

*Paper laid
By Hon S. Chapkore
Justice & Legal Aff
Committee Chg
on Wed 19/8/15
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**THE NATIONAL ASSEMBLY
ELEVENTH PARLIAMENT – THIRD SESSION**

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

**REPORT ON
THE PRESIDENTIAL MEMORANDUM ON THE ETHICS AND ANTI-CORRUPTION COMMISSION (AMENDMENT) BILL, 2015**

**Clerks Chambers,
National Assembly,
Parliament Buildings,
Nairobi**

August, 2015

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A REPORT OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS ON THE PRESIDENTIAL MEMORANDUM ON THE ETHICS AND ANTI-CORRUPTION COMMISSION (AMENDMENT) BILL, 2015

1. PREFACE

Hon Speaker,

On behalf of the Departmental Committee on Justice and Legal Affairs, and pursuant to provisions of Standing Order 199(6), it is my pleasant privilege and honour to present to this House a report of the Committee on the Ethics and Anti-Corruption Commission (Amendment) Bill, 2015.

The Committee derives its mandate from Standing Order No. 216(5) which provides as follows:-

- a) To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;*
- b) To study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;*
- c) **To study and review all legislation referred to it;***
- d) To study, assess and analyze the relative success of the ministries and departments measured by the results obtained as compared with their stated objectives;*
- e) To investigate and enquire into all matters relating to the assigned ministries and departments as may be deemed necessary, and as may be referred to it by the House or a minister; and*
- f) To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.*

The Second Schedule of the Standing Orders on Departmental Committees further states the subjects which the Committee is supposed to deal with while discharging its mandate. The subjects are as follows:-

- (a) Constitutional affairs;
- (b) The administration of law and Justice, including the Judiciary, public prosecutions, elections, ethics, integrity and anti-corruption; and
- (c) Human rights.

1.1. Committee Membership

The Committee was constituted on Thursday, 16th May, 2013 and comprises the following:-

- | | | | |
|-----|--|---|------------------|
| 1. | Hon. Samuel Chepkong'a, M.P. | – | Chairperson |
| 2. | Hon. Priscilla Nyokabi, M.P. | – | Vice Chairperson |
| 3. | Hon. Njoroge Baiya, M.P. | | |
| 4. | Hon. Muriithi Waiganjo, M.P. | | |
| 5. | Hon. Ndirangu Waihenya, M.P. | | |
| 6. | Hon. Florence Kajuju, M.P. | | |
| 7. | Hon. Kang'ata Irungu, M.P. | | |
| 8. | Hon. Benson Mutura, M.P. | | |
| 9. | Hon. John Njoroge Chege, M.P. | | |
| 10. | Hon. William Cheptumo, M.P. | | |
| 11. | Hon. Mohamed Abdi Haji, M.P. | | |
| 12. | Hon. Sammy Koech, M.P. | | |
| 13. | Hon. Moses Cheboi, M.P. | | |
| 14. | Hon. Paul Bii, M.P. | | |
| 15. | Hon. Charles Gimose, M.P. | | |
| 16. | Hon. Johanna Ng'eno, MP. | | |
| 17. | Hon. Boniface Otsiula, M.P. | | |
| 18. | Hon. David Ouma, M.P. | | |
| 19. | Hon. Neto Agostinho, M.P. | | |
| 20. | Hon. Kaluma Peter, M.P. | | |
| 21. | Hon. Fatuma Ibrahim Ali, M.P. | | |
| 22. | Hon. Ben Momanyi Orari, M.P. | | |
| 23. | Hon. Tom J. Kajwang', M.P. | | |
| 24. | Hon. (Bishop) Mutua Mutemi, M.P. | | |
| 25. | Hon. Olago Aluoch, M.P. | | |
| 26. | Hon. (Dr) Christine Oduor Ombaka, M.P. | | |
| 27. | Hon. Munuve G. Mati, M.P. | | |
| 28. | Hon. Mwamkale William Kamoti, M.P. | | |
| 29. | Hon. James Bett, M.P. | | |

1.2 Passage of the Ethics and Anti-Corruption Commission (Amendment) Bill, 2015

The Bill was sponsored by Hon. Samuel Chepkong'a on behalf of the Departmental Committee on Justice and Legal Affairs and was passed by the House on 9th July, 2015. Thereafter, it was committed to H.E. the President for assent in line with provisions of the constitution of Kenya and the National Assembly Standing Orders.

