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THE WHISTLEBLOWER PROTECTION BILL, 2023

A Bill for

AN ACT of Parliament to make provisions for the protection of whistleblowers; and for connected purposes.

ENACTED by the Parliament of Kenya, as follows—

PART 1 – PRELIMINARY

1. This Act may be cited as the Whistleblower Protection Act, 2023.

Short title.

2. In this Act, —

Interpretation.

“accounting officer” has the same meaning to it under section 2 of the Public Finance Management Act;

No. 8 of 2012.

“appropriate authority” in relation to a public body means the individual or body that has authority to institute disciplinary measures against a person found to have engaged in improper conduct under this Act;

“Commission” means the Ethics and Anti-Corruption Commission established under section 3 of the Ethics and Anti-Corruption Act;

“designated person” means a person or an institution authorized to receive a disclosure in accordance with section 10(3) of this Act;

No. 22 of 2011.

“enforcement agency” includes any statutory body conferred with investigative and enforcement functions;

“national security” has the meaning assigned to it under Article 238(1) of the Constitution;

“National Security Council” means the National Security Council established under Article 240 of the Constitution;

“personal information” has the meaning assigned to it under section 2 of the Access to Information Act;

No. 31 of 2016.

“whistleblower” means a person who has personal knowledge of, or access to, any data or information relating to a fact or event constituting improper conduct and who makes a disclosure of that information in accordance with this Act;

No. 16 of 2006.

“whistleblowing” means making a disclosure of improper conduct under this Act; and

“Witness Protection Agency” means the Witness Protection Agency established under section 3A of the Witness Protection Act.

3. The objects of this Act are —

Object.

- (a) to facilitate the disclosure and investigation of significant and serious matters in or relating to public or private bodies, which an employee or any other person believes may be unlawful, dangerous to the public or prejudicial to the public interest;
- (b) to enhance ethics and integrity in public and private bodies and among state officers and public officers in the case of public bodies;
- (c) to protect all persons who make disclosures under this Act;
- (d) to provide a framework for the management and investigation of disclosures of improper conduct made under this Act;
- (e) to promote transparency and accountability in the administration of public and private bodies; and
- (f) to provide a framework for public participation in preventing and combating improper conduct and corruption.

PART II – ADMINISTRATION

4. (1) The Commission shall be responsible for the enforcement of this Act.

Responsible
Commission.

(2) The Commission shall, in the exercise of the powers conferred under this Act or in implementing the provisions of this Act, be guided by the national values and principles specified under Article 10 of the Constitution.

5. The Commission shall —

- (a) develop a model whistleblower protection policy and procedures for consideration and adoption by public and private bodies;

Responsibilities,
of the
Commission under
this Act.

- (b) receive and investigate disclosures of improper conduct;
- (c) receive and investigate complaints of reprisal against whistleblowers; and
- (d) ensure the protection for whistleblowers in accordance with this Act.

6. (1) The Commission shall have power to do all things expedient or necessary for the exercise of its powers under this Act and shall —

Powers of the Commission.

- (i) supervise, monitor and co-ordinate all efforts related to the implementation and enforcement of this Act;
- (ii) subject to subsection (3), investigate all disclosures and complaints of reprisal made under this Act, and recommend appropriate action including prosecution if the improper conduct constitutes an offence under this or any other Act;
- (iii) determine whether a whistleblower is entitled to protection under this Act or the Witness Protection Act;
- (iv) refer requests for protection to the Witness Protection Agency;
- (v) undertake, in coordination and co-operation with the private and public sectors, a public awareness campaign on the provisions and benefits of this Act;
- (vi) develop guidelines for public and private agencies to develop whistleblower mechanisms, policies and procedures;
- (vii) approve whistleblower mechanisms, policies and procedures developed by public and private agencies; and
- (viii) develop and implement incentive programs to encourage whistleblowing, including making orders for monetary awards in accordance with the provisions of this Act.

No. 16 of 2006.

(2) The Commission may decline to investigate a disclosure or complaint of reprisal if it determines that the allegation is frivolous or vexatious or made in bad faith.

(3) The Commission shall communicate its decision under subsection (2) to the person making the disclosure or the complaint, giving reasons for the refusal.

7. (1) In the exercise of its investigative powers under this Act, the Commission may collaborate with any other enforcement agency or such other person as it may consider appropriate.

Co-operation with other Agencies.

