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

Cc:
Chairperson
Senate Standing Committee on Justice, Legal Affairs and Human Rights
Parliament Buildings
P.O. Box 41842-00100
Nairobi

4th May 2018

Dear Sir,



Re: Memorandum on the Public Participation Bill, No. 4 of 2018

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.

Introduction

The Public Participation Bill, 2018 seeks to provide a framework for effective public participation. The Constitution of Kenya 2010, ushered in a new system of governance that places the people at the centre of governance. Accordingly, all public processes ranging from policymaking, legislative process and ultimate decision-making, require the participation of the people of Kenya. This Bill therefore proposes to provide a mechanism to facilitate effective and coordinated public participation. The Bill if enacted will give effect to the Constitutional principles of public participation and participatory democracy as well enunciated in Articles 1, 10, 35, 69, 118, 174, 184, 196, 201, and 232 of the Constitution respectively.

While TISA commends the Senate in its effort to facilitate public participation in governance process by coming up with the proposed Public Participation Bill, 2018 and for providing the opportunity for non-state actors to input into the development process of the bill, TISA wishes to make the following observations and recommendations

1. Lack of a National Public Participation Policy

TISA lauds the efforts made by the Senate to develop a national public participation bill, however we note with concern that the Public Participation Bill is being developed in the absence of an

approved national public participation policy, which should guide the development of national public participation legislation. We note that the process of developing a national public participation policy is currently on going spearheaded by the department of justice under the office of the Attorney general.

Recommendation: The senate needs to collaborate with the Department of Justice to ensure that the two processes are undertaken concurrently and that the proposed public participation bill is aligned to the proposals of the national public participation policy.

2. Public Private Partnership Principle

We also note that the Bill fails to provide for public private partnership, a critical principle that brings non-state actors on board to enhance the public participation agenda. The bill should therefore, under clause 4 on guiding principles provide for public private partnerships, such as joint committees, technical teams, and citizen commissions to encourage direct dialogue and concerted actions on sustainable public participation.

3. Funding for Public Participation

Public participation has been marred by inadequate, unpredictable and insecure financing. In this case, every financial year, a certain percentage of the total budget both at national and county level should be allocated to public participation. The responsible officers of each authority or entity should be able to submit financial proposals for public participation in their respective jurisdictions every financial year. The budget allocations to participation should be cost effective.

Recommendation: The bill should make proposals for Governments at both levels to provide adequate funding for public participation on a regular and continuous basis and to provide guidelines that ensure that every institution adequately budgets for activities that require stakeholder engagement.

4. Notice for Public Participation

We note that clause 4(1) of this Bill provides that the relevant institution shall give the public adequate notice to make their input on the issue. However, we note that this provision is vague, The Bill should be specific on timeframe between the date of advertisement and the actual forum and deadline for submission of written memorandum. It should also indicate the timeframe for publicizing relevant documents prior to the actual forum and deadline for submission of written memorandum to enable adequate preparation for meaningful public participation.

Recommendation: We therefore recommend that the bill should provide at least 14-day notice period to enable the public review relevant documents and prepare adequately for the actual public participation forum and deadline for submission of written memorandum.

5. Limitation on the Right to Access to Information

Article 35 of the Constitution guarantees access to information for Kenyan citizens and 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 under Guideline 10 (3)(c), 10(4) and 10(5) as follows:

“A request for information may be subject to confidentiality requirements of the authority. Subject to the provisions of Article 35 of the Constitution and the law relating to freedom of information and data protection, the responsible authority may decline to give information to an applicant where (a) the request is unreasonable in the circumstances; or (b) the applicant fails to satisfy any confidentiality requirements imposed by the responsible authority. The right of

access to information under Article 35 of the Constitution shall be limited to the nature and extent specified under this section.”

Recommendation: Limitation on access to information under Guideline 10 (3)(c), 10(4) and 10(5) of the Bill should be in line with the Access to Information Act 2016 section 6 and section 14 which provides for review of a decision of a public entity decision refusing to grant access to the information applied for. The Bill should include a provision that if a request for access to information 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 Bill once passed into law vulnerable to constitutional challenges based on Article 35.

Other Recommendations

1. The Bill should include a commencement date for the Bill under Clause 1.
2. The interpretation section should give a comprehensive definition of public participation and the meaning of public as used in relation to the Public Participation Bill 2018.
3. The reports under clause 8(5) should be published on the website of the relevant institution and hard copies of the same made available to the public.
4. Under the general public participation guidelines (Schedule, Guideline 4), adequate notice should not be less than 14 days.
5. Guideline 4(2) on mechanisms for issue of notice should include 2 newspapers with national circulation.
6. Guideline 9 on the consultation document should include the requirement that the consultation document be availed to the public 14 days prior to the public participation forum and deadline for submission of written Memoranda.

Sincerely,



Wanjiru Gikonyo
National Coordinator