



## **KENYA NATIONAL COMMISSION ON HUMAN RIGHTS**

### **REVIEW OF THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2018 (NATIONAL ASSEMBLY BILL No. 12 of 2018)**

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## **A. INTRODUCTION**

1. The Kenya National Commission on Human Rights is an independent National Human Rights Institution created under Article 59 of the Constitution with a broad mandate to promote the culture and the respect of human rights in the Republic of Kenya. The operations of the Commission are guided by the United Nations Paris Principles on the establishment and functioning of independent national human rights institutions commonly referred to as the Paris Principles.
2. The Commission under Article 249 of the Constitution also has a mandate to secure observance of all state organs of democratic values and principles and to promote constitutionalism. Article 10 of the constitution requires all state organs to ensure they uphold constitutionalism and the rule of law whenever they make public policy decisions or interpret the constitution. One of the strategies pursued by the Commission to secure observance of all state organs of democratic values and principles is through the review of bills and policies.
3. It is in this regard, that the Commission issues this review on the Statute Law (Miscellaneous Amendments) Bill.

## **B. THE ADVISORY**

### **4. Judicature Act**

The amendment to Section 2 of the Judicature Act proposes that the meaning of the word 'judge' should include 'a judge serving in an acting capacity'. The Commission notes that the Constitution does not expressly provide for the position of an acting judge. In addition, the memorandum of objects does not provide a justification for the appointment of an acting judge. The Commission advises that the proposal be withdrawn/reconsidered as the proposal does not accord with the Constitution

### **5. The Civil Procedure Act**

This Act provides for the use of the term 'magistrate court of the third class'. This level of the magistracy, however, has since been abolished.

The Commission proposes that the phrase 'other than a magistrate's court of third class' in section 65(1) (b) are deleted because third- class magistrate's courts no longer exist.

## **6. The Registration of Persons Act**

The Commission welcomes the establishment of a National Integrated Identity Management System. Ensuring that all personal information is available from a single source will facilitate efficient and effective service delivery to Kenyans.

## **7. The Housing Act**

Section 3(2) of the Housing Act provides for the establishment and constitution of the National Housing Corporation. The following are proposed members to the National Housing Corporation:

- a chairperson appointed by the President;
- the Principal Secretary responsible for housing in the Ministry;
- a person appointed by the Cabinet Secretary for the time being responsible for finance; and
- not less than five nor more than seven persons appointed by the Cabinet Secretary for the time being responsible for housing, being persons who in his or her opinion possess knowledge of housing development.

The Commission notes that the proposal does not adequately take into account gender and disability in appointment of members to the National Housing Corporation. To illustrate this, the provision does not reflect the two thirds gender principle enshrined in the Constitution. In addition, the provision does not reflect Article 54(2) of the Constitution, which states that at least five percent of the members of the public in elective and appointive bodies should be persons with disabilities. Furthermore, the National Council for Persons with Disabilities is mandated under Section 7(1)(h) to consult with the Government in the provision of suitable and affordable housing for persons with disabilities. Hence, it is clear that there is need to ensure that the needs of persons with disabilities in terms of accessible and affordable housing are adequately represented. The Commission therefore advises that the proposed amendment should expressly provide for a person with disabilities or organizations representing persons with disabilities.

## **8. The Traffic Act**

The Bill proposes to amend section 8 of the Traffic Act to create an offence and prescribe a penalty on issuance of insurance cover to a person who is not the registered owner of a motor vehicle. The penalty under this section of the Bill is a fine not exceeding three hundred thousand shillings or imprisonment for a term not exceeding two years for a first offence, and to a fine not exceeding twenty thousand shillings or imprisonment for a term not exceeding two years for each subsequent offence. This penalty should be synchronised with the penalty prescribed in instances where an individual does not have insurance at all.

Furthermore, there is disconnect between the penalty imposed for first time offenders (a fine not exceeding three hundred thousand shillings) and second/subsequent offenders (a fine not exceeding twenty thousand shillings) in terms of penalties imposed. The deterrent effect is inadequate for second/subsequent offenders.