(2) If the Commission shares information with any other enforcement agency or person under subsection (1), that enforcement agency or person shall be subject to the provisions of this Act relating to protection of confidential information.

(3) A person or an enforcement agency to whom a request for co-operation is made by the Commission shall render such assistance as may be required by the Commission, including undertaking an investigation into a complaint of improper conduct if the nature of that conduct falls within the expertise or mandate of that person or enforcement agency.

(4) Where a person or an enforcement agency undertakes an investigation into improper conduct under subsection (3), that person or enforcement agency shall prepare a report and submit it to the Commission for further action and guidance.

8. A person is not liable for any action, claim, suit or demand, whether criminal or civil, in respect of any disclosure made or anything done or omitted to be done by that person in good faith in the exercise of a function conferred under this Act.

Immunity from legal proceedings.

PART III – IMPROPER CONDUCT AND THE DISCLOSURE PROCESS

9. The provisions of this Act shall apply with respect to the following forms of improper conduct in a public or private entity —

Improper conduct to which this Act applies.

- (a) a contravention of an Act of Parliament or of a County Assembly;
- (b) an act or omission which creates a danger to the life, health or safety of persons;
- (c) an act or omission which has or is likely to damage the environment;
- (d) gross mismanagement or wasteful expenditure or misuse of public asset;
- (e) a criminal offence, including an offence under any law relating to bribery, economic crimes or leadership and integrity;
- (f) a violation of human rights and fundamental freedoms as set out in Chapter Four of the Constitution; or
- (g) concealing of the improper conduct described in paragraphs (a) to (f) of this section.

10. (1) A disclosure is protected under this Act if —

Disclosures
protected by law.

- (a) the disclosure is made in good faith;
- (b) the person making the disclosure reasonably believes that the information disclosed, and any allegation contained in it, are substantially true;
- (c) the person does not make the disclosure for purposes of personal gain other than any reward payable under any written law; and
- (d) the person does not violate any law when making the disclosure.

(2) Where a person reasonably believes that an act which constitutes improper conduct has occurred, is occurring, or is likely to occur, such person may, subject to subsection (3), disclose information relating to such conduct to—

- (a) that person's supervisor;
- (b) the chief executive officer of the institution concerned; or
- (c) to a person who may be designated by an entity to receive such information.

(3) Where a disclosure relates to a matter involving the supervisor, the chief executive, head of the public or private entity in which a person works, such disclosure may be made to the Commission or to a designated person where the improper conduct falls within the description of matters which are dealt with by the designated person in the ordinary course of its duties.

11. A person may make a disclosure of improper conduct directly to the Commission only where such person —

Disclosures to be made to the Commission.

- (a) has previously made a disclosure to an accounting officer of a public entity and an investigation in respect of the disclosure has not been undertaken in accordance with its internal procedures;
- (b) has made a disclosure and the matter has not been resolved within the timelines specified by the entity for the carrying out of an investigation or resolving the issue;
- (c) is dissatisfied with the investigations undertaken or final decision issued by the entity to whom the disclosure is made;
- (d) reasonably believes that the matter presents an imminent risk of a substantial danger to the life, health or safety of a person, or a danger to the environment and that there is insufficient time to make a disclosure to another body or person; or
- (e) reasonably believes that a reprisal is likely to be taken or directed against them if the disclosure is made to any other person or body.

(2) Where the Commission reasonably believes that there is an imminent risk of a substantial and specific danger to the life, health or safety of a person, the Commission may investigate the matter or if it considers it expedient to do so, refer the matter to the relevant agency for investigation and appropriate action.

12. A person who knowingly gives false or misleading information in connection with a disclosure of improper conduct commits an offence and is liable, on conviction, to imprisonment for a term not exceeding fourteen years or a fine not exceeding ten million shillings or to both.

False or misleading disclosures.

13. A disclosure made under this Act shall contain, as far as practicable, information regarding —

Information to be included in disclosure.

- (a) the full name and contact information of the whistleblower, unless the disclosure is made anonymously;
- (b) the nature of the improper conduct in respect of which the disclosure is being made;
- (c) the person alleged to have engaged in improper conduct, including the name and contact information if known;
- (d) the time and location where the alleged improper conduct is taking place, took place or is likely to take place;
- (e) any other person who may have witnessed or has information regarding the improper conduct, including the name and contact information if available; and
- (f) if the disclosure is related to the whistleblower's employment, whether the whistleblower remains in that employment.

