



## Memorandum on Assumptions to office of the Governor Bill, 2018

To:

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Clerk of the Senate,  
Office of the Clerk/Secretary, Parliamentary Service Commission  
Main Parliament Building,  
P. O. Box 41842 – 00100,  
Nairobi.

Cc:

Chairperson,  
Standing Committee on Devolution and Intergovernmental Relations  
The Senate  
P. O. Box 41842 – 00100,  
Nairobi.



14<sup>th</sup> March 2018

### About TISA

The Institute for Social Accountability (TISA) is a civil society organization committed towards the achievement of sound policy and good governance in local development, to uplift livelihoods of, especially, the poor and marginalized in Kenya. TISA has been operational since March 2008, and is a locally registered Trust that has engaged with various relevant state and non-state actors in the quest to promote effective local governance in Kenya

### General remarks: Notice for Public Participation

The Constitution of Kenya 2010 Article 1 reposes all sovereign authority in the People of Kenya; The People of Kenya have delegated legislative authority to Parliament as the representatives of the People. Article 95 of the Constitution provides that the role of Parliament, among other roles, is to deliberate on issues of concern to the people and enact legislation accordance with the constitution.

The Constitution in Article 10 (2) provides that Public Participation be among the national values and principles of governance in Kenya. Article 118 (b) of the Constitution provides that Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its committees

The Constitution in Article 232 (1) on the values and principles of public service include: (d) involvement of the people in the process of policymaking; (e) accountability for administrative acts

and (f) transparency and provision to the public of timely and accurate information. Therefore, parliament is constitutionally bound to provide adequate opportunities for meaningful public participation in their business.

In view of the foregoing, it is important that the Senate adhere to standards of public participation to avoid challenges on the constitutionality of instruments emerging from the house because of insufficient consideration to the issue of public participation. It is not a sufficient consideration that bills have been published on the bill tracker of the Parliamentary website for months prior the notice for public input. For there are many are the bills that undergo first and second readings but do not see the end of the legislative process. For this reason, the Public should be given sufficient time to research and prepare a position and for logistical consideration such as availability to submit memoranda in person or online as the case maybe.

## **Review of the Bill**

### **The bill contains unconstitutional limitations on the right to information**

As noted in the bill, article 35 provides for the right of citizens to access information held by the state. The Access to information Act 2016 provides for among others, the implementation of Article 35 of the Constitution.

The bill has arbitrary and unconstitutional limitation on the right to access information held by the state. Clause 22 (b) provides a request for information in the public interest may be subject to the payment of a reasonable fee in instances where the Committee incurs an expense in providing the information. The clause should align itself with the Access to information Act section 11 and 12 that provides that the details of any fees or further fees to be paid for accessing information, together with the calculations made to arrive at the amount of the fee should be disclosed to the person seeking information.

Clause 23 of the bill provides that the committee shall not comply with a request for information from an applicant in instances where, disclosure of such information would be prejudicial to the security arrangements in place for the assumption of office of county governor. Further, if the disclosure of such information is undesirable in the public interest; or the information requested is at a deliberative stage by the Committee. (2) The Committee may decline to submit information to applicant where the applicant has failed to satisfy confidentiality requirements to the committee; or Payment of the prescribed fee has not been made. This provisions unduly contradict the access to information Act which provides that if a request is declined the reasons for making that decision, including the basis for deciding that the information sought is exempt, unless the reasons themselves would be exempt information; and (d) if the request is declined, a statement about how the requester may appeal to the Commission.

Failure to comply with the threshold for availing or withholding information as provided in the Access to information Act may make the Act once passed into law vulnerable to constitutional challenges based on Article 35.

Duplication in the provisions of the Assumption to Office of the Governor County Government (Amendment) Bill, 2017 (Senate Bills No. 11 of 2017).

There are potential tensions between the Assumptions to the office of the governor bill and the County Government (Amendment) Bill, 2017 (Senate Bills No. 11 of 2017) both of which include provisions of assumptions to office in the event of the death of a governor elect or the deputy governor elect. A decision is to be made as to whether there is need for a new legislation on assumptions to office of the governor or the same can be sufficiently legislated under the County Government Act.

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