

Rt. Hon. Speaker

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REPUBLIC OF KENYA
THIRTEENTH PARLIAMENT | FIRST SESSION

THE SENATE

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND
HUMAN RIGHTS

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

Approved for tabling
[Signature]
Rt. Hon. Speaker
12/01/2023

Clerk's Chambers,
The Senate,
Parliament Buildings,
NAIROBI.

January, 2023

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LIST OF ABBREVIATIONS/ACRONYMS

CAF	County Assemblies Forum
COG	Council of Governors
IEBC	Independent Electoral and Boundaries Commission
LSK	Law Society of Kenya
NGEC	National Gender and Equality Commission
NYC	National Youth Council
PPLC	Political Parties Liaison Committee
PSC	Parliamentary Service Commission
PSC	Public Service Commission
PWDs	Persons living With Disabilities

PRELIMINARIES

Establishment and Mandate of the Committee

The Standing Committee on Justice, Legal Affairs and Human Rights is established under the Standing Orders of the Senate and is mandated *'to consider all matters relating to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics, and integrity; agreements, treaties and conventions; and implementation of the provisions of the Constitution on human rights.*

Membership of the Committee

The Committee is comprised of –

- | | |
|--|--------------------|
| 1) Sen. Wakili Hillary Kiprotich Sigei, MP | - Chairperson |
| 2) Sen. Raphael Chimera Mwinzagu, MP | - Vice-Chairperson |
| 3) Sen. Fatuma Adan Dullo, CBS, MP | - Member |
| 4) Sen. Samson Kiprotich Cherarkey, MP | - Member |
| 5) Sen. William Cheptumo Kipkiror, CBS, MP | - Member |
| 6) Sen. Hamida Kibwana, MP | - Member |
| 7) Sen. Catherine Muyeka Mumma, MP | - Member |
| 8) Sen. Veronica W. Nduati, MP | - Member |
| 9) Sen. Andrew Omtatah Okoiti, MP | - Member |

FOREWORD BY THE CHAIRPERSON

Hon. Speaker,

The Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022) was published *vide* Kenya Gazette Supplement No. 174 of 2nd November 2022 and was introduced in the National Assembly by way of First Reading on 17th November, 2022. The Bill was considered by the National Assembly and passed without amendments, on 1st December, 2022.

Pursuant to Article 110(4) of the Constitution, the Bill was referred to the Senate where it was introduced, by way of First Reading, on Thursday, 8th December, 2022. Thereafter, the Bill stood committed to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration

In compliance with the provisions of Article 118 of the Constitution and Standing Order 145 (5) of the Senate Standing Orders, the Committee proceeded to undertake public participation on the Bill. In this regard, the Committee published an advertisement in the Daily Nation and Standard newspapers on Friday, 9th December, 2022 inviting members of the public to submit written memoranda to the Committee on the Bill. Additionally, the Committee sent invitations to key stakeholders inviting them to submit their comments on the Bill.

Following the call for submissions, the Committee received written memoranda from nine stakeholders, namely: Office of the Registrar of Political Parties, Council of County Governors, National Gender and Equality Commission, County Assemblies Forum, Katiba Institute, Kenya Conference of Catholic Bishops, National Youth Council, Independent Electoral and Boundaries Commission, and Mr. Eliud Matindi.

Hon. Speaker,

The Committee proceeded to consider the Bill at the length and held extensive discussions thereon including consultations with key stakeholders. Among the issues the Committee was particularly keen to resolve were –

- i) How to ensure that the selection panel complied with the High Court Judgment in Petition E364 of 2020 - *Okiya Omtatah Okioti V Attorney General & 5 Others*;
- ii) How to ensure that the selection panel complied with Article 27(8) of the Constitution on the two thirds gender principle;
- iii) How to address concerns on the suitability of the Political Parties Liaison Committee (PPLC) to nominate a member to the selection panel, noting –
 - a) the PPLC comprised political parties, the IEBC and the ORPP, which presented potential conflicts of interest particularly on the part of the IEBC;

- b) the PPLC existed at the national level and the county level, and the Bill did not clarify which level would undertake the nomination to the selection panel;
 - c) the PPLC was a forum for dialogue, and it was not anticipated in the Political Parties Act that the PPLC would be called upon to make nominations as proposed in the Bill; and
 - d) the foreseeable difficulty that would arise in the PPLC trying to agree on a single nominee to the selection panel.
- iv) The need for uniformity and consistency in the drafting language of the Bill; and
v) How to balance the diverse interests while maintaining the membership of the selection panel at seven.

