AWELE JACKSON
ADVOCATES LLP

Our Reference:	Your Reference:	Date
AJ/GEN/21	TBA	25th February, 2021

Liquid Telecommunications Kenya Limited
Sameer Business Park, Block A
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P.O. Box 62499-00200
Nairobi.

Dear Sir,

Att: Mr. Andrew Alston.

RE: ADVISORY OPINION - CONSTITUTIONALITY OF THE INFORMATION COMMUNICATION TECHNOLOGY PRACTITIONERS BILL, 2020

Further to your instructions dated 22nd February, 2021, we are pleased to render our advisory opinion in the above matter as hereunder;

I. Background and Summary of the Bill

There is currently pending in parliament the **Information Communication Technology Practitioners Bill, 2020**. The short title to the bill states that it is *'an Act of Parliament to provide for the training registration, licensing, practice and standards of ICT practitioners and for connected purposes'*. In the memorandum of objects, *'the principal object of the Bill is stated as to 'establish a legal framework for the training registration, licensing, practice and standards of ICT professionals in Kenya.'*

In summary, the Bill seeks to prescribe and regulate the training and qualifications of persons that can 'practice' the trade and craft of ICT in Kenya, establish the standards and terms of such practice through an ICT Practitioners Council and provide for offences for non-compliance with the requirements of the registration and licensing.

We have carefully reviewed the provisions of the Bill and highlight the following ten key provisions for purposes of our advisory opinion

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Firstly, the Bill defines *"Information Communication Technology (ICT)"* as technologies employed in collecting, storing processing, using or sending out information and include those involving the use of computers, mobile apparatus or any telecommunication system.

Secondly, the Bill seeks to establish an ICT Practitioners Institute that shall be governed by a council. The council shall consist of inter-alia the principal secretaries in the Ministry of information communication technology and the national treasury, a representative of the ICT Authority, representatives of training institutions in Kenya which have power to grant a qualification recognized under the Act, a representative of examination bodies established in law, four persons of good professional standing nominated by various bodies including the Information Communication Technology Association of Kenya, the Computer Society of Kenya, the Telecommunication Service Providers and the chairperson of the Institute.

Thirdly, the functions of the Institute shall include to establish standards of professional competence and practice amongst ICT practitioners, approve courses for purposes of registration of ICT Practitioners, administer such examinations as may be necessary to determine whether persons are qualified for registration, register and license ICT practitioners upon payment of the prescribed fees, formulate policies and programs governing the profession of Information Communication Technology Practitioners, approve institutions offering training and professional development courses for ICT practitioners, supervise the professional Conduct and practice of ICT practitioners and take the necessary disciplinary measures in cases of violations of professional conduct and discipline.

Fourth, the Act provides for the eligibility criteria for registration as an ICT Practitioner. A person shall be eligible for registration if the person is the holder of at least a bachelor's degree in an ICT related field including computer science, information technology, telecommunication, computer engineering from a recognized university; is the holder of at least a bachelor's degree in electrical and electronics engineering, mathematics or physics and has at least one year post qualification experience in ICT field; is the holder of a diploma in an ICT related field including computer science, information technology, telecommunication or computer engineering and has at least three years post qualification experience in ICT field; is the holder of at least a bachelor's degree from a recognized university and has at least three years post qualification experience in ICT field; or has demonstrated expertise, innovation or competence in ICT as may be determined by the Council.

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Fifth, the Bill requires an eligible person wishing to be registered as an ICT practitioner to apply in the prescribed form for registration and to pay a prescribed fee. If approved by the Council, an Applicant shall be registered and issued with a certificate of registration in the prescribed form. The council shall have the concomitant power to remove from the register the name of deceased persons, person convicted of an offence under the Act, a person whose name has been struck off the Register by the Council and any entry which has been incorrectly or fraudulently made in the register

Sixth in addition to registration every ICT practitioner shall be required to comply with the requirements for continuing education and supervision and be issued with a valid practice license by the Council in order to practice on their own behalf or to be employed. The Bill seeks to criminalize practice as an ICT practitioner without a license and further proscribes the levying of fees for ICT services without a license.

Seventh, it shall be professional misconduct if an ICT practitioner deliberately fails to follow the laid down standards of conduct and practice of the profession of ICT laid down by the Council; Commits gross negligence in the conduct of professional duties; allows another person to practice in their name where such person is not a holder of a practicing certificate issued under the Act, is not in a partnership with the ICT practitioners, takes advantage of clients by abusing a position of trust, expertise or authority, is insensitive to clients' needs, feelings, rights or welfare of others, shows incompetence or inability to render services for reasons ranging from inadequate training or inexperience, to personal unfitness such as a character defect or an emotional disturbance, evidences irresponsibility including lack of reliable or dependable execution of professional duties, attempts to blame others for one's mistakes, shoddy or superficial professional work or excessive delays in delivering necessary feedback, assessments, reports, or services or is guilty of abandonment through failure to follow through with their duties or responsibilities, thereby causing clients to become vulnerable or incur unnecessary expenditure. To this end any person dissatisfied with any services offered by an ICT practitioner or alleging breach of the standards of conduct as may be specified by the Council from time to time, may make a written complaint to the Council and the Council may remove such person's name from the register, suspend such person's license or registration for a period not exceeding twelve months or cancel such person's license.

