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THE NATIONAL ASSEMBLY

12TH PARLIAMENT – SECOND SESSION – 2018

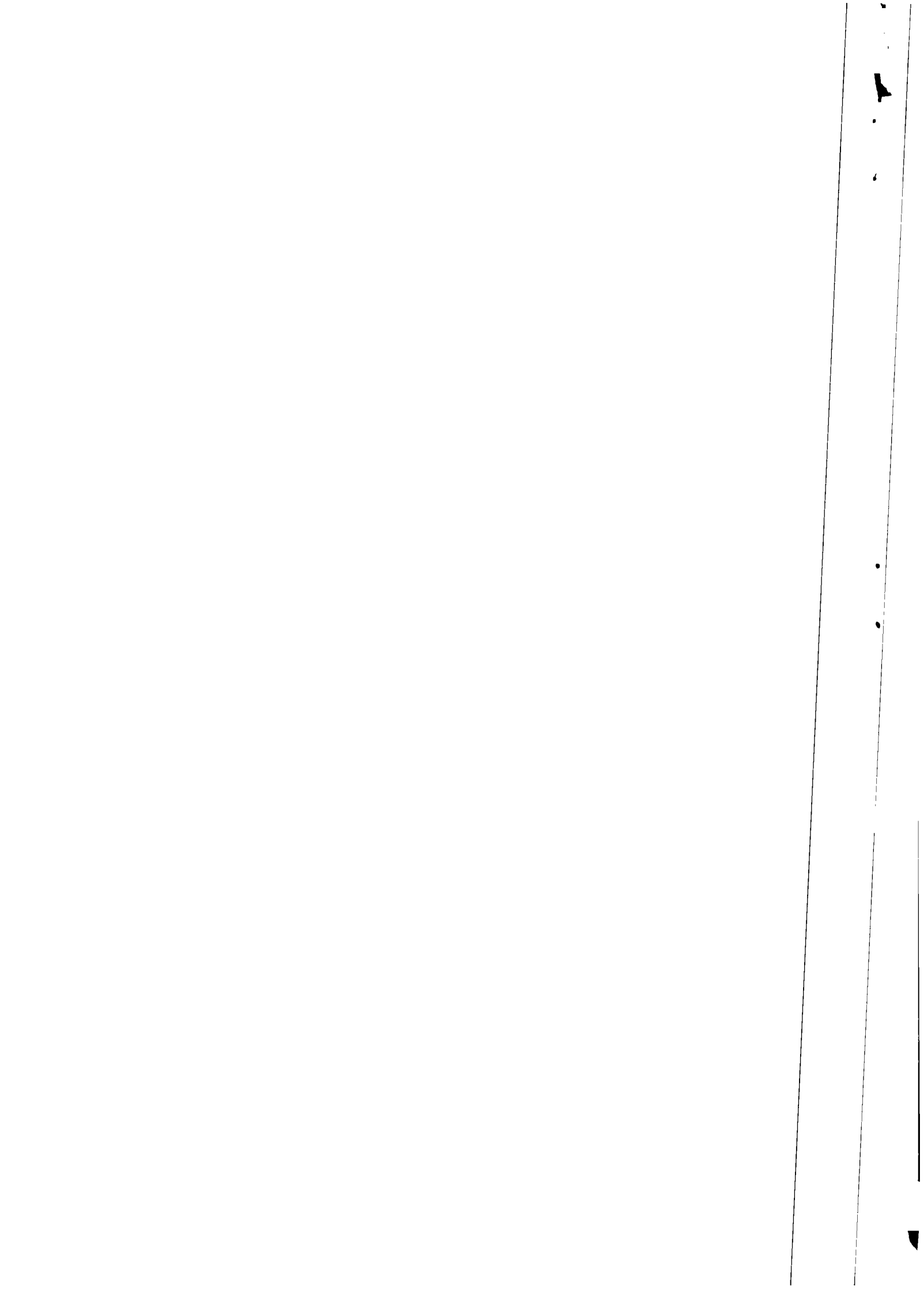
DEPARTMENTAL COMMITTEE ON ADMINISTRATION AND NATIONAL SECURITY

REPORT ON CONSIDERATION OF THE COUNTY GOVERNMENT BILL

(SENATE BILL No. 11 of 2017)

CLERK'S CHAMBERS,
DIRECTORATE OF COMMITTEES,
PARLIAMENT BUILDINGS,
NAIROBI

NOVEMBER 2018



CHAIRPERSON'S FOREWORD

Hon. Speaker,

The Bill was read for the first time on Thursday 19th April 2018 and subsequently committed to the Departmental Committee on Finance and Planning, after an advice from the Directorate of legal Services, the Bills was committed to the Departmental Committee on Administration and National Security on Wednesday 17th October 2018 pursuant to the provisions of Standing Order 127(1); it is on this basis therefore that the Committee makes this Report.

