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SENATE BILLS, 2014

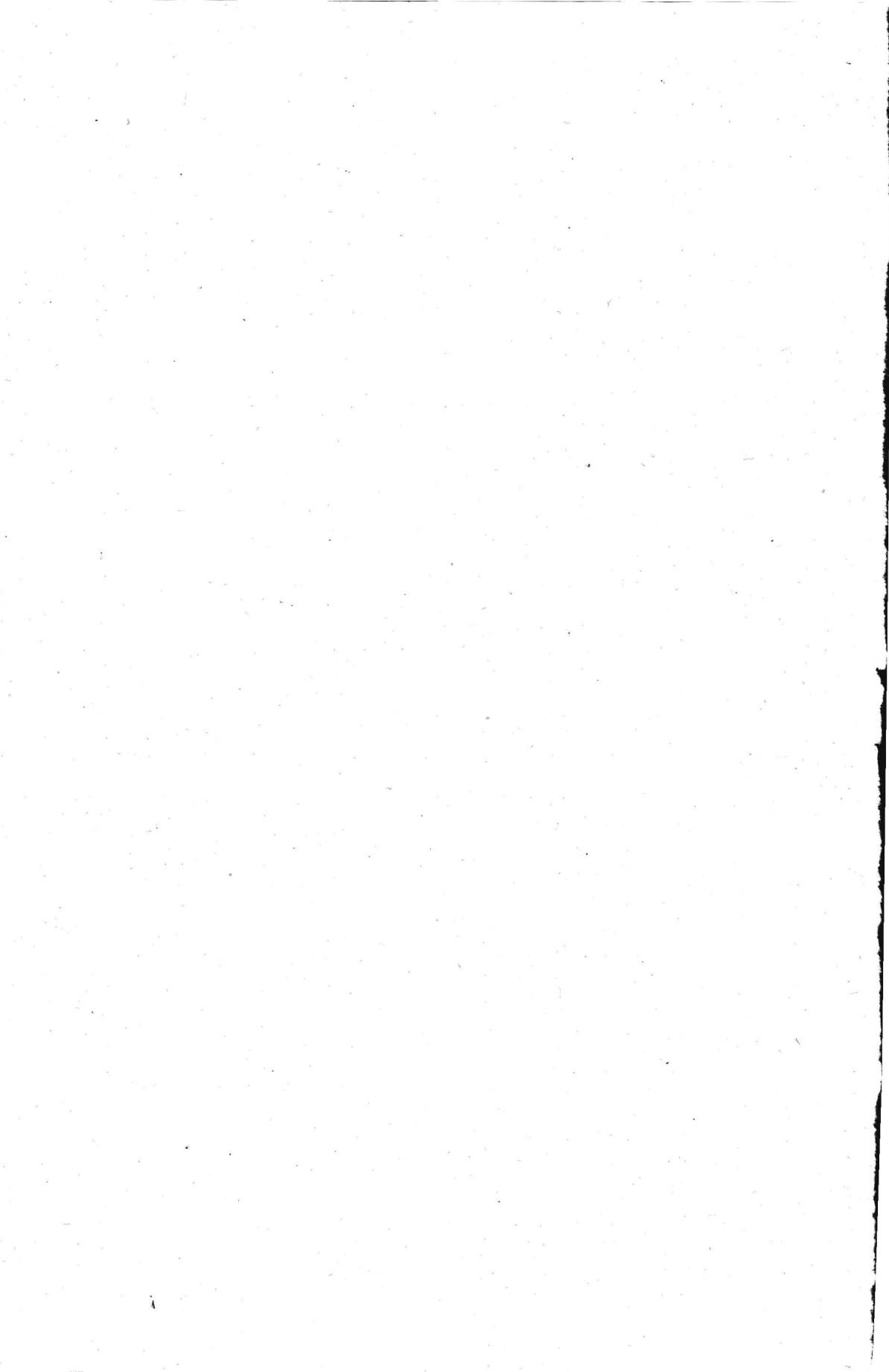
NAIROBI, 22nd April, 2014

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THE REPRODUCTIVE HEALTH CARE BILL, 2014**A Bill for**

AN ACT of Parliament to Provide for the recognition of reproductive rights; to set the standards of reproductive health; provide for the right to make decisions regarding reproduction free from discrimination, coercion and violence; and for connected purposes.

