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**THE KENYA
NATIONAL COMMISSION ON
HUMAN RIGHTS**
*Ken Obura**

PART A. INTRODUCTORY COMMENTARY

1 Introduction

This chapter examines the framework and operation of the Kenya National Commission on Human Rights (KNCHR) with a view to evaluating its effectiveness in promoting and protecting human rights in Kenya. The discussion is divided into four parts that focus in turn on the KNCHR's history, structure, mandate and public accountability. The analysis reveals that despite its firm constitutional and legislative foundation, the KNCHR faces a number of challenges that hamper its effectiveness in the promotion and protection of human rights. These challenges range from the legal to the political and operational.

2 Establishment and evolution of the KNCHR

2.1 Establishment

The KNCHR was established in 2011 as a constitutional commission pursuant to Article 59(4) of the Constitution. Article 59(4) gave Parliament the power to restructure the Kenya National Human Rights and Equality Commission (KNHREC), created under Article 59(1) of the Constitution, into two or more separate commissions. In line with this power, Parliament split the KNHREC to form the Kenya National Commission

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on Human Rights (KNCHR),¹ the Commission on Administrative Justice (CAJ),² and the National Gender and Equality Commission (NGEC).³ The KNCHR is given the mandate of promoting and protecting human rights, while the CAJ is to deal with malpractices in the governance and administration of public institutions, and the NGEC is to promote gender equality and non-discrimination.⁴ However, despite the split, the KNCHR remains the recognised human rights institution in Kenya and enjoys “A” status accreditation by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (renamed the Global Alliance of National Human Rights Institutions in 2016).⁵

The KNCHR was established as a national human rights institution (NHRI).⁶ That is to say, it is not part of the traditional executive, legislative and judicial organs of the state, but is created as an independent constitutional commission with the role of promoting and protecting human rights.⁷ As noted by the Supreme Court in *In the Matter of the National Land Commission*,⁸ constitutional commissions are “not a branch of government,”⁹ because, as the Court put it:

[t]hey do not have Governmental power. Unlike the courts, they cannot conclusively declare Government action to be unconstitutional or illegal. Unlike Parliament they cannot require the Executive to resign. Unlike the Executive, they cannot control the legal system by choosing our top judges or control the implementation of policy by managing the budget. They cannot order the Executive to act in a certain way and they cannot penalize unconstitutional behaviour.¹⁰

The KNCHR’s role is thus to complement (not to replace) the state’s legislative, executive and judicial measures taken to fulfil its human rights

1 KNCHR Act 14 of 2011.

2 CAJ Act 23 of 2011.

3 NGEC Act 15 of 2011.

4 See section 8 of KNCHR Act 2011, CAJ Act 2011, and NGEC Act 2011.

5 See Commission on Human Rights, Report of the 2nd International Workshop on National Institutions for the Promotion and Protection of Human Rights, Tunis, 13-17 December 1993, E/CN.4/1994/45 (23 December 1993), paragraphs 60-64.

6 KNCHR Act 14 of 2011.

7 Constitution of Kenya, Articles 59(4), 248 and 249.

8 [2015] eKLR.

9 *Ibid*, paragraph 172.

10 *Ibid*, citing with approval Prof. Christina Murray [in “The Human Rights Commission *et al*: What is the Role of South Africa’s Chapter 9 Institutions?”, in *Potchefstroom Electronic Journal* 2006(2), pp 9-10], in distinguishing the South African Chapter 9 independent commissions and offices (which have similar features to the 2010 Constitution commissions).

obligations.¹¹ Article 59 of the Constitution, which creates the KNCHR, is found in the same chapter as the Bill of Rights, signalling the expectation that the KNCHR is to play the role of guardian of human rights. In addition to the constitutional framework, the KNCHR has enabling legislation, namely the Kenya National Commission on Human Rights Act.¹² The Act confirms the KNCHR as a constitutional commission with a mandate to promote and protect human rights.¹³

2.2 Evolution

The establishment and development of the constitutionally grounded KNCHR took place over three distinct periods in Kenya's constitutional evolution. The first period (1995-2002) saw the initial establishment of the Standing Committee on Human Rights by presidential appointment. During the second period (2002-2010), the KNCHR was established through legislation. The third period ensued after the promulgation of the 2010 Constitution, by virtue of which the KNCHR was re-established as a constitutional commission with a constitutionally entrenched mandate to protect, promote and monitor human rights.

2.2.1 The Standing Committee on Human Rights, 1995-2002

The idea of promoting and protecting of human rights in Kenya by means a specialised body was first actualised in 1995 when the Standing Committee on Human Rights was formed by presidential decree.¹⁴ The creation of the Standing Committee was the culmination of both a relentless push by the opposition for democratic space and the imposition of conditions by the international community following decades of oppression under a one-party state.¹⁵

Initially, the Committee was created as an extension of the ruling party, Kenya African National Union (KANU).¹⁶ However, after human rights advocates criticised its independence and legitimacy, the President

11 For comparison, see C Murray, "The Human Rights Commission *et al*: What is the Role of South Africa's Chapter 9 Institutions?" (2006) 2 *PER*, p 5.

12 Kenya National Commission on Human Rights Act 2011.

13 KNCHR Act 2011, section 4.

14 Republic of Kenya, Gazette Notice No 3842 of 1996, Government Printers, Nairobi.

15 See HP Schmitz, "Transnational Activism and Political Change in Kenya and Uganda," in T Risse-Kappen, SC Ropp and K Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (1999), p 64.

16 *Ibid*, p 64.

sought to make it a national governmental body on human rights,¹⁷ doing so by way of a Gazette Notice issued on 21 June 1996, almost a year after the appointment of the Committee's members.¹⁸ The Gazette Notice also attempted to legitimise the Committee by indicating that it (the Notice) was issued under section 23 of the Constitution, which vested executive powers in the President and was interpreted as including the power to make such appointments.¹⁹

The Committee consisted of ten members drawn from academia, law, social work, farming, and the clergy.²⁰ Its functions were listed as:

- investigating complaints of alleged violation of fundamental rights and freedoms;
- investigating complaints of alleged injustice, abuse of power and unfair treatment of any person by a public officer in the exercise of his or her official duties; and
- educating the public about human rights and freedoms by such means as the Committee deems fit, including by publication, lectures and symposia.²¹

However, like many bodies created by presidential decree, the Committee lacked the attributes of an effective NHRI.²² It lacked adequate independence to check on the government – it was formed at the discretion of the President, its members were appointed and removed by him at his pleasure, and its reports were made to him and published only with his authorisation.²³ Furthermore, the Committee's members worked on a part-time basis, lacked security of tenure and depended on the executive for funding, which in most cases was inadequate.²⁴

The Committee also lacked the powers necessary for executing its mandate effectively – it could neither order the production of documents nor summon witnesses for the purposes of its investigations. Further curtailing its operational capability was the 1996 Regulation on

17 Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa*, USA, Human Rights Watch (2001), available at <https://www.hrw.org/reports/2001/africa/kenya/kenya.html> (accessed 9 February 2019), pp 168-187.

18 Republic of Kenya, Gazette Notice No 3842 of 1996, Government Printers, Nairobi.

19 The Parliament of Kenya, the National Assembly, Hansard Report (5 November 1998).

20 KNCHR, "It's Hard to be Good: The Work, the Wins and Challenges of the Kenya National Commission on Human Rights, July 2003-August 2011", Nairobi KNCHR (2012).

21 See Gazette Notice 3482 of 1996.

22 See SCA General Observations, paragraph 1.1 12.

23 Republic of Kenya, Gazette Notice 2128 of 2000, Government Printers; and Republic of Kenya, Gazette Notice 4148 of 2000.

24 See note 20, p 9.

Organization and Procedures, which was purportedly promulgated by the Committee, and which, among other provisions, limited public statements by the members.²⁵ Even though the legality of the regulation was challenged in Parliament as being beyond the powers of the Committee,²⁶ its promulgation lent credence to the common belief that the Committee was not a genuine effort by the government to address human rights issues but a ruse to appease donors and the opposition.²⁷

Despite the inadequate framework and challenging environment, the Committee was able to contribute towards the improvement of prison conditions, the sensitisation of the public on human rights, the documentation of human rights violations, and the drafting of the Kenya National Commission on Human Rights Bill of 1998.²⁸ The latter Bill heralded the second stage in the journey towards the establishment of a constitutionally protected, specialised and independent human rights body. The Bill was eventually passed by Parliament in 2002 after four years of debate and pressure from the international community.²⁹ The resultant Kenya National Commission on Human Rights Act created the Kenya National Commission on Human Rights as a statutory human rights body.³⁰

2.2.2 *The Kenya National Commission on Human Rights, 2002-2010*

The Commission started operating formally in 2003, shortly after a change in political leadership following the 2002 general elections. It was a vast improvement on the Standing Committee in terms of composition, mandate and practice.³¹ The Commission was composed of a chairperson and eight commissioners, all with knowledge and experience in matters relating to human rights.³² Both Parliament and the President were given a mandate in the recruitment process, with Parliament shortlisting 12

25 Republic of Kenya, Standing Committee on Human Rights (Organization and Procedures) (1996).

26 See note 17.

27 Parliament of Kenya, the National Assembly, Hansard Report (5 November 1998).

28 C Ideke, "Deflectionism or Activism? The Kenya National Commission on Human Rights in Focus", 1 *Essex Human Rights Review* (2004) 40, p 49.

29 See note 17, pp 175-176.

30 KNCHR Act 9 of 2002.

31 See generally K Kindiki, "On the Independence of the Kenya National Commission on Human Rights: A Preliminary Comment" 2 *East African Journal of Human Rights and Democracy* (2004), p 122.

32 KNCHR Act 2002, section 4.

nominees from whom the President would appoint nine commissioners.³³ Given the wave of change in the country at the time, many in the first cohort of commissioners were appointed from the ranks of those in civil society with credible human rights records.³⁴ To ensure the independence of the commissioners, the Act provided security of tenure of five years;³⁵ in addition, it specified grounds for removal in a process that was removed from the control of politicians by virtue of the requirement that the Chief Justice be responsible for appointing the investigating tribunal.³⁶

The mandate of the Commission was broadened to include investigation of human rights violations, awareness-raising, monitoring compliance with international obligations on human rights, and cooperation with other institutions working on human rights issues.³⁷ To facilitate its work, the Commission was endowed with powers enabling it to order the production of documents and summon witnesses for purposes of its investigations.³⁸ The Commission also had the power to order the release of any unlawfully detained or restricted person, order compensation, or order any other lawful and appropriate remedy.³⁹ Such orders could be registered and enforced as High Court orders.⁴⁰

Significantly, the Commission was made an independent body separate from the government, with the attendant powers including those to own property and to sue and be sued.⁴¹ In respect of finances, the Act provided that the Commission's funding be secured through appropriations by Parliament and any other grants or donations.⁴² The Commission was also made accountable to Parliament, with its reports on human rights matters to be made public.⁴³ The reports were required to document an overall assessment of the performance of the government in the field of human rights during the period under review and make recommendations for improvement.⁴⁴

Perhaps because of the activist background of its members, or perhaps because of its secure and enabling framework, the Commission was more

33 *Ibid*, section 6.

34 See note 20.

35 KNCHR Act 2002, section 9.

36 KNCHR Act 2002, section 11.

37 *Ibid*, section 16.

38 *Ibid*, section 19(1) and section 20.

39 *Ibid*, section 19(2).

40 *Ibid*, section 19(4).

41 *Ibid*, section 18.

42 *Ibid*, section 26.

43 *Ibid*, section 21.

44 *Ibid*, section 21.

visible and impactful than its predecessor.⁴⁵ The success of its efforts in monitoring compliance and observance of human rights by the government apparatus was evidenced by the government's effort to curtail its work by going as far as seeking an opinion from the Attorney-General as to whether the Commission had the powers to summon information from government departments.⁴⁶

Some have argued that the Commission's *modus operandi* of monitoring government operation was not appropriate as it led to unnecessary confrontation with government functionaries at the expense of cooperation in the promotion of human rights.⁴⁷ This friction was, however, to be expected given the country's history of rights violations by government institutions, particularly the police, and the protective mandate of the Commission, which required it to demand accountability from the government. Still, the fear that a government constantly in the cross-hairs of the Commission could feel cornered and sway Parliament to repeal the enabling statute was real and a significant factor in the push for the constitutionalisation of the human rights commission.⁴⁸

2.2.3 *Re-establishing the KNCHR as a constitutional commission*

A new constitution was promulgated in 2010 following a decade-long process of constitution-making. Among its progressive provisions was the establishment of the Kenya National Human Rights and Equality Commission (KNHREC) as a constitutional human rights body.⁴⁹ This was in line with the view of the majority of Kenyans, who had consistently indicated their dissatisfaction with a history of commissions that lacked independence and were susceptible to political interference.⁵⁰ Their desire for functionally, operationally and financially independent commissions was finally realised in the 2010 Constitution through the introduction of several constitutional commissions to assist in the implementation of the Constitution, including the KNHREC.⁵¹ Significantly, the Constitution provided that these constitutional bodies and their members were to be

45 See note 20, p 34.

46 LM Mute, "Infusing Human Rights in Policy and Legislation: Experiences from Kenya National Commission on Human Rights", in KC Katiba and CP Maina (eds), *The Protectors: Human Rights Commissions and Accountability in East Africa*, Kampala, Fountain Publishers (2008), pp 34-35.

47 See note 20, p 34.

48 *Ibid.*

49 Constitution of Kenya, 2010, Articles 59 and 248.

50 Republic of Kenya, Constitution of Kenya Review Commission Final Report (2005), pp 111-112.

51 Constitution of Kenya, Article 248(2).

subject only to the Constitution and the law and were not subject to direction from any person or authority.⁵²

In respect of the KNHREC, there were competing claims as to its most desirable architecture, with some advocating for a single entity to deal with human rights issues and others advocating for human rights functions to be split among two or more entities.⁵³ For example, the Bomas draft of the constitution suggested the creation of a single entity, the Commission for Human Rights and Administrative Justice,⁵⁴ while the Wako draft advocated for two commissions, namely a Gender Commission and a Commission on Human Rights and Administrative Justice.⁵⁵ In an attempt to find a compromise between these divergent views, the Constitution gave Parliament the leeway to restructure the KNHREC into two or more entities that could perform thematic human rights functions.⁵⁶ Parliament responded, as already noted, by restructuring the KNHREC into the three bodies (KNCHR, CAJ and NGEC) and assigning each with a distinct thematic focus.⁵⁷

Splitting the KNHREC has, however, introduced some challenges to the overall protection and promotion of human rights. For example, although the various pieces of legislation establishing the three human rights commissions require close working relationships between them to ensure effectiveness,⁵⁸ their current relationship seems strained.⁵⁹ Similarly, even though the task of promoting gender equality and non-discrimination was reserved for the NGEC, the NGEC has not been vigorous in enforcing its mandate, thereby “forcing” the KNCHR to take the lead, at the expense of its core mandate, in a number of important

52 *Ibid*, Article 249(2)(b).

53 The Commission for the Implementation of the Constitution, Second Quarterly Report on the Implementation of the Constitution (June 2011), pp 17-18.

54 The Draft Constitution of Kenya (Bomas Draft, named after the location (Bomas of Kenya) of the constitutional reform conference that adopted it on 15 March 2004. Available at https://katibaculturalrights.files.wordpress.com/2016/04/kenya_4_draft_constitution_bomas_draft_2004.pdf (accessed 2 February 2019).

55 Articles 76 and 77 of the Draft Constitution of Kenya (Wako Draft), named after the Attorney-General, Amos Wako. Available at <http://katibainstitute.org/Archives/images/2-2005-Referendum-Wako-Draft.pdf> (accessed 2 April 2015).

56 Constitution of Kenya, Article 59(4) and (5).

57 *Ibid*, section 2.1.

58 Section 8 of the KNCHR Act 2011; NGEC Act 2011; CAJ Act 2011.

59 See the Senate, Hansard Report, 18 July 2018. See also D Ayega, “Human Rights Bodies Differ on Proposed Merger”, *Capital News* (8 May 2018), available at <https://www.capitalfm.co.ke/news/2018/05/human-rights-bodies-differ-proposed-merger/> (accessed 11 February 2019).

gender-related cases.⁶⁰ Fortunately, Parliament had included, in the three statutes creating each of the three bodies, a proviso allowing for the bodies to be reviewed and restructured after five years to assure their effectiveness. It remains to be seen what the review process, which is long overdue, will determine, given that the three commissions have already expressed divergent views about the way forward, with the KNCHR supporting a merger and the CAJ and NGEC opposing it.⁶¹ This chapter focuses on the KNCHR, which continues to be the internationally recognised human rights institution in Kenya.

3 The institutional framework of the KNCHR

The KNCHR is made up of five commissioners, who are assisted by a professional secretariat.⁶² Article 250(1) of the Constitution provides that a constitutional commission shall consist of “at least three, but not more than nine, members”. Pursuant to this provision, Parliament enacted that the KNCHR commissioners shall be five in number and consist of a chairperson and four commissioners.⁶³ The commissioners’ role is to provide strategic leadership to the KNCHR, develop policies on the promotion and protection of human rights, build strategic partnership with stakeholders involved in human rights, and generally oversee the implementation of the KNCHR mandate.⁶⁴ Commissioners are thus at the helm of the KNCHR, with their work being made possible by a secretariat led by a chief executive or secretary who is accountable to the commissioners.⁶⁵ The secretariat handles the day-to-day operations of the KNCHR and is structured into departments aligned to the specific mandates of the Commission.⁶⁶

60 For example, when Parliament failed to pass legislation that would give effect to the two-thirds gender rule as required by the Constitution, it was the KNCHR, and not NGEC, that joined with civil society groups to petition the courts to force Parliament to act; the NGEC was content to appear as an *amicus curiae* after the filing of the case. See *Centre for Rights Education and Awareness & 2 Others v Speaker the National Assembly & 6 Others* [2017] eKLR.

61 See the Senate, Hansard Report, 18 July 2018.

62 Constitution of Kenya, Article 250(1) read together with Article 250(12).

63 KNCHR Act 2011, section 9.

64 KNCHR, Kenya National Human Rights Commission Strategic Plan 2018-2023, Nairobi, KNHCR (2018), p 62.

65 KNCHR Act 2011, section 21(3).

66 The current departments are: Complaints and Investigation; Research and Compliance; Economic Social and Cultural Rights; Redress; Public Affairs and Communication; Reforms and Accountability; and Support.

3.1 Independence

The entrenchment of the KNCHR in the Constitution clothes it with durability and security given that constitutions by their nature are not easy to amend.⁶⁷ The elaborate procedure for amending the Constitution also serves to bolster the KNCHR's independence in instances where the performance of its functions vexes the government.⁶⁸ In addition, the Constitution gives the KNCHR legally separate existence and endows it with the power to own property and to sue and be sued.⁶⁹ It also specifically provides that, inasmuch as it is a constitutional commission, the KNCHR, along with its commissioners, is subject only to the Constitution and the law and not to the direction of any person or authority.⁷⁰ The commissioners are also granted immunity "for anything done in good faith in the performance of a function of office".⁷¹

As noted, these constitutional provisions have been buttressed by the KNCHR Act, which, in addition to confirming the constitutional status of the KNCHR, gives it a separate existence from the government, with the attendant powers including those to own property and to sue and be sued.⁷² The Act extends immunity from prosecution not only to the commissioners but to the secretariat and agents of the Commission.⁷³ The Constitution⁷⁴ and the Act⁷⁵ further secure the tenure of the Commissioners for six years,⁷⁶ and delineate specific grounds for their removal in a process removed from the exclusive control of the executive by virtue of the requirement that Parliament be involved in debating the merits of any petition and approving it before the appointment of an investigating tribunal.⁷⁷

To ensure that they are fully committed to the KNCHR, the commissioners are appointed on a full-time basis.⁷⁸ Their remuneration is

67 See Constitution of Kenya, Articles 255-257.

68 See Office of the United Nations High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, p 32.

69 Constitution of Kenya, Article 53.

70 *Ibid*, Article 249(2)(b).

71 *Ibid*, Article 250(9).

72 KNCHR Act 2011, section 5. See also Constitution of Kenya, Article 253.

73 Constitution of Kenya, Article 250(9); KNCHR Act 2011, section 25.

74 *Ibid*, Article 251.

75 KNCHR Act 2011, section 16.

76 *Ibid*, section 14.

77 Constitution of Kenya, Article 251.

78 KNCHR Act, section 14(2).

also charged to the Consolidated Funds,⁷⁹ with the Constitution prohibiting downward variation of their remuneration while in office.⁸⁰ These provisions help “[promote] stability, an appropriate degree of management and direction, and limit [...] the risk of members being exposed to conflicts of interest upon taking office”.⁸¹ Commenting on the independence provisions of the constitutional commissions, the Supreme Court held in *Communications Commission of Kenya (CCK) and 5 Others v Royal Media Service*,⁸² that “[o]nce the law, more so the Constitution, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says”.⁸³

3.2 Appointment procedure

The appointment procedures of the KNCHR are provided for in the founding legislation, the KNCHR Act.⁸⁴ The procedures are clear and can be used to ascertain compliance.⁸⁵ The Act also ensures transparency and accountability by unambiguously delineating the minimum qualifications of the members, the process for their appointment, including publication of vacancies and shortlisted names, the timelines for each appointment process, and the responsible body for each stage of the appointment process.⁸⁶ The Act further attempts to shield the appointment process from undue influence by providing for an independent selection panel made up of eight members drawn from diverse sectors of society,⁸⁷ and by involving Parliament in the vetting and approval of the nominated names.⁸⁸ Commenting on the appointment process set out in the Act, the High Court noted in *Brian Weke & Another v Attorney-General & Another*,⁸⁹ that the process was elaborately set out, with a clear delineation of duties, to ensure that “none falters and none delays the appointment process”.⁹⁰

79 Constitution of Kenya, Article 250(7).

80 Constitution of Kenya, Article 250(8). This was informed by past experiences where the government used to cut the benefits and remuneration due to officers of independent commissions as a way of punishing them for failing to follow government directives.

81 SCA General Observations, paragraph 2.2 42.

82 [2014] eKLR.

83 *Ibid*, paragraph 170.

84 KNCHR Act 2011, section 11.

85 SCA General Observations 2013, paragraph 1.8, p 29.

86 *Ibid*, section 11.

87 *Ibid*, section 11(1).

88 *Ibid*, section 11(7).

89 [2014] eKLR.

90 *Ibid*, paragraph 30.

In a nutshell, the process is invoked when a vacancy is declared.⁹¹ It starts with the President, who is required to convene within 14 days a selection panel to handle the selection of suitable candidates for the vacant position.⁹² The selection panel is to be made up of eight members nominated by diverse sectors of society.⁹³ Once established, it is considered an independent body and is required to set down its own procedures; the executive's role is only to facilitate the panel's work by providing it with the necessary facilities.⁹⁴ This independence was confirmed in the case of *Community Advocacy and Awareness Trust & 8 Others v Attorney-General & 6 Others*,⁹⁵ where the court held as follows:

The selection panel provides an independent process to evaluate the competence, integrity and suitability of applicants. This selection panel is intended to insulate the appointment process from the effect of political patronage, nepotism and corruption. The selection panel is entitled to regulate its own process which must meet the constitutional standards of transparency, accountability and public participation.⁹⁶

The selection panel is required, within seven days of being convened, to invite applications and publish the names and qualifications of all applicants in the Gazette and two national daily newspapers.⁹⁷ After receiving applications, successfully shortlisted applicants are invited for interviews, which must be concluded with seven days after the closing date for receiving applications.⁹⁸ As part and parcel of making the process transparent, the list of shortlisted candidates is publicised in the same manner as the vacancy advert, stating the times, venue and supporting documents the interviewees are expected to bring to the interview. At the end of the interviews, at least three names for the chairperson and two names for each commissioner's post⁹⁹ should be forwarded to the President as the list from which to make his or her choices.¹⁰⁰ Within seven days, the Presidency then forwards the names of the nominees to the National Assembly for approval or rejection.¹⁰¹ The National Assembly has 21 days to vet the nominees.¹⁰²

91 KNCHR Act 2011, section 11(1).

92 *Ibid*, section 11(1).

