

REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY

Approved
SNA
1/12/22

Lt. Hon Speaker
You may approve
for Tabling.
[Signature]
1/12/22

THIRTEEN PARLIAMENT – FIRST SESSION – 2022
DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT ON-

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT)
BILL (NATIONAL ASSEMBLY BILL NO. 49 OF 2022)

THE NATIONAL ASSEMBLY PARLIAMENT BUILDINGS	
DATE:	01 DEC 2022
	THURSDAY
TABLED BY:	CHAIR, DC - JUSTICE & LEGAL AFFAIRS HON. GEORGE MURUGARA, MP
CLERK-AT-THE-TABLE:	Tracy chebet

CLERKS CHAMBERS
DIRECTORATE OF DEPARTMENTAL COMMITTEES
PARLIAMENT BUILDINGS
NAIROBI

DECEMBER 2022

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2 CHAIRPERSON'S FOREWORD

This report contains the proceedings of the Departmental Committee on Justice and Legal Affairs on its consideration of the Independent Electoral and Boundaries Commissions (Amendment) Bill (*National Assembly Bill No. 49 of 2022*) which was published on Wednesday, 2nd November, 2022.

The Bill went through the First Reading on Wednesday, 16th November, 2022 and was thereafter committed to the Departmental Committee on Justice and Legal Affairs for consideration and reporting to the House pursuant to the provision of Standing Order 127.

The Bill has two (2) clauses and one (1) Schedule and seeks to amend the First Schedule to the Independent Electoral and Boundaries Commission No. 9 of 2011 to change the composition of the Selection Panel that oversees the filing of vacant positions in the Commission. The proposal seeks to reduce the current allocation of the Parliamentary Service Commission which nominates four out of the seven members of the Panel. The proposal will allow the Political Parties Liaison Committee, established under section 38 of the Political Parties Act, No. 11 of 2011 and the Public Service Commission to each nominate one member to the Panel.

Following placement of advertisements in the print media on Monday, 21st November, 2022 requesting for comments on the Bill from members of the public and relevant stakeholders pursuant to Article 118(1) (b) of the Constitution and Standing Order 127(3), the Committee received five (5) written memoranda. In addition, the Committee invited key stakeholders to attend a public participation forum on 1st December, 2022 at 10.00a.m vide the letter dated 28th November, 2022 of Ref no. NA/DDC/JLAC/2022/008. Only the National Youth Council attended.

While considering the Bill, the Committee observed that enactment of the Bill will reduce the current allocation of the Parliamentary Service Commission which nominates four out of seven of the Panel to allow the Political Parties Liaison Committee and the Public Service Commission to each nominate one member to the Panel.

On behalf of the Departmental Committee on Justice and Legal Affairs and pursuant to the provisions of Standing Order 199(6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of the Independent Electoral and Boundaries Commission (Amendment) Bill (*National Assembly Bill No. 49 of 2022*). The Committee is grateful to the Offices of the Speaker and Clerk of the National Assembly for the logistical and technical support accorded to it during its consideration of the Bill. The Committee further wishes to thank the *Katiba* Institute Hon. Okiya Omtatah and Mr. Eliud Matindi for submitting memoranda on the Bill. Finally, I wish to express my appreciation to the Honourable Members of the Committee and the Committee Secretariat who made useful contributions towards the preparation and production of this report.

It is my pleasure to report that the Committee has considered the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bill No. 49 of 2022) and has the honour to report back to the National Assembly with the recommendation that the Bill be **approved without amendments**.

Hon. Murugara George Gitonga, MP
Chairperson, Departmental Committee on Justice and Legal Affairs



CHAPTER ONE

1 PREFACE

1.1 Establishment and Mandate of the Committee

1. The Departmental Committee on Justice and Legal Affairs is one of twenty departmental committees of the National Assembly established under **Standing Order 216** whose mandates pursuant to the **Standing Order 216 (5)** are as follows:

- i. *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;*
- ii. *To study the programme and policy objectives of ministries and departments and the effectiveness of the implementation;*
- iii. *on a quarterly basis, monitor and report on the implementation of the national budget in respect of its mandate;*
- iv. *To study and review all legislation referred to it;*
- v. *To study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;*
- vi. *To investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;*
- vii. *To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);*
- viii. *To examine treaties, agreements and conventions;*
- ix. *To make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;*
- x. *To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and*
- xi. *To examine any questions raised by Members on a matter within its mandate.*

1.1 Mandate of the Committee

2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider¹:-
 - a) The Judiciary;
 - b) Tribunals;
 - c) Access to Justice;
 - d) Public prosecutions;
 - e) Ethics, Integrity and Anti-corruption;
 - f) Correctional services;
 - g) Community service orders and witness protection;
 - h) Constitutional Affairs;
 - i) Sovereign immunity;
 - j) Elections including referenda;
 - k) Human rights;
 - l) Political parties; and
 - m) The State Law Office' including insolvency, law reform, public trusteeship, marriages and legal education.
3. In executing its mandate, the Committee oversees the following Ministries/Departments:
 - a) State Department of Correctional Services
 - b) State Law Office and Department of Justice
 - c) The Judiciary
 - d) Judicial Service Commission
 - e) Office of the Director of Public Prosecutions
 - f) Ethics and Anti-Corruption Commission
 - g) Independent Electoral and Boundaries Commission
 - h) Commission on Administrative Justice
 - i) Office of the Registrar of Political Parties

¹ National Assembly Standing Orders, 6th Edition

- j) Witness Protection Agency
- k) Kenya National Commission on Human Rights
- l) Kenya Law Reform Commission
- m) Council of Legal Education

1.2 Committee Membership

4. The Departmental Committee on Justice and Legal affairs was constituted by the House on 27th October 2022 and comprises of the following Members:

