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DIRECTORATE OF DEPARTMENTAL COMMITTEES
DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT ON THE CONSIDERATION OF THE ANTI-MONEY LAUNDERING AND
COMBATING OF TERRORISM FINANCING LAWS (AMENDMENT) BILL, 2023 (*NATIONAL
ASSEMBLY BILL NO. 35 OF 2023*)

 THE NATIONAL ASSEMBLY PARLIAMENT BUILDINGS NAIROBI	
DATE:	17 AUG 2023
	DAY: THURS
TABLED BY:	Hon George Murugara, MP Chair, Justice & Legal Affairs
CLERK AT THE YOUNG:	Xane Shubko

CLERK'S CHAMBERS
DIRECTORATE OF DEPARTMENTAL COMMITTEES
PARLIAMENT BUILDINGS
NAIROBI

AUGUST, 2023

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Kabata & 4 others v National Assembly & 3 others; Law Society of Kenya & 16 others (Interested Parties) (Petition E338, E342, 372, 373 & E407 of 2022 (Consolidated)) [2023] KEHC 481 (KLR) (Constitutional and Human Rights) (30 January 2023) (Judgment)

LIST OF ABBREVIATIONS AND ACRONYMS

AML	-	Anti-Money Laundering
CFT	-	Countering the Financing of Terrorism
ESAAMLG	-	Eastern and Southern Africa Anti-Money Laundering Group
FATF	-	Financial Action Task Force
LLPs	-	Limited Liability Partnerships
LSK	-	Law Society of Kenya
KLRC	-	Kenya Law Reform Commission
MCCP	-	Maendeleo Chap Chap Party
ODM	-	Orange Democratic Movement
UDA	-	United Democratic Alliance
WDM	-	Wiper Democratic Movement

ANNEXURES

- Annexure 1: Adoption Schedule
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CHAIRPERSON'S FOREWORD

This report contains the proceedings of the Departmental Committee on Justice and Legal Affairs on its consideration of the Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Bill (*National Assembly Bill No. 35 of 2023*) which was published on Tuesday 11th July, 2023. It was read for the first time in the House on Wednesday 26th July, 2023 and thereafter committed to the Departmental Committee on Finance and National Planning and the Departmental Committee on Justice and Legal Affairs, with the latter as the lead, for consideration and reporting to the House pursuant to the provision of Standing Order 127.

On Wednesday 2nd August, 2023, the Honourable Speaker of the National Assembly vide Communication No. 51 of 2023 directed that the two Committees prioritize consideration of the Bill and report to the House soonest as the Bill is informed by various international obligations that require the country to have a robust legal framework to combat money laundering, financing of terrorism and proliferation of weapons.

The Bill seeks to make various amendments to the following seventeen (17) statutes –

1. The Extradition (Contiguous and Foreign Countries) Act (Cap 76);
2. The Extradition (Commonwealth Countries) Act (Cap. 77);
3. The State Corporations Act (Cap. 446);
4. The Capital Markets Act (Cap. 485);
5. The Insurance Act (Cap. 487);
6. The Banking Act (Cap. 488);
7. The Central Bank of Kenya Act (Cap. 491);
8. The Anti-Corruption and Economic Crimes Act (No. 3 of 2003);
9. The Microfinance Act, 2006 (No. 19 of 2006);
10. The Proceeds of Crime and Anti-Money Laundering Act, 2009 (No. 9 of 2009);
11. The National Police Service Act, 2011 (No. 11A of 2011);
12. The Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011);
13. The Mutual Legal Assistance Act, 2011 (No. 36 of 2011);
14. The National Payment System Act, 2011 (No. 39 of 2011);
15. The Limited Liability Partnership Act (No. 42 of 2011);
16. The Prevention of Terrorism Act, 2012 (No. 30 of 2012); and
17. The Companies Act, 2015 (No. 17 of 2015).

The introduction of the Bill is in line with the practice of making minor amendments which do not merit the publication of separate Bills. The Bill was thus committed to the two (2) Departmental Committees of the National Assembly as follows:

1. Departmental Committee on Justice and Legal Affairs

- a. The Extradition (Contiguous and Foreign Countries) Act (Cap 76);
- b. The Extradition (Commonwealth Countries) Act (Cap. 77);
- c. The State Corporations Act (Cap. 446);
- d. The Anti-Corruption and Economic Crimes Act (No. 3 of 2003);
- e. The Proceeds of Crime and Anti-Money Laundering Act, 2009 (No. 9 of 2009);
- f. The National Police Service Act, 2011 (No. 11A of 2011);
- g. The Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011);
- h. The Mutual Legal Assistance Act, 2011 (No. 36 of 2011);
- i. The Prevention of Terrorism Act, 2012 (No. 30 of 2012); and

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

2. Departmental Committee on Finance and National Planning

- a. The Capital Markets Act (Cap. 485);
- b. The Insurance Act (Cap. 487);
- c. The Banking Act (Cap. 488);
- d. The Central Bank of Kenya Act (Cap. 491);
- e. The Microfinance Act, 2006 (No. 19 of 2006);
- f. The National Payment System Act, 2011 (No. 39 of 2011); and
- g. The Limited Liability Partnership Act (No. 42 of 2011).

In compliance with Article 118(b) of the Constitution and Standing Order 127(3), the Clerk of the National Assembly placed an advertisement in the print media on Monday 31st July, 2023 inviting the public to submit memoranda by way of written statements on the Bill.

In addition, the Clerk of the National Assembly vide letter Ref. No. *NA/DDC/JLAC/2023/092* dated 14th August, 2023 invited key stakeholders to submit views on the Bill and attend a public participation forum on Tuesday 15th August, 2023. The memoranda were to be received on or before Monday 14th August, 2023 at 5.00 pm (East African Time). By the close of the submission deadline, the Committee had not received any memoranda.