93 *Ibid*, section 11(2).

94 *Ibid*, section 11(3).

95 [2012] eKLR.

96 *Ibid*, paragraph 84.

97 KNCHR Act 2011, section 11(4).

98 *Ibid*, section 11(5).

99 *Ibid*, section 11(4).

100 *Ibid*, section 11(5).

101 *Ibid*, section 11(6).

102 *Ibid*, section 11(7).

If approved, the names of appointees are to be published in the Government Gazette by the President within seven days after receiving the approved list.¹⁰³ Where one or more of the nominees are rejected, the Speaker of the Assembly must communicate the same to the President within three days. Upon receiving the communication, the President must submit to the National Assembly a fresh nomination within seven days from amongst the persons appearing in the original shortlist forwarded by the selection panel.¹⁰⁴

This last requirement of fresh nomination from amongst the persons originally shortlisted was upheld in the case of *Brian Weke & Another v Attorney-General & Another*,¹⁰⁵ where the President's attempt to reconstitute the selection panel for fresh interviews after his nominee was rejected by the National Assembly was successfully challenged. It is only when the National Assembly rejects the second list forwarded by the President that the *same* selection panel will be required to carry out new interviews.¹⁰⁶

In spite of the clear and elaborate appointment procedure set out by the Act, a number of challenges have been noted in its operationalisation. First, despite the clear timelines for appointment, in practice these timelines have not been adhered to. In some instances, the selection panel has not been empanelled immediately after a vacancy has arisen;¹⁰⁷ in other instances the appointing authority has not made appointments despite being given a list of successful interview candidates by the selection panel,¹⁰⁸ or has substituted the names in the list with those not shortlisted by the selection panel.¹⁰⁹ Secondly, the vetting process, which was a new feature added to ensure that the appointment process is not hijacked by political interests of the executive¹¹⁰ and that appropriately qualified and representative commissioners with dedication to human rights are appointed,¹¹¹ has been hijacked in some instances by the political interests

103 *Ibid*, section 11(9).

104 *Ibid*, section 11(11).

105 [2014] eKLR.

106 KNCHR Act 2011, section 11(12).

107 See *Consortium for the Empowerment & Development of Marginalized Communities & 2 Others v Chairman the Selection Panel for Appointment of Chairperson & Commissioners to Kenya National Human Rights Commission & 4 Others* [2013] eKLR.

108 See *Brian Weke & Another v Attorney-General & Another* [2014] eKLR.

109 In 2015 the National Assembly rejected the name of the nominee Dr Samuel Njuguna Kabue as it was not on the list of nominees the selection committee sent to the President. See Panel Hansard, 10 March 2015, pp 13-24.

110 See generally J Kwaka, "Vetting and Social Audit of Leaders", in J Kwaka, O Okombo, *et al* (eds), *Challenging the Rulers: A Model for Good Governance* (2011), pp 236-258.

111 See Public Appointments (Parliamentary Approval) Act 33 of 2011.

of members of the National Assembly. For example, during the selection process of the current commissioners in 2013, the name of one of the shortlisted commissioners,¹¹² which was forwarded to Parliament by the President, was rejected by a number parliamentarians on the ground that he had appeared in a case challenging the constitutionality of the Constituencies Development Fund, a fund controlled by Members of Parliament (MPs).¹¹³

While some of these infractions have been thwarted in Parliament¹¹⁴ and in the courts,¹¹⁵ the delays that occur as a result are inimical to the work of the KNCHR as they deny it the full complement of commissioners required to give it strategic leadership. They also open the door for challenges to the legality of the KNCHR's work. As the High Court held in *Michael Sistu Mwaura Kamau v Ethics and Anti-Corruption Commission & 3 Others*,¹¹⁶ a constitutional commission is not properly constituted if its composition does not meet the number set in law.¹¹⁷

3.3 Financial autonomy

The KNCHR's source of funding is clearly stated in both the Constitution and the KNCHR Act. This assists in binding the responsible authorities and dispels doubt and confusion over sources of funding.¹¹⁸ The Constitution recognises the imperative for the KNCHR, as an independent commission, to be adequately funded as a means of ensuring it enjoys financial independence.¹¹⁹ In this respect, the Constitution provides that "Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote".¹²⁰ The High

112 Vincent Suyianka Lempaa (who was to represent the marginalised communities). See Kenya National Assembly Official Record (Hansard) (4 March 2014), pp 26-27.

113 See Kenya National Assembly Official Record (Hansard) (4 March 2014), pp 26-27.

114 See Hansard (10 March 2015), pp 13-24.

115 See, for example, *Brian Weke & Another v Attorney-General & Another* [2014] eKLR. In the case the issue revolved around the failure or refusal of the President to forward the names of the shortlisted candidates to the National Assembly for nomination and his action to reconstitute a Selection Panel to restart the shortlisting of candidates afresh. The court held that the President's action was illegal and a clear attempt to exert his influence on the Commission through its Constitution.

116 [2015] eKLR.

117 *Ibid*, paragraph 3.

118 See UN Handbook on the Establishment of NHRIs, paragraphs 73-78; Office of the United Nations High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, pp 40-41.

119 Constitution of Kenya, Article 249(3).

120 *Ibid*, Article 249(3).

Court, in the case of *Judicial Service Commission v Speaker of the National Assembly & 8 Others*,¹²¹ has echoed the importance of allocating sufficient funds to constitutional commissions to enable them to perform their mandate without undue influence.¹²²

From the wording of the Constitution, it is Parliament that has the primary responsibility to determine what counts as adequate government funding for the KNCHR. However, the government is not the only source of funding for the Commission. According to the KNCHR Act, the funds of the Commission may consist of monies allocated by Parliament, monies or assets as may accrue to the Commission in the course of the exercise of its powers or in the performance of its functions, and all monies from any other source provided, donated or lent to the Commission.¹²³ with regard to government funding, the KNCHR is required to prepare an annual estimate of its financial requirements and forward it to Parliament, through the cabinet secretary in charge of finance, for approval.¹²⁴ This is a complete departure from the 2002 Act, which invested the minister with the powers to approve its budget. This departure must have been intended to avoid executive control of the Commission through fund allocation.

However, the KNCHR has not always been allocated the funds requested in its budget estimates.¹²⁵ The amount allocated has also decreased over the years despite increasing inflation and increases in government budget allocation.¹²⁶ This could be explained partly by the growing trend for parliamentarians to reduce the amounts allocated to constitutional commissions, which are seen as adding no value to good governance.¹²⁷ While the role of the KNCHR in enhancing open and accountable governance is acknowledged, the fact that it is a constitutional commission could mean that it is lumped together with the other constitutional commissions. For example, in 2014 Parliament threatened

121 [2014] eKLR.

122 *Ibid*, paragraph 213.

123 *Ibid*, section 45.

124 *Ibid*, section 46.

125 Republic of Kenya Governance, Justice, Law and Order Sector (GJLOS), Report for Medium-Term Expenditure Framework (MTEF) Period 2013/14-2015/16 (October 2012), available at <https://bit.ly/2J1wJTf> (accessed 12 June 2014).

126 For example, in 2007/2008, the Commission received 32 per cent of the funds it had sought; in 2008/2009, 28 per cent; in 2009/2010, 37 per cent; in 2010/2011, 24 per cent; in 2011/2012, 71 per cent; in 2013/2014, 68 per cent; in 2015/2016, 67 per cent; in 2017/2018, 68 per cent; and in 2018/2019, 63 per cent in terms of its estimated approved budget. See the respective annual reports, available at the KNCHR website (accessed 20 January 2019).

127 A Shiundu, "Kenyan MPs Hit Back in Fight over Pay", *The East African* (30 May 2013), available at <https://bit.ly/2KSFnpE> (accessed 5 February 2019).

to reduce the composition of all commissions, including the KNCHR, to three members to stem a rising government wage bill.¹²⁸ Moreover, the protective mandate of KNCHR, which requires that it sometimes challenges government action, can provide a further incentive for the government to use financing to emasculate its work.¹²⁹

At any event, the consistent inadequacy of funding has had a negative impact on the ability of KNCHR to perform its mandate and has posed a threat to its independence. The challenge to performance has been seen, for example, in its inability to open enough branches across the country¹³⁰ and to employ enough staff to carry out its mandate.¹³¹ The threat to independence arises from the likelihood that the KNCHR will be reluctant to criticise the government for fear of having its funding further reduced or being forced to rely extensively on donor funding, with all the conditions that are usually attached to it.¹³²

3.4 Professional skill and knowledge

As already noted,¹³³ the KNCHR is made up of commissioners (a chairperson and four commissioners) and a secretariat headed by the chief executive or secretary. To qualify for the position of Secretary of the Commission, one must be a citizen of Kenya, have a degree from a university recognised in Kenya and have at least ten years' proven experience at management level.¹³⁴ Additionally, such an individual must meet the requirements of Chapter 6 of the Constitution.¹³⁵ Chapter 6 provides the minimum requirements for the integrity expected of public officials and leaders. The KNCHR Act and Constitution thus expect the incumbent to be a highly qualified individual capable of performing the functions of the office of the secretary. The secretary is assisted by staff recruited on the basis of their competence to handle any of the various

128 See L Aluanga-Delvaux, "It's Mixed Reactions To Proposals To Cut down on Commissioners", *Standard Digital* (16 March 2014), available at <https://bit.ly/2xy6PQN> (accessed 9 February 2019).

129 E Mutai, "House Frees Sh1.3bn after Slashing Commission Budgets", *Business Daily* (June 2013), available at <https://bit.ly/2JJvLt> (accessed 15 January 2019).

130 See the discussion on accessibility in section 3.7.

131 See the discussion on accessibility in section 3.7.

132 See Paris Principles B.2; SCA General Observations, paragraph 1.10 on "Adequate funding of NHRIs".

133 *Ibid*, section 3.

134 *Ibid*, section 21(2).

135 *Ibid*, section 21(2).

aspects of the KNCHR's work, including research, advocacy, lobbying, training, outreach, and investigations.¹³⁶

The criteria for appointment as chairperson of the Commission include having a degree and at least 15 years' experience in matters relating to law and human rights.¹³⁷ Such an individual also has to meet the integrity requirements of Chapter 6 of the Constitution.¹³⁸ While the requirement of expertise in law does not restrict the chairperson to persons with a legal background, the trend in appointment of KNCHR chairpersons, including the current one, is that all have had a legal background. This trend seems to be informed by the fact that most of Commission's work involves the law, including its mandate in quasi-judicial matters, which necessitates that the persons who lead the KNCHR have the requisite legal expertise to be effective in this regard.¹³⁹

The Act also lays out the requirements for the rest of the commissioners of the KNCHR. These requirements are not very different from those pertaining to the chairperson, except that the experience is reduced to ten years and the fields in which the experience is required is expanded to include law, public administration, economics or finance, gender and social development, human rights, management, or social sciences.¹⁴⁰ The qualifications required show a trend towards professionalisation of the KNCHR – they are such that the chances of hiring incompetent members are lessened. The long years of experience required also decreases the risk of undue influence, in that such a firm foundation would tend to endow the commissioners with the skill to deal with the pressures that come with the job. The expansion of the fields of expertise for commissioners is also beneficial given that the field of human rights is an interdisciplinary one. The flipside of these rigorous academic requirements, however, is that they lock out potential candidates who might not have the papers but who possess important areas of expertise required in human rights work, such as ability in grassroots mobilisation.

To safeguard the integrity of the KNCHR, the Act lists categories of people who are not qualified for appointment as chairperson or members. These include serving members of Parliament (MPs) or County Assemblies (MCAs), an undischarged bankrupt, or any person removed from office for contravening the Constitution or other law in the

136 *Ibid*, section 23.

137 *Ibid*, section 6(1).

138 *Ibid*, section 10(1)(a)-(c).

139 See K Mechlem, "Treaty Bodies and the Interpretation of Human Rights", 42 *Vanderbilt Journal of International Law* (2009), pp 917-918.

140 KNCHR, section 10(2)(a)-(c).

country.¹⁴¹ Excluding serving MPs and MCAs is necessary to avoid conflicts of interest, especially given that the KNCHR is ultimately accountable to the people through the latter's representatives. Barring undischarged bankrupt individuals and those removed from office for contravening the law is also important as appointing such individuals might engender distrust and lack of confidence in the KNCHR among members of the public, a situation which would be inimical to the effective functioning of KNCHR.

An evaluation of the practice followed in appointments in the light of the legal requirements reveals that, since the inception of the institution, the qualifications of KNCHR members and staff has been faithful by and large to the legal requirements.¹⁴² Matched against the criteria in the KNCHR Act, the current cohort of commissioners and secretary can be said to be qualified experts.¹⁴³

3.5 Relations with civil society

Unlike the 2002 Act, which expressly required the KNCHR “to encourage the efforts of other institutions working in the field of human rights and cooperate with such other institutions for the purpose of promoting and protecting human rights in Kenya”, the 2011 Act is silent on the relationship between the KNCHR and civil society. The Act provides only that the Commission shall “work with the National Gender and Equality Commission and the Commission on Administrative Justice to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration”.¹⁴⁴ This notwithstanding, the KNCHR has continued to collaborate with civil society organisations (CSOs) to pursue its objectives.¹⁴⁵

So far, these relations have had mixed results. The CSOs were instrumental in ensuring that KNCHR legislation was passed as the basis for forming the KNCHR. However, following the KNCHR's formation, they began worrying that the KNCHR would impinge on turf which until then was wholly dominated by human rights CSOs. Their concerns were that the development funding traditionally disbursed to them would now be invested in the Commission.¹⁴⁶ Because of the civil society's

141 *Ibid*, section 10(3).

142 See the profiles of the chairperson, commissioners and secretary at knchr.org (accessed 20 February 2019).

143 *Ibid*.

144 KNCHR Act 2011, section 8(h).

145 See, for example, KNCHR, Annual Report 2015/2016, Nairobi, KNCHR (2016).

146 See note 20, p viii.

instrumental role in the formation of the KNCHR, there has also been a perception or expectation that the KNCHR should in every instance articulate the agenda of the CSOs where there is a conflict between CSOs and the government.¹⁴⁷ These expectations have threatened to derail the relationship between the KNCHR and civil society. How the KNCHR manages them will determine how successful its relations are with this important partner in the protection and promotion of human rights.

3.6 Accessibility

To address the issue of accessibility, the Constitution and KNCHR require that diversity and representivity be considered during the appointment process.¹⁴⁸ The link between diversity in composition and accessibility is that diversity fosters a sense of involvement and engenders acceptance and support across all segments of society, which is necessary if these segments are to entrust the Commission with their human rights problems.¹⁴⁹ The Constitution specifically provides that appointments should reflect ethnic diversity and regional balance and at the same time ensure that no more than two-thirds of the appointees are persons of the same gender.¹⁵⁰

The constitutional provision of diversity in appointment has been the subject of litigation in a number of cases. For example, in the *Consortium for Empowerment and Development of Marginalized Communities* case,¹⁵¹ which dealt with a petition challenging the ethnic composition of candidates shortlisted to serve as commissioners of the KNCHR, the court held that in reading Article 250 of the Constitution and section 11 of the KNHCR, one cannot take a single constitutional commission or independent office and argue that because a particular region or ethnic group has not been represented, there has been a breach of the Constitution. To hold so would lead to an absurdity, given the high number of ethnic groups in the country and the few number of posts (five) in the KNCHR.¹⁵² Similarly, in the case of *Centre for Rights Education and Awareness & 2 Others v Speaker the National Assembly & 6 Others*,¹⁵³ the court held that pursuant to Articles 81 and 27 of the Constitution – which provide, respectively, for a two-thirds gender rule in the electoral process and affirmative action in correcting historical disadvantages – the

147 *Ibid.*

148 Constitution of Kenya, Article 250(4); KNCHR Act 2011, section 11(13).

149 See SCA General Observations, 20-21.

150 Constitution of Kenya, section 250(4); see also KNCHR Act 2011, section 7.

151 [2013] eKLR.

152 *Ibid.*, paragraph 38. See also *Community Advocacy and Awareness Trust & 8 Others v Attorney-General & 6 Others* [2012] eKLR paragraphs 9.

153 [2017] eKLR.

government “is required to develop policies and laws to ensure that not more than two-thirds of *elective or appointive* bodies shall be of the same sex”.¹⁵⁴

Based on the courts’ interpretation, the appointing authority has to take into consideration several factors, such as gender, ethnicity, regional balance and special interests (marginalised communities, youth and people with disabilities), and ensure broad representation of the country across all state and constitutional office appointments. In the interests of accessibility, the appointment of KNCHR commissioners, and by extension the hiring of staff, should be illustrative of Kenyan society, with no single community or segment dominating. As at the end of 2018, the KNCHR had not disaggregated its staff in terms of regional or ethnic background. It had a total of 113 employees, 67 of whom were male and 44, female. Of the 113, 79 were based at the headquarters and the remaining 24 were shared among the five regional offices. Two of the employees (male) were persons with a disability.¹⁵⁵ In addition, the Commission had three female and two male commissioners.¹⁵⁶ This complement, while meeting the two-thirds gender rule, was still inadequate in serving the country’s human rights’ needs.¹⁵⁷

In addition to representivity in composition, accessibility requires that the KNCHR be visible and physically available to citizens who need its help in vindicating their rights. Visibility and physical availability can be ensured by putting offices at strategic geographic locations where it is easy to gain access to the KNCHR’s offices. The Constitution entrenches devolution and requires access to services at both the county and national level.¹⁵⁸ In terms of this constitutional requirement, the KNCHR Act mandates the Commission to devolve its services by establishing branches at any place in Kenya.¹⁵⁹ So far, however, the KNCHR has opened only six offices (five regional offices and its headquarters in Nairobi) to serve all

154 *Ibid.*

155 KNCHR, Kenya National Commission on Human Rights: Annual Report for the 2017/2018 Financial Year, KNCHR (2018).

156 *Ibid.*

157 *Ibid.*

158 Constitution of Kenya 2010, section 6.

159 KNCHR Act 2011, section 6.

47 of the counties in the republic.¹⁶⁰ This limits the accessibility of the KNCHR to merely the few regions where it has a presence. To make matters worse, the offices are all situated in major towns, thus disadvantaging those from rural areas.

The KNCHR has tried to address its problems of accessibility by holding quarterly human rights clinics countrywide to interact with members of the public and educate them about their rights.¹⁶¹ The seasonal nature of these clinics, however, does little to mitigate the problem. More significantly, the KNCHR has introduced mobile-telephony short message and bulk message services by means of which petitioners can report complaints and receive status updates on them. This has enabled the public, especially in areas where the Commission does not have physical offices, to lodge complaints without having to incur the expense of travelling to the Commission's premises.¹⁶²

Another important factor in accessibility is language. The KNCHR publishes its reports or pamphlets mainly in English, along with a few in Swahili. The implication is that people who do not have a reading knowledge of these languages will be unable to understand them. Moreover, the language of communication for most of the employees of the Commission is restricted to English and Swahili, making it hard for them to interact with community members whose local language they do not understand. The circulation of these publications is also limited to those with access to the internet and newspapers, effectively locking out those without access to these media of communication.

4 The functional framework of the KNCHR

According to Burdekin, an effective and well-functioning NHRI should have, at a minimum, "a clearly defined, broad-based human rights mandate, incorporated in legislation or (preferably) constitutionally entrenched".¹⁶³ The entrenchment of its mandate in legislation helps safeguard the independence and autonomy of the NHRI; it also ensures

160 The five regional offices are found in Kitale (to serve North Rift region); Mombasa (to serve Coastal region); Kisumu (to serve Western region); and Nyahururu (to serve Central region).

161 Complaints and Investigations, available at <http://www.knchr.org/Departments/ComplaintsInvestigation.aspx> (accessed 10 February 2019).

162 KNHCR, Annual Report for the 2015/2016 Financial Year (2016), KNCHR, p 50.

163 B Burdekin and J Naum, *National Human Rights Institutions in the Asia Pacific Region*, Martinus Nijhoff Publishers, Leiden (2007).

that it is held accountable in terms of what is prescribed in law.¹⁶⁴ The need for a defined mandate stems from the possibility that some of the functions of an NHRI could be carried out by other institutions, thereby creating overlapping mandates.¹⁶⁵ Addressing this is especially important in jurisdictions, such as Kenya, that have an NHRI as well as other specialised institutions dealing with specific rights and maladministration.

Both the Constitution and the KNCHR Act endow the KNCHR with a human rights mandate, which hinges on two mutually inclusive roles: human rights protection (watchdog roles) and human rights promotion (advisory roles).¹⁶⁶ Consequently, the KNCHR has the required legitimacy, in terms of the Constitution and legislation, to be at the forefront of promoting and protecting the human rights of all within the borders of Kenya.¹⁶⁷ Within this broad mandate, the KNCHR has specific functions, including monitoring, advising, reviewing laws, investigating, and raising public awareness. These functions are explained below.

4.1 Commenting on existing and draft laws

To ensure that legislation is aligned with human rights principles, the KNCHR is mandated to review proposed or existing legislation and, through the relevant parliamentary committees, issue advice to Parliament on the constitutionality and appropriateness of such legislation and its impact on human rights. By end of 2018, it had reviewed eight bills, three laws, six policies and two administrative decision¹⁶⁸ and submitted an equal number of advisories to relevant policy-makers and focal points of legislation and policy.¹⁶⁹ An audit of the uptake of its recommendations showed that 44 per cent of the proposals the Commission made to Parliament were accepted and incorporated in the ensuing legislation.¹⁷⁰

The KNCHR also uses public interest litigation (PIL) to influence policy direction and interpretation of the Constitution through the judicial process. It participates in PIL either by originating petitions in its own

164 Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments (Belgrade, Serbia, 22-23 February 2012), available at <https://bit.ly/2NFaCXp> (accessed 12 January 2019), paragraphs 20-40.

165 See UN Handbook on the Establishment of NHRIs, paragraphs 86-94.

166 Constitution of Kenya, Article 59(4) read together with KNCHR Act 2011, section 8.

167 See LC Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection", 13 *Harvard Human Rights Journal* (2000), p 19.

168 Presidential Proclamation on Fresh Vetting of Public Office.

169 KNCHR, Sub-sector Report, Governance Justice Law and Order Sector (September 2018).

170 *Ibid.*

name or by joining existing petitions which have been filed by other parties and that have a major public interest component, doing so either as an *amicus curiae* or an interested party. This power to engage in public interest litigation was initially opposed by the state, which argued that the KNCHR is a part of the government. However, the court rejected the pleading in *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others*,¹⁷¹ by holding that the Commission “is entitled to lodge a petition seeking interpretation of legislation that is deemed to violate or threaten violation of the human rights and fundamental freedoms of individuals which it is constitutionally mandated to safeguard”.¹⁷² By end of 2018, the KNCHR had participated in 45 PIL cases,¹⁷³ a number of which led to policy and legal changes.¹⁷⁴

Nonetheless, the KNCHR faces capacity challenges in reviewing legislation from Kenya’s bicameral national legislature and 47 county assemblies; by end of 2018 it had only 20 lawyers in its permanent employ.¹⁷⁵ There is also no structured framework in place for engagement between the KNCHR and Parliament. Furthermore, even though its mandate extends to auditing existing laws to advise the relevant government departments on their compliance with human rights provisions, so far it has focused only on reviewing draft bills, which attests to the lack of an independent human rights audit of the laws since the enactment of the Constitution in 2010.