The Bill seeks to amend the County Governments Act to provide for salient provisions that are necessary for the administration of counties.

Standing Order 127(3) provides that “the Departmental Committee to which a bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the Committee makes a report to the House”.

The Clerk of the National Assembly published an advertisement on print media inviting the public to present submissions and memoranda on the County Government (Amendment) Bill, 2017 (Senate Bill No. 11 of 2017) The submissions/memoranda were to be received on or before Tuesday 29th May 2018 at 5.00 pm to the Finance and Planning Committee.

The House on 17th October 2018 resolved to re-allocate the consideration of the Bill to the Committee on Administration and National Security.

May I take this opportunity to thank all Members of the Committee for their input and valuable contributions during the deliberations of the Bill.

I also take this opportunity on behalf of the Committee to thank the Offices of the Speaker and the Clerk of the National Assembly for the support accorded to the Committee during the deliberations of the Bill. Further, the Committee wishes to thank all the stakeholders for their input of the Bill.

On behalf of the Committee and pursuant to the provisions of Standing Order 199(6) it is my pleasant duty to table the Report of the Departmental Committee on Administration and National Security on the County Government (Amendment) Bill (Senate Bill No. 11 of 2017).



(HON. PAUL KOINANGE, MP)

(CHAIRPERSON)

DEPARTMENTAL COMMITTEE ON ADMINISTRATION & NATIONAL SECURITY

EXECUTIVE SUMMARY

This report contains the Committee's proceedings during the County Government Amendment Bill (Senate Bill No. 11 of 2017)

The Clerk published an advertisement on print media inviting the public to present submissions and memoranda on the County Government Amendment Bill (Senate Bill No. 11 of 2017)

The Committee considered the County Government Amendment Bill (Senate Bill No. 11 of 2017) on Monday 12th November 2018 and adopted the report on Thursday 22nd November, 2018.

The Committee having considered County Government Amendment Bill (Senate Bill No. 11 of 2017) will be proposing amendments in—

CLAUSE 6 of the Bill be amended in the proposed amendments to section 9 by deleting the proposed new section 9A and substituting therefor—

Speaker of a
county
assembly.

9A. (1) The speaker of a county assembly shall be elected, in accordance with standing orders of the respective county assemblies, from among persons who are eligible to be elected as members of a county assembly but are not such members.

(2) At any time in the absence of the speaker of the county assembly or in matters that directly affect the speaker, the county assembly shall elect a member to act as speaker as contemplated under Article 178(2)(b) of the Constitution.

(3) Unless otherwise removed, the first member elected under subsection (4), shall, in the absence of the Speaker, preside over the sittings of the assembly for the term of the county assembly.

CLAUSE 7 of the Bill be amended in the proposed amendments to section 11 by deleting the proposed new section 11A

CLAUSE 8 of the Bill be amended in the proposed amendment to section 25 in the new subsection (2) by deleting the words “and the county Gazette” appearing immediately after the words *Kenya Gazette*.

CLAUSE 11 of the Bill be amended in the proposed amendments to section 31 by deleting the proposed new paragraph (a) and substituting therefor—

“(a) may dismiss a county executive member, if the governor considers appropriate and upon giving reasons for dismissal”

CLAUSE 15

The Bill be amended by deleting clause 15 and substituting therefor—

Amendment to
section 44 of
No. 17 of 2012.

15. Section 44 the principal Act is amended by-

(a) deleting subsection(2) and substituting therefor—

“(2) A person shall be qualified for appointment as a county secretary under subsection (1), if that person —

- (a) is a citizen of Kenya;
- (b) holds a degree from a university recognized in Kenya;
- (c) has at least ten years relevant professional experience;
- (d) has at least five years experience in a leadership

position at senior management level in a public service or private sector organization; and

(e) meets the requirements of leadership and integrity as prescribed in Chapter Six of the Constitution.

(b) by inserting the following new subsection immediately after subsection (2) –

(2A) The Governor shall, for the purpose of competitive recruitment of a county secretary under subsection (2), constitute a selection panel in accordance with section 58A(2).