14. (1) A disclosure made under this Act shall as far as possible be in writing, and where a whistleblower makes a disclosure orally, the person to whom the disclosure is made shall cause the disclosure to be reduced into a written statement.

Disclosure to be in writing.

(2) The written statement made under subsection (1) shall be read over, interpreted and explained to the whistleblower in a language the whistleblower understands, and the whistleblower shall affirm that the information contained in the statement is true to the best of their knowledge, information and belief, before appending their signature or mark on it.

15. (1) A person to whom a disclosure is made shall —

Action after receipt of disclosure.

- (a) make a record of the time and place where the disclosure is made;
- (b) give to the whistleblower an acknowledgment of receipt of the disclosure in writing, and

- (c) keep the statement received confidential and in safe custody pending investigation of the disclosure.

(2) Where the disclosure is made to a person or entity that is not mandated to carry out the investigation, that person or body may instead of recording the disclosure under subsection (1), assist the whistleblower to make the disclosure to the Commission or to the appropriate authority.

(3) Where a disclosure with respect to improper conduct by a public officer is made directly to the Commission pursuant to section 10, the Commission shall—

- (a) refer the matter to the accounting officer of the respective public entity seeking a written response on the matter within a period of thirty days of the notification; or
- (b) conduct an investigation where –
 - (i) the matter relates to the accounting officer or chief executive officer of the public entity;
 - (ii) the public body fails to respond within thirty days of the notice; or
 - (iii) the Commission is dissatisfied with the response provided by the entity.

(4) A person to whom a disclosure is made and who fails to keep the disclosure confidential commits an offence and is liable, on conviction, to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding fourteen years or to both.

16. Where a disclosure is made to a person authorised to receive the disclosure other than the Commission, the person receiving it shall submit a copy of the written disclosure to the Commission within seven days of receipt.

Submission of a copy of written disclosure to the Commission.

17. (1) A person may disclose acts constituting improper conduct under this Act without disclosing their identity.

Anonymous disclosures.

(2) A person who makes an anonymous disclosure shall be entitled to the same protections as any other person who makes a disclosure under this Act.

(3) The person or entity to whom a disclosure is made shall, upon receiving a disclosure under subsection (1), carry out such investigation or refer the matter to the relevant investigating authority in a manner that ensures that the anonymity of the whistleblower is maintained.

PART IV – WHISTLEBLOWER PROTECTION MEASURES

18. (1) Every public entity shall develop a whistleblower policy and reporting procedures in the prescribed form.

Duty to develop and put in place whistleblower policies and procedures.

(2) The Commission shall —

(i) within six months of the commencement of this Act, prescribe the particulars to be contained in a whistleblowers policy and reporting procedures under subsection (1); and

(ii) may assist a public entity or a private entity to develop and put in place appropriate whistleblower policies and procedures.

(3) Where a public entity fails to develop the policy and reporting procedures under subsection (1), the accounting officer of that entity commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to both.

PART V – PROTECTION OF WHISTLEBLOWERS AND INVESTIGATION OUTCOMES

19. (1) A whistleblower is entitled to —

Whistleblower protection.

(a) confidentiality of the information disclosed pursuant to this Act;

(b) confidentiality of their identity;

(c) immunity from civil or criminal liability in relation to the disclosure; and

(d) protection against reprisal.

(2) For the purpose of subsection (1)(a) and (c), protection shall be extended to a person who may be in need of protection —

- (a) by virtue of being related to a whistleblower;
- (b) on account of evidence given by the whistleblower; or
- (c) for any other reason which the Commission may consider sufficient.

(3) The protection accorded subsection (1) and (2) shall not be waived in the event that the disclosure does not lead to disciplinary action or prosecution of a person against whom the disclosure has been made.

(4) The intention of a whistleblower in making a disclosure shall not be a consideration regarding whether the whistleblower or any other person is entitled to protection under this Act.

(5) Upon determination by the Commission that the life or property of a whistleblower or that of his or her family or connected person is in danger or likely to be in danger as a result of the disclosure, the Commission may refer the matter to the Witness Protection Agency.

20. (1) No employer or person acting on behalf of an employer may, by reason of a disclosure made by an employee in accordance with this Act, directly or indirectly—

Workplace
reprisal.

