



The Voice of Private Sector in Kenya

Ref: 31/07-PPD/2016

July 13, 2016

Mr. Justin Bundi, CBS
The Clerk
Kenya National Assembly
Parliament Building
Nairobi

Dear Mr. Bundi,

**RE: MEMORANDA ON INFORMATION, COMMUNICATION AND TECHNOLOGY
PRACTITIONERS BILL, 2016**

We refer to our letter **Ref: 26/07-PPD/2016** dated July 6th, 2016, on the above subject.

We are pleased to inform you that the KEPSA ICT Sector Board in consultation with other ICT players has finalized scrutinizing the bill and made various observations. We hereby enclose our Memoranda on Information Communication and Technology Practitioners Bill, 2016, as requested.

We further wish to re-affirm our commitment and availability to appear before the Energy, Information and Communication Committee to defend our proposed position on the ICT Practitioners Bill, 2016.

We thank you for your continued support and cooperation.

Yours Sincerely,

Carole Kariuki, MBS, HSC
Chief Executive Officer

Cc: Hon. Jamlek Kamau, MP
Chair,
Energy, Information and Communication Committee

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Bloggers
Association
of Kenya



MEMORANDUM AND OBSERVATIONS PRESENTED TO THE NATIONAL ASSEMBLY ON THE INFORMATION COMMUNICATION TECHNOLOGY PRACTITIONERS BILL, 2016

This Memorandum is submitted by the Kenya Private Sector Alliance (KEPSA) on behalf of, and with the concurrence of the following organizations:

1. Kenya ICT Action Network (KICTANet);
2. Bloggers Association of Kenya (BAKE);
3. The iHub
4. Technology Service Providers of Kenya (TESPOK); and
5. Kenya Information Technology and Outsourcing Services (KITOS)

Overall observations

We, the organizations and entities submitting this Memorandum, take cognizance of the ICT Practitioners Bill 2015 (hereafter "Bill") as published and presented for the first reading before the National Assembly on July 6, 2016. We wish to state from the very onset that we came to learn of this Bill when it was first presented to the National Assembly for the first reading.

We further take note that the Ministry in charge of ICT, through a public communication, has already indicated that the Bill neither originates from the Government nor represents the Government's policy position relating to the ICT sector in Kenya. The Bill was introduced as a Private Member's Bill by Hon. Aden Duale. We also note that the ICT Policy is under review and this Bill, must as a matter of course and practice, be predicated upon the completion of that Policy that we, as stakeholders in the ICT Sector, are actively engaged in.

However, aware of the potential ramifications of this Bill on the ICT Sector as a whole and recognizing the need for an enabling legal and regulatory framework for the ICT Sector, we have elected to ventilate our stakeholder positions and observations on specific issues and areas of concern in relation to this Bill. This is in the spirit the letter and print of the constitution on public participation.

It is our considered position that this Bill must be weighed against the adequacy of existing laws and existing statutory and legislative environment to identify any gaps and limitations that require legislation and further intervention. Further, any proposed legislation must be geared towards achieving a facilitative and developmental role in the ICT sector. The legislative process must be premised on adequate stakeholders and public consultation and participation which is a cardinal constitutional principle in making legislation.

For this reason, any regulation affecting the Sector must ensure the widest possible consultation and considerable prudence in formulation, enactment and execution. It should be noted that the publication of this Bill has been met with significant concern by all relevant stakeholders in the ICT Sector due to a lack of consultation and engagement.

On the basis of the foregoing and issues propounded hereunder, we appeal for the **immediate withdrawal** of the **Information Communication Technology Practitioners Bill, 2016** as tabled before the National Assembly and published on 7th June 2016 to provide room for an all-inclusive and participatory process with all stakeholders in the Sector. Remember that such a right may not be alienated.

We have detailed hereunder glaring procedural and substantive gaps relating to the Bill in its legislative process and potential hurdles in its application.

1. Lack of stakeholder participation in the legislative process

Public participation in general and stakeholder participation in particular in the development of legislation, policies and administrative procedures is a principle in the Kenyan Constitution 2010 that needs to be respected and facilitated. Stakeholder participation in any legislation is a key element in according it legitimacy, relevance and acceptability.

In contravention of the spirit of 'public participation' as enshrined in the Constitution, there is no evidence of any form of broad-based, open and transparent consultation towards the development of the current Bill. Resulting from this, the Bill has glaring gaps, an example of which is enumerated under (2) below.

2. The Bill contravenes and is unsupportive of the Government policies on ICT, youth and unemployment

The Government's focus on development of an ICT enabled country has contributed to the development of a robust ICT landscape that has positioned Kenya as a leader in ICT in Africa. There has been significant focus on Science Technology and Innovation as core pillars of Vision 2030 towards increasing the talent pool of young innovators to spiral growth of entrepreneurship in Kenya.

In keeping with this policy objective, the Government and various private sector players have spearheaded initiatives such as; (i) innovation labs, (ii) ICT Incubation hubs at county level with the aim of extending these to constituency level as a means of empowering youth with necessary training and work experience to develop market ready ICT services and products, (iii) development and facilitation of a digital economy by empowering youth to develop software that is market ready and of which the National and County Governments will be primary consumers, (iv) creation of youth employment through ICT skills development, (v) education and (vi) professional development programmes.

Any such enactment or attempt should therefore address and build on the status quo and growth trends in the ICT industry.

