



Memorandum on the Computer Misuse and Cybercrimes (Amendment) Bill, 2021

To: The Honorable Aden Duale, Member of Parliament

The Attorney General of Kenya

The Speaker of the National Assembly

The Director of Public Prosecutions

**The Chairperson of the National Assembly Departmental Committee on Communications,
Information and Innovation**

The Clerk of the National Assembly

Executive Summary

ARTICLE 19 Eastern Africa, Access Now, the Bloggers Association of Kenya, Defenders Coalition, the Kenya ICT Action Network and the Kenya Union of Journalists present this memorandum in response to the Computer Misuse and Cybercrimes (Amendment) Bill, 2021 tabled before the National Assembly.¹⁵

This Bill seeks to amend the Computer Misuse and Cybercrimes Act (**CMCA**), 2018, and: -

1. provide for the prohibition against the sharing of pornography through the internet;
2. prohibit the use of electronic mediums to promote terrorism, extreme religious or cult activities; and
3. provide an additional function of the National Computer and Cybercrimes Coordination Committee (**Cybercrimes Committee**) which is to recommend websites that may be rendered inaccessible within the country.

The undersigned organisations have analysed the Bill for its compliance with international, regional and national laws and standards on the rights to freedom of expression and access to information, and the freedoms of assembly and association, both online and offline. Contrary to the assertion in the Memorandum of Objects and Reasons that the Bill does not ‘limit fundamental rights and freedoms,’ we note that all of the proposed amendments, if adopted, will infringe on protected rights and freedoms under the Bill of Rights, Chapter 4 of the Constitution of Kenya, 2010 and under international human rights law.¹⁶

We are cognisant of the global challenges presented by cyber crimes and the need to address information ‘disorders’ in the digital environments. Despite this, we reiterate that the government has obligations, under national and international law, to respect, protect and fulfil human rights, both offline and online. Based on this, we highlight the following: -

- 1. Clause 2 of the Bill** - the proposed expansion of the functions of the Cybercrimes Committee to render websites inaccessible contravenes the principle of non-interference with communication and digital technologies, and violates the principle of the rule of law under Article 10 of the Constitution of Kenya, 2010.

¹⁵ The Computer Misuse and Cybercrimes (Amendment) Bill, 2021 <[TheComputerMisuseandCybercrimes_Amendment_Bill_2021.pdf \(kenyalaw.org\)](#)>

¹⁶ The Memorandum of Objects and Reasons sets out the rationale for the Bill.

2. **Clause 3 of the Bill** - the proposed ban on pornography violates the right to freedom of expression, online and offline, as this is not one of the permissible limitations specified under Articles 24 and 33 (2) of the Constitution of Kenya, 2010 in a free and democratic society. Pornography is also not a form of expression that may be restricted under international law.
3. **Clause 4 of the Bill** - the proposed expansion of the cyber-harassment provision fails to meet the threshold for causation to establish criminal liability and contravenes the principles of legality, legal certainty and the rule of law under Article 10 of the Constitution of Kenya, 2010.
4. **Clause 5 of the Bill** - the proposed expansion of the cyber-terrorism provision will duplicate a similar offence under Part III of the Prevention of Terrorism Act. This will introduce legal uncertainty and will expose individuals to excessive criminal liability, by virtue of charges that may be raised under separate offences for the same crime.¹⁷ The clause will also violate the rights of arrested or accused persons generally to a fair trial as guaranteed under Articles 49 and 50 of the Constitution of Kenya, 2010.