Chairperson

Hon. Murugara George Gitonga, MP
Tharaka Constituency

UDA Party

Vice-Chairperson

Hon. Mutuse Eckomas Mwengi, OGW, MP
Kibwezi West Constituency

MCCP Party

Members

Hon. Maalim Farah, MP
Dadaab Constituency
WDM-K

Hon. Francis Kajwang' Tom Joseph, MP
Ruaraka Constituency
ODM Party

Hon. Junet Mohamed, MP
Suna East
ODM Party

Hon. (Dr.) Otiende Amollo, SC, MP
Rarieda Constituency
ODM Party

Hon. Maina Jane Njeri, MP
Kirinyaga (CWR)
UDA Party

Hon. Gichohi Kaguchia John Philip, MP
Murukweini Constituency
UDA Party

Hon. Mogaka Stephen M, MP
West Mugirango Constituency
Jubilee Party

Hon Onyiego Silvanus Osoro, MP
South Mugirango
UDA Party

Hon. Muchira Michael Mwangi, MP
Ol Jorok
UDA Party

Hon. Makali John Okwisia, MP
Kanduyi Constituency
FORD-Kenya

Hon. Muriu Wakili Edward, MP
Gatanga Constituency
UDA Party

Hon. Mohamed Aden Daudi, MP
Wajir East Constituency
Jubilee Party

Hon. Siyad Amina Udgoon, MP
Garissa Township
Jubilee Party

1.2 Committee Secretariat

5. The Committee is well-resourced and facilitated by the following staff:

Mr. Douglas Katho

Clerk Assistant II/Head of Secretariat

Mr. Ronald Walala
Senior Legal Counsel

Dr. Donald Manyala Keya
Research Officer

Ms. Winnie Kiziah
Media Relations Officer II

Mr. Clive Onyancha
Hansard Reporter III

Mr. Stanley Lagat
Serjeant-At-Arms

Mr. Omar Abdirahim
Fiscal Analyst II

Ms. Jael Ayiego Kilaka
Clerk Assistant III

Ms. Vivienne Ogega
Research Officer III

Mr. Alvin Ochieng'
Research Officer III

Mr. Shadrach Omondi
Legal Counsel

Mr. Anthony Kariuki
Serjeant-At-Arms

Ms. Michelle Omuom
Legal Counsel

Mr. Peter Mutethia
Audio Recording Officer

Mr. Joshua Kiilu
Legal Counsel

Ms. Fridah Ngari
Media Relations Officer

Ms. Julie Faith
Public Communications Officer

CHAPTER TWO

2 OVERVIEW OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL (*NATIONAL ASSEMBLY BILL NO. 49 OF 2022*)

2.1 Background

6. The Bill was necessitated by the case of *Okiya Omtatah Okoiti v Attorney General & 5 Others [2021] KEHC 439 (KLR)* whereby one of the issues for consideration was whether paragraph 1(2) of the IEBC Act, 2011 as amended by the IEBC Amendment Act, 2020 is unconstitutional to the extent that it infringes Article 10 of Constitution in being against the rule of law, an abuse of power and good governance and violates the independence of IEBC, equity, equality, non-discrimination and fairness and Article 38 of the Constitution.
7. The Court, in its Ruling, held that:
 - i. Section 2(2)(a) of the IEBC (Amendment) Act, 2020 variously offends the principles of good governance, transparency, integrity, social justice, equity, inclusiveness, equality, patriotism, national unity.
 - ii. There is now the need for legislation that will take such principles into account without losing sight of the fact that Kenyans are looking upon Parliament to pass legislation which will foster free, fair and credible elections and referenda.

2.2 Introduction

8. The main objective of the Bill is to amend the First Schedule to the Independent Electoral and Boundaries Commission Act No. 9 of 2011 to change the composition of the Selection Panel that oversees the filling of vacant positions in the Commission.
9. The proposal seeks to reduce the current allocation of the Parliamentary Service Commission which nominates four out of the seven members of the Panel. The Proposal will allow the Political Parties Liaison Committee, established under section 38 of the Political Parties Act No. 11 of 2011 and the Public Service Commission to each nominate one Member to the Panel.

2.3 Analysis of the Bill

The Bill proposes the following amendments:

10. **Clause 1** provides for the short title of the Bill.

11. **Clause 2** provides for amendment of the First Schedule to the Independent Electoral and Boundaries Commission Act, 2011 by deleting sub-paragraph (2) and substituting therefor the following new sub-paragraph –

“The Selection Panel shall consist of -

- a) one man and one woman, nominated by the Parliamentary Service Commission;
- b) one person nominated by the Public Service Commission;
- c) one person nominated by the Political Parties Liaison Committee;
- d) one person nominated by the Law Society of Kenya; and
- e) two persons nominated by the Inter-religious Council of Kenya.”

CHAPTER THREE

3 PUBLIC PARTICIPATION/STAKEHOLDERS' CONSULTATION

12. Following the call for memoranda from the public through the placement of adverts in the print media on 21st November, 2022 and vide a letter REF: NA/DDC/JLAC/2022/25 dated 29th November, 2022 inviting stakeholders for a meeting; the Committee received written memoranda from Katiba Institute and Hon. Okiya Omtatah.

3.1 Katiba Institute

13. Katiba Institute submitted a written memorandum to the Committee on Monday 28th November, 2022. It raised the following issues:

- i. That there may be challenges in identifying the nominee by the Political Parties Liaison Committee as there is no structure to ensure county participation.
- ii. Katiba Institute raised the two-third gender rule citing that the Bill did not provide for a mechanism to ensure that the composition of the Selection Panel shall comply with the requirement of the two-thirds gender rule as provided under Article 27(8) of the Constitution unlike the current provision whereby the Parliamentary Service Commission must nominate two women.
- iii. That there is no clear justification for the amendment Bill.

Committee Observation/Resolution

14. The Committee observed that:

- i. The House would not want to micromanage the affairs of the Political Parties Liaison Committee and that the Committee would come up with a mechanism of nominating their representative.
- ii. the issue on the two-third gender rule was speculative.

- iii. The amendment was necessitated by the case of *Okiya Omtatah Okiiti v Attorney General & 5 Others [2021] KEHC 439 (KLR)* whereby the Court held that the current provisions of having four out of seven members of the Selection Panel nominated by the Parliamentary Service Commission is unconstitutional to the extent that it tasked the PSC with administrative responsibilities of recruitment of IEBC Commissioners and thus violated the doctrine of separation of powers and the rule of law.

3.2 Senator, Okiya Omtatah, MP

15. He submitted written memoranda where he intimated to the Committee that the process of recruiting the Chair and Commissioners of IEBC ought to be in tandem with Articles 10, 88 and 250 of the Constitution especially the guiding national values and principles of governance, including sharing and devolution of power, participation of the people, inclusiveness and protection of the marginalized.
16. He emphasized that the Bill was an unconstitutional travesty that offends Article 10 of the Constitution and was of the opinion that other than the Law Society of Kenya (LSK), professional bodies (especially those that deal with governance/public affairs) had not been provided for and ought to be included.
17. He was of the opinion that the composition of the Selection Panel as intended to be amended included conflicted entities; the Parliamentary Service Commission and the Political Parties Liaison Committee.