1.3 Referral of the Bill to the House by H.E. the President

H.E. the President by way of memorandum dated 31st July, 2015 referred the Bill back to the House with reservations for reconsideration. This was pursuant to provisions of Article 115(1)(b) of the constitution and was communicated to the House by the Speaker on 5th August, 2015 who

committed the memorandum to the Departmental Committee on Justice and Legal Affairs for consideration and report to the House.

While committing the memorandum to the Committee, the Speaker was emphatic that the Committee considers it and reports back to the House within 21 days i.e. on or before 19th August, 2015 as required by Standing Order 154. A copy of the Presidential memorandum is annexed hereto as appendix 3.

1.5 Sittings of the Committee and adoption of report


The Committee considered the memorandum on 4th August, 2015 in the Boardroom on 4th floor, Continental House, Parliament Buildings. At its sitting of 18th August, 2015 in the Boardroom on 2nd floor, Continental House, Parliament, Buildings, the Committee considered and adopted its report on the memorandum. The adoption of the report was proposed by Hon. Sammy Koech and seconded by Hon. Benson Mutura. There was no dissenting voice to the adoption of the report. Minutes of the Committee's sitting adopting the report are annexed hereto as appendix 1. A list of Members who attended the sitting that adopted the report is also annexed hereto as appendix 2.

1.6. Acknowledgement

The Committee wishes to thank the Offices of the Speaker and Clerk of the National Assembly for providing guidance and technical support without which its work would not have been possible. The Chairperson expresses gratitude to Committee Members for their devotion and commitment to duty which made the consideration of this Bill a reality.

Hon. Speaker Sir,

On behalf of the Committee, I now wish to table this report in the House.

SIGNED.....

**Hon. Samuel Chepkong'a, MP
(Vice Chairperson)**

Departmental Committee on Justice and Legal Affairs

DATE.....18th August 2015.....

2.0. BACKGROUND

The Bill to which the Presidential memorandum relates was dated 19th June, 2015 and was sponsored by Hon. Samuel Chepkong'a on behalf of the Departmental Committee on Justice and Legal Affairs.

The Bill sought to amend the Ethics and Anti-Corruption Commission Act to increase the number of Commissioners from three to five. The Bill also sought to provide for the Chairperson and members of the Commission to serve on a part time basis. The Bill further sought to provide for a timeline for the appointment of the Chairperson and members of the Commission when a vacancy arises.

The Bill was passed by the House on 9th July, 2015 and forwarded to H.E. the President for assent on 14th July, 2015. In exercise of powers conferred on him by Article 115(1)(b) of the Constitution, H.E. the President refused to assent to the Bill while expressing reservations on Clauses 4 and 6. He proposed amendments to the two clauses and referred the Bill back to the House for reconsideration.

It should be noted that clause 4 and 6 of the Bill were amendments proposed by Hon. Amina Abdalla and Hon. Chris Wamalwa respectively and were carried during the Committee Stage of the House. Clause 4 amendment vests in the Public Service Commission the responsibility of interviewing and short listing candidates for appointment by the President as Ethics and Anti-Corruption Commission (EACC) Commissioners while sidelining Parliament in the entire process. Clause 6 is intended to remove from office the current serving Secretary/Chief Executive Officer and his Deputy in contravention of the Fair Administrative Action Act of 2015.

3.0. CONSIDERATION OF THE PRESIDENT'S MEMORANDUM ON THE BILL

H.E. the President proposed amendments on clause 4 and 6 of the Ethics and Anti-Corruption Bill, 2015. The Committee considered the memorandum on 4th August, 2015 at 10.00 a.m. in the Boardroom on 4th floor Continental House Parliament Buildings House. While considering the memorandum, the Committee was guided by the Hon. Speaker's Communication of 28th July, 2015 which gave Committees the liberty to amend recommendations from the President as long as the amendments account for the President's reservations in line with Article 115 of the Constitution. Amendments approved by the Speaker as taking into account the President's reservations would only require a simple majority to pass in the House.

