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**SENATE BILLS, 2019**

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## THE LIFESTYLE AUDIT (NO. 2) BILL, 2019

### A Bill for

**AN ACT of Parliament to give effect to Article 10 and Chapter 6 of the Constitution; to provide for the procedure for undertaking lifestyle audit; and for connected purposes.**

**ENACTED** by the Parliament of Kenya, as follows —

### PART I- GENERAL PROVISIONS

**1.** This Act may be cited as the Lifestyle Audit (No. 2) Act, 2019. Short title.

**2.** In this Act— Interpretation.

“account freezing order” means an order that prohibits a person by or for whom the account to which the order applies is operated from making withdrawals or payments from the account;

“alleged offence” means an offence under—

- (a) this Act;
- (b) the Anti-Corruption and Economic Crimes Act; No. 3 of 2003.
- (c) the Public Officer Ethics Act; No. 4 of 2003.
- (d) the Leadership and Integrity Act; No. 19 of 2012.
- (e) the Public Service (Values and Principles) Act; No. 1A of 2015.
- (f) the Bribery Act;
- (g) the Proceeds of Crime and Anti-Money Laundering Act; No. 47 of 2016.
- (h) the Public Finance Management Act; and No. 9 of 2009.
- (i) the Public Procurement and Asset Disposal Act; No. 18 of 2012.

“court” means the High Court established under Article 165 (1) of the Constitution; No. 33 of 2015.

“deferred prosecution agreement” means an agreement entered into between the Director of Public Prosecutions and a person who has been charged with, or whom the Director of Public Prosecutions is considering prosecuting for an alleged offence, under which —

- (a) the person agrees to comply with the requirements imposed on the person by the agreement; and

- (b) upon the approval of the agreement by the High Court.

“public notice”, in relation to a matter, means to cause a notice of the matter to be published in the *Gazette*;

“interim freezing order” means an order that prohibits a person from dealing with a property that is subject to a lifestyle audit exercise;

“investigating body” means a body having the power to undertake a lifestyle audit and specified under section 5;

“lawfully obtained income” means an income obtained lawfully under the laws of the country from where the income arises;

“lifestyle audit” means an investigative audit of a person's living standards to ascertain consistency with a person's lawfully obtained and reported income;

“officer” means a public officer or a state officer as defined under the Constitution;

“public officer” has the meaning assigned to it under the Constitution; and

“State officer” has the meaning assigned to it under the Constitution.

## PART II—CONDUCT OF A LIFESTYLE AUDIT

**3.** The following standards of professional conduct shall apply when a lifestyle audit is carried out with respect to a public or a state officer—

- (a) due care and professionalism;
- (b) objectivity;
- (c) confidentiality; and
- (d) existing standards under any other written law.

Standards of professional conduct when carrying out lifestyle audit.

**4.** (1) A lifestyle audit may be carried out if—

- (a) there are reasons to believe that a public officer or State officer is living beyond an officer's lawfully obtained and reported income;
- (b) the public officer or State officer is unable to account for the source of income; or
- (c) the public or State officer has misappropriated funds under that officer's care and trust.

Lifestyle audit process.

(2) An investigating body shall, where grounds exist for the conduct of a lifestyle audit under subsection (1) —

- (a) inform the officer of the requirement to carry out the audit;
  - (b) submit to the officer, information regarding the intended audit and the reasons for the audit; and
  - (c) accord the officer a right to be heard on the audit in accordance with subsection (3).
- (3) Before conducting a lifestyle audit, the investigating body shall give the officer—
- (a) a seven day’s notice of the nature and reasons for the proposed lifestyle audit;
  - (b) an opportunity to be heard and to make representations in that regard;
  - (c) notice of a right to a review or internal appeal against a lifestyle audit, where applicable;
  - (d) notice of the right to legal representation where applicable;
  - (e) notice of the right to cross-examine, where applicable; and
  - (f) information and evidence relied upon to make the decision to conduct the lifestyle audit.

**5.**(1) The following bodies shall have power to undertake lifestyle audit under section 4—

Bodies involved in lifestyle audit.

- (a) the Kenya Revenue Authority established under section 3 of the Kenya Revenue Authority Act;
- (b) the responsible Commission under section 3 of the Public Officer Ethics Act; and
- (c) the Ethics and Anti-Corruption Commission established under section 3 of the Ethics and Anti-Corruption Act.

No. 2 of 1995.

