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**SENATE BILLS, 2019**

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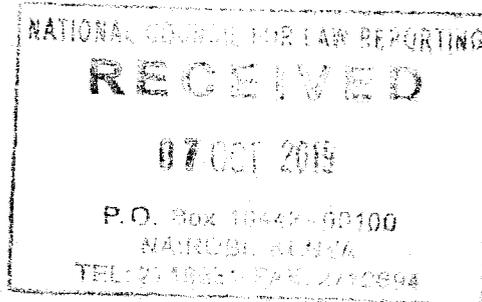
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**SCHEDULE**

## THE LIFESTYLE AUDIT BILL, 2019

### A Bill for

**AN ACT of Parliament to give effect to Article 10 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 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;
- (c) the Public Officer Ethics Act;
- (d) the Leadership and Integrity Act;
- (e) the Public Service (Values and Principles) Act;
- (f) the Bribery Act;
- (g) the Proceeds of Crime and Anti-Money Laundering Act;
- (h) the Public Finance Management Act; and
- (i) the Public Procurement and Asset Disposal Act, 2015;

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

“court” means the High Court established under Article 165 (1) of the Constitution;

“deferred prosecution agreement (DPA)” 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.

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

“investigating body” means a body having the power to undertake a lifestyle audit and specified under section 6;

“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;

“person” means a person who enters into a deferred prosecution agreement with the Director of Public Prosecutions and includes the meaning assigned to it under article 260 of 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.

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

- (a) respect;
- (b) due care and professionalism;
- (c) objectivity;
- (d) proper planning;
- (e) confidentiality; and
- (f) 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— Lifestyle audit process.
- (a) there are indications that a public or a state officer is living beyond an officer's lawfully obtained and reported income;
  - (b) that a public or a state officer is unable to account for the source of income; and
  - (c) that a public or a state officer has misappropriated funds under that officer's care and trust.
- (2) An investigating body shall, where grounds under subsection (1) exist for the conduct of a lifestyle audit—
- (a) inform the officer of the requirement to carry out the audit with respect to the officer;
  - (b) submit to the officer, information regarding the intended audit and the reasons for that an audit; and
  - (c) accord the officer a right to be heard on the audit in accordance with subsection (3).
- (3) Where a lifestyle audit is likely to adversely affect the rights or fundamental freedoms of a public or a state officer, the investigating body shall give the officer—
- (a) a one month 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; or
  - (f) information, materials and evidence relied upon to make the decision or to conduct a lifestyle audit.
5. This Act shall apply to— Application.
- (a) the Anti-Corruption and Economic Crimes Act;
  - (b) the Public Officer Ethics Act;

- (c) the Leadership and Integrity Act;
- (d) the Public Service (Values and Principles) Act;
- (e) the Bribery Act;
- (f) the Proceeds of Crime and Anti-Money Laundering Act;
- (g) the Public Finance Management Act; and
- (h) the Public Procurement and Asset Disposal Act, 2015.

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

Bodies involved in lifestyle audit.

- (a) 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) The bodies in subsection (1) may work jointly to investigate a matter of mutual interest and concern.

7. (1) An investigating body under section 6 may apply for a search warrant against a public or a state officer from a court of law.

Search Warrants.

(2) The application for the search warrant shall clearly spell out if evidence is likely to be found on the premises specified in the application.

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

- (a) an explanation of the alleged offence;
- (b) the name of the suspect;
- (c) the address of the premise to be searched;
- (d) an explanation that material relevant to concluding the case is likely to be found on the premises.

(4) A search warrant shall be executed within forty five business days, but can be extended if a court of law considers it appropriate.

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; and

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).

Cap. 75

9. A body under section 6 may apply for a search warrant to be issued against an officer—

Unexplained Wealth.

(a) to explain the nature and extent of their interest in a particular property; and

(b) the manner in which the property was acquired;

where there are reasonable grounds to suspect that the officer's known lawfully obtained income would be insufficient to allow the person to obtain the property.

10. (1) A person commits an offence if, during a lifestyle audit exercise, the person makes a statement that the person knows to be false or misleading.