3.1. Consideration of the President's memorandum on Clause 4 of the Bill and the Committee's recommendations thereon

Clause 4 of the Bill proposes to repeal and replace section 10 of the Act with the following new provision:-

(10) Where a vacancy arises in the membership of the Commission, the Public Service Commission shall, following the procedure set out in section 6, shortlist three qualified applicants for each vacancy and forwards the names of applicants so qualified to the President for appointment in accordance with that section''

The President submitted that this provision contravened Section 6 of the Act which provides for the appointment of Commissioners by a selection panel. He observed that the intention of the National Assembly was to remove the requirement for a selection panel for the purpose of filling a vacancy on the Commission.

In view of the foregoing, the H.E. the President stated that it was necessary to amend the proposed section in order to clarify that intention. He therefore recommended that Clause 4 of the Bill be amended by deleting the proposed Section 10 and substituting therefor the following new section:-

(10) Notwithstanding section 6, whenever a vacancy arises in the membership of the Commission, the Public Service Commission shall within fourteen days after the vacancy arises, advertise, interview and shortlist three qualified applicants for each vacancy and forward the names of the applicants so qualified to the President for appointment

The Committee observed as follows:-

- (i) The import of this recommendation by the President was for the House to accede to the President's assertion that its intention was to remove the selection panel in its entirety from the process of the appointment of the EACC Commissioners;
- (ii) Article 79 of the constitution mandates Parliament to enact legislation to establish an independent Ethics and Anti-Corruption Commission, which shall have the status and powers of a Commission under Chapter 15, for purposes ensuring compliance with, and enforcement of the provisions of this chapter.

(i) **Recommendations by the Committee**

Based on the foregoing, the Committee recommends that Clause 4 of the Bill be amended by deleting the proposed section 10 and substituting therefor the following section—

10. (1) *Whenever a vacancy arises in the membership of the Commission, the Public Service Commission shall, within fourteen days—*

- (a) *invite applications from persons who qualify for nomination and appointment by advertisement in at least two daily newspapers of national circulation;*
- (b) *consider the applications received to determine their compliance with the provisions of the Constitution and this Act;*
- (c) *short list the applicants;*
- (d) *conduct interviews of the shortlisted persons in public;*
- (e) *shortlist three qualified applicants for each vacancy; and*
- (f) *forward the names of the qualified persons to the President.*

(2) *The President shall, within fourteen days of receipt of the names of successful applicants forwarded under subsection (1) (f), select the person to fill the vacancy in the Commission and forward the name of the person to the National Assembly for approval.*

(3) *The National Assembly shall, within twenty-one days of the day it next sits after receipt of the name of an applicant under subsection (2), vet and consider the applicant, and may approve or reject applicants for any or all vacancies in the Commission.*

(4) *Where the National Assembly approves of an applicant, the Speaker of the National Assembly shall forward the name of the approved applicant to the President*

for appointment.

(5) The President shall, within seven days of receipt of the name of the approved applicant from the National Assembly, by notice in the Gazette appoint the applicant to the Commission.

(6) Where the National Assembly rejects any nomination, the Speaker shall within three days communicate its decision to the President and request the President to submit fresh nominations.

(7) Where a nominee is rejected by the National Assembly under subsection (6) the President shall within seven days, submit to the National Assembly a fresh nomination from amongst the persons shortlisted and forwarded by the Public Service Commission under subsection (1)(f).

(8) If the National Assembly rejects any or all of the subsequent nominees submitted by the President for approval under subsection (1), the provisions of subsections (1) and (2) shall apply.

(9) In short listing, nominating or appointing persons to fill a vacancy in the Commission, the Public Service Commission, the National Assembly and the President shall ensure that not more than two-thirds of the members are of the same gender.

