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REPUBLIC OF KENYA
KENYA NATIONAL ASSEMBLY
TENTH PARLIAMENT – SECOND SESSION

REPORT

OF THE
DEPARTMENTAL COMMITTEE
ON
FINANCE, PLANNING, TRADE & TOURISM

ON
THE PROCEEDS OF CRIME AND ANTI-MONEY
LAUNDERING BILL, 2008

1.0 INTRODUCTION

Mr. Speaker Sir, on behalf of the Members of the Departmental Committee No. F on Finance, Planning, Trade & Tourism and pursuant to the provisions of Standing Order No. 162, I would like to take this opportunity to present to the House, the Committee's Report on the Proceeds of Crime and Anti-Money Laundering Bill, 2008.

The membership of the Committee comprise of the following:-

The Hon. Chrysanthus Okemo, M.P. **(Chairman)**

The Hon. (Prof.) Philip Kaloki, M.P. **(Vice Chairman)**

The Hon. Jakoyo Midiwo, M.P.

The Hon. Musikari Kombo, M.P.

The Hon. Lucas Chepkitony, M.P.

The Hon. Nelson Gaichuhie, MP

The Hon. Ntoitha M'Mithiaru, M.P.

The Hon. Ahmed Shabbir Shakell, M.P.

The Hon. Nkoidila Ole Lankas, M.P.

The Hon. Lenny Kivuti, M.P.

The Hon. Ali Bahari, M.P.

The functions of this Departmental Committee as established under Standing Order No. 151 are *inter alia*:-

- (i) to study and review all legislation after First Reading subject to the exemptions under Standing Order No. 101 A (4)**
- (ii) to make reports and recommendations to the House as often as possible including recommendations of proposed legislation.**

2.0 DELIBERATION ON THE PROCEEDS OF CRIME AND

ANTI-MONEY LAUNDERING BILL, 2008

Clauses 1 -2	-	Amendment proposed
Clause 3 - 7	-	Agreed to
Clause 8	-	Amendment proposed
Clauses 9 - 22	-	Agreed to
Clause 23	-	Amendment proposed
Clauses 22- 24	-	Agreed to
Clause 25	-	Amendment proposed
Clauses 26-40	-	Agreed to
Clause 41	-	Amendment proposed
Clauses 42- 45	-	Agreed to
Clause 46	-	Amendment proposed
Clauses 47 - 50	-	Agreed to
Clause 51	-	Amendment proposed
Clauses 52 -107	-	Agreed to
Clauses 108- 109-	-	Amendment proposed
Clauses 110 -127	-	Agreed to
Clause 128	-	Amendment proposed
Clauses 129 - 130-	-	Agreed to

SCHEDULES

First Schedule	-	Agreed to
Second Schedule	-	Agreed to
Third Schedule	-	Amendment proposed
Fourth Schedule	-	Agreed to
Fifth Schedule	-	Agreed to
Sixth Schedule	-	Amendment proposed
Title	-	Agreed to

3.0 COMMITTEE'S OBSERVATIONS ON THE BILL

3.1. General

The Proceeds of Crime and Money Laundering Bill proposes to provide for offences by which money being proceeds of crime, is disguised and ultimately presented as if from legitimate source. The international initiatives on anti-money laundering have been targeted as combating mainly transnational criminal activities like drug trafficking, human trafficking, financing of terrorism and grand corruption. In a number of jurisdictions there is apparent connection between the fight against these particular criminal activities and measures against money laundering. The Bill appears however to take the broader approach and seeks to have within it proceeds of all manner of criminal activities.

In Kenya, the potential areas for money laundering is mainly grand corruption and drug trafficking. The proposed law would go along way in making it difficult to launder money from these criminal activities and would be an added tool in the fight against corruption that has wrecked the economy of this country and compromised the ability of the public sector to deliver services to the citizenry.

3.2 PART I – INTERPRETATION

Clause 2

“Designated non – financial business or professions” is defined by listing out a number of businesses and professions. The Minister is further empowered in the definition to add to the list, what is to be deemed as “designated non – financial business or professions”.

