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THE WHISTLEBLOWER PROTECTION BILL, 2023

A Bill for

AN ACT of Parliament to provide for the procedure for
the disclosure of information relating to improper
conduct in the public and private sectors; to
provide for the protection persons who make such
disclosure against victimization, and for connected
purposes

ENACTED by the Parliament of Kenya, as follows—

PART I – PRELIMINARY

1. This Act may be cited as the Whistleblower
Protection Act, 2023 and shall come into force on such date
as the Cabinet Secretary may, by notice in the Gazette, appoint.

2. In this Act, unless the context otherwise requires—

"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;

"Cabinet Secretary's means the Cabinet Secretary for
the time being responsible for matters relating to the
administration of justice;

"chief officer" means the chief executive officer of a
public or private body or any other prescribed by the
regulations;

"classified information" means information of a
particular security classification, the unauthorised
disclosure of which would prejudice national security;

"clear and convincing evidence" means evidence
indicating a high likelihood or substantial probability of
occurrence of an action to which this Act relates;

"Commission" means the Commission on
Administrative Justice established under section 3 of the
Commission on the Administration of Justice Act, 2011;

"confidential information" includes—

No. 23 of 2011
(a) the identity or location of —

(i) a whistleblower or any other person who is entitled to protection in accordance with this Act, or

(ii) a person about whom a whistleblower has made a disclosure of improper conduct and who is under investigation by the Commission;

(b) information which, if disclosed, may compromise the security of a person identified in paragraph (a);

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

"disclosure" means any disclosure of information regarding any improper conduct, made by a person who has reason to believe that the information concerned shows or tends to show that improper conduct has been committed, is being committed or is likely to be committed;

"enforcement agency" includes—

(a) any Government department, agency or other body set up by the National by or a County government, including a unit, section, division, department or agency of such Ministry, department, agency or body, conferred with investigative and enforcement functions by any written law or having investigation and enforcement powers;

(b) a body established by law and conferred with investigative and enforcement functions; or

(c) a unit, section, division, department or agency of a body established by law having investigative and enforcement functions;

"Fund" means the Whistleblower Reward Fund established under section 26;

gross mismanagement" means management action or inaction that creates a substantial risk of significant adverse impact upon the ability of an organization, office or unit to carry out its mandate;

"health information" means any information, including genetic information, whether oral or recorded in any form or medium, which—
(a) is created or received by a health care provider, public health authority, employer, life insurer, or school or university or any other educational institution; and

(b) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to that individual.

"improper conduct" means any of the activities referred to in section 11 and any other conduct which adversely affects the public interest;

"individually identifiable health information" means information which is part of health information, including demographic information collected from an individual, which identifies the individual or with respect to which there is a reasonable basis to believe the information can be used to identify the individual;

"National Environment Management Authority" means the National Environment Management Authority established by the Environmental Management and Coordination Act, 1999; No. 8 of 1999

“National Environmental Complaints Committee" means the National Environmental Complaints Committee established of the Environmental Management and Coordination Act, 1999;

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

“National Security Council” means the National Security Council established by Article 240(1) of the Constitution;

"national security organs" means the Kenya Defence Forces, the National Intelligence Service and the National Police Service established under the Constitution;

"personal information" has the meaning assigned to it under section 2 of the Access to Information Act, 2016; No.31 of 2016

private body includes any person, organization, company or other non-state actor which—
(a) is listed on Nairobi Securities Exchange; or
(b) whose nature of operations affects the public interest; or
(c) is in possession of information which is of public interest; or
(d) is engaged in business with the government or with any public entity; or
(e) is a private academic institution of higher learning; or
(f) any other body prescribed by regulation for the purposes of this Act.

"public body" includes—
(a) the Government, including the national or county government or any department, State organ, Agency, service or undertaking of the national or county government;
(b) the National Assembly, a County Assembly or the Parliamentary Service Commission;
(c) any corporation, council, board, commission, committee or other body which has power to act under and for the purposes of any written law relating to the national government or a county government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the government or money raised by rates, taxes or charges in pursuance of any such law;
(d) a public educational institution; or
(e) any other body prescribed by regulations for the purposes of this Act;

"public interest" means the collective interest of society in upholding the national values and principles of governance as set out in Article 10(2) of the Constitution of Kenya, 2010;

"reprisal" means—
(a) any action causing injury, loss or damage;
(b) intimidation, harassment or bullying;
(c) interference with the lawful employment, livelihood or freedom of any person, including by discrimination, demotion, suspension, disadvantage, termination or other adverse treatment in relation to a person's employment, career, profession, trade or business or the taking of disciplinary action, or any other discriminatory action that would adversely affect the exercise of rights protected by this Act, and includes a threat to take any of the actions referred to in paragraphs (a), (b) (c) by any person, whether acting on their own or at the direction of any other person;

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

"whistleblowing" means making a disclosure of improper conduct under this Act;

"whistleblower protection" means protection given to a whistleblower or other person under this Act.