Misleading Statements.

(2) A person who commits an offence under this section is liable on conviction, to imprisonment for a term of two years or to a fine of not less than five million Kenyan shillings or to both.

11. A true statement made by a person during a lifestyle audit exercise may be used to negotiate for a differed prosecution agreement.

Statements in general.

12. (1) The court may make an interim freezing order in respect of a property in question during a lifestyle audit, if the court considers it necessary.

Application for interim freezing order.

(2) An interim freezing order may be made only on the application of a body that applied for the search warrant on a property that is subject to a lifestyle audit.

(3) The court shall specify the period for which an order made under subsection (1) shall be valid.

(4) The period specified by a court under subsection (3) may not exceed a period of one year from the date an interim freezing order is made.

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

Discharge of interim freezing order.

14. (1) Where an interim freezing order in respect of any property is discharged, the person to whom the

Compensation.

property belongs may make an application to the High Court for the payment of 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 order compensation to be paid to the applicant 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 body that applied for the order; and
- (c) the order would not have been made had the default not occurred.

(4) Where the court makes an order for the payment of compensation—

- (a) the compensation is payable by the body that applied for the interim freezing order; and
- (b) the amount of compensation to be paid is the amount that the court considers reasonable, having regard to the loss suffered and any other relevant circumstances.

(5) Where an officer of a relevant body maliciously applies for an interim freezing order and the interim freezing order is subsequently discharged and a court orders compensation under subsection (1)—

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

15. (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 (1) may not exceed a period of two years 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.

16. (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 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.

17. (1) An investigating body may give a notice for the purpose of forfeiting money held in the frozen account.

Account forfeiture notice.

(2) An account forfeiture notice shall—

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

(3) The period for objecting an account forfeiture notice under subsection (1) shall be at least thirty days after the notice is given.

(4) If no objection is made under subsection (2), and the notice has not lapsed—

- (a) the amount of money stated in the notice is forfeited;
- (b) the bank with 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) immediately after the transfer has been made, the account freezing order made in relation to the frozen account ceases to have effect.

(5) An objection means a written objection sent to the address specified in the notice; and an objection is made when it is received at the address.

(6) 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.

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

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

18. (1) A member of the public may lodge a complaint to a body under section (4) on unexplained wealth of a public or a state officer.

Complaints by  
Members of  
Public.

(2) A person wishing to lodge a complaint under this Act may do so by way of a statutory declaration as provided for under Oaths and Statutory Declarations Act.

Cap. 15.

(3) Upon receipt of a complaint under subsection (1), the relevant 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) A relevant 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 relevant body, the relevant body may proceed to inquire into the complaint without such information or report in accordance with this Act.

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

19. (1) An investigating body under section 6 may apply *ex parte* to the court for an order requiring an associate of a suspected person to provide, within a reasonable time specified in the order, a written statement stating, in relation to a property specified by the body, 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 of a suspected person” means a person, who the relevant body reasonably believes may have had dealings with a person subject to a lifestyle audit exercise.

(3) The relevant 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.

(3) A person who neglects or fails to comply with a requirement under this section is guilty of an offence and is liable on conviction to a fine not less than one million shillings or to imprisonment for a term not exceeding three years, or to both.

Cap. 80

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

20. Lifestyle audit may be carried out on the immediate family of a public or a state officer if it is established that a property in question is owned by the public or state officer or members of their immediate family including joint ownership.

Immediate family.

21. If, as a result of an investigation 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 established under Article 157 of the Constitution.

Referral of matters to the Director of Public Prosecutions.

**PART II – DEFERRED PROSECUTION AGREEMENTS**

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

Entering into deferred prosecution agreement.

(2) A deferred prosecution agreement in respect of an alleged offence—

- (c) may be entered into before, on or after the date on which a person is charged with the alleged offence; but
- (d) shall not be entered into after the commencement of the trial for that alleged offence.

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

(4) A person may choose whether to enter into a deferred prosecution agreement with the Director of Public Prosecutions.