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Ninth, A person who, not being eligible to be licensed or registered under the Act, willfully and falsely takes or uses any name , title or addition implying a qualification to practice as an ICT practitioner, or who not being registered or licensed under the Act, practices or professes to practice or publishes that person's name as practicing as an ICT practitioner commits an offence and shall be liable on conviction to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding two years or both.

II) <u>The nature of the Constitutional rights and freedoms likely to be limited by the Bill.</u>

At the outset, the impugned bill threatens to dilute and/or limit two fundamental rights and freedoms guaranteed under the Bill of rights. **The freedom of expression** guaranteed under Article 33 of the Constitution and the **right to protection of intellectual property** guaranteed under Article 40 of the Constitution.

To begin with, Article 33(1) of the Constitution guarantees the freedom of expression inter-alia as follows;

Every person has the right to freedom of expression, which includes—

(a) freedom to seek, receive or impart information or ideas;

(b) freedom of artistic creativity; and

(c) academic freedom and freedom of scientific research.

This right is also guaranteed by the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples rights (ACHPR) and the Declaration of Principles on Freedom of Expression in Africa (the African Declaration). Most notably, Article 19 of the ICCPR sets out the right in greater detail as follows;

'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, <u>regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice</u>.'

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From our cursory review of the various authoritative declarations and commentaries on the freedom of expression in the contemporary world it is beyond per-adventure that the freedom of expression is integrally linked to ICT in all its manifestations and that the two are not mutually exclusive.

a) The UN Human Rights Committee (HR Committee) General Comment No. 34 in relation to Article 19 of the ICCPR calls on states to "*take all necessary steps to foster the independence of [information and communication technologies, such as internet and mobile based electronic information dissemination systems] and to ensure access of individuals thereto."*

b) The 2011 report of the UN Special Rapporteur on freedom of expression differentiated between access to online content and access to the "infrastructure and information communication technologies, such as cables, modems, computers and software, to access the internet in the first place and highlighted that access to the infrastructure and *ensuring universal access* to the internet should be a priority for all States. *Each State should thus develop a concrete and effective policy, in consultation with individuals from all sections of society, including the private sector and relevant Government ministries, to make the internet widely available, accessible and affordable to all segments of population."*

c) The principle of 'network neutrality' or 'net neutrality' protects the right to access internet content, applications, services and hardware *according to individual choice*. It requires that ISPs and governments treat all traffic and data on the internet equally, without discrimination, regardless of the nature of the sender, user, type of data, content, and platform.

Though not yet anchored as a legal norm within international law the 2011 Joint Declaration on Freedom of Expression and the internet of the four Rapporteurs recommended that there should be no discrimination in the treatment of internet data and traffic, based *on the device, content, author, origin and/or destination of the content, service or application.*

These international norms, treaties and conventions are applicable in Kenya by dint of Article 2(5) and (6) of the Constitution.

To the extent therefore that the Bill seeks to regulate any technologies employed in *collecting, storing processing, using or sending out information and include those involving the use of computers, mobile apparatus or any telecommunication system,* the Bill shall in many ways limit the freedom of expression as enshrined and recognized under the Bill of rights and international law.

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Article 40 (5) guarantees the protection of property and enjoins the state to support, promote and protect the intellectual property of Kenyans. It states;

> ***(5) the State shall support, promote and protect the intellectual property; rights of the people of Kenya."***

The Constitution provides a framework for recognition and protection of intellectual property whereas individual statutes provide detailed provisions for their protection and exploitation. The long and short of it is that intellectual property rights are a bundle of intangible rights over information and products created out of individual skill and innovation and subject only to existing intellectual property laws, includes, without more, the exclusive right to exploit the economic rights ensuing therefrom for a limited period of time.

In Beatrice Wangechi Mwaniki v Kenya Methodist University [2015] eKLR, the High Court defined Intellectual property as **the sum total of a group of rights, patents, registered designs, copyright, trade marks, know-how – i.e. any industrial information and techniques likely to assist in the manufacture or processing of goods or materials …," an expression of individual skill and experience…"**

At the very core of innovation therefore is the freedom to express oneself freely in accordance with individual choice. Under the existing intellectual property laws including the Copyright Act, Industrial Property Act and the Trade Marks Act, the law regulates the manner of protection of intellectual property as a product and NOT the author or originator of the intellectual property. In other words, the said laws do not purport to distinguish or classify categories of people who may or may not innovate.

As hereinafter expounded, to the extent therefore that the impugned Bill seeks to regulate who can practice of ICT, it introduces a new and absurd limitation that requires licensing in order to innovate, imposes a superfluous/parallel requirement for exploitation of intellectual property and otherwise fails the test of necessity.