Committee Observations

18. The Committee observed that while he was of the opinion that the Bill should include other professional bodies, he did not offer suggestions of professional bodies that should be included.

3.3 Johnson Rithaa – National Youth Council, Head of Regulation Department

19. Mr. Johnson Rithaa appeared before the Committee and submitted that the National Youth Council is still collecting views on the Bill from the youth. In this regard, he sought more time to submit a written memorandum on the Bill.

20. The Committee noted that the stakeholders who were unable to appear before the committee to elect to submit their views will not be locked out of the public participation and may elect to send written submission on the Bill considering that the Bill will still have to go to Senate.
21. The Committee received written submission on the Bill from the following-
- a. The Central Organisation of trade unions (Kenya),
 - b. the office of the registrar of Political Parties
 - c. Mr. Edward Matindi had sent written submissions on the Bill.
 - d. Katiba Institute and
 - e. Hon. Okiya Omtata, MP
22. Mr. Rithaa appeared before the Committee and submitted that the Council is still collecting views on the Bill from the youth in this regard; he sought more time to submit a written memorandum on the Bill.

CHAPTER FOUR

4 COMMITTEE OBSERVATIONS

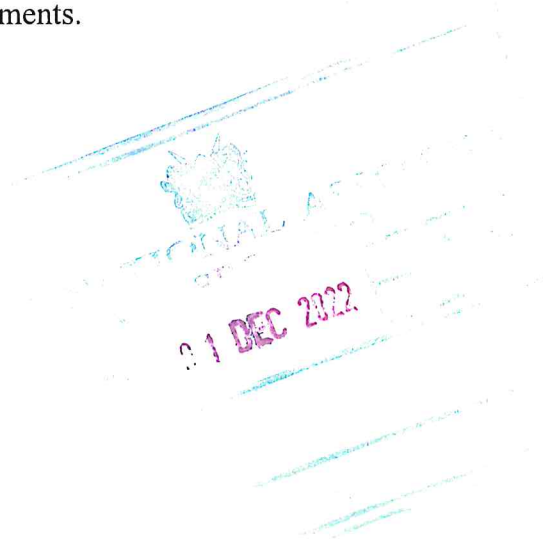
23. Upon reviewing the Bill, the Committee observed THAT:


- i. The change of the composition of the Selection Panel that oversees the filling of vacant positions in the Commission will allow the Political Parties Liaison Committee established under section 38 of the Political Parties Act No. 11 of 2011 and the Public Service Commission to each nominate one Member to the Panel.
- ii. The Bill is in compliance with the Ruling of the case of *Okiya Omtatah Okioti v Attorney General & 5 Others [2021] KEHC 439 (KLR)*.

CHAPTER FIVE

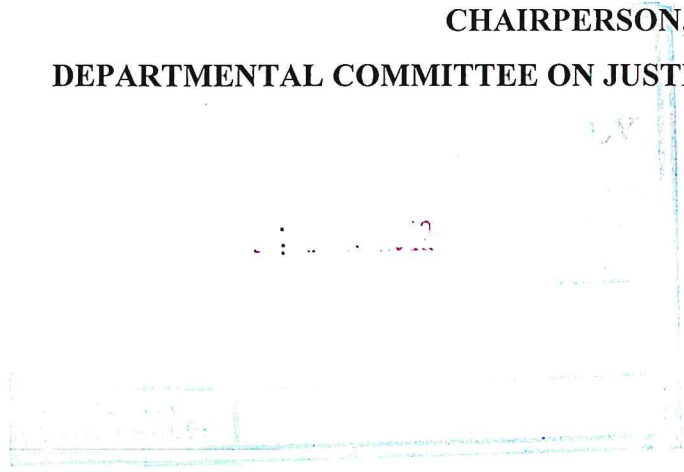
5 COMMITTEE RECOMMENDATIONS

24. The Committee having reviewed the Independent Electoral and Boundaries Commission (Amendment) Bill (*National Assembly Bill No. 49 of 2022*) recommends that the House approves the Bill without amendments.



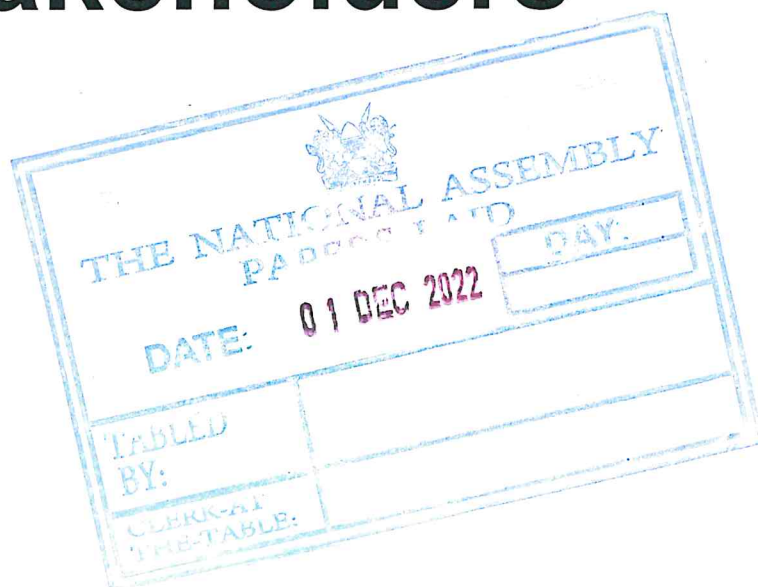
SIGNED.......... DATE.....*1. 12. 022*.....

HON. MURUGARA GEORGE GITONGA, MP
CHAIRPERSON,
DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

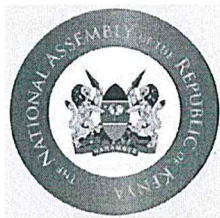


ANNEXURES

- 1 Adoption Schedule
- 2 Minutes
- 3 Newspaper Advert
- 4 Memoranda by Stakeholders



ADOPTION SCHEDULE



THE NATIONAL ASSEMBLY

13TH PARLIAMENT – FIRST SESSION (2022)

JUSTICE AND LEGAL AFFAIRS COMMITTEE

ADOPTION SCHEDULE

Adoption of the Independent Electoral and Boundaries Commission (Amendment) Bill (*National Assembly Bill No. 49 of 2022*)