- (a) subject that employee to disciplinary action;
- (b) dismiss, suspend, demote, harass or intimidate that employee;
- (c) refuse a transfer or promotion of the employee;
- (d) vary employee's terms and conditions of employment to the person's disadvantage;
- (e) refuse to give the employee a reference or give an adverse reference in respect of the employee;
- (f) deny the employee's appointment to any employment, profession or office;
- (g) threaten the employee with any of the actions referred to in paragraphs (a) to (g); or
- (h) adversely affect the employee's employment, profession or office, including that employee's employment opportunities and work security.

(2) Subsection (1) shall apply in respect of any person whose terms or conditions of employment may be affected —

- (a) by virtue of being related to a whistleblower;
- (b) because the person, being an employee, refuses to follow orders from senior employer or other person acting on behalf of an employer, which would cause the employee to violate this Act; or
- (c) for any other reason which the Commission may consider sufficient.

(3) For the avoidance of doubt, a whistleblower shall be entitled to protection from workplace reprisal.

21. No person acting or purporting to act on behalf of any public or private entity shall —

Reprisals in relation to contracts.

- (a) terminate a contract;
- (b) withhold a payment that is due and payable under a contract; or
- (c) refuse to enter into a subsequent contract;

by reason that the party to the contract or an employee of or person related to a party to the contract is or has been or is found to be a whistleblower.

22. (1) A whistleblower may make a complaint to the Commission against any reprisal taken by any person against the whistleblower or against any person entitled to protection under this Act.

Complaints of reprisal.

(2) A person is deemed to commit acts of reprisal if—

- (a) the person takes or threatens to take such acts because—
 - (i) a whistleblower has made a disclosure under this Act;
 - (ii) the person believes that a whistleblower has made or intends to make a disclosure under this Act; or

(b) the person incites, instructs or permits another person to take or threaten to commit such acts for any reason under paragraph (a).

(3) A person who commits an act of reprisal commits an offence and is liable, on conviction, to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding fourteen years or to both.

(4) A person shall not be liable under subsection (3) where such person demonstrates that he or she would have taken the same action in the absence of the disclosure.

23. (1) A person who —

- (a) makes or receives a disclosure; or
- (b) obtains confidential information in the course of investigation into such disclosure,

shall not disclose the confidential information or any part of the information to any other person.

(2) A person to whom a disclosure is made or transmitted under this Act shall not, without the consent of the whistleblower and subject to subsection (3), disclose to another person, the identity of the reporting person or any information from which the identity of the reporting person may be directly or indirectly deduced.

(3) Subsection (2) shall not apply to persons to whom the information is submitted for the purposes of enabling a follow-up or investigation into the disclosure as required under this Act.

(4) If any evidence in any civil, criminal or other proceedings in relation to this Act contains or relates to confidential information, the court, tribunal or other authority before which the proceedings are being held shall, unless it considers that the interests of justice require otherwise, —

- (a) hold that part of the proceedings which relates to confidential information in private; and,
- (b) make such order to suppress the publication of evidence given before the court, tribunal or other authority as, in its opinion, shall ensure that the confidential information is not disclosed, including an order that —
 - (i) the confidential information be redacted from any documentary evidence that forms part of the public record;

Confidential
information.

- (ii) no witness in the proceedings, including a whistleblower, shall be required to answer a question, give any evidence, or provide any information, which may lead to the disclosure of confidential information; and
- (iii) no person involved in the proceedings shall, during the proceedings, ask a question or make a statement which discloses or could disclose confidential information.

(5) A term of any settlement arising from a claim under this section, in so far as it purports to impose an obligation of confidentiality on any party to the settlement in respect of information which is accurate and which was or was proposed to be disclosed, shall be unenforceable.

(6) A person who, without lawful excuse, contravenes subsection (1) and (2) commits an offence and shall be liable on, conviction, to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding fourteen years or to both.

(7) In any proceedings for an offence for contravention of subsection (1), it shall be a defence to show that —

- (a) in the circumstances, the disclosure was in the public interest; and
- (b) where the offence is alleged to have been committed by a public officer and involves the disclosure of information obtained by the person in the person's position as such, the defendant had reasonable grounds to believe that the information was true before making the disclosure.

24. (1) The Commission, upon receipt of information under this Act, may carry out the following actions to remedy a violation of this Act —

Orders for relief.

