



MEMORANDUM SUBMITTED TO

NATIONAL ASSEMBLY'S DEPARTMENTAL COMMITTEE ON JUSTICE

AND LEGAL AFFAIRS

ON

THE CRIMINAL PROCEDURE CODE (AMENDMENT) BILL (NATIONAL

ASSEMBLY BILL NO. 11 OF 2026 AND THE PENAL CODE (AMENDMENT)

BILL (NATIONAL ASSEMBLY BILL NO. 12 OF 2026)

SUBMITTED BY:

THE FEDERATION OF WOMEN LAWYERS IN KENYA

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INTRODUCTION

FIDA-Kenya respectfully submits this Memorandum pursuant to **Article 118 of the Constitution of Kenya, 2010**, which guarantees public participation in parliamentary processes, and in response to the Committee's call for submissions.

As a key stakeholder in advancing constitutionalism, equality, and human rights, FIDA-Kenya is guided by the national values and principles of governance under **Article 10**, including human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of marginalized groups.

BACKGROUND

FIDA-Kenya is a non-profit, non-partisan organization committed to eliminating discrimination against women in line with **Article 27 of the Constitution**, which guarantees equality and freedom from discrimination. FIDA-Kenya manages legal aid clinics, works extensively on strategic impact litigation, women's rights advocacy and sexual and reproductive health rights.

Our submissions herein are informed by the practical, everyday realities observed within our police stations, courts and lived realities of the women who attend our legal aid clinics. FIDA-Kenya seeks to ensure that as we repeal the Penal Code and its criminal procedural laws, it does not inadvertently roll back protections for women, children, intersex persons and the socio-economically marginalised.

GENERAL POSITION ON THE BILL

FIDA-Kenya welcomes the overall objective of aligning the criminal justice framework with the Constitution and human rights standards but raises firm reservations to specific clauses within the proposed bill that introduce statutory loopholes, threaten women's property and land rights, and ignore survivor-centred standards in sexual and gender-based violence (SGBV) cases. Further, it fails to account for the lived realities of women, especially persons with psychosocial disabilities and fails to address emerging forms of technology-facilitated gender-based violence (TFGBV) and femicide.

FIDA-Kenya therefore supports the reforms and urges the committee to make the amendments that are in line with Articles 27,28,48,49,50 and 53 of the Constitution of Kenya.

CRIMINAL PROCEDURE AMENDMENT BILL, 2026

Clause 8 and 40	BODY SEARCHES OF INTERSEX PERSONS
Provision	27A “Where it is necessary to cause an intersex person to be searched, the search shall, where reasonably practicable, be conducted by a person of the sex which the intersex person shall prefer with strict regard to decency and in such manner s to protect the dignity of the intersex person”
Summary of issue	While the bill recognizes intersex persons and tries to protect their dignity, the wording has a potential loophole. The wording ‘where reasonably practicable’ could qualify human rights violations towards intersex persons. This downplays the right to bodily privacy, body autonomy and dignity and it allows police officers to bypass the preference of the intersex individual by citing administrative inconvenience. This could expose intersex persons to unwanted searches of an opposite or non-preferred sex thus violating fundamental protections against cruel, inhumane and degrading treatment. Most police stations in Kenya lack diverse personnel training and structures to accommodate intersex persons.
Suggested amendment	By deleting the word where <i>reasonably practicable</i> ” and replace with <i>“shall be conducted”</i>
Justification	The Constitution is the paramount law of the land. Article 28 of the Constitution of Kenya (COK) provides the right to dignity, and the same is absolute. The goal is to eliminate claw back clauses, thus ensuring mandatory compliance by police officers and preventing potential sexual harassment, abuse of power and systemic trauma inflicted on intersex persons.

Clause 33 replacing clause 79	TRANSFER OF CASES
Provision	79. “A magistrate may transfer a case of which the magistrate has taken cognizance to any other magistrate with competent jurisdiction to try that case within the local limits of the magistrate’s jurisdiction, whether evidence has been taken in the case or not.”
Summary of issue	This clause fails to consider the impact this has on victims. For victims of Sexual and gender based violence(SGBV) and domestic violence, it can be an emotional turmoil for an unexpected case transfer which could in some occasions involve re-telling traumatic incidences hence revictimizing the victim.