No.	HON MEMBER	SIGNATURE
1.	HON. MURUGARA GEORGE GITONGA, MP – <i>Chairperson</i>	
2.	HON. MUTUSE ECKOMAS MWENGI, MP – <i>Vice Chairperson</i>	
3.	HON. MAALIM FARAH, MP	
4.	HON. FRANCIS KAJWANG' TOM JOSEPH, MP	
5.	HON. JUNET MOHAMED, CBS, MP	
6.	HON. ONYIEGO SILVANUS OSORO, MP	
7.	HON. (DR.) OTIENDE AMOLLO, SC, MP	
8.	HON. MUCHIRA MICHAEL MWANGI, MP	
9.	HON. MAKALI JOHN OKWISIA, MP	
10.	HON. MURIU WAKILI EDWARD, MP	
11.	HON. MAINA JANE NJERI, MP	
12.	HON. GICHOHI KAGUCHIA JOHN PHILIP, MP	
13.	HON. MOGAKA STEPHEN M, MP	
14.	HON. MOHAMED ADEN DAUDI, MP	
15.	HON. SIYAD AMINA UDGOON, MP	

Minutes



REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

THIRTEENTH PARLIAMENT - FIRST SESSION - 2022

DIRECTORATE OF DEPARTMENTAL COMMITTEES

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

**MINUTES OF THE 19TH SITTING OF THE JUSTICE AND LEGAL AFFAIRS
COMMITTEE HELD ON THURSDAY 1ST DECEMBER, 2022 AT 10:00A.M. IN MINI
CHAMBER COUNTY HALL**

PRESENT

Members

- | | | |
|--|---|--------------------------|
| 1. Hon. Murugara George Gitonga, M.P. | - | Chairperson |
| 2. Hon. Mutuse Eckomas Mwangi, OGW, M.P. | - | Vice- Chairperson |
| 3. Hon. Onyiego Silvanus Osoro, M.P. | | |
| 4. Hon. Francis Kajwang' Tom Joseph, M.P. | | |
| 5. Hon. Muchira Michael Mwangi, M.P. | | |
| 6. Hon. Gichohi Kaguchia John Philip, M.P. | | |
| 7. Hon. Muriu Wakili Edward, M.P. | | |
| 8. Hon. Makali John Okwisia, M.P. | | |
| 9. Hon. Maina Jane Njeri, M.P. | | |
| 10. Hon. Mogaka Stephen M, M.P. | | |

ABSENT WITH APOLOGY

1. Hon. (Dr.) Otiende Amollo, SC, M.P
2. Hon. Maalim Farah, M.P.
3. Hon. Junet Mohamed, CBS, M.P.
4. Hon. Mohamed Aden Daudi, M.P.
5. Hon. Siyad Amina Udgoon, M.P.

IN ATTENDANCE

JLAC COMMITTEE SECRETARIAT

- | | | |
|-----------------------|---|----------------------|
| 1. Mr. Ahmed Salim | - | Clerk Assistant |
| 2. Mr. Ronald Walala | - | Senior Legal Counsel |
| 3. Mr. Abdirahim Omar | - | Fiscal Analyst II |
| 4. Mr. Clive Onyancha | - | Clerk Assistant III |
| 5. Mr. Alvin Ochieng' | - | Research Officer III |

- | | | |
|--------------------------------|---|-------------------------------|
| 6. Ms. Vivienne Ogega | - | Research Officer III |
| 7. Mr. Amos Tindi Simiyu | - | Hansard Reporter |
| 8. Mr. Geoffrey Wafula | - | Hansard Reporter |
| 9. Ms. Florence Muthoni | - | Hansard Reporter |
| 10. Ms. Julie Faith | - | Public Communications Officer |
| 11. Mr. Antony Mugendi Kariuki | - | Serjeant-At-Arms |

AGENDA

1. Prayers
2. Preliminaries
3. Matters arising
4. Public Participation on the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bill No.49 Of 2022)
5. Consideration and Adoption of Report on the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bill No.49 Of 2022)
6. Any Other Business
7. Adjournment/ Date of the Next Meeting

MIN. NO/DC/JLAC/2022/074: PRELIMINARIES

The meeting was called to order at eleven minutes past ten o'clock by the Vice-Chairperson followed by a word of prayer from the Vice chairperson and thereafter Members of the Committee introduced themselves.

MIN.NO/DC/JLAC/2022/075: ADOPTION OF THE AGENDA

The agenda was adopted having been proposed by Hon. Michael Muchira, M.P. and seconded by Hon. Makali John Okwisia, M.P.

MIN. NO/DC/JLAC/2022/076: PUBLIC PARTICIPATION ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO.49 OF 2022)

Mr. Johnson Rithaa appeared before the Committee and submitted that the National Youth Council is still collecting views on the Bill from the youth. In this regard, he sought more time to submit a written memorandum on the Bill.

Members noted that the stakeholders who were unable to appear before the committee to submit their views will not be locked out of the public participation and may elect to send written submission on the Bill considering that the Bill will still have to go to Senate.

The Committee received written submission on the Bill from the following-

- a. The Central Organisation of trade unions (Kenya),
- b. the office of the registrar of Political Parties

- c. Mr. Edward Matindi had sent written submissions on the Bill.
- d. Katiba Institute and
- e. Hon. Okiya Omtata, MP

MIN. NO/DC/JLAC/2022/077: CONSIDERATION AND ADOPTION OF REPORT ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO.49 OF 2022)

Members Considered and adopted the Reports on the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bill No.49 Of 2022) as proposed by proposed by Hon. Muchira Michael Mwangi, MP and seconded by Gichohi Kaguchia John Philip, MP.

MIN.NO/DC/JLAC/2022/078: ADJOURNMENT

There being no other business, the meeting was adjourned at 1.33p.m. and the next meeting shall be held on notice.

SIGNED:  DATE: 1.12.022
(CHAIRPERSON: HON. MURUGARA GEORGE GITONGA, MP)

Newspaper Advert



REPUBLIC OF KENYA
THIRTEENTH PARLIAMENT (FIRST SESSION)
THE NATIONAL ASSEMBLY
DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

In the Matter of Consideration by the National Assembly of the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bill No. 49 of 2022)

PUBLIC PARTICIPATION/SUBMISSION OF MEMORANDA

Article 118(1) (b) of the Constitution of Kenya and National Assembly Standing Order 127(3) require Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees.

The **Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bill No. 49 of 2022)** is sponsored by the **Leader of Majority Hon. Kimani Ichung'wa, CBS, MP** and was published on **2nd November 2022** and read a First Time in the House on **17th November, 2022** and committed to the **Departmental Committee on Justice and Legal Affairs** for consideration and reporting to the House in line with Standing Order 127.

