

SPECIAL ISSUE

Kenya Gazette Supplement No. 105 (National Assembly Bills No. 19)



REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

NATIONAL ASSEMBLY BILLS, 2013

NAIROBI, 22nd July, 2013

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**THE KENYA INFORMATION AND
COMMUNICATIONS (AMENDMENT) BILL, 2013**

A Bill for

**AN ACT of Parliament to amend the Kenya
Information and Communication Act, 1998 and
for connected purposes**

ENACTED by the Parliament of Kenya as follows—

1. This Act may be cited as the Kenya Information and Communications (Amendment) Act, 2013.

Short title.

2. (1) The Kenya Information and Communications Act, 1998, in this Act referred to as “the principal Act”, is amended in section 2—

Amendment to
section 2 of No. 2
of 1998.

- (a) by deleting the definition of “Commission” and inserting in its proper alphabetical sequence, the following new definition of—

“Authority” means the Communications Authority of Kenya established under section 3 of the principal Act;

- (b) by deleting the words “the Minister for the time being responsible for communications” in the definition of “Minister” and inserting the words “Cabinet Secretary”;

- (c) by inserting in proper alphabetical sequence the following new definitions—

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to electronic, print and all other types of media;

“Commission” means the Communications Authority of Kenya

“cyber security” means the collection of tools, policies, security concepts, security safeguards, guidelines, risk management approaches, actions, training, best practices, assurance and technologies that can be used to protect the cyber environment;

“former Commission” means the Communications Commission of Kenya immediately existing before the commencement of this Act;

“market” means a market in Kenya or a substantial part of Kenya and refers to the range of reasonable possibilities for substitution in supply or demand between particular kinds of goods or services and between suppliers or acquirers, or potential suppliers or acquirers, of those goods or services;

“media” means broadcast, electronic and other types of media but does not include print and book publishing;

“significant market power” means a position of economic strength enjoyed by a licensee which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave independently of its competitors, customers and consumers.

(2) The principal Act is amended by deleting the word “chairman” wherever it appears and substituting therefor the word “chairperson”.

Amendment to section 2 of No. 2 of 1998.

3. Part II of the principal Act is amended by deleting the words “Communications Commission of Kenya” wherever they appear and substituting therefor the words “Communications Authority of Kenya”.

Repeal and replacement of section 5A of No. 2 of 1998.

4. The principal Act is amended by repealing section 5A and replacing it with the following new section —

Independence of the Authority.

5A. (1) The Authority shall be independent and free of control by government, political or commercial interests in the exercise of its powers and in the performance of its functions.

(2) In fulfilling its mandate, the Authority shall be guided by the national values and principles of governance in

Article 10 and the values and principles of public service in Article 232 (1) of the Constitution.

5. The principal Act is amended by repealing section 5B and replacing it with the following new sections —

Repeal and replacement of section 5 of No. 2 of 1998.

Freedom of the media.

5B. (1) The Authority shall, in undertaking its functions under this Act comply with the provisions of Article 34 (1) and (2) of the Constitution.

(2) Subject to Article 24 of the Constitution, the right to freedom of the media and freedom of expression may be limited for the purposes, in the manner and to the extent set out in this Act and any other written law.”

(3) A limitation of a freedom under subsection (2) shall be limited only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

(4) The right to freedom of expression shall not extend to—

- (a) the spread of propaganda for war;
- (b) incitement to violence;
- (c) the spread of hate speech; or
- (d) advocacy of hatred that
 - (i) constitutes ethnic incitement, vilification of others persons or community or incitement to cause harm; or
 - (ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).

(5) The Authority may make Regulations for the better carrying out of the provisions of this section.

Policy guidelines by
Cabinet Secretary.

5C. (1) The Cabinet Secretary may issue to the Authority, policy guidelines of a general nature relating to the provisions of this Act.

(2) The guidelines referred to under subsection (1) shall be in writing and shall be published in the Kenya Gazette.

Repeal and
replacement of
section 6 of No.2
of 1998.

6. The principal Act is amended by repealing section 6 and replacing it with the following new section—

Board of the
Authority.