The Bill does not provide the basis upon which an entity qualifies to be designated as non-financial business or profession. It simply

lists the entities and proceeds to empower the Minister to add to the list without indicating what the Minister may need to take into account. This provision runs the risk of enabling the Minister include in the list those entities that the law may not have contemplated. It also implies that what the Minister may add to the list may not be based on any perceived risk that these businesses or professions may present in terms of being fertile grounds for money laundering.

3.3 PART II – MONEY LAUNDERING AND RELATED OFFENCES

(i) **Clause 8 – Financial promotion of an offence**

The use of the word “promote” connotes abetting or aiding in the commission of an offence. Section 20 of the Penal Code provides for the offence of aiding someone to commit a crime. However, the definition of ‘offence’ in the Bill is very broad and could mean any offence not necessarily related to money laundering. It is not clear if it was intended to replace aiding and abetting as set out in the said section 20 of the Penal Code.

The Bill implies that if one receives money to commit an offence, say in order to falsify documents, then that would constitute money laundering and be an “offence” under this Bill”.

(ii) **Clause 12 – Conveyance of monetary instruments to or from Kenya**

Clause 12 requires persons intending to convey monetary instruments in excess of the prescribed amount to report the same to “persons authorized by the regulations for that purpose”. This applies to both persons intending to send money into and outside Kenya. First, the threshold is too

low and has potential to cause inconvenience. Secondly, the Bill proposes to require foreigners to know what the Kenyan law stipulates and to report to “authorized persons” before transmitting money to Kenya.

It is not clear where one would locate these “persons authorized by regulations” outside Kenya and what would happen when persons who are not familiar with the relevant Kenyan law transmit the money i.e. whether the money will be returned to country of origin or the to the institution that receives the money for transmission.

Further, the reporting institutions are required to report on all transactions and there is no need for additional requirement for their customers to report as well since the reports made by the reporting institutions should suffice. The requirement for users of service to report transactions is also onerous and hardly an appropriate regulatory strategy.

3.4 PART III - Financial Reporting (Clauses 19-41)

- (i) This is proposed to be established as a body corporate with the main object of “making information collected by it available to investigating authorities, supervisory bodies and any other relevant bodies to facilitate the administration and enforcement of the laws of Kenya”.
- (ii) Its other objective is to exchange information with similar bodies in other countries regarding money laundering activities and related offences and ensure compliance with international standards and the best practice in anti-money laundering measures. It is useful to have an institution that would act as coordinating agency and serve as a focal point for the activities aimed at dealing with money laundering and

that explains the necessity for the establishment of the Centre.

(iii) However, it is not clear whether the Centre will have investigatory role to play over and above coordination. Under clause 22(a) the Centre is to receive and analyze reports on unusual or suspicious transactions from those required to make these reports. Under paragraph (b) the Centre is to send such reports to appropriate law enforcement agencies, if it considers such reports to be "suspicious". It is important to note that under Clause 42, the reports that the Centre is expected to receive are basically those that are considered "suspicious" by the reporting institution. It is not clear why the same reports submitted because of being considered "suspicious" would again have to undergo another process of scrutiny by the Centre to ascertain whether they are really "suspicious".

(iv) This arrangement suffers the following weaknesses:-
First, it attributes to the Centre certain expertise that a reporting institution would be better placed to possess. A bank reporting a suspicious transaction would normally have better expertise than the Centre due to its immediate interaction with the business. Vesting the Centre with the responsibility of determining whether a transaction is "suspicious" when in the first place the reporting institution has reported it to the Centre as "suspicious" is an unnecessary layer of bureaucracy as it would not be necessary to determine "suspicion" twice. A "suspicious" transaction once reported as such, should be acted upon to determine whether the suspicion is founded and not be

taken through another processes to determine if indeed it is “suspicious”.

Second, it also appears that the principle regarding the functions of the Centre are generally not properly thought through.

- (v) Clause 22(c) empowers the Centre to carry out inspections in the premises of any reporting institutions. While paragraph (b) presupposes that the Centre would simply receive reports and forward these to investigation authorities (see use of “law enforcement agencies” “intelligence agencies”), paragraph (c) appears to empower the Centre to carry out investigations on its own. The Centre should either be a coordinating outfit only or should instead be an investigating agency akin to the Kenya Anti-Corruption and Economic Crimes Commission. The investigatory powers of the Centre are also set out in Clause 35.