- (a) seek interim and final reliefs from a court as appropriate;
- (b) direct the referral of a whistleblower or any other person entitled to protection in accordance with this Act to the Witness Protection Agency, if the

No. 16 of 2006.

circumstances prescribed by section 3 of the Witness Protection Act apply;

- (c) impose upon an entity or person an administrative fine not exceeding Kenya Shillings ten million for violation of its obligations under the Act;
- (d) direct the entity to reinstate a person to a position lost as a result of workplace reprisal;
- (e) recommend compensation for loss of income;
- (f) recommend specific performance of contractual obligations; or
- (g) direct that any person specified in a court order desist from contacting the whistleblower or any other person entitled to protection under this Act for such specified period as may be necessary in the circumstances.

(2) The Commission may apply to the High Court for any other order that may be reasonably necessary to remedy a violation of this Act.

25. (1) The Commission may revoke the protection accorded to a whistleblower under this Act if it is determined that —

Revocation of whistleblower's protection.

- (a) the whistleblower participated in the improper conduct complained about;
- (b) in the disclosure of improper conduct, the whistleblower made a material statement which he or she knew or believed to be false;
- (c) the information disclosed is frivolous or vexatious; or
- (d) the disclosure principally involves questioning the merits of policy, except that protection may exist for disclosing the probable adverse consequences of a policy on the public interest.

(2) Where whistleblower protection is revoked, the Commission shall —

- (a) within seven days issue a written notice to the whistleblower explaining the reasons for revocation;
- (b) grant the whistleblower an opportunity to be heard on the revocation; and

(c) where appropriate, advise the Witness Protection Agency to take the necessary action.

26. (1) A person aggrieved by a decision of the Commission to revoke whistleblower protection, may apply for a review of the decision within thirty days of the decision.

Reconsideration
by Commission.

(2) An application for review shall be submitted in writing to the Commission and shall include information on—

- (a) the basis upon which the request is made;
- (b) submissions in support of the request; and
- (c) the relief or protection measure being sought.

(3) An application for review shall only be granted where the Commission is satisfied that—

- (a) there are new facts or evidence that could not reasonably have been provided earlier; or
- (b) the person seeking reconsideration was not afforded adequate opportunity to disclose information that could have affected the decision of the Commission.

(4) In reviewing its decision to deny relief or revoke whistleblower protection, the Commission may—

- (a) make a determination on the substance of the request without further information; or
- (b) conduct a further investigation.

(5) The Commission shall determine an application for review within a period of sixty days from the date of receipt of the application.

(6) Where the Commission rejects an application for review, it shall submit its decision together with the reasons for its decision within seven days of the decision.

(7) A person aggrieved by the decision of the Commission may appeal to the High Court.

27. (1) Upon concluding an investigation into a disclosure or complaint of reprisal under this Act, the Commission shall prepare a report which shall contain —

Investigation
report.

- (a) the findings of the investigation; and
- (b) recommendations for further steps if any, to be taken.

(2) If a finding is made that improper conduct has occurred, the Commission shall, in its report specify the identity of the wrongdoer.

28. (1) If, upon concluding its investigation, the Commission finds that —

Report
recommendations.

- (a) the disclosure is not substantiated, the Commission shall inform the whistleblower in a preliminary determination and seek comments before finalizing the matter; or
- (b) the improper conduct constitutes a criminal offence, the Commission shall refer the matter to the Director of Public Prosecutions.

(2) Where the Director of Public Prosecutions, upon receipt of a matter under subsection (1)(b), determines —

- (a) to initiate a prosecution, the Director shall submit a report to the Commission, in the prescribed manner, on the status of the prosecution until the matter has been finally disposed of; or
- (b) not to initiate the prosecution, the Director shall furnish the Commission with reasons in writing for that decision.

(3) If, upon considering any information provided by the appropriate authority, it appears to the Commission that insufficient steps or no action has been taken to give effect to the finding or recommendation under subsection (1)(b), the Commission may submit a report to the accounting officer responsible for that public entity, on the investigation, findings, recommendation and the expected response by the appropriate authority.

(4) The Commission shall inform the whistleblower of the results of the investigation and any other action taken.

29. (1) A public entity shall offer a whistleblower a monetary reward where the disclosure leads to —

Reward on
conviction or
recovery.

- (a) the arrest and conviction of an accused person; or
- (b) recovery of money or a public asset.

(2) Where money is recovered, the reward offered shall be not more than ten percent of the money recovered.

(3) Where an asset is recovered, the reward offered shall be not more than ten percent of the value of the asset recovered.

(4) A public body shall maintain a record of all the rewards offered.

