MEMERANDUM TO THE SENATE

ON

THE PROPOSED REPRODUCTIVE HEALTH BILL 2019

Presented by

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PART I:

INTRODUCTION

"A Bill for AN ACT of Parliament to provide for the right to reproductive health care; to set the standards of reproductive health; provide for the right to make decisions regarding reproductive health; and for connected purposes"

Our observation:

This is not a new Bill but a slight variation of a bill first introduced by Senator Judith Sijeny as a private members bill then referred to as the "Reproductive Health Care Bill 2014".

The then Education Cabinet Secretary Jacob Kaimenyi spoke against the bill saying the government will not allow "introduction of immorality" to young school children by any institution or law" because it sort to "to provide contraceptives , comprehensive sexuality education, and abortion services to adolescents - and parental consent is not required"

29th October 2019, it was adopted and published in the Kenya Gazette Supplement No. 186 (Senate Bills No. 23) and is Intended to lead to "The reproductive health care Act 2019"

This new Bill still makes provision for children below 18 to access contraceptive and abortion services and the only 'radical' change in as far as this matter is concerned is that article 33(a) of the bill now requires parental consent. Unfortunately, the bill is still based on the Sexual and Reproductive Health and Rights (SRHR) ideology that is inconsistent with our Constitution, national and Christian values.

Reproductive health, sexual health or family wellbeing.

Human reproduction:

Human reproduction is best referred to as procreation. Biologically, procreation is a function only possible between the male and the female, though it is the female who carries and gives forth the offspring. Even were assisted reproductive technology is used to treat infertility, there is still need of the male and female seed that must come from a man and a woman respectively. Further, infertility is by definition a problem of a couple and not an individual and when it is resolved, the child needs both parents in order to get the best outcome.

A pregnant woman is very vulnerable and yet she is performing an important national duty of reproduction for replacement and population stabilization at the very least. She therefore needs support from the spouse, society and the government.

Children need 18 – 24 years before they can fully independent of the parents and they learn different things from the father and the mother and 80% of what they learn is by observation. The family unit is the key sustainable procreation and is protected under the constitution. Therefore, any bill touching on procreation should ideally be titled the 'Family wellness Bill'. Whereas there will be sexual relationships and procreation outside of the family unit, it is not the responsibility of the government to encouraging or sustain such relationships, in fact, the government has a responsibly to discourage such behavior through public health initiatives as they increase the burden of broken home and its deleterious effects on the children, STDs, cancer of the cervix and abortion leading to increase in the medical costs and maternal morbidity and mortality.

Understanding sexual and reproductive health and rights language.

Definition of health and reproductive health.

The term "reproductive health" is a contentious term that was introduce into UN documents at the first ICPD conference in 1994 in Cairo which is defined as the physical, mental and social well-being, and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. It is contentious because the reproductive system, its functions and process are biological and don't possess mental or social components and would be too narrow a view of the dynamics of procreation! In Cairo, it was rejected by many stakeholders.

Further, the definition of reproductive health is drawn from the 1948 World Health Organization definition of health which states: Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

It is imperative to note that though the UN and WHO are important international organization that have made good inputs in health, they are not Kenyan or Christian organizations and their definitions and recommendations may not always reflect the values and aspiration of the Kenyan people and should not be accepted without interrogation.

The WHO definition of health and is insufficient as: a) it does not take into consideration spiritual wellbeing b) it is concerned about the very broad and amorphous 'social wellbeing' instead of 'family wellbeing' considering that the family is the primary unit of society. The constitution of Kenya 2010 (COK) recognizes the family as the primary unit of the society c) it does not included environmental wellbeing which is an integral part of our health. On the other hand, the National Wellness Institute promotes Six Dimensions of wellness: emotional, occupational, physical, social, intellectual, and spiritual. (https://www.nationalwellness.org/page/six_dimensions). Whereas it includes the spiritual aspect of health, it still used the term social instead of family. An improvement on the WHO definition of health as adopted at the prolife and profamily ICPD25 conference in Kenya 2019 as: The complete

state of physical, mental, spiritual, family and environmental wellbeing and not merely the absence of disease or infirmity.

SRHR and Redefinition of terms after promulgation of the constitution.

Sexual and Reproductive Health and Rights (SRHR) is a complex foreign social ideology that in summary is based on the following fundamental principles:

a) that sexual experience is mainly for pleasure and not procreation

b) that a large population is a hindrance to social and economic development therefore population reduction is encouraged

c) that sexual pleasure is a right.