(vi) **Clause 36 – Property tracking and monitoring orders**

Clause 36 requires that an order may be issued by the High Court requiring a person to deliver information to the Centre or to “the appropriate law enforcement agency”. This appears to be an acknowledgement that the Centre is not necessarily the only stop shop for information on suspicious transactions. Therefore, it can be by-passed and information directly given to the “the appropriate law enforcement agency”. In order to justify the establishment of the Centre there is need to ensure that the function with which it is vested is not shared with other institutions in a casual and imprecise manner as appears in Clause 36. That presents

potential for inter-institutional conflict and unjustified expenditure of public funds.

- (vii) Clause 41 – Books of accounts, records, audits and reports
Clause 41 is contrary to the Public Audit Act, 2003. Part III of the Public Audit Act provides for the audits of state corporations including: the preparation of accounts; the time limit for submitting the accounts, the requirement that the Controller and Auditor General audits the accounts and to report to the Minister for Finance etc. The re-enactment of similar provisions, albeit with some alterations, in the present Bill is unnecessary and makes it possible for the two laws to be in conflict. There is need to amend the Bill that the provisions relating to audit are altered in a manner that is different from those of the Public Audit Act.

3.5 PART IV – Anti- Money Laundering Obligations of a Reporting Institution

Clause 43 –Obligation to verify customers identity

It appears under Clause 43 that every reporting institution has to ascertain the identity of its customers and it does not matter the size of the transaction. It is not clear whether a state corporation for example would be required to produce the Act or legal notice under which it is established as a State Corporation or a company resolution to transact business on its behalf.

3.6 PART V - The Anti-Money Laundering Advisory Committee

This Committee is proposed to render advice to the Centre in the performance of the Centre's functions under the proposed law. This is an outfit akin to the Kenya-Anti Corruption Advisory Board and as a matter of purely drafting concern, the establishment of

the Committee should come immediately after Part III to enable one to easily appreciate the close symbiosis that is intended between the Centre and the Committee. The Committee is also composed of Government functionaries and persons from the related public sector institutions.

3.7 PART VI - Asset Recovery Agency

- (i) The Agency is proposed to have the responsibility of implementing the provisions of Part VI to XII. It is not clear whether it is proposed to be a body corporate but since that is not mentioned, by tradition it is normally assumed that it is not intended to be a body corporate. However, the Agency is proposed to be a semi-autonomous” body in the office of the Attorney General. The meaning of “semi-autonomous” is legally imprecise and there is need to clarify if it is a department in the office of the Attorney General and why it should engage staff over and above those seconded to it by the Attorney General if it is not a legal entity on its own right.
- (ii) It is important to audit the cost-benefit dimensions of the establishment of the Agency in order to determine whether it is necessary to establish it in the first place. The Kenya Anti Corruption Commission (KACC) is empowered under Part VI – COMPENSATION AND RECOVERY OF IMPROPER BENEFITS, of the Anti-Corruption and Economic Crimes Act) to commence proceedings for recovery of “unexplained assets”. The principles applicable in the KACC would be appropriate for criminal benefits accruing from other types of crime other than corruption.

- (iii) Clause 51 provide for the “functions and powers” of the Agency. The functions are to “implement the provisions of parts VI to XII of the Bill. However, this is not accurate as Part VI merely establishes the Agency and contains no provisions which one would say are to be implemented, at least not by the Agency.