6. (1) The management of the Authority shall vest on the Board which shall consist of—

- (a) a chairperson appointed by the President in accordance with section 6B;
- (b) the Principal Secretary for the time being responsible for matters relating to broadcast, electronic, print and all other types of media;
- (c) the Principal Secretary for the time being responsible for matters relating to finance;
- (d) the Principal Secretary for the time being responsible for matters relating to internal security; and
- (e) seven persons appointed by the Cabinet Secretary in accordance with section 6B.

7. The principal Act is amended by inserting the following new sections immediately after sections 6—

Qualifications for
appointment of
chairperson and
members of the
Board.

6A. (1) A person shall be qualified for appointment as a chairperson or member of the Board under subsection (1) (a) and (e), if that person is—

- (a) a citizen of Kenya;
- (b) holds a degree from a university recognized in Kenya, in any of the following fields—
 - (i) law;
 - (ii) telecommunications, information and communication technology;
 - (iii) Broadcasting;
 - (iv) postal regulation;
 - (v) humanities and social sciences; or
 - (vi) any other relevant field.
- (c) has experience in the relevant sector for a period of at least ten years in the case of the chairperson and five years in the case of any other member; and
- (d) satisfies the requirements of Chapter Six of the Constitution.

(2) Despite subsection 1(b) and (c), a person may be qualified for appointment as a chairperson or member of the Board, if such person, not being a degree holder, demonstrates that he or she has a distinguished career of not less than twenty years in the information, communication and technology sector.

(3) A person shall not be qualified for appointment as a chairperson or member of the Board under section 6 (1) (a) and (e) if that person—

- (i) in the last six months immediately preceding the appointment, had personal direct or indirect commercial interest in the sector regulated under this Act;
- (ii) is an office-bearer or employee of any political party;

- (iii) is a public officer;
- (iv) is an un-discharged bankrupt;
- (v) suffers from physical or mental infirmity that would render him or her incapable of discharging the functions of the Board ;
- (vi) has been convicted of a felony and sentenced to a term of imprisonment;
- (vii) has been convicted of an offence under this Act; or
- (viii) has been compelled to resign or been removed from office, on account of abuse of office.

Appointment
procedures.

6B. (1) Within fourteen days of the commencement of this Act, or of the occurrence of a vacancy in the office of chairperson or a member of the Board, the Cabinet Secretary shall, by notice in the Gazette and in at least two newspapers of national circulation, declare vacancies in the Board, and shall invite applications from qualified persons.

(2) The Cabinet Secretary shall, within seven days after the deadline of receipt of applications submitted under subsection (1), consider the applications, shortlist and publish the names of the shortlisted applicants inviting public comment in at least two newspapers of national circulation.

(3) The Cabinet Secretary shall within seven days of expiry of the period of notice under subsection (1) consider the public comments received under subsection (2) and—

- (a) in the case of the chairperson forward three names to the President for appointment;
- (b) in the case of any other member, make the appointment.

(4) The President shall, upon receipt of the names submitted to him under subsection 3 (a), appoint the chairperson from amongst the applicants.

(5) In selecting, shortlisting and appointing the chairperson and members of the Board, the President and the Cabinet Secretary shall—

- (a) ensure that the appointees to the Board, reflect the interests of all sections of the society;
- (b) ensure equal opportunities for persons with disabilities and other marginalised groups; and
- (c) ensure that not more than two thirds of the members are of the same gender.

(6) Every appointment made under this section shall be published in the Kenya Gazette.

Term of office.

6C. The chairperson and members of the Board shall hold office for a period of three years renewable once.

Vacation from office.

6D. (1) The office of the chairperson or member shall become vacant if the holder—

- (a) resign from office by notice in writing to the Cabinet Secretary;
- (b) dies;
- (c) is removed from office for—
 - (i) gross misconduct, whether in the performance of the chairperson or member's functions or otherwise; or
 - (ii) is absent from three consecutive meetings of the Authority without permission of the Board,

except for good cause shown.

(2) A person desiring the removal of the chairperson or a member of the Board on any ground specified in subsection (3) may present a complaint under oath to the Cabinet Secretary setting out the alleged facts constituting that ground.