No.4 of 2003.

No. 22 of 2011.

(2) An investigating body under subsection (1) may collaborate with another investigating body or any other entity it may consider necessary where the audit concerns a matter of mutual interest or concern and for the effective conduct of a lifestyle audit.

**6.** An investigating body may, where there are reasonable grounds to suspect that a public or State

Unexplained Wealth.

officer's lawfully obtained income would be insufficient to allow the person to obtain property held by such person, apply for a search warrant to be issued against an officer—

- (a) to explain the nature and extent of their interest in a particular property; and
- (b) the manner in which the property was acquired.

**7.** (1) An investigating body that intends to conduct a lifestyle audit may apply for a search warrant against a public or a State officer from a court of law.

Search Warrants.

(2) An investigating body shall, in making an application under subsection (1), specify the grounds on which the application is made and if material relevant to the lifestyle audit is likely to be found on the premises specified in the application.

(3) Where a search warrant is issued, it shall contain—

- (a) grounds for the conduct of a lifestyle audit;
- (b) the name of the public or state officer;
- (c) the address of the premises to be searched;
- (d) an explanation that material relevant to concluding the lifestyle audit is likely to be found on the premises.

(4) A search warrant shall be executed within thirty business days or such period as may, upon application to the court, be extended.

**8.** (1) A search may be conducted without a warrant in exceptional cases where there are reasonable grounds to believe that evidence may be removed or destroyed.

Search Without Warrant.

(2) Sections 119, 120 and 121 of the Criminal Procedure Code as to the execution of a search warrant shall apply to a search without a warrant under subsection (1).

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**9.** (1) A person commits an offence if, during the conduct of a lifestyle audit, that person knowingly makes a statement that is false or misleading.

Misleading Statements.

(2) A person who commits an offence under this section is liable on conviction, to imprisonment for a term

not exceeding two years or to a fine not exceeding five million Kenyan shillings or to both.

**10.** A statement made by a person during the conduct of a lifestyle audit may be used to negotiate for a deferred prosecution agreement in accordance with this Act.

Statements in general.

**11.** (1) An investigating body may, where it considers it necessary, make an application to the court for an interim freezing order with respect to a property that is subject to a lifestyle audit.

Application for interim freezing order.

(2). Where the court issues an interim order, it shall specify the period for which the order made shall be valid.

(3). The period specified by a court under subsection (2) shall not exceed a period of three months from the date that interim freezing order is made.

**12.** The High Court may at any time vary or discharge an interim freezing order on application made by an investigating body or a person affected by the order.

Discharge of interim freezing order.

**13.** (1) Where an interim freezing order in respect of any property is discharged, the person to whom the property belongs may make an application to the High Court for compensation.

Compensation.

(2) An application under subsection (1) shall be made within a period of three months upon the discharge of the interim freezing order.

(3) The court may make an order for compensation only if satisfied that—

- (a) the applicant has suffered loss as a result of the making of the interim freezing order;
- (b) there has been a serious default on the part of the investigating body that applied for the order; and
- (c) the order would not have been made had the default not occurred.

(4) Where an officer, acting on behalf of an investigating body and who without reasonable cause applies for or knowingly relies on false information to apply for and obtains an interim freezing order and the interim freezing order is subsequently discharged and compensation awarded pursuant to subsection (3)—

- (a) the officer of the investigating body shall be personally liable to pay the compensation; and
- (b) disciplinary action may be undertaken against that officer.

**14.** (1) An investigating body may apply to court for an account freezing order in relation to an account which is the subject of a lifestyle audit.

Application for account freezing order.

(2) An application for an account freezing order may be made without notice if the circumstances of the case are such that notice of the application would prejudice the taking of any steps under this Act to forfeit the money.

(3) An account freezing order ceases to have effect at the end of the period specified in the order.

(4) The period specified by a court under subsection (3) shall not exceed a period of three months from the date the account freezing order is made.

(5) An account freezing order shall provide for notice to be given to persons affected by the order.

**15.** (1) A court may at any time vary or set aside an account freezing order on an application made by—

Setting aside of account freezing order.

- (a) a relevant investigating body; or
- (b) a person affected by the order.

(2) A court shall, before it varies or sets aside an account freezing order, give an opportunity to a person who may be affected by its decision to be heard.

(3) A person against whom an account freezing order is issued may, subject to subsection (4) make an application for compensation.