The Ethics and Anti-Corruption Commission, The CiFAR (Civil Forum for Asset Recovery, The State Corporation Advisory Committee, The Law Society of Kenya (LSK), and Transparency International attended the public hearing forum and gave their views on the Bill which the Committee considered in the preparation of this report. The Kenya Law Reform Commission (KLRC), the Registrar of Companies, the National Counter Terrorism Centre, the National Police Service Commission and the Financial Reporting Centre (FRC) submitted their written memoranda to the Committee.

While considering the Bill, the Committee observed that the Bill addresses fundamental issues relating to combating terrorism financing and financing of proliferation of weapons of mass destruction as prescribed by the Financial Action Task Force (FATF). Notably, the FATF is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction and its recommendations are recognized as the international anti-money laundering (AML) and counter-terrorist financing (CFT) standards.

Generally, the Bill seeks to align various statutes to the international standard on combating terrorism financing and financing of proliferation of weapons of mass destruction. By virtue of Kenya's membership to the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), it subscribes to the FATF Recommendations. ESAAMLG is a regional entity committed to upholding worldwide principles in the campaign against financial wrongdoing, terrorism and proliferation funding. Therefore, the Bill is timely and vital to the country's participation in fighting money laundering and financing of terrorism in the international financial system.

On behalf of the Departmental Committee on Justice and Legal Affairs and pursuant to the provisions of Standing Order 199(6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of the Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Bill (*National Assembly Bill No. 35 of 2023*). The Committee is grateful to the Offices of the Speaker and Clerk of the National Assembly for the logistical and technical support accorded to it

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during its consideration of the Bill. The Committee further wishes to thank the LSK, KLRC, Registrar of Companies , Transparency International, the National Counter Terrorism Centre, the National Police Service Commission and the Financial Reporting Centre (FRC) for submitting their views on the Bill.

Finally, I wish to express my appreciation to the Honourable Members of the Committee and the Committee Secretariat who made useful contributions towards the preparation and production of this report.

It is my pleasure to report that the Committee has considered the Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Bill, 2023 (*National Assembly Bill No. 35 of 2023*) and have the honour to report back to the National Assembly with the recommendation that the House **approves the Bill with amendments as proposed in the Schedule of Amendments.**

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

CHAPTER ONE

1 PREFACE

1.1 Establishment of the Committee

1. The Departmental Committee on Justice and Legal Affairs is one of twenty departmental committees of the National Assembly established under **Standing Order 216** whose mandate pursuant to the **Standing Order 216 (5)** is as follows:

- i. *To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;*
- ii. *To study the programme and policy objectives of ministries and departments and the effectiveness of the implementation;*
- iii. *To, on a quarterly basis, monitor and report on the implementation of the national budget in respect of its mandate;*
- iv. *To study and review all legislation referred to it;*
- v. *To study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;*
- vi. *To investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;*
- vii. *To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);*
- viii. *To examine treaties, agreements and conventions;*
- ix. *To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation;*
- x. *To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and*
- xi. *To examine any questions raised by Members on a matter within its mandate.*

1.2 Mandate of the Committee

2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider¹:-
 - a) The Judiciary;
 - b) Tribunals;
 - c) Access to Justice;
 - d) Public prosecutions;
 - e) Ethics, Integrity and Anti-corruption;
 - f) Correctional services;
 - g) Community service orders and witness protection;
 - h) Constitutional Affairs;
 - i) Sovereign immunity;
 - j) Elections including referenda;
 - k) Human rights;
 - l) Political parties; and
 - m) The State Law Office' including insolvency, law reform, public trusteeship, marriages and legal education.
3. In executing its mandate, the Committee oversees the following Ministries/Departments:
 - a) State Department of Correctional Services;
 - b) State Law Office and Department of Justice;
 - c) The Judiciary;
 - d) Judicial Service Commission;
 - e) Office of the Director of Public Prosecutions;
 - f) Ethics and Anti-Corruption Commission;
 - g) Independent Electoral and Boundaries Commission;
 - h) Commission on Administrative Justice;
 - i) Office of the Registrar of Political Parties;
 - j) Witness Protection Agency;
 - k) Kenya National Commission on Human Rights;
 - l) Kenya Law Reform Commission; and

¹ National Assembly Standing Orders, 6th Edition.

m) Council of Legal Education.

1.3 Committee Membership

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

Chairperson

Hon. Murugara George Gitonga, MP
Tharaka Constituency

UDA Party

Vice-Chairperson

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

MCCP Party

Members

Hon. Maalim Farah, MP
Dadaab Constituency

WDM-Kenya

Hon. Francis Kajwang' Tom Joseph, MP
Ruaraka Constituency

ODM Party

Hon. Junet Mohamed, CBS, MP
Suna East Constituency

ODM Party

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

ODM Party

Hon. Onyiego Silvanus Osoro, CBS, MP
South Mugirango Constituency

UDA Party

Hon. Muchira Michael Mwangi, MP
Ol Jorok Constituency

UDA Party

Hon. Makali John Okwisia, MP
Kanduyi Constituency

FORD-Kenya

Hon. Muriu Wakili Edward, MP
Gatanga Constituency

UDA Party

Hon. Maina Jane Njeri, MP
Kirinyaga (CWR)

