

*Comments and proposed amendments to the
Truth, Justice and Reconciliation Commission Bill, 2008*

*Presented to the Parliamentary Committee on Legal Affairs and the Administration of
Justice*

The Amnesty provisions, as we indicated in the earlier memorandum and proposed amendments, presents constitutional and practical challenges that stand in need of review and amendment.

The Amnesty provisions suffer certain editorial and drafting difficulties. However due to the pressure of time, it has not been possible to exhaustively provide a comprehensive proposed amendments to the amnesty provisions.

We have prepared amendments on the issues that we think ought, as matter of priority, to be addressed to align the Bill with the constitutional parameters and public interest.

It is therefore recommended to the Committee on the Legal Affairs and Administration of Justice as follows-

1. That the Bill be amended by deleting clause 34 and substituting therefor the following new clause-

34. (1) A person may make an application for consideration of amnesty to the Commission for any act or omission which constitutes a matter to be investigated under this Act.

(2) The Commission may in accordance with this Part, and subject to subsection (3), recommend the grant of conditional amnesty to any person liable to any penalty under any law in Kenya or any international treaty to which Kenya is party.

(3) Notwithstanding subsection (2) no amnesty may be recommended by the Commission in respect of gross violation of human rights.

(4) Where the criminal penalty attaches in respect of a matter on which an amnesty has been requested under this Act the Commission shall not recommend amnesty in respect thereof-

(a) if the victim objects to the amnesty;

- (b) in respect of economic crimes, the applicant has not made, to the satisfaction of the Commission, compensation for the loss that may have been occasioned by the crime.

This amendment seeks to make it clear that no amnesty would be considered for certain types of violations namely gross violations of human rights and to bring the victim into the arrangement. Bringing the victim to consent to the grant of amnesty is important in order to take into account Chapter V of the Constitution that guarantees fundamental rights and freedoms. It is also sought to make amnesty in economic crimes possible only where compensation has been made by the violator.

2. That Clause 36 of the Bill be amended in subclause (3) by deleting paragraph (a) thereof and substituting therefor the following new paragraph-

- (a) inform the applicant that the application does not qualify for amnesty.

3. That clause 38 of the Bill be amended in subclause (3) by-

- (a) deleting the words “is an act of gross human rights violation” and substituting therefor the words “qualifies for the grant of amnesty.”

This provision seems to imply that there is a criteria for determining what “gross human rights violations” entail. This can be determined by the definition of “gross human rights violations” already in the definitions sections of the Bill

The amendment seeks to make the criteria set out under subclause (3), criteria for determining whether an act or omission would qualify for a recommendation for amnesty

- (b) deleting all the words appearing after the word “pursued” in paragraph (f);

The words sought be deleted add little value to the list. For example under paragraph (a) the motive of the person who committed the offence is already mentioned. Reference in paragraph (f) to “personal gain”, “out of personal malice” et al, are merely “motive”.

3. That the Bill be amended by inserting the following new clause immediately after clause 38-

38A. Where the Commission is of the view that a recommendation for amnesty should be made with respect to an application, the Commission shall

submit that recommendation to the Attorney General who may take into account the recommendation of the Commission with respect to the institution of, or continuance with, prosecution of the case subject of the amnesty application.

There is serious dilemma regarding the sole prerogative of the Attorney General under Section 26 of the Constitution to determine what case to prosecute or otherwise and the need to have amnesty as a critical component of this proposed law.

This amendment seeks to ensure that amnesty recommendations pay due regard to the prerogative of the A-G and would have persuasive and public interest value. Unfortunately, that is the best given our constitutional reality.

It is also proposed that amnesty recommendations may not need to wait for the Commission to finalise its report but would be disposed of during the life of the Commission.