171 *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others* [2015] eKLR.

172 *Ibid.*

173 KNCHR, Programme Performance-Based Budget (PBB) (September 2018).

174 See, for example, *Baby “A” (Suing through the Mother EA) and Another v Attorney-General and 6 Others* [2016] eKLR (where the court upheld the right of intersexual children); *KNCHR & Kituo cha Sheria v the Hon. Attorney-General & Others* [2016] eKLR (the court held that the directive of government closing a number of refugee camps was unconstitutional); *Kenya National Commission on Human Rights v Attorney-General & Another* [2015] eKLR (the court declared unconstitutional the Presidential Retirement Benefits (Amendment) Act 9 of 2013); *Coalition for Reform and Democracy (CORD) & Another v Republic of Kenya & Another* [2015] eKLR (the court declared unconstitutional the Security Laws (Amendment Act) 2014 for infringing a wide range of human rights); *Francis Kariuki Muruatetu & Another v Republic & 5 Others* [2016] eKLR (the Supreme Court held that the mandatory death sentence infringes the right to fair trial); and *LNW v Attorney-General & 3 Others* [2016] eKLR (where the court declared unconstitutional section 12 of the Registration of Births and Deaths Act, which contains the requirement of the consent of a father of a child born out of wedlock to have his name entered in the births register and the child’s birth certificate).

175 KNCHR, Annual Report 2017/2018, Nairobi (2019).

4.2 Monitoring domestic human rights situations

The KNCHR has a mandate under the Constitution¹⁷⁶ and the KNCHR Act¹⁷⁷ to monitor the observance of human rights in all spheres, including within national and county governments, businesses and private entities.¹⁷⁸ It uses a number of strategies to realise its monitoring mandate. One of them is conducting visits to targeted institutions. For example, by end of 2018, the KNCHR had visited 99 detention centres (police cells, borstal institutions and prisons) to assess the compliance of the targeted centres with human rights principles relating to places of detention.¹⁷⁹ Information obtained in these monitoring visits is usually compiled in a report and used to highlight areas that need to be improved to promote greater enjoyment of human rights.

The Commission also sends its representatives to form part of the task forces appointed by the government on human rights issues. For example, it is part of the task force on the death penalty appointed by the Attorney-General to advise the government on a framework for implementing a Supreme Court decision on the constitutionality of the sentence. It is also part of a task force advising the government on the implementation of a decision of the African Court on Human and Peoples' Rights in respect of the land and cultural rights of a minority community in Kenya, as well as a task force on policy and legal reforms regarding intersex persons.¹⁸⁰

In some cases, the courts have appointed the KNCHR to monitor human rights compliance in cases before them. For example, in *Miguna Miguna v Fred Okengo Matiang'i, Cabinet Secretary, Ministry of Interior and Coordination of National Government & 6 Others*, involving the forceful deportation of a Kenyan political activist whose citizenship the government contested, the High Court appointed the Commission to monitor the safe passage of the petitioner back into the country.¹⁸¹

The focus of the KNCHR's monitoring has been on government agencies.¹⁸² Its monitoring of the private sector, conducted through its business and human rights portfolio, has remained largely *ad hoc* and

176 Constitution of Kenya, Article 59(2)(d).

177 KNCHR Act 2011, section 8(c).

178 *Ibid*, section 8(c).

179 See note 173.

180 See note 175.

181 [2018] eKLR.

182 See note 175.

entailed giving awards for human rights compliance.¹⁸³ Such work has also involved mapping the country's hotspots for violence and monitoring human rights compliance in these areas – this was the approach the Commission adopted during the 2013 general elections.¹⁸⁴ Most recently it monitored the general election of 2017, producing three reports detailing the human rights situation before and after the election.¹⁸⁵ Monitoring elections is a carry-over from the practice of its predecessor, whose report of the 2007/2008 election – detailing widespread and systematic killings of more than 1,500 people and the displacement of more than 300,000¹⁸⁶ – formed part of the material on which the International Criminal Court prosecutor relied in investigating the Kenyan situation.

Apart from being presented in individual reports, the findings of these monitoring efforts are published in an annual independent alternative report alongside the presidential address on Kenya's compliance with the values and principles of good governance. The alternative report aims at giving an independent assessment of governmental compliance with human rights.

4.3 Monitoring and advising on compliance with international standards

The KNCHR is mandated to monitor state compliance with human rights treaties. This mandate involves recommending the review of legislation to bring it in line with international standards and where necessary offering support to organs of state on the compilation of reports due to treaty monitoring bodies. Such assistance is usually in the form of advice and general guidance on what information to include in the reports. Where possible, the KNCHR compiles alternative reports, on its own or with NGOs, that assess the measures taken by the government to fulfil its treaty obligations. The alternative reports are aimed at providing “information in

183 S Muhindi, “KNCHR Awards Wells Fargo, KK Security for Good Working Terms”, *The Star* (12 September 2017).

184 KNCHR, 2013 Elections: Safeguarding Rights: An Account of Hotspots, Elections 2013, Nairobi, KNCHR (2013).

185 KNCHR, *Fallacious Vote – A Human Rights Account of the 2017 Party Primaries*, Nairobi, KNCHR (2018); KNHRC, *The Mirage at Dusk: A Human Rights Account of the 2017 General Election*; and “Still Mirage: A Human Rights Account of the Fresh Presidential Polls, Nairobi, KNCHR (2018).

186 KNCHR, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, Nairobi, KNCHR (2008).

relation to the Kenyan government's efforts towards meeting its obligations" and "to guide the work of the treaty bodies".¹⁸⁷

In fulfilment of this mandate, by end of 2018 the Commission had prepared a report on the International Covenant on Civil and Political Rights (ICCPR) and a response to a list of issues under the Convention against Torture (CAT) to be submitted to the relevant treaty bodies. The two documents received input from CSOs and independent commissions. During Kenya's review by the Committee on the Elimination of Racial Discrimination (CERD), the Commission also engaged the CERD committee in a side event and briefed them on the human rights situation in Kenya.¹⁸⁸

4.4 Educating and informing

The KNCHR has been tasked with promoting respect for human rights and developing a culture of human rights.¹⁸⁹ A human rights culture refers to the totality of beliefs, principles and values underlying human rights.¹⁹⁰ Promoting respect for human rights and developing a human rights culture entail creating awareness of the rights and obligations underpinning human rights.¹⁹¹ As such, the KNCHR's mandate to publicise and provide education on human rights is significant.

This mandate is entrenched in the Constitution and KNCHR Act.¹⁹² It requires the KNCHR to formulate, implement and oversee programmes intended to raise public awareness of the rights and obligations of a citizen under the Constitution.¹⁹³ Public awareness programmes undertaken by the Commission should therefore focus on reaching all within the country by taking into consideration, among other things, the variety of languages spoken in the country, levels of education, and levels of economic empowerment.

187 KNCHR, *Alternative Report to the Committee on Elimination of all Forms of Racial Discrimination* (2016); *Report to the Committee against Torture on the Review of Kenya's Second Periodic Report on Implementation of the Provisions of the International Covenant against Torture and Other Cruel, Inhuman and Degrading Treatment and/or Punishment* (2013).

188 *Ibid.*

189 KNCHR Act 2011, section 8(a).

190 See D Irina, "A Culture of Human Rights and the Right to Culture", 1 *Journal for Communication and Culture* (2011), p 37.

191 See *Public Education on Human Rights*, available at <https://bit.ly/2J3hgCo> (accessed 6 January 2019).

192 Constitution of Kenya, Article 59(2); KNCHR Act 2011, section 8(g).

193 KNCHR Act 2011, section 8(g).

The KNCHR, in accordance with its mandate, has been conducting targeted training on human rights standards and principles. By end of 2018, it had trained a total of 326 public officers and sensitised more than 10,700 members of the public. The public officers were trained on human rights standards and principles, with the objective of improving their application of these standards and principles in organisational processes. The sensitisation of the public, on the other hand, was aimed at empowering communities to claim their rights and know where to report if their rights are violated. In addition to hosting workshops and providing general sensitisation, the KNCHR develops and disseminates training and other materials on thematic human rights areas for the public to use as reference guides.¹⁹⁴

To expand its outreach within its limited means, the KNCHR has been collaborating with education institutions to assist them in mainstreaming human rights issues in their curricula. It has signed a Memorandum of Understanding with Laikipia University and the University of Nairobi to help with the content of a basic course on human rights taken by all first-year students. In its current strategic plan, KNCHR intends to expand the collaboration to include, among other institutions, the Kenya School of Government, which is responsible for training senior government officials, and the Kenya Institute of Curriculum Development, which is responsible for developing curricula for primary and secondary schools.¹⁹⁵

4.5 Receiving and dealing with complaints and petitions

The KNCHR is empowered to receive complaints in terms of section 32 of the KNCHR Act. The Act allows for the lodging of complaints orally or in writing, and encourages a speedy process of investigation and resolution.¹⁹⁶ The KNCHR is also empowered to initiate investigations on its own motion or through referrals from other bodies.¹⁹⁷ However, it cannot deal with complaints or matters pending before courts or judicial tribunals; any matter under investigation by any other person or commission established under the Constitution or any other written law; any matter relating to foreign affairs; any matter relating to the exercise of the prerogative power of mercy; or any matter in respect of which there is a right of appeal or where another legal remedy exists.¹⁹⁸

194 Planning and Training Department, available at <https://bit.ly/2J0NQoh> (accessed 10 April 2017).

195 KNCHR Strategic Plan 2015-2018.

196 KNCHR Act 2011, section 33.

197 *Ibid.*

198 *Ibid.*

The KNCHR has the discretion to accept or decline the investigation of complaints.¹⁹⁹ However, the court held in *Isaac Aluoch Polo Aluochier v Kenya National Commission on Human Rights & 4 Others*,²⁰⁰ that the discretion to admit complaints is an administrative function amenable to judicial review and should ordinarily fall within the prescribed grounds set out under section 34 of the KNCHR Act.²⁰¹ The complaints-handling process is also required take into consideration the rules of natural justice by allowing adversely mentioned parties an opportunity to make presentations before the KNCHR issues recommendations.²⁰² To facilitate its investigation of the reported complaints, the KNCHR has been endowed with quasi-judicial powers under the KNCHR Act²⁰³ and the Constitution.²⁰⁴ These powers include the powers to order the production of documents and to summon witnesses for purposes of its investigations.²⁰⁵

The KNCHR is, however, yet to devise regulations to guide the exercise of these powers.²⁰⁶ This delay in prescribing regulations can be attributed partly to the High Court judgment in *Kenya Commercial Bank Ltd (KCB) v KNCHR*,²⁰⁷ in which the court declared the Complaints Procedures Regulation, promulgated in 2005 by the first KNCHR, as *ultra vires* because there was no provision in the KNCHR Act of 2002 for the creation of a hearing panel to settle human rights complaints.²⁰⁸ Fear of a similar ruling has caused the current KNCHR to refrain from using these powers until it has drafted regulations that are in line with Act and the Constitution.

The KNCHR does not have prosecutorial powers and instead forwards its cases to the Director of Public Prosecution (DPP) with a recommendation for prosecution. This handicap poses a challenge to the Commission in instances where its summonses to appear or produce documents are ignored. Although the Act provides for a penalty of a fine not exceeding one million shillings or a penalty of imprisonment for a term

199 KNCHR Act 2011, section 34.

200 [2016] eLKR.

201 The two grounds are (1) existence of adequate remedies under any written law or administrative practice; or (2) if the complaint is trivial, frivolous, vexatious or is not made in good faith.

202 *Ibid*, sections 35, 36 and 39.

203 *Ibid*, section 27.

204 Constitution of Kenya, Article 252(1) and (3).

205 *Ibid*, Article 252(1) and (3).

206 KNCHR Strategic Plan 2015-2018.

207 Misc. Application No 688 of 2006.

208 *Ibid*.

not exceeding two years, or both, the enforcement of the provision depends on the DPP. This challenge has led some detractors, such as the police, to deride the Commission as “a meaningless busybody out to accuse the police force falsely with baseless claims”.²⁰⁹ To compound the problem, section 19(4)-(6) of the 2002 Act was repealed – it had allowed, for example, for an interested party, on application, to get the KNCHR’s recommendations made an order of court if such application was uncontested.²¹⁰ The effect of this repeal by the 2011 Act was to weaken the court-type powers of the KNCHR.

Despite some of the inherent weaknesses in its enabling laws, the KNCHR has been utilising the complaints-handling provisions in the execution of its mandate. According to its annual reports, the number of complaints received is increasing exponentially,²¹¹ most of them relate to socio-economic rights,²¹² and more complaints are reported by men than by women.²¹³

Statistics from the past two reporting cycles²¹⁴ reveal that most of the complaints originated in urban areas, with the majority of them received at the Nairobi office.²¹⁵ The KNCHR attributes this to the proximity of its offices to the urban population and the fact that awareness of human rights is still lacking among the majority of Kenyans.²¹⁶ In an effort to make the complaints- lodging process more widely accessible, the Commission accepts complaints through various means, including through walk-ins to KNCHR offices and by phone, email, short message service (SMS), post, fax and online submission; it also receives referrals from the Integrated Public Complaints Referral Mechanism (IPCRM) established in 2014.²¹⁷

209 KNCHR, Annual Report for the 2015/2016 Financial Year (2016), KNCHR, p 50.

210 There is no record of this power having been used, perhaps explaining its exclusion from the 2011 Act.

211 The statistics are: 1,797 in 2013/2014 and 2,749 in 2015/2016.

212 The statistics are: 64.3 per cent compared to 26.2 per cent of civil political rights and 9.46 per cent of group right in 2013/2014; 58.9 per cent compared to 29.1 per cent of civil political rights and 12 per cent of group rights in 2015/2016.

213 The statistics are: 71.6 per cent in 2013/2014 and 69.2 per cent 2015/2016 compared to female complainants of 28.4 per cent in 2013/2014 and 30.8 per cent 2015/2016.

214 For 2013/2014: Nairobi Office 820 (45.63%), North Rift Regional Office 451 (25.10%), North Eastern Regional Office 133 (7.40%), Coast Regional Office 340 (18.92%) and Kisumu Regional Office 53 (2.95%). For 2015/2016: Nairobi Office 1,855 (35.9%), North Rift Regional Office 1,750 (32.7%), North Eastern Regional Office 285 (6.4%), Coast Regional Office 743 (14.4%) and Kisumu Regional Office 319 (10.6%).

215 KNCHR, 11th Annual Report 2013/2014 (2014), p 21.

216 KNCHR, Annual Report 2012/2013 (2014), p 17.

217 See note 215; KNCHR, 12th Annual Report 2015/2016 (2106), p 30.

In its most recent report, the KNCHR points out that it is starting to receive an increasing number of complaints through the additional means of Huduma Centres²¹⁸ and public forums.²¹⁹

4.6 Monitoring government compliance with advice and recommendations

Once a complaint is lodged with the KNCHR, it must decide whether to admit such a complaint for investigation, refer it to one of its referral partners, or offer legal advice. Additionally, from the complaints received, the KNCHR can get an idea of what are recurring human rights concerns and seek ways to address them on a large scale, such as by holding public hearings. Public hearings are aimed at facilitating dialogue between the affected individuals and those alleged to have caused the matter complained of.²²⁰ Examples of public inquiries by the KNCHR include those on alleged human rights violations arising from mining and salt manufacturing activities in the country's coastal region²²¹ and from security operations in the northern parts of Kenya.²²²

Where the KNCHR opts for an investigation, it is the outcome of these investigations that determines the nature of the action the KNCHR takes to provide redress.²²³ However, the Act does not state what appropriate redress might be, which means that the KNCHR is left to decide on the redress and ways of achieving it within the parameters of the Constitution. The KNCHR does not have the power to make binding decisions: it can only issue recommendations on what should be done to address the complaints raised. The courts have confirmed that the findings and recommendations of the Commission do not have legal force akin to that of court judgments and thus cannot be enforced against a state institution. For example, in *Republic v Kenya Vision 2030 Delivery Board & Another Ex-parte Eng Judah Abekah*,²²⁴ the court noted, in interpreting similar provisions under the Commission on Administrative Justice Act, that:

218 These are centres established by the national government to provide one-stop shop for government services.

219 See note 217.

220 KNCHR Act 2011, section 38.

221 KNCHR, Public Inquiry Report on Mining Activities in Taita-Taveta County, available at <https://bit.ly/2Jh5pzw> (accessed 15 February 2019).

222 KNCHR, Public National Inquiry on Security and Human Rights in North Rift, Kenya, available at <https://bit.ly/2YtHCmc> (accessed 15 February 2019).

223 See KNCHR, Annual Report 2012/2013 (2013), p 18.

224 *Republic v Kenya Vision 2030 Delivery Board & Another Ex-parte Eng Judah Abekah* [2015] eKLR.

the court(s) cannot compel a government agency to implement such recommendations. Government agencies have no statutory duty to implement the recommendations of the Commission. They cannot therefore be compelled by way of *mandamus* to implement those recommendations.²²⁵

The recommendations are to be framed in a way capable of being implemented, and in instances where there is laxity in abiding by them, the KNCHR is expected to make an effort to follow up on the implementation of such recommendations. The implementation of recommendations is, however, not guaranteed. This view is reinforced by the history of non-compliance with past recommendations made to Parliament and the executive by constitutional commissions and past commissions of inquiry.²²⁶

Where there is failure of compliance, the KNCHR can have recourse to other redress measures, such as approaching the courts to get a binding ruling on the matter. The latter is problematic, though, since it consumes time and resources and, being adversarial in nature, is likely to sour relationships between the KNCHR and the state organs taken to court. It also raises the risk of undermining the rule of law, especially where the court's order is disobeyed. It is therefore used as a last resort. Naming and shaming those complicit in human rights violations is another avenue the KNCHR can use to obtain compliance with its recommendations. Alternatively, where the situation allows, the Commission could refer matters to other authorities in a better position to resolve them. In this regard, the KNCHR has put a referral system in place, the Integrated Public Complaints Referral Mechanism (IPCRM), to guide referrals.²²⁷

5 Public accountability

The KNCHR's independence is not absolute, as it must be held accountable and its performance constantly reviewed. As noted by the Supreme Court in the matter of the National Land Commission, the independence of constitutional commissions "does not accord them *carte blanche* to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions ... [is] prescribed in the Constitution and the law..."²²⁸

The public accountability of the KNCHR is provided for both in the Constitution and the KNCHR Act.²²⁹ The KNCHR is required to compile

225 *Ibid.*

226 See the Truth, Justice and Reconciliation (Amendment) Act 44 of 2013.

227 See KNCHR 11th Annual Report 2013-2014, pp 23, 27.

228 In the Matter of the National Land Commission [2015] eKLR.

a report of its activities at the end of each financial year and submit it to Parliament and the President.²³⁰ It must contain the financial statements of the KNCHR, a description of its activities, the legal and administrative measures taken to address concerns it has identified, and recommendations on specific actions.²³¹ The KNCHR must publish the report in the Gazette and in at least one newspaper with national circulation to allow members of the public to access it.²³²

The submission of reports provides a meaningful way for the KNCHR to interact with the branches of government and make interested stakeholders aware of its workings. The Act is silent, however, on parliamentary debate on the reports submitted. This absence of a clear framework in legislation and parliamentary procedure regarding how Parliament should engage with the KNCHR's reports is partly responsible for the dearth of debate on them, which in turn makes it difficult for the KNCHR's recommendations to be implemented.

Moreover, restricting the publication of reports to the Kenya Gazette and newspapers reduces their accessibility by confining their exposure to the relatively few persons who can afford the two media. The KNCHR should hence employ other means of dissemination, such as appearing on television or radio shows and utilising social media. This would be in line with the Constitution's edict that the reports should be "published and publicised".²³³

6 Conclusion

The KNCHR has a stable and secure foundational framework, which should be taken to mean that it is equipped and intended to be an effective institution. However, some impediments remain to its operational effectiveness. These include inadequate funding; limited accessibility; inadequate quasi-judicial powers; difficult working relations with CSOs and fellow Article 59 commissioners; and deficient political will and support from the political class. Such challenges should be addressed to enable the KNCHR to carry out its crucial human rights mandate to the fullest. Given its constitutional entrenchment, the KNCHR should feel confident in engaging proactively with the authorities and other stakeholders to find amicable solutions to problems it has identified.

229 Constitution of Kenya, Article 254; KNCHR Act 2011, section 53.

230 KNCHR Act 2011, section 53(1); Constitution of Kenya, Article 254.

231 KNCHR Act 2011, section 53(1)(a)-(e).

232 KNCHR Act 2011, section 53(2); Constitution of Kenya, section 254(3).

233 Constitution of Kenya, section 254(3) (emphasis added).

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PART B. SELECTED HUMAN RIGHTS DOCUMENTS AND MATERIALS

B.1 Constitutional framework

The constitutional framework for the Kenya National Commission on Human Rights is laid down in the 2010 constitution as follows:

CHAPTER FOUR: BILL OF RIGHTS

Part 5: Kenya National Human Rights and Equality Commission

59.(1) There is established the Kenya National Human Rights and Equality Commission.

(2) The functions of the Commission are –

- (a) to promote respect for human rights and develop a culture of human rights in the Republic;
 - (b) to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development;
 - (c) to promote the protection, and observance of human rights in public and private institutions;
 - (d) to monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs;
 - (e) to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated;
 - (f) on its own initiative or on the basis of complaints, to investigate or research a matter in respect of human rights, and make recommendations to improve the functioning of State organs;
 - (g) to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights;
 - (h) to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice;
 - (i) to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct;
 - (j) to report on complaints investigated under paragraphs (h) and (i) and take remedial action; and (k) to perform any other functions prescribed by legislation.
- (3) Every person has the right to complain to the Commission, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(4) Parliament shall enact legislation to give full effect to this Part, and any such legislation may restructure the Commission into two or more separate commissions.

(5) If Parliament enacts legislation restructuring the Commission under clause (4) –

- (a) that legislation shall assign each function of the Commission mentioned in this Article to one or the other of the successor commissions;
- (b) each of the successor commissions shall have powers equivalent to the powers of the Commission under this Article; and
- (c) each successor commission shall be a commission within the meaning of Chapter Fifteen, and shall have the status and powers of a commission under that Chapter.

CHAPTER FIFTEEN – COMMISSIONS AND INDEPENDENT OFFICES

248.(1) This Chapter applies to the commissions specified in clause (2) and the independent offices specified in clause (3), except to the extent that this Constitution provides otherwise.

(2) The commissions are –

- (a) the Kenya National Human Rights and Equality Commission;
- (b) the National Land Commission;
- (c) the Independent Electoral and Boundaries Commission;
- (d) the Parliamentary Service Commission;
- (e) the Judicial Service Commission;
- (f) the Commission on Revenue Allocation;
- (g) the Public Service Commission;
- (h) the Salaries and Remuneration Commission;
- (i) the Teachers Service Commission; and
- (j) the National Police Service Commission.

(3) The independent offices are –

- (a) the Auditor-General; and
- (b) the Controller of Budget.

249.(1) The objects of the commissions and the independent offices are to –

- (a) protect the sovereignty of the people;
- (b) secure the observance by all State organs of democratic values and principles; and
- (c) promote constitutionalism.

- (2) The commissions and the holders of independent offices –
 - (a) are subject only to this Constitution and the law; and
 - (b) are independent and not subject to direction or control by any person or authority.
- (3) Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote.

250.(1) Each commission shall consist of at least three, but not more than nine, members.