(3) The Cabinet Secretary shall, within seven days, consider the complaint and if satisfied that it discloses a ground under subsection (3)—

(a) submit the complaint together with his recommendations to the President in the case of a chairperson; and

(b) determine the complaint in the case of a member of the Board.

(4) The procedure for removal of the chairperson and a member under section 6D shall be carried out in accordance with Article 47 of the Constitution on fair administrative justice set out in Article 47 of the Constitution.

6E. (1) The Authority shall establish a Broadcasting Standards Committee.

(2) The Broadcasting Standards Committee established by subsection (1) shall be responsible for—

(a) administering the broadcasting content aspect of this Act;

(b) formulating media standards; and

(c) regulating and monitoring compliance with those standards.

(3) The Broadcasting Standards Committee shall receive and consider reports and recommendations relating to broadcasting content from the Media Council established under the Media Council of Kenya Act.

8. Section 7 of the principal Act is amended by—

Amendment of
section 7 of No. 2
of 1998.

- (a) inserting the following new paragraphs immediately after paragraph (e)—
 - (f) establish a broadcasting standards committee and such other committees as may be necessary to carry out its functions; and
 - (g) co-opt persons whose skills and expertise may be necessary for the functions of the Authority;

Provided that any person co-opted in the Authority may attend the meetings of the Authority and participate in its deliberations, but shall have no power to vote.

(b) renumbering section 7 as section 7 (1).

9. Section 11 of the principal Act is amended—

Amendment of
section 11 of No.
2 of 1998.

- (a) by deleting subsection (1) and substituting therefor with the following new subsection—

(1) The Director-General shall be the chief executive officer of the Authority and shall be responsible for the day to the day management of the Authority.

- (b) By inserting the following new subsections immediately after subsection (2) —

(3) The Director-General shall be recruited and appointed by the Board through a competitive process.

(4) The Board shall determine the terms and conditions of service of the Director-General, in consultation with the Public Service Commission.

(6) The Director-General shall be appointed for a term of four years renewable once.

10. The Principal Act is amended by repealing section 12.

Repeal of section
12 of No. 2 of
1998.

11. Section 23 of the principal Act is amended by—

Amendment of
section 23 of No.
2 of 1998.

- (a) deleting paragraph (d);
- (b) renumbering paragraph (e) as paragraph (d)
- (c) inserting a new paragraph immediately after paragraph (d) as follows—

(e) have regard to the values and principles of the Constitution.

Amendment to the heading of Part V of No.2 of 1998.

11. The heading to Part V of the principal Act is amended by inserting the words “and courier” immediately after the word “postal”.

Amendment of section 46D of No. 2 of 1998

12. Section 46A of the principal Act is amended by inserting the following new paragraphs immediately after paragraph (h)—

- (i) administering the broadcasting content aspect of this Act;
- (j) developing media standards; and
- (k) regulating and monitoring compliance with those standards.

Amendment of section 46D of No 2 of 1998

13. Section 46D of the principal Act is amended in subsection (1) by—

- (a) inserting the following new paragraph immediately after paragraph (c) —
- (d) a public officer or a state officer.

(b) renumbering paragraph (d) as paragraph (e).

Amendment of section 46H of No. 2 of 1998

14. Section 46H of the principal Act is amended in subsection (2) (c) by inserting the words “or listening to” immediately after the word “watching”.

Amendment of section 46J of No 2 of 1998

15. Section 46J of the principal Act is amended by deleting paragraph (c) and substituting therefor the following new paragraph—

(c) fails to utilize the assigned broadcasting frequencies within such period as the Authority shall stipulate in the licence.

Repeal and replacement of section 46S of No of 1998.

16. The principal Act is amended by repealing section 46S.

Amendment to section 48 of No 2 of 1998

17. Section 48 of the principal Act is amended in subsection (1) by deleting the word “shall” and substituting thereof the word “may”.

Repeal and replacement to section 50 of No 2 of 1998.

18. The Principal Act is amended by repealing section 50 and replacing with the following new section-

Designation of Postal Corporation of Kenya.

50. The Authority may designate the Postal Corporation of Kenya to be the public postal licensee and assign to it, by notice in the Gazette, any of the powers, duties and functions of the Authority under this Part.