Whereas COK promulgated in 2010 in article 43(1)(a) contains the defective term 'reproductive health', it was not until 2015 that WHO published the 'Sexual health, human rights and the law' to establish the controlling definition of sexual health and to delineate everything sexual health must entail. This work was co-published with UNDP, UNFPA and the World Bank. According to this work, sexual health must include access to abortion, pleasurable and safe sexual experience, acceptance of the diversity of sexual behavior and expression (homosexuality, transgenderisms), legalization of sex work (prostitutions), legalization of same sex unions, access to cross sex hormones and gender reassignment surgery and that comprehensive sexuality education (CSE) as a crucial component of sexual health. It also requires that adolescent access sexual and reproductive health services without parental consent and these services include contraceptives and abortion. (https://apps.who.int/iris/bitstream/handle/10665/175556/9789241564984_eng.pdf;jsessionid=269629CA73C84FFB392D5B75DE42F9E9?sequence=1)

In contrast, our faith teaches that the sexual act is open to procreation that should be experience between a man and woman bound by marriage as a commitment to each other and to the responsibility of raising children. Despite the marriage, the sexual act cannot be a right of either the man or the woman as it is by mutual consent; both have to respect the right of the other and only given themselves to each other freely. If we allow sexual pleasure to be taught as a right, what happens when one wants the pleasure and there is no consenting partner of the opposite sex? It should be clear to that teaching sexual pleasure as a right would automatically create perverts who will engage in masturbation, same sex relationships, rape, bestiality, incest, teenage sex, abortion etc.

Therefore, the use of such terms as comprehensive health care services, reproductive health care services, reproductive rights, sexual and reproductive health, reproductive health and rights are loaded with meaning and may entail legalizing abortion, sodomy, prostitutions, same sex unions, access to cross sex hormones and gender reassignment surgery. It would also require adopting comprehensive sexuality education (CSE) providing adolescent access to sexual and reproductive health services (all the above and contraceptives) without parental consent.

All SRHR associated bills and policies aim to do exactly that and this one is no exception!

Terms that stand out in the bill that are from the SRHR ideology and language.

1. The title of the bill – Reproductive healthcare bill.
2. "Reproductive health" is repeated severally throughout the bill.
3. "age and development appropriate" in article 2, 5(g) and 33(6) is commonly used to include CSE
4. "Reproductive rights" use in article 2.
5. "sexual and reproductive health" used in the definition of reproductive right in article 2.
6. "Reproductive health and rights" in article 3.
7. "Comprehensive health care services" used in article 4 is not defined in this bill but in SRHR language commonly includes provision of 'safe' abortion services and contraceptives.
8. "Reproductive health care service" in article 4 is also not defined in this bill but in SRHR language includes 'safe' abortion and contraceptives.
9. "Right to reproductive health care services" used in article 4.
10. "adolescent friendly reproductive health service" used in article 32(1)
11. "unsafe abortion" used in article 32(2)

Because of the deeper meaning of this terms and the fact that most are not comprehensively defined in this bill, this bill risks being a stepping stone for legalizing abortion, sodomy, prostitutions, same sex unions, access to cross sex hormones and gender reassignment surgery, CSE and providing with contraceptives to adolescents without parental consent through the back door.

Teenage sex.

This bill defines the adolescent as "any person between the ages of 10-18 years". In the Kenya law, this are children who are protected from sexual activity which is termed defilement. Those among them who engage in sex are to be considered delinquent and treated with counseling. Even where biologically they may be mature to procreate, they are socially immature and without any capacity to bring up children that they may bear. It is therefore imperative that the government and all people of good will discourages teenage sex as opposed to facilitating the same.

Part III:

REVIEW OF SPECIFIC ARTICLES AND OUR RECOMMENDATIONS.

Article 3. The object of this Act (a) provide a framework for the protection and advancement of reproductive health rights for every person;

(c) ensure access to quality and comprehensive health care services to every person.

The term "reproductive health" and the term "reproductive health rights" used in article 3(a) are very different in meaning!

Reproductive health rights loaded with meaning and it includes sexual health rights as explained above.

Article 3 read with this understating means that the sole aim of this bill is to push Sexual and Reproductive Health and Rights (SRHR) agenda, which are inconsistent with many Kenyan religions, cultures values and national ethos.