"Witness Protection Agency" means the Witness Protection Agency established in accordance with the provisions of section 3A of the Witness Protection Act, 2006.

PART II – ADMINISTRATION

3. The object of this Act is to promote the public interest upholding the national values and principles of governance by protecting whistleblowers.

4. The purposes of this Act are—
(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 manage, investigate and make recommendations respecting disclosure of improper conduct and reprisals;
(e) to promote public confidence in the administration of public and private bodies;
(f) to enhance the procedures and mechanisms for promoting the administration of justice;
(g) to provide a framework for public participation in preventing and combating improper conduct;
(h) to reward persons who contribute to preventing and combating improper conduct; and
(i) to facilitate any other purpose prescribed in the regulations.

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

(2) In exercising any powers conferred under this Act or in implementing the provisions of this Act, the Commission shall be guided by the national values and principles provided for under Article 10 of the Constitution.

6. (1) This Act shall apply to all public bodies, and to such private bodies as may be determined by the Commission.

(2) For purposes of determining the private entities to which the Act shall apply in sub-section (1), the Commission shall develop and issue guidelines on the extent to which the Act shall apply to various private bodies, regard being had to the nature, size, operations and the public interest involved in the operations of such bodies.

7. The Commission shall—

(a) assist public and private bodies in meeting their obligations under this Act in general and under section 21 in particular;

(b) develop model policies and procedures for consideration and adoption by public and private bodies, with the necessary modifications, for
purposes of complying with the requirements of section 21;

(c) receive and investigate disclosures of improper conduct;

(d) receive and investigate complaints of reprisal; and

(e) ensure the protection for whistleblowers as provided in this Act

(2) For the purpose of subsection (1) the Commission shall establish a Whistleblower Review Committee in accordance with section 18 of the Commission on Administrative Justice Act, 2011, whose function shall be to receive and determine requests for reconsideration of a decision to revoke whistleblower protection.

(3) The Whistleblower Review Committee under subsection (2) shall consist of—

(i) one member of the Commission;

(ii) one senior official of the Commission appointed by the chairperson of the Commission; and

(iii) one senior public officer, being a person eligible for appointment as a judge of the High Court of Kenya, appointed by the Attorney-General.

8. (1) The Commission shall have power to do all things expedient or reasonably necessary for, or incidental to, the exercise of its general powers under this Act.

(2) Without prejudice to the generality of subsection (1), the Commission shall have power to—

(a) supervise, monitor and co-ordinate all efforts related to the implementation and enforcement of this Act;

(b) subject to subsection (3), below, 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;

(c) determine whether a whistleblower is entitled to protection as provided in this Act, or the Witness Protection Act, 2006;
(d) refer requests for protection to the Witness Protection Agency;

(e) undertake, in coordination and co-operation with the private and public sectors, a public awareness campaign on the provisions and benefits of this Act;

(f) develop guidelines for public and private agencies to develop whistleblower mechanisms, policies and procedures in accordance with section 22;

(g) approve whistleblower mechanisms, policies procedures developed by public and private agencies pursuant to the provisions of section 22, and

(h) develop and implement incentive programs to encourage whistleblowing, including making orders for monetary awards in accordance with the provisions of this Act.

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

Provided that the Commission shall communicate its decision under this subsection to the person making the disclosure or the complaint, giving reasons for the refusal.

(4) The Commission may develop procedures on the management and investigation of disclosures made by its members or staff or other persons.

(5) The powers conferred on the Commission under this Act are in addition to the powers of the Commission under the Commission on Administrative Justice Act, 2011.

9. (1) In the exercise of its investigative powers under this Act, the Commission may work in co-operation with any other enforcement agency or such other person as it may deems appropriate.

(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) Any person or enforcement agency to whom a request for cooperation is made by the Commission shall render all such necessary 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 any person or enforcement agency undertakes an investigation into improper conduct in accordance with subsection (3), that person or enforcement agency shall prepare a report as required in section 32 of this Act and forward it to the Commission for further action and guidance in accordance with section 33.

10. No person shall be liable to 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 him in good faith in the exercise or purported exercise of a function conferred by or under this Act.