The form of licensing as proposed in the current Bill would only serve to enshrine entry barriers and stifle innovation. This would be a retrogressive move to the development of the country given the fundamental role that ICT has played in other developed nations.

Further, the Vision 2030 objective of transforming the ICT Sector as an enabler for jobs creation is threatened by the restrictions on licensing and segregation of who can practice as an ICT practitioner. Projects such as Digify Africa by Google and Ford Foundation which seek to impart digital marketing skills have targeted and invested significant resources to empower the very groups that this Bill risks segregating. The Bloggers Association of Kenya has also initiated training and outreach programs on basic digital marketing skills around the country. The intended legislative environment ought to be desired towards a facilitative role against curbing any mischief or vices in the industry as opposed to stifling progress, research innovativeness and progress. Innovativeness thrives in free economy and environment as opposed to a restricted and constricted legal regime.

3. Adverse Labour implications

The onerous licensing regime that the Bill seeks to create would have a potential adverse impact on Kenyan ICT professionals and investors working in other countries, including Kenyans working as online service contractors and vendors for foreign companies. It is not clear whether the requirement to obtain a license would also apply to them in order for them to qualify to work in other countries? The same question arises in respect of foreign 'ICT practitioners' and investors operating in Kenya. In view of Kenya's commitments to the World Trade Organization (GATS,4) and the East African Common Market Protocol (EACP) on free movement of labor and services there is need to ensure that the bill does not undermine the country's obligations.

4. Lack of research and analysis to identify gaps; as the basis for legislation

Given the pervasiveness of ICT as an enabler for all business operations, it is problematic to definitively define the practice of ICT without having undertaken any statistical classification of jobs and occupations in market while at the same time having an understanding of the employment patterns across the ICT occupation. Such a study cannot be undertaken in isolation without the participatory engagement of all players in the ICT sector in Kenya.

As previously stated, there is no evidence of any form of broad-based, open and transparent consultation towards the development of a skills framework with industry stakeholders to date that would inform for instance a befitting definition of an ICT practitioner in Kenya. Arising from this, there is lack of clarity on the objective of the Bill.

5. Lack of harmonization with global ICT standards and licensing regimes

There is need to ensure that any legislation governing ICT practitioners is anchored on and benchmarked against best practice on standard and licensing regimes. The ICT experts and users in Kenya and globally use, implement or create products and services that are built on global technical standards. These technical standards are built on guiding principles, such as end-to-end interoperability, that ensure continued evolution and permission- less innovation based on bottom up stakeholder involvement through bodies such as the Institute of Electrical and Electronic Engineers (IEEE), Internet Engineering Taskforce (IETF), Internet Corporation for Assigned Names and Numbers (ICANN) and International Telecommunications Union (ITU).

The industry practitioners are currently licensed and regulated by the Communications Authority amongst other Kenya government and international agencies.

6. The Bill fails to take into account review of ICT Policy

It is an established practice that as far as possible, a Bill should be preceded by a Policy that outlines the broad issues that require legislation. The ICT Policy 2006 is currently under review to take into account and consideration, the various changes that have taken place in ICT since 2006.

It is necessary that this review is completed and once this Bill has been withdrawn, the proposed Bill drafted as the implementation tool of the Policy.

7. Proposed Institutional framework lacks clarity and merit

There is a lack of consensus on definition of terms used in the Bill, the structure of proposed bodies, their powers, capacity and relevance to the growth of the ICT Sector. There is need for clarity on how this Bill would be operationalized and the need to address potential conflict with existing statutory bodies operating in the sector.

Further, the Bill has isolated one organization from amongst other representative ICT organizations to its membership which appears as a non inclusive discriminatory move.

8. Incongruence with realities of ICT Training, Research and Development opportunities in the ICT Sector

It is important to recognize that ICT training is offered by both local and foreign institutions. It is however not clear how the proposed law seeks to regulate ICT-related courses that are examined internationally. Additionally, there are many disciplines within ICT including but not limited to networking, software development, application and ICT audit. All these disciplines may further be subdivided into classes creating a very wide spectrum of ICT disciplines and areas of specialisation. Some ICT experts have undertaken highly specialised training in sub disciplines and products software from vendors. The unique nature of ICT training is not acknowledged, making the Bill incongruent with realities of ICT training, certification and practice. The question of aggregation of standards with regards to ICT education is not addressed. There is also need to clarify whether tutors in training institutions will be required to acquire the proposed licenses.

9. Innovation and learning/knowledge, technology transfer and fostering tech entrepreneurship

Without prejudice to the impact of formal education processes, they have sometimes been accused of stifling innovation, whereby innovation is replaced with formal rules and processes. The Bill ignores 'self-taught' innovators who with the introduction of the licensing regime would be limited to practice.

In the converse, the most urgently required legislation is one that enhances the protection of ICT innovations from exploitation, particularly those undertaken by the category of persons that this Bill seeks to segregate.

Proposed way forward:

Based on the foregoing and the sentiments raised by members of the public, the media and other professional bodies in various foras, we recommend the following:

1. The **immediate withdrawal** of the **Information Communication Technology Practitioners Bill, 2016**; and
2. That the National Assembly recognizes the ongoing review process of the National ICT Policy and accordingly advises the Ministry of ICT to fast-track the finalization of the review to ensure policy coherence and alignment of legislation.