ENACTED by the Parliament of Kenya, as follows—

PART I—PRELIMINARY

Short title

1. This Act may be cited as the Reproductive Health Care Act, 2014.

Interpretation

2. In this Act—

“adolescent” means any person aged between ten and seventeen years.

“antenatal care” includes the correct diagnosis of pregnancy, followed by periodic examinations, screening and management of complications during pregnancy

“authorized facility” means a facility authorized by the Medical Practitioners and Dentists Board for the purposes of this Act.

Cap 141

“Board” means the Board of Directors established under section 36;

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for health;

“child” has the meaning assigned to it in the Children Act;

Cap 260

“child’s health care rights” means the right of every child to access quality health and medical care;

“clinical officer” means a person registered as a clinical officer under the Clinical Officers (Training, Registration and Licensing) Act;

“contraception” means the deliberate prevention of pregnancy by measures that prevent the normal process of ovulation, fertilization and implantation;

Cap 62B

“family planning” means the conscious effort by a person to plan for and attain the person’s desired number of

children and to regulate the spacing and timing of the births of the children with or without the use of contraceptive commodities;

“female genital mutilation” means female genital mutilation as defined in the Prohibition of Female Genital Mutilation Act;

“gestational surrogacy” means the process by which a woman attempts to carry and give birth to a child created through in vitro fertilization using the gamete or gametes of at least one of the intended parents and to which the gestational surrogate has made no genetic contribution;

“health care provider” means any person or institution that has been authorized to deliver health care services;

“health regulatory bodies” refer to any body or authority authorized by law to regulate the practice of medicine or health care provision;

“informed consent” means consent obtained freely, without threats or improper inducement, after appropriate disclosure to the patient of adequate and understandable information in a form and language understood by the patient;

“informed choice” means a voluntary decision by a patient to use or not to use a contraceptive method or to accept a sexual and reproductive health service, after receiving adequate information regarding the options, risks, advantages and disadvantages of all the available methods;

Cap 253

“juristic person” means an entity other than a natural person created by law and recognized as a legal entity having distinct identity, legal personality, duties and rights;

Cap 257

“maternal care” includes health care of a woman during pregnancy, childbirth and forty two days after childbirth;

“medical practitioner” means a person duly registered as a medical practitioner under the Medical Practitioners and Dentists’ Act;

“nurse” means a person duly registered as a nurse under the Nurses Act;

“Pregnancy” means the presence of a foetus in the womb;

“provider-initiated health care or testing” means the provision of care or testing to ensure public health or advancement of medicine;

“reproductive health” means a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes;

“reproductive rights” include the right of all individuals to attain the highest standard of sexual and reproductive health and to make informed decisions regarding their reproductive lives free from discrimination, coercion or violence;

“right to safe motherhood” means the right to access information and quality service by women throughout pregnancy and childbirth with the desired outcome of a live and healthy mother and baby;

“termination of pregnancy” for the purpose of this Act means the separation and expulsion by medical or surgical means, of the contents of the uterus of a pregnant woman before the foetus has become capable of sustaining an independent life outside the uterus; and

“tribunal” is the Tribunal established under section 41.

Objects and
purposes

3. The objects and purposes of this Act are to—

- (a) provide a framework for the protection and advancement of reproductive and health rights for the women;
- (b) promote women’s health and safe motherhood;
- (c) achieve a rapid and substantial reduction in maternal and child mortality rate; and
- (d) ensure access to quality and comprehensive provision of health care services to women and children.

