



REPUBLIC OF KENYA
THE SENATE - FIFTH SESSION

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FEDERATION OF WOMEN LAWYERS (FIDA-KENYA) SUBMISSIONS ON THE
ALTERNATIVE DISPUTE RESOLUTION BILL, 2021 (SENATE BILLS, 2021)

NO.	CLAUSE (AS IT IS IN THE Bill)	PROPOSED AMENDMENT	JUSTIFICATION
1.	Purpose of the Bill 'A Bill for AN ACT of Parliament to provide for the settlement of civil disputes by conciliation, mediation and traditional dispute resolution mechanism; to set out the guiding principles applicable; and for connected purposes'	The proposed title be amended to incorporate other ADR mechanisms and read as follows: "AN ACT of Parliament to provide for the settlement of civil and criminal disputes by diversion , conciliation, mediation, negotiation and arbitration ."	The proposed Alternative Dispute Resolution Bill does not recognize conclusively other mechanisms of ADR such as negotiation, diversion and arbitration The title of the bill which spells out its purpose and scope does not incorporate ADR in prosecution of criminal cases. It is noteworthy that the Directorate of Public Prosecution has incorporated alternatives to criminal prosecution through the National Prosecution Policy and the Diversion Policy.

<p>2.</p>	<p>Clause 2: Interpretations ‘Alternative Dispute Resolution’ means conciliation, mediation, traditional dispute resolution or any other mechanism of resolving disputes in which a person assist parties to resolve a dispute otherwise than through the normal judicial process or arbitration;</p>	<p>This definition of Alternative Dispute Resolution should include diversion as particularize in clause (1) above.</p> <p>It should also include arbitration as it is a form of ADR but direct that where a party seeks to resolve dispute through arbitration, they refer to the Arbitration Act as stipulated under Section 4 (2)(a) of the proposed Bill.</p>	<p>The term Alternative Dispute Resolutions refers to and incorporates all forms of resolution of disputes outside the court system which include negotiation, mediation, conciliation, arbitration as well as inquiry The Kenyan Constitution. Article 159 of the Constitution enjoins courts and judicial authorities in the exercise of judicial authority aimed at promoting all forms of alternative dispute resolution that include mediation, reconciliation, arbitration as well as traditional dispute resolution mechanisms.</p> <p>The Diversion Policy was introduced in 2015 by the National Prosecution Policy. The proposed alternatives to prosecution include plea negotiations and agreement, diversion and alternative and traditional dispute mechanisms.</p> <p>It also contemplates waiver of prosecution, discontinuing proceeding conditionally or unconditional or diverting cases from the formal justice considering the rights of victims and suspects.</p> <p>It is encouraging especially where matters relate to children in conflict with the law on the basis of the principle of the best interest of the child and need to rehabilitate such children.</p>
<p>3.</p>	<p>4. (1) This Act shall apply to certain civil disputes including a dispute where the</p>	<p>This section be amended to extend the scope of application of the Act to</p>	<p>The term Alternative Dispute Resolutions refers to and incorporates all forms of</p>

	<p>National government, a county government or a State organ is a party.</p>	<p>criminal disputes where the ODPP or any other person exercising the delegated powers makes a decision on diversion of a matter.</p>	<p>resolution of disputes outside the court system which include negotiation, mediation, conciliation, arbitration as well as inquiry</p> <p>The Kenyan Constitution. Article 159 of the Constitution enjoins courts and judicial authorities in the exercise of judicial authority aimed at promoting all forms of alternative dispute resolution that include mediation, reconciliation, arbitration as well as traditional dispute resolution mechanisms.</p> <p>The Diversion Policy was introduced in 2015 by the National Prosecution Policy. The proposed alternatives to prosecution include plea negotiations and agreement, diversion and alternative and traditional dispute mechanisms.</p> <p>It also contemplates waiver of prosecution, discontinuing proceeding conditionally or unconditional or diverting cases from the formal justice considering the rights of victims and suspects.</p> <p>It is encouraging especially where matters relate to children in conflict with the law on the basis of the principle of the best interest of the child and need to rehabilitate such children.</p>
<p>4.</p>	<p>5. Guiding principles of alternative dispute resolution a) voluntary participation in the alternative dispute resolution process and a</p>	<p>The proposed Bill should be amended in Section 5 to include compliance with the Constitution and the bill of rights in decisions made.</p>	<p>Art. 2(4) of the Constitution provides that any law including customary law that is inconsistent with the Constitution is void to the</p>