Further, the use term "every person" in reference to reproductive health rights expands the application of the bill such that it can be used to include children below the age of 10 who are the main targets of compressive sexuality education (CSE) which is also referred to as age appropriate education.

Article 4. (d) formulate and implement a comprehensive national strategy and plan of action to promote the realisation of the right to reproductive health care under Article 43 of the Constitution including provision of adolescent friendly reproductive health care services;

After appreciating the danger in the term reproductive health and right, it becomes clear that article 4(d) is aimed at advancing SRHR and especially to adolescents who according to the bill include children 10-17 years who are below the age of majority.

Article 4. (j) establish linkages and networks with local and international developmental partners and organisations to mobilise and source for funding to promote the realisation of the right to reproductive health and the delivery of effective reproductive health services;

This article formally opens doors for foreign funded NGO and other international bodies to fund the SRHR agenda.

Article 5. (g) provide age and development appropriate reproductive health services in the county health system and facilitate access to confidential, comprehensive, and non-judgmental reproductive health services by such persons;

This article allows for the introduction of CSE, provision of contraceptive to children below the age of maturity even without parental consent.

PART II – ACCESS TO FAMILY PLANNING SERVICES

Article 7 (1) Every person has the right to access reproductive health care services.

Again, use of the term "every person" under family planning services allows for provision of contraceptives to children under the age of majority even without parental consent.

PART III- ASSISTED REPRODUCTION

Assisted reproduction is a complex science replete with bioethical concerns because it handles human life outside the womb. For that reason, adoption is the best solution to infertility. However, we shall go ahead and address this section of the bill.

Assisted reproduction is generally aimed at alleviating infertility. Infertility by definition is a condition found in a couple consisting of a biological man and woman. In addition, the outcome of a successful intervention is a child who has a right to be treated with dignity and brought up by both parents. Single parenting by choice should be discouraged in the best interest of the child. Further, with the clamor for legalization of same sex unions as part of the SRHR agenda, there is a risk that poorly regulated assisted reproduction may be abused to 'manufacture' children for people in same sex relationships; which by nature are sterile.

Article 9 (1) Every person has a right to assisted reproduction.

This article is prone to abuse. For the best interest of the child, assisted reproduction should be a preserve of a legally married couple with proven infertility.

In all occasions of assisted reproduction, the child should have a right to eventually know its biological parents and lineage and in order to avoid cases of unintended incest and transmission of genetic disorders such as sickle cell that the donor may not have disclosed. Just like confidential government document, the identity of the donor (biological parent) should eventually be revealed to the child, even if it is after a set period of time when there are no legal parental obligations e.g. after 18 years.

Article 12 (1) Any person may donate gametes in a registered assisted reproduction facility in accordance with this Act.

It is critical that the law is made very clear that gamete donation, just like blood and organ donation be done free of charge. There should not be any financial inducement or compensation. Further, for the female donor, they need to be clearly informed of the risk factors in gamete donation. It is best that only women who already have children are recruited as donors.

Article 12 (5) A gamete provider shall not acquire any parental responsibility over the child born out of the use of the donated gametes.

Our constitution is very clear about parental responsibility even among those who are not married. In the event that commission parents reject a child for whatever reason, its biological

parents must be held to account to cater for the needs of the child. In the even that a single mother is allowed to conceive a child through assisted reproduction, the donor should have responsibility over the child.

Article 14 (1) A party may enter into a surrogate parenthood agreement only if— (a) the commissioning parent or commissioning parents are not able to give birth to a child and that condition is irreversible;

The fact that one person can be a commission parent opens doors for men in same sex relationships to seek a child through surrogacy.

The fact that the commissioning parents are defined in this bill to be of the opposite gender and not biological sex, opens a window for people of the same sex to access assisted reproduction services. E.g. In the event of a man in a relationship with a transgender woman (man who has undergone surgery and/or hormonal treatment and made to look like a woman) would qualify to be commissioning parents because there relationship is inevitably sterile.

In the same manner, two women in a same sex relationship would also qualify because their relationship is also sterile. Whereas they may not need surrogacy, they would need artificial insemination in order for one of them to achieve a pregnancy.

Article 18 (1) A surrogate parenthood agreement may be terminated –

(a) automatically, following the termination of pregnancy in accordance with this Act;

(b) before the implantation of a fertilized embryo in the surrogate mother's womb; or

(c) where a dispute arises between commissioning parents, and before the fertilized embryo is implanted in the surrogate mother.