(4) The court may make an order for compensation where satisfied that—

- (a) the person against whom an account freezing order was made has suffered loss as a result of the making of the interim freezing order;
- (b) there has been a serious default on the part of the investigating body that applied for the order; and
- (c) the order would not have been made had the default not occurred.

(5) Where an officer, acting on behalf of an investigating body and who without reasonable cause applies for or knowingly relies on false information to apply for and obtains an interim freezing order and the account freezing order is subsequently discharged and compensation awarded pursuant to subsection (4)—

- (a) the officer of the investigating body shall be personally liable to pay the compensation; and
- (b) disciplinary action may be undertaken against that officer.

**16.** (1) An investigating body shall give notice to an account holder for the purpose of forfeiting money held in the frozen account.

Account forfeiture notice.

(2) An investigating body shall, in issuing an account forfeiture notice under subsection (1),—

- (a) state the amount of money held in the frozen account which it is proposed be forfeited;
- (b) specify the period within which the account holder may raise an objection to the proposed forfeiture and the address to which any objections should be submitted; and
- (c) specify that the money will be forfeited unless an objection is received at that address within the period for raising an objection.

(3) A person who intends to raise an objection to an account forfeiture notice under subsection (1) shall submit an objection, in writing, to the address specified in the order within a period of thirty days of receipt of the notice.

(4) Where an account holder fails to raise an objection and the period specified under subsection (3) has lapsed—

- (a) the amount of money stated in the notice shall be forfeited;
- (b) the bank in which the frozen account is maintained shall transfer that amount of money into an interest-earning account nominated by and in the name of the investigating body; and
- (c) the account freezing order made in relation to the frozen account ceases to have effect upon the transfer of the funds.

(5) A person aggrieved by the determination made by the investigating body on the objection may appeal to a court within thirty days after the date of such a determination.

(6) An appeal shall not automatically operate as stay of forfeiture of the money held in the frozen account under subsection (1).

(7) Where an appeal has been instituted, a court may on an application, order a stay of forfeiture on terms a court considers just.

**17.** (1) A member of the public may lodge a complaint to an investigating body where such person has reason to believe that a person holds unexplained wealth of a public or a state officer.

Complaints by  
members of  
Public.

Cap. 15.

(2) A person who intends to lodge a complaint under subsection (1) shall submit the complaint in the prescribed form together with a statutory declaration made in accordance with the Oaths and Statutory Declarations Act.

(3) Upon receipt of a complaint under subsection (1), the relevant investigating body may—

- (a) call for information or a report regarding such complaint from any person within such reasonable time as may be specified by the body; and
- (b) without prejudice to paragraph (a), initiate such inquiry as it considers necessary, having regard to the nature of the complaint.

(4) An investigating body may decline to investigate a complaint if the body considers that the complaint is trivial, frivolous, vexatious or is not made in good faith.

(5) If the information or report called for under subsection (3)(a) is not received within the time stipulated by the investigating body, the body may proceed to inquire into the complaint without such information or report in accordance with this Act.

(6) The investigating body shall, within fifteen days of its decision, notify the complainant of the decision and the reasons for its decision, in writing.

**18.** (1) An investigating body may apply *ex parte* to the court for an order requiring an associate of a public or a state officer subject to a lifestyle audit to provide, within a reasonable time specified in the order, a written statement stating, in relation to a property specified in the order, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

Obligation to provide information.

(2) In subsection (1), “associate” means a person, who the investigating body reasonably believes has had dealings with a person who is the subject of a lifestyle audit and in relation to property reasonably believed to have been acquired by use of unlawfully obtained income.

(3) The investigating body may by notice in writing require a person to provide, within a reasonable time specified in the notice, information or documents in the person’s possession that relate to a person subject to a lifestyle audit exercise.

(4) A person who neglects or fails to comply with a requirement under this section commits an offence and shall be liable, on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both.

(5) A requirement under this section shall not require anything to be disclosed that is protected under the advocate-client privilege including anything protected by section 134 or 137 of the Evidence Act.

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**19.** Lifestyle audit may be carried out on the immediate family member of a public or a state officer if it is established that a property which is a subject of a lifestyle audit is owned by the immediate family including joint ownership.

Immediate family.

**20.** Where, as a result of a lifestyle audit under this Act, an investigating body is of the view that criminal proceedings should be instituted against an officer, the body shall refer the matter to the Director of Public Prosecutions.