PART III—IMPROPER CONDUCT

11. The provisions of this Act shall apply in respect of the to which this Act following forms of improper conduct in public or private bodies—

(a) a contravention of an Act of Parliament or of a County Assembly, or a regulation made pursuant thereto;

(b) an act or omission which creates a substantial and specific danger to the life, health or safety of persons, or to the environment;

(c) gross mismanagement of public funds or a public asset;

(d) bribery, corruption or economic crimes as defined in the Anti-Corruption and Economic Crimes Act, 2003 or any other written law;

(e) misuse of public funds;

(f) a criminal offence;

(g) a violation of human rights and fundamental freedoms as set out in Chapter Four of the Constitution;
(a) the identity or location of —

(i) a whistleblower or any other person who is entitled to protection in accordance with this Act, or

(ii) a person about whom a whistleblower has made a disclosure of improper conduct and who is under investigation by the Commission;

(b) information which, if disclosed, may compromise the security of a person identified in paragraph (a);

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

"disclosure" means any disclosure of information regarding any improper conduct, made by a person who has reason to believe that the information concerned shows or tends to show that improper conduct has been committed, is being committed or is likely to be committed;

"enforcement agency” includes—

(a) any Government department, agency or other body set up by the National by or a County government, including a unit, section, division, department or agency of such Ministry, department, agency or body, conferred with investigative and enforcement functions by any written law or having investigation and enforcement powers;

(b) a body established by law and conferred with investigative and enforcement functions; or

(c) a unit, section, division, department or agency of a body established by law having investigative and enforcement functions;

"Fund” means the Whistleblower Reward Fund established under section 26;

gross mismanagement" means management action or inaction that creates a substantial risk of significant adverse impact upon the ability of an organization, office or unit to carry out its mandate;

"health information" means any information, including genetic information, whether oral or recorded in any form or medium, which—
(a) is created or received by a health care provider, public health authority, employer, life insurer, or school or university or any other educational institution; and

(b) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to that individual.

"improper conduct" means any of the activities referred to in section 11 and any other conduct which adversely affects the public interest;

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"personal information" has the meaning assigned to it under section 2 of the Access to Information Act, 2016; No.31 of 2016

private body includes any person, organization, company or other non-state actor which—
(a) is listed on Nairobi Securities Exchange; or
(b) whose nature of operations affects the public interest; or
(c) is in possession of information which is of public interest; or
(d) is engaged in business with the government or with any public entity; or
(e) is a private academic institution of higher learning; or
(f) any other body prescribed by regulation for the purposes of this Act.

"public body" includes—

(a) the Government, including the national or county government or any department, State organ, Agency, service or undertaking of the national or county government;
(b) the National Assembly, a County Assembly or the Parliamentary Service Commission;
(c) any corporation, council, board, commission, committee or other body which has power to act under and for the purposes of any written law relating to the national government or a county government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the government or money raised by rates, taxes or charges in pursuance of any such law;
(d) a public educational institution; or
(e) any other body prescribed by regulations for the purposes of this Act;

"public interest" means the collective interest of society in upholding the national values and principles of governance as set out in Article 10(2) of the Constitution of Kenya, 2010;

"reprisal" means—
(a) any action causing injury, loss or damage;
(b) intimidation, harassment or bullying;

c) interference with the lawful employment, livelihood or freedom of any person, including by discrimination, demotion, suspension, disadvantage, termination or other adverse treatment in relation to a person's employment, career, profession, trade or business or the taking of disciplinary action, or any other discriminatory action that would adversely affect the exercise of rights protected by this Act, and includes a threat to take any of the actions referred to in paragraphs (a), (b) (c) by any person, whether acting on their own or at the direction of any other person;

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

"whistleblowing" means making a disclosure of improper conduct under this Act;

"whistleblower protection" means protection given to a whistleblower or other person under this Act.

"Witness Protection Agency" means the Witness Protection Agency established in accordance with the provisions of section 3A of the Witness Protection Act, 2006.

PART II – ADMINISTRATION

3. The object of this Act is to promote the public interest upholding the national values and principles of governance by protecting whistleblowers.

4. The purposes of this Act are—

(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 manage, investigate and make recommendations respecting disclosure of improper conduct and reprisals;
(e) to promote public confidence in the administration of public and private bodies;
(f) to enhance the procedures and mechanisms for promoting the administration of justice;
(g) to provide a framework for public participation in preventing and combating improper conduct;
(h) to reward persons who contribute to preventing and combating improper conduct; and
(i) to facilitate any other purpose prescribed in the regulations.

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

   (2) In exercising any powers conferred under this Act or in implementing the provisions of this Act, the Commission shall be guided by the national values and principles provided for under Article 10 of the Constitution.

6. (1) This Act shall apply to all public bodies, and to such private bodies as may be determined by the Commission.

   (2) For purposes of determining the private entities to which the Act shall apply in sub-section (1), the Commission shall develop and issue guidelines on the extent to which the Act shall apply to various private bodies, regard being had to the nature, size, operations and the public interest involved in the operations of such bodies.

7. The Commission shall—

   (a) assist public and private bodies in meeting their obligations under this Act in general and under section 21 in particular;

   (b) develop model policies and procedures for consideration and adoption by public and private bodies, with the necessary modifications, for
purposes of complying with the requirements of section 21;

(c) receive and investigate disclosures of improper conduct;

(d) receive and investigate complaints of reprisal; and

(e) ensure the protection for whistleblowers as provided in this Act

(2) For the purpose of subsection (1) the Commission shall establish a Whistleblower Review Committee in accordance with section 18 of the Commission on Administrative Justice Act, 2011, whose function shall be to receive and determine requests for reconsideration of a decision to revoke whistleblower protection.