(2B) The provisions of section 58A shall, with such modification as shall be necessary and subject to subsection (2C), apply to the recruitment of a county secretary under subsection (2).

(2C) Upon interviewing the applicants for the position of county secretary-

(i) the selection panel shall submit to the Governor the names of two applicants who qualify for appointment as county secretary; and

(ii) the Governor shall submit the name of one applicant to the county assembly for approval for appointment as county secretary by the Governor.

(2D) The county secretary shall hold office for a term of five years and shall be eligible for re-appointment once.

(c) by inserting the following new subsection immediately after subsection (3) –

(3A)The county secretary may be removed from office on the following grounds—

(a) inability to perform functions of the office arising

out of physical or mental infirmity;

(b) incompetence;

(c) gross misconduct;

(d) bankruptcy; or

(e) violation of the Constitution.

(3B) Before removal under subsection (3A), the county secretary shall be informed, in writing, of the reasons for the intended removal, and shall be given an opportunity to put a defence against any such allegations, either in person or through a representative.

(3C) Subject to subsection (3A),(3B) and conditions of appointment, a county secretary may be dismissed by the governor.

CLAUSE 25 of the Bill be amended in the introductory paragraph by deleting the words “deputy speaker” appearing after the word “serving as”

1.0 PREFACE

1.1 Establishment and mandate of the Committee

The Departmental Committee on Administration and National Security is established under *Standing Order 216* with the mandate to:

- a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- b) study the programme and policy objectives of Ministries and departments and the effectiveness of their implementation;
- c) **study and review all the legislation referred to it;**
- d) study, access and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
- e) investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary and as may be referred to them by the House;
- f) vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order No. 204 (Committee on appointments);
- g) examine treaties, agreements and conventions;
- h) make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
- i) consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
- j) examine any questions raised by Members on a matter within its mandate.

In executing its mandate, the Committee oversees the following Ministries and Departments:

- i) The Ministry of Interior & Coordination of National Government-
 - a) State Department of Interior;
 - b) State Department of Border Control, Immigration and Registration of Persons; and
 - c) State Department of Correctional Services.
- ii) The National Police Service Commission;
- iii) The Independent Policing Oversight Authority; and
- iv) The Public Service Commission.

In Accordance with the Schedule II of the Standing Orders, the Committee is mandated to oversight the—

- i) National Security;
- ii) Police Services;
- iii) Home Affairs;
- iv) Public Administration;
- v) Public Service;
- vi) Prisons; and
- vii) Immigration.

1.2 Committee Membership

The Committee comprises of the following members;

1. Hon. Paul Koinange, MP - **(Chairperson)**
2. Hon. John Waluke, MP - **(Vice-Chairperson)**
3. Hon. Athanas Wamunyinyi, MP
4. Hon. Peter Kaluma, MP
5. Hon. Makali Mulu, MP
6. Hon. Aduma Owuor, MP
7. Hon. George Theuri, MP

8. Hon. Didmus Wekesa Barasa Mutua, MP
9. Hon. Geoffrey Kingagi Muturi, MP
10. Hon. Marselino Malimo Arbelle, MP
11. Hon. Tecla Chebet Tum, MP
12. Hon. Josphat Kabinga Wachira, MP
13. Hon. Nimrod Mbithuka Mbai, MP
14. Hon. Martin Deric Ngunjiri Wambugu, MP
15. Hon. Abdi Omar Shurie, MP
16. Hon. Halima Mucheke, MP
17. Hon. Peter Francis Masara, MP
18. Hon. Ahmed Kolosh Mohammed, MP
19. Hon. Edward Oku Kaunya, MP

1.3 Committee Secretariat

1. Mr. Abdullahi Aden - Senior Clerk Assistant
2. Mr. Joshua Ondari - Clerk Assistant
3. Ms. Clarah Kimeli - Senior Legal Counsel
4. Mr. Edison Odhiambo - Fiscal Analyst III
5. Mr. Donald Manyala - Research Officer III

2.0 BACKGROUND

The Bill seeks to amend the County Governments Act, No. 17 of 2012 to provide for salient provisions that are necessary for the administration of counties.

The Bill was referred to the Committee on Wednesday 17th October 2018 and subsequently committed to the Committee pursuant to the provisions of Standing Order 127(1), it is on this basis that the Committee makes this Report. The Committee received submissions from stakeholders before the adoption of this report.