- (2) The chairperson and each member of a commission, and the holder of an independent office, shall be –
 - (a) identified and recommended for appointment in a manner prescribed by national legislation;
 - (b) approved by the National Assembly; and
 - (c) appointed by the President.
- (3) To be appointed, a person shall have the specific qualifications required by this Constitution or national legislation.
- (4) Appointments to commissions and independent offices shall take into account the national values mentioned in Article 10, and the principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya.
- (5) A member of a commission may serve on a part-time basis.
- (6) A member of a commission, or the holder of an independent office –
 - (a) unless *ex officio*, shall be appointed for a single term of six years and is not eligible for re-appointment; and
 - (b) unless *ex officio* or part-time, shall not hold any other office or employment for profit, whether public or private.
- (7) The remuneration and benefits payable to or in respect of a commissioner or the holder of an independent office shall be a charge on the Consolidated Fund.
- (8) The remuneration and benefits payable to, or in respect of, a commissioner or the holder of an independent office shall not be varied to the disadvantage of that commissioner or holder of an independent office. Composition, appointment and terms of office.
- (9) A member of a commission, or the holder of an independent office, is not liable for anything done in good faith in the performance of a function of office.
- (10) The members of a commission shall elect a vice-chairperson from among themselves –

- (a) at the first sitting of the commission; and
 - (b) whenever it is necessary to fill a vacancy in the office of the vice-chairperson.
- (11) The chairperson and vice-chairperson of a commission shall not be of the same gender.
- (12) There shall be a Secretary to each commission who shall be –
- (a) appointed by the commission; and
 - (b) the chief executive officer of the commission.

251.(1) A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for –

- (a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;
 - (b) gross misconduct, whether in the performance of the member's or office holder's functions or otherwise;
 - (c) physical or mental incapacity to perform the functions of office;
 - (d) incompetence; or
 - (e) bankruptcy.
- (2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.
- (3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President.
- (4) On receiving a petition under clause (3), the President –
- (a) may suspend the member or office holder pending the outcome of the complaint; and
 - (b) shall appoint a tribunal in accordance with clause (5).
- (5) The tribunal shall consist of –
- (a) a person who holds or has held office as a judge of a superior court, who shall be the chairperson;
 - (b) at least two persons who are qualified to be appointed as High Court judges; and
 - (c) one other member who is qualified to assess the facts in respect of the particular ground for removal.
- (6) The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days.

(7) A person suspended under this Article is entitled to continue to receive one-half of the remuneration and benefits of the office while suspended.

252.(1) Each commission, and each holder of an independent office—

- (a) may conduct investigations on its own initiative or on a complaint made by a member of the public;
- (b) has the powers necessary for conciliation, mediation and negotiation;
- (c) shall recruit its own staff; and
- (d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.

(2) A complaint to a commission or the holder of an independent office may be made by any person entitled to institute court proceedings under Article 22 (1) and (2). General functions and powers.

(3) The following commissions and independent offices have the power to issue a summons to a witness to assist for the purposes of its investigations –

- (a) the Kenya National Human Rights and Equality Commission;
- (b) the Judicial Service Commission;
- (c) the National Land Commission; and
- (d) the Auditor-General.

253. Each commission and each independent office –

- (a) is a body corporate with perpetual succession and a seal; and
- (b) is capable of suing and being sued in its corporate name.

254.(1) As soon as practicable after the end of each financial year, each commission, and each holder of an independent office, shall submit a report to the President and to Parliament.

(2) At any time, the President, the National Assembly or the Senate may require a commission or holder of an independent office to submit a report on a particular issue.

(3) Every report required from a commission or holder of an independent office under this Article shall be published and publicised.

B.2 Legislative and regulatory instruments

Acting under article 59(4) of the Constitution, Parliament split the National Human Rights and Equality Commission to form three Commissions namely, the Kenya National Commission on Human

Rights, the Commission on Administrative Justice and the National Gender and Equality Commission, all of which deal with specified aspects of human rights. In addition to specific legislation regulated each of these Commissions, Parliament also enacted the Commission of Administrative Justice Act Subsidiary Legislation No 23 of 2011, which regulates the lodging and handling procedure of a complaint before the Commission.

B.2.1 Kenya Commission on Human Rights Act No 14 of 2011 (Revised Edition 2012)

ARRANGEMENT OF SECTIONS

PART I – PRELIMINARY

Section

- 1) Short title.
- 2) Interpretation.

PART II – ESTABLISHMENT AND STATUS OF COMMISSION

- 3) Establishment of the Commission.
- 4) Status of successor Commission.
- 5) Powers of Commission as a body corporate.
- 6) Headquarters.
- 7) Guiding principles of Commission.
- 8) Functions of the Commission.
- 9) Membership of Commission.
- 10) Qualifications for appointment of chairperson and members.
- 11) Procedure for appointment of chairperson and members.
- 12) Oath of office.
- 13) Powers of the chairperson.
- 14) Tenure of office.
- 15) Vacancy of office of chairperson and members.
- 16) Removal from office.
- 17) Filling of vacancy.
- 18) Committees of the Commission.
- 19) Procedures of the Commission.
- 20) Terms and conditions of service.
- 21) Appointment of secretary.

- 22) Removal of secretary.

Section

- 23) Appointment of staff.
- 24) The common seal of the Commission.
- 25) Protection from personal liability.
- 26) General powers of the Commission.
- 27) Powers of a court.

PART III – INVESTIGATIONS BY THE COMMISSION

- 28) Powers relating to investigations.
- 29) Jurisdiction in investigations.
- 30) Limitation of jurisdiction.
- 31) Power not limited by other provisions.
- 32) Complaints.
- 33) Form of complaint.
- 34) Discretion not to investigate.
- 35) Notice if complaint not investigated.
- 36) Representations if adverse findings, etc.
- 37) Notice of investigation to organization.
- 38) Hearings of Commission.
- 39) Persons likely to be prejudiced or affected to be heard.
- 40) Statements made by persons to the Commission.
- 41) Action after inquiry.

PART IV – REPORT AND RECOMMENDATIONS

- 42) Report to organization.
- 43) Report to the complaint.
- 44) Report of misconduct to appropriate authority.

PART V – FINANCIAL PROVISIONS

Section

- 45) Funds of the Commission.
- 46) Financial year.
- 47) Annual estimates.
- 48) Accounts and audit.

- 49) Bank accounts.

PART VI – MISCELLANEOUS PROVISIONS

- 50) Management of information.
- 51) Correspondence from persons in custody, etc.
- 52) Offences.
- 53) Report of the Commission.
- 54) Report to Parliament on the implementation of report.
- 55) Review of mandate.
- 56) Regulations.

PART VII – SAVINGS AND TRANSITIONAL PROVISIONS

- 57) Transfer of complaints to the Commission.
- 58) Contracts.
- 59) Savings.
- 60) Repeal of Act No 9 of 2002.

SCHEDULE

FIRST SCHEDULE – OATH/AFFIRMATION OF CHAIRPERSON/ A MEMBER/SECRETARY

SECOND SCHEDULE – MEETINGS AND PROCEDURE OF THE COMMISSION

No 14 of 2011

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS ACT

[Date of assent: 27th August, 2011.]

[Date of commencement: 30th August, 2011.]

An Act of Parliament to restructure the Kenya National Human Rights and Equality Commission and to establish the Kenya National Commission on Human Rights pursuant to Article 59(4) of the Constitution; to provide for the membership, powers and functions of the Kenya National Commission on Human Rights, and for connected purposes

[Corr. No 18/2012, Act No 12 of 2012.]

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Kenya National Commission on Human Rights Act, 2011.

2. Interpretation

(1) In this Act, unless the context otherwise requires –

“**Cabinet Secretary**” means the Cabinet Secretary for the time being responsible for matters relating to human rights; “chairperson” means the chairperson of the Commission appointed under section 11;

“**Commission**” means the Kenya National Commission on Human Rights established under section 3;

“**Disciplined Service**” includes –

- (a) the National Youth Service;
- (b) the Kenya Wildlife Service; or
- (c) any other Disciplined Service established by any written law;

“**former Kenya National Commission on Human Rights**” means the Commission established under the Kenya National Commission on Human Rights Act, (No 9 of 2002);]

“**human rights**” means the fundamental rights and freedoms protected under the Constitution, and the Laws of Kenya;

“**National Security Organs**” means the national security organs established under Article 239(1) of the Constitution;

“**public officer**” has the meaning assigned to it under Article 260 of the Constitution;

“**secretary**” means the secretary to the Commission appointed by the Commission under Article 250(12) of the Constitution in accordance with the procedure set out in section 21.;

(2) Despite subsection (1), until after the first elections under the Constitution, references in this Act to the expression “Cabinet Secretary” shall be construed to mean “Minister”.

PART II – ESTABLISHMENT AND STATUS OF COMMISSION

3. Establishment of the Commission

(1) There is established a Commission to be known as the Kenya National Commission on Human Rights.

(2) The Commission is established as a successor Commission pursuant to the provisions of Article 59(4) of the Constitution.

4. Status of successor Commission

For the avoidance of doubt, the Commission shall, pursuant to Article 59(5)(c) of the Constitution, be a commission within the meaning of Chapter Fifteen of the Constitution and shall have the status and powers of a Commission under that Chapter.

5. Powers of Commission as a body corporate

In addition to the powers of a Commission under Article 253 of the Constitution, the Commission shall have power to –

- (a) acquire, hold, charge and dispose of movable and immovable property; and
- (b) do or perform all such other things or acts for the proper discharge of its functions under the Constitution and this Act as may lawfully be done or performed by a body corporate.

6. Headquarters

The headquarters of the Commission shall be in the capital city but the Commission may establish branches at any place in Kenya.

7. Guiding principles of Commission

In fulfilling its mandate, the Commission shall act in accordance with the values and principles set out in the Constitution and the Laws of Kenya, and shall observe and respect –

- (a) the diversity of the people of Kenya;
- (b) impartiality and gender equity;
- (c) all treaties and conventions which have been ratified in Kenya and in particular the fact that human rights are indivisible, interdependent, interrelated and of equal importance for the dignity of all human beings; and
- (d) the rules of natural justice.

8. Functions of the Commission

The functions of the Commission shall be to –

- (a) promote respect for human rights and develop a culture of human rights in the Republic;

- (b) promote the protection and observance of human rights in public and private institutions;
- (c) monitor, investigate and report on the observance of human rights in all spheres of life in the Republic;
- (d) receive and investigate complaints about alleged abuses of human rights, except those relating to the violation of the principle of equality and freedom from discriminations under the gender and equality commission, and take steps to secure appropriate redress where human rights have been violated;
- (e) on its own initiative or on the basis of complaints investigate or research matter in respect of human rights, and make recommendations to improve the functioning of State organs;
- (f) act as the principal organ of the State in ensuring compliance with obligations under international and regional treaties and conventions relating to human rights except those that relate to the rights of special interest groups protected under the law relating to equality and non-discrimination;
- (g) formulate, implement and oversee programmes intended to raise public awareness of the rights and obligations of a citizen under the Constitution;
- (h) work with the National Gender and Equality Commission and the Commission on Administrative Justice to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration;
- (i) perform such other functions as the Commission may consider necessary for the promotion and protection of human rights; and
- (j) perform such other functions as may be prescribed by the Constitution and any other written law.

9. Membership of Commission

The Commission shall consist of a chairperson and four other members appointed in accordance with the Constitution and the provisions of this Act.

10. Qualifications for appointment of chairperson and members

- (1) A person shall be qualified for appointment as the chairperson of the Commission if the person –
- (a) has knowledge and at least fifteen years experience in matters relating to law and human rights;
 - (b) holds a degree from a university recognized in Kenya; and
 - (c) meets the requirements of Chapter Six of the Constitution.

(2) A person shall be qualified for appointment as a member of the Commission if the person –

- (a) holds a degree from a university recognized in Kenya;
- (b) has knowledge and at least ten years' experience in matters relating to any of the following fields –
 - (i) law;
 - (ii) public administration;
 - (iii) economics or finance;
 - (iv) gender and social development;
 - (v) human rights;
 - (vi) management; or
 - (vii) social sciences;
- (c) has had a distinguished career in their respective fields; and
- (d) meets the requirements of Chapter Six of the Constitution.

(3) A person shall not be qualified for appointment as the chairperson or a member if such person –

- (a) is a member of Parliament or a County Assembly;
- (b) is a member of a local authority;
- (c) is an undischarged bankrupt; or
- (d) has been removed from office for contravening the provisions of the Constitution or any other law.

11. Procedure for appointment of chairperson and members

(1) Whenever there is a vacancy in the Commission the President shall, within fourteen days of the occurrence of the vacancy, convene a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Commission.

(2) The selection panel convened under subsection (1) shall consist of –

- (a) one person nominated by each of the following bodies –
 - (i) the Office of the President;
 - (ii) the Office of the Prime Minister;
 - (iii) the Ministry responsible for matters relating to justice;
 - (iv) the Ministry responsible for matters relating to gender and social development;
 - (v) the Public Service Commission;
 - (vi) the Law Society of Kenya; and
 - (vii) the National Council for Persons with Disabilities; and
- (b) two persons nominated by the Association of Professional Societies in East Africa.

(3) The selection panel shall, subject to this section, determine its own procedure, and the ministry responsible for public service shall provide it with such facilities and such other support as it may require for the discharge of its functions.

(4) The selection panel shall, within seven days of its convening, invite applications from qualified persons and publish the names and qualifications of all applicants in the Gazette and two daily newspapers of national circulation.

(5) The selection panel shall within seven days of receipt of applications under subsection (4) consider the applications, interview and shortlist at least three persons qualified for appointment as chairperson and eight persons qualified for appointment as members of the Commission and shall forward the names of the selected candidates to the President for nomination.

(6) Until after the first general election after the commencement of this Act, the President in consultation with the Prime Minister shall, within seven days of receipt of the names forwarded under subsection (5), nominate one person for appointment as chairperson and four persons for appointment as members of the Commission, and shall forward the names of the persons nominated to the National Assembly.

(7) The National Assembly shall, within twenty-one days of the day it next sits after receipt of the names of the nominees under subsection (6), consider all the nominations received and may approve or reject any nomination.

(8) Where the National Assembly approves the nominees, the Speaker shall, forward the names of the approved persons to the President for appointment.

(9) The President shall, within seven days of the receipt of the approved nominees from the National Assembly, by notice in the Gazette, appoint the chairperson and members approved by the National Assembly.

(10) Where the National Assembly rejects any nomination, the Speaker shall, within three days, communicate the decision of the National Assembly to the President to submit fresh nominations.

(11) Where a nominee is rejected by Parliament under subsection (10), the President in consultation with the Prime Minister shall, within seven days, submit to the National Assembly a fresh nomination from amongst the persons shortlisted and forwarded by the selection panel under subsection (5).

(12) If Parliament rejects all or any subsequent nominee submitted by the President for approval under subsection (11), the provisions of subsections (5) and (6) shall apply.

(13) In shortlisting, nominating or appointing persons as chairperson and members of the Commission, the selection panel, the National Assembly and the President shall ensure that not more than two-thirds of the members are of the same gender, shall observe the principle of gender equity, regional and ethnic balance and shall have due regard to the principle of equal opportunities for persons with disabilities.

(14) After the first elections after the commencement of this Act, the member of the selection panel under subsection (2)(b) shall be replaced by a representative of the Public Service Commission.

(15) Despite the foregoing provisions of this section, the President, in consultation with the Prime Minister may by notice in the Gazette, extend the period specified in respect of any matter under this section by a period not exceeding twenty-one days.

12. Oath of office

The chairperson, members and the secretary shall each make and subscribe, before the Chief Justice, the oath or affirmation set out in the First Schedule.

13. Powers of the chairperson

(1) The chairperson shall, within seven days of the appointment of the members, convene the first meeting of the Commission at which the members shall elect the vice-chairperson of the Commission from amongst the members.

(2) The chairperson shall –

- (a) preside over all meetings of the Commission;
- (b) be the spokesperson for the Commission; and
- (c) supervise and direct the work of the Commission.

(3) If the office of chairperson becomes vacant or if the chairperson is unable to exercise the powers or perform the functions of his office owing to absence, illness or any other cause, the vice-chairperson shall exercise those powers or perform those functions.

14. Tenure of office

(1) The chairperson and members of the Commission shall be appointed for a single term of six years and are not eligible for re-appointment.

(2) The chairperson and members of the Commission shall serve on a fulltime basis.

15. Vacancy of office of chairperson and members

(1) The office of the chairperson or a member of the Commission shall become vacant if the holder –

- (a) dies;
- (b) by notice in writing addressed to the President resigns from office;

- (c) is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.

(2) The President shall notify every resignation, vacancy or termination in the Gazette within seven days.

16. Removal from office

The chairperson or member of the Commission may be removed from office in accordance with Article 251 of the Constitution.

17. Filling of vacancy

(1) Where a vacancy occurs in the membership of the Commission under section 15 or 16 the appointment procedure provided for under this Act shall apply.

(2) A member appointed under subsection (1) to fill a vacancy shall serve for a term of six years but shall not be eligible for re-appointment.

18. Committees of the Commission

(1) The Commission may, from time to time establish, committees for the better carrying out of its functions.

(2) The Commission may –

- (a) co-opt into the membership of a committee established under subsection (1), other persons whose knowledge and skills are necessary for the functions of the Commission;
- (b) hire such experts or consultants as are necessary for the functions of the Commission.

19. Procedures of the Commission

(1) The business and affairs of the Commission shall be conducted in accordance with the Second Schedule.

(2) Except as provided in the Second Schedule, the Commission may regulate its own procedure.

20. Terms and conditions of service

The salaries and allowances payable to, and other terms and conditions of service of the chairperson and members of the Commission shall be determined by the Salaries and Remuneration Commission.

21. Appointment of secretary

(1) The appointment of the secretary to the Commission, under Article 250(12) of the Constitution shall be through a competitive recruitment process.

(2) A person shall be qualified for appointment as a secretary to the Commission if the person –

- (a) is a citizen of Kenya;
- (b) holds a degree from a university recognized in Kenya;
- (c) has had at least ten years proven experience at management level; and
- (d) meets the requirements of Chapter Six of the Constitution.

(3) The secretary shall be the chief executive officer of the Commission and head of the secretariat and shall be responsible to the Commission.

(4) The secretary shall hold office for a term of five years and shall be eligible for re-appointment for a further term of five years.

22. Removal of secretary

(1) The secretary may be removed from office by the Commission in accordance with the terms and conditions of service for –

- (a) inability to perform the functions of the office of secretary arising out of physical or mental incapacity;
- (b) gross misconduct or misbehaviour;
- (c) incompetence or neglect of duty;
- (d) violation of the Constitution; or
- (e) any other ground that would justify removal from office under the terms and conditions of service.

(2) Before the secretary is removed under subsection (1), the secretary shall be given –

- (a) sufficient notice of the allegations made against him or her; and
- (b) an opportunity to present his or her defence against the allegations.

23. Appointment of staff

(1) The Commission may appoint such staff as may be necessary for the proper discharge of its functions under this Act, and upon such terms and conditions of service as the Commission may determine.

(2) The staff appointed under subsection (1) shall serve on such terms and conditions as the Commission, in consultation with the Salaries and Remuneration Commission may determine.

(3) The Government may, upon request by the Commission second to the Commission such number of public officers as may be necessary for the proper performance of the functions of the Commission.

(4) A public officer seconded to the Commission shall, during the period of secondment, be deemed to be an officer of the Commission and shall be subject only to the direction and control of the Commission.

24. The common seal of the Commission

(1) The Common seal of the Commission shall be kept in such custody as the Commission shall direct and shall not be used except on the order of the Commission.

(2) The common seal of the Commission when affixed to a document and duly authenticated shall be judicially and officially noticed and, unless the contrary is proved, any necessary order or authorization of the Commission under this section shall be presumed to have been duly given.

25. Protection from personal liability

No matter or thing done by a member of the Commission or any officer, employee or agent of the Commission shall, if the matter or thing is done in good faith while executing the functions, powers or duties of the Commission, render the member, officer, employee or agent personally liable for any action, claim or demand whatsoever.

26. General powers of the Commission

In addition to the powers conferred in Article 252 of the Constitution, the Commission shall have power to –

- (a) issue summons as it deems necessary for the fulfillment of its mandate;
- (b) require that statements be given under oath or affirmation and to administer such oath or affirmation;
- (c) adjudicate on matters relating to human rights;
- (d) obtain, by any lawful means, any information it considers relevant, including requisition of reports, records, documents and any information from any person, including governmental authorities, and to compel the production of such information for the proper discharge of its functions;
- (e) by order of the court, enter upon any establishment or premises, and to enter upon any land or premises for any purpose material to the fulfillment of the mandate of the Commission and in particular, for the purpose of obtaining information, inspecting any property or taking copies of any documents, and for safeguarding any such property or document;
- (f) interview any person or group of persons;

- (g) subject to adequate provision being made to meet his expenses for the purpose, call upon any person to meet with the Commission or its staff, or to attend a session or hearing of the Commission, and to compel the attendance of any person who fails to respond to a request of the Commission to appear and to answer questions relevant to the subject matter of the session or hearing;
- (h) conduct audits of any public or private institution to establish the level of compliance with the Constitution with regard to integrating the principle of equality and equity in its operations;
- (i) require any public or private institution to provide any special report on matters relating to the institution's implementation of the principle of equality and equity including gender equity.

[Corr. No 18/2012.]

27. Powers of a court

In the performance of its functions under this Act, the Commission shall have the powers of a court to –

- (a) issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;
- (b) question any person in respect of any subject matter under investigation before the Commission; and
- (c) require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission.

PART III – INVESTIGATIONS BY THE COMMISSION

28. Powers relating to investigations

(1) The Commission may, for the purpose of conducting any investigation pertaining to an inquiry, employ the services of any public officer or investigation agency of the Government at the expense of the Commission.

(2) For the purpose of investigating any matter pertaining to an inquiry, a public officer or agency whose services are employed under subsection (1) may, subject to the direction and control of the Commission –

- (a) summon and enforce the attendance of any person for examination;
- (b) require the discovery and production of any document; and
- (c) subject to the Constitution and any written law, requisition any public record or copy thereof from any public officer.

(3) The provisions of section 40 shall apply in relation to any statement made by a person before any public officer or agency whose services are

employed under subsection (1) as they apply in relation to any statement made by a person in the course of giving evidence before the Commission.

(4) The public officer or agency whose services are employed under subsection (1) shall investigate any matter pertaining to the inquiry and submit a report thereon to the Commission in that behalf.

(5) The Commission shall satisfy itself on the correctness of the facts stated and the conclusion, if any, arrived at in the report submitted to it under subsection (4) and for that purpose, the Commission may make such inquiry (including the examination of any person or persons who conducts or assists in the investigation) as it deems fit.

[Corr. No 18/2012.]

29. Jurisdiction in investigations

(1) The Commission shall investigate any complaint, or on its own initiative, investigate any matter relating to human rights in –

- (a) a public office or a private institution; or
- (b) any other body or agency of the State.

(2) The Commission shall endeavour to resolve any matter brought before it by conciliation, mediation or negotiation.

(3) If the matter referred to under subsection (2) cannot be resolved by conciliation, mediation or negotiation and the Commission determines that there is discrimination carried out unjustly or unreasonably, the Commission shall make such recommendations as it deems fit.

30. Limitation of jurisdiction

The Commission shall not investigate –

- (a) a matter pending before any court or judicial tribunal;
- (b) deleted by Sch. to Act No 12 of 2012;
- (c) a matter relating to relations between the State and any foreign State or international organization recognized as such under any international law;
- (d) a matter relating to the exercise of the prerogative of mercy;
- (e) a matter relating to equality and freedom from discrimination;
- (f) anything in respect of which there is a right of appeal or other legal remedy unless, in the opinion of the Commission, it is not reasonable to expect that right of appeal or other legal remedy to be resorted to; or
- (g) any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law.