(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.

23. After a deferred prosecution agreement is entered into between the Director of Public Prosecutions and a person in respect of an alleged offence, the following shall apply—

- (a) if 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 cannot be prosecuted for the alleged offence 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 disgorgement of a benefit derived from the alleged offence;

Effect of deferred prosecution agreement on court proceedings.

- (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.

24. (1) A person may be a body corporate, a limited liability partnership, or an individual.

Persons who may enter into deferred prosecution agreements.

(2) A person shall be represented by an advocate at the time the person enters into a deferred prosecution agreement.

25. (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; and
- (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.

(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 34.

(3) The requirements that a deferred prosecution agreement may impose on the person include, but are not limited to—

- (a) pay to the Director of Public Prosecutions a financial penalty;
- (b) compensate victims of the alleged offence;
- (c) compensate for loss of public funds;
- (d) pay interest on the lost public funds;

- (e) surrender all private assets acquired using public funds;
  - (f) donate money to a charity or any other third party;
  - (g) disgorge any profits made by the person from the alleged offence;
  - (h) implement a compliance programme, or make changes to an existing compliance programme, relating to the person's policies or to the training of the person's employees or both;
    - (i) appoint a person—
      - (i) to assess and monitor the person's internal controls;
      - (ii) to 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 prohibited by the deferred prosecution agreement; and
      - (iii) to report to the Director of Public Prosecutions any misconduct in the implementation of the person's compliance programme or internal controls;
  - (j) cooperate in —
    - (i) investigation relating to the alleged offence; and
    - (ii) any investigation relating to any possible offence, committed by any officer, employee or agent of the person, that arises from the same or substantially the same facts as the alleged offence;
  - (k) pay 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 financial penalty agreed 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 may impose time limits within which the person who is the subject to the deferred prosecution agreement shall comply with the requirements imposed on the person.

(6) A deferred prosecution agreement may include a term setting out the consequences of a failure by a person subject to the deferred prosecution agreement to comply with any of its terms.

26. (1) After the commencement of negotiations between the Director of Public Prosecutions and the person in respect of a deferred prosecution agreement but before the terms of the deferred prosecution agreement are agreed, the Director of Public Prosecutions shall apply to the High Court for a declaration that—

Preliminary hearing for court approval of deferred prosecution agreement.

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

(3) The Director of Public Prosecutions may make a further application to the court for a declaration under subsection (1) if, following the previous application, the court declined to make a declaration.

(4) A hearing at which an application under this section is determined shall be held in private.

(5) A declaration under subsection (1) shall be made in private.

(6) Reasons under subsection (2) shall be given in private.

27. (1) Where the Director of Public Prosecutions and the person have agreed 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 interests of justice; and

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

(2) The Director of Public Prosecutions may not make an application under subsection (1) unless the court has made a declaration under section 26.

(3) A deferred prosecution agreement only comes 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) A hearing at which an application under this section is determined may be held in private.

(6) Where the court decides to approve the deferred prosecution agreement and make a declaration under subsection (1) it shall do so, and give its reasons, in an open court.

(7) Upon approval of the deferred prosecution agreement by the court, 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 to make the declaration.

unless the Director of Public Prosecutions is prevented from doing so by law or an order of the court under section 34.

28. (1) When a deferred prosecution agreement is in force and the person fails to comply with the terms of the deferred prosecution agreement, the Director of Public Prosecutions may make an application to the High Court on a breach of the deferred prosecution agreement.

Breach of deferred prosecution agreement.

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

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

Failure to comply with a deferred prosecution agreement.

- (a) direct the Director of Public Prosecutions and a 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 decides 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 orders the Director of Public Prosecutions and a person to agree to a proposal 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

unless the Director of Public Prosecutions is prevented from doing so by law or by an order of the court under section 34.

(5) Where the court terminates a deferred prosecution agreement under section 30 (1) (b), the Director of Public Prosecutions shall publish—

- (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)

unless the Director of Public Prosecutions is prevented from doing so by law or by an order of the court under section 34.