As rights under the Bill of rights, Articles 33 and 40 form an integral and inalienable core of the constitution and serve the purpose of inter-alia promoting social justice and the *realization of the potential of all human beings* (emphasis ours). All other rights, powers, privileges and obligations under the Constitution inconsistent with the Bill of rights must be construed in such a way as to defer to the Bill of rights.

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To underscore its centrality, Article 19 of the Constitution proclaims the Bill of rights as the framework for social, economic and cultural policies and that the rights stipulated therein are inherent in every person and not granted by the state and can only be limited as contemplated in the Constitution. Article 20 as read with Article 259 enjoins the court in applying the Bill of rights to adopt interpretations that most favors the enforcement of a right or fundamental freedom and to promote the values that underlie an open and democratic society based on equity and freedom among others. Under Article 21 the state has a positive duty to observe respect, protect, promote and fulfil rights and freedoms in the Bill of rights.

III. The Applicable law and standards of limitation of rights under the Bill of rights.

Pursuant to Article 24(1) as read with Article 25 of the Constitution, save for the freedom from torture, slavery, the right to fair trial and the right to habeus corpus any other right or fundamental freedom in the Constitution may be limited subject HOWEVER to the standards set out under Article 24 of the Constitution. In providing our advisory opinion therefore, the focus is on the extent to which the impugned bill limits the fundamental right to protection of property and the freedom of expression and whether the said limitations are reasonable and justifiable (and therefore constitutional) as contemplated by Article 24 of the Constitution.

In this regard, Article 24 of the Constitution states;

> ***"(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—***
>
> ***(a) the nature of the right or fundamental freedom;***
>
> ***(b) the importance of the purpose of the limitation;***
>
> ***(c) the nature and extent of the limitation;***
>
> ***(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***

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> ***(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.***
>
> ***…***
>
> ***(3) <u>The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied. (Emphasis added)"</u>***

In **<u>Kenya Human Rights Commission v Communications Authority of Kenya & 4 others Petition No. 86 of 2017 [2018] eKLR</u>** Mativo J. explained the test in the following terms;

> "71. A common way of determining whether a law or a regulation or decision that limits rights is justified is by asking whether the law is proportionate. The test of proportionality has been established to be the following:- *Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?;Are the means in service of the objective rationally connected (suitable) to the objective?; Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective? Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?...*
>
> 72. A limitation of a constitutional right will be constitutionally permissible if **(i)** <u>it is designated for a proper purpose;</u> **<u>(ii)</u>** <u>the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose;</u> **<u>(iii)</u>** <u>the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally</u> **<u>(iv)</u>** <u>there needs to be a proper relation ("proportionality *stricto sensu*" or "balancing") between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right.'</u>
>
> 73. It is worth borrowing the words of the Canadian Supreme Court in the case of ***R vs Oakes***[1986] 1 SCR 103 [69]–[70] where Dickson CJ said that to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied.

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> *a. The first criterion concerned the importance of the objective of the law. First, the objective, which the measures responsible for a limit on a constitutional right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important….*
>
> *b. Secondly, the means chosen for the law must be 'reasonable and demonstrably justified', which involves 'a form of proportionality test' with three components: First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance.'…*
>
> 74. When employing the language of proportionality, the High Court would ask whether the end could be pursued by less drastic means, and it has been particularly sensitive to laws that impose adverse consequences unrelated to their object, such as the infringement of basic common law rights. This kind of test resembles those employed in European Union law and in Canada…."

Under Article 24(3) of the Constitution, the burden of proving the reasonableness and proportionality of any limitation of a fundamental right is *expressly* reposed in the person seeking to justify the limitation and has to be discharged on a *high* standard based on *cogent* and *persuasive* evidence. In **Robert Alai v The Hon Attorney General & another; Petition No. 174 of 2016 [2017] eKLR**, the court (Mwita J.) set out the standard of proof as follows;

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> "50. The principle enunciated above is that constitutionally guaranteed rights should not be limited except where the limitation is reasonable, justifiable and the objective of that limitation is intended to serve the society. The standard required to justify limitation, is high enough to discourage any limitation that does not meet a constitutional test. And that limitation to a right is an exception rather than a rule.
>
> …

The court in the above case then cited the case of **Moise Vs. Greater Commission Transitional Local Council; Minister of Justice and Constitutional Development, intervening (Women's Legal Centre as Amicus Curiae) 2001 (4) sa 481 (CC)** and stated;

> ***"If the government wishes to defend the particular enactment, it then has the opportunity-indeed an obligation-to do so. The obligation includes not only the submission of legal argument but the placing before court of the requisite factual material and policy considerations."***

The court then stated at page 25:

> **"*The respondents have been found woefully wanting on this front. They have not submitted any evidence or material of whatever nature in justification of the limitation in question. That being the case, the conclusion is, in my view, inescapable that the respondent has failed to satisfy this court that the restrictions and limitations imposed on the applicants' Freedom of speech or expression are either reasonable or justifiable. Besides, the deeming provisions of subsection 3 of section 3 are plainly contrary to the constitutionally entrenched right of being presumed innocent until proven otherwise."***