Referral of matters to the Director of Public Prosecutions.

**PART III – DEFERRED PROSECUTION AGREEMENTS**

**21.** (1) A person who is the subject of a lifestyle audit may enter into a deferred prosecution agreement with the

Entering into deferred prosecution

Director of Public Prosecutions in accordance with this Part. agreement.

(2) The Director of Public Prosecution may, before instituting criminal proceedings against a person who is the subject of a lifestyle audit, invite that person into negotiations for the purpose of entering into a deferred prosecution agreement where –

- (a) there are reasonable grounds for believing that the person has committed an offence that forms the subject matter of the lifestyle audit;
- (b) public interest would be served if the parties enter into a deferred prosecution agreement in accordance with this Act; and
- (c) charges with respect to the alleged offence have been drawn against that person.

(2) A deferred prosecution agreement may be entered into with respect of an alleged offence, whether alleged to have been committed before or after the date of commencement of this Act.

(3) A deferred prosecution agreement in respect of an alleged offence may be entered into at any time before commencement of the trial.

(4) One deferred prosecution agreement may be entered into in respect of two or more alleged offences.

(5) Before a deferred prosecution agreement is in force, a party to the deferred prosecution agreement may withdraw from a negotiation concerning the agreement without giving any reason for the withdrawal.

**22.** The Director of Public Prosecution shall, before entering into negotiations for a deferred prosecution agreement with a person who is subject to a lifestyle audit under section 21, take into account the following factors in determining whether to enter into the agreement —

- (a) prior criminal conduct of the person;
- (b) the extent to which the person has cooperated with the investigating body and adhered to the relevant processes;
- (c) whether the person has taken positive steps to address the issues raised by the investigating body;

Factors to take into account in entering into a deferred prosecution agreement.

- (d) if public interest would best be served by entering into the deferred prosecution agreement;
- (e) such other factors as the Director of Public Prosecution shall consider relevant.

**23.** The Director of Public Prosecutions shall, in inviting a person who is the subject of a lifestyle audit into negotiations under this Part and in writing –

Entry into negotiations.

- (a) identify the factors for consideration in determining whether to offer an agreement at the conclusion of negotiations;
- (b) explain to that person the manner in which the negotiations shall be conducted and the responsibilities of the parties during the negotiations;
- (c) inform the person of the rights and obligations of the parties to the negotiations;
- (d) outline the manner in which the agreement shall come into force and cease to be in force.
- (e) identify the date by which that person shall submit a notice in writing on acceptance of the invitation to enter into the negotiations and any conditions attached thereto;
- (f) outline the process for withdrawing from the negotiations and the agreement;
- (g) explain to that person the effects of a deferred prosecution agreement;
- (h) advise on the confidentiality requirements and the manner in which information obtained during negotiations may be disclosed and used; and
- (i) inform the person of the right to institute criminal proceedings in relation to the matters contained in the agreement where the person materially contravenes that agreement.

**24.** A person who intends to enter into a deferred prosecution agreement shall be entitled to be represented by an advocate or such other person as he or she determines.

Representation.

**25.** Where a deferred prosecution agreement is entered into between the Director of Public Prosecutions

Effect of deferred prosecution agreement on

and a person in respect of an alleged offence, the following provisions shall apply—

court proceedings.

- (a) where the person has been charged with the alleged offence, the person is considered to have been granted a discharge not amounting to an acquittal in relation to the alleged offence, when the deferred prosecution agreement comes into force;
- (b) while the deferred prosecution agreement is in force, the person shall not be prosecuted for the alleged offence or for any other offence on the same facts in any criminal proceedings;
- (c) while the deferred prosecution agreement is in force, any limitation period or time limit for the commencement of any of the following matters shall be suspended—
  - (i) the prosecution of the alleged offence;
  - (ii) any civil penalty action in respect of the alleged offence;
  - (iii) any proceedings for an order for repayment of a benefit derived from the alleged offence;
  - (iv) any proceedings for the confiscation of any property that —
    - (A) is used, or intended to be used, for the commission of the alleged offence; or
    - (B) constitutes a benefit derived from the alleged offence; or
  - (v) any disciplinary proceedings, or other proceedings relating to the imposition of any regulatory measure, under any written law, that arise from the facts of the alleged offence.

**26.** (1) A deferred prosecution agreement shall contain—

Content of deferred prosecution agreement.

