a judge serving in acting capacity	▪ The proposed amendment is unconstitutional and is an illegality. ▪ The amendment breaches Article 167 and 166 of the Constitution ▪ There would be no security of tenure hence prone to political manipulation and horse trading. ▪ See Section 34 of the Public Service Commission Act as comparison. Acting cannot exceed 6 months. The Judiciary is not an exception. No public officer should act in office for more than 6 months	Reject alternative appoint Commissioner of Assize
2	The National Council for Law Reporting (No.11 of 1994)	2(4)	Moving of the Council from Judiciary to the Office of the Attorney General	▪ The Council has done excellent work in reporting decisions of the courts in a timely manner due to the close proximity with the authors. This has helped in access to justice as lawyers	▪ The proposal should be rejected. ▪ The National Council for Law Reporting should remain under

The Statute	Section	Issue	Problem	Remedies
3	48, 81, 88	Limiting the right to strike in essential services	are able to assess precedents to argue cases. ICJ Kenya supports the proposal as it seeks to protect the right to life and at the same time guarantees the right to strike in a structured manner.	the Judiciary. Allow proposal

Regards,



Samwel Mohochi
Executive Director

Kenyan Section of the International Commission of Jurists (ICJ Kenya)