In the ***Julian Robinson case***, at paragraph 203(m) the court acknowledged that the standard of proof, though the civil standard, should in view of the nature of the rights in question be *rigorously applied* and that *cogent* and *persuasive* evidence would be required for *each* element of the test. The court stated as follows;

> *"An important component of the Oakes test, which often seems neglected, is the onus the Supreme Court placed on the evidence which would be required for the justificatory process. The Court appreciated the nature of the rights that would be at stake in any Charter case, thus their demand for the infringing limit to cross a*

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> *high threshold. This threshold was set high because the guarantee of the entrenched rights was to be the norm, and their limitation the exception. The standard of proof that these "exceptions" would have to meet was the civil standard of proof "applied rigorously." To meet this burden, evidence would be required for each element of the test, and the quality of that evidence was to be "cogent and persuasive." The evidence would also need to clearly illustrate the effects of allowing the limit, and what other options the government actor had when they decided on their final course of action. …*
>
> …
>
> **[140]** I am fully aware that **Oakes** marks the high water mark of judicial insistence that the legislature meet the constitutional standard before laws can be said to have passed constitutional muster. The article of Mr Michael Johnston reveals what can happen when courts do not enforce the constitutional standard with firmness. If too much deference is consistently given to the executive and legislature there is the risk that there is likely to be creeping encroachment on fundamental rights. This risk of encroachment is such that we may end up with a de facto application of the presumption of constitutionality approach found in the jurisprudence of the pre-Charter era where primacy was given to legislative preference and not the legal standard. From Mr Johnston's perspective it is not that the **Oakes** test is weak, the problem, in his view, is that judges of the Canadian Supreme Court, in some instances, have tended to lower the evidential threshold."

For reasons hereinafter stated, we are of the considered opinion that on the face of it, the stated objects of the Bill fall far short of the above established standards of limitation. In essence, no persuasive and cogent evidence has been availed to demonstrate that the stated purpose or object of the bill is *sufficiently important* or that the concerns, if any, sought to be cured are pressing enough to warrant overriding the *fundamental* right and freedom of expression and protection of intellectual property guaranteed under Articles 33 and 40 of the Constitution respectively and connected rights; or that the means employed to achieve the objectives of the said bill have any *rational connection* with its stated purpose or; that they will infact achieve the said objectives; or that the means used to achieve the stated objectives of the impugned Bill are *the only available and viable alternatives* that would least violate the

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stated rights; or that the *benefit arising from the violation is infact greater than the harm likely to be caused*.

The European Court of Human Rights in **Ashby Donald and others vs France**, Appl. Nr. 36769/08 held that the law limiting the freedom of expression must strictly establish the doctrine of necessity and that it is not enough that the impugned law pursues a legitimate aim. It held that the law '***must be pertinently motivated as being necessary in a democratic society, apart from being prescribed by law and pursuing a legitimate aim.'***

iv. Analysis of the nature and purpose of the impugned Bill relative to the standards set out in Article 24(1) of the Constitution.

In our opinion, the purpose and objects stated under section 3 of the Bill are by and of themselves NOT indicative of the mischief or concerns that the Bill seeks to cure. In our view, sub sections (a)-(f) merely set out '***what'*** the Bill seeks to achieve and not '***why'*** it seeks to achieve them. There is no indication in the Bill for ***why*** for instance it is necessary to prescribe standards of practice for ICT professionals, ***why*** is it necessary to train and register them, ***why*** is it necessary to license them, or ***why*** is it necessary to impose criminal sanctions for exploiting one's experience or talent in an ICT field without a license or registration. Strictly speaking therefore, the marginal note to the said section misrepresents its actual provisions as the said provisions do not answer the necessity, problem or mischief or public policy concern that the Bill seeks to cure.

In our considered opinion, failure to stipulate the '***why'*** or true object of the bill is not a coincidence. Looked at as a whole, it is more probable than not that the Bill merely seeks the trivial purpose of protectionism and control over the ICT industry and otherwise serves no genuine, reasonable or pressing purpose or public policy concern to justify the Limitations it seeks to impose.

That said, considering the nature and scope of the freedom of expression and the right to protection of intellectual property as explained above, it is inescapable that the information, communication and Technology (ICT) industry and all its manifestations is a function of free expression, scientific research, creativity and the protection of intellectual property (both the freedom to innovate and the right to exploit the innovation). To the extent therefore that it seeks to regulate or impose restrictions on *who* can engage in the ICT industry and *how* they can engage, the ICT Practitioner's Bill is no ordinary Bill. It is a Bill that has the potential

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consequence of limiting rights guaranteed under the Bill of rights and must accordingly be tested against the high standards set out under Article 24(1) and (2) of the Constitution to ensure it meets constitutional muster

In the current context, it is our considered opinion that held against the standards under Article 24 of the Constitution, the 'disclosed' and 'true' purpose of the Bill are not genuine or sufficiently necessary as to justify its intrusive, excessive and disproportionate effect on the freedom of expression and the right to intellectual property in a free and democratic society. There are otherwise more efficacious and/or minimal means of achieving the 'disclosed' and 'true' purpose of the Bill and of limiting the deleterious effects of its provisions. We hold this opinion for the following main reasons;

