

THE COUNTY STATUTORY INSTRUMENTS BILL
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SCHEDULE

EXPLANATORY MEMORANDUM

THE COUNTY STATUTORY BILL, 2015

A Bill for

AN ACT of Parliament to provide for the making, scrutiny, publication and operation of county statutory instruments and for matters connected therewith

ENACTED by the Parliament of Kenya, as follows—

PART I—PRELIMINARY

1. This Act may be cited as the County Statutory Instruments Act, 2015. Short title

2. In this Act— Interpretation

“Committee” means a committee on delegated legislation established under the Standing Orders of a county assembly or any other committee that may be established by a county assembly for the purpose of reviewing and scrutinizing statutory instruments;

“explanatory memorandum” in relation to a statutory instrument, means a statement that—

- (a) is prepared by a regulation-making authority;
- (b) explains the purpose and operation of the statutory instrument;
- (c) if any documents are incorporated in the statutory instrument by reference, contains a description of the documents so incorporated and indicates how they may be obtained;
- (d) if consultation was undertaken before the statutory instrument was made, contains—
 - (i) a brief statement of the way the consultation was carried out;
 - (ii) an outline of the results of the consultation; and
 - (iii) a brief explanation of any changes made to the legislation as a result of the consultation;
- (e) if no such consultation was undertaken, explains why no such consultation was undertaken;
- (f) contains such other information as is prescribed on the notes as set out in the Schedule; and

is accompanied by the regulatory impact statement prepared for the statutory instrument;

“regulation-making authority” means any authority authorized by an Act of a county assembly to make statutory instruments;

“responsible county executive committee member” means the county executive committee member for the time being responsible for administering the relevant Act or provision under which or in relation to which the statutory instrument is made or preserved; and

“statutory instrument” means any rule, order, regulation, direction, form, tariff of costs or fees, letters, patent, commission, warrant, proclamation, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of a County Assembly under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.

3. (1) This Act applies to every statutory instrument made directly or indirectly under any Act of a county assembly.

Application

(2) Nothing under this section may be construed as precluding a County Assembly from applying the provisions of this Act to any published Bills awaiting consideration by a County Assembly.

4. The object of this Act is to provide a comprehensive framework for the making, scrutiny, publication and operation of statutory instruments by—

Object of the Act

- (a) requiring regulation-making authorities to undertake appropriate consultations before making statutory instruments;
- (b) promoting high standards in the drafting of statutory instruments to ensure their legal effectiveness, clarity and intelligibility to anticipated users;
- (c) enhancing public participation in the making of statutory instruments;
- (d) establishing a mechanism for scrutiny of statutory instruments by county assemblies; and

- (e) establishing a mechanism for the periodic review of statutory instruments and where they no longer have a continuing purpose, their repeal.

PART II—CONSULTATIONS BEFORE MAKING STATUTORY INSTRUMENTS

5. (1) Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—

Consultation before
making statutory
instruments

- (a) have a direct, or a substantial indirect effect on business; or
- (b) restrict competition

the regulation-making authority shall consult with persons who are likely to be affected by the proposed instrument.

- (2) In determining whether a regulation-making authority has undertaken consultations under subsection (1), regard shall be had to the extent to which the consultation—

- (a) drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and
- (b) ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on the proposed content of the statutory instrument.

(3) Without limiting by implication the form that consultation referred to in subsection (1) might take, the consultation shall—

- (a) involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or
- (b) invite submissions to be made by a specified date or invite participation in public hearings to be held concerning the proposed instrument.

PART III—REGULATORY IMPACT STATEMENTS

6. If a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation-making authority shall, prior to

Regulatory impact
statements

making the statutory instrument, prepare a regulatory impact statement regarding the instrument.

7. (1) A regulation-making authority shall in preparing a regulatory impact assessment, set out in a clear and precise language, the following information-

Contents of
regulatory impact
statements

- (a) a statement of the objectives of the proposed statutory instrument and the reasons its proposed enactment;
- (b) a statement explaining the effect of the proposed statutory instrument where the instrument proposes to amend an existing statutory instrument;
- (c) a statement of other practicable means of achieving the objectives, including other regulatory as well as non-regulatory options;
- (d) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives;
- (e) the reasons why the other means are not appropriate;
- (f) any other matters specified by the statutory instrument; and
- (g) a summary of the provisions of the statutory instrument.

(2) The assessment of the costs and benefits shall include an assessment of the economic, environmental and social impact and the likely administrative and compliance costs including resource allocation costs.

(3) The regulation-making authority shall, in preparing a regulatory impact statement, obtain independent advice as to the adequacy of the regulatory impact statement and of the assessment included in the regulatory impact statement in accordance with the guidelines.

(4) The responsible county executive committee member shall before a statutory instrument in respect of which a regulatory impact statement is required is made, issue a certificate in writing specifying that—

- (a) the requirements relating to regulatory impact statements stipulated under this Act and the guidelines have been complied with; and
- (b) in the opinion of the county executive committee member, the regulatory impact statement adequately sets out the likely impact of the proposed statutory instrument.