This Report and the amendments proposed by the Committee are therefore the product of extensive consultations that have taken place to ensure that we have a good law in place that will stand the test of time.

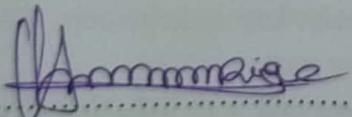
Hon. Speaker,

May I take this opportunity to commend the Members of the Committee for their devotion and commitment to duty, which made the consideration of the Bill successful.

I also wish to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to the Committee in undertaking this important assignment. Lastly, I wish to thank the stakeholders who submitted written memoranda which greatly aided the Committee in considering the Bill.

Hon. Speaker,

It is now my pleasant duty, pursuant to standing order 148(1) of the Senate Standing Orders, to present the Report of the Standing Committee on Justice, Legal Affairs and Human Rights on The Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022).

Signed  Date..... 18/01/2023

**SEN. WAKILI HILLARY KIPROTICH SIGEL, MP
CHAIRPERSON, STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS
AND HUMAN RIGHTS.**

ADOPTION OF THE REPORT OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS ON THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (AMENDMENT) BILL, NATIONAL ASSEMBLY BILLS NO. 49 OF 2022

We, the undersigned Members of the Standing Committee on Justice, Legal Affairs and Human rights, do hereby append our signatures to adopt this Report

No	Name	Signature
1.	Sen. Wakili Hillary Kiprotich Sigei, MP (Chairperson)	
2.	Sen. Raphael Chimera Mwinzagu, MP (Vice-Chairperson)	
3.	Sen. Fatuma Adan Dullo, CBS, MP	
4.	Sen. Samson Kiprotich Cherarkey, MP	
5.	Sen. William Cheptumo Kipkiror, CBS, MP	
6.	Sen. Hamida Kibwana, MP	
7.	Sen. Catherine Muyeka Mumma, MP	
8.	Sen. Veronica W. Nduati, MP	
9.	Sen. Andrew Omtatah Okoiti, MP	

CHAPTER ONE: INTRODUCTION

1.1 Introduction

1. The Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022) was published *vide* Kenya Gazette Supplement No. 174 of 2nd November 2022 and was introduced in the National Assembly by way of First Reading on 17th November, 2022. The Bill was considered by the National Assembly and passed without amendments, on 1st December, 2022. A copy of the Bill as passed by the National Assembly and referred to the Senate is attached to this Report as *Appendix 2*.
2. Pursuant to Article 110(4) of the Constitution, the Bill was referred to the Senate where it was read a First Time on Thursday, 8th December, 2022 and thereafter stood committed to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration. A copy of the Message from the National Assembly conveying the Bill to the Senate is attached as *Appendix 3*.

1.2 Background

3. The Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022) was necessitated by the Judgment of the High Court in Constitutional Petition E364 of 2020: *Okiya Omtatah Okioti v Attorney General & 5 Others*, delivered on 29th November, 2021. A copy of the said Judgment is attached as *Appendix 4*.
4. In that case, the Court issued a declaration that, to the extent that section 2(2)(a) of the Independent Elections and Boundaries Commission (Amendment) Act (No 18 of 2020) provided that the Parliamentary Service Commission shall nominate 4 out of 7 members of the Selection Panel for the nominees for the appointment of members of the IEBC, then the said provision variously infringed on Article 10 of the Constitution and was therefore unconstitutional.
5. The Court proceeded to issue an order quashing the said section 2(2)(a) of the Independent Elections and Boundaries Commission (Amendment) Act (No 18 of 2020).