(3) The Whistleblower Review Committee under subsection (2) shall consist of—

(i) one member of the Commission;

(ii) one senior official of the Commission appointed by the chairperson of the Commission; and

(iii) one senior public officer, being a person eligible for appointment as a judge of the High Court of Kenya, appointed by the Attorney-General.

8. (1) The Commission shall have power to do all things expedient or reasonably necessary for, or incidental to, the exercise of its general powers under this Act.

(2) Without prejudice to the generality of subsection (1), the Commission shall have power to—

(a) supervise, monitor and co-ordinate all efforts related to the implementation and enforcement of this Act;

(b) subject to subsection (3), below, 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;

(c) determine whether a whistleblower is entitled to protection as provided in this Act, or the Witness Protection Act, 2006;
(d) refer requests for protection to the Witness Protection Agency;

(e) undertake, in coordination and co-operation with the private and public sectors, a public awareness campaign on the provisions and benefits of this Act;

(f) develop guidelines for public and private agencies to develop whistleblower mechanisms, policies and procedures in accordance with section 22;

(g) approve whistleblower mechanisms, policies procedures developed by public and private agencies pursuant to the provisions of section 22, and

(h) develop and implement incentive programs to encourage whistleblowing, including making orders for monetary awards in accordance with the provisions of this Act.

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

Provided that the Commission shall communicate its decision under this subsection to the person making the disclosure or the complaint, giving reasons for the refusal.

(4) The Commission may develop procedures on the management and investigation of disclosures made by its members or staff or other persons.

(5) The powers conferred on the Commission under this Act are in addition to the powers of the Commission under the Commission on Administrative Justice Act, 2011.

9. (1) In the exercise of its investigative powers under this Act, the Commission may work in co-operation with any other enforcement agency or such other person as it may deems appropriate.

(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) Any person or enforcement agency to whom a request for cooperation is made by the Commission shall render all such necessary 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 any person or enforcement agency undertakes an investigation into improper conduct in accordance with subsection (3), that person or enforcement agency shall prepare a report as required in section 32 of this Act and forward it to the Commission for further action and guidance in accordance with section 33.

10. No person shall be liable to 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 him in good faith in the exercise or purported exercise of a function conferred by or under this Act.

PART III—IMPROPER CONDUCT

11. The provisions of this Act shall apply in respect of the to which this Act following forms of improper conduct in public or private bodies—

(a) a contravention of an Act of Parliament or of a County Assembly, or a regulation made pursuant thereto;

(b) an act or omission which creates a substantial and specific danger to the life, health or safety of persons, or to the environment;

(c) gross mismanagement of public funds or a public asset;

(d) bribery, corruption or economic crimes as defined in the Anti-Corruption and Economic Crimes Act, 2003 or any other written law;

(e) misuse of public funds;

(f) a criminal offence;

(g) a violation of human rights and fundamental freedoms as set out in Chapter Four of the Constitution;
communicate the refusal and reasons therefor in writing to the person making the request within fourteen days of the decision.

(5) In reconsidering a decision to deny relief or revoke whistleblower protection, the Whistleblower Review Committee may—

(a) make a decision on the substance of the request without further information; or

(b) investigate the matter further, including speaking again to any person who had previously been interviewed, or conducting an interview with any other person.

(6) A final decision on the substance of the request for reconsideration, the reasons therefor, and such consequential orders as may be necessary to give effect to the decision shall be communicated in writing by the Whistleblower Review Committee to the person who has requested reconsideration within sixty days of receiving the request.

(7) Any person aggrieved by the decision of the Whistleblower Review Committee may appeal to the High Court.

(8) The High Court may make an interim or final order with respect to the request made, and may also make such consequential orders as necessary to give effect to the order.

PART VII—OUTCOMES OF INVESTIGATION

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

(a) the findings of the investigation; and

(b) recommendations for further steps if any, to be taken, based on the findings of the investigation.

(2) If a finding is made that improper conduct has occurred, the report in (1), including the identity of the wrongdoer, shall be publicly disclosed by the Commission.

33. (1) If the investigation finds that—
(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, and in the case where—

(i) the Director of Public Prosecutions decides to prosecute; the Director of Public Prosecutions shall report periodically to the Commission on the status of the prosecution until the matter has been finally disposed of; or

(ii) the Director of Public Prosecutions decides not to prosecute; the Director of Public Prosecutions shall furnish the Committee with reasons in writing for that decision.

(2) If after 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 as required under subsection (1) (b), the Commission may submit a report to the Cabinet Secretary responsible for that public body, on the investigation, findings, recommendation and the response by the appropriate authority.