(2) Where the commissioning parent or commissioning parents have reason to believe that the child

born is not the child contemplated under the surrogate parenthood agreement, the commissioning parent or commissioning parents may apply for the conduct of a DNA test on the child.

(3) Where upon the conduct a DNA test under subsection (2), it is found that the child born is not the child contemplated under the surrogate parenthood agreement, the surrogate parenthood agreement shall be terminated automatically.

(4) Where the surrogate parenthood arrangement terminates under subsection (3), the commissioning parent or commissioning parents shall not bear any parental rights over the child.

The article above demonstrate clearly how assisted reproduction commodifies, discriminates and abuses the dignity of the resultant child!

The only express mention of termination of a pregnancy in this bill is if the child is suspected to be mentally or found to be physical challenged. This bill offers the killing of such a child!

What the bill refers to as a "fertilized embryo" in Kenya is a human being, a person with full right and privileges under our constitution but at the most vulnerable stage of life where their further development depend on them being placed in a mother's womb uterus. What happens to this person when a surrogate agreement is terminated before implantation (before being places in a mothers womb)?

What happens to a child who's DNA does not match and if found "is not the child contemplated under the surrogate parenthood agreement "since the commissioning parents no longer have parental responsibility?

The ministry of health together will experts in this field are already working of an assisted reproductive health bill that would take care of this concerns. It is best to allow the MOH to finalize its bill.

PART V – TERMINATION OF PREGNANCY

Termination of pregnancy is not defined in this bill. Termination of a pregnancy simply means deliberately brining the pregnancy to an end. If such termination is performed before the preborn person can sustain life outside the mother, it would lead to the death of the preborn person 100% of the time. Further, if the termination of pregnancy can either be performed using methods that can save or kill the preborn person. Deliberate termination of pregnancy before the preborn person can sustain life outside of the mother or using methods that deliberate kill the preborn person are both illegal in Kenya.

Article 26 (1) A pregnancy may be terminated by a trained health professional where in the opinion of the trained

health professional—

Because this bill defines trained health professional as "a registered clinical officer, a registered nurse and a registered midwife" articles 26 implies that this cadre of health professionals can offer an opinion on termination of pregnancy. This is very misleading! The

only cadre of health professionals trained to the level of proficiency to offer **an opinion** as to when pregnancy can be terminated are medical doctors who are not even mentioned in the definition of trained health professionals in this bill. Whereas clinical officers, nurses and midwifes can be trained on the technique of terminating a pregnancy, they would need to be trained to become doctors in order to offer an opinion on termination of pregnancy. Article 26 of this bill therefore seeks to change and misinterpret the meaning of article 26(4) of the constitution.

Article 26 (1) (c) there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality that is incompatible with life outside the womb.

The COK 2010 recognizes the personhood of the preborn. It is therefore unconstitutional to deliberately kill a preborn person through termination of a pregnancy on the grounds of perceived physical or mental disability as envisaged in article 26(1)(c). Further, it is not for the health professional to determine what is incompatible with life outside the womb; it is instead their obligation and responsivity to attempt to save the life of every person, including the preborn, regardless of the chance of survival, whether real, perceived or imagined.

Article 27 (1) A trained health professional who has a conscientious objection to the termination of a pregnancy as envisaged under this Act shall, except in case of emergency treatment, refer the pregnant woman to a trained health professional who is willing to provide this service.

Article 27 (2) A trained health professional in subsection (1) who does not refer a pregnant woman as specified under subsection (1), commits an offence and is liable, on conviction, to imprisonment for a term of three years or a fine of one million shillings or to both fine and imprisonment.

This provision on conscientious objection is unnecessary. The only time a health professional would have a consciences objection to the termination of pregnancy is when the termination is illicit for lacking a medical indication. Such a health professional would be acting in a morally and ethically upright manner and don't need to be protected by the law. It is even worse when this bills article 27(2) suggests that such health professionals should be punished for doing what is good and right.

PART VII – REPRODUCTIVE HEALTH OF ADOLESCENTS

According to the ICPD (1994), 7.6. All countries should strive to make accessible through the primary health-care system, reproductive health **to all individuals of appropriate ages**.