	<p>party may withdraw from alternative dispute resolution process at any time;</p> <p>b) the right to information including the right to be informed of the existence of an alternative dispute resolution process prior to the commencement of process of determining a dispute;</p> <p>c) confidentiality except in the case of traditional dispute resolution;</p> <p>d) determination of disputes in the shortest time practicable taking into account the nature of the dispute;</p> <p>(e) impartiality in the determination of a dispute under this Act by the conciliator, mediator or traditional dispute resolver and disclosure of any conflict of interest that may arise;</p> <p>(f) a conciliator, mediator or traditional dispute resolver shall facilitate disputes which he or is competent to facilitate; and</p> <p>(g) the parties may use more than one alternative dispute resolution mechanism in an attempt to resolve a dispute.</p>	<p>The proposed Bill should be amended in Section 5 to include the principle of equality of the parties during the process.</p> <p>The Bill should be amended in Section 5 to include the principle of accessibility and flexibility.</p>	<p>extent of the its inconsistency and any act or omission in contravention of the Constitution is invalid.</p> <p>In all the ADR mechanisms, the independent third party is required to treat all parties to the dispute as equal during the process of resolution of the dispute.</p> <p>The state is obligated to ensure access to justice. This means that the ADR mechanism adopted or used in civil and criminal cases should be easily accessible to the parties at minimal costs.</p>
<p>5.</p>	<p>11(2)(c). Referral of cases to conciliation or mediation.</p> <p>‘The clause making provision for alternative dispute resolution of the agreement, contract or any arrangement entered into by the parties is</p>	<p>The proposed Bill should be amended in Section 11, “<i>the subtitle to read “Referral of cases to court annexed conciliation or mediation processes,”</i></p>	<p>The proposed Bill recognizes 3 forms/methodologies of referral to conciliation and or mediation.</p> <p>Under Section 11 reference is made to conciliation and/or mediation through the court process while Section 12(1)</p>

	Inoperative, incapable of being performed or void'		refers to parties' voluntary initiative to approach conciliation/mediation mechanisms as a form of resolving their dispute while Section 12(2) and (3) refers to referral of parties to a conciliation/ mediation mechanism arising from an agreement entered into by both parties.
6.	12(3). Submission to conciliation or mediation '(3) A party to an agreement which has not made provision for submission of a dispute to alternative dispute resolution or a dispute covered under this Act may, with the consent of the other party to the agreement, submit a dispute arising out of that agreement for determination through conciliation or mediation.'	This provision should be amended to require that the consent to submit to conciliation or mediation should be reduced in writing.	This consent should be reduced into writing since it is essential to ascertain the autonomy and equality of parties during the conciliation and mediation process. It may also be easily enforceable as the party autonomy and voluntariness is essential in ADR.
7.	16. Obligations of a mediator or conciliator	The proposed Bill be amended to include the requirement for the mediator or conciliator to be guided by the principles as stipulated in Section 5 of the Act The proposed Bill be amended to include the requirement of the mediator or conciliator to treat both the parties equally during the proceedings.	This inclusion is necessary to ensure that the mediator or conciliator facilitates the mechanism in the proper manner and that the mediator or conciliator is bound by the principles of the respective mechanism. It also holds the mediator or conciliator to a specified standard. This should be included as party equality is a foundational requirement of ADR mechanisms. This addition would also ensure that the mediator or conciliator carries out his actions to a required standard.
8.	24. End of conciliation or mediation	The proposed Bill should be amended to include the requirement that a	The Bill should in addition to the already recognized

		mediation or conciliation may end where the mediator or conciliator resigns or on account of non-payment of prescribed deposit by the parties or one party.	circumstance where the ADR process ends, include resignation or non-payment to ensure that the mediator or conciliator is also protected as he discharges his duties.	
9.	29(1). End of traditional dispute resolution	<p>The proposed Bill should be amended to two additional means of ending traditional dispute resolution:</p> <p>a) Parties jointly decide to end the traditional dispute resolution or,</p> <p>Where one party wishes to end the traditional dispute resolution.</p>	<p>These additions are necessary as one of the most fundamental principles of ADR mechanisms is that they are party driven and voluntary. Therefore, where either party or both parties collectively do not wish to continue the process, they should have an opportunity to terminate them. This option has also been recognized above in Clause 24(1) and there is no evident fundamental difference as to why it would not be included for traditional dispute mechanisms. Further, it also recognizes the ability of the party to terminate the process ahead in Clause 29(2)(b) with no prior provision.</p>	