UDA Party

Hon. Gichohi Kaguchia John Philip, MP
Mukurweini Constituency

UDA Party

Hon. Mogaka Stephen M, MP
West Mugirango Constituency

Jubilee Party

Hon. Aden Daud, EBS, MP
Wajir East Constituency

Jubilee Party

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

Jubilee Party

1.4 Committee Secretariat

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

Mr. Douglas Katho
Clerk Assistant I/Head of Secretariat

Mr. Ronald Walala
Senior Legal Counsel

Ms. Vivienne Ogega
Research Officer III

Mr. Stanley Lagat
Senior Serjeant-At-Arms

Ms. Faith Jully Malala
Public Communication Officer III

Ms. Winnie Kiziah
Media Relations Officer II

Ms. Fridah Ngari
Media Relations Officer III

Mr. Omar Abdirahim
Fiscal Analyst II

Mr. Antony Kariuki
Serjeant-At-Arms

Ms. Jael Ayiego
Clerk Assistant III

Mr. Peter Mutethia
Audio Officer III

Mr. Abdikafar Abdi
Clerk Assistant III

Mr. Alex Amwatta
Hansard Reporter III

Mr. Alvin Ochieng'
Research Officer III

Mr. Silas Opanga
Hansard Reporter III

CHAPTER TWO

2 OVERVIEW OF THE ANTI-MONEY LAUNDERING AND COMBATING OF TERRORISM FINANCING LAWS (AMENDMENT) BILL (*NATIONAL ASSEMBLY BILL NO. 35 OF 2023*)

2.1 Background

6. The Bill which was sponsored by the Majority Leader, Hon. Kimani Ichung'wah, MGH, MP, was published on Tuesday 11th July, 2023 and read for the first time in the House on Wednesday 26th July, 2023. It was thereafter committed to two Departmental Committees; and the Departmental Committee on Finance and National Planning and the Departmental Committee on Justice and Legal Affairs. Vide Communication No. 51 of 2023, the Honourable Speaker of the National Assembly directed that the Departmental Committee on Justice and Legal Affairs be the lead Committee.

2.2 Summary of Legal Provisions

7. The Bill seeks to amend seventeen (17) Acts of Parliament to introduce amendments targeted at implementing various measures to combat money laundering, terrorism financing and financing of proliferation of weapons of mass destruction.
8. After the First Reading of the Bill, the Hon. Speaker committed amendments to the following ten (10) Acts to the Committee to facilitate public participation and report to the House—
 - a) The Extradition (Contiguous and Foreign Countries) Act (Cap.76);
 - b) The Extradition (Commonwealth Countries) Act (Cap. 77);
 - c) The State Corporations Act (Cap. 446);
 - d) The Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003);
 - e) The Proceeds of Crime and Anti-Money Laundering Act, 2009 (No. 9 of 2009);
 - f) The National Police Service Act, 2011 (No. 11A of 2011);
 - g) The Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011);
 - h) The Mutual Legal Assistance Act, 2011 (No. 36 of 2011);
 - i) The Prevention of Terrorism Act, 2012 (No. 30 of 2012); and
 - j) The Companies Act, 2015 (No. 17 of 2015).
9. The rest of the amendments contained in the Bill were committed to the Departmental Committee on Finance and National Planning. The Departmental Committee on Justice and Legal Affairs was designated as the Lead Committee for purposes of Reporting to the House.

10. On the amendments committed to JLAC, the Bill seeks to—

- (1) Amend the **Extradition (Contiguous and Foreign Countries) Act (Cap. 76)** to allow the Attorney General to surrender a fugitive criminal who consents to be extradited to a requesting state; and to expressly cross-reference the offences under the Prevention of Terrorism Act that are extraditable i.e. proliferation acts, financing of proliferation acts, collection or provision of property and services for the commission of terrorist acts; dealing in property owned or controlled by terrorist groups; soliciting and giving of support to terrorist groups or for the commission of terrorist acts; and facilitation of terrorist acts.
- (2) Amend the **Extradition (Commonwealth Countries) Act (Cap. 77)** to allow the Attorney General to surrender a fugitive criminal who consents to be extradited to a requesting state; and to expressly cross-reference the offences under the Prevention of Terrorism Act that are extraditable i.e. e. proliferation acts, financing of proliferation acts, collection or provision of property and services for commission of terrorist acts; dealing in property owned or controlled by terrorist groups; soliciting and giving of support to terrorist groups or for the commission of terrorist acts; and facilitation of terrorist acts.
- (3) Amend the **State Corporations Act (Cap. 446)** to exclude the Financial Reporting Centre from the definition of “state corporation”.
- (4) Amend the **Anti-Corruption and Economic Crimes Act (No. 3 of 2003)** to include an offence involving the laundering of the proceeds of corruption in the definition of “economic crime”.
- (5) Amend the **Proceeds of Crime and Anti-Money Laundering Act, 2009 (No. 9 of 2009)** to—
 - (a) expand the scope of application of the cover the combating of terrorism financing and financing of proliferation of weapons of mass destruction;
 - (b) allow the Financial Reporting Centre to share information with any foreign financial intelligence unit or appropriate foreign law enforcement authority, subject to provisions of the Act and any conditions the Director-General of the Centre considers appropriate;
 - (c) subject designated non-financial businesses and professions in which the risk of terrorism financing and financing of proliferation of weapons of mass destruction exists to the provisions of POCAMLA;
 - (d) enhance the penalty for willful failure to report the conveyance of monetary instruments into or out of Kenya, or material misrepresentation of the amount of