- (a) a charge or draft charge prepared by the Director of Public Prosecutions relating to the alleged offence;
- (b) a statement of facts relating to the alleged offence, which may include admissions made by the

person that enters into the deferred prosecution agreement; and

(c) the rights and obligations of the parties.

(2) A deferred prosecution agreement shall specify an expiry date on which the deferred prosecution agreement ceases to have effect if the deferred prosecution agreement is not already terminated under section 32.

(3) The requirements that a deferred prosecution agreement may impose on the person include, —

- (a) payment to the Director of Public Prosecutions of a financial penalty;
- (b) compensation of victims of the alleged offence;
- (c) compensation for loss of public funds;
- (d) payment of interest on the lost public funds;
- (e) surrender of all private assets acquired using public funds;
- (f) donation of money to a charity or any other third party;
- (g) surrender of any profits made by the person from the alleged offence;
- (h) implementation of a compliance programme or making of changes to an existing compliance programme, relating to the person's policies or to the training of the person's employees or both;
- (i) appointment of a person to—
  - (i) assess and monitor the person's internal controls;
  - (ii) advise the person and the Director of Public Prosecutions, of any improvements to the person's compliance programme that are necessary, or that will reduce the risk of a recurrence of any conduct related to the alleged offence ; and
  - (iii) report to the Director of Public Prosecutions any misconduct in the implementation of the person's compliance programme or internal controls;

- (j) cooperation in —
  - (i) investigations relating to the alleged offence; or
  - (ii) any investigation relating to any possible offence, committed by any officer, employee or agent of that person, that arises from the same or substantially the same facts as the alleged offence; or
- (k) payment of any reasonable costs of the Director of Public Prosecutions in relation to the alleged offence or the deferred prosecution agreement.

(4) The amount of any penalty agreed to between the Director of Public Prosecutions and the person shall be broadly comparable to the fine that a court would have imposed on the person on conviction for the alleged offence following a guilty plea.

- (5) A deferred prosecution agreement shall set out —
  - (a) time limits within which the person who is the subject to the deferred prosecution agreement shall comply with the requirements imposed on the person; and
  - (b) the consequences of non-compliance by a person subject to the deferred prosecution agreement.

**27.** (1) Upon the commencement of negotiations with respect to a deferred prosecution agreement but before the terms of the deferred prosecution agreement are agreed upon by the parties, the Director of Public Prosecutions shall apply to the High Court for a declaration that—

- (a) entering into a deferred prosecution agreement with a person is likely to be in the interests of justice; and
- (b) the proposed terms of the deferred prosecution agreement are fair, reasonable and proportionate.

(2) The Court shall consider and determine the application under subsection (1) and shall set out the reasons for its decision.

(3) The Director of Public Prosecutions may make a further application to the Court for a declaration under

Preliminary hearing for court approval of deferred prosecution agreement.

subsection (1) if, following the previous application, the court declined to make a declaration.

(4) The hearing and determination of an application under this section shall be held in camera.

**28.** (1) Where the Director of Public Prosecutions and the person have agreed on the terms of a deferred prosecution agreement, the Director of Public Prosecutions shall apply to the High Court for a declaration that—

Final hearing for court approval of deferred prosecution agreement.

(a) the deferred prosecution agreement is in the interest of justice; and

(b) the terms of the deferred prosecution agreement are fair, reasonable and proportionate.

(2) The Director of Public Prosecutions shall not make an application under subsection (1) unless the Court has made a declaration under section 27.

(3) A deferred prosecution agreement shall only come into force when it is approved by the High Court making a declaration under subsection (1).

(4) The Court shall give reasons for its decision on whether or not to make a declaration under subsection (1).

(5) The hearing and determination of an application under this section may be held in camera..

(6) The Court shall, in determining an application under subsection (1), set out its reasons for its decision and deliver its decision in an open court.

(7) Upon approval of the deferred prosecution agreement by the Court, the Director of Public Prosecutions shall publish—

(a) the deferred prosecution agreement;

(b) the declaration of the court under section 27 and the reasons for its decision to make the declaration;

(c) in a case where the court initially declined to make a declaration under section 27 the court's reason for that decision; and

(d) the court's declaration under this section and the reasons for its decision.

**29.** (1) Where a deferred prosecution agreement is in force and the person fails to comply with the terms of the agreement, the Director of Public Prosecutions may make an application to the High Court for –

- (a) an order compelling the person to comply with the terms of the agreement on such conditions as the Court may consider necessary to impose, for the remedy of any outcome of such non-compliance; or
- (b) termination of the agreement.

