

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY

THIRTEENTH PARLIAMENT – SECOND SESSION – 2023

DIRECTORATE OF DEPARTMENTAL COMMITTEES

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT ON THE CONSIDERATION OF THE CONFLICT OF INTEREST, 2023 (*NATIONAL ASSEMBLY BILL NO. 12 OF 2023*)

THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 03 OCT 2023	DAY: TUESDAY
TABLED BY:	CHAIRPERSON, JUSTICE & LEGAL AFFAIRS HON. GEORGE MURUGARA, MP
CLERK AT THE TABLE:	Inzofu Mwale.

CLERK'S CHAMBERS

DIRECTORATE OF DEPARTMENTAL COMMITTEES

PARLIAMENT BUILDINGS

NAIROBI

OCTOBER, 2023

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LIST OF ABBREVIATIONS AND ACRONYMS

AG	-	Office of the Attorney General
EACC	-	Ethics and Anti-Corruption Commission
IEBC	-	Independent Electoral and Boundaries Commission
JSC	-	Judicial Service Commission
KLRC	-	Kenya Law Reform Commission
KNUT	-	Kenya National Union of Teachers
LIA	-	Leadership and Integrity Act, 2012
LSK	-	Law Society of Kenya
MCCP	-	Maendeleo Chap Chap Party
NLC	-	National Land Commission
NPSC	-	National Police Service Commission
POEA	-	Public Officers Ethics Act, 2003
PSC	-	Public Service Commission
ODM	-	Orange Democratic Movement
ODPP	-	Office of the Director of Public Prosecutions
SRC	-	Salaries and Remuneration Commission
TSC	-	Teachers Service Commission
UDA	-	United Democratic Alliance
WDM	-	Wiper Democratic Movement

ANNEXURES

- Annexure 1: Adoption Schedule
- Annexure 2: Minutes
- Annexure 3: Conflict of Interest Bill, 2023
- Annexure 4: Advertisement inviting the public to submit memoranda on the Bill
- Annexure 5: Letter from the Clerk of the National Assembly inviting relevant stakeholders to submit memoranda on the Bill
- Annexure 6: Letter from the Clerk of the National Assembly inviting relevant stakeholders to attend the public participation forum
- Annexure 7: Memoranda by Stakeholders

CHAIRPERSON'S FOREWORD

This report contains the proceedings of the Departmental Committee on Justice and Legal Affairs on its consideration of the Conflict of Interest Bill (*National Assembly Bill No. 12 of 2023*) which was published on Monday 3rd April, 2023.

The Bill was read for the first time in the House on Tuesday 6th June, 2023 and 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 sixty (60) clauses and seeks to repeal the Public Officers Ethics Act, 2003 and amend provisions of the Leadership and Integrity Act, 2012; the Ethics and Anti-Corruption Commission Act, 2011; and the Anti-Corruption and Economic Crimes Act, 2003. The Bill seeks to provide for the management of conflict of interest in the discharge of official duties.

In compliance with Article 118(b) of the Constitution and Standing Order 127(3), the Clerk of the National Assembly placed an advertisement in the print media on Monday 12th June, 2023 inviting the public to submit memoranda by way of written statements on the Bill.

In addition, the Clerk of the National Assembly vide letter Ref. No. *NA/DDC/JLAC/2023/060* dated Friday 23rd June, 2023 invited key stakeholders to submit views on the Bill and attend a public participation forum on Thursday 29th June, 2023. The memoranda were to be received on or before Monday 26th June, 2023 at 5.00 pm (East African Time). By the close of the submission deadline, the Committee had received nineteen memoranda.

The Judiciary, the Office of the Attorney General (AG), the Council of County Governors (COG), the Independent Electoral and Boundaries Commission (IEBC), the Ethics and Anti-Corruption Commission (EACC), the Law Society of Kenya (LSK), the Kenya Law Reform Commission (KLRC), the Kenya Medical Practitioners Pharmacists and Dentist's Union (KMPDU), the Kenya National Union of Teachers (KNUT), the National Police Service Commission (NPSC), the Parliamentary Service Commission, the Public Service Commission (PSC), the Office of the Director of Public Prosecutions (ODPP), the Salaries and Remuneration Commission (SRC), the Teachers Service Commission (TSC), Transparency International, *Uraia* Trust, *Mzalendo* Trust and Dr. Donald Keya, PhD gave their views on the Bill which the Committee considered in the preparation of this report.

While considering the Bill, the Committee observed that while the Bill seeks to repeal the Public Officers Ethics Act, 2003, it does not adequately provide for fundamental aspects of ethics in the public service enumerated in the Public Officer Ethics Act, 2003.

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 Conflict of Interest Bill (*National Assembly Bill No. 12 of 2023*). 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 Judiciary, the AG, the COG, the IEBC, the EACC, the LSK, the KLRC, the KMPDU, the KNUT, the NPSC, the Parliamentary Service Commission, the PSC, the ODPP, the SRC, the TSC, Transparency International, *Uraia* Trust, *Mzalendo* Trust and Donald Keya, PhD for submitting memoranda on the Bill.

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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 Conflict of Interest Bill (*National Assembly Bill No. 12 of 2023*) and have the honour to report back to the National Assembly with the recommendation that the House approves the Bill with amendments as proposed in the Schedule of Amendments.


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

CHAPTER ONE

1 PREFACE

1.1 Establishment 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 mandate pursuant to the **Standing Order 216 (5)** is 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. To, 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 recommendations 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.*

1.2 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;
 - j) Witness Protection Agency;
 - k) Kenya National Commission on Human Rights;
 - l) Kenya Law Reform Commission; and

¹ National Assembly Standing Orders, 6th Edition.

m) Council of Legal Education.

1.3 Committee Membership

4. The Departmental Committee on Justice and Legal Affairs was constituted by the House on 27th October, 2022 and comprises 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-Kenya

Hon. Francis Kajwang' Tom Joseph, MP
Ruaraka Constituency

ODM Party

Hon. Junet Mohamed, CBS, MP
Suna East Constituency

ODM Party

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

ODM Party

Hon. Onyiego Silvanus Osoro, CBS, MP
South Mugirango Constituency

UDA Party

Hon. Muchira Michael Mwangi, MP
Ol Jorok Constituency

UDA Party

Hon. Makali John Okwisia, MP
Kanduyi Constituency

FORD-Kenya

Hon. Muriu Wakili Edward, MP
Gatanga Constituency

UDA Party

Hon. Maina Jane Njeri, MP
Kirinyaga (CWR)

UDA Party

Hon. Gichohi Kaguchia John Philip, MP
Mukurweini Constituency

UDA Party

Hon. Mogaka Stephen M, MP
West Mugirango Constituency

Jubilee Party

Hon. Aden Daud, EBS, MP
Wajir East Constituency

Jubilee Party

Hon. Siyad Amina Udgoon, MP
Garissa Township (CWR)

Jubilee Party

1.4 Committee Secretariat

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

Mr. Douglas Katho
Clerk Assistant I/Head of Secretariat

Mr. Ronald Walala
Senior Legal Counsel

Ms. Vivienne Ogega
Research Officer III

Mr. Stanley Lagat
Senior Serjeant-At-Arms

Ms. Faith Jully
Public Communication Officer III

Ms. Winnie Kiziah
Media Relations Officer II

Mr. Antony Kariuki
Serjeant-At-Arms

Mr. Omar Abdirahim
Fiscal Analyst II

Ms. Fridah Ngari
Media Relations Officer III

Ms. Jael Ayiego
Clerk Assistant III

Mr. Peter Mutethia
Audio Officer III

Mr. Abdikafar Abdi
Clerk Assistant III

Mr. Alex Amwatta
Hansard Reporter III

Mr. Alvin Ochieng'
Research Officer III

Mr. Silas Oponga
Hansard Reporter III

CHAPTER TWO

2 OVERVIEW OF THE CONFLICT OF INTEREST BILL (*NATIONAL ASSEMBLY BILL NO. 12 OF 2023*)

2.1 Background

6. The Bill which was sponsored by the Majority Leader, Hon. Kimani Ichung'wah, MGH, MP, was published on Monday 3rd April, 2023 and read for the first time in the House on Tuesday 6th June, 2023. It was thereafter committed to the Departmental Committee on Justice and Legal Affairs.

