

EXPLANATORY NOTE REVISED CIVIL SOCIETY DRAFT OF THE TJRC BILL

This note highlights some of the key adjustments and insertions to the draft Bill.

PART 1—PRELIMINARY

Note the inclusion of the definitions of **human rights violation, corruption, economic transgression, perpetrator, public office and victim community**.

PART II—ESTABLISHMENT OF COMMISSION

Section 5 provides for **strong independence** of the Commission.

Section 6 requires the Commission and its personnel to adhere to certain **values and principles**.

Section 7 sets out in basic terms the objectives and functions of the Commission. This is a **simplified version** of the earlier text, which ran to several pages. The section discloses 3 broad objectives, namely

- **establishing the truth;**
- **redressing the wrongs suffered by victims;** and
- **preventing the repeat of human rights violations.**

Under each objective, the essential means of achieving it are set out.

Section 8 details the bodies or committees that must be established in order to achieve the objectives, namely

- **Truth Seeking,**
- **Victim Support & Reparation,**
- **Gender,** and
- **Outreach & Reconciliation.**

Section 9 requires the Commission to strive for gender equity but requires that at least **one third of all staff** in all bodies and departments be women.

Section 10 proposes the expansion of the Selection Committee to 13 persons to allow for greater representation from civil society and representation of government (the President and Prime Minister nominating one person each). This section also imposes **certain conditions** on national and international commissioners.

Section 10 also suggests not reconvening the Selection Committee to remove a commissioner. Instead, a **committee of Parliament** may perform this role.

Section 11 imposes a **code of conduct** on commissioners and members of staff. It specifically prohibits conflicts of interest and provides for a procedure to be followed when a conflict arises.

Section 13 provides for a preparatory phase of 3 months for the Commission to **prepare its basic systems, recruit essential staff, plan its operations** and engage in **outreach** and the raising of **public awareness** (including the distribution of plain language guides to the TJRC law).

Section 14 provides for an operational phase of 24 months in which the Commission must **complete its operations and deliver its final report**.

An outreach phase of 6 months is provided for the purpose of **distribution of the final report; the production of popular and child friendly versions, public education; archiving and closure**.

Section 15 provides for a Secretary to the Commission and a Corporate Services department to support the **administrative, financial, logistical personnel and legal needs** of the Commissioners and all the committees, units and other bodies of the Commission. The Secretary exercises executive control over the machinery that supports the work of the Commissioners and the committees and units, **but does not exercise control over the substance of the work** of the committees and units.

Section 18 requires victims to be handled according to certain **procedures and principles**.

PART III—TRUTH SEEKING

Part III provides for the creation of a Truth Seeking Committee. This committee will conduct inquiries and hearings into **human rights violations, economic transgressions, corruption and the abuse of power**. It will also conduct inquiries and hearings for the purpose of making **justice & public vetting recommendations**.

The Committee will be supported by an Investigative & Research Unit which will support the Committee in its duties and functions. The Committee and Unit will be the “engine room” for the key fact finding function of the Commission.

PART IV—VICTIM SUPPORT & REPARATION

Part IV provides for the creation of a Victim Support and Reparation Committee. This committee will **reach out to victims and victim communities** and conduct victim hearings. It will **assess the needs** of victims and victim communities and recommend reparations. The Committee is required to provide **protective, legal, psycho-social and logistical support services** to victims. It will be supported in its work by a Victims’ Support Unit.

PART V—GENDER

Part V provides for the creation of a Gender Committee. This committee will conduct **gender sensitivity training** for all the Commission's personnel; **recommend protocols** for the Commission's procedures; **monitor gender related practices** within the Commission and advise on best practice; **investigate gender based human rights violations** and marginalization; **reach out to victims** of gender based violations and conduct public or private hearings; **assess the needs** of victims of gender based violations; and **make recommendations** as to the measures required to redress such violations and marginalization. The Committee will be supported in its work by a Gender Support Unit.

PART VI—OUTREACH & RECONCILIATION

This part creates an Outreach and Reconciliation Committee. This Committee will conduct the **outreach activities** of Commission. It will **assess the reconciliation & healing needs** of victims, victim communities & other stakeholders, engage in **activities to promote reconciliation** and healing, and **recommend measures** to promote lasting reconciliation and healing. The Committee will be supported in its work by an Outreach & Reconciliation Unit

PART VII—INVESTIGATIONS & HEARINGS

Part VII sets out the specific investigative powers of the Commission. Section 37 **ousts the application** of the Official Secrets Acts to the inquiries of the Commission except in very limited circumstances.

Section 38 specifies the procedural rights of persons implicated and victims. Essentially, whenever the Commission contemplates making a **decision or recommendation which may be to the detriment** of a person implicated, such person, together with any associated victim, must be afforded an opportunity to **make representations and/ or to appear at a hearing**.

Sections 38 and 39 prescribe the methods and procedures for compelling witnesses to appear before the Commission, for the inadmissibility in subsequent legal proceedings of certain incriminating evidence, and for the search and seizure of certain documents and articles.

Section 41 requires the hearings of the Commission to be **open** unless there are good reasons to hold them behind closed doors. It also stipulates certain procedures to be followed in respect of victims and witnesses. Section 42 provides for the right of legal representation for those summoned to appear before the commission and for the appointing of legal representation in limited circumstances. Section 43 proposes the establishment of a limited witness protection programme when there is a demonstrable threat of harm to essential witnesses.