- monetary instruments from a fine not exceeding ten percent of the value of the instruments to a fine not exceeding fifty percent of the amount of the monetary instruments, or imprisonment for a term not exceeding five years, or to both;
- (e) require supervisory bodies to apply their regulatory and supervisory powers and obligations to combat money laundering, terrorist financing and proliferation financing;
 - (f) Insert new sections 36B, 36C and 36D to provide for cooperation and collaboration between the Financial Reporting Centre and supervisory bodies in combating money laundering, terrorism financing and proliferation financing; outline the enforcement powers of supervisory bodies under the Act; and provide for the adoption of a risk-based approach the monitoring of reporting institutions, respectively;
 - (g) enhance the penalty for failure to comply with an obligation under the Act to a fine not exceeding three million shillings for individuals and a fine not exceeding five million shillings for body corporates;
 - (h) reduce the period within which a suspicious activity or transaction is to be reported to the centre from seven days to two days;
 - (i) require reporting institutions to identify and verify persons or entities seeking to enter into a business relationship with them, including their customers. With regard to government departments, a reporting institution must obtain authorization from the National Treasury, in addition to a letter from an accounting officer;
 - (j) require reporting institutions to apply appropriate countermeasures proportionate to the risk presented by countries on their own initiative and also in the event they are required to do so by the Financial Action Task Force (FATF);
 - (k) empower the Financial Reporting Centre to inform reporting institutions of any high-risk countries and the countermeasures applicable to such countries;
 - (l) appoint the Attorney-General as the chairperson of the Asset Recovery Advisory Board and limit the role of the Board to an advisory role and approval of budgets and reports;
and
 - (m) increase the value of a cash transaction which a reporting institution is obliged to file a report with the Financial Reporting Centre from US\$ 10,000 or to US\$ 15,000;
- (6) Amend the **National Police Service Act, 2011 (No.11A of 2011)** to insert a new section 56A allowing the controlled delivery of illicit or suspect consignments for purposes of investigating an offence;

- (7) Amend the **Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011)** to allow state agencies and organs to grant the Ethics and Anti-Corruption Commission access to information on the prevention of economic crime;
- (8) Amend the **Mutual Legal Assistance Act, 2011 (No. 36 of 2011)** to preclude secrecy or confidentiality rules applying to designated non-financial businesses or professions from being used as a ground against mutual legal assistance;
- (9) Amend the **Companies Act, 2015 (No. 15 of 2015)** to—
 - (a) prescribe requirements on particulars of nominee shareholders, nominee directors and beneficial ownership that must be provided to the Registrar;
 - (b) require companies to keep a record of information on its beneficial owners for at least ten (10) years from the date they cease to be beneficial owners;
 - (c) repeal Section 104 of the Act which precludes the registration of Trusts;
 - (d) require companies to maintain a register of nominee directors
 - (e) allow companies to appoint either a company secretary or a contact person obligated to maintain records relating to the directorship, shareholding, beneficial ownership and other information required to be kept by the company;
 - (f) increase the period during which the Registrar is required to retain originals or lodged documents to seven (7) years;
 - (g) include failure to file annual returns or financial statements for five years and failure to lodge a copy of the register of beneficial ownership as reasons for the belief that a company is not carrying on business and its striking off from the register; and
 - (h) extend the obligation of preserving company records for at least seven years to foreign companies and the officers, administrators or liquidators of companies that are struck off or liquidated.
- (10) Amend the **Prevention of Terrorism Act, 2012 (No. 30 of 2017)** to—
 - (a) criminalize the act of manufacturing, acquiring, possessing, developing, exporting, trans-shipping, brokering, transporting, transferring, stockpiling, supplying, selling or using nuclear, ballistic, chemical, radiological or biological weapons or any other weapon capable of causing mass destruction, and their means of delivery and related materials including technology, goods, software, services or expertise in contravention of this Act or any international obligations derived from relevant United Nations Security Council Resolutions. These “proliferation acts” and their financing are

- punishable, upon conviction, to imprisonment for a term not exceeding twenty years or to a fine not exceeding twenty million shillings, or to both;
- (b) criminalize the financing of travel for terrorism purposes and associating with or professing association with a terrorist group;
 - (c) penalize making available or providing assets and economic resources to designated persons and entities with imprisonment for a term not exceeding twenty years for a natural person and a fine not exceeding twenty million shillings for a legal person;
 - (d) penalize a legal person that commits a terrorist act, harbours terrorists, provides weapons to terrorist groups; directs the commission of a terrorist act; fails to prevent entry of weapons; engages in radicalization, recruitment or training of members of a terrorist group, aids in the commission of a terrorist act in foreign states; is a member of a terrorist group; incites a person or a group of persons to carry out a terrorist act; engages in kidnapping and hostage-taking while committing a terrorist act; or collects, generates or transmits information for the use in the commission of a terrorist act to a fine not exceeding thirty million shillings;
 - (e) penalize a legal person that contravenes any other provisions of the Prevention of Terrorism Act to a fine not exceeding twenty million shillings;
 - (f) require the Director of the Counter-Terrorism Centre to design and formulate a framework for the de-radicalization, disengagement and re-integration Programme for returnees and at-risk individuals;
 - (g) require all persons intending to engage in activities to prevent and counter violent extremism and radicalization through counter-messaging or public outreach, and disengagement and reintegration of radicalized individuals to seek the written approval of the Centre prior to engaging in the activities;
 - (h) establish the Counter Financing of Terrorism Inter-Ministerial Committee to, with the assistance of prescribed sector-specific Law Enforcement Coordinating Groups, implement resolutions relating to the suppression of terrorism financing and the prevention, suppression and disruption of the proliferation of, and financing of, dealings with weapons of mass destruction and other related resolutions in accordance with the Act; and to formulate and supervise the implementation of the National Strategy and Action Plan on Counter Financing of Terrorism; and

- (i) outline the roles of the Financial Reporting Centre and supervisory bodies in combating the financing of terrorism and financing proliferation acts.

CHAPTER THREE

3 PUBLIC PARTICIPATION AND STAKEHOLDER ENGAGEMENT ON THE BILL

3.1 Legal Framework on Public Participation

11. 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.”