PART II—ACCESS TO CONTRACEPTIVES AND FAMILY PLANNING SERVICES

Access to
contraception

4. The National and County Governments shall make available contraception and family planning services, including contraceptive options, counseling, information and education.

5. Every health care service provider prescribing a contraceptive method shall provide information to the person to whom the prescription is being given as to its advantages and disadvantages and ensure informed consent.

Right to information

PART III—GESTATIONAL SURROGACY

6. In this part, the term “partner” means a stable person of the opposite sex in a relationship.

Meaning of Partner

7. (1) Every person has a right to gestational surrogacy.

Right to Gestational Surrogacy

(2) The Cabinet Secretary shall make regulations to regulate the right to gestational surrogacy.

8. A surrogate parenthood agreement is valid if—

Surrogate parenthood agreement must be in writing

- (a) it is in writing and is signed by all the parties thereto;
- (b) it is entered into in Kenya; and
- (c) the surrogate mother and her husband or partner, if any, are at the time of entering into the agreement domiciled in Kenya.

9. (1) Where a commissioning parent is married or involved in a permanent relationship, the agreement shall not be valid unless the husband, wife or partner of the commissioning parent has given his or her written consent to the agreement and has become a party to the agreement.

Consent of husband, wife or partner

(2) Where the surrogate mother is married or involved in a permanent relationship, the agreement shall not be valid unless her husband or partner has given his written consent to the agreement and has become a party to the agreement.

(3) Where a husband or partner of a surrogate mother who is not the genetic parent of the child unreasonably withholds his consent, the parties shall proceed to sign the agreement and it shall be valid.

10. No surrogate parenthood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at

Genetic origin of child

Requirements of a
Surrogate
parenthood
agreement —

least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.

11. A party may enter into a surrogate parenthood agreement only if—

- (a) the commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible;
- (b) the commissioning parent or parents—
 - (i) are in terms of this Act competent to enter into the agreement;
 - (ii) are in all respects suitable persons to accept the parenthood of the child that is to be conceived; and
 - (iii) understand and accept the legal consequences of the agreement and this Act and their rights and obligations thereof;
- (c) the surrogate mother—
 - (i) is in terms of this Act competent to enter into the agreement;
 - (ii) is in all respects a suitable person to act as a surrogate mother;
 - (iii) understands and accepts the legal consequences of the agreement and this Act and her rights and obligations thereof;
 - (iv) is not using gestational surrogacy as a source of income;
 - (v) has a documented history of at least one pregnancy and viable delivery; and
 - (vi) has a living child of her own;
- (d) the agreement includes adequate provisions for the contact, care, upbringing and general welfare of the child that is to be born in a stable home environment, including the child's position in the event of the death of the commissioning parents or one of them, or their divorce or separation before the birth of the child; and

- (e) in general, having regard to the personal circumstances and family situations of all the parties concerned, but above all the interests of the child that is to be born, the agreement should be confirmed.

12. No artificial fertilisation of the surrogate mother may take place; before the surrogate parenthood agreement is duly signed and the provisions of section 10 satisfied.

Artificial fertilisation of surrogate mother

13. A surrogate parenthood agreement is terminated by a termination of pregnancy that may be carried out in terms of the provisions of this Act.

Termination of parenthood agreement

14. (1) Subject to subsections (2) and (3), a person may not in connection with a surrogate parenthood agreement give or promise to give to any person, or receive from any person, a reward or compensation in cash or in kind.

Payments in respect of surrogacy prohibited

(2) A promise or agreement for the payment of any compensation to a surrogate mother or any other person in connection with a surrogate parenthood agreement or the execution of such an agreement is not enforceable, except a claim for—

- (a) compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate parenthood agreement;
- (b) loss of earnings suffered by the surrogate mother as a result of the surrogate parenthood agreement; or
- (c) insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy.