PART VIII—FINDINGS & RECOMMENDATIONS

This part sets out the scope and types of the findings and recommendations the Commission is entitled to make; and the method of making recommendations.

Commission to make recommendations to:

- address the causes of conflict in order to prevent the repetition of human rights violations in the future;
- address the different needs of victims and victim communities;
- promote healing and reconciliation at the national, community and individual levels;
- deal with any outstanding matters arising from the work of the Commission that require further action ;

In making such recommendations the Commission shall propose the necessary **institutional, administrative, legislative, constitutional** and/ or other measures which ought to be introduced in order to achieve the objects of the recommendations.

Provision is made for the making of “justice recommendations” in specific cases. This section is intended to **replace the conditional amnesty** recommendations currently provided in the Bill. The Commission would be empowered to recommend specific cases to the Attorney General that are **appropriate for prosecution** and cases that are **not appropriate** for prosecution. Similarly the Commission may recommend appropriate cases to the President for the exercise of his **pardon power**, and specify cases that are not appropriate for pardons. Specific criteria are proposed for the making of these recommendations in s 47(3). These criteria include the **nature and gravity** of the offence; whether there was a **political motivation** behind the offence; whether the offence was **disproportional** to the political objective pursued; and others.

Where the AG declines to implement the justice recommendations he or she is required to **provide reasons** to the National Assembly and the Kenya National Commission on Human Rights (KNCHR) within 90 days of the publication of the recommendations in the Gazette.

Provision is made for the making of “public office recommendations” in specific cases for the **purpose** of promoting accountability and addressing corruption and bad governance.

Such a recommendation would be for the removal or barring from public office, with or without conditions, of any person whom the Commission has found to be **responsible for a human rights violation, an economic transgression or an act of corruption**. The Commission would employ the same criteria as set out in the justice recommendations clause for the making of the public office recommendations.

A recommendation for the removal of a person from public office would be made **to the body or entity authorized by the Constitution or any other law** or regulation to remove a person from the public office. Where the body or entity in question declines to implement a public office recommendation it shall **provide reasons** to the President, Prime Minister, National Assembly and the KNHRC within 60 days of the publication of the recommendations in the Gazette.

It is proposed that a recommendation for the barring of a person, not currently in public office, from holding public office be made to the Director of Public Administration, who shall enter such details into a public register, and **no person** whose name appears on such list shall be permitted to hold public office until the **conditions**, if any, in the recommendation have been complied with; or until a **court** has reviewed the finding of the Commission and has overturned such finding.

The public office recommendations **do not entail a screening or vetting program** for public officials. That is beyond the scope of the proposed law. The provisions merely provide the Commission with the option of making such recommendations when the Commission finds an individual responsible for a serious human rights violation or corruption through its inquiries. By way of example, the Commission will not carry out a vetting or screening programme in the police. But, if it finds that a police officer is responsible for a massacre it may recommend that the officer be removed from the police force.

PART IX—EXPENSES OF THE COMMISSION

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PART X—FINAL REPORT

The Commission is obliged to complete its final report at the **end of the operational period** and submit the report to the President and Prime Minister. The Commission must **publicly release its report at the same time** and the Minister must publish the report in the Gazette within 14 days of its release. A procedure is provided for the tabling and debating of the report in a **special sitting of the National Assembly** within 21 days of its publication in the Gazette.

During the outreach period the Commission must facilitate events to promote public awareness of the report and **distribute the report widely** and make **summaries** available to the public, including popular and video **versions** of the report and versions aimed at youth and children.

Specific responsibilities are imposed upon the Government of Kenya, which within **6 months** of the release of the final report must publish in the Gazette the specific recommendations of the Commission which the government **intends to implement**; a high level plan and strategy for the implementation of such recommendations; and the

specific recommendations of the Commission which the government **declines to implement**, together with the **detailed reasons** therefore.

The Speaker of the National Assembly is required to arrange a special sitting of the Assembly within 21 days of the response of the government to consider and **debate the government's response** and to consider any further action, if any that the Assembly may wish to take.

The KNHRC is required to **monitor** the implementation of the Commission's recommendations; and it must **publish periodic reports**, at least once a year, setting out the findings of its monitoring efforts. All organs of state are required to **respond timeously** to each reasonable request made by the KNHRC in pursuance of its obligations. An **unwarranted refusal** to do so or an unreasonable delay in complying with such request shall be a **punishable offence**.

PART XI—GENERAL PROVISIONS

This part requires the Commission's personnel not to disclose information that is **confidential**.

Offences and penalties are provided in this part. Offences include the obstruction of the Commission in the performance of its duties; willfully furnishing false information; failing to obey a subpoena; disclosure of confidential information; destruction of an article in anticipation of an investigation; refusal to respond to reasonable requests from the KNCHR while monitoring implementation of recommendations.

The President may issue regulations on any matter that requires to be prescribed for the proper application of this Act.

Commissioner and staff are indemnified for acts committed under the Act in good faith.

Staff is downsized during outreach phase, retaining only the staff required for completion of outreach objectives. During outreach phase Commission must **archive** its materials. Commission must submit a **report on its activities** in the outreach phase. Commission is **dissolved** at end of outreach phase.

Adjustments suggested for Schedule 1 – nomination and appointment of commissioners – are proposed in respect of **time frames** and **number of finalists** selected by selection commission and **nominees** put by the National Assembly. It is proposed that the President appoint the commissioners **in concurrence** with the Prime Minister.