(3) The Commission shall inform the whistleblower of the result of the investigation and or other action taken pursuant to subsection (1) (b) above.

PART VIII—WHISTLEBLOWER REWARD FUND

34. There is established by this Act a Whistleblower Reward Fund.

35. The Fund shall consist of —

(a) monies appropriated by the National Assembly;

(b) monies received by the Fund as grants, donations or gifts from nongovernmental or non-public sources;

(c) income generated by investments made by the Board of Trustees;
(d) interest accruing from the Fund;
(e) any other monies from any other source donated or lent to the Fund.

36. The object of the Fund is to provide funds for payment of monetary rewards to whistleblowers.

37. A whistleblower who makes a disclosure which leads to the arrest and conviction of an accused person shall be rewarded with money from the Fund.

38. (1) A whistleblower whose disclosure results in the recovery of an amount of money or asset shall be rewarded from the Fund —

(a) where the money is recovered, with ten percent of the amount of money recovered, or
(b) in the case of the recovery of an asset, with ten percent of the value of asset recovered, or
(c) such other amount of money as the Commission may determine.

(2) Notwithstanding subsection (1), the Commission may in cases where it is just to do so, grant monetary reward to a whistleblower whose disclosure does not fall within sub-section (1)(a) or (b).

39. Moneys for the Fund shall be paid into a bank account opened by the Commission with the approval of the Cabinet Secretary responsible for financial matters.

PART IX—ENFORCEMENT, OFFENCES AND PENALTIES

40. The Commission or any other person may apply to the High Court for enforcement of any order made by the Commission in accordance with this Act, including an order of the Whistleblower Review Committee.

41. Any person who—

(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.

42. Any person who has knowledge that improper conduct has occurred or is likely to occur and who does not make a disclosure under this Act within two days thereof, commits an offence.

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

PART X — MISCELLANEOUS PROVISIONS

44. (1) Nothing in this Act authorises the disclosure of—

(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(5)(f)—

(i) classified information, within the meaning of the laws set out in the Schedule, or any other information which is subject to any restriction created by or under any other written law, or

(ii) any personal information or individually identifying health information, or
(iii) any information, document or matter or any class of information, documents or matters prescribed in the regulations.

(2) The Cabinet Secretary may by order in the Gazette amend the Schedule.

(3) Nothing in this Act authorizes the Commission or a public or private body or a designated person to publicly disclose personal information or individually identifying health information unless, in the opinion of the Commission or a public or private body or a designated person, it is necessary to disclose that information in order to carry out his or her duties and functions under this Act.

(4) Any person who knowingly discloses information whose disclosure is limited under this section, commits and offence and is liable, on conviction, to a fine not exceeding five million shillings, or to imprisonment for a term not exceeding six years or both.

(5) It shall be a defence to a charge under subsection (4) that the disclosed information limited under sub-section (1) was already in the public domain at the time of the disclosure.

(6) The Cabinet Secretary shall, in consultation with the Commission and the national security organs, make regulations respecting the procedures and mechanisms for the handling of classified information and the management and investigation of disclosures which would have been made and concluded, but for the limitations provided for under this Section.

45. 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 or regulation to disclose, report or otherwise give notice of any matter.

46. (1) The Cabinet Secretary 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 or the regulations, subject to such conditions as the Cabinet Secretary may deem fit.

(2) The Cabinet Secretary shall provide reasons for giving an exemption under this section and shall ensure that
the exemption, including any terms or conditions are made available to the public.

47. (1) Subject to any limitations provided for under this Act or regulations, every public or private body shall at the beginning of each year prepare and submit to the Commission a report on all disclosures made to it in the preceding year.

(2) The report under subsection (1) shall include the following information—

(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 body 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) The report under subsection (1) shall be included in the annual report of the public or private 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 body shall make the report under subsection (1) available to the public on request.

48. (1) The Commission shall report annually to the National Assembly on the exercise and performance of
the functions and duties of the Commission 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, the number of disclosures acted on and the number of disclosures not acted on by the Commission or by a public or private body;

(c) the number of investigations commenced by the Commission or a public or private body under this Act;

(d) the number of recommendations the Commission has made and whether the public or private bodies to which the recommendations relate have complied with the recommendations;

(e) 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;

(f) whether, in the opinion of the Commission, there are any systemic problems that may give rise to or have given rise to improper conduct;

(g) a summary of the reports of public and private bodies on the disclosures received and action taken, including action taken in response to reprisals;

(h) an assessment of the compliance of public and private bodies with the provisions of this Act or its regulations; and

(i) any recommendations for improvement that the Commission considers appropriate.

(2) The report under subsection (1) shall be given to the Speaker of the National Assembly, who shall table a copy of it in the National Assembly within two months after receiving it if the National Assembly is then sitting or,
if it is not, within one month after the start of the next sitting.