[Act No 12 of 2012, Sch.]

31. Power not limited by other provisions

The Commission may investigate or carry out an inquiry into any matter despite a provision in any written law to the effect that the action is final or cannot be appealed, challenged, reviewed, questioned or called in question.

32. Complaints

(1) A complaint to the Commission may only be made by the person aggrieved by the matter complained of or on his behalf as specified under subsection (2).

(2) A complaint may be made on behalf of an aggrieved person –

- (a) if the aggrieved person is dead or otherwise not able to act for himself or herself, by a member of his or her family or other person suitable to represent the aggrieved person; or
- (b) by a member of the National Assembly with the consent of the aggrieved person or other person who, under paragraph (a), is entitled to make the complaint on behalf of the aggrieved person.

33. Form of complaint

(1) A person wishing to lodge a complaint alleging violation of human rights may do so orally or in writing addressed to the secretary or such other person as may be duly authorised by the Commission for that purpose.

(2) Where a complaint under subsection (1) is made orally, the Commission shall cause the complaint to be recorded in writing.

(3) A complaint under subsection (1) shall be in such form and contain such particulars as the Commission may prescribe.

(4) Upon receipt of a complaint under subsection (1), the Commission may –

- (a) call for information or a report regarding such complaint from any person within such reasonable time as may be specified by the Commission;
- (b) without prejudice to paragraph (a), initiate such inquiry as it considers necessary, having regard to the nature of the complaint.

(5) If the information or report called for under subsection (4)(a) is not received within the time stipulated by the Commission, the Commission may proceed to inquire into the complaint without such information or report.

(6) If on receipt of the information or report the Commission is satisfied either that no further action is required or that the required action has been initiated by a State organ or other body responsible for the matters

complained of, the Commission shall, in writing, inform the complainant accordingly and take no further action.

34. Discretion not to investigate

The Commission may decline to investigate a complaint if the Commission considers that –

- (a) there are in existence adequate remedies under any written law or administrative practice; or
- (b) the complaint is trivial, frivolous, vexatious or is not made in good faith.

35. Notice if complaint not investigated

If the Commission decides not to investigate a complaint or to discontinue the investigation of a complaint, the Commission shall inform the complainant in writing of that decision and the reasons for the decision as soon as reasonably practicable.

36. Representations if adverse findings, etc.

The Commission shall give any person, State organ, public office or organization against whom an adverse finding or recommendation is made an opportunity to make representations concerning the finding or recommendation before the Commission includes the finding in its report.

37. Notice of investigation to organization

Before commencing an investigation under this Act, the Commission shall give notice of the intended investigation to the administrative head of the State organ, public office or organization to which the investigation relates.

38. Hearings of Commission

The hearings of the Commission during an inquiry shall be open to the public, except where the Commission otherwise decides.

39. Persons likely to be prejudiced or affected to be heard

- (1) Subject to subsection (2), if at any stage of an inquiry the Commission –
- (a) considers it necessary to inquire into the conduct of any person; or
 - (b) is of the opinion that the reputation of any person is likely to be prejudiced by the inquiry, it shall give that person an opportunity to

appear before the Commission by himself or by an advocate to give evidence in his own defence.

(2) This section shall not apply where the credibility of a witness is being impeached.

40. Statements made by persons to the Commission

No statement made by a person in the course of giving evidence before the Commission shall subject such person to any civil or criminal proceedings except for giving false evidence by such statement.

41. Action after inquiry

The Commission may, upon inquiry into a complaint under this Act take any of the following steps –

- (a) where the inquiry into a violation of human rights or negligence discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons;
- (b) recommend to the complainant a course of other judicial redress which does not warrant an application under Article 22 of the Constitution;
- (c) recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged violation of human rights other appropriate methods of settling the complaint or to obtain relief;
- (d) provide a copy of the inquiry report to all interested parties; and
- (e) submit summonses as it deems necessary in fulfilment of its mandate.

PART IV – REPORT AND RECOMMENDATIONS

42. Report to organization

(1) After concluding an investigation or an inquiry under this Act, the Commission to which the investigation relates.

(2) The report shall i shall make a report to the state organ, public office or organization include –

- (a) the findings of the investigation and any recommendations made by the Commission;
- (b) the action the Commission considers should be taken and the reasons for the action; and
- (c) any recommendations the Commission considers appropriate.

(3) The Commission may require the State organ, public office or organization that was the subject of the investigation to submit a report to the Commission within a specified period on the steps, if any, taken to implement the recommendations of the Commission.

(4) If there is failure or refusal to implement the recommendations of the Commission within the specified time, the Commission shall prepare and submit to the National Assembly a report, detailing the failure or refusal to implement its recommendations, and the National Assembly shall take appropriate action.

43. Report to the complainant

The Commission shall inform the complainant on the results of the investigation in writing.

44. Report of misconduct to appropriate authority

If, after an investigation, the Commission is of the opinion that there is evidence that a person, an officer or employee of the State organ, public office or organization which was investigated under this Act is guilty of misconduct, the Commission shall report the matter to the appropriate authority.

PART V – FINANCIAL PROVISIONS

45. Funds of the Commission

The funds of the Commission shall consist of –

- (a) monies allocated by Parliament for the purposes of the Commission;
- (b) such monies or assets as may accrue to the Commission in the course of the exercise of its powers or in the performance of its functions under this Act; and
- (c) all monies from any other source provided, donated or lent to the Commission.

46. Financial year

The financial year of the Commission shall be the period of twelve months ending on the thirtieth of June in each year.

47. Annual estimates

(1) Before the commencement of each financial year, the Commission shall cause to be prepared estimates of the revenue and expenditure of the Commission for that year.

(2) The annual estimates shall make provision for all the estimated expenditure of the Commission for the financial year concerned and, in particular, shall provide for –

- (a) payment of the salaries, allowances and other charges in respect of the staff of the Commission;
 - (b) payment of pensions, gratuities and other charges and in respect of benefits which are payable out of the funds of the Commission;
 - (c) maintenance of the buildings and grounds of the Commission;
 - (d) funding of training, research and development of activities of the Commission;
 - (e) creation of such funds to meet future or contingent liabilities in respect of benefits, insurance or replacement of buildings or installations, equipment and in respect of such other matters as the Commission may think fit.
- (3) The annual estimates shall be approved by the Commission before the commencement of the financial year to which they relate and shall be submitted to the Cabinet Secretary for tabling in National Assembly.
- (4) No expenditure shall be incurred for the purposes of the Commission except in accordance with the annual estimates approved under subsection (3).

48. Accounts and audit

- (1) The Commission shall cause to be kept all proper books and records of account of the income, expenditure, assets and liabilities of the Commission.
- (2) Within a period of three months after the end of each financial year, the Commission shall submit to the Auditor-General the accounts of the Commission in respect of that year together with a –
- (a) statement of the income and expenditure of the Commission during that year; and
 - (b) statement of the assets and liabilities of the Commission on the last day of that financial year.
- (3) The annual accounts of the Commission shall be prepared, audited and reported upon in accordance with the provisions of the Constitution and the Public Audit Act, 2003 (No 12 of 2003).

49. Bank accounts

The Commission shall open and maintain such bank accounts as shall be necessary for the performance of its functions.

PART VI – MISCELLANEOUS PROVISIONS

50. Management of information

(1) The Commission and the staff of the Commission shall maintain confidence in respect of all matters that come to their knowledge in the exercise of their duties.

(2) Subject to the provisions of Article 35 of the Constitution, the Commission and the staff of the Commission shall not be called to give evidence in respect of any matter that comes to their knowledge in the exercise of their duties.

(3) Notwithstanding subsection (1), the Commission may disclose in any report made by the Commission under this Act, any matter that in the opinion of the Commission may be disclosed in order to establish grounds for the Commission's findings and recommendations of the Commission.

51. Correspondence from persons in custody, etc.

Every person in charge of a prison, remand or mental institution where a person is held in custody, or of any institution where a person is a patient or inmate shall ensure, notwithstanding the provisions of any other written law, that any correspondence from such person to the Commission is transmitted in confidence and any written communication in that regard shall remain sealed.

52. Offences

A person who –

- (a) without justification or lawful excuse, obstructs, hinders or threatens the Commission or a member of staff acting under this Act;
- (b) submits false or misleading information;
- (c) fails to honour summons; or
- (d) misrepresents to or knowingly misleads the Commission or a member of staff of the Commission acting under this Act, commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years or to both.

53. Report of the Commission

(1) The report of the Commission under Article 254 of the Constitution shall, in respect of the financial year to which it relates, contain –

- (a) the financial statements of the Commission;
- (b) a description of the activities of the Commission;

- (c) recommendations on specific actions to be taken in furtherance of the findings of the Commission;
- (d) recommendations on legal and administrative measures to address specific concerns identified by the Commission; and
- (e) any other information relating to its functions that the Commission considers relevant.

(2) The Commission shall publish the report in the Gazette and in at least one newspaper with national circulation.

(3) The President, the National Assembly or the Senate may at any time require the Commission to submit a report on a particular issue.

54. Report to Parliament on the implementation of report

(1) The Cabinet Secretary shall, prepare an annual report on the implementation of human rights and shall submit the report to Parliament in accordance with Article 153(4)(b) of the Constitution.

(2) Where any of the recommendations contained in the report submitted under subsection (1) have not been implemented, the Cabinet Secretary shall report to the National Assembly the reasons therefor.

55. Review of mandate

Parliament shall, upon expiry of five years from the date of commencement of this Act, and pursuant to Article 59(4) of the Constitution, review the mandate of the Commission with a view to amalgamating the Commission with the commission responsible for administrative justice.

56. Regulations

The Commission may make regulations for the better carrying into effect of the provisions of this Act.

PART VII – SAVINGS AND TRANSITIONAL PROVISIONS

57. Transfer of complaints to the Commission

(1) All complaints, which immediately before the commencement of this Act were made to the Kenya National Human Rights and Equality Commission and the former Kenya National Commission on Human Rights at the commencement of this Act, shall be deemed to have been made to the Commission.

(2) The Commission shall transfer complaints relating to the mandate of the National Gender and Equality Commission and the Commission on

Administrative Justice to these commissions unless the investigation or inquiry relating to the complaint is at such a stage that such transfer may result in a delay of justice for those involved.

58. Contracts

The Commission shall be bound in all contracts, including contracts of service, if any, subsisting at the commencement of this Act and to which the Kenya National Human Rights and Equality Commission was party.

59. Savings

(1) Notwithstanding section 60 –

- (a) any order or notice made or issued by the Kenya National Human Rights and Equality Commission and the former Kenya National Commission on Human Rights shall be deemed to have been made or issued under this Act;
- (b) any function carried out by the Kenya National Human Rights and Equality Commission and the former Kenya National Commission on Human Rights during the transition period shall be deemed to have been carried out under this Act;
- (c) all assets and liabilities which immediately before the commencement of this Act were vested in the Kenya National Human Rights and Equality Commission and the former Kenya National Commission on Human Rights shall vest in the Commission;
- (d) all rights, powers and duties, whether arising under any written law or otherwise which immediately before the coming into operation of this Act were vested in the Kenya National Human Rights and Equality Commission shall be transferred to, vested, imposed on, or be enforceable by or against the Commission;
- (e) all actions, suits or legal proceedings by or against the Kenya National Human Rights and Equality Commission shall be carried out on, prosecuted by or against the Commission and no such suit, action or legal proceedings shall abate or be affected by the coming into operation of this Act. (2)

Notwithstanding section 9, the persons who were members of the former Kenya National Commission on Human Rights and who became members of the Kenya National Human Rights and Equality Commission pursuant to section 26 of the Sixth Schedule to the Constitution shall become members of the Commission upon the commencement of this Act for their unexpired term. Provided that the process of appointing new Commissioners under section 11 of this Act shall be commenced at least four months before the expiry of that term.

[Act No 12 of 2012, Sch.]

60. Repeal of Act No 9 of 2002

The Kenya National Commission on Human Rights Act, 2002 (No 9 of 2002) is repealed.

FIRST SCHEDULE [Section 12.]

OATH/AFFIRMATION OF THE OFFICE OF CHAIRPERSON/A MEMBER/SECRETARY

I having been appointed (the chairperson/ member of/Secretary to) the Kenya National Commission on Human Rights do solemnly (swear/ declare and affirm) that I will at all times obey, respect and uphold the Constitution of Kenya and all other laws of the Republic; that I will faithfully and fully, impartially and to the best of my ability, discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice. (SO HELP ME GOD). Sworn/ Declared by the said.....
Before me thisday of
..... Chief Justice.

SECOND SCHEDULE [Section 20.]

MEETINGS AND PROCEDURE OF THE COMMISSION

1. Meetings

- (1) The Commission shall decide when and where it meets and the meetings shall be convened by the chairperson.
- (2) The Commission shall have at least four meetings in every financial year and not more than four months shall elapse between one meeting and the next meeting.
- (3) Unless three quarters of the members otherwise agree, at least seven days' notice in writing of a meeting shall be given to every member.
- (4) A meeting shall be presided over by the chairperson or in his or her absence by the vice-chairperson. (5) The members of the Commission shall elect a vice-chairperson from among themselves –
 - (a) at the first sitting of the Commission; and
 - (b) whenever it is necessary to fill the vacancy in the office of the vicechairperson.
- (6) The chairperson and vice-chairperson shall not be of the same gender.

(7) The Commission may invite any person to attend any of its meetings and to participate in its deliberations, but such person shall not have a vote in any decision of the Commission.

2. Conflict of interest

(1) If any person has a personal or fiduciary interest in any matter before the Commission, and is present at a meeting of the Commission or any committee at which any matter is the subject of consideration, that person shall as soon as is practicable after the commencement of the meeting, declare such interest and shall not take part in any consideration or discussion of, or vote on any question touching such matter.

(2) A disclosure of interest made under sub-paragraph (1) shall be recorded in the minutes of the meeting at which it is made.

(3) A person who contravenes sub-paragraph (1) commits an offence and is liable, upon conviction, to a fine not exceeding three million shillings, or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

(4) No member or staff of the Commission shall transact any business or trade with the Commission.

3. Quorum

(1) Subject to sub-paragraph (2), the quorum of the meeting shall not be less than half of the appointed members.

(2) Where there is a vacancy in the Commission, the quorum of the meeting shall not be less than three appointed members.

4. Voting

A question before the Commission shall be decided with a supporting vote of at least two thirds of the members present.

5. Rules of procedure and minutes

The Commission shall –

- (a) determine rules of procedure for the conduct of its business; and
- (b) keep minutes of its proceedings and decisions.

***B. 2.2 National Gender and Equality Commission Act No 15 of 2011
(Revised Edition 2012)***

ARRANGEMENT OF SECTIONS

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Section

- 1) Short title.
- 2) Interpretation.

PART II – ESTABLISHMENT AND STATUS OF COMMISSION

- 3) Establishment of the Commission.
- 4) Status of successor Commission.
- 5) Powers of Commission as a body corporate.
- 6) Headquarters.
- 7) Guiding principles of Commission.
- 8) Functions of the Commission.
- 9) Membership of Commission.
- 10) Qualifications for appointment of chairperson and members.
- 11) Procedure for appointment of chairperson and members.
- 12) Oath of office.
- 13) Powers of the chairperson.
- 14) Tenure of office.
- 15) Vacancy of office of chairperson and members.
- 16) Removal from office.
- 17) Filling of vacancy.
- 18) Committees of the Commission.
- 19) Procedures of the Commission.
- 20) Terms and conditions of service.
- 21) Appointment of secretary.
- 22) Removal of secretary.
- 23) Appointment of staff.
- 24) The common seal of the Commission.
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PART III – INVESTIGATIONS BY THE COMMISSION

- 28) Powers relating to investigations.
- 29) Jurisdiction in investigations.
- 30) Limitation of jurisdiction.
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- 32) Complaints.
- 33) Form of complaint.⁴

Section

- 34) Discretion not to investigate.
- 35) Notice if complaint not investigated.
- 36) Representations if adverse findings, etc.
- 37) Notice of investigation to organization.
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- 39) Persons likely to be prejudiced or affected to be heard.
- 40) Statements made by persons to the Commission.
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- 42) Report of organization.
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- 45) Funds of the Commission.
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- 50) Management of information.
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- 53) Report of the Commission.
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PART VII – SAVINGS AND TRANSITIONAL PROVISIONS

56) Transfer of complaints to the Commission.

57) Contracts.

58) Savings.

59) Repeal of Act No 13 of 2003.

SCHEDULES

FIRST SCHEDULE – OATH/AFFIRMATION OF CHAIRPERSON/
A MEMBER/SECRETARY

SECOND SCHEDULE –MEETINGS AND PROCEDURE OF THE
COMMISSION

NATIONAL GENDER AND EQUALITY COMMISSION ACT

[Date of assent: 27th August, 2011.]

[Date of commencement: 30th August, 2011.]

An Act of Parliament to establish the National Gender and Equality Commission as a successor to the Kenya National Human Rights and Equality Commission pursuant to Article 59(4) of the Constitution; to provide for the membership, powers and functions of the Commission, and for connected purposes

1. Short title

This Act may be cited as the National Gender and Equality Commission Act, 2011.

2. Interpretation

(1) In this Act, unless the context otherwise requires –

“**Cabinet Secretary**” means the Cabinet Secretary for the time being responsible for matters relating to gender;

“**chairperson**” means the chairperson of the Commission appointed under section 11;

“**Commission**” means the National Gender and Equality Commission established under section 3;

“**former National Commission on Gender and Development**” means the Commission established under the National Commission on Gender and Development Act, 2003 (No 13 of 2003);

“gender” means the social definition of women and men among different communities and cultures, classes, ages and during different periods in history;

“gender mainstreaming” means ensuring that the concerns of women and men form an integral dimension of the design of all policies, laws and administrative procedures including budgeting and budget implementation, and the monitoring and evaluation of programmes implementing such policies, laws and administrative procedures in all political, economic and societal spheres, so as to ensure that women and men benefit equally, and that inequality is not perpetuated;

“marginalised group” means a group of people who, because of laws or practices before, on or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4) of the Constitution;

“person with disability” means any person with any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have a substantial or long term effect on an individual’s ability to carry out ordinary day to day activities;

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

“secretary” means the secretary to the Commission appointed by the Commission under Article 250(12) of the Constitution in accordance with the procedure set out in section 21;

(2) Despite subsection (1), until after the first elections under the Constitution, references in this Act to the expression “Cabinet Secretary” shall be construed to mean “Minister”.

PART II – ESTABLISHMENT AND STATUS OF COMMISSION

3. Establishment of the Commission

(1) There is established a Commission to be known as the National Gender and Equality Commission.

(2) The Commission shall be a successor in title to the Kenya National Human Rights and Equality Commission established by Article 59 of the Constitution, pursuant to clauses (4) and (5) of that Article.

4. Status of successor Commission

For the avoidance of doubt, the Commission as a successor Commission shall, pursuant to Article 59(5)(c) of the Constitution, be a Commission within the meaning of Chapter Fifteen of the Constitution and shall have the status and powers of a Commission under that Chapter.

5. Powers of Commission as a body corporate

In addition to the powers of a successor Commission under Article 253 of the Constitution, the Commission shall have power to –

- (a) acquire, hold, charge and dispose of movable and immovable property; and
- (b) do or perform all such other things or acts for the proper discharge of its functions under the Constitution and this Act as may lawfully be done or performed by a body corporate.

6. Headquarters

The headquarters of the Commission shall be in the capital city but the Commission may establish branches at any place in Kenya.

7. Guiding principles of Commission

In fulfilling its mandate, the Commission shall act in accordance with the values and principles set out in the Constitution and the laws of Kenya, and shall observe and respect –

- (a) the diversity of the people of Kenya;
- (b) impartiality, gender equality and gender equity;
- (c) inclusiveness, non-discrimination and protection of the marginalized groups;
- (d) all treaties and conventions which have been ratified in Kenya and in particular the fact that human rights are indivisible, interdependent, interrelated and of equal importance for the dignity of all human beings; and
- (d) the rules of natural justice.

8. Functions of the Commission

The functions of the Commission shall be to –

- (a) promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution;
- (b) monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions;
- (c) act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups including minorities and marginalised persons, women, persons with disabilities, and children;

- (d) co-ordinate and facilitate mainstreaming of issues of gender, persons with disability and other marginalised groups in national development and to advise the Government on all aspects thereof;
- (e) monitor, facilitate and advise on the development of affirmative action implementation policies as contemplated in the Constitution;
- (f) investigate on its own initiative or on the basis of complaints, any matter in respect of any violations of the principle of equality and freedom from discrimination and make recommendations for the improvement of the functioning of the institutions concerned;
- (g) work with other relevant institutions in the development of standards for the implementation of policies for the progressive realization of the economic and social rights specified in Article 43 of the Constitution and other written laws;
- (h) co-ordinate and advise on public education programmes for the creation of a culture of respect for the principles of equality and freedom from discrimination;
- (i) conduct and co-ordinate research activities on matters relating to equality and freedom from discrimination as contemplated under Article 27 of the Constitution;
- (j) receive and evaluate annual reports on progress made by public institutions and other sectors on compliance with constitutional and statutory requirements on the implementation of the principles of equality and freedom from discrimination;
- (k) work with the National Commission on Human Rights, the Commission on Administrative Justice and other related institutions to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration in the protection and promotion of rights related to the principle of equality and freedom from discrimination;
- (l) prepare and submit annual reports to Parliament on the status of implementation of its obligations under this Act;
- (m) conduct audits on the status of special interest groups including minorities, marginalised groups, persons with disability, women, youth and children;
- (n) establish, consistent with data protection legislation, databases on issues relating to equality and freedom from discrimination for different affected interest groups and produce periodic reports for national, regional and international reporting on progress in the realization of equality and freedom from discrimination for these interest groups;
- (o) perform such other functions as the Commission may consider necessary for the promotion of the principle of equality and freedom from discrimination; and
- (p) perform such other functions as may be prescribed by the Constitution and any other written law.

9. Membership of Commission

The Commission shall consist of a chairperson and four other members appointed in accordance with the Constitution and the provisions of this Act.

10. Qualifications for appointment of chairperson and members

(1) A person shall be qualified for appointment as the chairperson of the Commission if the person –

- (a) has knowledge and at least fifteen years experience in matters relating to human rights and gender;
- (b) holds a degree from a university recognized in Kenya; and
- (c) meets the requirements of Chapter Six of the Constitution.

(2) A person shall be qualified for appointment as a member of the Commission if the person –

- (a) holds a degree from a university recognized in Kenya;
- (b) has knowledge and at least ten years' experience in matters relating to any of the following fields –
 - (i) law;
 - (ii) public administration;
 - (iii) economics;
 - (iv) gender and social development;
 - (v) human rights;
 - (vi) management; or
 - (vii) social sciences;
- (c) has had a distinguished career in their respective fields; and
- (d) meets the requirements of Chapter Six of the Constitution.

(3) A person shall not be qualified for appointment as the chairperson or a member if such person –

- (a) is a member of Parliament or a County Assembly;
- (b) is a member of the governing body of a political party;
- (c) is a member of a local authority;
- (d) is an undischarged bankrupt; or
- (e) has been removed from office for contravening the provisions of the Constitution or any other law.

11. Procedure for appointment of chairperson and members

(1) Whenever there is a vacancy in the Commission the President shall, within fourteen days of the occurrence of the vacancy, convene a selection

panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Commission.

(2) The selection panel convened under subsection (1) shall consist of one person from each of the following bodies representatively –

- (a) Office of the President;
- (b) Office of the Prime Minister;
- (c) Ministry responsible for matters relating to justice;
- (d) Ministry responsible for matters relating to gender and social development;
- (e) Public Service Commission;
- (f) the Association of Professional Societies in East Africa;
- (g) the Kenya Private Sector Alliance; and
- (h) the National Council for Persons with Disabilities.