30. Where the Director of Public Prosecutions believes that a person has failed to comply with the terms of the deferred prosecution agreement but decides not to make an application to the High Court under section 28, 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

unless the Director of Public Prosecutions is prevented from doing so by law or by an order of the court under section 34.

31. Where the High Court terminates a deferred prosecution agreement under section 29 (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.

32. (1) At any time when a deferred prosecution agreement is in force, the Director of Public Prosecutions and a 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 under section 28; or
  - (b) 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) When the Director of Public Prosecutions and a person have agreed 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 interests of justice; and
- (b) the terms of the deferred prosecution agreement as varied are fair, reasonable and proportionate.

(3) A 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 private provided that if the court decides to approve the variation and make a declaration under subsection (2) it shall do so, and give its reasons, in an open court.

(6) Where the court decides not to approve the variation, the Director of Public Prosecutions shall publish the court's decision and the reasons for it, unless the Director of Public Prosecutions is prevented from doing so by law or by an order of the court under section 34.

(7) Where the court decides to approve the variation, 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,

unless the Director of Public Prosecutions is prevented from doing so by law or by an order of the court under section 34.

33. (1) If a deferred prosecution agreement remains in force until its expiry date, then after the expiry of the deferred prosecution agreement the proceedings instituted under section 23 shall be discontinued by the Director of Public Prosecutions by giving notice to the High Court..

(2) Where proceedings are discontinued under subsection (1), fresh criminal proceedings may not be instituted against the person for the alleged offence.

(3) Subsection (2) shall not be a bar to fresh proceedings from being instituted against a person in a case

Discontinuance of proceedings on expiry of deferred prosecution agreement

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, a 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 to 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 under section 28 is pending in court; or
- (b) following an application under section 28 the court has directed the parties to agree proposals to remedy a person's failure to comply, but the parties have not yet reached an agreement; or
- (c) the parties have agreed proposals to remedy a 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 mentioned in 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 mentioned in 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 mentioned in 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.

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

Publication of information.

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

(2) In a proceeding under this Part, the High Court may, in the interests of justice, public safety, public security or propriety or for other sufficient reason, make either or both of the following orders—

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

(3) A person who does an act in contravention of an order under 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 3 years or to both.

35. (1) The statement of facts contained in the deferred prosecution agreement under section 27 in a criminal proceeding 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.

36. The Director of Public Prosecutions shall pay into the Consolidated Fund all monies received from a term in a deferred prosecution agreement requiring a person to—

- (a) pay a financial penalty to the Director of Public Prosecutions; and

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

- (b) disgorge any profits made by the person from the alleged offence.

37. (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 investigative bodies under section 6;
- (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 by regulation in consultation with other investigative bodies, issue guidelines on cooperation and collaboration in the investigation of crimes under this Act.

38. 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

39. 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.

**SCHEDULE**

(s. 6)

**INFORMATION REQUIRED TO CONDUCT  
LIFESTYLE AUDIT.**

The following information shall be required during a lifestyle audit process—

- (a) name of public or state officer;
- (b) birth information;
- (c) marital status;
- (d) address;
- (e) employment information;
- (f) names of spouse or spouses;
- (g) names of dependent children/and or adults;
- (h) financial statements;
- (i) income including, but not limited to, salary and emoluments and income from investments;
- (j) assets including, but not limited to, land, buildings, vehicles, investments and financial obligations owed to the public or state officer;
- (k) liabilities; and
- (l) legal entities that the public or state officer or the members of their family are the owners or beneficial owners;

## 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 on 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. The Bill therefore, seeks to provide a framework for the—

- (a) lifestyle audit process;
- (b) standards of professional conduct when carrying out lifestyle audit;
- (c) bodies to be involved in lifestyle audit;
- (d) unexplained wealth;
- (e) amendment of section 30 of Public Officer Ethics Act to make the declarations of the income, assets and liabilities public;
- (f) referral of matters to the Director of Public Prosecutions; and
- (g) procedure in carrying out lifestyle audit on state and public officers.

Part II 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 13th August, 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.

