



# ARTICLE 19

## **ARTICLE 19 EASTERN AFRICA**

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### **MEMORANDUM ON THE COMPUTER MISUSE AND CYBERCRIMES (AMENDMENT) BILL, 2024**

**TO:  
THE CLERK OF THE NATIONAL ASSEMBLY**

**ARTICLE 19 EASTERN AFRICA RESPONSE TO THE COMPUTER MISUSE AND CYBER CRIMES (AMENDMENT)  
BILL, 2024**

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## **Introduction**

ARTICLE 19 Eastern Africa (EA) works to champion for freedom of expression and access to information in Kenya and the Eastern Africa region. We are emphatic that the regulation of cyber space requires a multi-stakeholder approach given its complexity and impact on human rights and specifically freedom of expression. We have regularly provided legal recommendations on proposed ICTs legislations in Kenya such as the Computer Misuse and Cybercrimes Bill<sup>1</sup> and the Data Protection Bill.<sup>2</sup>

Therefore, we are grateful for the opportunity to participate in this public consultation on the Computer Misuse and Cybercrimes (Amendment) Bill, 2024 and provide our position and look forward to the discussions that will follow.

## **Summary and Recommendations**

ARTICLE 19 EA has analyzed the proposed amendments and have noted the following areas that require compliance with international human rights standards on freedom of expression

1. Amendment of section 6 on the functions of the National Computer Cybercrimes Co-ordination Committee (hereinafter NC4) to include issuing a directive to render a website or application inaccessible where it is proved that it promotes illegal activities.
2. Section 27 on the offence of cyber harassment to be amended in subsection (1) by inserting the words “or is likely to cause them suicide” immediately after the word person.
3. Introduction of the provision on unauthorised SIM Card swap with intent to commit an offence under section 42A.

We would like to submit the following recommendations:

1. The National Computer Cybercrimes Co-ordination Committee’s functions should not be expanded to blocking of websites and applications which are severe limitation on freedom of expression that require a court’s determination. Additionally, the

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<sup>1</sup> ARTICLE 19, Kenya: Computer Misuse and Cybercrimes Bill, available at: <https://www.article19.org/resources/kenya-computer-cybercrimes-bill-2017/>

<sup>2</sup> ARTICLE 19, Kenya: Data Protection Bill, available at: <https://www.article19.org/wp-content/uploads/2019/11/Kenya-Data-Protection-Bill-2019-final-2.pdf>

amendment, if enacted will result in overlapping functions between communications authority of Kenya established under the Kenya Information and Communications Act and NC4.

2. The amendment on section 27 should be deleted, the inclusion of this vague terminology in the definition of a cyber harassment fails to meet the legality requirement under international law, which requires that laws should be sufficiently precise to enable individuals to regulate their conduct online and to avoid arbitrary applications of the provision.
3. The proposed offence on unauthorised SIM card swap should be significantly narrowed. It should be made clear that the unauthorised alteration or unlawful taking of ownership of another person's SIM-card serves as the means to or preparatory act to the commission of a further offence, which should be clearly defined. Sanctions need to be proportionate and not include imprisonment. In addition, the offence should be introduced under the Kenya Information and Communications Act.