(3) The selection panel shall, subject to this section, determine its own procedure, and the ministry responsible for public service shall provide it with such facilities and such other support as it may require for the discharge of its functions.

(4) The selection panel shall, within seven days of its convening, invite applications from qualified persons and publish the names and qualifications of all applicants in the Gazette and two daily newspapers of national circulation.

(5) The selection panel shall within seven days of receipt of applications under subsection (4) consider the applications, interview and shortlist at least three persons qualified for appointment as chairperson and eight persons qualified for appointment as members of the Commission and shall forward the names of the selected candidates to the President for nomination.

(6) Until after the first general election after the commencement of this Act, the President in consultation with the Prime Minister shall, within seven days of receipt of the names forwarded under subsection (5), nominate one person for appointment as chairperson and four persons for appointment as members of the Commission, and shall forward the names of the persons nominated to the National Assembly.

(7) The National Assembly shall, within twenty-one days of the day it next sits after receipt of the names of the nominees under subsection (6), consider all the nominations received and may approve or reject any nomination.

(8) Where the National Assembly approves the nominees, the Speaker shall, forward the names of the approved persons to the President for appointment.

(9) The President shall, within seven days of the receipt of the approved nominees from the National Assembly, by notice in the Gazette, appoint the chairperson and members approved by the National Assembly.

(10) Where the National Assembly rejects any nomination, the Speaker shall, within three days, communicate the decision of the National Assembly to the President to submit fresh nominations.

(11) Where a nominee is rejected by Parliament under subsection (10), the President in consultation with the Prime Minister shall, within seven days, submit to the National Assembly a fresh nomination from amongst the persons shortlisted and forwarded by the selection panel under subsection (5).

(12) If Parliament rejects all or any subsequent nominee submitted by the President for approval under subsection (11), the provisions of subsections (5) and (6) shall apply.

(13) In shortlisting, nominating or appointing persons as chairperson and members of the Commission, the selection panel, the National Assembly and the President shall ensure that not more than two-thirds of the members are of the same gender, shall observe the principle of regional and ethnic balance and shall have due regard to the principle of fair representation for persons with disabilities.

(14) After the first elections after the commencement of this Act, the member of the selection panel under subsection (2)(b) shall be replaced by a representative of the Public Service Commission.

(15) Despite the foregoing provisions of this section, the President, in consultation with the Prime Minister may by notice in the Gazette, extend the period specified in respect of any matter under this section by a period not exceeding twenty-one days.

12. Oath of office

The chairperson, members and the secretary shall each make and subscribe, before the Chief Justice, the oath or affirmation set out in the First Schedule.

13. Powers of the chairperson

(1) The chairperson shall, within seven days of the appointment of the members, convene the first meeting of the Commission at which the members shall elect the vice-chairperson of the Commission from amongst the members.

(2) The chairperson shall –

- (a) preside over all meetings of the Commission;
- (b) be the spokesperson for the Commission; and

(c) supervise and direct the work of the Commission.

(3) If the office of chairperson becomes vacant or if the chairperson is unable to exercise the powers or perform the functions of his office owing to absence, illness or any other cause, the vice-chairperson shall exercise those powers or perform those functions.

14. Tenure of office

(1) The chairperson and members of the Commission shall be appointed for a single term of six years and are not eligible for re-appointment.

(2) The chairperson and members of the Commission shall serve on a full-time basis.

15. Vacancy of office of chairperson and members

(1) The office of the chairperson or a member of the Commission shall become vacant if the holder –

(a) dies;

(b) by notice in writing addressed to the President, resigns from office;

(c) is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.

(2) The President shall notify every resignation, vacancy or termination in the Gazette within seven days.

16. Removal from office

The chairperson or member of the Commission may be removed from office in accordance with Article 251 of the Constitution.

17. Filling of vacancy

(1) Where a vacancy occurs in the membership of the Commission under section 15 or 16, the appointment procedure provided for under this Act shall apply.

(2) A member appointed under subsection (1) to fill a vacancy shall serve for a term of six years but shall not be eligible for re-appointment.

18. Committees of the Commission

(1) The Commission may, from time to time, establish, committees for the better carrying out of its functions.

(2) The Commission may –

- (a) co-opt into the membership of a committee established under subsection (1) other persons whose knowledge and skills are necessary for the functions of the Commission;
- (b) hire such experts or consultants as are necessary for the functions of the Commission.

19. Procedures of the Commission

- (1) The business and affairs of the Commission shall be conducted in accordance with the Second Schedule.
- (2) Except as provided in the Second Schedule, the Commission may regulate its own procedure.

20. Terms and conditions of service

The salaries and allowances payable to, and other terms and conditions of service of, the chairperson and members of the Commission shall be determined by the Salaries and Remuneration Commission.

21. Appointment of secretary

- (1) The appointment of the secretary to the Commission under Article 250 (12) of the Constitution shall be through a competitive recruitment process.
- (2) A person shall be qualified for appointment as a secretary to the Commission if the person –
 - (a) is a citizen of Kenya;
 - (b) holds a degree from a university recognized in Kenya;
 - (c) has had at least ten years proven experience at management level;
 - (d) has extensive experience in public administration; and
 - (e) meets the requirements of Chapter Six of the Constitution.
- (3) The secretary shall be the chief executive officer of the Commission and head of the secretariat and shall be responsible to the Commission.
- (4) The secretary shall hold office for a term of five years and shall be eligible for re-appointment for a further term of five years.

22. Removal of secretary

- (1) The secretary may be removed from office by the Commission in accordance with the terms and conditions of service for –
 - (a) inability to perform the functions of the office of secretary arising out of physical or mental incapacity;
 - (b) gross misconduct or misbehaviour;

- (c) incompetence or neglect of duty;
- (d) violation of the Constitution; or
- (e) any other ground that would justify removal from office under the terms and conditions of service.

(2) Before the Secretary is removed under subsection (1), the Secretary shall be given –

- (a) sufficient notice of the allegations made against him or her; and
- (b) an opportunity to present his or her defence against the allegations.

23. Appointment of staff

(1) The Commission may appoint such staff as may be necessary for the proper discharge of its functions under this Act, and upon such terms and conditions of service as the Commission may determine.

(2) The staff appointed under subsection (1) shall serve on such terms and conditions as the Commission, in consultation with the Salaries and Remuneration Commission may determine.

(3) The Government may, upon request by the Commission, second to the Commission such number of public officers as may be necessary for the proper performance of the functions of the Commission.

(4) A public officer seconded to the Commission shall, during the period of secondment, be deemed to be an officer of the Commission and shall be subject only to the direction and control of the Commission.

24. The common seal of the Commission

(1) The common seal of the Commission shall be kept in such custody as the Commission shall direct and shall not be used except on the order of the Commission.

(2) The common seal of the Commission when affixed to a document and duly authenticated shall be judicially and officially noticed and, unless the contrary is proved, any necessary order or authorization of the Commission under this section shall be presumed to have been duly given.

25. Protection from personal liability

No matter or thing done by a member of the Commission or any officer, employee or agent of the Commission shall, if the matter or thing is done in good faith while executing the functions, powers or duties of the Commission, render the member, officer, employee or agent personally liable for any action, claim or demand whatsoever.

26. General powers of Commission

In addition to the powers conferred in Article 252 of the Constitution, the Commission shall have power to –

- (a) issue summons as it deems necessary for the fulfilment of its mandate;
- (b) require that statements be given under oath or affirmation and to administer such oath or affirmation;
- (c) adjudicate on matters relating to equality and freedom from discrimination;
- (d) obtain, by any lawful means, any information it considers relevant, including requisition of reports, records, documents and any
- (e) by order of the court, enter upon any establishment or premises, and to enter upon any land or premises for any purpose material to the fulfillment of the mandate of the Commission and in particular, for the purpose of obtaining information, inspecting any property or taking copies of any documents, and for safeguarding any such property or document;
- (f) interview any person or group of persons;
- (g) subject to adequate provision being made to meet his expenses for the purpose, call upon any person to meet with the Commission or its staff, or to attend a session or hearing of the Commission, and to compel the attendance of any person who fails to respond to a request of the Commission to appear and to answer questions relevant to the subject matter of the session or hearing;
- (h) conduct audits of any public or private institution to establish the level of compliance with the Constitution with regard to integrating the principle of equality and equity in its operations; and
- (i) require any public or private institution to provide any special report on matters relating to the institution's implementation of the principle of equality and equity including gender equity.

27. Powers of a court

In the performance of its functions under this Act, the Commission shall have the powers of a court to –

- (a) issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;
- (b) question any person in respect of any subject matter under investigation before the Commission; and
- (c) require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission.

PART III – INVESTIGATIONS BY THE COMMISSION

28. Powers relating to investigations

(1) The Commission may, for the purpose of conducting any investigation pertaining to an inquiry, employ the services of any public officer or investigation agency of the Government at the expense of the Commission.

(2) For the purpose of investigating any matter pertaining to an inquiry, a public officer or agency whose services are employed under subsection (1) may, subject to the direction and control of the Commission –

- (a) summon and enforce the attendance of any person for examination;
- (b) require the discovery and production of any document; and
- (c) subject to the Constitution and any written law, requisition any public record or copy thereof from any public officer.

(3) The provisions of section 40 shall apply in relation to any statement made by a person before any public officer or agency whose services are employed under subsection (1) as they apply in relation to any statement made by a person in the course of giving evidence before the Commission.

(4) The public officer or agency whose services are employed under subsection (1) shall investigate any matter pertaining to the inquiry and submit a report thereon to the Commission in that behalf.

(5) The Commission shall satisfy itself on the correctness of the facts stated and the conclusion, if any, arrived at in the report submitted to it under subsection (4) and for that purpose, the Commission may make such inquiry (including the examination of any person or persons who conducts or assists in the investigation) as it deems fit.

29. Jurisdiction in investigations

(1) The Commission shall investigate any complaint, or on its own initiative, investigate any matter relating to equality and freedom from discrimination in –

- (a) relation to any person,
- (b) a public office or a private institution; or
- (c) any other body or agency of the State.

(2) The Commission shall endeavour to resolve any matter brought before it by conciliation, mediation or negotiation.

(3) If the matter referred to under subsection (2) cannot be resolved by conciliation, mediation or negotiation and the Commission determines that there is discrimination carried out unjustly or unreasonably, the Commission shall make such recommendations as it deems fit.

30. Limitation of jurisdiction

The Commission shall not investigate –

- (a) a matter pending before any court or judicial tribunal;
- (b) a criminal offence;
- (c) a matter relating to relations between the State and any foreign state or international organization recognized as such under any international law;
- (d) anything in respect of which there is a right of appeal or other legal remedy unless, in the opinion of the Commission, it is not reasonable to expect that right of appeal or other legal remedy to be resorted to; or
- (e) any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law.

31. Power not limited by other provisions

The Commission may investigate or carry out an inquiry into any matter despite a provision in any written law to the effect that the action is final or cannot be appealed, challenged, reviewed, questioned or called in question.

32. Complaints

(1) A complaint to the Commission may only be made by the person aggrieved by the matter complained of or on his behalf as specified under subsection (2).

(2) A complaint may be made on behalf of an aggrieved person –

- (a) if the aggrieved person is dead or otherwise not able to act for himself or herself, by a member of his or her family or other person suitable to represent the aggrieved person; or
- (b) by a member of the National Assembly with the consent of the aggrieved person or other person who, under paragraph (a) is entitled to make the complaint on behalf of the aggrieved person.

33. Form of complaint

(1) A person wishing to lodge a complaint alleging discrimination may do so orally or in writing addressed to the secretary or such other person as may be duly authorised by the Commission for that purpose.

(2) Where a complaint under subsection (1) is made orally, the Commission shall cause the complaint to be recorded in writing.

(3) A complaint under subsection (1) shall be in such form and contain such particulars as the Commission may prescribe.

(4) Upon receipt of a complaint under subsection (1), the Commission may –

- (a) call for information or a report regarding such complaint from any person within such reasonable time as may be specified by the Commission; and
- (b) without prejudice to paragraph (a), initiate such inquiry as it considers necessary, having regard to the nature of the complaint.

(5) If the information or report called for under subsection (4)(a) is not received within the time stipulated by the Commission, the Commission may proceed to inquire into the complaint without such information or report.

(6) If on receipt of the information or report the Commission is satisfied either that no further action is required or that the required action has been initiated by a State organ or other body responsible for the matters complained of, the Commission shall, in writing, inform the complainant accordingly and take no further action.

34. Discretion not to investigate

The Commission may decline to investigate a complaint if the Commission considers that –

- (a) there are in existence adequate remedies under any written law or administrative practice; or
- (b) the complaint is trivial, frivolous, vexatious or is not made in good faith.

35. Notice if complaint not investigated

If the Commission decides not to investigate a complaint or to discontinue the investigation of a complaint, the Commission shall inform the complainant in writing of that decision and the reasons for the decision as soon as reasonably practicable.

36. Representations if adverse findings, etc.

The Commission shall give any person, State organ, public office or organization against whom an adverse finding or recommendation is made, an opportunity to make representations concerning the finding or recommendation before the Commission includes the finding in its report.

37. Notice of investigation to organization

Before commencing an investigation under this Act, the Commission shall give notice of the intended investigation to the administrative head of the

State organ, public office or organization to which the investigation relates.

38. Hearings of Commission

The hearings of the Commission during an inquiry may be open to the public.

39. Persons likely to be prejudiced or affected to be heard

- (1) Subject to subsection (2), if at any stage of an inquiry the Commission –
- (a) considers it necessary to inquire into the conduct of any person; or
 - (b) is of the opinion that the reputation of any person is likely to be prejudiced by the inquiry, it shall give that person an opportunity to appear before the Commission by himself or by an advocate to give evidence in his own defence.
- (2) This section shall not apply where the credibility of a witness is being impeached.

40. Statements made by persons to the Commission

No statement made by a person in the course of giving evidence before the Commission shall subject such person to any civil or criminal proceedings except for giving false evidence by such statement.

41. Action after inquiry

The Commission may, upon inquiry into a complaint under this Act, take any of the following steps –

- (a) where the inquiry into a complaint of discrimination discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons;
- (b) recommend to the complainant a course of other judicial redress which does not warrant an application under Article 22 of the Constitution;
- (c) recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged discrimination, other appropriate methods of settling the complaint or to obtain relief;
- (d) provide a copy of the inquiry report to all interested parties; and
- (e) submit summonses as it deems necessary in fulfillment of its mandate.

PART IV – REPORT AND RECOMMENDATIONS

42. Report to organization

(1) After concluding an investigation or an inquiry under this Act, the Commission shall make a report to the State organ, public office or organization to which the investigation relates.

(2) The report shall include –

- (a) the findings of the investigation and any recommendations made by the Commission;
- (b) the action the Commission considers should be taken and the reasons for the action; and
- (c) any recommendation the Commission considers appropriate.

(3) The Commission may require the State organ, public office or organization that was the subject of the investigation to submit a report to the Commission within a specified period on the steps, if any, taken to implement the recommendations of the Commission.

(4) If the recommendations of the Commission are not implemented within the specified time, the Commission may submit the report to Parliament as the Commission thinks fit.

43. Report to the complainant

The Commission shall inform the complainant on the results of the investigation in writing.

44. Report of misconduct to appropriate authority

If, after an investigation, the Commission is of the opinion that there is evidence that a person, an officer or employee of the State organ, public office or organization which was investigated under this Act is guilty of misconduct, the Commission shall report the matter to the appropriate authority.

PART V – FINANCIAL PROVISIONS

45. Funds of the Commission

The funds of the Commission shall consist of –

- (a) monies allocated by Parliament for the purposes of the Commission;
- (b) such monies or assets as may accrue to the Commission in the course of the exercise of its powers or in the performance of its functions under this Act; and

- (c) all monies from any other source provided, donated or lent to the Commission.

46. Financial year

The financial year of the Commission shall be the period of twelve months ending on the thirtieth of June in each year.

47. Annual estimates

(1) Before the commencement of each financial year, the Commission shall cause to be prepared estimates of the revenue and expenditure of the Commission for that year.

(2) The annual estimates shall make provision for all the estimated expenditure of the Commission for the financial year concerned and, in particular, shall provide for the –

- (a) payment of the salaries, allowances and other charges in respect of the staff of the Commission;
- (b) payment of pensions, gratuities and other charges and in respect of benefits which are payable out of the funds of the Commission;
- (c) maintenance of the buildings and grounds of the Commission;
- (d) funding of training, research and development of activities of the Commission;
- (e) creation of such funds to meet future or contingent liabilities in respect of benefits, insurance or replacement of buildings or installations, equipment and in respect of such other matters as the Commission may think fit.

(3) The annual estimates shall be approved by the Commission before the commencement of the financial year to which they relate and shall be submitted to the Cabinet Secretary for tabling in National Assembly.

(4) No expenditure shall be incurred for the purposes of the Commission except in accordance with the annual estimates approved under subsection (3).

48. Accounts and audit

(1) The Commission shall cause to be kept all proper books and records of account of the income, expenditure, assets and liabilities of the Commission.

(2) Within a period of three months after the end of each financial year, the Commission shall submit to the Auditor-General the accounts of the Commission in respect of that year together with a –

- (a) statement of the income and expenditure of the Commission during that year; and
- (b) statement of the assets and liabilities of the Commission on the last day of that financial year.

(3) The annual accounts of the Commission shall be prepared, audited and reported upon in accordance with the provisions of Articles 226 and 229 of the Constitution and the Public Audit Act, (No 12 of 2003).

49. Bank accounts

The Commission shall open and maintain such bank accounts as shall be necessary for the performance of its functions.

PART VI – MISCELLANEOUS PROVISIONS

50. Management of information

(1) The Commission and the staff of the Commission shall maintain confidence in respect of all matters that come to their knowledge in the exercise of their duties.

(2) Subject to the provisions of Article 35 of the Constitution, the Commission and the staff of the Commission shall not be called to give evidence in respect of any matter that comes to their knowledge in the exercise of their duties.

(3) Notwithstanding subsection (1), the Commission may disclose in any report made by the Commission under this Act, any matter that in the opinion of the Commission may be disclosed in order to establish grounds for the Commission's findings and recommendations of the Commission.

51. Correspondence from persons in custody, etc.

Every person in charge of a prison, remand or mental institution where a person is held in custody, or of any institution where a person is a patient or inmate shall ensure, notwithstanding the provisions of any other written law, that any correspondence from such person to the Commission is transmitted in confidence and any written communication in that regard shall remain sealed.

52. Offences

A person who –

- (a) without justification or lawful excuse, obstructs hinders, threatens the Commission or a member of staff acting under this Act;

- (b) submits false or misleading information;
- (c) fails to honour summons; or
- (d) misrepresents to or knowingly misleads the Commission or a member of staff of the Commission acting under this Act, commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.

53. Report of the Commission

(1) The report of the Commission under Article 254 of the Constitution shall, in respect of the financial year to which it relates, contain –

- (a) the financial statements of the Commission;
- (b) a description of the activities of the Commission;
- (c) recommendations on specific actions to be taken in furtherance of the findings of the Commission;
- (d) recommendations on legal and administrative measures to address specific concerns identified by the Commission; and
- (e) any other information relating to its functions that the Commission considers relevant.

(2) The Commission shall publish the report in the Gazette and in at least one newspaper with national circulation.

(3) The President, the National Assembly or the Senate may at any time require the Commission to submit a report on a particular issue.

54. Report to Parliament on the implementation of report

(1) The Cabinet Secretary shall prepare an annual report on the implementation of human rights and shall submit the report to Parliament in accordance with Article 153(4)(b) of the Constitution.

(2) Where any of the recommendations contained in a report submitted under subsection (1) have not been implemented, the Cabinet Secretary shall report to the National Assembly the reasons therefor.

55. Regulations

The Commission may make regulations for the better carrying into effect of the provisions of this Act.

PART VII – SAVINGS AND TRANSITIONAL PROVISIONS

56. Transfer of complaints to the Commission

All complaints, which immediately before the commencement of this Act were made to the Kenya National Human Rights and Equality Commission and the former National Commission on Gender and Development shall at the commencement of this Act, be deemed to have been made to the Commission.

57. Contracts

The Commission shall be bound in all contracts, including contracts of service, if any, subsisting at the commencement of this Act and to which the Kenya National Human Rights and Equality Commission was party to.

58. Savings

(1) Notwithstanding section 60 –

- (a) any order or notice made or issued by the Kenya National Human Rights and Equality Commission and the former Kenya National Commission on Human Rights shall be deemed to have been made or issued under this Act;
- (b) any function carried out by the Kenya National Human Rights and Equality Commission and the former Kenya National Commission on Human Rights during the transition period shall be deemed to have been carried out under this Act;
- (c) all assets and liabilities which immediately before the commencement of this Act were vested in the Kenya National Human Rights and Equality Commission shall vest in the Commission;
- (d) all rights, powers and duties, whether arising under any written law or otherwise which immediately before the coming into operation of this Act were vested in the Kenya National Human Rights and Equality Commission shall be transferred to, vested, imposed on, or be enforceable by or against the Commission;
- (e) all actions, suits or legal proceedings by or against the Kenya National Human Rights and Equality Commission shall be carried out on, prosecuted by or against the Commission and no such suit, action or legal proceedings shall abate or be affected by the coming into operation of this Act.

(2) Notwithstanding section 9, the persons who were members of the former National Commission on Gender and Development who became members of the Kenya National Human Rights and Equality Commission pursuant to section 26 of the Sixth Schedule to the Constitution shall

become members of the Commission upon the commencement of this Act for their unexpired term.

59. Repeal of Act No 13 of 2003

The National Commission on Gender and Development Act, 2003 (No 13 of 2003), is repealed.

FIRST SCHEDULE [Section 12.]

OATH/AFFIRMATION OF THE OFFICE OF CHAIRPERSON/A MEMBER/SECRETARY

SECOND SCHEDULE [Section 20.]

MEETINGS AND PROCEDURE OF THE COMMISSION

1. Meetings

(1) The Commission shall decide when and where it meets and the meetings shall be convened by the chairperson.

(2) The Commission shall have at least four meetings in every financial year and not more than four months shall elapse between one meeting and the next meeting.

(3) Unless three quarters of the members otherwise agree, at least seven days' notice in writing of a meeting shall be given to every member.

(4) A meeting shall be presided over by the chairperson or in his or her absence, by the vice-chairperson.

(5) The members of the Commission shall elect a vice-chairperson from among themselves –

(a) at the first sitting of the Commission; and

(b) whenever it is necessary to fill the vacancy in the office of the vicechairperson.

(6) The chairperson and vice-chairperson shall not be of the same gender.

(7) The Commission may invite any person to attend any of its meetings and to participate in its deliberations, but such person shall not have a vote in any decision of the Commission.

2. Conflict of interest

(1) If any person has a personal or fiduciary interest in any matter before the Commission, and is present at a meeting of the Commission or any committee at which any matter is the subject of consideration, that person shall as soon as is practicable after the commencement of the meeting, declare such interest and shall not take part in any consideration or discussion of, or vote on any question touching such matter.

(2) A disclosure of interest made under subparagraph (1) shall be recorded in the minutes of the meeting at which it is made.

(3) A person who contravenes subparagraph (1) commits an offence and is liable, upon conviction, to a fine not exceeding three million shillings, or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

(4) No member or staff of the Commission shall transact any business or trade with the Commission.

3. Quorum

(1) Subject to subparagraph (2), the quorum of the meeting shall not be less than half of the appointed members.

(2) Where there is a vacancy in the Commission, the quorum of the meeting shall not be less than three appointed members.

4. Voting

A question before the Commission shall be decided with a supporting vote of at least two-thirds of the members present.