Firstly, the Act seeks to regulate and restrict the cadre of persons who may practice any trade or craft within the purview of ICT. In effect, by seeking to inter-alia approve courses for purposes of registration of ICT Practitioners, administer such examinations as may be necessary to determine whether persons are qualified for registration under the Act, register and license ICT practitioners, formulate policies and programs governing the profession of Information Communication Technology Practitioners, approve institutions offering training and professional development courses for Information Communication Technology practitioners and supervise the professional Conduct and practice of ICT practitioners, it focuses on regulation *individuals* as opposed to the *technologies* they innovate. Contrary to Article 24(1)(c) of the Constitution, this intention is inimical to the very essence and core of the freedom of expression as defined hereinbefore. It makes the absurd and retrogressive assumption that the capacity to innovate or to conceive and express an idea is taught and not inherent and that unless the council (read 'government') has approved a course, administered an exam, registered or licensed an individual, the said individual cannot freely innovate or exploit the product of his innovation. Needless to say, the direct consequence of this restriction will be to nullify technologies for which there are no certifications, stifle expression and thereby stifle innovation.

Secondly, to the extent that the Bill seeks to regulate standards of professional practice it presupposes without cogent evidence that; (i) the ICT industry has a common body of knowledge that qualifies it as a profession. On the contrary the overwhelming evidence in the industry is that ICT skills are so wide and all-encompassing to be governed by a single set of practices. It is stated for example that within the Internet Engineering Task Force, there are currently 30 Active working groups in the Applications space, 17 in the Internet area, 14 in the operational area 24 in the Routing area, 25 in the security area and 11 in the transport

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area making a total of 107 separate working groups covering domains that have very little to do with each other and require entirely different skillsets and mindsets. It is accordingly an exercise in futility and an undue restriction on the freedom of expression and creativity to create a straitjacket for ICT standards out of which persons wishing to practice ICT cannot venture (ii) the Bill presupposes without cogent evidence that there are currently no standards of professional practice in the ICT industry or that the existing ones are inadequate or inappropriate for purpose. On the contrary, there is overwhelming evidence that some of the best standards and indeed technologies in the ICT industry have been the result of *open source* collaborations and peer-reviews by a larger and borderless community of ICT experts in diverse areas of practice - and not state regulators. The sponsor of the Bill shall accordingly be put to strict proof to the contrary. (iii) the idea that a council comprised mainly of state actors will determine who may engage in ICT practice and the standards that they must abide by in doing so defeats the very principle of the *Bill of rights* i.e. is to protect the class of rights enshrined thereunder against infringement by *public officials/the state.* In the modern-day world where technology permeates every aspect of life, the Bill if enacted into law shall amount to creeping censorship and suppression of expression. As held in the Julian Robinson case (supra) <u>If too much deference is consistently given to the executive and legislature there is the risk that there is likely to be creeping encroachment on fundamental rights.</u>

Thirdly, as the party with the onus to prove that indeed the limitations proposed by the Bill are justifiable the sponsor of the bill has not availed cogent, verifiable or any evidence to demonstrate that approving courses for purposes of registration of ICT Practitioners, administering examinations to determine whether persons are qualified for registration or registering and licensing ICT practitioners among others will achieve any meaningful public policy purpose or cure a mischief in the public interest. Absent such evidence, the presumption in law therefore is that the proposed limitations and regulations are unfounded, arbitrary, unreasonable and therefore unconstitutional – **See the Julian Robinson case** (supra)

Fourth, as discussed above, Article 40 of the Constitution enjoins the state to support, promote and protect the Intellectual property of the people of Kenya. This includes refraining from condoning any actions that are likely to deprive the people of Kenya their intellectual property. That said, (i) it is of public notoriety that technology and innovation is by individuals and is by its very nature universal and collaborative. In effect, placing licensing restrictions in order for individuals to express and exploit their innovative ideas within our boundaries discourages local innovation and promotes brain drain to countries that promote free

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expression within the confines of the universally accepted intellectual property laws. (ii) Intellectual property by its very nature connotes the freedom to invent and the concomitant right to freely exploit inventions. The licensing requirement in the Bill essentially alters local and international intellectual property laws and norms and creates an absurd parallel statutory requirement that for one to register a patent for example, he has to demonstrate that he was licensed to invent in the first place. The alternative would be to disclose the invention and lose it altogether. It will further have the unreasonable and absurd consequence that an inventor of a patent or copyright for example can only exploit the said patent for the full period provided for on condition that he is licensed as an ICT practitioner. If he should be struck off the register, his right to exploit his IP would be similarly suspended for as long as the council deems it necessary. Further, the Bill can be construed to mean that any licensee or sub-licensee to any technology but who has no academic qualifications or experience recognized by the council shall upon the Act becoming law lose the right to exploit such license and MUST employ an ICT practitioner to exploit it or apply for registration and licensing as such - the presumption being that only ICT practitioners can exploit their technologies. These consequences are absurd, unreasonable, impractical and run contra the universal principles of intellectual property that the government is mandated to support, promote and protect as explained in part II. above. (iii) limiting the right to freely exploit intellectual property rights and freedoms gravely impact inventors' rights to a livelihood, stifles free expression and thought and threatens to deny the public at large the benefit of innovations some of which are critical in the 21st Century for their health, national security, access to information, freedom and right of communication etc.