(2) The court shall on an application under subsection (1) determine whether, on the balance of probabilities, a person has failed to comply with the terms of the deferred prosecution agreement.

**30.** (1) Where the court finds that a person has failed to comply with the terms of the deferred prosecution agreement, it may—

- (a) direct the Director of Public Prosecutions and the person to agree to a proposal to remedy the person's failure to comply; or
- (b) terminate the deferred prosecution agreement.

(2) The court shall give reasons for its decisions under subsection (1).

(3) Where the court determines that a person has not failed to comply with the terms of the deferred prosecution agreement, the Director of Public Prosecutions shall—

- (a) publish the court's decision; and
- (b) its reasons for that decision unless the Director of Public Prosecutions is prevented from doing so by law or by an order of the court under section 34.

(4) Where the court makes an order compelling the parties to an agreement to remedy a person's failure to comply, the Director of Public Prosecutions shall—

- (a) publish the court's decisions under subsection (1); and
- (b) the reasons for the decision.

(5) Where the court terminates a deferred prosecution agreement under subsection (1)(b), the Director of Public Prosecutions shall publish—

Breach of deferred prosecution agreement.

Failure to comply with a deferred prosecution agreement.

- (a) the fact that the deferred prosecution agreement has been terminated by the court following a failure by a person to comply with the terms of the deferred prosecution agreement; and
- (b) the court's reasons for its decisions under subsections (2) and (3).

**31.** Where the Director of Public Prosecutions believes that a person has failed to comply with the terms of the deferred prosecution agreement but determines not to make an application to the High Court under section 29, the Director of Public Prosecutions shall publish details relating to that decision, including—

Director of Public Prosecutions decision on a deferred prosecution agreement.

- (a) the reasons for the Director of Public Prosecutions' belief that a person has failed to comply; and
- (b) the reasons for the Director of Public Prosecutions' decision not to make an application to the court.

**32.** Where the High Court makes an order for termination of a deferred prosecution agreement under section 29(1)(b) or 30(1)(b), a person shall not be entitled to—

Termination of a deferred prosecution agreement by a court.

- (a) recover any money that the person had paid, before the termination, pursuant to a requirement imposed by the deferred prosecution agreement; and
- (b) a relief for a detriment caused to the person by the person's compliance with the terms of the deferred prosecution agreement before the termination.

**33.** (1) At any time when a deferred prosecution agreement is in force, the Director of Public Prosecutions and the person may agree to vary its terms if—

Variation of deferred prosecution agreement.

- (a) the court has allowed the parties to vary the deferred prosecution agreement upon the application of the Director of Public Prosecutions; or
- (b) the variation of the deferred prosecution agreement is necessary to avoid a failure by a

person to comply with its terms in circumstances that were not, and could not have been, foreseen by the Director of Public Prosecutions or a person at the time that the deferred prosecution agreement was agreed.

(2) Where the parties to a deferred prosecution agreement agree to vary the terms of a deferred prosecution agreement, the Director of Public Prosecutions shall apply to the High Court for a declaration that—

- (a) the variation is in the interest of justice; and
- (b) the terms of the deferred prosecution agreement as varied are fair, reasonable and proportionate.

(3) The variation of a deferred prosecution agreement only takes effect when it is approved by the High Court making a declaration under subsection (2).

(4) The court shall give reasons for its decision on whether or not to make a declaration under subsection (2).

(5) A hearing at which an application under this section is determined may be held in camera provided that where the Court approves an application for the variation and makes a declaration under subsection (2) it shall do so, and give its reasons, in an open court.

(6) Where the court determines not to approve an application for the variation of an agreement, the Director of Public Prosecutions shall publish the court's decision and the reasons for it.

(7) Where the court approves an application for the variation of an agreement, the Director of Public Prosecutions shall publish—

- (a) the deferred prosecution agreement as varied; and
- (b) the court's declaration under this section and the reasons for its decision to make the declaration.

**34.** (1) Where a deferred prosecution agreement remains in force until its expiry date, then upon the expiry of the deferred prosecution agreement the proceedings instituted prior to the entry of the agreement shall be discontinued by the Director of Public Prosecutions by giving notice to the High Court.

Discontinuance of proceedings on expiry of deferred prosecution agreement

(2) Where proceedings are discontinued under subsection (1), criminal proceedings may not be instituted against the person for the same alleged offence or on account of the same offence.