1.3 Objects of the Bill

6. Arising from the said Judgment of the High Court in *Okiya Omtatah Okioti v Attorney General & 5 Others*, the Independent Electoral and Boundaries

Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022) seeks to change the composition of the Selection Panel that oversees the filling of vacant positions in the Commission.

7. The Bill seeks to reduce the current allocation of the Parliamentary Service Commission in nominating members of the Selection Panel from four to two, and to allow the Political Parties Liaison Committee and the Public Service Commission to each nominate one member to the Panel.

1.4 Consequences of the Bill

8. Once enacted, the Bill 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 Selection Panel.

1.5 Overview of the Bill

9. The Bill proposes the following amendments –

- a) **Clause 1** provides for the short title of the Bill.

- b) **Clause 2** provides for amendment of the First Schedule to the Independent Electoral and Boundaries Commission Act, 2011 at paragraph 1 by deleting sub-paragraph (2) and substituting therefor the following new sub-paragraph –

"(2) 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 TWO: PUBLIC PARTICIPATION ON THE BILL

2.1 Introduction

10. The Committee pursuant to the provisions of Article 118 of the Constitution and Standing Order 145 (5) of the Senate Standing Orders, proceeded to undertake public participation on the Bill. In this regard, the Committee published an advertisement in the *Daily Nation* and *Standard* newspapers on Friday, 9th December, 2022 inviting members of the public to submit written memoranda on the Bill. The advertisement was also posted on the Parliament website and social media platforms. A copy of the advertisement is attached as *Appendix 5*.
11. Additionally, the Committee sent invitations by email to key stakeholders inviting them to submit their comments on the Bill.
12. In response to the advertisement and invitations, the Committee received written submissions from –
 - a) Office of the Registrar of Political Parties;
 - b) Council of County Governors;
 - c) National Gender and Equality Commission;
 - d) County Assemblies Forum;
 - e) Katiba Institute;
 - f) Kenya Conference of Catholic Bishops;
 - g) National Youth Council;
 - h) Independent Electoral and Boundaries Commission; and
 - i) Mr. Eliud Matindi.
13. Copies of the said submissions are attached as *Appendix 6*, with a summary thereon in the form of a matrix attached as *Appendix 7*.

2.2 Overview of Stakeholder Submissions on the Bill

I. Office of the Registrar of Political Parties

14. The Registrar of Political Parties made the following proposals –
 - i) That clause 2(2)(a) of the Bill on the proposal of the Selection Panel to consist of ‘one man and one woman nominated by the Parliamentary Service Commission’ be recrafted to ‘two persons of either gender nominated by the Parliamentary Service Commission’, to align with the need to use uniform language through the clause.

- ii) On the proposed nomination of one person by the Political Parties Liaison Committee (PPLC), as contained at clause 2(2)(c) of the Bill, that the Committee should consider whether PPLC appointing a representative to the Selection Panel would affect the nature and effect of the dialogue envisioned between ORPP, IEBC, and political parties under section 38 of the Political Parties Act; and whether it was intended to amend Section 38(4) of the Political Parties Act with respect to the role of the Registrar in prescribing functions for the PPLC.
- iii) That clause 2(2)(e) of the Bill on the proposal of the Selection Panel to comprise *'two persons nominated by the Inter-religious Council of Kenya'* be recrafted to, *'two persons of either gender nominated by the Inter-Religious Council of Kenya'*, to ensure realization of the requirement of two-thirds gender principle under Article 27(8) of the Constitution.

II. Council of County Governors

- 15. The Council of County Governors proposed that clause 2(2) of the Bill be amended to include *'two persons nominated by the council of county governments.'* This would ensure that the 47 County Governments were represented in the selection panel for commissioners of the IEBC.

III. National Gender and Equality Commission

- 16. The National Gender and Equality Commission proposed that sub-paragraph 2(e) of the Bill be deleted and replaced with new sub-paragraphs (e) and (f), whereby the Inter-religious Council of Kenya would nominate one person to the selection panel, with the other slot being allocated to a person nominated by the umbrella organization of persons with disability, to represent persons with disability.
- 17. NGEC further proposed an amendment to paragraph 5 of the First Schedule to the IEBC Act (No. 9 of 2011) by inserting the words *'and interests of persons with disability'*. This would ensure that the IEBC has the representation of Commissioners with disability.