3.8 PART XI – Criminal Assets Recovery Fund

- (i) Part XI (Clauses 105 to 110) provides for a fund to be known as the Criminal Assets Recovery Fund. The Fund is to consist of moneys mainly from confiscation orders under the Bill and moneys received from the consolidated Fund as well as the property confiscated under the KACC Act.
- (ii) The problem becomes apparent when examining the application of the Fund. Clause 109 empowers the Attorney General to determine the allocation of the funds which should, in any case, among others go to “specific law enforcement agencies”. The Fund would also be allocated to “any institution, organization or fund”.
- (iii) Public institutions have their budgetary allocations from the Treasury through the annual estimates. Therefore, there is no justification for an arrangement where publicly funded institutions are to receive some money from another source other than the Consolidated Fund to finance their regular operations. It is also not indicated for what purpose the funds are to be utilized in these public institutions.
- (iv) The allocations of the funds to “any institution, organization or fund” should seriously be reconsidered since it is not clear whether they are public or private organizations;

organizations involved in anti-money laundering activities; or any organization that the Attorney General may deem fit to benefit. It is also quite curious to vest in an individual a fund and empower him to donate money from it to any outfit he deems fit.

3.9 PART XIII – Miscellaneous provisions

(i) **Clause 118- Investigations**

Clause 118 is unnecessary as it merely repeats what is contained in section 26(4) of the Constitution.

- (ii) **Clause 128 – Amendment of Schedules.** Clause 128 empowers the Minister to amend the First, Second and Third Schedule. The Schedules are already in dispute because it is felt that the thresholds they provide are rather too low. Even if granted that they are placed at the appropriate amount, the Minister can decide to lower them which would not be in the interest of business.

The law should empower the Minister to only increase the amount involved and not to simply “amend” which may imply reducing as that would defeat the very reason for setting the amounts in the first place. Therefore, there should be a proviso under the Clause to the effect that the Minister may only increase the amounts set out in the schedules and shall not in any case lower the amounts.

4.0 PROPOSED AMENDMENTS TO THE BILL

The Committee held meetings with the Deputy Prime Minister and Minister for Finance and the proposed amendments have been agreed upon by both the Committee and the Ministry of Finance.

CLAUSE 1

THAT, Clause 1 be amended by inserting the words **“provided that such date shall not exceed six months after the date of assent”** after the word “appoints”.

CLAUSE 2

THAT, Clause 2 be amended as follows:-

- (a) by deleting the word “committee” in the definition of “Committee” wherever it appears and substituting therefor with the word “Board”.
- (b) in the definition of “designated non-financial business or professions” by deleting paragraph (f) of that definition and substituting therefor with the following new paragraph-
 - (f) such other business or profession in which the risk of money laundering exists as the Minister may, on the advice of the Centre declare.

CLAUSE 8

THAT, Clause 8 be amended by deleting the words “promote the carrying out of an offence” and substituting therefor with the following words **“commits an offence under this Act”**.

CLAUSE 22

THAT, Clause 22 be amended by deleting sub-clause (k).

CLAUSE 23

THAT, Clause 23 be amended by deleting the word “committee” wherever it appears and substituting therefor the word “Board”.

CLAUSE 25

THAT, Clause 25 be amended as follows:-

- (a) in sub-clause (1) by inserting the words ***“in consultation with the Anti-Money Laundering Advisory Committee”*** immediately after the word ***“may”***;
- (b) in sub-clause (2) by inserting the words ***“in consultation with the Anti-Money Laundering Advisory Committee”*** immediately after the word ***“may”***;
- (c) by deleting the word “committee” wherever it appears and substituting therefor the word “Board”.

CLAUSE 41

THAT, Clause 41 of the Bill be amended –

- (a) by deleting sub-clause (3);
- (b) by deleting sub-clause (4);
- (c) by deleting sub-clause (5);
- (d) by deleting sub-clause (6);
- (e) by deleting sub-clause (7);
- (f) by deleting sub-clause (8);
- (g) by deleting sub-clause (9);
- (h) by deleting sub-clause (10);
- (i) by deleting sub-clause (11);
- (j) by deleting sub-clause (12);

PART V

THAT, the heading of Part V of the Bill be amended by deleting the word ***“Committee”*** and substituting therefor with word “Board”

CLAUSE 46

THAT, Clause 46 be deleted and be substituted therefor with the following new clause:-

46. (1) There is established a Committee to be known as the Anti-Money Laundering Advisory Committee which shall consist of:-

- (a) the Permanent Secretary in the Ministry of for the time being responsible for matters relating to finance, who shall be the Chairman;
- (b) the Permanent Secretary in the Ministry of for the time being responsible for matters relating to internal security;
- (c) the Attorney-General;
- (d) the Governor, Central Bank of Kenya;
- (e) the Commissioner General, Kenya Revenue Authority;
- (f) the Director, who shall be the Secretary;
- (g) the Chairman, Law Society of Kenya;
- (h) the Chief Executive Officer, Institute of Certified Public Accountants of Kenya; and
- (i) one other person appointed by the Minister, as the Minister may deem appropriate, from the private sector who shall have knowledge and expertise in matters relating to money laundering.