Recommendations

1. We recommend
 - a. the withdrawal of the Cybercrimes Amendment Bill, 2021, in its entirety.
 - b. the Attorney General, the Hon. Duale, the Director of Public Prosecutions and the Chairperson of the National Assembly Departmental Committee on Communications, Information and Innovation initiate meaningful consultations with a diverse and representative group of stakeholders to align the CMCA, 2018 with international laws and standards.
 - c. the National Assembly places its consideration of the Cybercrimes Amendment Bill, 2021 on hold until:
 - i. Civil Appeal No. 197 of 2020, *The Bloggers Association of Kenya (BAKE) - vs - The Hon. Attorney General & 3 Others* challenging 26 provisions in the CMCA, 2018 before the Court of Appeal is determined.
 - ii. Parliament complies with the High Court's order to regularise the CMCA, 2018 by the end of July 2021, lest the finding of unconstitutionality is given effect.
 - d. the Office of the Director of Public Prosecutions exercises discretion not to charge individuals under the 26 impugned provisions in the CMCA, 2018, which is currently *sub judice* before the Court of Appeal in Civil Appeal No. 197 of 2020, *The Bloggers Association of Kenya (BAKE) - vs - The Hon. Attorney General & 3 Others*.

¹⁷ ARTICLE 19 (2018), Kenya: Computer and Cybercrimes Bill, 2017 <[Kenya-analysis-April-2018.pdf \(article19.org\)](https://www.article19.org/kenya-analysis-april-2018.pdf)>

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Clause	Provision	Proposal	Justification
Clause 2	<p>Proposed amendment to Section 6, CMCA 2018</p> <p><i>Recommend websites to be rendered inaccessible within the Republic</i></p>	<p>We recommend the deletion of this clause</p>	<p>This provision seeks to expand the functions of the National Computer and Cybercrimes Coordination Committee (Cybercrimes Committee) to render websites inaccessible in Kenya.</p> <p>Digital platforms, including websites, facilitate the rights to access to information and freedom of expression in the digital age. Given their significance, States are prohibited from interfering with individuals’ right to ‘seek, receive and impart information through any means of communication and digital technologies, through measures such as the removal, blocking or filtering of content, unless this interference is justifiable and compatible with international human rights law and standards’ (Principle 38, Declaration of Principles on Freedom of Expression and Access to Information in Africa).¹⁸</p> <p>Further, the proposed expansion of the Committee’s functions risks contravening the principle of the rule of law under Article 10 of the Constitution of Kenya, 2010. This requires laws to be well-defined, predictable, regular and legally certain, to curb abuse of power, arbitrariness and illegality. The proposed expansion of the Committee’s functions contravenes this principle by virtue of its:</p>

¹⁸ African Commission on Human and Peoples’ Rights (2019), Declaration of Principles on Freedom of Expression and Access to Information in Africa
https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf

			<ul style="list-style-type: none"> ● <u>vagueness</u>: the failure to detail, <i>inter alia</i>, the applicable criteria which will be used by the Committee to recommend websites to be made inaccessible, or to provide safeguards and specify enforcement mechanisms contravenes the principles of the rule of law and legal certainty. We also note that this vague amendment, if enacted, will enable Internet controls, leading to an environment of censorship. ● <u>duplication of regulatory functions</u>: the regulation of information and communications services rests with the Communications Authority of Kenya and the Kenya Film Classification Board.¹⁹ This clause will introduce legal uncertainty in regulation, thus infringing on the principles of the rule of law and legality under the Constitution of Kenya, 2010.
Clause 3	<p>Proposed amendment to Section 24, CMCA, 2018</p> <p><i>Pornography</i> 24A. (1) A person shall not knowingly-</p> <p>(a) <i>publish pornography through a computer system;</i></p> <p>(b) <i>produce pornography for the purpose of its publication through a computer system;</i></p> <p>(c) <i>download, distribute, transmit, disseminate,</i></p>	We recommend the deletion of this clause	<p>Despite the statement that the Bill will not limit fundamental rights and freedoms in the Memorandum of Objects and Reasons, we stress that this proposed ban of pornography will violate Articles 24, 33 and 35 of the Constitution of Kenya, 2010.</p> <p>Under Article 24 of the Constitution of Kenya, 2010, the State is under a duty to demonstrate that limitations on fundamental rights and freedoms are permissible in a free and democratic society. This requires ‘demonstrating the relationship between the limitation and its purpose, and show[ing] that there</p>

¹⁹ The Communications Authority of Kenya is mandated, under the Kenya Information and Communications Act, to ‘licence and regulate postal, information and communication services in Kenya.’ Further, the Kenya Film Classification Board is mandated, under the Films and Stage Plays Act (CAP 222), to ‘control the making and exhibition of cinematograph films, for the licensing of stage plays, theatres and cinemas; and for purposes incidental thereto and connected therewith.’