	<p>This structure could potentially disadvantage women from low-income groups and marginalised women whose mobility, time, and financial constraints are highly restricted. Because of the delay in courts, the Chief Justice operationalized the specialized courts, which included SGBV courts to hear and determine these cases within 6 months; thus, transferring the cases will not help in meeting this target.</p>
Suggested amendment	<p>Introducing a condition of transfer “In matters that involve sexual violence, domestic violence and children, the matter should not be transferred without hearing the complainant and the court to put down written reasons confirming that the transfer is necessary and would not cause secondary trauma or prohibitive costs to the victim. “</p>
Justification	<p>This amendment will go in tandem and operationalize Article 48 of the Constitution of Kenya on access to justice and Article 50 of fair trial by centering the victim’s socio-economic and psychosocial well-being. This will also help in abiding to international survivor-centered standards for handling SGBV matters.</p>

Clause 35 Amending section 82	ENTRY OF NOLLE PROSEQUI
Provision	The Director of Public Prosecutions (DPP) shall enter a nolle prosequi with the permission of the court.
Summary of issue	While we applaud the tightening of judicial oversight of the discontinuation of criminal cases, the same is silent on the voice of the victim. Most of the time, SGBV victims discover their matters have been dropped after it has happened. This then leads to thoughts of system failure and corruption by the victim. In other instances, women in domestic abuse are forced/coerced/manipulated into reconciliations without the Judicial officer (JO) assessing their safety and risks, which could be ongoing.
Suggested amendments	“In serious offences such as SGBV and domestic violence, the court shall not grant permission for a nolle prosequi unless it is satisfied that the victim has fully been informed and their views are considered and placed on record”
Justification	In line with survivor-centeredness, it is important to get the views of the victim. It also strengthens Kenya’s state obligation under international instruments such as the Maputo Protocol to ensure women are active protected participants in criminal proceedings that fundamentally impact their survival and safety.

Clause 42 amending section 131(3)	FORFEITURE OF IMMOVABLE PROPERTY
Provision	131(3) “A warrant may be executed within the local limits of the jurisdiction of the court which issued it; and it shall authorize the attachment and sale of the movable property belonging to the person without those limits, when endorsed by a magistrate within the local limits of whose jurisdiction the property is found.”
Summary of issue	By dropping the word “movable” property, the interpretation would now mean it’s in reference to immovable property, and if that is the case, then it fails to appreciate the unique dynamics affecting women in Kenya. Due to the patriarchal nature of our society, many women only hold beneficial, equitable or matrimonial interests in these properties. Their names do not appear in the title deeds and thus if a male relative absconds court, then the women are left destitute, disposed and homeless together with their children without being heard in court. Our experience through the legal aid clinic is that most of the time, the women find auctioneers at their doorstep to seize the property without any prior.
Suggested amendment	Introduce a sub-clause “Before making the forfeiture order, the court shall issue a mandatory notice to hear the spouse, dependent residing or utilizing the property, if any, before making an order”
Justification	This directly addresses structural discrimination against women’s land and property rights, fulfilling the state's mandate under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa. (Maputo Protocol).

Clauses 49 and 50 replacing sections 162 & 166	FITNESS TO STAND TRIAL & MENTAL ILLNESS SPECIAL VERDICTS
Provision	This involves the governing procedures for determining an accused’s fitness to stand trial and the institutional committal of individuals found not guilty by reason of mental illness.
Summary of issues	This is definitely a plus from previous regimes where individuals would “just” be detained, but there is less

	<p>safeguard on less restrictive alternatives and ongoing periodic reviews.</p> <p>Women with psychosocial disabilities face a high risk of being institutionalized under the criminal procedure. While in there, they are exposed to abuse (sexual) and are separated from their children and families without any safeguards.</p> <p>Because of the cycle of abuse, women can also be disproportionately labeled as “mentally ill” when they act out of trauma, especially from Intimate Partner Violence (IPV).</p>
Suggested amendment	<p>Introduce a timeframe. “Any order for institutionalization under this section shall be subject to automatic judicial review every 6 months, and the court to order the medical assessment to be gender responsive and trauma-informed, taking into account the full consideration any history of domestic violence, abuse or psychosocial factors affecting the accuses- <i>this is for example women convicted of infanticide.</i></p>
Justification	<p>This ensures we align with the Convention on the Rights of Persons with Disabilities (CRPD) and CEDAW General Recommendation 35 with regard to women navigating trauma within the justice system.</p>