IV. County Assemblies Forum

- 18. The County Assemblies Forum proposed amendments to sub-paragraphs 2(b) and (c) of the Bill to provide that the nominees each by the Public Service

Commission and the Political Parties Liaison Committee would not be of the same gender. This would ensure that the selection panel complied with the two-thirds gender principle under Article 27(8) of the Constitution.

V. Katiba Institute

19. Katiba Institute submitted that the provision in the existing law should be retained as it is including the gender prescriptions thereon. This was on the basis that the purpose for the proposed amendments had not been offered except for the changes in the composition and where the proposed nominees were to be drawn from.
20. Katiba Institute therefore proposed that the Bill be rejected or that it be amended to ensure that –
 - i) the Political Parties Liaison Committee selects a participant that is representative of the national and county levels of the Political Parties Liaison Committee and is independent of partisan influence;
 - ii) the built-in system for complying with Article 27 of the Constitution on two thirds gender principle is maintained; and
 - iii) the policy objective the Bill seeks to fill or the harm it intends to correct is explained.

VI. Kenya Conference of Catholic Bishops

21. The Kenya Conference of Catholic Bishops proposed that the Bill be amended –
 - i) at sub-paragraph (a), to provide that the two nominees by the Parliamentary Service Commission would be one each from the government side and the opposition, to ensure inclusivity and promote trust in the electoral management body by all players;
 - ii) at sub-paragraph (b), to re-allocate the position reserved for the Public Service Commission to civil society or faith-based institutions;
 - iii) at sub-paragraph (c), to provide that the nomination by the Political Parties Liaison Committee would also consider the non-parliamentary parties; and
 - iv) at sub-paragraph (e), to add one more nominee to the Inter-religious Council of Kenya and further provide that the two nominees should be representatives from different faiths.

VII. National Youth Council

22. The National Youth Council proposed the introduction of two nominees nominated by the NYC to represent the youth in the selection panel. This was on the basis that youth comprise the largest proportion of the population both as voters and consumers of the services offered by the IEBC.

VIII. Independent Electoral and Boundaries Commission

23. The Commission expressed support for the proposed amendments as they were in line with the High Court decision in Constitutional Petition E364 of 2020 - *Okiya Omtatah Okiiti v Attorney General & 5 others*. The Commission also recommended that the nominating entities conduct the process of nominating members of the selection panel in an open and transparent manner.

IX. Mr. Eliud Matindi

24. Mr. Eliud Matindi submitted that the proposed composition of the selection panel comprising of five members nominated by State organs and two members nominated by non-state actors, as set out in the Bill, would be unconstitutional, null and void just like the provision which was held unconstitutional for having four out seven members picked by one entity. Further, the proposal would offend the national values and principles of governance as set out in Article 10 of the Constitution.
25. He further observed that the proposal to have the Political Parties Liaison Committee nominate one person to be a member of the selection panel was unconstitutional and a breach of the national values and principles of governance particularly on good governance, transparency and accountability. This was because under, section 38 of the Political Parties Act, 2011, PPLC is established at the national and county levels. This means there are forty-eight (48) established PPLC entities, and it was unclear which of the said entities would be the one nominating the one position.
26. Lastly, Mr. Matindi submitted that the Bill failed to meet binding constitutional requirements, including the duty imposed by Articles 21, 27 and 28 of the Constitution with regards to promoting and advancing gender equality.