Fifth, considering its far-reaching effects on the freedom of expression and protection of Intellectual property, there is ample cogent evidence to demonstrate that the Bill's provisions are infact a disproportionate and excessive means of 'regulating' the ICT industry and that there are already in place less restrictive means of regulating the industry which would have insignificant effect on the affected fundamental rights and freedoms. (i) there is no empirically verifiable evidence that the existing common laws of contract and tort do not provide adequate remedies for loss or harm caused by an ICT practitioner who '*takes advantage of clients by abusing a position of trust, expertise or authority; is insensitive to clients' needs, feelings, rights or welfare of others; or shows incompetence or inability to render services for reasons ranging from inadequate training or inexperience*'. These are common law torts that are adequately remediable at the instance of an injured party and for which extensive jurisprudence exists under case law and statute (including the Consumer

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Protection Act, the Sale of goods Act and the Law of Contract Act). (ii) The Bill is superfluous and unnecessary to the extent that it seeks to regulate the standards of conduct of ICT professionals by means of additional criminal sanctions. Yet again there is no empirical or verifiable evidence that the existing sanctions under Kenya Information and Communication Act and the Computer Misuse and Cybercrimes Act are inadequate deterrents against unethical or immoral conduct or that indeed that mandatory licensing of practitioners will deter such conduct. In other words there is no cogent evidence in support of the view that failing to undertake approved courses, attend approved learning institutions, register or take out a license impairs innovations or in any way affects the quality of ICT practice. Quite the reverse, comparative regional and international experience shows that some of the greatest innovations and ideas are borne out of free expression of thought outside of formal instruction. Bill Gates – Founder of Microsoft, Michael Dell – Founder of Dell Computers, Mark Zuckerberg – Founder of Facebook, Steve Jobs – Founder of Apple Computers, Jack Dorsey – Founder of Twitter, Paul Allen – Co-Founder of Microsoft, Larry Ellison – Founder of Oracle, Evan Williams, Co-founder of Twitter, Jan Koum – Creator WhatsApp and many more are all great examples that free and unhindered expression spurs innovation, (iii) it is settled that ICT practice is the function of intellectual expression and it is more likely than not that regulations and sanctions imposed by the Bill will have the counterproductive effect of discouraging mainstream practice and thereby make it impractical to enforce professional standards against john doe players in the industry. The collateral effects of this will be that local ICT professionals will be placed at a disadvantage relative to their international counterparts who will be outside the jurisdiction of the sanctions imposed by the Bill. (iv) Some of the offences created by the Bill are too vague and nebulous to be enforced under the standards of fair trial guaranteed under Article 50 of the Constitution. '*Being insensitive to clients' needs; feelings, rights or welfare of others; showing incompetence or inability to render services for reasons ranging from inadequate training or inexperience, to personal unfitness such as a character defect or an emotional disturbance; irresponsibility including lack of reliable or dependable execution of professional duties; attempting to blame others for one's mistakes; shoddy or superficial professional work or excessive delays in delivering necessary feedback; assessments, reports, or services; abandonment through failure to follow through with duties or responsibilities, thereby causing clients to become vulnerable or incur unnecessary expenditure;* are vague offences that would cause uncertainty and suppress free expression because the statute is worded in a standardless way that invites arbitrary enforcement. Such vague laws are susceptible to abuse by unscrupulous persons for malicious ends not rationally connected to the true purpose of the proposed law. In our considered

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opinion these provisions of the Bill are void under the *void-for-vagueness doctrine*. Due to lack of specificity it fails to give adequate guidance to ordinary citizens, fails to advise possible victims of the law of the nature of the precise offense with which they will be charged, and fails to guide courts in trying accused persons. It is a settled principle of law that where a statute is so vague or so threatening to constitutionally protected rights and freedoms, it can be invalidated as wholly unconstitutional under Article 2(4) of the Constitution.

Finally, as it were, the Bill seeks the rather narrow purpose of protectionism for Kenyan ICT practitioners. Purposively construed, it is empirically evident that the limitations imposed by the Bill will have serious collateral deleterious effects on individual ICT practitioners and the public at large relative to its ill-considered benefits. (i) Considering the universal nature of ICT practice in the 21st century, imposing licensing conditions on foreign ICT professionals will be counter-productive and disadvantageous to Kenyan professionals who will ultimately lose out on collaborative engagements with their peers and may have to face reciprocal and unbearable working conditions in other economies (ii) suppressing expression, creativity and scientific research will have the unintended consequence of encouraging extra-legal dealings and practices in the black market and with that inhibit free flow of information and collaboration for growth and development, (iii) it is absurd and circuitous that in addition to academic qualifications one would require demonstrated experience to be licensed yet the said experience can only be gained from work or practice as an ICT practitioner which itself requires a license. In a country grappling with serious rates of unemployment, it is in the public interest that such a regulatory framework be demonstrative of more than just mere protectionism. As it is, the Bill implies that innovation and self-employment in the ICT industry must only be sanctioned by the state. (iv) the bill contradicts the National ICT Policy, 2019 and in particular, Kenya's strategic plan to leverage regional and international cooperation and engagements and service delivery in a manner that ensures a prosperous, *free, open* and stable society. (v) the Bill creates additional red tape that will be impractical to enforce in view of the intellectual and remote nature of ICT practice. This further translates to a unnecessary increase of national expenditure.