Further, Standing Order 127(3) provides that “the Departmental Committee to which a bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the Committee makes a report to the House”

The Clerk of the National Assembly published an advertisement on print media inviting the public to present submissions and memoranda on the County Government Amendment Bill (Senate Bill No. 11 of 2017)

The Committee received submissions from the Kenya Law Reform Commission,

Article 109 of the Constitution provides that Parliament shall exercise its legislative power through Bills passed by the House and assented to by the

2.1 On Public Participation

Article 118 (1) of the Constitution provides that; Parliament shall—

- (a) Conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and
- (b) Facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

(c) (2) Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.

Pursuant to Article 118 of the Constitution and Standing Order 127(3) the committee invited memoranda from the public vide a notice in the local dailies.

The Constitution obligates the State and all State organs to ensure adequate public consultation on all public policies, legislation or any decision that is likely to impact on the people of Kenya. Failure to factor in the mandatory requirement of public participation exposes the legislative instrument or policy framework to constitutional challenges of legitimacy, hence making it actionable for unconstitutionality in a court of law.

Effective public consultation is based on principles of openness, transparency, integrity and mutual respect. The open process facilitates acceptability amongst the key stakeholders, subsequently facilitating efficient and effective implementation of the legislative instrument.

2.2 Communication and committal to committee

Pursuant to Standing order 127 (1) of the National Assembly the Bill was committed to the Departmental Committee on Administration and National Security and report to the House.

2.3 Memoranda

The Clerk published an advertisement on print media inviting the public to present submissions and memoranda on the County Government Amendment Bill (Senate Bill No. 11 of 2017)

The committee received submissions from Hon. Moses Kuria, MP Gatundu South Constituency and the Kenya Law Reform Commission,

2.4 Committee proceedings

The Committee Considered the County Government Amendment Bill (Senate Bill No. 11 of 2017) on Monday 12th November 2018 and adopted the report on Thursday 22nd November, 2018.

3.0 SUMMARY OF THE COUNTY GOVERNMENT (AMENDMENT) BILL (SENATE BILL NO. 11 of 2017)

Salient provisions in the Bill

Clause 2 provides for the procedure of development of county symbols; the clause seeks to introduce of the requirement for counties to apply to the College of Arms for a grant of arms in accordance with section 4 of the College of Arms Act.

Clause 3 provides for commencement and sitting of a county assembly.

Section 136 (1) of the County Governments Act provided for the first sitting of a county assembly after the first election under the new Constitution. The provision gave the Independent Electoral and Boundaries Commission powers to set the place, time and date of the first sitting of a county assembly. Thereafter county assemblies have provided for this in their respective standing orders as per the Second Schedule of the Act that prescribes specific matters to be provided for in the standing orders of the county assemblies.

Clause 6 seeks to insert a new section 9A to the Act of the Act to put in place the legal framework for the establishment of the office of a speaker and deputy speaker of a county assembly; As it is currently, there is no provision establishing the office of the deputy Speaker.

- ❖ *Article 178(2) provides that the county assembly shall be presided by a speaker or in the absence of the speaker, another member elected by the county assembly;*
- ❖ *The constitution does not provide for the position of a deputy speaker.*

Clause 7 seeks to provide for instances of—

- (a) vacation of the office of a speaker of a county assembly under the proposed new 11(1);
- (b) the grounds for removal of a speaker under the proposed new 11(2);

(c) 11(3) provides for procedure of issuance of a notice where a speaker may be removed through a resolution of the county assembly whereas (3)-(8) provides for the procedure of handling the motion.

There is need to provide for an election of a member of a county assembly to preside over matters that directly affect a speaker of a county assembly. (Section 9(4) that is being deleted by Clause 6 provided for the same).

Clause 8 seeks to amend section 25 of the Act to provide for commencement of county assembly legislations; when the same can be considered to be effective.

The County Printer is not yet in force thus there are no county gazette notices; making reference to a non-existent entity makes the law redundant.

Clause 9 amends section 27 of the Act to provide for recall of a member of a county assembly sections 27 of the County Governments Act provides that a recall can only be initiated upon judgment by a High Court and that a person who contested cannot initiate a recall, the amendment therefore seeks delete the same.

The proposal sets out the grounds of recall but fails to provide for who determines that the threshold of the grounds upon which the recall is based has been met.

Clause 15 seeks to provide the recruitment procedure of a county secretary by a selection panel. There is need to make the position of the county secretary independent.

Clause 23 seeks to amend section 121 of the Act by amending subsection (2)(j) which requires the approval of the Cabinet Secretary to obtain the services of a financial expert in the support to county governments, substituting the same with approval by the county executive officer.