19. Section 83A of the principal Act is amended in subsection (1) by inserting the words “up to a maximum of one per centum of the annual gross turnover of the offending licensee in the preceding year for every year or part thereof in which the offence is continuing” immediately after the word “shilling”.

Amendment of section 83A of No. 2 of 1998.

20. The principal Act is amended by inserting the words “and cyber security” in the heading to Part IVA immediately after the word “Services”.

Amendment to the heading of Part VIA of No. 2 of 1998.

21. Section 83C of the principal Act is amended—

Amendment of section 83C of No. 2 of 1998.

(a) renumbering section 83C as section 83C(1);

(b) in subsection (1) —

(i) by inserting the words “and cyber security” after the word “electronic transaction”.

(ii) by inserting the following new paragraphs immediately after paragraph (f)—

(g) promote and facilitate the efficient management of critical internet resources; and

(h) develop a framework for facilitating the investigation and prosecution of cybercrime offences.

(c) by inserting the following new subsection immediately after subsection (1)—

(2) The Cabinet Secretary may in consultation with the Authority make regulations with respect to cyber security.

22. Section 83Q of the principal Act is amended by inserting the following new subsection immediately after subsection (2)—

Amendment of section 83Q of No. 2 of 1998.

(3) Any person who secures unauthorized access or attempts to secure unauthorized access to a protected system commits an offence and is liable on conviction, to a fine not exceeding five million shillings or to imprisonment for a term of ten years or to both.

Repeal of section 83U of No.2 of 1998.

23. The principal Act is amended by repealing section 83U and replacing therefor the following new section—

83U. Any person who intentionally and without authorization, engages in the input, acquisition, alteration, deletion or suppression of a telecommunication system or otherwise alters the authenticity or integrity of such a system, with the intent that it be considered or acted upon for legal purposes as though it were authentic or with integrity, regardless of whether or not the system is directly readable or intelligible, for any unlawful purpose, commits an offence and shall be liable, on conviction, to a fine not exceeding one million shillings or to imprisonment for a term of not exceeding five years or to both.

Repeal of section 83V of No.2 of 1998.

24. The principal Act is amended by repealing section 83V and replacing it with the following new section—

83V. The Cabinet Secretary may, in consultation with the Authority, make regulations under this Part.

Amendment of section 84K of No.2 of 1998.

25. Section 84K of the principal Act is amended in subsection (1)—

(a) by deleting paragraph (c);

(b) by deleting the word “Commission” and substituting therefore the word “Fund” appearing in paragraph (d).

Repeal of sections 84L to 84N of No.2 of 1998.

26. The principal Act is amended by repealing sections 84L to 84N, both sections inclusive.

Amendment of section 84P of No.2 of 1998.

27. Section 84P of the principal Act is amended by deleting paragraphs (b) and (c) and substituting therefor the following new paragraphs—

- (b) operations of the Fund;
- (c) mechanisms for accessing the Fund;

28. Section 84 S (2) of the principal Act is amended—

Amendment of section 84S of No.2 of 1998.

- (a) in paragraph (a) by deleting the words “which unfairly excludes or limits competition between such operators and any other party”,
- (b) by deleting paragraph (c) and substituting therefor the following new paragraph—
 - (c) the effectuation of any anti-competitive conduct in the communications sector;

29. Section 84T (6) of the principal Act is amended—

Amendment of section 84T of No.2 of 1998.

- (a) by deleting the words “is competing unfairly” and substituting therefor the words “has engaged in anti-competitive conduct”.
- (b) by deleting paragraph (b) and substituting therefor the following new paragraph—
 - (b) require the licensee to pay a fine not exceeding the equivalent of ten percent of the annual gross turnover of the preceding year, for each financial year that the breach persists..
- (c) by inserting the word “or” immediately after the word “void”;
- (d) by inserting the following new paragraph immediately after paragraph as follows—
 - (d) impose any other lawful remedial measure to redress this offence.

30. Section 84W of the principal Act is amended—

Amendment of section 84W of No.2 of 1998.