The above grounds are by no means exhaustive and shall with time be further developed. They are however sufficient demonstration that the Bill fails the legitimate aim, necessity and proportionality test under Article 24 of the Constitution.

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v. Material/Constitutional Procedural defects of the Bill

a. **Failure to specifically express the intention to limit fundamental rights and freedoms.**

Article 24 of the Constitution provides specific mandatory procedural requirements that any law seeking to limit a right or fundamental freedom MUST comply with. It provides at sub-article (2) as follows;

> *(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—*
>
> *(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;*
>
> *(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and*
>
> *…*

In our considered opinion, this requirement is not in vain. It is intended to facilitate transparency, accountability and informed public participation in critical legislative processes that are likely to affect fundamental rights and freedoms. It further serves the useful purpose of ensuring that where a piece of legislation seeks to limit fundamental rights and freedoms, the legislature can demonstrate, as it is required to under Article 24(3) of the Constitution that indeed the mischief sought to be cured by the law is sufficiently important to warrant the limitation of the affected fundamental rights and freedoms and that the means employed to achieve the said objective is rational or absolutely necessary or the least restrictive. Unlike for ordinary legislation this high test is a deliberate safeguard for ordinary members of the public against purposeful or unintended derogation of their constitutional rights and freedoms. Without more, failure to comply with the said requirements where it is demonstrable, as in this case, that the legislation in question will limit a right or fundamental freedom renders the Act unconstitutional by dint of Article 2(4) of the Constitution.

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b. **Lack of effective and meaningful Public participation**

Under Article 10(2) (a) of the Constitution, the rule of law, democracy and participation of the people are key national values and principles of governance that ***bind all State organs, State officers, public officers and all persons whenever any of them— inter-alia enacts, applies or interprets any law.***

Article 118 (1) (b) of the Constitution in particular mandates parliament (including the National Assembly) to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. To this end Standing Order No. 127(3) of the National Assembly mandates the relevant Departmental Committee to which a Bill is committed to facilitate public participation and take into account the views and recommendations of the public when it makes its report to the whole House. These provisions essentially represent the expanded scope of our democracy to a partly representative and partly participatory one. Our courts and courts in other commonwealth jurisdictions have in several decisions on these and similar provisions interpreted the same as conferring a positive and mandatory duty on the National Assembly to take *deliberate, positive and genuine measures to facilitate meaningful, informed and quality participation of ordinary citizens in its legislative processes to ensure that views that may influence any legislation are taken into account before any such law is passed*. Public participation is therefore a function of and promotes openness, transparency and accountability which are the foundational tenets of Kenya's constitutional democracy.

In **Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR Petition No. 532 Of 2013 Consolidated with Petition Nos. 12 OF 2014, 35, 36 OF 2014, 42 OF 2014, & 72 OF 2014 and Judicial Review Miscellaneous Application No. 61 Of 2014**, GV Odunga J. aptly captures the centrality of public participation in Kenya's legislative processes thus;

> *"49….it is clear that public participation plays a central role in both legislative and policy functions of the Government whether at the National or County level. It applies to the processes of legislative enactment, financial management and planning and performance management."*

On the standard or quality of public participation, the Learned Judge stated;

> *"75…In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained*

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> *both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.…*

In summary, the purpose of public participation in the lawmaking process is to afford the public the opportunity to influence the decision of law-makers. This requires the law-makers to objectively consider the representations made and thereafter make an informed decision. To do this, Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Otherwise, the duty to facilitate public participation would have no meaning.

From the information available to us thus far, the alleged public participation in respect of the impugned bill may very well be a cosmetic exercise and falls far below the constitutional standard laid out in the ***Gakuru case*** for the following reasons;

a) Firstly, it is clear that Standing order 127(3) as read together with Articles 10 and 118(1)(b) of the Constitution requires more than mere advertisement, of the amendments, of the nature and scope impugned, in a newspaper. As hereinbefore demonstrated, the impugned bill has prescribed new mandatory and far-reaching limitations that threaten to impact critical individual rights and freedoms without which the full enjoyment of other related and equally important rights and freedoms in the 20th century would be impaired.

b) Against the established standard, it will be critical therefore to establish how effective the alleged advertisement/call for memoranda was in facilitating public participation including whether the 7-day period for public participation was 'adequate' in light of the scope and nature of the Bill, whether the stakeholders meetings were infact held