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

*“(3) The Departmental Committee to which a Bill is committed shall **facilitate public participation on the Bill** through an appropriate mechanism including-*

(a) inviting submission of memoranda;

(b) holding public hearings;

(c) consulting relevant stakeholders in a sector; and

(d) consulting experts on technical subjects.

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

3.2 Memoranda Received on the Anti-Money Laundering and Combating Terrorism Financing (Amendment) Bill

13. Pursuant to the aforementioned provisions of law, the Clerk of the National Assembly placed an advertisement in the print media on Monday 31st July, 2023 inviting the public to submit memoranda by way of written statements on the Bill. Further, the Clerk of the National Assembly vide letter Ref. No. *NA/DDC/JLAC/2023/092* dated 14th August, 2023 invited key stakeholders to submit views on the Bill and attend a public participation forum on Tuesday 15th August, 2023 respectively.

14. To this end, the Departmental Committee on Justice and Legal Affairs received eight memoranda from the Law Society of Kenya (LSK), the Kenya Law Reform Commission (KLRC), the Registrar of Companies, the State Corporations Advisory Committee, Transparency International, the National Counter Terrorism Centre, the National Police Service Commission and the Financial Reporting Centre (FRC). The memoranda are annexed to this report as *Annexure 9*.

15. The Registrar of Companies submitted memoranda in support of all the proposed amendments to the Companies Act, 2015.

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16. The LSK, KLRC, Transparency International, the National Counter Terrorism Centre and the National Police Service Commission submitted memoranda in support of the Bill with some reservations while the FRC submitted a Joint Memorandum together with the Attorney General and the Law Society of Kenya proposing amendments to POCAMLA and consequential amendments to the LSK Act. They submitted as follows:

a) The Extradition (Contiguous and Foreign Countries) Act (Cap. 77) and Extradition (Commonwealth Countries) Act (Cap. 76)

17. The LSK noted that the two Acts introduce the concept of 'simplified extradition' where consent is sought arbitrarily. Thus, it proposed the following amendment to ensure that consent is not sought arbitrarily:

"Informed Consent" means any manifestation of express, unequivocal, free, specific and informed indication of the fugitive criminal's wishes by a statement or by a clear affirmative action, signifying agreement to be extradited to the requesting state."

18. LSK further proposed that Section 10A (2) be amended to indicate that prior to consent by the fugitive criminal, s/he be afforded the opportunity to seek independent legal advice; and the assistance of an interpreter without payment if the fugitive criminal person cannot understand the language used when obtaining consent. It was their further proposal that the consent form list out all the charges against the fugitive person and that it be witnessed by an adult of sound mind for purposes of striking a balance between expediency and protecting the rights of the individual involved.

Committee Observation

19. The Committee agreed with the proposals.

b) State Corporations Act, 2003

20. Transparency International endorsed the amendment to Section 2(b) noting that it protects the independence of the Financial Reporting Centre from Executive overreach. On its Part, the State Corporations Advisory Committee proposed that the exemption of the FRC from the provisions of the State Corporations Act should only relate to its operational independence. In their view, a blanket exemption for the FRC would prevent any oversight on the governance of the Centre and the utilization of funds voted to it.

Committee Observation

21. The Committee agreed with the views of Transparency International on the need to protect the operational independence of the FRC in line with FATF Standards to which the country subscribes. The Committee further noted that the Centre is not a commercial entity and is funded principally to meet its recurrent expenditure.

c) The Proceeds of Crime and Anti-Money Laundering Act, 2009

22. The LSK submitted that Clause 24C (1) of the Bill proposes a new opening statement that appears to be restrictive to the scope of application with respect to reporting institutions. It further stated that Section 24C of the Act currently covers both reporting institutions and specified persons. Hence, it was their submission that the opening statement remain as is or be amended as follows:

“Where a specified person or reporting institution fails to comply with the provisions of this Act, the Centre may, for reason disclosed in writing – ”

23. It further noted that while section 24C (2) of the Act provides that the Financial Reporting Centre (FRC) shall give the person or reporting institution a written notice of not less than fourteen days to show cause as to why they should not be barred from employment in a reporting institution, the LSK was of the opinion that the section be amended to expressly provide for an avenue for appeal or judicial review. It proposed that section 24(C) be amended by introducing the following new subsection:

“(3) Any person aggrieved by the Centre's exercise of powers under this section may apply to the High Court for judicial review within fourteen days after the decision is made.”

24. The LSK submitted that Clause 36A (3A) introduces an amendment that is a repetition of the mandate of supervisory bodies under Section 36A (5) (a) of the Act as read with Section 36A (2) and is unnecessary and thus, should be deleted to prevent redundancy.

25. Further, the LSK noted that while Clause 36B will enhance cooperation between the supervisory bodies with their domestic and international bodies, there is a need to ensure that information sharing especially with foreign counterparts upholds the principles and obligations of personal data protection pursuant to Section 25 of the Data Protection Act, 2019. It, therefore, proposed the inclusion of a general provision under the proposed amendment to Section 2A on the scope of the application as follows:

“For the purposes of this Act, all information collected shall be dealt with in accordance with the principles and provisions of the Data Protection Act, 2019.”

26. Transparency International proposed that the definition of ‘competent authority’ be aligned with the definition provided under the Companies Act, 2015 to ensure consistency with existing laws.
27. The Financial Reporting Centre, through its Director-General, submitted a Joint Memorandum signed by the Attorney-General, the FRC and the Law Society of Kenya containing agreed proposals to amend POCAMLA to settle Nairobi Constitutional Petition E005 of 2022 *Mwaura Kabata vs Hon Attorney General & Others*² and ensure the compliance of Advocates notaries and independent legal professions through a self-regulatory mechanism supervised by the LSK in compliance with FATF standards.