2.2 Summary of Legal Provisions

7. The Conflict of Interest Bill seeks to repeal and replace the Public Officer Ethics Act, 2003 and establish a framework for managing conflicts of interest in the discharge of public duties under the general supervision of the Ethics and Anti-Corruption Commission.
8. The Bill contains sixty (60) clauses which provide as follows:
 - a) **Clause 3** of the Bill outlines the objectives of the legislation as promotion of objectivity and impartiality in official decision making; ensuring that the integrity of decision makers is not compromised by private interests; enhancing public confidence in the delivery of public services; providing a framework for the regulation and management of real, apparent or potential conflict between public interest and private interest; and providing an institutional framework for the management of conflict of interest.
 - b) **Clause 5** of the Bill provides for the administration of all aspects of the legislation to the Ethics and Anti-Corruption Commission. Under **Clause 6**, the Commission is mandated, among others, to institute proceedings for the forfeiture of undeclared or unexplained assets.
 - c) **Part III (Clauses 8-29)** of the Bill defines the nature and extent of conflict of interest and the attendant obligations on public officers. Public officers are under an obligation to avoid conflict of interest generally (**Clause 9**) and specifically with regard to decision-making (**Clause 10**); participation in legislative proceedings (**Clause 11**); preferential treatment (**Clause 12**); use of official information (**Clause 13**); use of their influence (**Clause 14**); receiving offers of employment (**Clause 15**);

receiving and giving gifts (**Clause 16 and 17**); accepting complimentary treatment (**Clause 18**); engaging in public procurement (**Clause 19**); ownership of private entities (**Clause 20**); recruitment of persons into the public service (**Clause 21**); outside employment (**Clause 23**); political neutrality (**Clause 25**); and public collections (**Clause 26**).

- d) **Clause 22** of the Bill precludes public officers from entering into any arrangement intended to conceal a conflict of interest while **Clause 27** of the Bill restricts former public officers from acting for or against the entity in which they were previously employed until the lapse of two years from the date of their termination. The Commission may, under, **Clause 29**, waive this restriction upon written application on the grounds, *inter alia*, that an officer was not directly involved in the decision-making over the matter in issue. Contravening the restrictions prescribed with regard to the specific conflict of interests constitute offences.
- e) **Clause 24** of the Bill obligates all public entities to maintain a public register of conflicts of interest in which the conflicts must be particularized.
- f) **PART IV (Clauses 30-47)** of the Bill contains Compliance Measures. Under the Bill, a public officer is under a duty to recuse themselves from any proceedings in which they are in a conflict of interest, formally record the nature and details of the conflict and file a declaration of the recusal with the EACC within sixty (60) days. Under **Clause 31 and 32** of the Bill, a public officer is required to file, with the EACC, a declaration of income, assets and liabilities within thirty (30) days of employment, biennially, and within thirty (30) days of ceasing to be a public officer.
- g) **Clause 33** of the Bill mandates the Commission to analyse all declarations made and to ascertain their completeness and correctness and whether they raise any possible issues of conflict or contain any discrepancies or inconsistencies. The Clause allows the EACC to seek clarifications within six (6) months of the filing of a declaration.
- h) **Clause 34** of the Bill provides for access to the declarations filed with the EACC upon satisfying the Commission of a legitimate interest in the declaration. **Clause 34(2)** allows law enforcement agencies unrestricted access to the declarations. The Clause precludes any person who has obtained access to the records from disclosing the contents of such records without the prior written authority of the Commission. A

person who contravenes this requirement for confidentiality is liable, upon conviction, to a fine not exceeding one million shillings or a term of imprisonment not exceeding two years, or both the fine and imprisonment.

- i) **Clause 35** of the Bill provides for the retention of information submitted to the Commission under the Bill for a period of at least five (5) years after a person exits the public service.
- j) **Clause 38, 39, 40, 41, 42, 43 and 44** of the Bill provide for the obligation on a public officer to divest private interests that would place an officer in a position of conflict; the manner in which one may divest such interests and the assets exempted from the mandatory divestiture. Under the Bill, a public officer may elect either to sell their interests in an arms-length transaction or establish a Blind Trust in which the officer has no direct control over within ninety days of appointment or employment. Only charged assets and assets of minimal value may be exempted from the requirement.
- k) **Clause 47** of the Bill obligates the EACC to develop and publicise in the *Kenya Gazette* the administrative mechanisms for the implementation of the Compliance Measures outlined under **Part IV** within twelve (12) months of the passage of the Bill.
- l) **PART V (Clauses 48-51)** of the Bill contain provisions on complaints and investigations. Under Clause 48, a public officer who is under investigation must be informed of the allegations and afforded an opportunity to make representation on the matter before conclusion of the investigations. A State or public officer may be suspended from office pending the investigation or determination of any allegations made against the officer under Clause 50 of the Bill. In terms of recommendations, Clause 51 of the Bill allows the EACC to either recommend disciplinary action against a State or public officer; appropriate measures to ensure compliance with or cessation of further violation of the provisions of the Bill; or prosecution by the Director of Public Prosecutions. The provision further allows the EACC to apply to the High Court for an appropriate order to compel the implementation of its recommendations.
- m) **PART VI** of the Bill contains miscellaneous provisions. **Clause 52** of the Bill levies a general penalty for offences under the Act where a convicted person is liable to a

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fine not exceeding four million shillings or imprisonment for a term not exceeding ten years, in the case of a natural person; or a fine not exceeding ten million shillings in the case of a body corporate. Where the conduct that constitutes an offence under the Bill results in a quantifiable benefit or loss, or both a benefit and a loss, an additional mandatory fine of two times the amount of the benefit, loss, or benefit and loss is to be added to the prescribed fine.

- n) **Clause 54(4)** precludes persons from providing false information that is maliciously intended to injure another person to the Commission. A person convicted of providing false information is liable to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding three years, or both the fine and imprisonment.
- o) **Clause 56** of the Bill obligates every reporting entity to file compliance reports in the prescribed form.
- p) **Part VII (Clause 58-60)** of the Bill contains provisions on the repeal and saving of the Public Officer Ethics Act, 2003 and consequential amendments.
- q) **Clause 58** repeals the Public Officer Ethics Act, 2003 while **Clause 59** saves the obligations undertaken by the existing “responsible Commissions” under the Act until the development of the administrative provisions established under the Bill by the EACC. Under the provision, a public officer shall be required to divest any private interests that place the officer in a position of conflict within twenty-four months of the commencement of the provisions of the Bill.
- r) **Clause 60** of the Bill amends the Public Procurement and Asset Disposal Act, 2015, the Leadership and Integrity Act, 2012, the Ethics and Anti-Corruption Commission Act, 2011, and the Anti-Corruption and Economic Crimes Act, 2003 in the manner outlined in the Third Schedule to the Bill. The Clause, as read with the Schedule seeks to—
 - a) repeal and replace section 59 of the Public Procurement and Asset Disposal Act, 2015 on the limitations imposed on public officers with regard to participating in public procurement.
 - b) amend the Leadership and Integrity Act, 2012 to—
 - (i) delete references to the Public Officer Ethics Act, 2003;

- (ii) delete section 14 of the Act on gifts;
 - (iii) delete section 16 of the Act on conflict of interest;
 - (iv) delete section 17 of the Act on participation in tenders;
 - (v) delete section 18 of the Act on public collections;
 - (vi) delete section 23 of the Act on political neutrality;
 - (vii) delete section 26 of the Act on other gainful employment;
 - (viii) delete section 27 of the Act on offers of future employment;
 - (ix) delete section 28 of the Act on former state officers acting in a government or public matter; and
 - (x) repeal and replace section 52 of the Act to apply all provisions of the Leadership and Integrity Act, 2011 to state and public officers. Currently, the requirements of the Act on public collections do not apply to public officers;
- c) amend section 11 of the Ethics and Anti-Corruption Commission Act, 2011 to include functions granted by statute as additional functions of the EACC;
- d) amend the Anti-Corruption and Economic Crimes Act, 2003 to—
- (i) delete section 44 on conflict of interest; and
 - (ii) delete section 62(6) of the Act. The subsection provides that suspension under the section, if charged with corruption, does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.