5. Rules of procedure and minutes

The Commission shall –

- (a) determine rules of procedure for the conduct of its business; and
- (b) keep minutes of its proceedings and decisions.

B.2.3 Commission on Administrative Justice Act No 23 of 2011 (Revised Edition 2012)

ARRANGEMENT OF SECTIONS

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- 1) Short title.
- 2) Interpretation.

PART II – ESTABLISHMENT AND STATUS OF COMMISSION

- 3) Establishment of the Commission.
- 4) Status of successor Commission.

- 5) Powers of Commission as a body corporate.
- 6) Headquarters.
- 7) Guiding principles of Commission.
- 8) Functions of the Commission.
- 9) Membership of Commission.
- 10) Qualifications for appointment of chairperson and members.
- 11) Procedure for appointment of chairperson and members.
- 12) Oath of office.
- 13) Powers of the chairperson.
- 14) Tenure of office.
- 15) Vacancy of office of chairperson and members.
- 16) Removal from office.
- 17) Filling of vacancy.
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SCHEDULES

FIRST SCHEDULE – OATH/AFFIRMATION OF THE OFFICE OF
CHAIRPERSON/A MEMBER/SECRETARY
SECOND SCHEDULE – MEETINGS AND PROCEDURE OF THE
COMMISSION

COMMISSION ON ADMINISTRATIVE JUSTICE ACT No 23 OF 2011

[Date of assent: 27th August, 2011.]

[Date of commencement: 5th September, 2011.]

An Act of Parliament to restructure the Kenya National Human Rights and Equality Commission and to establish the Commission on Administrative Justice pursuant to Article 59(4) of the Constitution; to provide for the membership, powers and functions of the Commission on Administrative Justice, and for connected purposes

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Commission on Administrative Justice Act, 2011.

2. Interpretation

(1) In this Act, unless the context otherwise requires –

“**administrative action**” means any action relating to matters of administration and includes – (a) a decision made or an act carried out in the public service; (b) a failure to act in discharge of a public duty required of an officer in public service; (c) the making of a recommendation to a Cabinet Secretary; or (d) an action taken pursuant to a recommendation made to a Cabinet Secretary;

“**Cabinet Secretary**” means the Cabinet Secretary for the time being responsible for matters relating to public service;

“**chairperson**” means the chairperson appointed in accordance with section 11;

“**Commission**” means the Commission on Administrative Justice established under section 3;

“**Public Complaints Standing Committee**” means the public Complaints Standing Committee established by Gazette Notice No 5826 of 29th June 2007;

“**public office**” has the meaning assigned to it under Article 260 of the Constitution;

“**public officer**” has the meaning assigned to it under Article 260 of the Constitution;

“**secretary**” means the secretary to the Commission appointed by the Commission under Article 250(12) of the Constitution in accordance with the procedure set out in section 22.

(2) Despite subsection (1), until after the first elections under the Constitution, references in this Act to the expression “Cabinet Secretary” shall be construed to mean “Minister”.

PART II – ESTABLISHMENT AND STATUS OF COMMISSION

3. Establishment of the Commission

(1) There is established a Commission to be known as the Commission on Administrative Justice.

(2) The Commission shall be the successor to the Public Complaints Standing Committee existing immediately before the coming into force of this Act.

4. Status of successor Commission

For the avoidance of doubt, the Commission shall be a Commission within the meaning of Chapter Fifteen of the Constitution and shall have the status and powers of a Commission under that Chapter.

5. Powers of Commission as a body corporate

In addition to the powers of a Commission under Article 253 of the Constitution, the Commission shall have power to –

- (a) acquire, hold, charge and dispose of movable and immovable property; and
- (b) do or perform all such other things or acts for the proper discharge of its functions under the Constitution and this Act as may lawfully be done or performed by a body corporate.

6. Headquarters

The headquarters of the Commission shall be in the capital city, but the Commission may establish branches at any place in Kenya.

7. Guiding principles of Commission

In fulfilling its mandate, the Commission shall act in accordance with the values and principles set out in the Constitution and the laws of Kenya, and shall observe and respect –

- (a) the diversity of the people of Kenya;
- (b) impartiality and gender equity;

- (c) all treaties and conventions which have been ratified by Kenya and in particular the fact that human rights are indivisible, interdependent, interrelated and of equal importance for the dignity of all human beings; and
- (d) the rules of natural justice.

8. Functions of the Commission

The functions of the Commission shall be to –

- (a) investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;
- (b) investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;
- (c) report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;
- (d) inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service;
- (e) facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs;
- (f) work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;
- (g) recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;
- (h) provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;
- (i) publish periodic reports on the status of administrative justice in Kenya;
- (j) promote public awareness of policies and administrative procedures on matters relating to administrative justice;
- (k) take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration;
- (l) work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and
- (m) perform such other functions as may be prescribed by the Constitution and any other written law.

9. Membership of Commission

The Commission shall consist of a chairperson and two other members appointed in accordance with the Constitution and the provisions of this Act.

10. Qualifications for appointment of chairperson and members

(1) A person shall be qualified for appointment as the chairperson of the Commission if the person –

- (a) has knowledge and at least fifteen years experience in matters relating to human rights, law, conflict resolution, arbitration or administrative justice;
- (b) holds a degree from a university recognized in Kenya; and
- (c) meets the requirements of Chapter Six of the Constitution.

(2) A person shall be qualified for appointment as a member of the Commission if the person –

- (a) holds a degree from a university recognized in Kenya;
- (b) has knowledge and at least ten years' experience in matters relating to any of the following fields –
 - (i) law;
 - (ii) public administration;
 - (iii) economics or finance;
 - (iv) gender and social development;
 - (v) human rights;
 - (vi) conflict resolution;
 - (vii) management; or
 - (viii) social sciences;
- (c) has had a distinguished career in their respective fields; and
- (d) meets the requirements of Chapter Six of the Constitution.

(3) A person shall not be qualified for appointment as the chairperson or a member of the Commission if such person –

- (a) is a member of Parliament or a County Assembly;
- (b) is a member of the governing body of a political party;
- (c) is a member of a local authority;
- (d) is an undischarged bankrupt; or
- (e) has been removed from office for contravening the provisions of the Constitution or any other law.

11. Procedure for appointment of chairperson and members

- (1) The President shall, within fourteen days of the commencement of this Act convene a selection panel for the purpose of selecting suitable

candidates for appointment as the chairperson or member of the Commission.

- (2) The selection panel convened under subsection (1) shall consist of one person from each of the following bodies representatively –
 - (a) Office of the President;
 - (b) Office of the Prime Minister;
 - (c) Ministry responsible for matters relating to justice;
 - (d) Public Service Commission;
 - (e) the Association of Professional Societies in East Africa; and
 - (f) the National Council for Persons with Disabilities.
- (3) The selection panel shall, subject to this section, determine its own procedure and the Ministry responsible for Public Service shall provide it with such facilities and other support as it may require for the discharge of its functions.
- (4) The selection panel shall, within seven days of its convening, invite applications from qualified persons and publish the names and qualifications of all applicants in the Gazette and two daily newspapers of national circulation.
- (5) The selection panel shall, within seven days of receipt of applications under subsection (4), consider the applications, interview and shortlist at least three persons qualified for appointment as chairperson and five persons qualified for appointment as members of the Commission, and shall forward the names of the selected candidates to the President for nomination.
- (6) Until after the first general election after the commencement of this Act, the President in consultation with the Prime Minister shall, within seven days of receipt of the names forwarded under subsection (5), nominate one person for appointment as chairperson and two persons for appointment as members of the Commission, and shall forward the names of the persons nominated to the National Assembly.
- (7) The National Assembly shall, within twenty-one days of the day it next sits after receipt of the names of the nominees under subsection (6), consider all the nominations received and approve or reject any nomination.
- (8) Where the National Assembly approves the nominees, the Speaker shall, forward the names of the approved persons to the President for appointment.
- (9) The President shall, within seven days of the receipt of the approved nominees from the National Assembly, by notice in the Gazette, appoint the chairperson and members approved by the National Assembly.

(10) Where the National Assembly rejects any nomination, the Speaker shall, within three days, communicate the decision of the National Assembly to the President to submit fresh nominations.

(11) Where a nominee is rejected by Parliament under subsection (10), the President in consultation with the Prime Minister shall, within seven days, submit to the National Assembly a fresh nomination from amongst the persons shortlisted and forwarded by the selection panel under subsection (5).

(12) If Parliament rejects all or any subsequent nominee submitted by the President for approval under subsection (11), the provisions of subsections (5) and (6) shall apply.

(13) In shortlisting, nominating or appointing persons as chairperson and members of the Commission, the selection panel the National Assembly and the President shall ensure that not more than two-thirds of the members are of the same gender, shall observe the principle of gender equity, regional and ethnic balance and shall have due regard to the principle of equal opportunities for persons with disabilities.

(14) After the first elections after the commencement of this Act, the member of the selection panel specified under subsection (2)(b) shall be replaced by a representative of the Public Service Commission.

(15) Despite the foregoing provisions of this section, the President, in consultation with the Prime Minister may, by notice in the Gazette, extend the period specified in respect of any matter under this section by a period not exceeding twenty-one days.

12. Oath of office

The chairperson, members and the secretary shall each make and subscribe, before the Chief Justice, the oath or affirmation set out in the First Schedule.

13. Powers of the chairperson

(1) The chairperson shall, within seven days of the appointment of the members, convene the first meeting of the Commission at which the members shall elect the vice-chairperson of the Commission from amongst the members.

(2) The chairperson shall –

- (a) preside over all meetings of the Commission;
- (b) be the spokesperson for the Commission; and
- (c) supervise and direct the work of the Commission.

(3) If the office of chairperson become vacant or if the chairperson is unable to exercise the powers or perform the functions of his office owing to

absence, illness or any other cause, the vice-chairperson shall exercise those powers or perform those functions.

14. Tenure of office

(1) The chairperson and members of the Commission shall be appointed for a single term of six years and are not eligible for re-appointment.

(2) The chairperson and members of the Commission shall serve on a fulltime basis.

15. Vacancy of office of chairperson and members

(1) The office of the chairperson or a member of the Commission shall become vacant if the holder –

- (a) dies;
- (b) by notice in writing addressed to the President resigns from office;
- (c) is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.

(2) The President shall notify every resignation, vacancy or termination in the Gazette within seven days.

16. Removal from office

The chairperson or member of the Commission may be removed from office in accordance with Article 251 of the Constitution

17. Filling of vacancy

(1) Where a vacancy occurs in the membership of the Commission under section 15 or 16, the appointment procedure provided for under this Act shall apply.

(2) A member appointed under subsection (1) to fill a vacancy shall serve for a term of six years but shall not be eligible for reappointment.

18. Committees of the Commission

(1) The Commission may, from time to time establish, committees for the better carrying out of its functions.

(2) The Commission may –

- (a) co-opt into the membership of a committee established under subsection (1), other persons whose knowledge and skills are necessary for the functions of the Commission;

- (b) hire such experts or consultants as are necessary for the functions of the Commission.

19. Procedures of the Commission

- (1) The business and affairs of the Commission shall be conducted in accordance with the Second Schedule.
- (2) Except as provided in the Second Schedule, the Commission may regulate its own procedure.

20. Terms and conditions of service

The salaries and allowances payable to, and other terms and conditions of service of the chairperson and members of the Commission shall be determined by the Salaries and Remuneration Commission.

21. Appointment of secretary

- (1) The appointment of the secretary to the Commission under Article 250(12) of the Constitution shall be through a competitive recruitment process.
- (2) A person shall be qualified for appointment as a secretary to the Commission if the person –
 - (a) is a citizen of Kenya;
 - (b) holds a degree from a university recognized in Kenya;
 - (c) has had at least ten years proven experience at management level; and
 - (d) meets the requirements of Chapter Six of the Constitution.
- (3) The secretary shall be the chief executive officer of the Commission and head of the secretariat and shall be responsible to the Commission.
- (4) The secretary shall hold office for a term of five years and shall be eligible for re-appointment for a further term of five years.

22. Removal of secretary

- (1) The secretary may be removed from office by the Commission in accordance with the terms and conditions of service for –
 - (a) inability to perform the functions of the office of secretary arising out of physical or mental incapacity;
 - (b) gross misconduct or misbehaviour;
 - (c) incompetence or neglect of duty;
 - (d) violation of the Constitution; or

- (e) any other ground that would justify removal from office under the terms and conditions of service.

(2) Before the secretary is removed under subsection (1), the secretary shall be given –

- (a) sufficient notice of the allegations made against him or her; and
- (b) an opportunity to present his or her defence against the allegations.

23. Appointment of staff

(1) The Commission may appoint such staff as may be necessary for the proper discharge of its functions under this Act, and upon such terms and conditions of service as the Commission may determine.

(2) The staff appointed under subsection (1) shall serve on such terms and conditions as the Commission, in consultation with the Salaries and Remuneration Commission, may determine.

(3) The Government may, upon request by the Commission, second to the Commission such number of public officers as may be necessary for the proper performance of the functions of the Commission.

(4) A public officer seconded to the Commission shall, during the period of secondment, be deemed to be an officer of the Commission and shall be subject only to the direction and control of the Commission.

24. The common seal of the Commission

(1) The Common seal of the Commission shall be kept in such custody as the Commission shall direct and shall not be used except on the order of the Commission.

(2) The common seal of the Commission when affixed to a document and duly authenticated shall be judicially and officially noticed and, unless the contrary is proved, any necessary order or authorization of the Commission under this section shall be presumed to have been duly given.

25. Protection from personal liability

No matter or thing done by a member of the Commission or any officer, employee or agent of the Commission shall, if the matter or thing is done in good faith while executing the functions, powers or duties of the Commission, render the member, officer, employee or agent personally liable for any action, claim or demand whatsoever.

26. General powers of Commission

In addition to the powers conferred in Article 252 of the Constitution, the Commission shall have power to –

- (a) issue summons as it deems necessary for the fulfilment of its mandate;
- (b) require that statements be given under oath or affirmation and to administer such oath or affirmation;
- (c) adjudicate on matters relating to administrative justice;
- (d) obtain, by any lawful means, any information it considers relevant, including requisition of reports, records, documents and any information from any person, including governmental authorities, and to compel the production of such information for the proper discharge of its functions;
- (e) by order of the court, enter upon any establishment or premises, and to enter upon any land or premises for any purpose material to the fulfilment of the mandate of the Commission and in particular, for the purpose of obtaining information, inspecting any property or taking copies of any documents, and for safeguarding any such property or document;
- (f) interview any person or group of persons;
- (g) subject to adequate provision being made to meet his expenses for the purpose, call upon any person to meet with the Commission or its staff, or to attend a session or hearing of the Commission, and to compel the attendance of any person who fails to respond to a request of the Commission to appear and to answer questions relevant to the subject matter of the session or hearing.

27. Powers of a court

In the performance of its functions under this Act, the Commission shall have the powers of a court to –

- (a) issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;
- (b) question any person in respect of any subject matter under investigation before the Commission; and
- (c) require any person to disclose any information within the person's knowledge relevant to any investigation by the Commission.

PART III – INVESTIGATIONS BY THE COMMISSION

28. Powers relating to investigations

(1) The Commission may, for the purpose of conducting any investigation pertaining to an inquiry, employ the services of any public officer or

investigation agency of the Government at the expense of the Commission.

(2) For the purpose of investigating any matter pertaining to an inquiry, a public officer or agency whose services are employed under subsection (1) may, subject to the direction and control of the Commission –

- (a) summon and enforce the attendance of any person for examination;
- (b) require the discovery and production of any document; and
- (c) subject to the Constitution and any written law requisition any public records or copy thereof from any public officer.

(3) The provisions of section 40 shall apply in relation to any statement made by a person before any public officer or agency whose services are employed under subsection (1) as they apply in relation to any statement made by a person in the course of giving evidence before the Commission.

(4) The public officer or agency whose services are employed under subsection (1) shall investigate any matter pertaining to the inquiry and submit a report thereon to the Commission in that behalf.

(5) The Commission shall satisfy itself on the correctness of the facts stated and the conclusion, if any, arrived at in the report submitted to it under subsection (4) and for that purpose, the Commission may make such inquiry (including the examination of any person or persons who conducts or assists in the investigation) as it deems fit.

29. Jurisdiction in investigations

(1) The Commission shall investigate any complaint, or on its own initiative, investigate any matter arising from the carrying out of an administrative action of –

- (a) a public office;
- (b) a state corporation within the meaning of the State Corporations Act (Cap. 446); or
- (c) any other body or agency of the State.

(2) The Commission shall endeavour to resolve any matter brought before it by conciliation, mediation or negotiation.

(3) If the matter referred to under subsection (2) cannot be resolved by conciliation, mediation or negotiation and the Commission determines that the administrative action was carried out unjustly or unreasonably, the Commission shall make such recommendations as it deems fit.

30. Limitation of jurisdiction

The Commission shall not investigate –

- (a) proceedings or a decision of the Cabinet or a committee of the Cabinet;

- (b) a criminal offence;
- (c) a matter pending before any court or judicial tribunal;
- (d) the commencement or conduct of criminal or civil proceedings before a court or other body carrying out judicial functions;
- (e) the grant of Honours or Awards by the President;
- (f) a matter relating to the relations between the State and any foreign State or international organization recognized as such under international law;
- (g) anything in respect of which there is a right of appeal or other legal remedy unless, in the opinion of the Commission, it is not reasonable to expect that right of appeal or other legal remedy to be resorted to; or
- (h) any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law.

31. Power not limited by other provisions

The Commission may investigate an administrative action despite a provision in any written law to the effect that the action is final or cannot be appealed, challenged, reviewed, questioned or called in question.

32. Complaints

(1) A complaint to the Commission may only be made by the person aggrieved by the matter complained of or on his behalf as specified under subsection (2).

(2) A complaint may be made on behalf of an aggrieved person –

- (a) if the aggrieved person is dead or otherwise not able to act for himself or herself, by a member of his or her family or other person suitable to represent the aggrieved person; or
- (b) by a member of the National Assembly with the consent of the aggrieved person or other person who, under paragraph (a), is entitled to make the complaint on behalf of the aggrieved person.

33. Form of complaint

(1) A person wishing to lodge a complaint under this Act may do so orally or in writing addressed to the secretary or such other person as may be duly authorised by the Commission for that purpose.

(2) Where a complaint under subsection (1) is made orally, the Commission shall cause the complaint to be recorded in writing.

(3) A complaint under subsection (1) shall be in such form and contain such particulars as the Commission may prescribe.

(4) Upon receipt of a complaint under subsection (1), the Commission may –

- (a) call for information or a report regarding such complaint from any person within such reasonable time as may be specified by the Commission; and
- (b) without prejudice to paragraph (a), initiate such inquiry as it considers necessary, having regard to the nature of the complaint.

(5) If the information or report called for under subsection 4(a) is not received within the time stipulated by the Commission, the Commission may proceed to inquire into the complaint without such information or report.

(6) If on receipt of the information or report the Commission is satisfied either that no further action is required or that the required action has been initiated by a State organ or other body responsible for the matters complained of, the Commission shall, in writing, inform the complainant accordingly and take no further action.

34. Discretion not to investigate

The Commission may decline to investigate a complaint if the Commission considers that –

- (a) there are in existence adequate remedies under any written law or administrative practice; or (b) the complaint is trivial, frivolous, vexatious or is not made in good faith.

35. Notice if complaint not investigated

If the Commission decides not to investigate a complaint or to discontinue the investigation of a complaint, the Commission shall inform the complainant in writing of that decision and the reasons for the decision as soon as reasonably practicable.

36. Representations if adverse findings, etc.

The Commission shall give any person, State organ, public office or organization against whom an adverse finding or recommendation is made, an opportunity to make representations concerning the finding or recommendation before the Commission includes the finding in its report.

37. Notice of investigation to organization

Before commencing an investigation under this Act, the Commission shall give notice of the intended investigation to the administrative head of the State organ, public office or organization to which the investigation relates.

38. Hearings of Commission

The hearings of the Commission during an inquiry shall be open to the public, except where the Commission otherwise decides.

39. Persons likely to be prejudiced or affected to be heard

(1) Subject to subsection (2), if at any stage of an inquiry the Commission –

- (a) considers it necessary to inquire into the conduct of any person; or
- (b) is of the opinion that the reputation of any person is likely to be prejudiced by the inquiry, it shall give that person an opportunity to appear before the Commission by himself or by an advocate to give evidence in his own defence.

(2) This section shall not apply where the credibility of a witness is being impeached.

40. Statements made by persons to the Commission

No statement made by a person in the course of giving evidence before the Commission shall subject such person to any civil or criminal proceedings except for giving false evidence by such statement.

41. Action after inquiry

The Commission may, upon inquiry into a complaint under this Act take any of the following steps –

- (a) where the inquiry discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons;
- (b) recommend to the complainant a course of other judicial redress which does not warrant an application under Article 22 of the Constitution;
- (c) recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged violation, other appropriate methods of settling the complaint or to obtain relief;
- (d) provide a copy of the inquiry report to all interested parties; and
- (e) submit summonses as it deems necessary in fulfilment of its mandate.

PART IV – REPORT AND RECOMMENDATIONS

42. Report to organization

(1) After concluding an investigation or an inquiry under this Act, the Commission shall make a report to the State organ, public office or organization to which the investigation relates.

(2) The report shall include –

- (a) the findings of the investigation and any recommendations made by the Commission;
- (b) the action the Commission considers should be taken and the reasons for the action; and
- (c) any recommendation the Commission considers appropriate.

(3) The Commission may require the State organ, public office or organization that was the subject of the investigation to submit a report to the Commission within a specified period on the steps, if any, taken to implement the recommendations of the Commission.

(4) If there is failure or refusal to implement the recommendations of the Commission within the specified time, the Commission may prepare and submit to the National Assembly a report detailing the failure or refusal to implement its recommendations and the National Assembly shall take appropriate action.

43. Report to the complainant

The Commission shall inform the complainant on the results of the investigation in writing.

44. Report of misconduct to appropriate authority

If, after an investigation, the Commission is of the opinion that there is evidence that a person, an officer or employee of the State organ, public office or organization which was investigated under this Act is guilty of misconduct, the Commission shall report the matter to the appropriate authority.

PART V – FINANCIAL PROVISIONS

45. Funds of the Commission

The funds of the Commission shall consist of –

- (a) monies allocated by Parliament for the purposes of the Commission;

- (b) such monies or assets as may accrue to the Commission in the course of the exercise of its powers or in the performance of its functions under this Act; and
- (c) all monies from any other source provided, donated or lent to the Commission.

46. Financial year

The financial year of the Commission shall be the period of twelve months ending on the thirtieth of June in each year.

47. Annual estimates

(1) Before the commencement of each financial year, the Commission shall cause to be prepared estimates of the revenue and expenditure of the Commission for that year.

(2) The annual estimates shall make provision for all the estimated expenditure of the Commission for the financial year concerned and, in particular, shall provide for the –

- (a) payment of the salaries, allowances and other charges in respect of the staff of the Commission;
- (b) payment of pensions, gratuities and other charges and in respect of benefits which are payable out of the funds of the Commission;
- (c) maintenance of the buildings and grounds of the Commission;
- (d) funding of training, research and development of activities of the Commission;
- (e) creation of such funds to meet future or contingent liabilities in respect of benefits, insurance or replacement of buildings or installations, equipment and in respect of such other matters as the Commission may think fit.

(3) The annual estimates shall be approved by the Commission before the commencement of the financial year to which they relate and shall be submitted to the Cabinet Secretary for tabling in the National Assembly.

(4) No expenditure shall be incurred for the purposes of the Commission except in accordance with the annual estimates approved under subsection (3).