<p><i>circulate, deliver, exhibit, lend for gain, exchange, barter, sell or offer for sale, let on hire or offer to let on hire, offer in any way, or make available in any way from a telecommunications apparatus pornography;</i> or <i>(d) possess pornography in a computer system or on a computer data storage medium.</i></p> <p><i>(2) A person who contravenes subsection (1) commits an offence and is liable, on conviction, to a fine not exceeding twenty million shillings or imprisonment for a term not exceeding twenty five years, or to both.</i></p> <p><i>(3) It shall be a defence to a charge for an offence under subsection (1) where a publication is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, art, representation or figure is in the interest of science, literature, learning or other objects of general concerns.</i></p>		<p>were no less restrictive means to achieve the purpose intended.’²⁰ We note that this duty has not been discharged.</p> <p>Under Article 33 (2) of the Constitution of Kenya, 2010, the right to freedom of expression can only be legitimately restricted where it amounts to ‘propaganda for war; incitement to violence; hate speech; or advocacy of hatred that—constitutes ethnic incitement, vilification of others or incitement to cause harm; or is based on any ground of discrimination specified or contemplated in Article 27 (4).’ The proposed ban on pornography is not one of the permitted grounds specified under Article 33 (2) of the Constitution of Kenya, 2010, and will violate the right to freedom of expression.</p> <p>Under international law, pornography is not a form of expression that may be restricted under international law. Attempts to regulate pornography are rooted in morality, culture and tradition arguments.²¹ However, the UN Human Rights Committee affirmed that limitations on rights for the protection of morals must be based on principles not deriving exclusively from a single tradition (social, philosophical or religious).²² We note that this has not been demonstrated in the Bill.</p> <p>The proposed definition of ‘pornography’ in the Bill relies on the term ‘sexually explicit conduct.’ This vague, subjective broad definition could be used to police content, expression and communication that is perfectly</p>
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²⁰ *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR, para 96 <[Petition 149 of 2015 - Kenya Law](#)>

²¹ Tagnay, C & Kee, J SM, *Erotics: Sexuality, freedom of expression and online censorship* <[standpoints erotics- sexuality freedom of expression and online censorship.pdf \(agi.ac.za\)](#)>

²² UN Human Rights Committee (1993) General comment No. 22 (48) (art. 18)* <[http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6OkG1d%2fPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2bfud3cPVrcM9YR0iUh4IvOtM7YUcKE6R1aBpKmYAstxgdf4vXLMslHe1LcOio8z%2f9pGJsac2JNOOTO4jAaVkCo02vVbw65HVERDHhA%3d%3d](#)>

	<p>(4) For purposes of this section— <i>"pornography" "includes any data, whether visual or audio, that depicts persons engaged in sexually explicit conduct; "publish" includes to-</i></p> <p><i>(a) distribute, transmit, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell or offer for sale, let on hire or offer to let on hire, offer in any other way, or make available in any way;</i></p> <p><i>(b) having in possession or custody, or under control, for the purpose of doing an act referred to in paragraph (a); or</i></p> <p><i>(c) print, photograph, copy or make in any other manner whether of the same or of a different kind or nature for the purpose of doing an act referred to in paragraph (a).</i></p>		<p>legitimate, lawful and protected under Article 33 (1) (b) and (c) of the Constitution of Kenya, 2010 which provides for freedom of artistic creativity, academic freedom and freedom of scientific research.²³ For example, <i>ordinary citizens</i> who post their photos and videos on social media platforms, and journalists, academics, creatives and artists who depict nudity, sex and eroticism in books, pamphlets, papers, writings, drawings, paintings, art, representations or figures - that should only be accessible to adults - risk prosecution.</p> <p>The use of the word ‘knowingly’ when prescribing criminal conduct in this clause is not a sufficient intentionality requirement.²⁴ Instructively, this clause does not rely on the more stringent requirement of ‘intent’ or even serious harm in connection with the offence before criminal sanctions attach. Additionally, subjective <i>mens rea</i> typically requires proof or evidence of the accused person’s state of mind plus accompanying evidence that the individual understood that their action or inaction would bring about the harm in question. This subjective standard lowers the threshold for culpability while raising conceivable risks of abuse by law enforcement agencies.</p> <p>The ‘public good’ defence provided in the proposed amendment is insufficient. The lack of any defence of reasonableness or public interest means that the proposed offence could easily be used to punish individuals engaged in entirely legitimate activities.</p> <p>Further, the proposed amendment seeks to introduce inordinately</p>
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²³ ARTICLE 19 (2016), Kenya: Cybersecurity and Protection Bill <[Analysis-Kenya-Cyber-Security-and-Protection-Bill-2016.pdf \(article19.org\)](#)>