The Bill seeks to change the composition of the Selection Panel that oversees the filling of vacant positions in the Commission. The proposal will enable the Political Parties Liaison Committee, established under section 38 of the Political Parties Act, No. 11 of 2011 and the Public Service Commission to each nominate one member to the Panel.

IN COMPLIANCE with Article 118(1) (b) of the Constitution and Standing Order 127(3), the Departmental Committee on Justice and Legal Affairs hereby invites the public and interested stakeholders to submit any memoranda they may have on the Bill.

Copies of the Bill are available at the National Assembly Table Office, Main Parliament Building or on www.parliament.go.ke/the-national-assembly/house-business/bills.

The memoranda may be forwarded to the **Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi**; or hand-delivered to the **Office of the Clerk, Main Parliament Buildings, Nairobi**; or emailed to clerk.nationalassembly@parliament.go.ke to be received on or before **Monday, 28th November, 2022 by 5.00 pm**.

SAMUEL NJOROGE
CLERK OF THE NATIONAL ASSEMBLY

21st November 2022
For the Welfare of Society and the just Government of the People

Memoranda

by

Stakeholders

OKIYA OMTATAH OKOITI
ROOM 4, FLOOR B1,
WESTERN WING,
NSSF BUILDING
P.O BOX 60286-00200
NAIROBI.
Email: okiyaomtatah@gmail.com
Phone: 0722684777

1st December 2022

MR. SAMEUL NJORGE
THE CLERK OF THE NATIONAL ASSEMBLY
PARLIAMENT BUILDINGS
P. P. BOX 41842 - 00100
NAIROBI.
Email: cna@parliament.go.ke

Dear Sir,

REF: INVITATION TO SUBMIT VIEWS ON NATIONAL ASSEMBLY BILL NO. 49 OF 2022

Thank you for sending me a direct invitation vide your letter of 28th November 2022, Ref: NA/CNC/CORR/2022 (305), to participate on the consideration of the Independent Electoral and Boundaries Commission (Amendment) Bill, 2022 (*Kenya Gazette Supplement No. 174 (National Assembly Bills No. 49)*).

I am sorry that I am not able to appear before the Hon. Committee of the National Assembly in person because I am away in Juba South Sudan until on Sunday 4th December, 2022.

In the circumstances, kindly allow me to participate in the consideration of the Bill by making the following remarks:

1. My comparison of the parties intended to constitute the Selection Panel for the appointment of the Chair and Members of the IEBC in this Bill to those in the section of the 2020 Act, which was quashed by the High Court, is as follows:

S/N	Nominating Entity	SLOTS in the 2020 Act	Slots in the 2022 Act	Remarks
1	Parliamentary Service Commission	4	2	State Organ
2	Public Service Commission	0	1	State Organ
3	Political Parties Liaison Committee	0	1	State Organ
4	Law Society of Kenya	1	1	Professional Body
5	2 Inter-Religious Council of Kenya	2	2	Private Entities

2. The process of the recruiting the Chair and Commissioners of IEBC must meet the minimum requirements of Articles 10, 88 and 250 of the Constitution. The process must take full account of all constitutional requirements, especially the guiding national values and principles of governance, including sharing and devolution of power, participation of the people, inclusiveness and protection of the marginalised.
3. Like was the case in *Okuya Omtatah Okoiti v Attorney General, National Assembly Senate, Parliamentary Service Commission, Law Society of Kenya & Inter-Religious Council of Kenya [2021] KEHC 439 (KLR)*, the impugned amendments are unconstitutional for derogating, reducing and regressing on these standards, including by having 4 (four) of the 7 (seven) nominating organisations for the selection panel being State organs.
4. It should be noted that, given the multiplicity of Political Parties Liaison Committees, being at both the national and county levels pursuant to **Section 38 of the Political Parties Act (No. 11 of 2011)**, it is the Registrar of political parties who calls the shots, and it is the Registrar, who, for all practical purposes, can nominate a person to fill the slot for the 48 Committees. The section provides:

38. Establishment of Political Parties Liaison Committee

(1) There is established a Political Parties Liaison Committee.

(2) The Political Parties Liaison Committee shall be established at the national and county levels.

(3) The principal function of the Political Parties Liaison Committee is to provide a platform for dialogue between the Registrar, Commission and political parties.

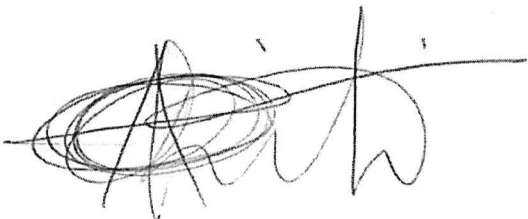
(4) The Political Parties Liaison Committee shall perform such other functions as may be prescribed by the Registrar.

[Emphasis supplied.]

5. Further, other than the LSK, professional bodies (especially those that deal with governance/public affairs) are not provided for and need to be included. It is a constitutional imperative to do so to increase opportunities for participation of the largest possible number of people of Kenya. And it can be done given there is no point having two nominees from the Parliamentary Service Commission or any other entity. One representative per entity is enough.
6. Further, the Parliamentary Service Commission is a conflicted entity in the circumstances, because it represents politicians whose election the IEBC supervises.
7. In the same vein, the Political Parties Liaison Committee is also conflicted as regards the mandate of the IEBC and should be removed from the list alongside the Parliamentary Service Commission.
8. It is the petitioner's submission that this is an unconstitutional travesty that offends Article 10 of the Constitution, reducing, as it does, and their representatives, opportunities for inclusiveness and a chance to protect and bring on board previously marginalised communities.

Thanks.

Yours faithfully,

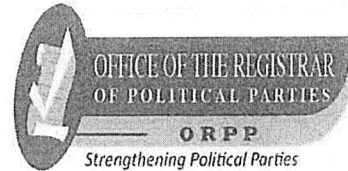
A handwritten signature in black ink, appearing to read 'Okiya Omtatah Okioti', with a long horizontal line extending to the right.

Okiya Omtatah Okioti



REPUBLIC OF KENYA

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Lion Place, 1st & 4th Floor
Off Waiyaki Way
P.O. Box 1131-00606
Sarit Centre, Nairobi.

Ref: RPP/ADM/4/1/1 VOL III (15)

Date: 1st December, 2022

Clerk of the National Assembly
Clerk's Chambers
National Assembly, Parliament Buildings
P.O. Box 41842-00100
NAIROBI

Dear Sir,

RE: MEMORANDUM ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL, 2022

Reference is made to the above subject matter and your letter dated 28th November, 2022 whose content is duly noted.