(2) the ex-officio members under subsection(1) (a) to (h) may attend in person or through a designated representative.

(3) A person appointed under sub-section (1)(i) shall hold office for a term of three years but shall be eligible for re-appointment for one further term of not more than three years.

- (4) The Anti-Money Laundering Advisory Committee may co-opt such other persons as appear to it to have special knowledge or experience in anti-money laundering.

CLAUSE 50

THAT, Clause 50 be amended as follows:-

- (a) by deleting sub-clause (2) and substituting therefor with the following new sub-clause.
- (2). The Attorney General shall appoint a fit, competent and proper person to be the Director of the Agency (hereinafter referred to as the "Agency Director").
- (b) by inserting a new sub-clause (3) to read as follows:-
- (3) For a person to be appointed as the Agency Director, the person shall-
- (i) hold a degree in law, economics or finance from a recognized university;
- (ii) have at-least fifteen years working experience in relevant field, five of which have been at senior management level.
- (c) by renumbering sub-clauses (3) and (4) as sub-clauses (4) and (5) respectively.

CLAUSE 51

THAT, Clause 51 of the Bill be amended by deleting the expression "VI" and substituting therefor with the expression "VII".

CLAUSE 108

THAT, the Bill be amended by deleting Clause 108 and substituting therefor the following new clause:-

108. In the administration of the Fund, the following shall apply-

- (a) all monies derived from concluded confiscation and forfeiture orders stipulated in Part VII to Part X shall be paid into the Consolidated Fund; and
- (b) all property derived from concluded confiscation or forfeiture orders stipulated in Part VII to Part X shall vest in the Government and be disposed of in accordance with the relevant law relating to disposal of public property.

CLAUSE 109

THAT, the Bill be amended by deleting Clause 109.

CLAUSE 128

THAT, Clause 128 of the Bill be amended by –

(a) deleting the words “**for finance**” appearing after the word “**Minister**”

(b) renumbering the existing provision as sub clause (1) and inserting a new sub-clause (2) as follows-

“(2) An Order made under sub section (1) shall not decrease the monetary sums specified in the Second and Third Schedules.”

THIRD SCHEDULE

THAT, the Third Schedule be amended by deleting the expression “**US\$5,000**” and substituting therefor the expression “**US\$10,000**”.

SIXTH SCHEDULE

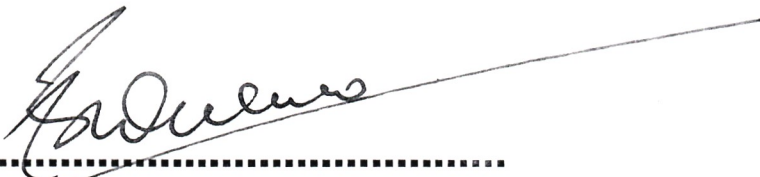
THAT, the Sixth Schedule be amended as follows:-

- (a) in paragraph 3, by deleting the word "**eleven**" and substituting therefor the word "**six**".
- (b) in paragraph 8(1), by deleting the word "**eleven**" and substituting therefor the word "**six**".
- (c) by deleting the word " Committee" wherever it appears and substituting therefore the word "Board".

5.0 CONCLUSION

The Committee recommends that the House adopts its Report on the Proceeds of Crime and Anti- Money Laundering Bill, 2008. Mr. Speaker Sir, may I take this opportunity to thank all Members of the Committee for their input and valuable contributions during the deliberations on the Bill.

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Hon. Chrysanthus Okemo, MP
Chairman- Departmental Committee on
Finance, Planning, Trade & Tourism

Date.....19-02-09.....