PART VI— ENFORCEMENT, OFFENCES AND PENALTIES

30. The Commission or any other person may apply to the High Court for the enforcement of any order made by the Commission in accordance with this Act.

Enforcement of Commission's orders.

31. A person who —

Obstructing an investigation.

- (a) without justification or lawful excuse, obstructs, hinders, assaults or threatens a person acting under this Act;
- (b) deceives or knowingly misleads the Commission or a person acting under this Act, including by creating any false record or other evidence;
- (c) destroys, alters, conceals or removes documents, records or evidence that the person believes, or has grounds to believe, may be relevant to an investigation or proceeding under this Act;
- (d) makes false accusations to the Commission or a person acting under this Act; or
- (e) directs, counsels or causes, in any manner, a person to do anything mentioned in paragraphs (a) to (d) commits an offence.

32. A person who commits an offence under this Act for which no penalty is expressly provided, is liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding seven years or to both.

General penalty.

PART VII— MISCELLANEOUS PROVISIONS

33. Nothing in this Act shall be deemed to authorise the disclosure of —

Limits on disclosure

- (a) information or documents that would disclose the deliberations of the Cabinet or a committee of the Cabinet or the National Security Council or a Committee of the Council, or the proceedings of any of them;
- (b) information that is protected by advocate-client privilege;
- (c) in the case of a disclosure under section 15 if the information —
 - (i) is classified information, under the Official Secrets Act, or any other information which is subject to any restriction created by or under any other written law, or;
 - (ii) is any personal information or individually identifying personal health information, or
- (d) any information, document or matter or any class of information, documents or matters prescribed under this Act.

34. Nothing in this Act relating to the making of a disclosure shall be construed as affecting the obligation of an employee or any other person under any other Act to disclose, report or otherwise give notice of any matter.

Other obligations to report not offered

35. (1) The Commission may, by notice in the *Gazette*, exempt any person, class of persons, public entity, information, record or thing from the application of all or any portion of this Act provided that the exemption is in public interest.

Exemption

(2) The Commission shall provide reasons for exempting a person under subsection (1) and shall publicize the information relating to the exemption including any terms or conditions are made available to the public.

(3) Exemptions specified in subsection (1) shall not be construed as a limit to public interest.

36. (1) Subject to any limitations provided for under this Act, every public entity shall within three months of the end of each calendar year prepare and submit to the Commission a report on all disclosures made to it in the preceding year.

Annual Report of a public or private body to the Commission

(2) A report under subsection (1) shall include information on —

- (a) the number and nature of disclosures received by the public or private body, the number of disclosures acted on and the number of disclosures not acted on by the public or private body;
- (b) the number of investigations commenced by the public or private body as a result of such disclosures;
- (c) the status of investigations into the disclosures taken up for investigations;
- (d) in the case of an investigation that results in a finding of improper conduct, a description of the improper conduct and any recommendations made or corrective measures taken in relation to the improper conduct or the reasons as to why no corrective measure was taken;
- (e) the average number of days taken by the public or private entity to determine the appropriate mode of disposal of disclosures received by it; and
- (f) the number of full-time staff of the public or private body devoted to handling disclosures and the total amount of funds expended by the body for processing such disclosures.

(3) A report under subsection (1) shall be included in the annual report of the public entity if the annual report is made available to the public, and where it is not, the chief executive officer of the public or private entity shall make the report under subsection (1) available to the public on request.

37. (1) The Commission shall submit an annual report to Parliament on the exercise and performance of its functions and duties under this Act, setting out —

- (a) the number of general inquiries made to the Commission relating to this Act;
- (b) the number of disclosures received by the Commission under this Act;

- (c) the number of disclosures acted on and the number of disclosures not acted on by the Commission or by a public or private entity;
- (d) the number of investigations commenced by the Commission or a public or private entity under this Act;
- (e) the recommendations the Commission has made and whether the public or private entities to which the recommendations relate have complied with the recommendations;
- (f) the number of complaints of reprisals received by the Commission or a public or private body under this Act, the number of complaints of reprisals acted on and the number of complaints of reprisals not acted on by the Commission or by a public or private body;
- (g) whether, in the opinion of the Commission, there are any systemic problems that may give rise to or have given rise to improper conduct;
- (h) a summary of the reports of public and private bodies on the disclosures received and action taken, including action taken in response to reprisals;
- (i) an assessment of the compliance of public and private bodies with the provisions of this Act or its regulations; and
- (j) any recommendations for improvement that the Commission considers appropriate.