CHAPTER THREE

3 PUBLIC PARTICIPATION AND STAKEHOLDER ENGAGEMENT ON THE BILL

3.1 Legal Framework on Public Participation

9. Article 118 (1)(b) of the Constitution provides that:

“Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees.”

10. The National Assembly Standing Order 127 (3) and (3A) stipulates that:

*“(3) The Departmental Committee to which a Bill is committed shall **facilitate public participation on the Bill** through an appropriate mechanism including-*

(a) inviting submission of memoranda;

(b) holding public hearings;

(c) consulting relevant stakeholders in a sector; and

(d) consulting experts on technical subjects.

(3A) The Departmental Committee shall take into account the views and recommendations of the public under paragraph (3) in its report to the House.”

3.2 Memoranda Received on the Conflict of Interest Bill

11. Pursuant to the aforementioned provisions of law, the Clerk of the National Assembly placed an advertisement in the print media on Monday 12th June, 2023 inviting the public to submit memoranda by way of written statements on the Bill. Further, the Clerk of the National Assembly vide letters Ref. No. *NA/DDC/JLAC/2023/060* and *NA/DDC/JLAC/2023/082* dated Friday 23rd June, 2023 and Thursday 3rd August, 2023, respectively invited key stakeholders to submit views on the Bill and attend a public participation forum on Thursday 29th June, 2023 and Tuesday 8th August, 2023 respectively.

12. To this end, the Departmental Committee on Justice and Legal Affairs received nineteen memoranda from the Judiciary, the Office of the Attorney General (AG), the Council of County Governors (COG), the Independent Electoral and Boundaries Commission (IEBC), the Ethics and Anti-Corruption Commission (EACC), the Law Society of Kenya (LSK), the Kenya Law Reform Commission (KLRC), the Kenya Medical Practitioners Pharmacists and Dentists’ Union (KMPDU), the Kenya National Union of Teachers (KNUT), the National Police Service Commission (NPSC), the Parliamentary Service Commission, the Public Report of the Departmental Committee on Justice and Legal Affairs on the Consideration of the Conflict of Interest Bill (*National Assembly Bill No. 12 of 2023*)

Service Commission (PSC), the Office of the Director of Public Prosecutions (ODPP), the Salaries and Remuneration Commission (SRC), the Teachers Service Commission (TSC), Transparency International, *Uraia* Trust, *Mzalendo* Trust and one public officer, Donald Keya, PhD. The memoranda are annexed to this report as *Annexure 7*.

13. The Judiciary, the AG, the COG, the IEBC, the EACC, the LSK, the KLRC, the KNUT, the NPSC, the PSC, the ODPP, the SRC, the TSC, Transparency International and *Mzalendo* Trust submitted memoranda in support of the Bill but with some reservations.
14. The Office of the Attorney General appeared before the Committee on Thursday 27th July, 2023 and submitted views in support of the Bill but with some reservations.
15. The ***Uraia* Trust** was of the view that the Bill complies with Article 10 of the Constitution and is a manifestation of true good governance thus its support for it.
16. The PSC opposed the Bill in its entirety stating that there was no justification for it as its contents are majorly a replica of already existing provisions of law and only introduces two new aspects of divestiture and establishment of blind trust.

Clause 1

17. The **Judiciary** submitted that while the long title of the Bill and its substantive provisions provide for the management and regulation of conflict of interest, it does not sufficiently provide for other aspects of ethics in the public service as provided for in the Public Officer Ethics Act, 2003. Hence, its recommendation that the Bill be expanded to cover all aspects of ethics in the public service.
18. ***Mzalendo* Trust** submitted that the commencement clause be amended to propose that the commencement of the Bill be guided by Article 116 of the Constitution.
19. The **NLC** submitted that the title of the Bill be amended to Integrity and Conflict of Interest Bill, 2023 as conflict of interest is a part of integrity in general and the contents of the Bill entail more aspects than just conflict of interest.

Committee Observation

20. The Committee was of the view that the submission by the Judiciary on the Clause was not adequately specific with regard to the items proposed for inclusion. The Committee agreed with the proposal by ***Mzalendo* Trust** on the need to align the commencement with Article

116 of the Constitution. The Committee was of the view that the title “Conflict of Interest Bill” adequately addresses the issues contained in it.

Clause 2

21. The **Office of the AG** was of the view that a definition of “conflict of interest” be included in the Bill as follows:

“conflict of interest” means a conflict between the public duty and private interests of a public official, in which the public official has private capacity interests which could improperly influence the performance of his official duties and responsibilities;

22. The **IEBC** submitted that the definition of “public officer” be reviewed to align it with the meaning assigned to it under the Constitution.
23. The **ODPP** and the **NLC** noted that Clause 2 includes the common law definition of a “partner” which may result in a conflict of laws as the new marriage laws do not consider cohabitation as a form of marriage. It, therefore, recommended that the definition be deleted.
24. The **TSC** was of the view that the definition of gainful employment as drafted is narrow and restrictive and should be amended to specifically refer to a steady allowance arising out of steady employment. They further submitted an additional amendment to the definition of “reporting entity” to expressly include Constitutional Commissions which are part of the state organs and proposed the inclusion of what constitutes a conflict of interest both directly and indirectly in the definitions.
25. The **Council of Governors** proposed that the term “State officer” and its definition in the Constitution be included in the interpretation clause to make a distinction between State and public officers.
26. **Mzalendo Trust** proposed that the definition of “unexplained asset” as derived from Section 2 of the Anti-Corruption and Economic Crimes Act, 2003 be amended as it is limiting especially in the scope of what the Bill is intended to achieve as it would require someone to have been reasonably suspected of corruption or economic crime. It, thus, recommended that only subsection (b) of Section 2 of the Anti-Corruption and Economic Crimes Act, 2003 be applicable in the Bill.
27. **Transparency International** proposed the inclusion of the definition of a “whistleblower” being that the term has been used in Clause 54 of the Bill.

28. **Donald Keya, PhD** submitted that the definition of “relative” be amended and limited to only the members of the nuclear member of a public officer i.e. the spouse and children. He noted that the definition is too broad and purports to unjustly restrict the rights and freedoms of relatives of public officers.
29. The **Parliamentary Service Commission** proposed that the term “gainful employment” be rephrased to “other gainful employment” to explain the fact that the kind of employment referred to is additional employment to public engagement by the public official. It also stated that the definition of the word “Commission” be amended to mean “Commission or reporting authority responsible for the public official” in line with the view that conflict of interest arises differently for every public entity and hence can be best managed by the responsible commission or reporting entity that the public official reports to.
30. Further, the Commission added that there is a need to define “unexplained assets” in the context of the intended Conflict of Interest Act rather than adopting the definition in the Anti-Corruption and Economic Crimes Act which is tied to corruption and economic crimes.

Committee Observation

31. The Committee agreed with the proposals on the definition of the terms “conflict of interest”; “family” (in relation to common-law partners); “relative” (in relation to common-law partners) “unexplained asset”; and “public officer” for purposes of uniformity, clarity and alignment with the provisions of the Constitution and existing laws. The Committee was of the further view that the definition of the term “State Officer” is subsumed in the definition of “public officer”; and that the terms “whistleblower” and “gainful employment” have ordinary meanings and therefore do not require further definition.

Clause 3

32. **Transparency International** proposed that sub-clause (2)(a) be amended by deleting the word “official” to enhance clarity on the scope of its application and align it with the language used in other parts of the Bill, particularly, Clause 8(a), 10(1) and 12(1). It also submitted that sub-clause (2)(c) be amended by introducing the words “integrity of public office and” to align it to Articles 73 and 75 of the Constitution. Further, it proposed the introduction of two new objects:

- “(d) enhance accountability to the public for decisions and actions by public officers in execution of their duties;*
- (e) promote selfless service by public officers based solely on the public interest;”*

Committee Observation

33. The Committee was of the view that the word “official” has been consistently used throughout the Bill and does not create any ambiguity in the cited provisions.
34. The Committee agreed with the submissions on amending the subclause (2)(c) and the introduction of two additional paragraphs for purposes of clarity and alignment of the objects of the Bill with the provisions of Article 73 and 75 of the Constitution.