3.2. Consideration of the President's memorandum on Clause 6 the Bill and the Committee's recommendations thereon

Clause 6 of the Bill provides as follows:-

6(1) The offices of the secretary and the Deputy Secretary to the Commission shall become vacant upon commencement of this Act.

(2) Until the new members of the Commission are appointed, the Secretary and the Deputy Secretary shall continue to hold the office in an acting capacity.

The President observed that effect of this provision was to remove the concerned officers from office by operation of the law and this was contrary to section 17(2) of the Act which provides as follows:-

(2) Where the question of the removal of the secretary under subsection (1) arises, the Commission shall inform the Secretary in writing of the reasons of the intended removal, and shall give the secretary the opportunity to respond thereto in writing.

The President also pointed out that the proposed provision violated Article 47 of the constitution of Kenya which confers on all persons the right of administrative action which is expeditious, efficient, lawful and procedurally fair and requires that any person who is adversely affected by any such action should be given written reasons for the action.

In light of the foregoing, H.E. the President recommended that the Bill, be amended by deleting Clause 6 and substituting therefore the following new clause:-

6(1) Every person who immediately before the commencement of this Act was an employee of the Commission, shall upon such commencement continue to serve in his or her respective position in accordance with the contract of employment:

Provided that the Commission shall within the period of one year after the appointment of Commissioners under this Act, using criteria determined by the Commission, vet such employee to ensure he or she is fit and proper to continue serving as such.

(2) The services of any person who fails to meet the vetting criteria established by the Commission under this Act shall be terminated in accordance with the contract of employment.

The mover of the amendment, Hon. Chris Wamalwa, was persuaded by the President's recommendation in principle. While the Committee was also agreeable to the recommendation, It noted that the recommendation provided for a period of vetting that could contravene the right of the affected EACC employees to fair and expeditious determination of any issues surrounding their employment.

(i) Recommendation

To address its concern under this clause, the Committee recommends the Bill be amended by deleting clause 6 and substituting therefor the following clause—

6. (1) *Within six months of the*

commencement of this Act, the Commission shall—

(a) develop criteria to vet all employees of the Commission; and

(b) determine whether the employees are fit to continue serving the Commission.

(2) The Commission shall terminate the services of a person determined unfit to continue serving under subsection (1).

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

APPENDIX 1

MINUTES OF THE SIXTY FIRST SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON TUESDAY, 18TH AUGUST, 2015 AT 10.00 A.M. IN THE BOARDROOM ON 2ND FLOOR, CONTINENTAL HOUSE, PARLIAMENT BUILDINGS

PRESENT:-

Hon. Samuel Chepkong'a, MP – **Chairperson**
Hon. Benson Mutura, MP
Hon. Moses Cheboi, MP
Hon. Dr. Christine Ombaka, MP
Hon. Kaluma Peter, MP
Hon. Paul Bii, MP
Hon. Sammy Koech, MP
Hon. Neto Agostinho, MP
Hon. Boniface Otsiula, MP
Hon. Muriithi Waiganjo, MP
Hon. Olago Aluoch, MP
Hon. William Mwamkale, M.P
Hon. Njoroge Baiya, MP
Hon. Tom.J. Kajwang', MP
Hon. Ndirangu Waihenya, MP
Hon. Charles Gimose, MP

ABSENT:-

Hon. Priscilla Nyokabi, MP – **Vice Chairperson**
Hon. Fatuma Ibrahim Ali, MP
Hon. Johanna Ngeno, MP
Hon. Mutua Mutemi (Bishop), MP
Hon. John Njoroge Chege, MP
Hon. Ben Momanyi Orori, MP
Hon. Florence Kajuju, MP
Hon. Kang'ata Irungu, MP
Hon. William Cheptumo, MP
Hon. David Ouma Ochieng, MP
Hon. James Bett, MP
Hon. Mohamed Abdi Haji, MP
Hon. Munuve Mati John, MP

IN ATTENDANCE:-

SECRETARIAT:-

Mr. George Gazemba - Senior Clerk Assistant
Ms. Mary L. Lemerelle - Clerk Assistant III
Mr. Ronald Walala - Legal Counsel II
Clare Jerotich - Research Assistant II

MIN No. JLA/230/2015:- - **PRELIMINARIES**

The Chairperson called the meeting to order at 10.30 a.m. with a word of prayer from himself.