Clause 83 introducing section 395	COMPOSITION OF THE CRIMINAL PROCEDURE RULES COMMITTEE
Provision	This creates a new section which establishes the Criminal Procedure Rules Committee
Summary of issues	The composition fails to incorporate expertise from mental health experts and psychologists, gender justice experts, and human rights experts. The fact that it lacks expertise from key players means it looks “neutral”, but the rules will continue to overlook the invisible barriers, secondary trauma and structural limitations faced by women and vulnerable groups as they go through the criminal justice system.
Suggested amendments	Expand the committee members – could include women’s rights organisations, psychologists, disability organisations etc.
justification	Under Article 27 of the Constitution of Kenya, the state has a duty to address historical marginalization and discrimination

PENAL CODE AMENDMENT BILL, 2026

<p>Clause 11 inserting Section 160A</p>	<p>LIMITATION OF CRIMINAL LIABILITY FOR ABORTION</p>
<p>Provision</p>	<p>160.” Any person who unlawfully supplies to or procures for any person any thing whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman whether she is or is not with child, is guilty of a felony and is liable to imprisonment for three years.”</p> <p>160A.”it shall not be an offence under section 158,159 or 160 if any person was acting in accordance with the circumstances contemplated under Article 26(4) of the Constitution.</p>
<p>Summary of issues</p>	<p>While it is impressive that we are anchoring reproductive rights within the penal code, we cannot and should not just cross-reference it. Without any clear supportive defences, then we are looking at a lacuna at the implementation stage.</p> <p>We know that most of the time and from case law, women and medical officers often face harassment and arrest based on the circumstances. Reproductive health decisions must be shielded from systemic criminalisations to protect women’s bodily autonomy and health, particularly in cases of sexual violence, rape and incest.</p>
<p>Suggested amendments</p>	<p>Amending section 160A to read: 160A. (1)” It shall not be an offence under section 158,159 or 160 if any person was acting in accordance with the circumstances contemplated under Article 26(4) of the Constitution.</p> <p>(2) For the avoidance of doubt, no registered medical practitioner, nurse or clinical officer shall be subjected to criminal prosecution or harassment for providing safe termination of pregnancy under the conditions specified in Article 26(4).</p>
<p>justification</p>	<p>With the addition of the clause, it safeguards the right to health as enshrined in Article 43(1) of the Constitution regarding the right to the highest attainable standard of health, including reproductive healthcare.</p> <p>This further aligns with article 14 of the Maputo Protocol, which mandates state parties to authorize safe abortion to protect women’s physical and mental health in instances of sexual violence, rape and incest.</p>

Clause 2 amending section 4	DEFINITIONAL TERM OF LIFE IMPRISONMENT
Provision	The bill amends section 4 to define imprisonment for life as a fixed term of 30 years
Summary of issue	Capping life imprisonment at 30 years fails to take into account the extreme crimes committed. This could include: genocide, SGBV, murder, femicide, defilement and rape. Capping the years at 30 years means that a perpetrator could be released on good behavior and would compromise the safety of the victim after they have served their sentence. We have experienced cases where a perpetrator has been released and has eventually killed the victim.
Suggested amendment	Add a proviso that “imprisonment means 30 years, provided that murder arising out of SGBV, femicide, defilement or sexual violence on vulnerable persons life imprisonment shall mean life imprisonment.”
justification	The proviso still respects judicial authority and discretion while noting the state's due obligation to protect women from systemic violence.

Clause 15-22	ABOLITION OF CRIMINAL DEFAMATION AND LIBEL
Provision	Repeal sections 194-200 abolishing libel and defamation as penal code offences
Summary of issue	While we celebrate the promotion of freedom of expression enshrined in the Constitution of Kenya under Article 33, the removal without other safeguards is not a win for women, especially with the technologically facilitated gender-based violence (TFGBV). In Kenya, female politicians, human rights activists and women in general are frequently victims of non-consensual sharing of images, online campaigns that are malicious and deepfakes, which tend to be a form of character assassination meant to affect them politically. Removing these sections without taking into account the modern age of technology will be a hot spot for continuous online harassment.
Suggested amendment	Add a subsection to include the prevalence of TFGBV.
justification	This ensures the right to privacy for women is safeguarded

CONCLUSION

FIDA-Kenya reiterates that while these amendments are long overdue, it urges the committee to align these reforms on gender equity, human dignity and non-discrimination as enshrined in the Constitution of Kenya and to affirm Kenya's obligations under regional and international human rights instruments, thereby advancing a criminal justice system that is embedded in survivor-centeredness and gender responsiveness.

SUBMITTED BY:

The Federation of Women Lawyers(FIDA)Kenya