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Your Ref: AKCP/24/12/14/2

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Dear

RE: ADVISORY OPINION ON ALTERNATIVE DISPUTE RESOLUTION (ADR) FOR CREDIT INFORMATION SHARING IN KENYA

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249 of the Constitution, the Commission alongside others has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of democratic values and principles. Further, Article 59 (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, while Section

2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty. Section 8 (f) of the same Act empowers the Commission to work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration.

The Commission makes reference to the joint consultative meeting held in our offices on the 17th February, 2014 and your follow up letter of 24th February 2014 with regard to the above captioned in which you seek our advice on the following:

- 1) The structure of the proposed ADR mechanism as documented in Chapter 3 of the CIS ADR Handbook.
- 2) The possibility of a representative of the CAJ sitting in the proposed steering committee of the CIS ADR office.
- 3) The inadequacy of the Draft CIS Bill and Regulations.
- 4) Any other aspects of our proposals

(a). The Structure of the proposed ADR mechanism

The Commission welcomes the idea of an Ombudsman but wishes to clarify that it only deals with public officers and public entities as opposed to private persons and private entities. We also note that there is an emerging concept of the private ombudsman in the various sectors in various jurisdictions which cannot be conclusively dealt with in this advisory. Nonetheless, it ought to be emphasized that the private ombudsman scheme is contractual and this means it can only be founded on the consent of the parties. Be that as it may, we note the usage of the word 'ombud's office'. Our understanding is that the choice of word is intended to avoid the ongoing gendered debate on the ombudsman office. We propose that you adopt the phraseology ombudsman as traditionally used which in itself does not denote gender. It should be noted that the word in itself is not an English word but Swedish and does not in any way depict gender.

On the ADR mechanism proposed, we make the following recommendations:

- 1) That you consider replacing the name ombuds office with the name ombudsman office as discussed above.
- 2) That there be a level of independence in the office of the ombudsman. The jurisdiction of the ombuds office cannot be directed by the Steering Committee.
- 3) That the ombuds office should meet the international principles of an ombudsman i.e. impartiality and neutrality, independence, confidentiality and informality.

- 4) That the composition of the steering Committee be lean so as to increase its effectiveness. The current composition as designed is bloated and might not work effectively. Further, the Judiciary cannot have a representative in the Steering Committee by virtue of its adjudicative role. We propose between five (5) to seven (7) members in the Steering Committee.
- 5) That in the same way the CAJ sends report to the Legislature including complaints, the same should apply to the ombuds office contemplated by AKCP. The ombuds person should not be vilified in the work that he does.
- 6) The structure will be determined by the preliminary issue on whether the scheme is one of a private ombudsman or not. If the same is anchored in legislation, then the Commission on Administrative Justice will have jurisdiction and exercise oversight over it and the officers therein.

(b). Involvement of the Commission on Administrative Justice in the Steering Committee

The involvement of the Commission as a member of the Steering Committee invites a comment. First, if the whole framework is anchored in legislation, the entity becomes a public one. This means that it will fall squarely under the jurisdiction of the Commission including the overall performance contracting regime of the Commission. In the event that this is adopted, it would not therefore be proper that CAJ sends a representative in an entity it exercises oversight over, including the officers therein. This will definitely amount to conflict of interest as CAJ cannot be a judge in its own cause.

Suppose the entity was private in nature, can the CAJ send a representative to the steering Committee? The answer would still be in the negative. The Commission receives complaints against public officers and public entities as per the constitutive Act. By the very fact that the entity is private in nature, the CAJ cannot be involved.

How then can the Commission on Administrative Justice be involved? If the lender is a public institution, then the Commission will have jurisdiction by dint of the constitutive Act. In the event that the Credit Information Sharing Bill, 2013 is enacted into law, then the entity ceases from being a private entity and therefore falls under the overall jurisdiction of the Commission on Administrative Justice. Institutions like the Higher Education Loans Board (HELB) falls within the jurisdiction of the Commission and the Commission continues to exercise oversight in line with the Commissions mandate. For private entities the Commission can enter into a partnership for information sharing, complaint referral mechanism and offer of advisory opinions.

(c) The Adequacy of the Draft CIS Bill and the Regulations

As discussed earlier, the most important question is how the Credit Reference Bureaus if the Bill is enacted into law will relate with the Commission on Administrative Justice. The Commission on Administrative Justice has a mandate to receive complaints against public officers and public entities in both spheres of government. The Credit Reference Bureaus contemplated by the Bill will be creatures of parliament, therefore public entities which are amenable to the jurisdiction of CAJ. It is important that this is addressed. On the content of the Bill we note the following;-

- i) Section 11 (1) of the Bill empowers the cabinet secretary to make regulations providing for the use of ADR mechanisms in dealing with any disputes that may arise in the collection, processing, storage and sharing of information under the proposed Act. We note that the proposed ADR mechanism proposed in Chapter 3 of the CIS ADR Handbook will be rendered nugatory if the Bill was to sail through in its current form as the same will vest exclusively in the Cabinet Secretary
- ii) Further, the cabinet secretary is empowered through regulations to provide for penalties for non-compliance with the provisions of the Act, regulations or any directive. We wish to advise that offences and penalties are a preserve of Parliament and should appear on the face of an Act of parliament and cannot be delegated to a cabinet Secretary. Section 11 (1) e in its current form cannot pass the constitutionality test as stipulated in A. 2 (4) of the Constitution.

We thank you for you cooperation and assure you of our regards.

Sincerely

CMMR. OTIENDE AMOLLO, EBS
CHAIRPERSON OF THE COMMISSION