Clause 4

35. The **KLRC** noted that Clause 4 of the Bill excludes fundamental reporting entities including State officers and the private sector as was initially provided for under the Public Officer Ethics Act, 2003 which the Bill intends to repeal. It recommended that the original scope as provided for under the Draft Bill be reinstated.

Committee Observation

36. The Committee noted that the Public Officer Ethics Act, 2003 only applies to public officers and that the KLRC did not provide specific details on the items proposed for inclusion in the Bill.

Clause 5

37. According to the **Judiciary**, Clause 5 and 6 of the Bill mandates the EACC with the exclusive administration of the proposed law which takes away the constitutional functions of the Judicial Service Commission and offends various provisions of the Constitution including Articles 1, 159, 172 and 249. Consequently, it recommended that Clause 5 be revised to empower the Judicial Service Commission (JSC) to administer the proposed law with respect to State and public officers employed by the JSC.
38. The **PSC** submitted that the day-to-day administration and management of conflict of interest is better carried out by the individual reporting entities and that it would be redundant and untenable for the EACC to discharge that duty with respect to all public officers from various

reporting entities including TSC, JSC, the Parliamentary Service Commission and all the forty-seven (47) county public service boards among others. It added that it does not promote efficiency in dealing with malfeasance related to the code of conduct and is against the spirit of the United Nations Convention Against Corruption because EACC does not exercise disciplinary control over the public officers.

39. The **Parliamentary Service Commission** proposed that Clause 5 as read with Clauses 6 and 7 be rephrased to remove the administration of the proposed Act in terms of enforcement and implementation from the sole ambit of the EACC and be divested to the Commission or reporting authority for the public officer involved. It also noted that there should be a provision to specify who will be exercising the oversight role over EACC officials as related to conflict of interest.

Committee Observations

40. The Committee did not agree with the proposals made by the Judiciary, PSC and the Parliamentary Service Commission. The Committee noted that the Constitution contains a specific Chapter on Leadership and Integrity which applies to all State and public officers. The Constitution further establishes three arms of government and Commissions and independent offices that are not subject to the direction or control of any other entity. As such, the proposal in the Bill for the EACC to administer the legislation on conflict of interest is derived from Chapter Six of the Constitution and does not affect the independence of the institutions established by the Constitution and the public and State officers who serve in the institutions.

Clause 6

41. The **Council of Governors** proposed an additional function of the Commission as follows:
- “Develop policies, standards, guidelines and promote best practices for the management of conflict of interest.”

Committee Observation

42. The Committee agreed to the proposal by the Council of Governors.

Clause 7

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43. The **IEBC** noted that the Bill gives the EACC the power to summon witnesses and require them to give or produce evidence as the Commission may consider necessary contrary to Article 252(3) of the Constitution that expressly provides that the power to issue summons to a witness for purposes of investigation vests with the Kenya National Human Rights and Equality Commission (KNCHR), the Judicial Service Commission (JSC), the National Land Commission (NLC) and the Auditor General.

Committee Observation

44. The Committee did not agree with this view. Article 79 of the Constitution as read with the Ethics and Anti-Corruption Commission Act, establishes an independent ethics and anti-corruption commission with the status and powers of a commission under Chapter Fifteen of the Constitution for purposes of ensuring compliance with, and enforcement of, the provisions of the Constitution on Leadership and Integrity. EACC therefore possesses the powers to issue summons to assist it in investigations similar to that granted to the Commissions specified under Article 252 of the Constitution.

Clause 8

45. The **TSC** proposed the deletion of the word “perceived” under Clause 8(b) as it may be subject to abuse.

46. On Clause 8(c), the **NPSC** submitted that the word “perceived” be substituted with “can be demonstrated” as the former is not an objective measure of what would amount to actions or omissions that impair public officers’ ability to act perform their public duties. It further proposed substitution of “has interests” with “pursue interests” because public officers have diverse personal interests under Clause 8(c).

Committee Observation

47. The Committee did not agree with these views. The term “perceived” as used in the Clause connotes the perspective that a reasonable person or the court may hold with regard to an act or omission by a public officer and whether the same constitutes a conflict of interest.

48. The Committee was of the view that the proposal by the NPSC was vague.

Clause 9

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49. **Transparency International** recommended the addition of the words “to the reporting authority or Commission and comply with any directions to avoid the conflict” to ensure accountability by providing clarity on who a public officer should report to.

Committee Observation

50. The Committee agreed with the proposal and observed that adding the words proposed identifies the entity to which a public officer is required to report any conflict that arises during the discharge of his or her duties.

Clauses 10, 36 and 37

51. The **Law Society of Kenya** noted that these clauses fail to provide a penalty for the offences prescribed and hence are subject to the general penalty provided under Clause 52. Thus, it advised that the clauses be amended to provide for penalties to the offences stipulated therein as the general penalty is too harsh and limits the judicial discretion of the court.
52. The **ODPP** also submitted that Clause 36(2) be reworded as payment of fines is a judicial function by the courts and hence should not be vested with the EACC.

Committee Observation

53. The Committee was of the view that in the absence of an alternative proposal and rationale for an alternative penalty, the general penalty provided under Clause 52 of the Bill would apply. The Committee agreed to the deletion of Clause 36(2) to remove the requirement it imposes to pay criminal fines to the EACC.

Clause 11

54. The **Parliamentary Service Commission** submitted that the clause be deleted as it is already provided for in the Parliamentary Powers and Privileges Act, 2017 and the County Assemblies Powers and Privileges Act, 2017.

Committee Observation

55. The Committee agreed with the proposal.

Clause 13

56. The **NPSC** proposed substituting the phrase “interests of another person” with “private interests” under Clause 13(1). It stated that “interests” is a general term and the interests sought to be regulated in the Bill are “private interests”.

Committee Observation

57. The Committee noted that the Clause prohibits misuse of official information for both public and private interests. It did not agree with the proposal.

Clause 15

58. The **NPSC** proposed deletion of Clause 15(1)(b) it noted that receipt of an employment offer does not indicate any act or omission in the conduct of the public officer to act for private interests and could be unsolicited.

59. The Parliamentary Service Commission proposed deletion of reporting of acceptance of an offer of outside employment to EACC and instead recommended that such reporting be done to the responsible Commission or reporting authority within seven days.

Committee Observation

60. The Committee noted that subclause (3) clearly defines an “offer of outside employment” as a formal proposal made to a public officer to work for or privately do business with an entity which has official dealings with the reporting entity in which the public officer is serving. The Clause is therefore sufficiently clear as to the nature of offer that it applies to.

Clause 16

61. The **LSK** submitted that the provisions of Clause 16(3) on gifts and other benefits are too restrictive and intrusive to the privacy of a public officer. It proposed that the clause be amended to dictate that such declaration only be made during suspicious circumstances of gifting.

Committee Observation

62. The Committee did not agree with the proposal. It noted that the restrictions on gifting and obligations to report the receipt of gifts are integral to avoiding any real or perceived conflict of interest on the part of a public officer.

Clause 17

63. The **TSC** submitted that the nature of gifts referred to in paragraph (b) be amended to exclude gifts awarded to employees for exemplary performance. Moreover, **Mzalendo Trust** submitted that this clause be amended by inserting a penalty clause on the responsible person for failure to maintain a register of gifts.

Committee Observation

64. The Committee did not agree with the proposals. The Committee noted that Clause 17 only seeks to buttress the obligation to report the receipt of gifts under Clause 16 of the Bill. It is therefore not necessary to provide an exemption to nature of gifts that may be included in the Register or to penalise a registrar who relies on gifting information that may never be submitted.

Clause 18

65. The **TSC** noted that Clause 18(1), as drafted, criminalizes all complimentary treatment. Also, it stated that Clause 18(2) is open-ended and should be expounded further by providing clear parameters of what exceptional circumstances entails.