- (a) in the first subsection (2) by deleting paragraph (g) and substituting therefor the following new paragraph—
 - (g) account separation;
- (b) in subsection (4) by—
 - (i) deleting the words “twenty five percent of

the gross turnover of the entire telecommunications market” appearing in paragraph (a) and substituting therefor the words “fifty per centum of the relevant gross market segment;

(ii) deleting paragraphs (b), (c) and (d) and substituting therefor the following new paragraphs—

(b) significant market power enjoyed by the telecommunications service provider; and

(c) any other consideration the Authority may determine.

Amendment of section 85A of No.2 of 1998.

31. Section 85A of the principal Act is amended by inserting the following new subsection immediately after subsection (2)—

(3) The Cabinet Secretary shall in consultation with the Authority make regulations with respect to infrastructure sharing.

Amendment of section 90 of No.2 of 1998.

32. Section 90 of the principal Act is amended in subsection (4) by deleting the words “subsection (3) and substituting therefor the words “subsection (2).

Repeal and replacement of section 93 of No.2 of 1998.

33. The principal Act is amended by repealing section 93 and replacing it with the following new section—

93. Access to information and restrictions on disclosure of information held by the Authority shall be implemented pursuant to Article 35 of the Constitution.

Amendment of section 102 of No.2 of 1998.

34. Section 102 of the principal Act is amended—

(a) in subsection (1) by—

(i) deleting paragraph (a) and substituting therefor following new paragraph—

(a) a chairperson who shall be a person competent to be appointed as a Judge of the High Court or who is an Advocate of the High Court of not less than ten years.

(ii) deleting the word “two” appearing in subsection 1 (b) and substituting with the

word "four" appearing in paragraph (b);

(iii) deleting paragraph (c);

(b) by deleting subsection (2) and substituting the following new subsection—

(2) The chairperson of the Tribunal shall be appointed by the Judicial Service Commission.

(2A) The provisions set out in the Second Schedule shall have effect in relation to the membership, procedure and sittings of the Tribunal.

(c) inserting the following new subsection immediately after subsection (4)—

(5) The quorum for the conduct of the business of the Tribunal shall be three members, one of whom shall be the Chairperson.

35. Section 102A of the principal Act is amended in—

Amendment of
Section 102 A in
No. 2 of 1998

(a) in subsection (2), by deleting the word "seven" and substituting therefor the words "nine";

(b) in subsection (2) (b), by deleting the words "at least four" and substituting therefor the words "eight";

(c) in subsection 4 (a) by inserting the following words "or any other relevant field" after the word "finance";

(d) by inserting the following new subsections immediately after subsection (4)—

(5) The Universal Service Advisory Council shall—

(a) advise the Authority and provide strategic policy guidance for the administration and implementation of the Universal Service Fund; and

(b) perform any other functions as the Cabinet Secretary, in consultation with the Board, may from time to time assign.

(6) The Council shall consist of a chairperson and eight other members appointed in accordance with this section.

(7) Within fourteen days of the commencement of this Act, or of the occurrence of a vacancy in the office of chairperson or a member of the Council, the Cabinet Secretary shall by notice in the Gazette and in at least two daily newspapers of national circulation, declare vacancies in the Council, inviting applications from qualified persons.

(8) Within seven days of receipt of applications submitted under subsection (7), the Cabinet Secretary shall consider the applications, shortlist and publish the names of the shortlisted applicants inviting public comment.

(9) Within seven days after the expiry of the period of notice under subsection (7) the Cabinet Secretary shall consider the public comments received, and make the appointment.

(10) In selecting, nominating, approving or appointing the chairperson and members of the Council, the Cabinet Secretary shall—

- (a) ensure that the nominees to the Council, reflect the interests of all sections of the society;
- (b) ensure equal opportunities for persons with disabilities and other marginalised groups; and
- (c) ensure that not more than two thirds of the members are of the same gender.

(11) Every appointment made under section 5 (1) shall be by name and by notice in the Kenya Gazette.

36. The principal Act is amended by inserting the following new sections immediately after section 103—

104. (1) The Authority shall pursuant to Article 157 (12) of the Constitution have the power to undertake prosecution of any offence under this Act.

(2) An officer duly authorised in writing by the Authority may conduct a prosecution for any offence under this Act.

Transition.