(3) any person who renders a bona fide professional legal or medical service with a view to the confirmation of a surrogate parenthood agreement in terms of section 11 or in the execution of such an agreement, is entitled to reasonable compensation therefor.

15. (1) A person may not artificially fertilise a woman in the execution of a surrogate parenthood agreement.

Prohibition of certain acts

(2) A person may not in any way for or with a view to compensation, make known that any person is or might possibly be willing to enter into a surrogate parenthood agreement.

PART IV—SAFE MOTHERHOOD

Authorized persons

16. Maternal care shall be offered by—

- (a) Medical practitioners;
- (b) Clinical Officers;
- (c) Nurses; and
- (d) Community health workers.

Ante-natal care and delivery services

17. Every public hospital whether under the management of a County Government or National Government shall provide free ante-natal care and delivery services.

Information and treatment of HIV/AIDS
Cap 246A

18. Access to information and treatment of HIV and AIDS to a pregnant woman shall be as stipulated in the HIV and AIDS Prevention and Control Act.

PART V—TERMINATION OF PREGNANCY

Termination of pregnancy

19. (1) A pregnancy may be terminated if a trained health professional, after consultation with the pregnant woman, is of the opinion that—

- (a) the continued pregnancy would endanger the health of the mother; or
- (b) as a result of the pregnancy the life or health of the mother is in danger.

(2) Trained health professionals shall offer non-mandatory and non-directive counseling, before and after the termination of a pregnancy.

Consent

20. Subject to section 19(1), termination of pregnancy may take place—

- (a) only with the consent of the pregnant woman;
- (b) in the case of a pregnant minor, after consultation with the minor's parents, guardian or such other persons with parental responsibility over the said minor, provided that the best interest of the minor shall prevail; or

- (c) in the case of a mentally unstable person, after consultation with the parents, guardian or such other persons with parental responsibility over the said person.

21. A person who violates section 20 commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding three years.

Offences and
penalty

PART VI—HEALTH FACILITIES

22. A person offering maternal and child health care services shall operate in an environment with adequate medical facilities.

Medical facilities

23. There shall be a level five hospital in every County responsible for offering county referral services.

County referral
hospital

24. (1) Each level five hospital shall have at least five ambulances.

Emergency services

(2) No person shall be denied emergency medical treatment in whatever circumstance, including inability to pay.

25. A level five hospital shall be fully equipped to handle—

Hospital equipment

(a) child-birth emergencies; and

(b) intensive care patients.

26. The level five hospitals shall have such number of medical practitioners, clinical officers and nurses as the county executive member for health in the County in consultation with the Board, shall from time to time determine.

Medical
practitioners

PART VII—CONFIDENTIALITY

27. A person who possesses information by virtue of this Act shall not divulge such information to any person unless as provided under this Act.

Confidentiality

28. A person who contravenes section 27 commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings, or to imprisonment for a term not exceeding two years or both.

Offences and
penalty

PART VIII—CHILD HEALTH CARE

Child health care

29. Every child has a right to health care, of which parents, national government and the county government shall have the responsibility of providing.

Immunization,
vaccination and de-
worming

30. Every child has a right to free immunization, vaccination and de-worming at any public hospital.

Annual check up

31. Any child below the age of five years is entitled to a free annual medical check up at any public hospital.

Medical training

32. The County Executive Member responsible for health in the County shall facilitate training to the formal and informal community based midwives and health care providers in basic maternal and child health services to improve ante-natal and post-natal care for women and children.

PART IX—REPRODUCTIVE HEALTH OF ADOLESCENTS

Adolescent
reproductive health
services

33. (1) The Cabinet Secretary for health shall in consultation with the Board facilitate the provision of adolescent friendly reproductive health services.

(2) In the provision of reproductive health services to adolescents, parental consent is not mandatory.

(3) Despite sub-section (2) above, nothing prevents a health care provider from whom reproductive health services are sought by an adolescent, from referring the adolescent to a qualified person for provision of the necessary services.