MIN No. JLA/231/2015:- **CONSIDERATION AND ADOPTION OF REPORTS ON BILLS**

(i) **Consideration and adoption of report on Business Registration Service Bill, 2015**

The Committee considered and adopted its report on the Business Registration Service Bill, 2015. The adoption of the report was proposed by Hon. Sammy Koech and seconded by Hon. Charles Gimose. No member dissented to the adoption of the report.

(ii) **Consideration and adoption of report on the Presidential memorandum on the Ethics and Anti-Corruption Commission (Amendment) Bill, 2015**

The Committee considered and adopted its report on the Business Registration Service Bill, 2015. The adoption of the report was proposed by Hon. Sammy Koech and seconded by Hon. Benson Mutura. There was no dissenting voice to the adoption of the report.

MIN No. JLA/232/2015:- - **ADJOURNMENT**

There being no other business to transact, the sitting adjourned at forty five minutes past noon.

Signed:


(Chairperson, Departmental Committee on Justice and Legal Affairs)

Date:


APPENDIX 2



**KENYA NATIONAL ASSEMBLY
ELEVENTH PARLIAMENT**

DEPARTMENTAL COMMITTEE ON JUSTICE & LEGAL AFFAIRS

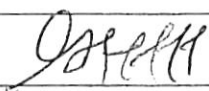
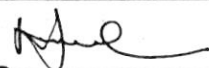
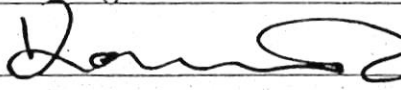

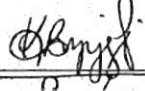
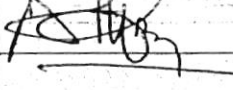
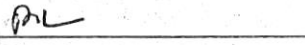

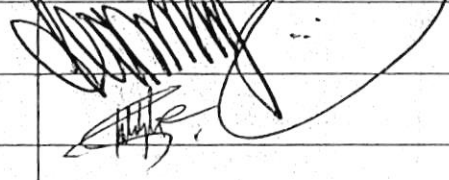
MEMBERS ATTENDANCE

Date: 18th August, 2015

Venue: CONTINENTAL HOUSE 2ND FLOOR

Agenda: ADOPTION OF REPORT ON PRESIDENT'S MEMORANDUM ON EACC (AMENDMENT),
BILL, 2015 AND MEETING WITH IEBC ON ELECTIONS (AMENDMENT) BILL, 2015

	NAMES	SIGNATURE
1.	Hon. Samuel Chepkonga (Chairperson)	
2.	Hon. Priscila Nyokabi (Vice Chairperson)	
3.	Hon. Agostinho Neto	
4.	Hon. Ben Momanyi Orori	
5.	Hon. Benson Mutura	
6.	Hon. Boniface Otsiula	
7.	Hon. Charles Gimose	
8.	Hon. Christine Ombaka (Dr.)	
9.	Hon. David Ochieng'	
10.	Hon. Fatuma Ibrahim	
11.	Hon. Florence Kajuju	
12.	Hon. Irungu Kang'ata	
13.	Hon. James Bett	
14.	Hon. Johanna Ngeno	

15.	Hon. John Munuve	
16.	Hon. John M. Waiganjo	
17.	Hon. John Njoroge	—
18.	Hon. John Olago Aluoch	
19.	Hon. Kamoti W. Mwamkale	
20.	Hon. Mohamed Abdi Haji	
21.	Hon. Moses Cheboi	
22.	Hon. Njoroge Baiya	
23.	Hon. Paul K.Bii	
24.	Hon. Peter Kaluma	
25.	Hon. Robert Mutemi (Bishop)	—
26.	Hon. Sammy Koech	
27.	Hon. T.J. Kajwang	
28.	Hon. Waihenya Ndirangu	
29.	Hon. William Cheptumo	

George Gazemba

For: The Clerk of the National Assembly

APPENDIX 3



THE CONSTITUTION OF KENYA
REFUSAL TO ASSENT TO THE ETHICS AND
ANTI-CORRUPTION COMMISSION (AMENDMENT)
BILL, 2015

MEMORANDUM

By His Excellency the Honourable Uhuru Kenyatta,
President and Commander-in-Chief of the Kenya
Defence Forces.