Committee Observation

66. The Committee did not agree with the proposal. The Committee noted that the Clause expressly outlines the circumstances under which complimentary treatment may be accepted by a public officer and guides on the manner of reporting such treatment.

Clause 19

67. The **TSC** submitted that this clause be amended to include the place of proxies such as spouse(s) and children to avoid abuse by public officers and to protect the sanctity of the Public Procurement and Disposal Act, 2015.

68. The **NPSC** proposed the deletion of the word “beneficiary” under Clause 19(1). It stated that the proposal is against Articles 27(3)(4) and 40 of the Constitution on the right to economic opportunities and property. Further, it added that public officers have the right to property which includes stake in companies and shares in which beneficial interests are declarable in law.

69. **Donald Keya, PhD** proposed that Clause 19(1) be amended to restrict public officers from engaging in business only with their reporting entity and not all reporting entities. He noted that this restriction was unjust and would result in hesitations by professionals to offer their competence and expertise in the public service. Further, that the Clause portrays being a public officer as punitive and will lead to a decline in the skillset in the public service hence compromising on the quality of the public service.
70. The **Parliamentary Service Commission** proposed deletion of Clause 19(2) as the same is sufficiently provided for under the Public Procurement and Asset Disposal Act, 2015 and attendant regulations.

Committee Observation

71. The Committee did not agree with the proposals on the Clause. The Committee noted that the Bill relates to the affairs of public officers in their official capacity and that it is in addition to the existing provisions of the Public Procurement and Asset Disposal Act, 2015.

Clause 20

72. **Transparency International** proposed the amendment of Clause 20(1) to provide for conflict of interest arising in situations where a public officer holds shares or interests in private legal entities, either directly or indirectly by substituting the phrase “acquire an” with “hold a direct or indirect”.

Committee Observation

73. The Committee did not agree with the proposal. The Committee noted that the Clause seeks to regulate the **prospective** investment by public officers in entities that are party to government contracts. Other provisions of the Bill address the issue of existing investments by public officers.

Clause 21

74. **Transparency International** proposed the deletion of sub-clause (2) which provides for the exemption of conflict in recruitment or in the alternative definition of “personal staff”.

Committee Observation

75. The Committee did not agree with the proposal. The Committee noted that there may be a category of personal staff whose recruitment may require the participation of an affected State or public officer. Examples include a bodyguard, personal doctor, nurse; or assistant.

Clause 23

76. The **SRC** proposed the amendment of the sub-clause (1) in whole to read as follows:

“A public officer who accepts employment on a part-time basis in another public institution shall inform the institution offering them the job, before accepting the job offer of their full-time employment as a public officer.”

77. The **TSC** also submitted that the use of the word “incompatible” in sub-clause (1) is vague and ought to be amended in line with Article 47 of the Constitution. Moreover, it added that sub-clause (2) ought to be expanded in scope by providing what amounts to gainful employment prohibited under the Act to avoid abuse. It also stated that sub-clause (3) is impractical as it is deemed to criminalize hard work and no employer would authorize an employee to seek gainful employment elsewhere.

78. The **NPSC** proposed deletion of Clause 23(3) as it is an intrusion to a person’s privacy where any other gainful employment that is not in conflict of interest with the reporting authority is pursued outside official duty and time.

79. The **Parliamentary Service Commission** submitted that since Clause 23(2) refers to the fact that public officials are generally permitted under the Act to engage in other gainful employment, Clause 23(1) should be amended to reflect this general rule.

Committee Observation

80. The Committee did not agree with the proposals. The Committee noted that Clause 23 clearly outlines the circumstances under which a full-time public or state-officer may attempt to engage in any other gainful employment activity and even provides a requirement that the reporting entity to which an officer belongs must be notified of such additional employment activities.

Clause 24

81. The **Office of the AG** noted that having the register of conflict of interest open to the public may pose a challenge. Hence, it proposed that the register only be accessible to an applicant

with a legitimate interest to ensure that the Commission is not burdened with frivolous requests for inspection of the register. It was of the opinion that clause 24(2) be amended by deleting paragraph (c) and substituting therefor the following new section:

“be open to any person for inspection upon making an application to the reporting authority if the applicant satisfies the reporting authority that he has a legitimate interest and good cause in the furtherance of the objectives of this Act.”

82. **Mzalendo Trust** thought that the clause be amended by expressly providing for ways in which the register of conflict of interest is to be made open to the public in compliance with the Access to Information Act, 2016.

Committee Observation

83. The Committee agreed with the proposals. The Committee noted that it would be prudent for the Bill to expressly prescribe the manner in which the Register should be accessible to the public in line with the Access to Information Act with necessary safeguards.

Clause 25

84. The **ODPP** was of the view that sub-clause (1) on political neutrality be aligned with Article 77(2) of the Constitution as the clause provides that Cabinet Secretaries and members of the County Executive Committee can hold office in political parties contrary to the Constitution.

85. **Transparency International** proposed the inclusion of an additional sub-clause as follows:

“(c) engage in political activity that may compromise or be seen to compromise the political neutrality of his/her office.”

86. The **NPSC** noted that Cabinet Secretaries as well as members of a County Executive Committee are public officers who should be politically neutral thus, proposed amendment of Clause 25(1) to read as follows:

“An appointed public officer including a Cabinet Secretary or a member of a County Executive Committee, shall not, in the performance of his duties-”

Committee Observation

87. The Committee did not agree with the proposal by the ODPP and the NPSC. The Clause does not allow any appointed State Officers to hold office in a political party. The Committee

agreed with the submission by Transparency International for purposes of clarifying the neutrality of the duties carried out by other public officers.

Clause 26

88. The **IEBC** noted that the terms “official social media platforms” be defined to specify the said platforms to avoid creating room for conjecture.

89. Further, the **ODPP** submitted that sub-clause (1)(c) be amended to provide for various exemptions such as social contributions for welfare purposes for colleagues such as medical bills and burial contributions among others.

Committee Observation

90. The Committee did not agree with the proposals. The Committee noted that the Clause precludes public officers from conducting public collections in the discharge of their official duties. Such collections constitute a major conflict of interest and may affect the quality of services given to a member of the public who refuses to participate in such a collection.

Clauses 27, 28 and 29

91. The **IEBC** submitted that there lacks a succinct justification for Clause 27. In addition, it was of the view that there is need for clarity by providing a timeline within which a public officer should refrain from engaging in subsequent activities that have the potential for conflict of interest.

92. The **TSC** proposed the deletion of Clauses 27, 28 and 29 on the basis that they amount to a violation of the rights of certain professionals especially Advocates in the public service. According to them, the provisions impede the right to earn a living from the practice of a profession. Furthermore, the provisions conflict with the principles in the Advocates Act, Cap 16.

93. On the other hand, the **ODPP**, the **NLC** and **EACC** proposed the substitution of the word “after” with “preceding” in Clause 28 of the Bill.

94. The **NPSC** submitted that the term “State” is quite broad and only the reporting entity to which a former public officer was engaged as an employee should be considered as there was privity of relationship. It, therefore, proposed amendment of Clause 27(1)(a) to read as follows:

“A former public officer shall not –

(a) act for or on behalf of any person in connection with any specific proceeding, transaction, negotiation or case in which the reporting entity is the immediate former employer and is a party and with respect to which the former public officer had acted for, or provided advice to that reporting entity.”

95. The NPSC further submitted that Article 35 of the Constitution guarantees access to information held by the State subject to legal limitations hence it was their submission that the only information that should be limited is anti-competitive or classified information or misinformation. Further, it stated that Clause 27(1)(c) has the potential to limit witnesses in legal proceedings who advance the rule of law and constitutionalism. It thus proposed amendment of the clause to read as follows:

“A former public officer shall not –

(c) use classified information obtained in his official capacity to further the interests of another person or entity.”

96. The **Parliamentary Service Commission** proposed deletion of Clauses 27, 28 and 29. It noted that the restriction should be dealt with the responsible commission or reporting authority on case by case basis depending on demonstrable conflict of interest.