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and how accessible the said meetings were to ordinary citizens and the public at large, the level and quality of attendees etc.

c) Considering the *nature, importance and scope of impact of the impugned amendments on the public* as hereinbefore demonstrated, using the 'ordinary citizen' standard, it is more likely than not that a majority of ordinary citizens didn't even see the advert or saw it but did not understand its far reaching import. As stated by the South African Constitutional Court in the ***Doctors for life case***, *Public involvement in the legislative process requires access to information and the facilitation of learning and understanding in order to achieve meaningful involvement by ordinary citizens.* In the words of Justice GV Odunga in the ***Gakuru case***, *'there must be an attempt to exhort the public to participate in the process of the enactment of the Bill.* In the circumstances, the question that begs answer is whether the 7 day call for memoranda was an 'adequate' attempt to exhort the public to meaningfully participate in this legislative process?

d) Under Article 24(2)(a) of the Constitution, any legislation limiting a constitutional right, as the impugned bill, *must specifically express the intention to limit that right or fundamental freedom, and the nature and extent of the limitation*. From a cursory review of the invitation for public participation and submission of memoranda by the clerk of the National Assembly, it is clear this provision was not complied with. We note that no effort was made to avail any information, memorandum or explanation setting out the scope, effect and/or objects of the impugned Bill so as to enable the public make informed representations on the Bill. It is therefore quite possible that even where adequate time is availed for public participation, which is obviously not the case herein, the same may not yield much if ordinary members of the public do not understand the nature and effect of the limitations proposed in the Bill on their fundamental rights and freedoms. It is more probable than not that the Bill would achieve greater participation before the 2nd reading if the same is well explained and broken down to the public as contemplated by Article 24(2)(a) of the Constitution.

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vi. Conclusion

In conclusion, we believe a prima facie case can be made out that the Bill is on the face of it unconstitutional and that its intentions are not sufficiently important to warrant it deleterious effects on the freedom of expression and right to intellectual property.

In the event that a Petition has to be filed in court, much as the onus is on the sponsor of the Bill to demonstrate the justifiability of the limitations in the Bill, the Petitioners as the aggrieved parties must as a matter of course prepare adequate empirical material in the form of expert testimony to corroborate the above arguments. Comparative experiences from other jurisdictions will be invaluable in this regard.

Procedurally, current jurisprudence suggests that any party aggrieved by the threatened violations of their fundamental rights and freedoms by a Bill would have to wait until the same is enacted into law in order to challenge it. The presumption is usually that to challenge a Bill before enactment is presumptuous and an affront to the principle of separation of powers as it would amount to interference with the prerogative and independence of Parliament guaranteed by the Constitution itself. Nonetheless, I have always held the opinion that purposively construed in light of section 127(3) of the standing orders, public participation in the legislative process is divided into two stages each of which must be in strict compliance with the Constitution i.e. the committee and the whole house stage. As already stated herein above, standing Order No. 127(3) of the National Assembly mandates the relevant Departmental Committee to which a Bill is committed to facilitate public participation and to take into account the views and recommendations of the public when it makes its report to the whole House. In my considered opinion, failure to comply with this express prescription of law entitles any party whose rights are threatened by the proposed enactment to move the court, after the 3rd reading but before submission of the Bill to the President for assent to enforce compliance. Such a case would in my opinion serve the secondary and important purpose of lobbying the President against signing the Bill.

In the alternative, Article 119 of the Constitution entitles every person to petition parliament to consider any matter within its authority. In the premises, in addition to the right to submit memoranda, you may elect to submit a detailed petition as prescribed under the Petitions to Parliament (Procedure) Act for consideration at the second reading of the Bill. Pursuant to standing orders 131 – 138 a petition to parliament that coincides with the second reading of the Bill may very well facilitate important amendments before the Bill committed for adoption at the third reading.

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As a last resort, should the Bill be enacted into law, a Constitutional Petition and an interlocutory application for interim orders staying implementation of the Act pending hearing and determination of the Petition would stand a good chance of success if filed.

We would be pleased to prepare draft petitions to parliament and court if called upon to

We hope that this opinion will be of assistance to you. Do not hesitate to contact us should you require any clarification or further information.

Yours faithfully,
Awele Jackson Advocates LLP

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AWELE JACKSON
ADVOCATES LLP

Our Reference:	Your Reference:	Date
AJ/GEN/21	TBA	22nd February, 2021

PROFORMA INVOICE/QUOTATION

Liquid Telecommunications Kenya Limited

Dear Sir,

Att: Mr. Andrew Alston.

Legal Opinion – Constitutionality of the Information, Communication Technology Practitioners' Bill, 2020.	**KSHS.**
To prepare a legal opinion on the Constitutionality of the Information, Communication Technology Practitioners' Bill, 2020 to wit; undertaking a comprehensive review of the impugned Bill, Hansard reports and previous similar bills, industry commentaries and reports, follow up correspondence and clarification of any arising issues.	
Taking into account the urgency of the matter	
Professional fees:	300,000
VAT @16%	48,000
TOTAL	**348,000**

Thanking you for your custom

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