(5) The responsible county executive committee member shall submit to the clerk of the county assembly, a copy of the regulatory impact statement and the compliance certificate for tabling before the county assembly with the statutory instrument.

8. (1) A regulation making authority that intends to prepare a regulatory impact statement shall notify the residents of the county, of the intended preparations, by notice in the *Gazette*, *County Gazette* and in a newspaper of wide circulation within the county.

Notification of
regulatory impact
statements

(2) If the proposed statutory instrument is likely to have a significant impact on a particular group of people, the regulation-making authority shall publish the notice in a way that is likely to ensure members of the group understand the purpose and content of the notice.

(3) The notice shall—

- (a) include a brief statement of the policy objectives sought to be achieved by the proposed legislation;
- (b) state where copies of the regulatory impact statement may be obtained or inspected;
- (c) if a draft of the proposed statutory instrument may be obtained or inspected, state where the draft may be obtained or inspected ;
- (d) state that anyone may comment on the proposed legislation;
- (e) state how and when comments may be made; and
- (f) state how consultations about the proposed legislation will take place.

(4) The notice shall allow at least fourteen days from publication of the notice for the making of comments.

(5) A copy of the regulatory impact statement may be available for inspection free of charge, or a copy may be

availed upon payment of a reasonable fee, at the place, or each of the places, specified in the notice.

- (6) The regulation making authority shall—
 - (a) consider all comments and submissions before making the statutory instrument; and
 - (b) submit a copy of all comments and submissions submitted to the Committee as soon as practicable after the statutory instrument is tabled in the County Assembly or upon request by the Committee.

9. The requirement for the preparation of a regulatory impact statement under this Part shall not apply to the preparation of a statutory instrument which only provides for—

Where regulatory
impact statements
may be unnecessary

- (a) a matter that is not of a legislative character, including, a matter of a machinery, administrative, drafting or formal nature;
- (b) a matter that does not operate to the disadvantage of any person (other than a county government entity) by—
 - (i) decreasing the person's rights;
 - (ii) imposing liabilities on the person;
- (c) an amendment of statutory instrument to take account of the prevailing Kenyan legislative drafting practice;
- (d) the commencement of an Act of the county assembly or subsidiary legislation or a provision of an Act of a county assembly or subsidiary legislation;
- (e) an amendment of statutory instrument that does not fundamentally affect the legislation's application or operation;
- (f) saving or transitional provisions;
- (g) a matter arising under legislation that is substantially uniform or complementary with legislation of the county government ;
- (h) a matter advance notice of which would enable someone to gain unfair advantage; or

- (i) an amendment of a fee, charge or tax consistent with announced county government policy.

PART IV—SCRUTINY OF STATUTORY INSTRUMENTS BY A COUNTY ASSEMBLY

10. (1) Every regulation-making authority shall within seven sitting days after the publication of a statutory instrument, transmit a copy of the statutory instrument to the clerk of the county assembly for tabling before the county assembly.

Laying of statutory instruments before a County Assembly

(2) The regulation making authority shall submit the statutory instrument under subsection (1) together with an explanatory memorandum in the form set out in the Schedule.

(3) The clerk of the county assembly shall register or cause to be registered every statutory instrument transmitted to the county assembly for tabling or laying under this Part.

(4) If a copy of a statutory instrument that is required to be laid before the county assembly is not so laid in accordance with this section-

- (a) the statutory instrument shall cease to have effect immediately after the last day for it to be so laid; and
- (b) any act done under the statutory instrument before it ceases to have effect, shall not be prejudiced.

11. (1) Every statutory instrument made after the commencement of this Act shall stand referred to the committee or any other committee that may be established for the purpose of reviewing and scrutinizing statutory instruments.

Referral to the committee

(2) Nothing under subsection (1) shall be construed as precluding the committee from scrutinizing statutory instruments previously published before the commencement of this Act.

(3) The provisions of subsection (1) shall not apply to any rules, regulations and orders emanating from a court of competent jurisdiction in Kenya.

12. The committee shall, in scrutinizing a statutory instrument, be guided by the principles of good governance

Relevant considerations

and the rule of law and shall consider whether the statutory instrument—

- (a) accords with the provisions of the Constitution, the Act pursuant to which it is made or other written law;
- (b) infringes on fundamental rights and freedoms of the public;
- (c) contains a matter which in the opinion of the committee should more properly be dealt with in an Act of the county assembly;
- (d) imposes taxes;
- (e) directly or indirectly bars the jurisdiction of the courts;
- (f) gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give such power;
- (g) involves expenditure from the Consolidated Fund or other public revenues;
- (h) is defective in its drafting or for any reason the form or purport of the statutory instrument calls for elucidation;
- (i) appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;
- (j) appears to have had unjustifiable delay in its publication or laying before the county assembly;
- (k) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (l) makes rights, liberties or obligations unduly dependent insufficiently defined administrative powers;
- (m) inappropriately delegates legislative powers;
- (n) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
- (o) appears for any reason to infringe on the rule of law;

- (p) inadequately subjects the exercise of legislative power to scrutiny by a county assembly; and
- (q) meets such other requirement as the committee may consider appropriate.