Committee Observation

97. The Committee did not agree with the proposals made by the IEBC, TSC, NPSC and the Parliamentary Service Commission. The Committee noted that prohibition from working against the interests of an institution in which one was employed is consistent with the normative guidelines of employment in a bid to prevent a former employee from using privileged information acquired in the course of their service to the detriment of the former employer. The clauses are aimed at realizing public service integrity and to ensure professional and conscientious discharge of official duties by public officer regardless of their future prospects of employment by other entities.

98. The Committee agreed to the proposals by the ODPP, NLC and EACC on amendment of section 28 of the Bill to clarify the prohibition to the employment activities of a public officer applies “after” they leave the public service.

Clause 30

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99. The **TSC** noted that the sub-clause (2)(b) places an unnecessary burden to file a declaration of recusal with the Commission and recommended that instead, the reporting authority bears it as it is the custodian of the register of conflict of interest.
100. The **Parliamentary Service Commission** submitted that Clause 30(2)(b) should be amended to mandate the responsible commission to report to EACC periodically instances of recusal of public officers under their jurisdiction and conflict that was avoided.

Committee Observation

101. The Committee did not agree with the proposals. The Committee noted that the requirement to report the recusal to both the reporting entity and the EACC is an accountability mechanism that ensures a proper record of the recusal is maintained.

Clause 31

102. The **Judiciary, TSC and Transparency International** proposed that the clause be amended to provide that declaration of income, assets and liabilities for employees be submitted to the respective reporting authorities and not the EACC.
103. Additionally, the **TSC** submitted that sub-clause (4)(c) be deleted as it amounts to a violation of privacy contrary to Article 31 of the Constitution.
104. The **Parliamentary Service Commission** proposed amendment of the clause to allow the responsible commission or reporting authority to be responsible and enforce compliance with declaration of income, asset and liabilities and report on non-compliance measures to EACC. Further, it proposed that the clause be amended to allow a public officer to only declare incomes, assets and liabilities of a spouse that are in joint names of the spouses.

Committee Observation

105. The Committee did not agree with the proposals. The Committee noted that the Constitution contains a specific Chapter on Leadership and Integrity which applies to all State and public officers. The Constitution further establishes three arms of government and Commissions and independent offices that are not subject to the direction or control of any other entity. As such, the proposal in the Bill for the EACC to administer the legislation on conflict of interest is derived from Chapter Six of the Constitution and does not affect the independence

of the institutions established by the Constitution and the public and State officers who serve in the institutions.

106. Additionally, the Committee noted that the requirement to include information to a change in the marital status of a public officer in their declarations is to allow the EACC to interrogate the extent to which the conduct of a public officer and the persons within the definition the officer's "family" complies with the requirements of the Bill and the Constitution.

Clauses 32, 33 and 34

107. The **Office of the AG, IEBC, EACC, NLC ODPP and Transparency International** noted a numbering error in the sub-clauses under Clauses 32, 33 and 34 of the Bill.
108. The **LSK** submitted that the timeline for declaration provided under Clause 32(1) of the Bill is too short and inadequate to determine the financial liquidity of a person. Hence, it proposed that the clause be amended to increase that period from one year to three or five years.
109. The **TSC** proposed that Clause 32(4) be amended to provide that a public officer files the final declaration thirty days prior to exit as opposed to after ceasing to be a public officer to allow the reporting entity to enforce the provision.
110. **Transparency International** proposed amending Clause 33(1) of the Bill to have the reporting authority analyse, process and verify the declarations alongside the EACC.
111. The **NPSC** submitted that the declaration referred to in Clause 34(1) excludes wealth declaration as it contains personal information subject to the right to privacy. It added that the consent of a public officer should be sought when such private information is to be shared in accordance with the Data Protection Act, 2019.
112. On Clause 34(8), the **NPSC** submitted that the enforcement agency referred to in the clause be defined to specifically provide for a person employed by the EACC and not all enforcement officers generally. It also proposed the deletion of the words "unrestricted access to the disclosures with" and replacement with "reasonable access upon request on notice to reporting entities". It noted that the right to privacy and access information should be managed through transparent, accountable and lawful means.

Committee Observation

113. The Committee agreed with the proposals relating to the numbering errors identified in Clauses 32, 33 and 34 of the Bill.

114. The Committee, however, did not agree with the other proposals by the LSK, TSC, NPSC and Transparency International relating to the three Clauses. The Committee notes that save for the entity to which reporting is made, the proposals in the Clauses are modelled on the wealth declaration model that is currently followed under the Public Officer Ethics Act, 2003. No compelling justification has been provided to alter this model. Additionally, the proposal for dual scrutiny by the EACC and the entity in which a public officer serves may lead to unnecessary duplication and hamper the realisation of the objectives outlined under the Bill.

Clause 36

115. The NLC proposed the deletion of the words “commits an offence” and substitution with “will be subjected to administrative action for a maximum of two failures and/or violations upon service with Notice of submission of Information”. It noted that the clause as drafted is extremely punitive and that an administrative action such as warning for a first failure suffices. Further, that an offence can only take maximum effect after a maximum of two violations or on the third violation and that proof of service of notice to the person is not necessary.

Committee Observation

116. The Committee agreed with the view that Clause 36(2) is unnecessarily punitive and noted that it further irregularly requires payment of fines to the EACC.

Clause 45

117. The TSC submitted that the clause be reworded to avoid abuse such that the power to take any compliance measures by the Commission is exercised after due process including a fair hearing.

Committee Observation

118. The Committee agreed with the proposal. The Committee noted that it would be prudent for the EACC to observe the various rights guaranteed under the Constitution, including the right to fair hearing and fair administrative action.

Clause 48

119. The **IEBC** and **ODPP** submitted that the clause does not provide the nature and procedure for lodging complaints and investigations. It was its submission that the clause be amended to provide that complaints be lodged attached with evidence to avoid filing frivolous complaints and wasting the EACC's time.

120. The **TSC** proposed that the clause be amended in whole to avoid abuse by expounding it to include other players in the justice sector including the National Police Service and the Directorate of Criminal Investigations in the reporting process, providing the procedure through which information may be processed, and the modalities of investigations.

121. The **Parliamentary Service Commission** proposed that the clause be amended to allow investigations by the responsible commission or reporting authority for complaints of contravention of the provisions of this Act and the responsible commission or reporting authority to report its finding with recommendations within a prescribed period to EACC.

Committee Observation

122. The Committee did not agree with the proposals. The Committee noted that the Clause as read together with clause 49 outlines a comprehensive procedure for the lodging of complaints and the manner in which they are to be processed.

Clause 49

123. The **TSC** was of the view that Clause 49, as drafted, is pre-emptive and thus, should be amended to provide for some form of preliminary inquiry to determine whether a conflict of interest is apparent or not.

124. **Transparency International** proposed that sub-clause (2) be amended to allow a timeline within which complaints ought to be addressed after acknowledgement of the complaint.

Committee Observation

125. The Committee did not agree with the proposals. The Committee noted that the Clause as read together with clause 48 outlines a comprehensive procedure for the lodging of complaints and the manner in which they are to be processed. Given the nature of investigations relating to leadership and integrity and cautious not to unduly fetter the investigations, the Committee noted that it would be imprudent to prescribe a timeline for the conclusion of the investigations by the EACC.

Clause 50

126. The **Judiciary** stated that suspension of public officers under investigation for breach of the proposed Act, as provided for under Clause 50, conflicts with Article 168 of the Constitution which outlines a different procedure for handling investigations against judicial officers and staff of the Judiciary. Thus, it submitted that the Clause be amended to ensure further clarity and to avoid conflict with the Constitution and Judicial Service Act, 2011.
127. The **TSC** also submitted that the clause on suspension from office is subject to abuse and should instead be subjected to the provisions of law governing the operations of the reporting authorities and other statutes.
128. **Transparency International** proposed the addition of the phrase “unless the person is charged in accordance with Section 51(1)(d)” to Clause 50 (2) to align it to Section 62(1) of the Anti-Corruption and Economic Crimes Act, 2003.
129. The **NLC** proposed the addition of the words “may be suspended on full pay” to Clause 50(1) to avoid a declaration of guilty until proven innocent.
130. The **Parliamentary Service Commission** proposed that the suspension of a public official pending investigations be done by the responsible commission or reporting authority where there is a likelihood of interference with evidence, witnesses or the investigations.