Reproductive health care in the context of primary health care should, inter alia, include: family-planning counselling, information, education, communication and services; education and services for prenatal care, safe delivery and postnatal care, especially breast-feeding and infant and women's health care; prevention and appropriate treatment of infertility; abortion as specified in paragraph 8.25 (to be provided only in counties where it is legal), including prevention of abortion and the management of the consequences of abortion; treatment of reproductive tract infections; sexually transmitted diseases and other reproductive health conditions; and information, education and counselling, as appropriate, on human sexuality, reproductive health and responsible parenthood. Referral for family-planning services and further diagnosis and treatment for complications of pregnancy, delivery and abortion, infertility, reproductive tract infections, breast cancer and cancers of the reproductive system, sexually transmitted diseases, including HIV/AIDS should always be available, as required. Active discouragement of harmful practices, such as female genital mutilation, should also be an integral component of primary health care, including reproductive health-care programmes.

From the forgoing, it is should be clear to all people of good will that the intention of the ICPD program of action was to provide reproductive health to individual of appropriate age and not "age appropriate reproductive health services!

This bill defines adolescents as children between the age of 10-18. Children 10-17 are below the age of majority. In any case, any morally upright society should discourage children who have no capacity to take up parental responsivity, especially those below the age of majority from engaging in sexual activity not providing clinics where they can access contraceptives and information about sex.

Further, parental responsibility must not be circumvented, especially in determining what information is appropriate to children. Such responsibility should not be left to the trained health professional. There are cases of material such as the recently banned book on "health choices" that was encouraging children to engage in sexual actively.

Finally, contraceptive have side effect that are a danger to the health of adults and adolescents as defined in this bill still have developing hormonal systems. It is very unfortunate that children, especially girls below the age of majority, should be exposed to contraceptives even with parental consent.

Our laws and government policy should be geared more towards inculcating the value of chastity and respect of human dignity as well as discouraging early sexual debut; not facility early sex thought provision of SRHR clinic.

Article 32. (1) The National government shall collaborate with county governments to ensure that adolescents have access to adolescent friendly reproductive health services.

(2) Adolescent friendly reproductive health services shall include age-appropriate –

(a) mentorship programmes;

(b) spiritual and moral guidance;

(c) counselling on—

(i) abstinence;

(ii) consequences of unsafe abortion; and

(iii) sexually transmitted infections and HIV/AIDS;

(iv) substance and drug abuse;

(d) training in livelihood and life skills;

(e) vocational trainings; and

(f) such other health services as the Cabinet Secretary

shall determine.

Whereas the list below looks good, it does not describe everything that encompasses reproductive health. This list does not prevent the provision of other aspects of reproductive health e.g. contraceptive that are not indicated above.

HIV/AIDS prevention programs have been used to introduce CSE in countries that have rejected the CSE program. A good example is a booklet called "Healthy happy and hot" by IPPF that encourage children with HIV not only to engage in sexual activity but not to disclose their HIV statue to their sexual partner.

Education on sexuality is the preserve of parents and any material development to teach the children on this sensitive subject in schools should be geared towards preserving the natural family and have parental participation and acceptance.

Article 33. In the provision of adolescent friendly reproductive health services, a health provider shall—

(a) obtain parental consent; and

(b) give due consideration to the exact age of the adolescent in a bid to <u>provide age-appropriate information, education and reproductive health services</u>.

The term 'age appropriate reproductive health information and education' is used to describe CSE.

Plain reading of this article implies that parental consent is only necessary under a formally approved adolescent friendly reproductive health service center specifically set up by the national or county government. Adolescents seeking similar service outside this government structure need not have parental consent.

The bill implies that the whole concept of adolescent friendly clinics is to allow adolescent access reproductive health information and serves in the absence of their parents. If indeed the drafter of this bill had the intention of seeking parental consent, then this whole idea of adolescent friendly clinics should be scraped to allow parents seek appropriated service for their children as they deem fit.

Whereas the drafters of this bill claim it is not a money bill, it is. Drawing from the statement of the Objects and Reasons for the Bill: "that this Bill proposes to impose obligations on each level of government to ensure availability of reproductive health care services including requiring both levels of government to provide adequate financial resources in their budgets to meet the obligations."

Recommendation:

This bill negates basic biological and medical facts, it weakens the family structure, it aims at encouraging behavior that would be against our public health policies, and is based on the SRHR ideology that is not in keeping with our constitution, our believe in the almighty God of all creation.

Considering that all Kenyans are bound by article 10 of the constitution of Kenya while among other things interpreting the constitution and enacting laws, this bill should be rejected as it aims to introduce the Sexual and Reproductive Health and Rights agenda through the back door.