**MATRIX REPRESENTATION**  
**THE COMPUTER MISUSE AND CYBERCRIMES (AMENDMENT) BILL 2024**

Clause	Provision	Proposal	Justification
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3	<p>Amendment of section 6 on the functions of the National Computer Cybercrimes Co-ordination Committee to include issuing a directive to render a website or application inaccessible where it is proved that it promotes illegal activities,</p>	<p>We recommend that this amendment be deleted</p>	<p>This amendment gives the NC4 overbroad powers to block websites or applications deemed to promote the listed illegal activities.</p> <p>Given that website or application blocking is a harsh limitation on freedom of expression, such actions must comply with international human rights standards as well as Article 24 of the Constitution of Kenya namely:</p> <ol style="list-style-type: none"> <li>a. Prescribed by Law</li> <li>b. Legitimate aim</li> <li>c. Proportional</li> </ol> <p>Courts are much better placed to issue these orders guided by the above parameters following determination of the illegality of the activities. We therefore recommend that these orders can only be issued by a court of law which will decide the measures to take on a case-by-case basis.</p> <p>We reiterate our earlier recommendations on the Kenya Computer Misuse and Cybercrimes (Amendment) Bill 2021 below:</p> <ul style="list-style-type: none"> <li>• 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.</li> </ul>
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4	Section 27 of the Principal Act is amended in subsection(1) by inserting the words “or is likely to cause them suicide” immediately after the word person.	We recommend that this amendment be deleted	<p>This amendment is ambiguous and fails the certainty test for criminal legislation. As drafted, it is subjective and does not sufficiently guide citizens on how to conduct themselves online.</p> <p>A limitation on freedom of expression requires laws to be well-defined, predictable, regular and legally certain, to curb abuse of power, arbitrariness and illegality.</p>
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6	Insertion of unauthorised SIM Card swap with intent to commit an offence under section 42 A	We recommend that this amendment be deleted and be made under the Kenya Information and Communications Act instead.	<p>The offence is unduly broadly drafted and will present practical challenges of having to establish the “intent to commit an offence”. In particular, the reference to intent to commit ‘an offence’, i.e. an offence under any possible law fails to comply with the requirements of legal certainty under international law.</p> <p>The criminal law should only criminalise intent to commit both specific and serious offences rather than broadly refer to every possible offence, however minor.</p> <p>The legality principle further requires that individuals should be able to reasonably expect where criminal offenses are defined. The fact that the offence is to be introduced in the Computer Misuse and Cybercrimes Act rather than in the Kenya Information and Communications Act (under which Guidelines on SIM card registration were adopted) is thus problematic.</p> <p>Further, the prescription of criminal penalties, including imprisonment and/or onerous fines, for this offence appear to be disproportionate. Generally, criminal sanctions constitute “serious interference with the freedom of expression and are disproportionate responses in all but the most egregious cases”.</p> <p>Recommendation: The proposed offence on unauthorised SIM card swap should be significantly</p>
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### **About ARTICLE 19 Eastern Africa**

ARTICLE 19 Eastern Africa is a regional human rights organization duly registered in 2007 as a non-governmental organization in Kenya. It operates in fourteen (14) Eastern Africa countries and is affiliated to ARTICLE 19, a thirty three (33) year old leading international NGO that advocates for freedom of expression collaboratively with over ninety (90) partners worldwide. ARTICLE 19 Eastern Africa leads advocacy processes on the continent on behalf of, and with, our sister organizations ARTICLE 19 West Africa and ARTICLE 19 Middle East and North Africa.

Over the past years, we have built a wealth of experience defending and promoting digital rights at the local, regional, and international levels. We have contributed to several Internet Freedom Policies, Data Protection, Cybercrime Bills and TV White Space Frameworks including Kenya's Copyright (Amendment) Bill 2017, The Intellectual Property Office of Kenya Bill 2020, Uganda's Data Protection and Privacy Act (2019), Uganda's Draft TV White Space Guidelines (2018), Kenya's Data Protection Bill(s) (2018/2019), the Kenya Cybercrime and Computer Related Crimes Bill 2014, the Tanzania Cybercrime Act, 2015, the Huduma Bill (2019), among many others. We were also part of the Inter-Agency Technical Committee of the Ministry of ICT that developed the Kenya Cybercrime Bill, 2016 and the Kenya Data Protection Bill, 2018.

If you would like to discuss this analysis further, please contact us at [kenya@article19.org](mailto:kenya@article19.org) - with Mugambi Kiai ([mugambikiai@article19.org](mailto:mugambikiai@article19.org)) in copy - or +254 727 862 230