(3) Subsection (2) shall not be a bar to the institution of proceedings against a person where, after a deferred prosecution agreement has expired, the Director of Public Prosecutions finds that during the course of the negotiations for the deferred prosecution agreement, the person—

- (a) provided inaccurate, misleading or incomplete information to the Director of Public Prosecutions; and
- (b) knew or ought to have known that the information was inaccurate, misleading or incomplete.

(4) A deferred prosecution agreement shall not be treated as having expired for the purposes of subsection (1) if, on the expiry date specified in the deferred prosecution agreement,—

- (a) an application made by the Director of Public Prosecutions Director of Public Prosecutions under section 28 is pending in court;
- (b) following an application under section 28 the court has directed the parties to remedy the person's failure to comply, but the parties have not yet reached an agreement; or
- (c) the parties have agreed proposals to remedy the person's failure to comply following the direction of the court under section 28 but the person has not yet complied with the agreement.

(5) In the case specified under subsection (4)(a)—

- (a) if the court decides that a person has not failed to comply with the terms of the deferred prosecution agreement, the deferred prosecution agreement shall expire when the application is decided;
- (b) if the court terminates the deferred prosecution agreement, the deferred prosecution agreement is to be treated as not having remained in force until its expiry date; and
- (c) if the court orders the parties to agree to proposals to remedy a person's failure to comply, the

deferred prosecution agreement shall be treated as expiring when the parties have reached such an agreement and the person has complied with it.

(6) In the case specified under subsection (4)(b), the deferred prosecution agreement shall expire when the parties have reached an agreement and the person has complied with it.

(7) In the case specified under subsection (4)(c), the deferred prosecution agreement shall expire when the person complies with the agreement.

(8) Where proceedings are discontinued under subsection (1), the Director of Public Prosecutions shall publish—

- (a) the fact that the proceedings have been discontinued; and
- (b) details of a person's compliance with the deferred prosecution agreement, unless the Director of Public Prosecutions is prevented from doing so by law or by an order of the court under section 34.

#### **PART IV — MISCELLANEOUS PROVISIONS**

**35.** (1) The High Court may defer the publication of information under this Part for such a time as it considers necessary, if it appears to the Court that the postponement is necessary to avoid substantial risk of prejudice to the administration of justice in—

- (a) legal proceedings;
- (b) an investigation under this Act; or
- (c) a criminal investigation under any other written law.

(2) In proceedings under this Part, the High Court may, in the interests of justice, public safety, public security or propriety or for any other sufficient reason, make an order requiring —

- (a) any information which is contained in a Court document intended to be produced before the court, be removed or be sufficiently redacted;
- (b) a person shall not publish such information, or do an act that is likely to lead to the publication of such information.

Publication of  
information.

(3) A person who contravenes subsection (2) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

**36.** (1) The statement of facts contained in a deferred prosecution agreement under section 26 in a criminal proceedings against a person for the alleged offence shall be treated as proof by formal admission by the person.

Use of material in criminal proceedings.

(2) Subsection (3) applies where the Director of Public Prosecutions and a person have entered into negotiations for a deferred prosecution agreement but the deferred prosecution agreement has not been approved by the High Court under section 27.

(3) Material described in sub-paragraph (5) may only be used in evidence against a person —

- (a) on a prosecution for an offence consisting of the provision of inaccurate, misleading or incomplete information; or
- (b) on a prosecution for some other offence where in giving evidence a person makes a statement inconsistent with the material.

(4) However, material may not be used against a person by virtue of subsection (5)(b) unless evidence relating to it is adduced, or a question relating to it is asked, by or on behalf of a person in the proceedings arising out of the prosecution.

(5) The material is—

- (a) material that shows that a person entered into negotiations for a deferred prosecution agreement, including in particular—
  - (i) a draft of the deferred prosecution agreement;
  - (ii) a draft of a statement of facts intended to be included within the deferred prosecution agreement;
  - (iii) a statement indicating that a person entered into such negotiations; and

- (b) material that was created solely for the purpose of preparing the deferred prosecution agreement or statement of facts.

**37.** The Director of Public Prosecutions shall pay into the Consolidated Fund all monies received pursuant to a deferred prosecution agreement requiring a person to—

Monies received by Director of Public Prosecutions under deferred prosecution agreement.