105. The transition provisions set out in the Sixth Schedule to to this Act shall have

Amendment of
No. 2 of 1998 by
insertion of new
sections 104 and
105.

effect with respect to the staff, assets, rights, liabilities, obligations, agreements and other arrangements existing at the commencement of this Act.

37. (1) On the commencement of this Act-

Transitional provisions.

- (a) any person who was an employee of the former Commission immediately before the commencement of this Act shall be deemed to be an employee of the Authority on the same terms and conditions of service;
- (b) all property, assets, rights, liabilities, obligations, agreements licences and other arrangements existing at the commencement of this Act and vested in, acquired, incurred or entered into by or on behalf of the former Commission, shall, be deemed to have vested in or to have been acquired, incurred or entered into by or on behalf of the Authority to the same extent as they were enforceable by or against the former Commission before the commencement of the Act;
- (c) where the transfer of any property transferred to or vested in the Authority under subsection (1) is required by any written law to be registered, the Authority shall, within six months from the date of commencement of this Act and amendments thereto or within such other period as any relevant law may prescribe, apply to the appropriate registering authority for the registration of the transfer and thereupon the registering authority shall, at no cost to the Authority or any person by way of registration fees, stamp or other duties—
 - (i) make such entries in the appropriate register as shall give effect to the transfer;
 - (ii) where appropriate, issue to the Authority a certificate of title or other statutory evidence of ownership of the property or make such amendments on such certificates or in the appropriate register as may be necessary; and

- (iii) make any necessary endorsements on such deeds or other documents as may be presented to such registering authority relating to the title, right or obligation concerned.

Amendment of
the First Schedule
to No. 2 of 1998.
Amendment of
the Second
Schedule to No. 2
of 1998.

38. The First Schedule to the Principal Act is amended by deleting subsection 1(1).

39. The Second Schedule to the principal Act is amended by deleting paragraph 1.

Amendment of
the Fourth
Schedule to No. 2
of 1998.

40. The Fourth Schedule to the principal Act is amended—

- (a) by deleting paragraph 6.
- (b) in paragraph 9, by deleting the words “one half of the” and substituting therefor the word “six”;
- (c) inserting a new paragraph immediately after paragraph 11 as follows—

12. The Council shall submit to the Board a report on the discharge of its functions on a quarterly basis.

Amendment of
the Fifth Schedule
to No. 2 of 1998.

41. The Fifth Schedule to the principal Act is amended in—

- (a) paragraph (3) (a) by deleting the words “six months” and substituting therefor the words “twelve months”;
- (b) paragraph (3) (b) by deleting the words “six months” and substituting therefor the words “one year”.

MEMORANDUM OF OBJECTS AND REASONS

The legislative proposal giving rise to this Bill has been submitted by the of Cabinet Secretary for Information, Communication and Technology.

The principle object of this Bill is to provide part of the framework for the realization of the right of freedom of the media as provided for under Article 34 of the Constitution in relation to the oversight over broadcasting. This is cognisant of the fact that broadcasting is over the radio frequency spectrum, a resource that the State is bound to utilize for the benefit of the people of Kenya in keeping with the requirements of the Constitution of Kenya, 2010.

The Bill seeks to provide for the body that is free of control by government, political or commercial interests that will set broadcasting media standards, and regulate and monitor compliance with those standards. The Bill further seeks to provide for a complaints and regulatory oversight body mechanism over broadcasting media standards.

The Bill while recognizing the fact that every person has the right of freedom of expression underlies that only a few persons can be licenced to broadcast due to the limited resource that is the raduio frequency spectrum.. The Bill also recognizes that Freedom of the media is a corollary to freedom of expression which is limited under Article 33 and 34 of the Constitution of Kenya 2010.

The Bill seeks to provide a broadcasting media standards framework for these and to regulate and monitor compliance with those standards in a converged environment of telecommunicatons and broadcasting technologies. The Bill therefore limits the freedom of expression and of the media to the extent of the setting up of a body to set broadcasting media standards and to regulate and monitor compliance with those standards.

The Bill seeks to amend the Kenya Information and Communications Act in order to among other things, align it with the Constitution of Kenya, 2010. In this respect the Bill seeks to provide for a statutory framework governing the communications sector in order to conform to, and