(3) Where it is in the public interest to do so, the Commission may publish a special report relating to any matter within the scope of the Commission’s responsibilities under this Act, including a report referring to and commenting on any particular matter investigated by the Commission.

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

49. (1) A committee of Parliament may, at any time, refer to the Commission for investigation and report any petition or matter that is before the committee for consideration that may relate to improper conduct to which this Act applies.

(2) The Commission shall pursuant to subsection (1)

(a) subject to any special directions of the committee, investigate the petition or matter referred to the Commission insofar as it is within the scope of the Commission’s mandate pursuant to this Act, and

(b) make any report to the Committee that the Commission thinks fit

(3) The Cabinet Secretary may, at any time, refer to the Commission for investigation and report any matter that is within the scope of the mandate of the Commission pursuant to this Act.

(4) Where the Cabinet Secretary makes a request under sub-section (3), the Commission shall—

(a) subject to any special directions of the Cabinet Secretary, investigate the petition or matter referred to the Commission insofar as it is within the scope of the Commission’s mandate pursuant to this Act, and

(b) make any report to the Cabinet Secretary that the Commission deems fit.

(5) Where a reference is made to the Commission under sub-section (1) or (3) and the Commission concludes
communicate the refusal and reasons therefor in writing to the person making the request within fourteen days of the decision.

(5) In reconsidering a decision to deny relief or revoke whistleblower protection, the Whistleblower Review Committee may—

(a) make a decision on the substance of the request without further information; or

(b) investigate the matter further, including speaking again to any person who had previously been interviewed, or conducting an interview with any other person.

(6) A final decision on the substance of the request for reconsideration, the reasons therefor, and such consequential orders as may be necessary to give effect to the decision shall be communicated in writing by the Whistleblower Review Committee to the person who has requested reconsideration within sixty days of receiving the request.

(7) Any person aggrieved by the decision of the Whistleblower Review Committee may appeal to the High Court.

(8) The High Court may make an interim or final order with respect to the request made, and may also make such consequential orders as necessary to give effect to the order.

PART VII—OUTCOMES OF INVESTIGATION

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

(a) the findings of the investigation; and

(b) recommendations for further steps if any, to be taken, based on the findings of the investigation.

(2) If a finding is made that improper conduct has occurred, the report in (1), including the identity of the wrongdoer, shall be publicly disclosed by the Commission.

33. (1) If the investigation finds that—
(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, and in the case where—

(i) the Director of Public Prosecutions decides to prosecute; the Director of Public Prosecutions shall report periodically to the Commission on the status of the prosecution until the matter has been finally disposed of; or

(ii) the Director of Public Prosecutions decides not to prosecute; the Director of Public Prosecutions shall furnish the Committee with reasons in writing for that decision.

(2) If after 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 as required under subsection (1) (b), the Commission may submit a report to the Cabinet Secretary responsible for that public body, on the investigation, findings, recommendation and the response by the appropriate authority.

(3) The Commission shall inform the whistleblower of the result of the investigation and or other action taken pursuant to subsection (1) (b) above.

PART VIII—WHISTLEBLOWER REWARD FUND

34. There is established by this Act a Whistleblower Reward Fund.

35. The Fund shall consist of —

(a) monies appropriated by the National Assembly;

(b) monies received by the Fund as grants, donations or gifts from nongovernmental or non-public sources;

(c) income generated by investments made by the Board of Trustees;
(d) interest accruing from the Fund;

(e) any other monies from any other source donated or lent to the Fund.

36. The object of the Fund is to provide funds for payment of monetary rewards to whistleblowers.

37. A whistleblower who makes a disclosure which leads to the arrest and conviction of an accused person shall be rewarded with money from the Fund.

38. (1) A whistleblower whose disclosure results in the recovery of an amount of money or asset shall be rewarded from the Fund —

(a) where the money is recovered, with ten percent of the amount of money recovered, or

(b) in the case of the recovery of an asset, with ten percent of the value of asset recovered, or

(c) such other amount of money as the Commission may determine.

(2) Notwithstanding subsection (1), the Commission may in cases where it is just to do so, grant monetary reward to a whistleblower whose disclosure does not fall within sub-section (1)(a) or (b).

39. Moneys for the Fund shall be paid into a bank account opened by the Commission with the approval of the Cabinet Secretary responsible for financial matters.

PART IX—ENFORCEMENT, OFFENCES AND PENALTIES

40. The Commission or any other person may apply to the High Court for enforcement of any order made by the Commission in accordance with this Act, including an order of the Whistleblower Review Committee.

41. Any person who—

(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.

42. Any person who has knowledge that improper conduct has occurred or is likely to occur and who does not make a disclosure under this Act within two days thereof, commits an offence.