Committee Observation

28. The Committee noted that the amendments proposed were limited to specific provisions of POCAMLA. In relation to the concerns raised by the LSK, the Committee was of the view that the proposals to amend section 24C of POCAMLA were limited to subsection (1) and adequately cater for the concern raised. With regard to the amendments to section 36A, the Committee noted that the amendments seek to expand the scope of the section to cover terrorism financing and financing of proliferation of weapons of mass destruction. On the concern raised with regard to sharing of data, the Committee observed that the current section 40(2) of POCAMLA requires the FRC to adhere to the provisions of the Data Protection Act, 2019.
29. Additionally, the Committee noted that judicial review accrues to an individual as of right under the Constitution. It would therefore not be prudent to legislate further on the same.
30. With regard to the issue raised by Transparency International, the Committee noted that the term “competent authority” is variously defined in different Acts of Parliament to connote the entities to which those Acts apply or refer to. As such, harmonization of the definition across different Acts without taking into account the peculiar context of the provisions of each Act would be counterproductive.

² Kabata & 4 others v National Assembly & 3 others; Law Society of Kenya & 16 others (Interested Parties) (Petition E338, E342, 372, 373 & E407 of 2022 (Consolidated)) [2023] KEHC 481 (KLR) (Constitutional and Human Rights) (30 January 2023) (Judgment)

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31. With regard to the Joint Memorandum submitted by the FRC, Attorney-General and LSK, the Committee noted that the compromise arrived at was a welcome reprieve from the long-running court dispute on the mandatory listing of Advocates as reporting institutions and its threat to the sanctity of attorney-client privilege. The Committee, therefore, agreed with the proposals contained in the memorandum.
32. The Committee further noted that agreeing with the proposed amendments to POCAMLA in the Joint Memorandum would necessitate the inclusion of consequential amendments to the Law Society of Kenya Act in the Bill to bestow the LSK with a supervisory mandate over lawyers, notaries and independent legal professionals for purposes of enforcing anti-money laundering standards in the legal profession.

d) The Ethics and Anti-corruption Commission Act, 2011

33. The Ethics and Anti-Corruption Commission and the LSK submitted that the proposed section 11(3A) be reworded to empower the Commission to gain access to relevant information from other state entities for purposes of investigations.

Committee Observation

The Committee noted Chapter 6 of the Constitution, the Anti-Corruption and Economic Crimes Act 2003 and the Ethics and Anti-Corruption Act, 2011, and the Leadership and Integrity Act 2012 adequately empower the Commission with regard to the prevention and investigation of anti-corruption and economic crimes, the Committee therefore agreed with the proposal in the **Bill**.

e) The National Police Service Act, 2011

34. The LSK proposed the inclusion of a sub-section empowering the Cabinet Secretary to make regulations governing the procedure of controlled delivery introduced under the proposed amendments in the proposed new section 56A.
35. Transparency International noted that the proposed new section 56A, as drafted, could open up avenues for corruption and should be amended to include an accountability mechanism.
36. The National Police Service Commission proposed that the provision relating to controlled delivery be amended to specify that the officers allowed to engage in such delivery be gazetted officers of the rank of inspector and above, and that the Cabinet Secretary be empowered to prescribe regulations to curb against abuse of the technique. They further proposed the

inclusion of the Office of the Director of Public Prosecutions in the list of Law Enforcement Coordinating Groups in the proposed new Schedule of the Act.

Committee Observation

37. The Committee agreed to the proposals.

f) The Companies Act, 2015

38. The LSK was of the view that the whereas the amendments to the Act are crucial to promoting transparency and disclosure of beneficial ownership in conformity with the Financial Action Task Force (FATF) Standards, there is no means of verifying information declared by companies. Thus, it proposed that this be included in the Bill.

39. Transparency International was of the view that the period of maintaining company records of a foreign company struck off pursuant to Sections 991 and 992 of the Act under Clause 992A be amended to seven years to ensure consistency with other provisions on record keeping for other types of companies and LLPs.

Committee Observation

40. The Committee agreed with the proposal by Transparency International on consistency. With regard to the proposal by the LSK, the Committee noted that it would be onerous and impracticable to require the Registrar to verify all information declared by companies in compliance with obligations imposed by the Act.

g) Prevention of Terrorism Act, 2012

41. The National Counter Terrorism Centre proposed amendments to Section 40B (2)(b), (2)(d) and a new subsection 3 concerning the formulation of a framework for the deradicalisation, dis-engagement and re-integration programme for returnees and at-risk individuals.

Committee Observation

42. The Committee observed that the proposals were addressing a matter that had not been subjected to public participation.

43. The National Counter Terrorism Centre also proposed that the proposed new section 40D of the Act be amended to include the Director of the National Counter-Terrorism Centre as a Member of the Counter Financing of Terrorism Inter-Ministerial Committee.

