SUBMISSION OF MEMORANDA ON THE PUBLIC PARTICIPATION BILL (SENATE BILL NO.4 OF 2018)

TO

THE SENATE’S STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

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A. Introduction

1. The Kenya National Commission on Human Rights is an independent National Human Rights Institution created under Article 59 of the Constitution with a broad mandate to promote the culture and the respect of human rights in the Republic of Kenya. The operations of the Commission are guided by the United Nations Paris Principles on the establishment and functioning of independent national human rights institutions commonly referred to as the Paris Principles.

2. The Commission under Article 249 of the Constitution also has a mandate to secure observance of all state organs of democratic values and principles and to promote constitutionalism. Article 10 of the constitution requires all state organs to ensure they uphold constitutionalism and the rule of law whenever they make public policy decisions or interpret the constitution. One of the strategies pursued by the Commission to secure observance of all state organs of democratic values and principles is through the issuance of advisories.

3. It is in this regard, that the Commission issues this review on the proposed Public Participation Bill.

B. Background

4. The Constitution of Kenya 2010 in Article 1 recognizes the people of Kenya as sovereign. Such recognition can and has been interpreted as requiring the involvement of the people in governance as well as all other public processes that affect their day to day lives. This involvement is what the Constitution refers to as ‘public participation’ in Articles 10, 35, 69, 118, 174, 184, 196, 201 and 232. It is for this reason that the Public Participation Bill was drafted, to provide a framework for effective public participation.
5. The Public Participation Bill was drafted in order to provide a framework through which effective public participation can take place. It breathes life into the aforementioned Articles of the Constitution by providing general guidelines on public participation that act as the bare minimum and that ought to guide the responsible authorities while conducting public participation while at the same time requiring that they develop their own specific guidelines within a given timeframe.

C. The Advisory

Section 4(1) requires the relevant institutions to give the public adequate notice for them to make their input. The commission suggests that a timeframe should be specified to guarantee meaningful participation. The commission has received many complaints from the public indicating that the right to participate in a development project was rushed and that adequate time was not provided.

6. **Access to information by the public.** Section 10 (1) (b) requires that documents must be published and distributed in a language and form that can be used by public, the commission suggests that there ought to be a deliberate single provision [proposed Section 10 (1) (c)] that expressly requires the information be accessible to persons in with disabilities using the same language as the Constitution in Articles 7 (3) (b) which states ‘…the state shall promote the development and use of indigenous languages, Kenyan sign Language, Braille and other communication formats and technologies accessible to persons with disabilities.’’ This article is further amplified by Article 54 on specific rights of persons living with disabilities.

**Schedule – General Public Participation**

7. Section 11 requires the responsible authority to undertake certain steps when processing responses however the lingering question is was whether there exists a mechanism that is used to ensure effective public
participation. The Bill should provide for a clear procedure on feedback mechanism on decisions made by the responsible authorities.

8. Section 12(d) which allows public officers to receive gifts of any amount on condition that the gift is not ‘contingent’ on an interested party’s desired result where that result conflicts professional judgment was found to be in conflict with Section 12 of the Public Officers Ethics Act. The Commission was suggested that the Bill should be aligned to the provisions of the Public Officers Ethics Act.

Additional important issues

9. It was noted that the Bill had failed to provide for a sanction/penalty as a consequence of non-compliance, given the emphasis placed on public participation by the Constitution. The Commission recommends for an inclusion of a penalty in the bill to guarantee effective implementation of the proposed law once passed and signed. Perhaps the sanctions/penalties provided for in the Public Procurement and Asset Disposal Act may be considered as a reference point.

10. The commission has also noted that the Public Participation Policy spearheaded by the Office of the Attorney General is still at a validation stage. The commission suggests that the honourable house considers holding back on the debate of this bill and instead push for the adoption of the policy wherefrom more issues related to public participation may be considered for further input in the public participation bill.