Clause 24 seeks to amend section 124 of the Act to include the Deputy Speaker as persons to remain in office during the prorogation of a county Assembly.

Clause 25 provides for transition of the deputy speaker county public service Board and the county secretary to serve in the remainder of the term upon coming into force of the Act: The Position of Deputy Speaker is not spelt out in the Constitution.

4.0 SUBMISSIONS ON THE COUNTY GOVERNMENT (AMENDMENT) BILL (SENATE BILL NO. 11 of 2017)

4.1 submissions from the Hon. Moses Kuria M.P Gatundu South Constituency

The Member submitted that—

1. There is need to protect the position of the Majority and Minority Leader in a county assembly; the member averred that there is no stability on holders of these positions;
2. There is need for the process of removal of a speaker of a county assembly to be done by the Senate since the counties in the past have not been objective in the removal of a speaker of a county assembly; and
3. There is need to provide for a legal framework for to allocate funds to the counties as conditional grants attached to specific programmes and activities. This the Member attributes to the misuse of funds and lack of accountability in the counties.

In light of the above it is the view of the Committee that—

- (a) Section 10 of the County Governments Act establishes the offices of the party leaders of the county assemblies; subsection (2) provides that *the leader of majority party shall be the person who is the leader of the second largest party and subsection (3) provides that the minority leader shall be the person who is the leader of the second largest party.*

This therefore implies that the political parties determine who becomes a minority and majority party and the removal in the same way is done by the parties.

- (b) The election of a speaker of a county assembly is done by the assembly; its is therefore prudent to allow the same institution that elected the office holder to have the power of removing the holder; further the Constitution has provided for the right to fair administrative action, where one feels that he/she has not been accorded the same, the courts have the power to determine.

- (c) The misuse of funds generally is not to be viewed with a closed 'eye'; there is need to do an overhaul of the Public Management Act (PFMA) substantively, amending the PFMA Act peace-mealy may not curb the current issues of mismanagement of public resources.

4.2 submissions from the Kenya Law Reform Commission

Clause 8 (Section 25) on Publication of a County Bill Article 199 requires publication to be done in the gazette. Gazette is defined under Article 260 of the Constitution to mean the Kenya Gazette published with the authority of the national government, or a supplement of the Kenya gazette.

The government printer ought to decentralize its services pursuant to Article 6(3) of the Constitution; currently they have presence only in Murang'a county.

Clause 11 (Section 31) on the powers of the governor. Dismissal should be done pursuant to Article 47 of the Constitution.

Clause 17 (Section 58) Composition of the

Clause 17 (Section 58) on the composition of the county Public Service Board. There must be a distinct role of the secretary from that of the other members. This distinction is currently lacking in section 58 of the Act.

With regard to section 58 the committee is of the view that an amendment to paragraph (c) 58(1) to make the Secretary an appointee of the Board and an ex officio member of the Board without the right to vote. He or she shall be the head of the Secretariat. Insert the grounds and procedure for the removal a Secretary from office. Prescribe the qualifications and tenure of office of the Secretary.

5.0 COMMITTEE OBSERVATIONS

1. The Bill seeks to cure a *lacuna* in the law as that existing provisions of the do not provide for the same.
2. Clause 3 provides for commencement and sitting of a county assembly. Section 136 (1) of the County Governments Act provided for the first sitting of a county assembly after the first election under the new Constitution. The provision gave the Independent

Electoral and Boundaries Commission powers to set the place, time and date of the first sitting of a county assembly. Thereafter county assemblies have provided for this in their respective standing orders as per the Second Schedule of the Act that prescribes specific matters to be provided for in the standing orders of the county assemblies.

3. Clause 6 seeks to insert a new section 9A to the Act to put in place the legal framework for the establishment of the office of a speaker and deputy speaker of a county assembly; As it is currently, there is no provision establishing the office of the deputy Speaker.
4. Article 178(2) provides that the county assembly shall be presided by a speaker or in the absence of the speaker, another member elected by the county assembly;
5. The constitution does not provide for the position of a deputy speaker. If the constitution contemplated the creation of the position of a county assembly speaker, the same would have been put in the Constitution, the constitution gives life to the states thus the later should never depart from the former.
6. **Clause 8** seeks to amend section 25 of the Act to provide for commencement of county assembly legislations; when the same can be considered to be effective. The County Printer is not yet in force thus there are no county gazette notices; making reference to a non-existent entity makes the law redundant.
7. **Clause 15**, there is need to provide or qualifications of a county secretary.
8. **Clause 9** amends section 27 of the Act to provide for recall of a member of a county assembly sections 27 of the County Governments Act provides that a recall can only be initiated upon judgment by a High Court and that a person who contested cannot initiate a recall, the amendment therefore seeks delete the same. The proposal sets out the grounds of recall but fails to provide for who determines that the threshold of the grounds upon which the recall is based has been met.
9. There is need to make the position of the county secretary independent.