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Committee Observation

44. The Committee agreed with the proposal.

CHAPTER FOUR

4 COMMITTEE OBSERVATIONS

45. Upon reviewing the Bill and the submissions received, the Committee made the following observations:
- a) A close reading of the Memorandum and Objects of the Bill discloses that the Bill seeks to align various statutes to the international standard on combating terrorism financing and financing of proliferation of weapons of mass destruction as prescribed by the Financial Action Task Force (FATF);
 - b) The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and financing of the proliferation of weapons of mass destruction. Its recommendations are recognised as the international anti-money laundering (AML) and counter-terrorist financing (CFT) standard.
 - c) Over 200 nations and territories have jointly committed to integrating the FATF's Recommendations into their frameworks. Kenya subscribes to the FATF Recommendations through its membership in the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG). ESAAMLG is a regional entity committed to upholding worldwide principles in the campaign against financial wrongdoing, terrorism, and proliferation funding.
 - d) The fundamental actions delineated in the FATF's recommendations involve the following components—
 - (i) identifying the risks, and developing policies and domestic coordination;
 - (ii) pursuing money laundering, terrorist financing and the financing of proliferation;
 - (iii) applying preventive measures for the financial sector and other designated sectors;
 - (iv) establishing powers and responsibilities for the competent authorities and other institutional measures;
 - (v) enhancing the transparency and availability of beneficial ownership information of legal persons and arrangements; and
 - (vi) facilitating international cooperation.
 - e) The Bill is therefore timely and addresses key issues that have a role to play in the country's participation in the international financial system.

f) Attorney-client privilege remains protected in law. As recently as 2022, the House amended the Proceeds of Crime and Anti-Money Laundering Act, 2009 to include Advocates and other professionals as reporting institutions for the purposes of the Act. The Committee noted that the Court had previously, in Nairobi High Court Petition No. E005 of 2022 *Mwaura Kabata vs Hon Attorney General & Others*³, issued conservatory orders staying the operationalisation of the listing of Advocates and other cited professions as reporting institutions. The proposals contained in the Joint Memorandum submitted by the FRC, the Attorney General and the LSK, if adopted by the House would adequately address the concerns of all parties.

³ Kabata & 4 others v National Assembly & 3 others; Law Society of Kenya & 16 others (Interested Parties) (Petition E338, E342, 372, 373 & E407 of 2022 (Consolidated)) [2023] KEHC 481 (KLR) (Constitutional and Human Rights) (30 January 2023) (Judgment)

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CHAPTER FIVE

5 COMMITTEE RECOMMENDATIONS

46. The Committee, having considered the Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Bill, 2023 (*National Assembly Bills No. 35 of 2023*) and the submissions from members of the public and stakeholders, **recommends that the House approves the Bill—**

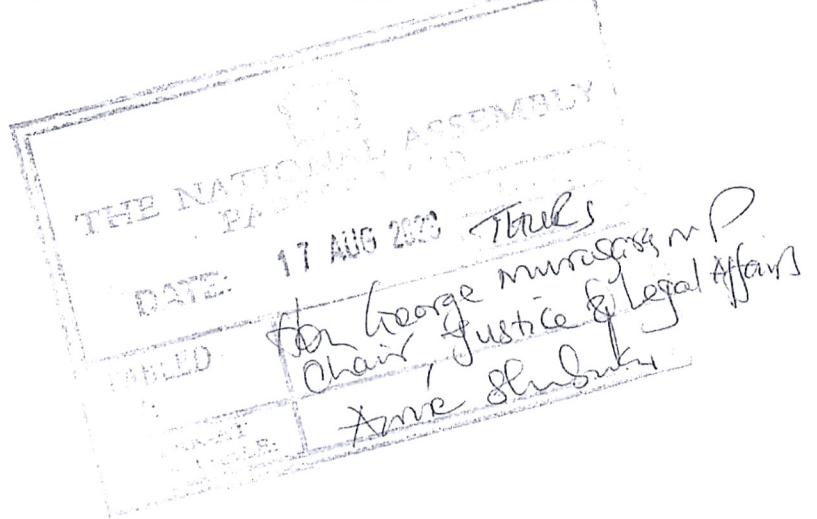
- (1) with amendments to the provisions relating to the Extradition (Commonwealth Countries) Act (Cap. 76); the Extradition (Contiguous and Foreign Countries) Act (Cap. 77); the Proceeds of Crime and Anti-Money Laundering Act, 2009; the National Police Service Act, 2011; the Prevention of Terrorism Act, 2012 and the Companies Act, 2015 as proposed in the Schedule of Amendments; and
- (2) with consequential amendments to the Law Society of Kenya Act, 2014 as proposed in the Schedule of Amendments

SIGNED.......... DATE..... 17. 8. 2023

HON. GEORGE GITONGA MURUGARA, MP

CHAIRPERSON

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS



6 SCHEDULE OF AMENDMENTS

47. In view of the observations made, the Committee proposed the following amendments to the Bill:

1) **THAT** the Bill be amended with regard to the amendments the Extradition (Commonwealth Countries) Act (Cap. 76) in the proposed new section 10A by inserting the following new subsections immediately after subsection (4)—

(5) Prior to executing a consent under this section, a fugitive criminal shall be afforded—

(a) the opportunity to seek independent legal advice; and

(b) an interpreter at no cost if the fugitive criminal is unable to understand the language used.

(6) A consent obtained under this section shall—

(a) outline the extraditable charges that it relates to; and

(b) be witnessed by an adult of sound mind.

(7) For purposes of this section “consent” means the manifestation of express, unequivocal, free, specific and informed indication of the fugitive criminal’s wishes by a statement or by a clear affirmative action, signifying agreement to be extradited to the requesting state.”

Rationale: To strike a balance between expediency and protecting the rights of the individual involved.

2) **THAT** the Bill be amended with regard to the amendments to the Extradition (Contiguous and Foreign Countries) Act (Cap. 77) in the proposed new section 13A by inserting the following new subsections immediately after subsection (4)—

“(5) Prior to executing a consent under this section, a fugitive criminal shall be afforded—

(a) the opportunity to seek independent legal advice;

(b) an interpreter at no cost if the fugitive criminal is unable to understand the language used.

(6) A consent obtained under this section shall—

(a) outline the extraditable charges that it relates to; and

(b) be witnessed by an adult of sound mind.