Submitted to the Speaker of the National Assembly.

WHEREAS a Bill entitled “An Act of Parliament to amend the Ethics and Anti-Corruption Commission Act”, the short title of which is “The Ethics and Anti-Corruption Commission (Amendment) Act, 2015”, was passed by the National Assembly on the 9th July, 2015;

AND WHEREAS the Ethics and Anti-Corruption Commission (Amendment) Bill, 2015, was presented to me for assent, in accordance with the provisions of the Constitution, on the 14th July, 2015;

NOW THEREFORE, in exercise of the powers conferred on me by Article 115(1)(b) of the Constitution, I refuse to assent to the Ethics and Anti-Corruption Commission (Amendment) Bill, 2015, for the reasons set out hereunder:

CLAUSE 4

Clause 4 of the Bill proposes to repeal and replace section 10 of the Act with the following new provision—

Filling of Vacancy.

10. Where a vacancy arises in the membership of the Commission, the Public Service Commission shall, following the procedure set out in section 6, shortlist three qualified applicants for each vacancy and forward the names of the applicants so qualified to the President for appointment in accordance with that section.

This provision contradicts Section 6 of the Act which provides for the appointment of Commissioners by a selection panel.

The intention of the National Assembly was to remove the requirement for a selection panel for the purposes of filling of a vacancy on the Commission.

It is necessary to amend the proposed section in order to clarify that intention.

RECOMMENDATION

In view of the foregoing reason, I recommend that Clause 4 of the Bill be amended by deleting the proposed Section 10 and substituting therefor the following new section—

Filling of Vacancy.

10. Notwithstanding section 6, whenever a vacancy arises in the membership of the Commission, the Public Service Commission shall, within fourteen days after the vacancy arises, advertise, interview and shortlist three qualified applicants for each vacancy and forward the names of the applicants so qualified to the President for appointment.

CLAUSE 6

Clause 6 of the Bill provides as follows:—

Transitional Provision.

6(1) The offices of the Secretary and the Deputy Secretary to the Commission shall become vacant upon the commencement of this Act.

(2) Until the new members of the Commission are appointed, the Secretary and the Deputy Secretary shall continue to hold office in an acting capacity.

The effect of the proposed provision is to remove the concerned officers from office by operation of the law.

This is contrary to Section 17(2) of the Act which provides as follows—

(2) Where the question of the removal of the Secretary under subsection (1) arises, the Commission shall inform the Secretary in writing of the reasons of the intended removal, and shall give the Secretary the opportunity to respond thereto in writing.

The proposed provision is contrary to Article 47 of the Constitution which confers on all persons the right to administrative action which is expeditious, efficient, lawful and procedurally fair, and requires that any person who is likely to be adversely affected by any such action should be given written reasons for the action.

RECOMMENDATION

In view of the foregoing reason, I recommend that the Bill be amended by deleting Clause 6 and substituting therefor the following new clause:

Transitional Provision. 6.(1) Every person who immediately before the commencement of this Act was an employee of the Commission, shall upon such commencement continue to serve in his or her respective position in accordance with the contract of employment:
Provided that the Commission shall,

within the period of one year after the appointment of Commissioners under this Act, using criteria determined by the Commission, vet such employee to ensure that he or she is fit and proper to continue serving as such.

(2) The services of any person who fails to meet the vetting criteria established by the Commission under this section shall be terminated in accordance with the contract of employment.

Dated the 31st July....., 2015.

A handwritten signature in black ink, appearing to read 'Uhuru Kenyatta', written in a cursive style.

UHURU KENYATTA,
President.