CHAPTER THREE: COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

3.1 Committee Observations

27. Having considered the Bill and the submissions received thereon, the Committee made the following observations –
- (a) That the Bill sought to comply with the Judgment of the High Court in Petition E364 of 2020 - *Okiya Omtatah Okiiti v. Attorney General and 5 Others*, in ensuring that no single entity nominated a majority of the members of the selection panel thus giving the entity undue power in the decision making of the selection panel.
 - (b) That there was need to have a balance in the selection panel in terms of members nominated to represent political interests vis-à-vis those who were expected to be politically neutral.
 - (c) That the concerns raised by stakeholders on the suitability of the Political Parties Liaison Committee (PPLC) to nominate a member to the selection panel were valid, and it was further observed that –
 - (i) the PPLC comprises of political parties, the IEBC and the Office of the Registrar of Political Parties, which presented a potential conflict of interest particularly on the part of the IEBC;
 - (ii) the PPLC exists at the national level and the county level, and the Bill did not clarify which level would undertake the nomination to the selection panel;
 - (iii) the PPLC is a forum for dialogue, and it is not anticipated in the Political Parties Act that the PPLC would be called upon to make nominations as proposed in the Bill; and
 - (iv) it was foreseeable that difficulties would arise in the PPLC trying to agree on a single nominee to the selection panel, hence the need to increase the number of persons nominated within the auspices of the PPLC.
 - (d) The Committee noted submissions by various stakeholders which, if adopted, would have the effect of expanding the membership of the selection panel from the current seven (7) to nine (9). This would ideally accommodate most sections of society including civil society and non-parliamentary political parties who are not represented in the panel. While the Committee was attracted to the proposal, it was furnished with a Legal Brief on the matter where it was noted that such an amendment was substantial and went beyond the scope of the Bill as published. Consequently, introducing the amendment at this stage would expose the

Bill, once passed, to legal challenges for incorporating the said amendments without having substantively subjected them to public participation. A copy of the Advisory is annexed to this Report as *Appendix 8*.

- (e) That there is need to ensure gender balance in the composition of the selection panel. All entities nominating more than one person should not nominate persons of the same gender.
28. The Committee further observed that, in considering Bills that had significant public interest and importance, it was important that consultations take place between the respective Committees of the two Houses of Parliament, and allow for consensus by the two Speakers, on the core aspects and text of the proposed legislation. This would in turn facilitate the expeditious processing of Bills once formally introduced for consideration before either House.
29. The Committee therefore observed that the following amendments to the Bill would be required –
- (a) that the Bill be amended at sub-paragraph 2(a), to reduce the nominees by the Parliamentary Service Commission from two to one;
 - (b) that the Bill be further amended at paragraph 2(c), to provide for two persons to be nominated by the majority and the minority parties represented at the Political Parties Liaison Committee. This will ensure that the conflict of interest posed by IEBC's participation in the PPLC is eliminated by specifying that only political parties would be involved in nominating persons to the selection panel excluding IEBC and ORPP – who are members of the Political Parties Liaison Committee at the national level;
 - (c) That the two persons nominated by the political parties in sub-paragraph 2(c) be of opposite gender in order to promote gender equity; and
 - (d) That the two persons nominated by the Inter-Religious Council of Kenya in sub-paragraph 2(e) be of opposite gender in order to promote gender equity.
30. The text of the proposed amendments is attached as **Appendix 9**.

3.2 Committee Recommendations

31. Having considered the Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022) and the submissions received thereon, the Standing Committee on Justice, Legal Affairs and Human Rights recommends that the Senate **passes the Bill with amendments** as proposed by the Committee.

LIST OF APPENDICES

- Appendix 1:* Minutes of the sittings of the Committee in considering the Bill
- Appendix 2:* The Independent Electoral and Boundaries Commission (Amendment) Bill (National Assembly Bills No. 49 of 2022), as passed by the National Assembly and referred to the Senate
- Appendix 3:* Message dated 2nd December, 2022 from the National Assembly conveying the Bill to the Senate
- Appendix 4:* Judgment of the High Court in Constitutional Petition E364 of 2020: *Okiya Omtatah Okioti v Attorney General & 5 Others*, delivered on 29th November, 2021
- Appendix 5:* Advertisement published in the *Daily Nation* and *Standard* newspapers on Friday, 9th December, 2022
- Appendix 6:* Copies of submissions received on the Bill
- Appendix 7:* Matrix of submissions and Committee comments/ determination
- Appendix 8:* Legal Brief on the proposal to expand the membership of the selection panel
- Appendix 9:* Text of amendments proposed by the Committee to the Bill