(7) For purposes of this section “consent” means the manifestation of express, unequivocal, free, specific and informed indication of the fugitive criminal’s wishes by a statement or by a clear affirmative action, signifying agreement to be extradited to the requesting state.””

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Rationale: To strike a balance between expediency and protecting the rights of the individual involved.

- 3) **THAT** the Bill be amended with regard to the Proceeds of Crime and Anti-Money Laundering Act, 2009 as follows—

<i>Provision</i>	<i>Amendment</i>
s.2	<p>Insert the following new definition in proper alphabetical sequence—</p> <p>“Self-Regulatory Body” means the Law Society of Kenya;</p>
S.8	<p>Insert the following new Sub-Section 8(3) immediately after Sub-Section 8(2) to read—</p> <p>Provided that where lawyers, notaries and other independent legal professionals seek to dissuade a client from engaging in illegal activity, this shall not amount to tipping-off.</p>
S.36 and S.36A	<p>Add the following word “and Self-Regulatory Body” immediately after “Supervisory Body” whenever it appears in Section 36 and 36A.</p>
S.44	<p>Insert the following proviso in sub section (3). Provided that lawyers, notaries and other independent legal professionals may send reports under this sub section through the Law Society of Kenya which will build reporting channels to the Centre.</p> <p>Insert the following new Sub-Section3A immediately after section 44(3) to read—</p> <p>Lawyers, notaries, other independent legal professionals, are not required to report suspicious transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.</p> <p>Insert the following new Sub-Section3AA immediately after section 44(3) to read—</p> <p>The information referred to in Sub-Section 3A refers to information received from or obtained by the lawyer,</p>

notary, or other independent legal professional from a client: (a) in the course of ascertaining the legal position of their client, or

(b) in performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings.

Insert the following new Sub-Section 3B immediately after section 44(3) to read—

The Law Society of Kenya and the Financial Reporting Centre Shall establish appropriate mechanisms to cooperate for exchange of information relating to suspicious transaction reporting and supervision.

Rationale: To create a self-regulatory mechanism where the Law Society of Kenya (LSK) is introduced as a Self-Regulating Body (SRB) responsible for supervision of Advocates in relation to compliance with POCAMLA

4) **THAT** the Bill be amended with regard to the amendments to the National Police Service Act, 2011 in the proposed section 56A—

(a) by inserting the following new subsection immediately after subsection (1)—

“(1A) The Cabinet Secretary shall prescribe, in regulations, the procedure and safeguards applicable to a controlled delivery.”

(b) by deleting the definition “authorised officer” in the proposed subsection (2) and substituting therefor the following new definition—

“authorised officer” means a gazetted officer of the rank of inspector and above;”

Rationale: (1) To empower the Cabinet Secretary to gazette Regulations prescribing the modalities of a controlled delivery and safeguards preventing abuse of the investigative technique.

(2) To limit the use of controlled delivery to officers of the rank of inspector and above.

5) **THAT** the Bill be amended with regard to the amendments to the Companies Act, 2015 in the proposed new section 992A by deleting the word “six” appearing immediately after the words “at least” and substituting therefor the word “seven”.

Rationale: To harmonize the period which a local representative of a foreign company is required to retain the records relating to the company with the period of seven years prescribed for local companies and limited liability partnerships.

6) **THAT** the Bill be amended with regard to the amendments to the Prevention of Terrorism Act, 2014—

(a) in the proposed new section 40D(2) by inserting the following new paragraph immediately after paragraph (g)—

(ga) the Director of the National Counter Terrorism Centre;

(b) in the proposed new Schedule by inserting the following new paragraph immediately after paragraph (f)—

(fa) Office of the Director of Public Prosecution;

Rationale: (1) To include the Director of the National Counter-Terrorism Centre as a Member of the Counter Financing of Terrorism Inter-Ministerial Committee.

(2) To include the Office of the Director of Public Prosecutions in the list of Law Enforcement Coordinating Groups in the proposed new Schedule of the Act.

7) **THAT** the Bill be amended to insert the following new section in the Law Society of Kenya Act, 2014—

Powers on anti-money laundering, combating the financing of terrorism countering proliferation financing matters.

4A. (1) Pursuant to section 36A of the Proceeds of Crime and Anti-Money Laundering Act, 2009, the Law Society of Kenya shall regulate, supervise and enforce compliance for anti-money laundering, combating the financing of terrorism and countering proliferation financing for lawyers, notaries and other legal professionals.

(2) In undertaking its mandate under subsection (1), the Society may—

(a) conduct onsite inspection;

(b) compel the production of any document or information the LSK may require for the purpose of discharging its supervisory mandate under the Proceeds of Crime and Anti-Money Laundering Act, 2009;

(c) impose monetary, civil or administrative sanctions for violations related to anti-money laundering, combating the financing of terrorism and countering proliferation financing purposes;

(d) issue regulations, guidelines, directions, rules or instructions for anti-money laundering, combating the

financing of terrorism and countering proliferation financing purposes;

(e) cooperate and share information for anti-money laundering, combating the financing of terrorism and countering proliferation financing purposes; and

(f) take such action as is necessary to supervise and enforce compliance by lawyers, notaries and other legal professionals with the provisions of the Proceeds of Crime and Anti-Money Laundering Act and any regulations, guidelines, rules, instruction or direction made or issued thereunder.

(2) The provisions under this Section shall come into effect after six (6) months from the date of enactment of this Act.

Rationale: To enable LSK to issue enforceable guidelines for AML/CFT purposes. The amendments shall come into effect six (6) months from the date of enactment to allow for—

- (a) sensitization of LSK members on the new requirements;
- (b) setting up by the LSK of structure to take on board these new responsibilities; and
- (c) give an opportunity to LSK to consider best practices and develop appropriate regulations/guidelines.