48. Accounts and audit

(1) The Commission shall cause to be kept all proper books and records of account of the income, expenditure, assets and liabilities of the Commission.

(2) Within a period of three months after the end of each financial year, the Commission shall submit to the Auditor-General the accounts of the Commission in respect of that year together with a –

- (a) statement of the income and expenditure of the Commission during that year; and
- (b) statement of the assets and liabilities of the Commission on the last day of that financial year. (3) The annual accounts of the Commission shall be prepared, audited and reported upon in accordance with the provisions of Articles 226 and 229 of the Constitution and the Public Audit Act, 2003 (No 12 of 2003).

49. Bank accounts

The Commission shall open and maintain such bank accounts as shall be necessary for the performance of its functions.

PART VI – MISCELLANEOUS PROVISIONS

50. Management of information

(1) The Commission and the staff of the Commission shall maintain confidence in respect of all matters that come to their knowledge in the exercise of their duties.

(2) Subject to the provisions of Article 35 of the Constitution, the Commission and the staff of the Commission shall not be called to give evidence in respect of any matter that comes to their knowledge in the exercise of their duties.

(3) Notwithstanding subsection (1), the Commission may disclose in any report made by the Commission under this Act, any matter that in the opinion of the Commission may be disclosed in order to establish grounds for the Commission's findings and recommendations of the Commission.

51. Correspondence from persons in custody, etc.

Every person in charge of a prison, remand or mental institution where a person is held in custody, or of any institution where a person is a patient or inmate shall ensure, notwithstanding the provisions of any other written law, that any correspondence from such person to the Commission is transmitted in confidence and any written communication in that regard shall remain sealed.

52. Offences

A person who –

- (a) without justification or lawful excuse, obstructs, hinders or threatens the Commission or a member of staff acting under this Act;
- (b) submits false or misleading information;
- (c) fails to honour summons; or
- (d) misrepresents to or knowingly misleads the Commission or a member of staff of the Commission acting under this Act, commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.

53. Report of the Commission

(1) The report of the Commission under Article 254 of the Constitution shall, in respect of the financial year to which it relates, contain –

- (a) the financial statements of the Commission;
- (b) a description of the activities the Commission;
- (c) recommendations on specific actions to be taken in furtherance of the findings of the Commission;
- (d) recommendations on legal and administrative measures to address specific concerns identified by the Commission; and
- (e) any other information relating to its functions that the Commission considers relevant.

(2) The Commission shall publish the report in the Gazette and in at least one newspaper with national circulation.

(3) The President, the National Assembly or the Senate may at any time require the Commission to submit a report on a particular issue.

54. Report to Parliament on the implementation of report

(1) The Cabinet Secretary shall, prepare an annual report and submit the report to Parliament in accordance with Article 153(4)(b) of the Constitution.

(2) Where any of the recommendations contained in a report submitted under subsection (1) have not been implemented, the Cabinet Secretary shall report to Parliament the reasons therefor.

55. Review of mandate

Parliament shall, upon expiry of five years from the date of commencement of this Act, and pursuant to Article 59(4) of the Constitution, review the mandate of the Commission with a view to amalgamating the Commission with the commission responsible for

human rights. 56. Regulations The Commission may make regulations for the better carrying into effect of the provisions of this Act.

PART VII – SAVINGS AND TRANSITIONAL PROVISIONS

57. Transfer of complaints to the Commission

All complaints relating to maladministration, which immediately before the commencement of this Act were made to the Kenya National Human Rights and Equality Commission and the former Public Complaints Standing Committee at the commencement of this Act, shall be deemed to have been made to the Commission.

58. Contracts

The Commission shall be bound in all contracts, including contracts of service, if any, subsisting at the commencement of this Act and to which the Public Complaints Standing Committee was party.

59. Savings

(1) Notwithstanding the provisions of this Act –

- (a) any order or notice made or issued by the Kenya National Human Rights and Equality Commission and the former Public Complaints Standing Committee shall be deemed to have been made or issued under this Act;
- (b) any function carried out by the Kenya National Human Rights and Equality Commission and the former Public Complaints Standing Committee during the transition period shall be deemed to have been carried out under this Act;
- (c) all rights, powers and duties, whether arising under any written law or otherwise which immediately before the coming into operation of this Act were vested in the Public Complaints Standing Committee shall be transferred to, vested imposed on, or be enforceable by or against the Commission;
- (d) all actions, suits or legal proceedings by or against the Public Complaints Standing Committee shall be carried out on, prosecuted by or against the Commission and no such suit, action or legal proceedings shall abate or be affected by the coming into operation of this Act; and
- (e) all assets and liabilities which immediately before the commencement of this Act were vested in, or enforced against, the Public Complaints Standing Committee shall, by virtue of this paragraph, vest in the Commission.

FIRST SCHEDULE [Section 12.]

OATH/AFFIRMATION OF THE OFFICE OF CHAIRPERSON/ A MEMBER/SECRETARY

I having been appointed (the chairperson/member of/ Secretary to) the Commission on Administrative Justice, do solemnly (swear/declare and affirm) that I will at all times obey, respect and uphold the Constitution of Kenya and all other laws of the Republic; that I will faithfully and fully, impartially and to the best of my ability, discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice. (SO HELP ME GOD). Sworn/Declared by the said Before me this day of
..... Chief

SECOND SCHEDULE [Section 19.]

MEETINGS AND PROCEDURE OF THE COMMISSION

1. Meetings

- (1) The Commission shall decide when and where it meets and the meetings shall be convened by the chairperson.
- (2) The Commission shall have at least four meetings in every financial year and not more than four months shall elapse between one meeting and the next meeting.
- (3) Unless three quarters of the members otherwise agree, at least seven days' notice in writing of a meeting shall be given to every member.
- (4) A meeting shall be presided over by the chairperson or in his or her absence by the vice-chairperson.
- (5) The members of the Commission shall elect a vice-chairperson from among themselves –
 - (a) at the first sitting of the Commission; and
 - (b) whenever it is necessary to fill the vacancy in the office of the vicechairperson.
- (6) The chairperson and vice-chairperson shall not be of the same gender.
- (7) The Commission may invite any person to attend any of its meetings and to participate in its deliberations, but such person shall not have a vote in any decision of the Commission.

2. Conflict of interest

- (1) If any person has a personal or fiduciary interest in any matter before the Commission, and is present at a meeting of the Commission or any committee at which any matter is the subject of consideration, that person shall as soon as is practicable after the commencement of the meeting,

declare such interest and shall not take part in any consideration or discussion of, or vote on any question touching such matter.

(2) A disclosure of interest made under sub-paragraph (1) shall be recorded in the minutes of the meeting at which it is made.

(3) A person who contravenes sub-paragraph (1) commits an offence and is liable, upon conviction, to a fine not exceeding three million shillings, or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

(4) No member or staff of the Commission shall transact any business or trade with the Commission directly or indirectly.

3. Quorum

(1) Subject to sub-paragraph (2), the quorum of the meeting shall not be less than half of the appointed members.

(2) Where there is a vacancy in the Commission, the quorum of the meeting shall not be less than three appointed members.

4. Voting

A question before the Commission shall be decided with a supporting vote of at least two-thirds of the members present. 5. Rules of procedure and minutes The Commission shall –

- (a) determine rules of procedure for the conduct of its business; and
- (b) keep minutes of its proceedings and decisions.

B.2.4 Commission on Administrative Justice Act Subsidiary Legislation No 23 of 2011

ARRANGEMENT OF REGULATIONS

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SCHEDULES

FIRST SCHEDULE – FORMS

SECOND SCHEDULE – SUMMONS TO ATTEND THE COMMISSION

PART I – PRELIMINARY

1. Citation

These Regulations may be cited as the Commission on Administrative Justice Regulations, 2013.

2. Interpretation

In these Regulations, unless the context otherwise requires –

“**Act**” means the Commission on Administrative Justice Act, 2013 (Cap. 102A);

“**admission**” means the process by which the eligibility of a complaint to determination by the Commission is done;

“**Chairperson**” means the Chairperson of, the Commission appointed in accordance with section 11 of the Act;

“**Commission**” means the Commission on Administrative Justice established under section 3 of the Act;

“**Commissioner**” means a member of the Commission appointed under section 11 of the Act;

“**Complainant**” means a person or institution alleging breach of any matter under the mandate of the Commission;

“**Complaint**” means an oral, written or any other communication made or addressed to the Commission or taken up by the Commission against a State Office or State Officer or Public Officer or Public Office;

“**hearing**” means a sitting of a hearing panel for the purpose of enabling it to reach or announce a decision on a complaint under adjudication;

“investigation” includes the formal process following a preliminary inquiry or on the Commission’s own motion of establishing the facts in a matter, by an investigator, upon a decision of the Commission;

“mediation” means the process by which the Commission assists a complainant and the respondent to reach a fair settlement regarding the complaint and may include, the process of conciliation or negotiation;

“respondent” means a person or institution against whom or who the complaint is made;

“State office” has the meaning assigned to it under Article 260 of the Constitution; and

“State officer” has the meaning assigned to it under Article 260 of the Constitution.

PART II – LODGING AND HANDLING PROCEDURE OF A COMPLAINT

3. Lodging of complaints

A complaint may be lodged at the offices of the Commission or at such place or places and in such form as the Commission may from time to time determine.

4. Parties to a complaint

A complaint may be lodged by the complainant in person or by a person acting on behalf of the complainant or by any other person authorized by law to act for the complainant, provided that the Commission may admit anonymous complaints.

5. Form of a complaint

(1) Where the complaint is made orally, or otherwise, or the complainant cannot read or write, the complaint may be reduced to writing by a designated officer of the Commission.

(2) A written complaint shall be in such form as the Commission may determine and shall include -

- (a) the name and contact details of the complainant;
- (b) the particulars of the respondent;
- (c) the substance of the complaint in sufficient detail to enable the Commission to act.

(3) The complainant may attach or provide any documents necessary to support the complaint.

(4) Despite the foregoing, a complaint may be made anonymously, or treated in such a manner as to protect the identity of, or particulars of, the complainant where necessary, as may be directed by the Chairperson.

6. Principles of natural justice

In the determination of complaints under these Regulations, the Commission shall have due regard to the principles of natural justice and shall not be bound by any legal or technical rules of evidence applicable to proceedings before a court of law.

7. Fees

The Commission shall not charge any fee in the lodging and determination of complaints.

8. Service of process

(1) Any document required or authorized to be served under these Regulations shall, where practicable, be served personally on the person by delivering or tendering the document to that person.

(2) Where it is not possible to effect personal service, the document may be served in such manner as the Commission may determine.

(3) Any document requiring service under these Regulations shall be served by an officer of the Commission or any other person authorized to do so by the Commission.

9. Screening of complaints

(1) A complaint shall, upon being entered into the register under regulation 16, be forwarded to the appropriate Department in the Commission for screening.

(2) The Commission, upon screening the complaint, may –

- (a) admit the complaint;
- (b) where appropriate, advise the complainant in writing that the matter is not within the mandate of the Commission; or
- (c) advise the complainant that the matter lies for determination by another body or institution and refer the same to the said body or institution.

10. Discontinuation of a complaint

Where, in the opinion of the Commission, a complaint does not merit further consideration, it may discontinue further proceedings on the complaint, record its reasons and notify the complainant accordingly.

11. Appeal

(1) Where a complaint has been discontinued under regulation 10, the complainant may, in writing, appeal to the Chairperson against the discontinuation.

(2) Where an appeal is disallowed, the complaint shall be closed and the appellant notified appropriately.

(3) For purposes of this regulation, a letter under the hand of the Chairperson notifying the complainant of the decision of the Commission shall be considered as notice for the purposes of this regulation.

12. Withdrawal and lapse of complaint

(1) A complainant may, in writing, withdraw a complaint pending before the Commission at any stage during its consideration.

(2) Where a complainant unjustifiably fails or neglects to respond to communication from the Commission within three months from the date of the last communication, the Commission may deem the complaint to have lapsed.

(3) Despite the provisions of paragraphs (1) and (2), the Commission may, in its discretion, proceed to deal with a complaint in the public interest.

(4) Where a complaint has lapsed, the complainant may apply to the Chairperson for readmission of the complaint and give reasons in support of the application for re-admission to the satisfaction of the Chairperson.

13. Joint consideration of complaint

(1) Where two or more complaints are lodged in which the same or similar allegations are raised against a respondent or respondents, the Commission may

- (a) consolidate the complaints; or
- (b) treat one complaint as a test complaint and stay further action on the other complaints pending resolution of the test complaint.

(2) The decision on a test complaint shall apply, *mutatis mutandis*, to all other complaints with which the test complaint was consolidated.

14. Judicial notice

The Commission may take judicial notice of facts that are publicly known.

15. Language

(1) Proceedings before the Commission shall be conducted in the English or Swahili languages.

(2) The Commission shall endeavour to ensure that a party who cannot speak or understand the language of proceedings is entitled to the services of an interpreter to be provided by the Commission.

(3) For purposes of paragraph (2), interpretation shall include interpretation for braille, sign-language or such other interpretation as may be deemed necessary.

16. Register of Complaints

The Commission shall keep a register of complaints in which all complaints shall, upon receipt, be entered.

PART III – ADMISSION AND RESOLUTION OF A COMPLAINT

17. Action on complaint

(1) Upon admission of a complaint, the Commission shall draft a communication in form CAJ 1-1 or CAJ 2-1, as applicable, set out in the First Schedule, to the respondent.

(2) Upon the expiry of fourteen working days, if there is no response after receipt, a reminder giving seven days to comply in form CAJ 3-1 set out in the Second Schedule shall be communicated to the respondent.

(3) If there is still no response under paragraph (2), a further and final reminder giving seven days to comply in form CAJ 3-1 set out in the Second Schedule, shall be send to the respondent.

(4) If upon the expiry of twenty-eight days there is still no response, the Commission shall issue summons or make such other orders to attend to the respondent in a form to be determined by the Commission.

18. Failure to respond to summon

If a respondent fails to respond to the summonses or other orders referred to in regulation 17, the Commission may proceed to –

- (a) determine the complaint in the absence of the respondent;

- (b) institute legal proceedings against the respondent under to section 52(c) of the Act;
- (c) cite the respondent as an unresponsive State or Public Office or Officer or declare such State or Public Officer to be unfit to serve in the Public Service;
- (d) take appropriate action against the unresponsive State or Public Office or Officer through Performance Contracting; or
- (e) report the respondent in the Commission's Statutory Reports.

19. Resolution of complaint

In resolving a complaint, the Commission may –

- (a) conduct investigations;
- (b) requisite and obtain information or documents;
- (c) conduct an inquiry;
- (d) undertake mediation, negotiation and conciliation;
- (e) constitute a hearing panel;
- (f) invite or summon any person or persons to attend to the Commission;
- (g) obtain warrants of arrest for breach of any summons or orders of the Commission; or
- (h) obtain orders from court authorizing search or seizure.

20. Action against respondent

After adopting any of the options stated in regulation 19, the Commission may determine the complaint and –

- (a) make a formal determination that the respondent is in breach of the Constitution, the Act or any other legislation;
- (b) declare the respondent to be a person ineligible to hold a state or public office;
- (c) enter the name of the respondent in the Commission's Citation Register which shall be signed and sealed by the Chairperson and which shall include the nature of the complaint and the determination made; or
- (d) make any other adverse finding against the respondent.

21. Determination of complaint

In determining the complaint, the Commission may

- (a) recommend an appropriate remedy;
- (b) award appropriate compensation to the complainant;
- (c) recommend the removal of the respondent from State or Public office;
- (d) issue a formal caution or warning to the respondent; or

- (e) publish the action taken in the Commission's Statutory Report.

PART IV – INVESTIGATIONS

22. Investigations

- (1) Where the complaint has been admitted, or where the commission has taken up a matter on its own initiative, the Chairperson may commission an investigation by an officer of the Commission or any public office or investigation agency.
- (2) The investigator may, subject to the direction and control of the Commission –
 - (a) issue summonses or requisition information in form to be determined by the Commission;
 - (b) administer an Oath or Affirmation;
 - (c) requisite any document or information from any person or institution; and
 - (d) by order of court, enter into any establishment or premises, conduct inspections or collect documents.
- (3) Upon completion of the investigation, the investigator shall prepare a report and submit it to the Chairperson of the Commission.
- (4) Upon review of the report, the Commission may –
 - (a) conduct a formal hearing;
 - (b) undertake a mediation or a conciliation;
 - (c) refer the complaint to the appropriate public body for further-action; or
 - (d) determine the complaint appropriately.
- (5) The Commission shall keep a record of each investigation and may publish the findings and recommendations, pursuant to an investigation, and may include these in its Statutory Report.

PART V – MEDIATION, CONCILIATION AND NEGOTIATION

23. Procedure

- (1) The Commission may, in writing, advise the parties to a complaint that the dispute may be best resolved through mediation and conciliation.
- (2) Where both parties to a complaint consent to mediation and conciliation, the Commission shall, in consultation with the parties, fix an appropriate date for a meeting.
- (3) The Commission shall issue a mediation notice which shall include –
 - (a) the names of the parties to the complaint; and

(b) the date, time and venue of the mediation meeting.

(4) Upon the issuance of a mediation notice, but before the date of the meeting, the Chairperson shall constitute a mediation panel consisting of at least one Commissioner and such number of other persons as the Chairperson may consider necessary.

24. Procedures at conciliation meeting

During the mediation or meeting, the panel appointed under regulation 23(4) may apply such procedures as it may, in the interests of the parties, deem appropriate in the circumstances.

25. Conciliation agreement

(1) At the conclusion of the mediation process, both parties shall sign a mediation and conciliation agreement bearing the common seal of the Commission and signed by the designated Commissioner.

(2) A mediation or conciliation agreement signed under this regulation, shall be deemed to be a determination of the Commission, and shall be enforceable as such.

(3) Despite provisions of this regulation, the Commission may make awards for compensation under this Part.

PART VI – COMMISSION HEARINGS

26. Hearings

(1) The Commission may conduct a hearing on any complaint or matter under its jurisdiction where it considers desirable or appropriate to do so.

(2) A hearing panel shall consist of such persons as the Chairperson may appoint.

(3) Unless the circumstances otherwise require, for reasons stated, the Commission shall conduct its hearings in public.

27. Hearing procedure

(1) Upon determination that a complaint should be addressed through a hearing, the Commission shall issue a notice to the concerned parties on the constitution of a hearing panel and require them to enter appearance.

(2) The notice referred to in paragraph (1) shall be in the form to be determined by the Commission and shall include –

(a) the names of the parties;

(b) the date, place and time of the hearing;

- (c) the penalty for non-compliance;
- (d) the duration within which appearance is required; and
- (e) a notice that a party may appear in person or with an advocate, representative or intermediary.

(3) An appearance before the hearing panel shall be made within fourteen days from the date of service of the notice to the parties under paragraph (2).

(4) Where a party has entered appearance under to paragraph (3), the Commission shall give directions and fix a hearing date.

(5) For purpose of this regulation, a letter or any other sufficient indication in writing, by a party, informing the Commission that the party shall appear on the date and place of hearing, shall be considered as notice of appearance by that party.

(6) Upon fixing a hearing date, a hearing notice in form to be determined by the Commission, shall be served on all the parties.

28. Default in appearance

(1) Where a party to a complaint has been duly served and fails to appear as required, the hearing panel may proceed to hear the respondent and make orders in default of appearance as it may deem fit.

(2) If, on the day fixed for the hearing of a complaint, the respondent appears in answer to the summons but the complainant does not appear, or vice-versa, the hearing panel may, if satisfied that a hearing notice was duly served, proceed to dispense with the complaint on the basis of the evidence before it.

(3) Where a complaint is determined under paragraphs (1) and (2), the party in default may move the Commission to set aside the decision and reinstate the complaint subject to satisfying the Commission that there were satisfactory grounds and reasons for nonattendance at the hearing.

(4) The hearing panel may, upon consideration of the motion under paragraph (3), set aside the decision and fix a new date for the hearing of the complaint with notice to both parties, and upon such terms and conditions as it deems fit.

29. Procedure at hearing

(1) Despite the provisions of this regulation, a hearing panel may adopt a suitable procedure for the purpose of resolving the matter while avoiding unnecessary legal technicalities and formalities.

(2) The parties shall be heard in such order as the hearing panel shall determine and shall be entitled to give evidence, call witnesses, question

any witnesses and address the hearing panel both on the evidence and generally on the subject matter of the complaint.

(3) The hearing panel may, at any time, put questions to either party or any witnesses and may, at its discretion, call such additional evidence or expert testimony as it considers necessary.

(4) The hearing panel shall enter an appropriate decision on part or all of the complaint.

(5) The hearing panel may, for sufficient reason, at any time before or after the beginning of the hearing, adjourn the proceedings and in every such case the Commission shall fix a date for further hearing of the complaint.

(6) In the course of the proceedings, the hearing panel may make such preservatory or interim orders, as it may deem fit and just in the circumstances.

(7) Evidence before the hearing panel may be given orally, or if the hearing panel so orders, by affidavit or written statement, but the hearing panel may at any stage require the personal attendance of any witness, deponent or author of a written statement or document.

(8) At any hearing, the hearing panel may, if it is satisfied that it is just and reasonable to do so with no resulting prejudice to the respondent, permit a party to rely on grounds not stated in his complaint, or as the case may be, his reply, and adduce any evidence not initially presented to the Commission.

(9) Evidence before the hearing panel shall be given on oath or affirmation and for that purpose, the hearing panel shall administer such oath or affirmation.

(10) The evidence of the parties and that of each witness shall be recorded by the hearing panel or by any person authorized to do so by the Commission.

30. Change of Advocate

An advocate who appears for a party at any stage shall be deemed to be that party's advocate throughout the proceedings unless –

- (a) the party to the complaint files a written revocation of the advocate's authority with the Commission;
- (b) the advocate files a written notice of withdrawal from the matter with the Commission.

31. Panel decisions

(1) After concluding the hearing of the matter, the hearing panel shall render a decision reflecting substantive justice.

(2) A decision under paragraph (1) shall be in writing and shall state –

- (a) the nature of the complaint;
- (b) a summary of the relevant facts and evidence adduced before the panel;
- (c) the determination and reasons supporting the panel's decision;
- (d) the remedy to which the complaint is entitled; and
- (e) the order of the panel necessary to enforce the remedy.

(3) Where the decision of the hearing panel is not given immediately after the hearing of the complaint, the panel shall deliver the decision on notice.

(4) After the decision is rendered, the Commission may correct typographical errors without prejudice to the substance of its findings.

32. Orders

(1) The orders made in a decision of the hearing panel shall be extracted, sealed and authenticated as orders of the Commission and shall be signed by the Chairperson.

(2) Orders of the Commission shall be enforced in similar manner as Orders of Court.

33. Copies of proceedings

Parties may obtain a copy of the Commission's decision free of charge.

PART VII – MISCELLANEOUS

34. Amicus curiae

(1) The Commission may, on its own motion or upon invitation, seek to join legal proceedings in a court of law or judicial tribunal as interested party, interveners or amicus curiae, provided that when the Commission is requested to do so it may, upon giving written reasons, decline to be enjoined in such proceedings.

(2) In determining whether to join proceedings as interested parties, interveners or amicus curiae, the Commission shall satisfy itself that the issues before the court –

- (a) are matters of broad public interest;
- (b) are matters raising substantial policy implications;
- (c) are matters affecting public administration;
- (d) are matters relating to administrative justice;
- (e) are matters concerning leadership and integrity; or
- (f) are matters of interest to the Commission in light of its mandate.

35. Forms

The Commission may from time to time determine any other forms for the better carrying out of the provisions of the Act and these Regulations.

36. Cases not covered by these Regulations

Any case not covered by these Regulations shall be dealt with in accordance with such instructions as the Commission may issue from time to time.