(2) Where it is in the public interest to do so, the Commission may publish a report relating to any matter within the scope of the Commission's responsibilities under this Act.

(3) The Commission shall make its report under subsection (1) available to the public.

38. Any person or public or private entity may seek advice from the Commission on the implementation of this Act or a particular provision thereof.

Request for advice

39. (1) The Attorney General, in consultation with the Commission, may make regulations for the better carrying out of the provisions of this Act.

Power to make regulations

(2) Without prejudice to the generality of the subsection (1), the Commission may make regulations prescribing —

- (a) the procedures to be followed by a public or private entity, a designated person or the Commission in managing and investigating disclosures and reporting the outcome of investigations, including setting time periods for action;
- (b) the category of information that may be disclosed to the Commission;
- (c) the forms of disclosure to the Commission, including direct disclosures and the procedure generally for making a disclosure;
- (d) prescribing the procedure for referring a matter that constitutes a threat to national security or an imminent risk of a substantial or specific danger to life, health or safety of individuals or to the environment, including persons to whom the matter may be referred and the time period for referring those matters;
- (e) the procedure for, and the designation of persons or institutions which may receive disclosures under this Act;
- (f) the information to be included in a disclosure;
- (g) the circumstances in which the Commission is not required to investigate a disclosure;
- (h) the exemption of any person, class of persons, public entity, information, record or thing from the application of all or any part or provision of this Act;
- (i) the forms for making complaints respecting reprisals;
- (j) the circumstances in which the Commission may investigate a complaint respecting a reprisal;

- (k) respecting the collection, use and disclosure of information, including personal information and individually identifying health information, for the purposes of this Act;
- (l) imposition of administrative fines for violations of the Act;
- (m) forms for any request, notice, order, declaration or other matter under this Act; and
- (n) any other matter required to be prescribed under this Act.

MEMORANDUM OF OBJECTS AND REASONS

Statement of the Objects and Reasons for the Bill

A whistleblower is a person, who could be an employee of a company, or a government agency, disclosing information to the public or some higher authority about any wrongdoing, which could be in the form of fraud, corruption or other serious misdeeds.

Kenya faces a challenge in reporting of instances of corruption as there is a lack of a comprehensive legal framework to protect citizens and persons who wish to report instances of corruption and wrongdoing that they have witnessed.

The objective of this Bill is to create a legal framework that will extend the protections available under the Witness Protection Act to whistleblowers.

Part I of the Bill deals with the short title and the definitions clause of the Bill. Herein are key definitions that explain the various words and phrases contained in the Bill for ease of reference.

Part II of the Bill contains the clauses relating to the administration of the Bill. It is instructive that the task of administration of the clauses of the Bill has been bestowed onto the Ethics and Anti-Corruption Commission (EACC).

Part III of the Act sets out the forms of improper conduct and gross misconduct to which the Act relates.

Part IV of the Act requires every private or public body to establish and maintain written procedures for the investigation of disclosures of improper conduct made by employees or other persons. Clause 10 in this Part sets out the bodies and offices to which disclosures may be made. Clause 13 specifies what information should be put in the disclosure

Part V of the Bill requires public and private bodies to put in place whistleblower policies and procedures according to their size, in line with guidelines to be issued by the Commission.

Part VI of the Bill provides for the protection of whistleblowers. It provides for confidentiality of information, immunity from liability and protection against reprisals of any form as a result of the disclosure.

Part VII of the Bill provides for the outcomes of an investigation by the Commission. The report of the Commission may recommend prosecution where appropriate or call upon the body in respect of which a complaint is made to take the necessary action.

Part VIII of the Bill prescribes penalties for offences against the Act, including making of false disclosures, misleading the Commission, or failing to make a disclosure while being aware that improper conduct has occurred or is likely to occur.

Part IX of the Bill provides limits on disclosure under the Act. The Bill shall not authorize the disclosure of information relating to national security, classified information under specified law, or personal health information except in certain circumstances.

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

Clause 38 of the Bill gives the Cabinet Secretary powers to make regulations for the implementation of the provisions in the Bill. The Bill does not limit any fundamental rights and freedoms.

Statement of how the Bill concerns county governments

The Bill concerns county governments in terms of Article 110(1)(a) of the Constitution as it affects the functions and powers of County Governments set out in the Fourth Schedule.

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 1st November, 2023.

GLORIA ORWOBA,
Senator.