- (a) pay a financial penalty to the Director of Public Prosecutions; and
- (b) disgorge any profits made by the person from the alleged offence.

**38.** (1). The Director of Public Prosecutions may make Regulations generally for the better carrying out into effect of this Act.

Regulations.

(2) Without limiting the generality under subsection (1), the Director of Public Prosecutions may make regulations providing for—

- (a) the procedure for cooperation with the relevant investigating bodies under section 5;
- (b) guidance and regulation in the submission of information and carrying out of investigations;
- (c) classification of and prosecution of specified offences or class of offences; and
- (d) conditions to be complied with in prosecuting under this Act.

(3) The Director of Public Prosecutions may, in consultation with other investigating bodies, issue guidelines on cooperation and collaboration in the investigation of crimes under this Act.

**39.** Section 26 of the Public Officer Ethics Act is amended in subsection (1) by inserting the words “and the Ethics and Anti-Corruption Commission” immediately after the words “public officer”

Amendment of section 26 of No. 4 of 2003

**40.** The Public Officer Ethics Act is amended by deleting section 30 and substituting therefor the following section—

Amendment of section 30 of No. 4 of 2003

Access to declarations

**30.** The contents of a declaration or clarification under this Act shall be accessible to the public.

### **MEMORANDUM OF OBJECTS AND REASONS**

The principal purpose of the Bill is to provide a legal framework for lifestyle audit. The Bill seeks to incorporate the values and principles of governance under Article 10 of the Constitution into the public or state officers' public work.

There is no legal framework presently as to how a lifestyle audit is to be carried out on a public or a state officer who is suspected to be living beyond that person's lawful income.

Part III of the Bill provides for amnesty for corruption cases under deferred prosecution agreement with the Director of Public Prosecutions.

The deferred prosecution agreements framework is in response to perceived deficiencies in the existing prosecution framework involving economic crimes which include—

- (a) long, expensive and complicated investigations and trials for offences of economic crime; and
- (b) non compensation of victims of economic crimes.

The deferred prosecution agreements shall be concluded under the supervision of a High Court judge, who must be convinced that the deferred prosecution agreement—

- (a) is in the interests of justice; and
- (b) that the terms of the deferred prosecution agreement are fair, reasonable and proportionate.

#### **Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms**

This Bill does not delegate any legislative powers nor does it limit fundamental rights and freedoms.

#### **Statement on how the Bill concerns county governments**

The Bill concerns county governments in terms of Articles 110(1) (a) of the Constitution in that it contains provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule to the Constitution. The obligations proposed to be imposed by the Bill will have a direct impact on the means through which State and public officers serving in county governments discharge their functions under Part 2 of the Fourth Schedule to the Constitution.

#### **Statement that the Bill is not a money Bill within the meaning of Article 114 of the Constitution**

This Bill is not a money Bill within the meaning of Article 114 of the Constitution.

Dated the 9th October, 2019.

FARHIYA ALI HAJI,  
*Senator.*

*Section 26 of No. 4 of 2003, which it is proposed to amend-*

**26. Declaration required**

(1) Every public officer shall, once every two years as prescribed by section 27, submit to the responsible Commission for the public officer a declaration of the income, assets and liabilities of himself, his spouse or spouses and his dependent children under the age of 18 years.

(2) The declaration shall be in the form set out in the Schedule and shall include the information required by the form.

*Section 30 of No. 4 of 2003, which it is proposed to amend-*

**30. Access to declarations**

(1) The contents of a declaration or clarification under this Act shall be accessible to any person upon application to the responsible Commission in the prescribed manner if the applicant shows to the satisfaction of the responsible Commission that he or she has a legitimate interest and good cause in furtherance of the objectives of this Act, in such declaration or clarification:

Provided that prior to the responsible Commission making an affirmative decision under this section, it shall grant the opportunity to the affected party to make representations on the matter.

(2) No information obtained pursuant to subsection (1) shall be published or in any way made public except with prior written authority of the responsible Commission.

(3) Any person who—

(a) publishes or in any way makes public any information obtained under the foregoing sections without prior permission of the responsible Commission;

(b) knowingly republishes or otherwise disseminates or discloses to another person information to which this section relates where—

(i) such information was disclosed to himself or to some other person; or

(ii) such information was obtained in contravention of this Act,

shall be guilty of an offence and liable on conviction to imprisonment for five years or to a fine not exceeding five hundred thousand shillings, or to both.