Provision of
information and
policies

34. (1) The Board in consultation with government institutions and other bodies shall—

- (a)** facilitate the provision to of adolescent- friendly reproductive health and sexual health information and education;
- (b)** facilitate the provision to adolescents of confidential, comprehensive, non-judgmental and affordable reproductive health services;
- (c)** develop policies to protect adolescents from physical and sexual violence and discrimination including cultural practices that violate the reproductive health rights of the adolescents; and

- (d) facilitate adolescents access to information, comprehensive sexuality education and confidential services.

(2) The Board shall make such recommendations to the Cabinet Secretary on a continuous basis as to changes or inclusions to make such regulations as may be necessary to ensure that the object of section 33 (1) is achieved.

35. The Prohibition of Female Genital Mutilation Act, shall govern any issues relating to female genital mutilation and adolescents.

Female genital
mutilation
Cap 62B

PART X—REPRODUCTIVE AND CHILD HEALTH CARE BOARD

36. (1) There is established a body to be known as the Reproductive and Child Health Care Board.

Establishment of
Board

(2) The Board shall be a body corporate with perpetual succession and a common seal, and shall in its corporate name be capable of—

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding, charging and disposing of moveable and immoveable property;
- (c) borrowing or lending money; and
- (d) undertaking such other functions for the proper performance of its functions under this Act.

(3) The secretariat of the Board shall be based in Nairobi City County.

(4) The functions of the Board are to—

- (a) ensure the co-ordination and implementation of National and County Government policies, regulations and obligations under national and international laws relating to reproductive and child health care rights;
- (b) in conjunction with other relevant bodies, carry out regular surveys in all aspects of reproductive and child health in order to establish the status of the cultural and other practices applied and to make recommendations to the Cabinet Secretary;

- (c) provide administrative guidance to the Board's secretariat;
- (d) recruit and supervise the chief executive officer;
- (e) create awareness and educate members of the public about all issues relating to reproductive and child health care;
- (f) propose, formulate and ensure the passing of laws, rules, guidelines and policies for the implementation of reproductive and child health care rights; and
- (g) carry out such duties or functions as may be necessary to achieve the objects and purposes of this Act.

Members of the
Board

37. (1) The Board shall consist of—

- (a) a chairperson appointed by the Board from among its members;
- (b) the Principal Secretary, responsible for the National Treasury or a person designated by the Principal Secretary;
- (c) the Principal Secretary, responsible for Health or a person designated by the Principal Secretary;
- (d) the Principal Secretary, responsible for Devolution and Planning or a person designated by the Principal Secretary;
- (e) the Director of the National Coordinating Agency for Population and Development;
- (f) a Commissioner of the Kenya National Commission on Human Rights nominated by the Commission;
- (g) a representative of the Kenya Medical Practitioners and Dentists Board;
- (h) a representative of the Kenya Medical Association;
- (i) a representative of the Nursing Council of Kenya;
- (j) a representative from the Kenya Clinical Officers Association;
- (k) two persons representing civil society

organizations working in the area of reproductive and child health care;

(l) one person appointed by the Cabinet Secretary, who has knowledge, experience and strong commitment to advocacy for reproductive and child health care;

(m) a young person representing a reproductive and child health care rights institution or movement; and

(n) one person representing persons with disabilities.

(2) The Cabinet Secretary shall have due regard to gender balance in appointing members of the Board.

(3) The Board shall have powers to—

(a) manage, control and administer the assets of the Board in such manner and for such purposes as best promote the purposes for which the Board is established;

(b) receive any gifts, grants, donations or endowments made to the Board or any other monies in respect of the Board and make disbursements therefrom;

(c) determine the provisions to be made for capital and recurrent expenditure and reserves for the Board;

(d) open a bank account or bank accounts for the funds of the Board; and

(e) invest any monies of the Board not immediately needed by the Board.

(4) There shall be a secretary to the Board who shall be the chief executive officer who shall be appointed by the Board through a competitive process.