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

PART X — MISCELLANEOUS PROVISIONS

44. (1) Nothing in this Act authorises the disclosure of—

(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(5)(f)—

(i) classified information, within the meaning of the laws set out in the Schedule, or any other information which is subject to any restriction created by or under any other written law, or

(ii) any personal information or individually identifying health information, or

Obligation to make disclosure.

General penalty.

Limits on disclosure.
(iii) any information, document or matter or any class of information, documents or matters prescribed in the regulations.

(2) The Cabinet Secretary may by order in the Gazette amend the Schedule.

(3) Nothing in this Act authorizes the Commission or a public or private body or a designated person to publicly disclose personal information or individually identifying health information unless, in the opinion of the Commission or a public or private body or a designated person, it is necessary to disclose that information in order to carry out his or her duties and functions under this Act.

(4) Any person who knowingly discloses information whose disclosure is limited under this section, commits an offence and is liable, on conviction, to a fine not exceeding five million shillings, or to imprisonment for a term not exceeding six years or both.

(5) It shall be a defence to a charge under subsection (4) that the disclosed information limited under sub-section (1) was already in the public domain at the time of the disclosure.

(6) The Cabinet Secretary shall, in consultation with the Commission and the national security organs, make regulations respecting the procedures and mechanisms for the handling of classified information and the management and investigation of disclosures which would have been made and concluded, but for the limitations provided for under this Section.

45. 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 or regulation to disclose, report or otherwise give notice of any matter.

46. (1) The Cabinet Secretary 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 or the regulations, subject to such conditions as the Cabinet Secretary may deem fit.

(2) The Cabinet Secretary shall provide reasons for giving an exemption under this section and shall ensure that
the exemption, including any terms or conditions are made available to the public.

47. (1) Subject to any limitations provided for under this Act or regulations, every public or private body shall at the beginning of each year prepare and submit to the Commission a report on all disclosures made to it in the preceding year.

(2) The report under subsection (1) shall include the following information—

(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 body 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) The report under subsection (1) shall be included in the annual report of the public or private 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 body shall make the report under subsection (1) available to the public on request.

48. (1) The Commission shall report annually to the National Assembly on the exercise and performance of
the functions and duties of the Commission 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, the number of disclosures acted on and the number of disclosures not acted on by the Commission or by a public or private body;

(c) the number of investigations commenced by the Commission or a public or private body under this Act;

(d) the number of recommendations the Commission has made and whether the public or private bodies to which the recommendations relate have complied with the recommendations;

(e) 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;

(f) whether, in the opinion of the Commission, there are any systemic problems that may give rise to or have given rise to improper conduct;

(g) a summary of the reports of public and private bodies on the disclosures received and action taken, including action taken in response to reprisals;

(h) an assessment of the compliance of public and private bodies with the provisions of this Act or its regulations; and

(i) any recommendations for improvement that the Commission considers appropriate.

(2) The report under subsection (1) shall be given to the Speaker of the National Assembly, who shall table a copy of it in the National Assembly within two months after receiving it if the National Assembly is then sitting or,
if it is not, within one month after the start of the next sitting.

(3) Where it is in the public interest to do so, the Commission may publish a special report relating to any matter within the scope of the Commission's responsibilities under this Act, including a report referring to and commenting on any particular matter investigated by the Commission.

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

49. (1) A committee of Parliament may, at any time, refer to the Commission for investigation and report any petition or matter that is before the committee for consideration that may relate to improper conduct to which this Act applies.

(2) The Commission shall pursuant to subsection (1) —

(a) subject to any special directions of the committee, investigate the petition or matter referred to the Commission insofar as it is within the scope of the Commission's mandate pursuant to this Act, and

(b) make any report to the Committee that the Commission thinks fit

(3) The Cabinet Secretary may, at any time, refer to the Commission for investigation and report any matter that is within the scope of the mandate of the Commission pursuant to this Act.

(4) Where the Cabinet Secretary makes a request under sub-section (3), the Commission shall—

(a) subject to any special directions of the Cabinet Secretary, investigate the petition or matter referred to the Commission insofar as it is within the scope of the Commission's mandate pursuant to this Act, and

(b) make any report to the Cabinet Secretary that the Commission deems fit.

(5) Where a reference is made to the Commission under sub-section (1) or (3) and the Commission concludes
that it does not have a mandate over the matter, it shall refer the matter, to the body that is mandated by law to act on the matter and the body to which the matter is referred shall act on the request and provide a report to the Commission or the National Assembly, as the case may be.

50. The expenses incurred in the implementation of this Act or the regulations shall be borne by the Commission.

51. Any person or public or private body may seek advice from the commission on the implementation of this Act or a particular provision thereof.

52. (1) The Cabinet Secretary may make regulations for the better carrying out of the provisions of this Act.