Annexed herewith is a comprehensive memorandum on the Independent Electoral and Boundaries Commission(Amendment) Bill, 2022.

This Office remains available for any further consultations.

Yours faithfully,

Ann N. Nderitu, CBS
Registrar of Political Parties



@ORPPKenya

www.orpp.or.ke



ORPPKenya



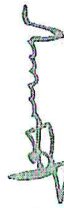
MEMORANDUM ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL, 2022

1. The Office of the Registrar of Political Parties (ORPP) was established in 2011 under Section 33 of the Political Parties Act, 2011 (PPA). The functions of the ORPP are stipulated under Section 34 of the PPA and across the Act.

2. The ORPP urges the Departmental Committee on Justice and Legal Affairs to consider the following remarks;

PROVISION	CONTENT	REMARKS
Clause 2(2)(a)	The Selection Panel shall consist of— (a) One man and one woman nominated by the Parliamentary Service Commission. (b) ... (c) ... (d) ... (e) ...	The Committee should consider recrafting the clause to; <i>“two persons of either gender nominated by the Parliamentary Service Commission”.</i> The proposal aligns with the need to use uniform language through the clause.
Clause 2(2)(c)	The Selection Panel shall consist of— (a) ... (b) ... (c) <i>One person nominated by the Political Parties Liaison Committee</i> (d) ...	The Political Parties Act, 2011 under Section 38 establishes the Political Parties Liaison Committee (PPLC) to provide a platform for dialogue between the Registrar (herein ORPP), Commission (herein IEBC) and political parties. The Registrar convenes PPLC and further sets its agenda in consultation with political parties and the IEBC. Noting that PPLC includes all registered political parties, being a part of the Selection Panel therefore provides an avenue for all political parties including those not represented in the Parliamentary Service Commission to take part in determining the composition of the

		<p>Commission.</p> <p>In terms of the best practices from other jurisdictions, the primary role of PPLC is to facilitate dialogue on election related matters; determining an Election Management Body is an election related issue.</p>
<p>Clause 2(2)(e)</p>	<p>The Selection Panel shall consist of—</p> <p>(a)...</p> <p>(b)...</p> <p>(c)...</p> <p>(d)...</p> <p>(e) two persons nominated by the Inter-religious Council of Kenya</p>	<p>The Committee should consider recrafting the clause to</p> <p><i>"two persons of either gender nominated by the Inter-Religious Council of Kenya"</i></p> <p>This proposal contributes to realization of the requirement under Article 27(8) of the Constitution which provides that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.</p>



Ann N. Nderitu, CBS
Registrar of Political Parties

Mr. Samuel Njoroge

Clerk of the National Assembly of Kenya

Nairobi

Kenya

Via E-mail to: clerk.nationalassembly@parliament.go.ke

*D/Departmental
Committees
for attention of JIAC
29/11/22*

*Douglas Katho
Pls facilitate
4/11/22
30/11/22*

Dear Mr Njoroge,

Ref: Independent Electoral and Boundaries Commission [Amendment] Bill, 2022 - National Assembly Bills No. 49 - Invitation to Submit Memoranda.

1. I refer to your recent public notice inviting members of the public to submit representations they may have on the above Bill. Please find below my representations.

2. In my opinion and, in view of the judgement of the High Court of Kenya in *Okoti v Attorney General & 5 others (Constitutional Petition E364 of 2020) [2021] KEHC 439 (KLR)* - <http://kenyalaw.org/caselaw/cases/view/224173> -, the proposed composition of the Selection Panel for the recruitment of IEBC commissioners as set out in the Bill would be unconstitutional, null and void.

3. Legislating for five [5] of the seven [7] positions to be nominees of State agencies and public organs, with just two [2] positions being reserved for a non-State body, offends the national values and principles of governance as set out in Article 10 of the Constitution, including but not limited to:
 - a. Sharing and devolution of power;

 - b. Democracy;

 - c. Equity;

 - d. Social justice;

**DIRECTOR
RECEIVED**
30 NOV 2022
R D
Directorate of Departmental Committees

**NATIONAL ASSEMBLY
RECEIVED**
29 NOV 2022
CLERK'S OFFICE
P. O. Box 41842, NAIROBI

- e. Inclusiveness;
- f. Equality;
- g. Non-discrimination;
- h. Protection of the marginalised;
- i. Good governance;
- j. Integrity;
- k. Transparency and;
- l. Accountability.

4. Just as the previous changes that reserved four [4] of the seven [7] positions to one State organ were held to breach binding principles of good governance, transparency, integrity, social justice, equity, inclusiveness, equality, patriotism and national unity, the proposal to reserve five of the seven available slots to State agencies and public body nominees likewise breach the Constitution.

5. In the judgement cited above, the court held that:

“179. There must have been good reasons why previously the number of nominees by PSC into the Selection Panel was not more than one half of the nominees. Indeed, the reasons are many. One of them is the perception of independence of the Selection Panel. A Selection Panel which has majority of its members nominated by one entity cannot pass the threshold of being portrayed as inter alia independent and fair. The dominance of the members appointed by one entity into the Selection Panel definitely raises legal eye brows

...

182. From the history of Constitution-making in Kenya and the quest for free and fair elections, the objective of the IEBC Amendment Act ought to further the realization of the goal that IEBC will eventually conduct fair, free and credible elections and referenda.

183. In this case, the IEBC Amendment Act runs counter that objective. The IEBC Amendment Act instead creates a scenario of suspicion not only on the Commissioners to be appointed, but also the eventual independence of the IEBC. It is clear beyond any peradventure that the Selection Panel was dominated by the nominees by PSC. That dominance runs contrary to good governance, transparency, integrity, social justice, equity, inclusiveness, equality, patriotism, national unity among like principles.

184. It is not far-fetched to imagine the likelihood of the majority of the members of the Selection Panel nominated by PSC to favour some candidates during the nomination process. Such preferred candidates may eventually become Commissioners of IEBC and their independence would naturally be put to question."

- 6.** The fears expressed by the Court with regards to the outcome of the recruitment process carried out under the impugned process came to pass. The four commissioners recruited under the flawed process are currently the subject of proceedings under **Article 251** of the Constitution, seeking their removal from office.
- 7.** In addition to the above, providing that one [1] position in the Selection Panel will be a nominee of the Political Parties Liaison Committee is, in my considered opinion, unconstitutional and a breach of the national values and principles of governance already set out, particularly on good governance, transparency and accountability.
- 8.** This is because, under **Section 38, Political Parties Act, 2011**, the Political Parties Liaison Committee is established at the national and county levels. This means there are **forty-eight [48]** established Political Parties Liaison Committee entities.
- 9.** It is unclear which of the forty-eight entities will be the one nominating the allocated position on the Selection Panel nor how the nominee would be identified/selected. There

are strong grounds to suspect that the intended beneficiary and nominating body for this position is in fact the Registrar of Political Parties.