(5) The Board may appoint such officers as are necessary for the proper discharge of the functions of the Board under this Act, upon such terms and conditions as the Board may from time to time determine.

(6) The Board shall determine its own procedure.

(7) There shall be paid to the members of the Board such remuneration and allowances as the Cabinet Secretary

may determine in consultation with the National Treasury and the Salaries and Remuneration Commission.

Vacancy of office

38. The office of a member of the Board shall become vacant—

- (a) at the expiry of three years from the date of appointment;
- (b) if the member is removed from the membership of the Board by the Cabinet Secretary for failure to discharge the functions of the office;
- (c) if the member resigns as a member of the Board;
- (d) upon the death of such member;
- (e) if the member is bankrupt; or
- (f) if the member suffers physical or mental incapacity that hinder the discharge of functions of the office.

Term of office

39. The term of a Board member shall be three years, renewable once.

Ex-officio member

40. The Chief Executive Officer of the Board shall be an *ex-officio* member of the Board with no voting rights.

PART XI—REPRODUCTIVE AND CHILD HEALTH CARE TRIBUNAL

Establishment of tribunal

41. (1) There is established a tribunal to be known as the Reproductive and Child Health Care Tribunal.

(2) The Tribunal shall consist of the following members who shall be appointed by the Judicial Service Commission with the approval of the Senate—

- (a) a chairperson with legal experience and knowledge of reproductive and child health care rights;
- (b) the Attorney-General or a person designated by the Attorney-General;
- (c) an advocate of the High Court of Kenya nominated by the Law Society of Kenya;
- (d) two representatives nominated by the medical practitioners and dentists Board, being specialists in matters of reproductive health care;

- (e) two persons having such specialized skill or knowledge necessary for the discharge of the functions of the Tribunal.

(3) The quorum of a meeting of the Tribunal shall be three members.

(4) All matters before the Tribunal shall be determined by the decision of a simple majority of the members present.

(5) There shall be paid to the members of the Tribunal such remuneration and allowances as the Cabinet Secretary may in consultation with the National Treasury and the Salaries and Remuneration Commission determine.

42. The office of a member of the Tribunal shall be deemed to be vacant—

Expiration of term

- (a) at the expiry of three years;
- (b) if the member ceases to be a member of the professional body that appointed the member;
- (c) if the member is removed from membership of the Tribunal by the Judicial Service Commission for failure to discharge the functions of the office; and
- (d) if the member resigns from office.

43. The Judicial Service Commission shall while appointing members to the Tribunal ensure that the term of no more than one-third of the members of the Tribunal lapses at the same time.

Term of office

44. (1) The Tribunal shall have jurisdiction—

Jurisdiction

- (a) to hear and determine complaints arising out of any breach of the provisions of this Act;
- (b) to hear and determine any matter as may be referred to it pursuant to the provisions of this Act;
- (c) to perform such other functions as may be conferred upon it by this Act or any other written law.

(2) On hearing a complaint, the Tribunal shall have all the powers of a subordinate court of the first class to summon witnesses, to take evidence upon oath or

affirmation and to call for the production of books of account and other documents.

(3) The Tribunal shall within fourteen days of receipt of a complaint, give notice of the complaint to the respondent in writing informing the respondent to file a response thereto within twenty eight days of the notice.

(4) Where the Tribunal considers it desirable, it may receive evidence by affidavit and administer interrogatories and require the person to whom the interrogatories are administered to make full and true reply to the interrogatories within the time specified by the Tribunal.

(5) In determining any matter the Tribunal may take into consideration any evidence which it considers relevant to the subject matter before it, notwithstanding that the evidence would not otherwise be admissible under the Evidence Act.

(6) The Tribunal shall have power to summon expert evidence as may be necessary for the discharge of its functions under this Act.

(7) All summons, notices or other documents issued under the hand and seal of the chairperson shall be deemed to be issued by the Tribunal.