²⁴ ARTICLE 19 (2018), Kenya: Cybercrime and Computer Related Crimes Bill <[Microsoft Word - Kenya Cybercrime Bill 129072014 BB.doc \(article19.org\)](#)>

			<p>disproportionate sanctions. The custodial sentence of twenty-five (25) years or fines of up to KES 20 million shillings (USD 183,941), is unduly harsh and unreasonable.</p> <p>We note that there is a duplication of child pornography offences under Section 24 of the CMCA, 2018 and Section 16 of the Sexual Offences Act, 2006.</p>
Clause 4	<p>Proposed amendment of Section 27 of the CMCA, 2018</p> <p><i>"(aa) is likely to cause those persons to commit suicide or cause any other harm to themselves;</i></p> <p><i>(ab) is likely to cause other persons to join or participate in unlicensed and extreme religious or cult activities;"</i></p>	<p>We recommend the deletion of this clause</p>	<p>Clause 4 of the Bill seeks to criminalise conduct using the word ‘likely’ which is vague and requires subjective interpretation, and fails to meet the threshold for causation to establish criminal liability. In turn, the proposed amendments to Section 27 of the CMCA, 2018 contravene the principles of legality, legal certainty and the rule of law under Article 10 of the Constitution of Kenya, 2010.</p>
Clause 5	<p>Proposed amendment of Section 33 of the CMCA, 2018</p> <p><i>(1A) A person who publishes or transmits electronic messages that is likely to cause other persons to join or participate in terrorist activities, commits an offence and shall be liable on conviction to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding twenty five years, or to</i></p>	<p>We recommend the deletion of this clause</p>	<p>Generally, we stress that the offence of cyber-terrorism is improperly canvassed under the CMCA, 2018, given the existence of a similar offence under Part III of the Prevention of Terrorism Act (PTA). This proposed amendment risks exposing individuals to excessive criminal liability, by virtue of charges that may be raised under separate offences for the same crime.</p> <p>Additionally, the proposed sentence under Clause 5 of the Bill is in direct conflict with the sentence provided under Section 30A of the PTA, despite the similarity of offences. Section 30A of the PTA provides for a maximum of fourteen (14) years, whereas this amendment proposes twenty-five (25) years.</p>

	<p><i>both.</i></p>		<p>This duplication will also contravene the established rule against duplicity and the principle of fairness, which entitles a person charged with a criminal offence to 'know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence.' This also risks preventing the court from 'hearing the charge [to] know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction.'²⁵ More importantly, this duplication would violate the rights of arrested or accused persons generally to a fair trial as guaranteed under Articles 49 and 50 of the Constitution of Kenya, 2010.</p> <p>We note that Section 30 of the PTA is not properly defined and grants National Security Organs in Kenya, including the National Intelligence Service and the National Police Service, broad powers to restrict the right to freedom of expression under Article 33 of the Constitution of Kenya, 2010.</p>
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²⁵ *Hassan Jillo Bwanamaka & another v Republic* [2018] eKLR <[Criminal Appeal 1 of 2017 - Kenya Law](#)>