10. **Clause 24** seeks to amend section 124 of the Act to include the Deputy Speaker as persons to remain in office during the prorogation of a county Assembly.

6.0 COMMITTEE RECOMMENDATIONS

From the above observations, the Committee shall propose amendment as follows—

CLAUSE 6 of the Bill be amended in the proposed amendments to section 9 by deleting the proposed new section 9A and substituting therefor—

Speaker of a county assembly. **9A.** (1) The speaker of a county assembly shall be elected, in accordance with standing orders of the respective county assemblies, from among persons who are eligible to be elected as members of a county assembly but are not such members.

(2) At any time in the absence of the speaker of the county assembly or in matters that directly affect the speaker, the county assembly shall elect a member to act as speaker as contemplated under Article 178(2)(b) of the Constitution.

(3) Unless otherwise removed, the first member elected under subsection (4), shall, in the absence of the Speaker, preside over the sittings of the assembly for the term of the county assembly.

CLAUSE 7 of the Bill be amended in the proposed amendments to section 11 by deleting the proposed new section 11A

CLAUSE 8 of the Bill be amended in the proposed amendment to section 25 in the new subsection (2) by deleting the words “and the county Gazette” appearing immediately after the words *Kenya Gazette*.

CLAUSE 11 of the Bill be amended in the proposed amendments to section 31 by deleting the proposed new paragraph (a) and substituting therefor—

“(a) may dismiss a county executive member, if the governor considers appropriate and upon giving reasons for dismissal”

CLAUSE 15

The Bill be amended by deleting clause 15 and substituting therefor—

Amendment to
section 44 of
No. 17 of 2012.

16. Section 44 the principal Act is amended by-

(a) deleting subsection(2) and substituting therefor—

“(2) A person shall be qualified for appointment as a county secretary under subsection (1), if that person —

(a) is a citizen of Kenya;

(b) holds a degree from a university recognized in Kenya;

(c) has at least ten years relevant professional experience;

(d) has at least five years experience in a leadership position at senior management level in a public service or private sector organization; and

(e) meets the requirements of leadership and integrity as prescribed in Chapter Six of the Constitution.

(b) by inserting the following new subsection immediately after subsection (2) –

(2A) The Governor shall, for the purpose of competitive recruitment of a county secretary under subsection (2), constitute a selection panel in accordance with section 58A(2).

(2B) The provisions of section 58A shall, with such modification as shall be necessary and subject to subsection (2C), apply to the recruitment of a county secretary under subsection (2).

(2C) Upon interviewing the applicants for the position of county secretary-

- (i) the selection panel shall submit to the governor the names of two applicants who qualify for appointment as county secretary; and
- (ii) the governor shall submit the name of one applicant to the county assembly for approval for appointment as county secretary by the governor.

(2D) The county secretary shall hold office for a term of five years and shall be eligible for re-appointment once.

(2E) The county secretary shall be an *ex officio* member with no voting rights.

- (c) by inserting the following new subsection immediately after subsection (3) –

(3A) The county secretary may be removed from office on the following grounds—

- (a) inability to perform functions of the office arising out of physical or mental infirmity;
- (b) incompetence;
- (c) gross misconduct;
- (d) bankruptcy; or
- (e) violation of the Constitution.

(3B) Before removal under subsection (3A),

thecounty secretary shall be informed, in writing, of the reasons for the intended removal, and shall be given an opportunity to put a defence against any such allegations, either in person or through a representative.

(3C) Subject to subsection (3A),(3B) and conditions of appointment, a county secretary may be dismissed by the governor.

CLAUSE 25 of the Bill be amended in the introductory paragraph by deleting the words “deputy speaker” appearing after the word “serving as”

Date: 22nd Nov 2018

Signature: 

(HON. PAUL KOINANGE, MP)

(CHAIRPERSON)

DEPARTMENTAL COMMITTEE ON ADMINISTRATION & NATIONAL SECURITY