10. Kindly bring my submissions to the attention of the Departmental Committee on Justice and Legal Affairs.

Yours sincerely,

matindi eliud

Eliud Matindi

Bavance13@gmail.com

28.11.2022



28 November 2022

The Clerk of the National Assembly
PO Box 41842-00100
Nairobi

*DLS / D/Departmental
Committees
for attention 4
JLC*

**Re: Independent Electoral and Boundaries Commission (Amendment)
Bill (National Assembly Bill No. 49 of 2022)**

29/11/22

Background

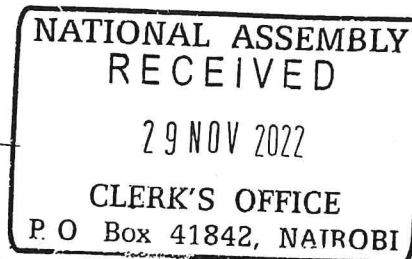
Katiba Institute (KI) is a research and litigation institution established in 2011 with the mission of supporting the implementation of Kenya's 2010 Constitution, helping to resist efforts to undermine that Constitution, and generally to assist in developing a culture of constitutionalism in Kenya. It undertakes constitutional research, comments on policy and laws from a constitutional perspective, and publishes books and other material on the Constitution. Much of its work is going to court to enforce rights under the Constitution and ensure the proper performance of constitutional duties and responsibilities.

KI also fosters the spirit of constitutionalism in the East African region by promoting the exchange of academic discourse on constitutional issues and working with like-minded organizations to secure greater freedoms in the East African Region.

Summary and General Remarks

The Bill proposes amendments to the Independent Electoral and Boundaries Commission Act by changing the composition of the Selection Panel that oversees filling vacant positions in the Commission. The selection panel is currently comprised of four individuals chosen by the Parliamentary Service Commission (PSC), one chosen by Law Society of Kenya, and two chosen by the Inter-religious Council of Kenya members, The Bill would reduce the number of panellists selected by the PSC by two and give the Political Parties Liaison Committee (PPLC) and the Public Service Commission one nominee each.

*Mr Ronald Wanjau She
Please bring up the
same before the
New Committee # 29/11/2022*



KI has three primary concerns regarding the Bill:

- a. The constitutional and practical consequences of allowing the PPLC to select a panellists
- b. The risk that the amended system for selecting panellists will invite violations of Article 27(8) and the requirement that no more than two-thirds of the panellists be of the same gender
- c. The absence of an explanation as to why the Bill is necessary or how the Bill improves upon or addresses flaws in the existing law

Discussion

a. Allowing the PPLC to select a panellist

The PPLC is established under the Political Parties Act. The PPLC is established at both national and county levels. The Political Parties Act states that the principal function of the PPLC is 'to provide a platform for dialogue between the Registrar [of Political Parties], [Independent Electoral and Boundaries] Commission and political parties'. It may also perform 'such other functions as may be prescribed by the Registrar'.

The Office of the Registrar of Political Parties states on its website that the functions (aims and objectives) of the Political Parties Liaison Committee are as follows:

- i. To champion and advocate for free, fair, peaceful and transparent electoral environment and processes in Kenya;
- ii. To provide a platform for structured multiparty dialogue between Political Parties and the Electoral Management Body on issues relating to the organization and conduct of elections and the electoral environment generally;
- iii. To enhance genuine interaction, experience sharing and information exchange between political parties and the Electoral Management Body (EMB) as a way of building trust and confidence in the electoral process;
- iv. To identify gaps and shortcomings in the electoral law and process and adopt a consultative and proactive approach in making suggestions for improvement;

v. To carry out any other objective as the Political Parties Liaison Committee shall deem necessary.

However, neither the Political Parties Act nor any subsidiary legislation identifies who are members of the PPLC, how they are chosen, and the extent to which the members are beholden to the interests of their respective political parties. It is unclear how the PPLC will select a panelist and the degree to which those participating in that process will comply with Article 27 requirements. Finally, there is no mechanism to ensure that those who make the selection will do so based on an independent assessment of the best candidate instead of a party preference.

In short, the Bill transforms the PPLC from a committee tasked with liaising with the IEBC to one that plays a significant role in establishing who will be a part of the IEBC. Given that the members of the PPLC are there because they are representatives of a political party, the Bill fundamentally interferes with the political independence of the selection panel charged with overseeing the filling of vacant positions in the IEBC. The IEBC, in turn, oversees elections in Kenya, where these politicians and their political parties will play an adversarial role. The amendment risk altering the constitutionally guaranteed right of all Kenyans to free, fair and democratic elections run by a body that is independent of political influence.

Equally as concerning, the manner in which the PPLC would identify a panellist is opaque, at best. The legislation does not ensure that the panellist will be chosen from a representative group of all political parties or by the parties that are the largest and therefore have the greatest voting power. This concern is even further exacerbated by the existence of coalition political parties, which may garner enough authority to select a person who will be beholden to that party's partisan agenda. If the legislation were to continue, it would first need to be redrafted to address that gap and clarify who would be making the selection on the Committee's behalf and to what extent partisan leanings would influence that person or persons.

Finally, we are concerned about how the panellist selection would incorporate participation from both the national and county levels of the PPLC. For the selection to truly be representative of the membership of the PPLC, it would also need to include county-level participation. Under the current legislation, there is

no structure to ensure county participation. The recent election of the steering committee members for the National PPLC comprised members drawn from various political parties. Still, there is no indication whether the same structure exists for county governments. And there is no indication that the representatives from county governments will have a say in who participates in appointing a panellist. These concerns are not only practical, but may require the National Assembly to work with the Senate on determining whether this is a bill that would affect the counties under Article 110.

b. Compliance with the two-third gender principle under Article 27

Under the current Act, the Parliamentary Service Commission chooses four of the seven panellists. Two of those chosen by the Parliamentary Service Commission must be women. This requirement helps ensure that the selection panel meets the two-thirds gender requirement.

By limiting the number of panellists, the Bill does away with this inbuilt mechanism for ensuring that the panel meets Article 27's two-thirds gender requirement. As the Bill stands, there is no mechanism for ensuring compliance. If the other parties do not select candidates that ensure the two-thirds gender requirement is met, the selection panel will have to be rejected.