(2) Without prejudice to the generality of the subsection (1), the Cabinet Secretary may make regulations relating to—

(a) the procedures to be followed by a public or private body or designated persons or by the Commission in managing and investigating disclosures and reporting the outcome of investigations, including setting time periods for action;

(b) disclosures to the Commission, including when a person may make a disclosure directly to the Commission, and the circumstances and procedure generally for making a disclosure;

(c) instructions by the Commission for a public body to investigate a disclosure which has been made directly to the Commission pursuant to the provisions of section 17(3);

(d) disclosures by the employees of the Commission, including when an employee may make a disclosure directly to the Chairperson or the Secretary of the Commission, or an external agency, and the circumstances and procedure generally for making such a disclosure;

(e) 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;

(f) designating persons or institutions which may receive disclosures under this Act;

(g) prescribing other information to be included in a disclosure;

(h) prescribing circumstances in which the Commission is not required to investigate a disclosure;

(i) prescribing the time periods for an investigation into the allegations raised in a disclosure by the Commission or any other person or entity;

(j) for 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;

(k) prescribing the forms for making complaints respecting reprisals;

(l) prescribing the circumstances in which the Commission may investigate a complaint respecting a reprisal;

(m) prescribing any information, document, matter or classes of information, documents or matters which should not be included in a disclosure under this Act;

(n) respecting the collection, use and disclosure of information, including personal information and individually identifying health information, for the purposes of this Act;

(o) prescribing forms for any request, notice, order, declaration or other matter under this Act;

(p) providing for the service or delivery of any request, notice, order, direction, instruction, requirement or other thing lawfully done under this Act;

(q) prescribing elements to be included in a procedure established in accordance with section 13 of this Act;
(r) prescribing requirements, criteria or other elements to be included in the Whistleblower reward program, including the payment of awards from the Fund, as provided for in Part VIII of this Act;

(s) public education on whistleblowing; and

(t) any other matter incidental to the foregoing.

SCHEDULE

(S.44(1)(c))

LAWS RELATING TO CLASSIFIED INFORMATION


2. The National Intelligence Service Act, 2012 (No. 28 of 2012).


MEMORANDUM AND OBJECTS OF REASONS

The object of this Bill is to set out the procedures for the disclosure of information on improper conduct within the public or private sectors, and to provide for the protection of the people making such disclosures (whistleblowers).

Part I of the Bill has preliminary provisions which include definitions of terms. "Improper conduct" is defined to include among other things, contravention of the law, acts which may endanger the life, health or safety of the members of the public, mismanagement of public funds, bribery and corruption, and acts which violate the Constitution.

Part II of the Bill provides for the administration of the Act. The Act when passed by Parliament will be administered by the Commission on Administrative Justice established under the Commission on Administration of Justice Act, 2011, which shall co-operate with other appropriate agencies in this process. The Act provides immunity from legal proceedings for a person making any disclosure under the Act.

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 15 in this part sets out the bodies and offices to which disclosures may be made. Clause 16 specifies what information should be put in the disclosure.

Clauses 18 and 19 set out the procedure for forwarding information to the Commission. Clause 20 provides that disclosures may be made anonymously.

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.

Clause 28 enjoins whistleblowers and those to whom disclosures are made to observe confidentiality. In addition, the Clause requires that confidentiality be observed where information received from a whistleblower is presented as evidence in a court case. Clause 29 of the Bill sets out the interim orders the Commission may make upon receipt of a complaint. These include reference to the Witness Protection Agency,
reinstatement to a position lost as a result of workplace reprisal, and compensation for loss of income among others.

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 provides for the establishment of a Whistleblower Reward Fund to be operated by the Commission to provide rewards to whistleblowers where a disclosure leads to recovery of money or an asset.

Part IX 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 X 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. This part also empowers the Cabinet Secretary to exempt classes of persons, public entities, and any information or record from the application of the provisions of the Act, with reasons for the exemption which shall be given to the public,

Annual reports under the Act are to be made —

(a) by public and private bodies to the Commission on all disclosures made to them during the preceding year; and

(b) by the Commission to the National Assembly, detailing, among others things, the number if disclosures made in the preceding year, the investigation conducted and the outcomes. In addition to the above a Committee of Parliament may refer a matter to the Commission for investigation and report.

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

Clause 52 of the Bill provides that the Cabinet Secretary may make Regulations. The Bill therefore delegates legislative powers to the Cabinet Secretary. The Bill however does not limit fundamental rights and freedoms.

Statement that the Bill does not concern County Governments

The Bill does not concern County Governments in terms of Article 110(1)(a) of the Constitution as it does not contain provisions affecting the
functions and powers of County Governments recognized in the Fourth Schedule to the Constitution.

**Statement that the Bill is a money Bill within the meaning of Article 114 of the Constitution**

The enactment of this Bill shall occasion additional expenditure of public funds, to be provided through the estimates.

Dated the 22nd August, 2023.

IRENE MUTHONI KASALU,
*Member of Parliament.*