Committee Observation

131. The Committee did not agree with the proposals. The Committee noted that the opening statement of subclause (1) clearly subjects the operation of the Clause to the provisions of the Constitution and any other written law. Article 168 of the Constitution would still be the applicable provision to judges. Additionally, the Committee noted that the suspension prescribed under the Clause is to operate pending the laying of charges against a public officer.

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Clause 51

132. The **TSC** proposed deletion of Clause 51(2) on the grounds that recommendations from EACC should not be binding instead, they should remain as best practices.
133. The **ODPP** recommended that the word “Prosecution” be substituted therefor with “Prosecutions” as provided under Clause 51(1)(d) of the Bill.

Committee Observation

134. The Committee did not agree with the proposal by the TSC. The Committee noted that the Constitution mandates the Judiciary to hear and determine cases. As such EACC can rightfully make an application to the High Court for appropriate orders for breach of provisions of the Bill.
135. The Committee agreed with the proposal of the ODPP.

Clause 52

136. The **TSC** proposed amendment of Clause 52 to provide for a lesser fine as a penalty.
137. **Transparency International** proposed the introduction of an additional sub-clause (4) as follows:

“A person who has been prosecuted and found guilty of an offence under this Act shall upon conviction be disqualified from holding any other public office.”

Committee Observation

138. The Committee did not agree with the proposals. The Committee noted that the general penalty prescribed is adequate is a measure likely to deter public officers from engaging in the conduct to which the Bill applies. The Committee further noted that Article 75 of the Constitution clearly outlines the penalty that awaits a person who violates Chapter Six of the Constitution will face.

Clause 54

139. The **ODPP** proposed that Clause 54(1) be reworded to replace the words “is of public interest” with “is in the public interest” to align it to Clause 54(2) of the Bill.
140. **Transparency International** proposed the addition of a new sub-clause to provide for the enhanced protection of whistleblowers and witnesses as follows:

“A whistleblower, informant or a witness in a complaint or a case of conflict of interest shall not be intimidated or harassed for providing information to law enforcement institutions or giving testimony in a court of law. Every reporting institution and law enforcement agency shall put in place reasonable mechanisms to protect the identity of informants and witnesses.”

Committee Observation

141. The Committee agreed with the proposal by the ODPP to amend Clause 54(1) and insert the correct phrase. The Committee was, however, of the view that the submission by Transparency International on the protection of whistleblowers is adequately covered in subclause (1).

Clause 55

142. The **Parliamentary Service Commission** submitted that there is need to define what “good faith” means in the context of the Act since the same can be open to numerous interpretations despite grave impact of the intended legislation on public officials.

Committee Observation

143. The Committee noted that there is no definite and exhaustive definition of the phrase “good faith” and that this would be determined on a case-by-case basis by judicial authorities.

Clause 56

144. The **Office of the AG** and **TSC** proposed the amendment of the clause to provide for a clearer format for the compliance reports referred to therein to aid in the implementation and enforcement of the conflict of interest legislation. The **Office of the AG** further stated that the clause be deleted and substituted therefor with the following new clause:

“Every reporting entity shall, within six months after the end of the financial year, file compliance reports with the Commission in the prescribed form.”

Committee Observation

145. The Committee agreed with the proposal.

Clause 58

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146. The **EACC** stated that while Clause 58 of the Bill provides for the repeal of the Public Officer Ethics Act, 2003 it does not sufficiently provide for a saving clause for the already existing Codes of Conduct and Ethics developed under sections 5 and 6 of the Act.
147. The **IEBC** and **Transparency International** proposed that the Public Officer Ethics Act, 2003 should not be repealed in its entirety since some of its key aspects have not been adequately addressed in the Bill i.e. Part III of the Act on the general code of conduct and ethics; the establishment of specific codes of conduct; performance of duties; professionalism; no improper enrichment; acting for foreigners; care of property; giving of advice; misleading the public; conduct of private affairs; sexual harassment; and reporting improper orders.
148. The **TSC** also submitted that the Bill does not adequately cater to provisions of the Public Officer Ethics Act, 2003, particularly, on sexual harassment.
149. The **PSC** proposed that the Public Officers Ethics Act, 2003 should not be repealed. It noted that the Act was enacted to operationalize Articles 7 and 8 of the United Nations Convention Against Corruption aimed at promoting meritocracy in appointments in the public service.
150. The **Parliamentary Service Commission** submitted that the Bill has a narrow and special focus on conflict of interest leaving out other aspects of ethics in the public service which are well covered under the Public Officers Ethics Act, 2003. It thus proposed that the Bill should amend specific aspects of the POEA that relate to conflict of interest and preserve the POEA as concerns other aspects of ethics in the public service that the Bill has left out.

Committee Observation

151. The Committee did not agree with the proposals. The Committee noted that majority of the provisions contained in the General Code of Conduct and Ethics under the Public Officer Ethics Act, 2003 were reproduced in the General Leadership and Integrity Code under the Leadership and Integrity Act, 2012. The provisions of the Leadership and Integrity Act, 2012 which are proposed for deletion in the Third Schedule to the Bill have been reintroduced in the main body of the Bill. Additionally, the Committee noted that under the Leadership and Integrity Act, 2012, all public bodies are under an obligation to formulate and publish Specific Leadership and Integrity Codes in addition to the General Code.

Clause 59

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152. The **ODPP** submitted that Clause 59, as a saving clause, does not adequately provide for the conduct of ongoing investigations and case pending before the court brought under Section 42 of the Anti-Corruption and Economic Crimes Act, 2003 which it proposes to repeal.
153. The **Judiciary** submitted that the Bill does not contain a substantive clause that would anchor the Codes of Conduct by responsible Commissions as currently provided for under Sections 5 and 6 of the Public Officer Ethics Act, 2003. They urged Parliament to revise the Bill to include a substantive clause empowering the JSC and other responsible Commission to promulgate Codes of Conduct.

Committee Observation

154. The Committee agreed with the proposals by the ODPP on saving any ongoing investigations and prosecutions in relation to offences that the Bill seeks to delete.
155. With regard to the submission by the Judiciary, the Committee was of the view that that majority of the provisions contained in the General Code of Conduct and Ethics under the Public Officer Ethics Act, 2003 were reproduced in the General Leadership and Integrity Code under the Leadership and Integrity Act, 2012. The provisions of the Leadership and Integrity Act, 2012 which are proposed for deletion in the Third Schedule to the Bill have been reintroduced in the main body of the Bill. Additionally, the Committee noted that under the Leadership and Integrity Act, 2012, all public bodies are under an obligation to formulate and publish Specific Leadership and Integrity Codes in addition to the General Code.

Third Schedule: Consequential Amendments

156. The **KNUT** submitted that Section 42 of the Anti-Corruption and Economic Crimes Act, 2003 should not be deleted as it will amount to encouraging agents of public officers and State officers to engage in activities that would cause conflict between the private interests and official duty. It also stated that Section 62(2) of the Anti-Corruption and Economic Crimes Act, 2003 should not be deleted as it is protected by the virtue that it does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.
157. The **KNUT** further submitted that Section 2(2) of the Leadership and Integrity Act, 2012 (LIA) should not be deleted as it emphasizes the change of title as stated in the Constitution.
- Report of the Departmental Committee on Justice and Legal Affairs on the Consideration of the Conflict of Interest Bill (National Assembly Bill No. 12 of 2023)**

Additionally, the Union stated that Section 6(3) of the LIA should not be deleted because it is integral that the POEA forms part of this Code.

158. The **KNUT** noted that Section 59 of the Public Procurement and Asset Disposal Act, 2015 (PPADA) should not be deleted as proposed in the Bill as it will encourage conflict of interest in the discharge of official duties, hence encourage corruption. It thus, proposed that the words “or a Board member of a committee or Board of that State organ or public entity” under Section 59(a) and the words “an officer of that Public entity or State organ” under Clause 59(b) be retained. It further noted that the words “himself and herself” under Section 2(a) of the PPADA should not be deleted.