(8) Upon any complaint made to the Tribunal under this Act, the Tribunal may—

(a) consider the complaint on merit and make such orders as it may consider just and fitting;

(b) recommend cancellation or suspension of a practitioner's certificate; or

(c) reprimand the practitioner.

(9) Any aggrieved party may be represented before the Tribunal by an advocate.

(10) Any party aggrieved by a decision of the Tribunal shall have a right of appeal to the High Court within thirty days of the decision.

45. Any person summoned by the Tribunal to attend and give evidence or to produce any records, books of account, statements, or other documents or who is required to answer interrogatories and who, without sufficient cause—

- (a) refuses or fails to attend at the time and place mentioned in the summons served upon that person;
- (b) refuses or fails to answer or to answer fully and satisfactorily, to the best of the person's knowledge and belief all questions lawfully put to the person by or with the concurrence of the Tribunal; or
- (c) refuses or fails to produce any records, books of account, statements or other documents which are in the person's possession or under the person's control mentioned in any summons served upon the person;

Commits an offence and shall be liable upon conviction to a fine not exceeding fifty thousand shillings, imprisonment for a term not exceeding six months, or to both.

46. (1) Where the Tribunal awards damages or costs in any matter before it, it shall, on application by the person in whose favor the damages or costs are awarded, issue to him a certificate stating the amount of damages or costs.

Awards of the
Tribunal

(2) Every certificate issued under subsection (1) may be filed in the High Court by the person in whose favor the damages or costs have been awarded and, upon being so filed, shall be deemed to be a decree of the High Court and may be executed as such.

47. Except as otherwise provided in this Act, the Chief Justice may in consultation with the chairperson of the Tribunal, and by Notice in the *Gazette* make rules governing the practice and procedure of the Tribunal having regard to the object and purpose of the Act.

Rules of the
Tribunal

PART XII—MISCELLANEOUS PROVISIONS

48. A person convicted of an offence under this Act for which no penalty is provided shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding one hundred thousand shillings, or to both.

Offences and
Penalty

49. Subject to the provisions of this Act, the Cabinet Secretary may make Regulations on—

Regulations

- (a) implementation of this Act;
- (b) any matter which is required or permitted by this Act to be prescribed by regulations;
- (c) the provision of high quality and acceptable family planning services; and
- (d) any other matter which is necessary or expedient in order to achieve or promote the objects of this Act.

Persons aggrieved
by Act

50. Any person who is aggrieved by any decision made under this Act or Regulations made hereunder may make a reference to the Tribunal established under section 41.

Inconsistency

51. Where the provisions of this Act or any Regulations made hereunder are inconsistent with the provisions of any other written law, the provisions of this Act shall prevail.

MEMORANDUM OF OBJECTS AND REASONS

Statement of the Objects and Reasons for the Bill

The Bill seeks to make provision for the actualization of reproductive rights. The right to make free and informed decisions, which is central to the exercise of any right, shall not be subjected to any form of coercion and must be fully guaranteed by the State, like the right itself. Respect for protection and fulfillment of reproductive health and rights which seek to promote the rights and welfare of every person particularly couples, adult individuals, women and adolescents.

The Bill also seeks to deal with the issue of inadequate facilities at county government hospitals, especially in terms of emergency services including but not limited to ambulance services and equipment for intensive care services and gynaecological services as well.

The Bill seeks to bring forth the issue reproductive health for the adolescent and mentally unstable persons, which has been neglected for some time. It gives for guidance

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

The Bill does not delegate legislative powers nor does it limit fundamental rights and freedoms.

Statement of how the Bill concerns county governments

The Bill concerns county governments in terms of Article 110(a) of the Constitution as it affects the functions and powers of County Governments set out in the Fourth Schedule. The issue of health care and especially provision of health facilities affect the functions of county governments.

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 8th April, 2014.

JUDITH SIJENY,
Senator.