The amendment to Section 57 should indicate a specific penalty, in the light of the fact that the East African Community Load Control Act is also silent on the penalty to be prescribed in cases where a vehicle is unlawfully carrying a load requiring a permit.

The Bill proposes penalties, including imprisonment under sections 94, 104 and 106(8). In the light of the 2016 Audit of the Criminal Justice system in Kenya which raised concerns over over-incarceration, the Commission proposes that mechanisms such as probation or community service orders be employed rather than deprivation of liberty. The Bill could also use such penalties as time-bound revocation of licences.

#### **9. The National Council for Law Reporting**

The Bill proposes to amend the National Council for Law Reporting Act to establish the Council as a body under the Office of the Attorney General. The Commission asserts that the Attorney General is a user/consumer of laws on an equal basis with every other entity. As such, it is a conflict of interest for the Council to be under the Office of the Attorney General. For administrative and legal reasons, the Council should continue in its status as a semi-autonomous body. It is critical that case reporting be undertaken by a neutral/objective party.

#### **10. The Community Service Orders Act**

The Bill proposes to remove the Director of Probation from the Community Service Orders Committee. The Commission is of the view that the Director of Probation should be part of the Community Service Orders Committee.

Under Section 7(1)(c) the Bill proposes to replace the Permanent Secretary responsible for matters relating to administration and internal security with the Permanent Secretary responsible for matters relating to the interior and coordination of national government. The Commission is of the view that administratively, the PS in charge of correctional services is the one who should be included as a member of the National Community Service Orders Committee.

## **11. The Children Act**

The Commission is of the view that the Statute Law Miscellaneous (Amendment) Bill 2018 should not include an amendment to the Children Act, 2001. This is because the Children's Act is already under review, and a Bill (2017) has been developed with input from and wide consultation with a range of stakeholders<sup>1</sup>.

## **12. The Employment Act**

The proposed amendment to Section 10 of the Employment Act gives leeway to the employer to deploy, reassign, or re-designate an employee. The Commission considers that this provision should not apply to private employers and that the Bill should clarify that this provision applies to only the public sector.

## **13. The Labour Relations Act**

Under Section 81(e), the civil matter of engaging in an unprotected strike or even a protected one in essential services (whose list has been expanded), has been criminalized with the imposition of a fine as well as a jail term. The Commission proposes that the provision imposing criminal sanctions against workers who engage in a strike should be removed from the Bill.

## **14. The Proceeds of Crime and Anti Money Laundering Act**

The Bill proposes to amend the Proceeds of Crime and Anti-Money Laundering Act, (the PROCAMLA Act) 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. 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

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<sup>1</sup> The Bill can be found on the website of the National Council for Children's Services: <http://www.childrenscouncil.go.ke/images/documents/Acts/The-Children-Bill-First-Draft---16th-June-2017.pdf>

Constitution of Kenya, 2010 to every person. The constitutional right to privacy between a client and an advocate finds protection under common law and further protection under the Evidence Act, due to the central role it plays in ensuring the Constitutional right to access to justice.

Furthermore, the provision encroaches on the legal privilege of advocate – client confidentiality provided under the Evidence Act (Section 134) and the Advocates Act. The Commission recommends that Sections 2 and 48 should not be amended as proposed and should be maintained.

#### **15. The Office of the Director of Public Prosecutions Act**

The Bill proposes to omit the expression "Ethics and Anti-Corruption Commission" in the definition of "investigative Agency". This means that the Ethics and Anti-corruption Agency will not be considered as an investigative agency. The Commission recommends that Section 2(1) of the Office of the Director of Public Prosecutions Act should not be amended as indicated.

#### **16. The National Social Security Fund Act**

The Bill proposes to amend section 6 of the National Social Security Fund Act to state that in making appointments of the members to the Board under subsection (1) (d), the Cabinet Secretary shall observe regional and gender balance. The Commission proposes to add 'disability' as a consideration in making appointment of the members to the Board in the light of Article 54(2) of the Constitution of Kenya. In addition, with regard to gender, the provision should explicitly reflect the two thirds gender principle in making appointments to the Board.