Committee Observation

159. The Committee did not agree with the proposals. It noted that the consequential amendments contained in the Third Schedule are integral to the shift to one legislation to govern the issue of conflict of interest by public officers.

CHAPTER FOUR

4 COMMITTEE OBSERVATIONS

160. Upon reviewing the Bill and the submissions received, the Committee made the following observations:

- a) The Title of the Bill may be misleading as to its contents and the matters that the Bill seeks to regulate.
- b) The Bill is aimed at regulating the conduct of public officers to enhance integrity in the public service. However, it is important to strike a balance between the public interest and the individual interests of the public officers to avoid imposing unjust restrictions on the activities of public officers.
- c) The Bill makes consequential amendments to delete section 42 of the Anti-Corruption and Economic Crimes Act, 2003 without prescribing adequate saving mechanisms for any offences with ongoing investigations or prosecutions under the provision; and
- d) The Bill seeks to repeal the entire Public Officer Ethics Act, 2003 without providing clear guidance on the status of the provisions that have not been reintroduced substantively in the Bill.
- e) The Bill contains various typographical and cross-referencing errors. The Bill would, therefore, require several amendments to 'clean up' the affected provisions.
- f) The public participation exercise highlighted the need to amend various provisions of the Bill to correct grammatical errors; align the contents with the provisions of the Constitution and written law and to include missing provisions for purposes of clarity and completeness of the proposed legislation.

CHAPTER FIVE

5 COMMITTEE RECOMMENDATIONS

161. The Committee, having considered the Conflict of Interest Bill (*National Assembly No. 12 of 2023*) and the submissions from members of the public and stakeholders, **recommends that the House approves the Bill with amendments as proposed in the Schedule of Amendments.**

SIGNED.....



DATE.....

3/10/2023

HON. GEORGE GITONGA MURUGARA, MP

CHAIRPERSON

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

CHAPTER SIX

6 SCHEDULE OF AMENDMENTS

162. In view of the observations made, the Committee proposed the following amendments to the Bill:

(1) CLAUSE 1

THAT, Clause 1 of the Bill be amended by deleting the words “and shall come into force on such date as the Attorney-General may, by notice in the Gazette, appoint”.

Rationale: To align the commencement of the Act with the provisions of Article 116 of the Constitution.

(2) CLAUSE 2

THAT, Clause 2 of the Bill be amended—

(a) by inserting the following new definition in proper alphabetical sequence—

“conflict of interest” means a conflict between the public duty and private interests of a public official, in which the public official has private capacity interests that could improperly influence the performance of his official duties and responsibilities;

(b) in the definition “family” by deleting the words “common-law partner” appearing in paragraph (a) and (b);

(c) by deleting the definition “unexplained asset” and substituting therefor the following new definition—

“unexplained asset” means an asset of a person whose value is disproportionate to his or her known sources of income at or around that time and for which there is no satisfactory explanation.

(d) by deleting the definition “public officer” and substituting therefor the following new definition—

“public officer” has the meaning assigned to it by Article 260 of the Constitution

(e) in the definition “relative” by deleting the words “common lay partnership”

Rationale: To amend the definitions for purposes of uniformity, clarity and alignment with the provisions of the Constitution and existing laws.

(3) CLAUSE 3

THAT Clause 3 of the Bill be amended in subclause (2) by—

(a) deleting paragraph (c) and substituting therefor the following new paragraph—

“(c) enhance integrity of public office and public confidence in the delivery of public services;

(b) inserting the following new paragraphs after paragraph (e)—

“(f) enhance accountability to the public for decisions and actions by public officers in execution of their duties;

(g) promote selfless service by public officers based solely on the public interest;”

Rationale: for purposes of clarity and alignment of the objects of the Bill with the provisions of Article 73 and 75 of the Constitution.

(4) CLAUSE 6

THAT, Clause 6 of the Bill be amended by inserting the following new paragraph immediately after paragraph (i)—

“(j) Develop policies, standards, guidelines and promote best practices for the management of conflict of interest.”

Rationale: to empower the EACC with an additional function with regard to conflict of interest

(5) CLAUSE 9

THAT, Clause 9 of the Bill be amended in paragraph (b) by inserting the words “to the reporting authority or Commission and comply with any directions to avoid the conflict” immediately after the word “officer”.

Rationale: To identify the entity to which a public officer is required to report any conflict that arises during the discharge of his or her duties.

(6) CLAUSE 11

THAT, the Bill be amended by deleting Clause 11

Rationale: Declaration of conflict of interest in parliamentary debate is adequately covered under the Parliamentary Powers and Privileges Act, 2015 and the County Assemblies Powers and Privileges Act, 2017.

(7) CLAUSE 24

THAT, Clause 24 of the Bill be amended in subsection (2)(c) by inserting the words “subject to the provisions of the Access to Information Act, 2012” immediately after the words “public”.

Rationale: to expressly prescribe the manner in which the Register of Conflict of Interests should be accessible to the public in line with the Access to Information Act, ____ with necessary safeguards

(8) CLAUSE 25

THAT, Clause 25 of the Bill be amended by in subclause (1) inserting the following new paragraph immediately after paragraph (b)—

“(c) engage in political activity that may compromise or be seen to compromise the political neutrality of his/her office.”

Rationale: to add the need for political neutrality in carrying out public duties.

(9) CLAUSE 28

THAT, Clause 28 of the Bill be amended by deleting the word “preceding” appearing immediately after the word “immediately” and substituting therefor the word “after”.

Rationale: to clarify the prohibition on the employment activities of a public officer applies “after” they leave the public service.

(10) CLAUSE 36

THAT, Clause 36 be amended by deleting subclause (2).

Rationale: To remove the requirement it imposes to pay criminal fines to the EACC.

(11) CLAUSE 45

THAT, Clause 45 of the Bill be amended by

(a) renumbering the existing provision as subclause (1);

(b) inserting the following new subclause immediately after subclause (1)—

“(2) In issuing an order under subsection (1), the Commission shall observe the right to fair hearing and fair administrative action.”

(12) CLAUSE 51

THAT, Clause 51 be amended in subclause (1) (d) by deleting the words “Public Prosecutions” appearing immediately after the word “Director” and substituting therefor the words “Public Prosecutions”.

Rationale: To include the proper title of the DPP as provided in the Constitution.

(13) CLAUSE 54

THAT, Clause 54 be amended in subclause (1) by deleting the words “is of” appearing immediately after the words “if the disclosure” and substituting therefor the words “is in the”.

Rationale: To align the subclause with the phrase used in subclause (2).

(14) CLAUSE 56

THAT, the Bill be amended by deleting Clause 56 and substituting therefor the following new clause—

Reports by reporting entities.	56. Every reporting entity shall, within six months after the end of the financial year, file compliance reports with the Commission in the prescribed form.
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Rationale: To provide for a clearer format for the submission of compliance reports to aid in the implementation and enforcement of the conflict of interest legislation.

(15) CLAUSE 59

THAT, Clause 59 of the Bill be amended by inserting the following new subclause immediately after subclause (3)

“(4) Any criminal proceedings commenced under the provisions in the Third Schedule proposed for repeal before the commencement of this Act shall be continued.”

Rationale: To save the conduct of ongoing investigations and case pending before the court brought under Section 42 of the Anti-Corruption and Economic Crimes Act, 2003 which is proposed for repeal.



THE NATIONAL ASSEMBLY
13TH PARLIAMENT – SECOND SESSION - 2023
JUSTICE AND LEGAL AFFAIRS COMMITTEE

ADOPTION SCHEDULE

AGENDA: Adoption of the Report on the Consideration of the Conflict of Interest Bill, 2023 by Hon. Kimani Ichung'wah, MP (Kikuyu Constituency)

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, CBS, 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. ADEN DAUD, EBS, MP	
15.	HON. SIYAD AMINA UDGOON, MP	

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ANNEXURES