The risks here are two-fold: first, it could create a crisis in which the panellists are rejected and the parties compelled to make different picks. Second, it risks undermining compliance with Article 27. The built-in safeguard of requiring the Parliamentary Service Commission to pick two male and two female panellists avoided these problems. It ensured that the panel would meet the two-third gender requirements while allowing the other selectees freedom to choose the person who they thought was best for the job. By doing away with this in-built mechanism, the Bill courts political and constitutional crises.

c. The rationale for the amendment

Finally, there is no offered purpose for the proposed amendments. The Bill does not identify the problem it intends to fix or explain why the selection committee envisioned under the Bill would be better suited to select positions at the IEBC. Without explaining the benefit of the amendments, it creates an impression of an

ulterior motive by the mover of the Bill, who is the leader of the majority, particularly when the Commission is in crisis with two opposing factions set out.

We do not suggest that self-dealing exists, but without a clear indication of why the amendments are an improvement to the existing system, Parliament risks further undermining an embattled and beleaguered IEBC. If there is a rationale other than giving the political party with the greatest power influence over the IEBC, it is incumbent on Parliament to set it out. Without such information, there is no clear understanding of why this amendment would improve the independence or the functioning of the IEBC.

Detailed review of the Bill and Recommendations

No.	Ref.	Comments	Recommendations
1.	General Comment on the purpose of the amendments	The purpose for the proposed amendments has not been offered except for the changes in the composition and where the proposed nominees are to be drawn from.	The reason for the proposed amendments should be clearly stated so that the public understands the implications of the proposed changes and can offer their views.
2.	New Subparagraph (2)	Reduces the current allocation to the Parliamentary Service Commission, which nominates four persons to the selection panel, two women and two men, to two nominees and allows the Political Parties Liaison Committee and The Public Service Commission, one nominee each. Introduces the Political Parties Liaison Committee which is established under Section 38 of the Political Parties Act and is to be	The provision should be retained as is and the gender prescriptions retained.

		<p>established under the national and county levels.</p> <p>Comments:</p> <p>There are no principal functions of the Committee save for the vague principal function of providing a platform for dialogue between the Registrar, the Commission and political parties; and any other functions as prescribed by the Registrar of political parties.</p> <p>It is unclear where the proposed nominee will come from, whether at the national or county levels.</p> <p>Notably, the Bill concerns county governments in line with Article 110(1)(a) of the Constitution.</p> <p>Secondly, it is unclear on the criteria through which the nominee shall be selected and from which party to avoid having partisan interests represented in the selection panel, hence increasing the potential interference with the affairs of the panel and the independence of the IEBC.</p> <p>The Bill proposes to have one person nominated by the Public Service Commission, following a</p>	
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		<p>reduction of the current four representatives of the Parliamentary Service Commission. The Parliamentary Service Commission and the Public Service Commission are both constitutional commissions made up of civil servants. There is no justification for the particular distinction of having members nominated by the Parliamentary Service Commission as opposed to the Public Service Commission as proposed in the Bill.</p>	
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Conclusion

For the reasons explained above, we believe that the Bill should either be rejected or fundamentally revised in order to 1) ensure that the PPLC selects a participant that is representative of the national and county levels of the PPLC and is independent of partisan influence; 2) ensure that the built-in system for complying with Article 27's two-thirds gender principle is maintained; and 3) explain what policy objective the Bill attempts to fulfil or what harm it intends to correct.

On behalf of Katiba Institute:

Eileen Imbosa
Chris Kerkering
Katiba Institute
House No. 5, The Crescent, Off Parklands Road
P.O. Box 26586-00100
Nairobi
info@katibainstitute.org

Central Organization of Trade Unions (Kenya)

All correspondence should be addressed to the Secretary General

Chairman - General

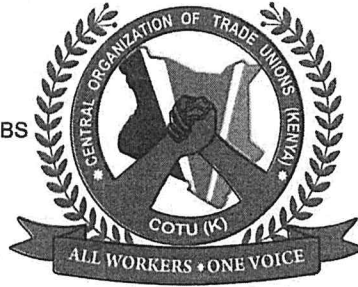
Rajabu W. Mwondi, MBS

Secretary - General

Dr. Francis Atwoli, NOM (DZA), CBS, EBS, MBS

Treasurer - General

Rebecca Nyathogora, HSC



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Our Ref: COTU/ADM3/12/VOL III/124

1st December, 2022

Peter K. Chemweno,
Office of Clerk,
National Assembly of Kenya,
P.O. Box 41842 – 00100,
NAIROBI.

Dear Sir,

**RE: INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT)
BILL, 2022 (NATIONAL ASSEMBLY BILL NO. 49 OF 2022)**

The Central Organization of Trade Unions in Kenya, COTU (K) recognizes the need to relook at the composition of the IEBC Selection Panel as enumerated under the IEBC Act, First Schedule, to be more inclusive and representative.

In doing so, COTU (K) **SUPPORTS** the amendments **BUT** with some slight amendments to equally include workers on the selection panel. COTU (K) would like to recommend **THAT** the amendment be further amended to ensure that **ALL** members of the select panel have one representative and thus leaving room for one representative of the workers on the select panel. This would, therefore, mean that an amendment be made on 2 (e) of the proposed amendment to have one representative of the Inter-religion council of Kenya as opposed to the proposed two. In doing so, Kenyan workers, who are the biggest stakeholders in any election, will be represented in the selection panel through the most representative umbrella Trade Union, currently COTU (K).

Noteworthy, COTU (K) represents Kenyan workers on **MANY** Boards, Committees, and Selection Panel. For instance, according to the Office of the Director of Public Prosecution Act No.2 of 2013, as in 8 (e), COTU (K) forms part of the selection panel on the appointment of the Director in the ODPP.

Further, COTU (K) remains a key and strategic stakeholder of the IEBC in their pre and post-election engagement considering the pivotal role COTU (K) plays in the promotion of peace during the election. It is of utmost high interest to Kenyan workers that they are represented on the selection panel of the IEBC.

Yours Sincerely,

Dr. Francis Atwoli, NOM (DZA), CBS, EBS, MBS
SECRETARY GENERAL

Deputy Secretary General: Benson Okwaro
1st Vice Chairman: Rev. Joel Chebii, OGW
2nd Vice Chairman: Francis Murage

1st Assistant Secretary General: Ernest N. Nadome
2nd Assistant Secretary General: Carolyn Rutto
Deputy Treasurer General: Bro. Washington O. Ododa