13. The committee may exempt certain statutory instruments or class of statutory instruments from scrutiny if the committee upon consulting the relevant regulation-making authority, is satisfied that the scrutiny is not reasonably practical due to the number of regulations in that class.

Exemptions

14. The committee shall table a report before the county assembly -

Report to the County Assembly

- (a) containing only a resolution that the statutory instrument that stands referred to the committee is void.
- (b) indicating the manner in an identified portion of the statutory instrument offends the criteria set out in section 12 and the recommendations thereof.

15. In so far as is practically possible, the committee shall in considering a statutory instrument, confer with the regulation-making authority which has made the statutory instrument that is before the committee for scrutiny, before tabling the report before the county assembly.

Notice to the regulation-making authority

16. Upon the tabling of a report regarding a statutory instrument before the County Assembly, the statutory instrument shall, if the County Assembly passes a resolution that the statutory instrument is void, stand revoked.

Tabling of the Report

17. Where the County Assembly adopts a report or a resolution that a statutory instrument is void, under section 16, the instrument shall stand revoked and the regulation making authority shall publish the revocation within fourteen days.

Revocation

PART V—GENERAL PROVISIONS

18. (1) Subject to subsection (3), a statutory instrument shall by virtue of this section stand revoked on the day which is ten years after the making of the statutory instrument unless—

Automatic revocation of statutory instruments

- (a) it is sooner repealed or expires; or
- (b) a regulation is made exempting it from expiry.

(2) The responsible county executive committee member may in consultation with the committee, make a regulation under this Act extending the operation of a statutory instrument that would otherwise be revoked by virtue of this section.

(3) An extension under sub-section (2) shall not exceed twelve months.

(4) Only one extension of the operation of a statutory rule can be made under subsection (2).

19. (1) Subject to subsection (2), every statutory instrument shall be published in the *Kenya Gazette* and *County Gazette* and shall be assigned a serial number as of the year in which it is made which shall be printed on the face of the statutory instrument.

Publication of
instruments

(2) If a question arises as to whether statutory instruments under any provision of an enactment are statutory instruments, the county executive member for the time being responsible for legal affairs may, by certificate in writing, decide the matter.

(3) Every certificate issued under subsection (2) shall be published in the *Kenya Gazette* and the *County Gazette*.

20. (1) A statutory instrument shall come into operation on the date specified in the statutory instrument or, if a date is not specified, then, subject to subsection (2), the statutory instrument shall come into operation on the date of its publication in the *Gazette* subject to annulment where applicable.

Commencement of
statutory instrument

(2) If a statutory instrument is made after the passing or making but before the coming into operation of the enabling legislation under which it is made, the statutory instrument, whether or not it is previously published, shall not come into operation before the date on which the enabling legislation comes into operation.

(3) A statutory instrument may be made to operate retrospectively to any date not being earlier than the commencement of the enactment under which it is made but no person is liable to a penalty in respect of any contravention of a provision in a statutory instrument required to be published in the *Gazette* where the alleged

contravention occurred before the publication unless the court is satisfied that before the alleged contravention, the purport of the statutory instrument had been brought to that person's notice.

21. (1) Where a statutory instrument purports to be made in exercise of a particular power, it shall be deemed to be made in exercise of all powers thereunto enabling.

Exercise of powers

(2) A statutory instrument shall not be inconsistent with the provisions of the enabling legislation, or of any Act, and the statutory instrument is void to the extent of the inconsistency.

(3) Where an Act confers a power to make a statutory instrument it shall be deemed also to include a power exercisable in the like manner and subject to the like conditions, if any, to amend, revoke or replace any statutory instrument.

(4) Where an Act confers power on any person to make a statutory instrument or to do anything for any general purpose and also for any special purposes incidental thereto, the enumeration of the special purposes shall not derogate from the generality of the general purpose.

(5) There may be annexed to the breach of statutory instrument a penalty, which the regulation making authority may consider fit.

22. (1) A statutory instrument may provide for the imposition of fees and charges in respect of any matter with regard to which provision is made in the enabling legislation.

Fees and charges

(2) A power to impose fees or charges shall include power to provide for all or any of the following matters—

- (a) specific fees or charges;
- (b) minimum fees or charges;
- (c) maximum fees or charges;
- (d) *ad valorem* fees or charges;
- (e) payment of fees or charges either generally or under specified conditions or in specified circumstances; and

- (f) reduction, waiver or refund, in whole or in part, of any fees or charges, either upon the happening of a certain event or in the discretion of a specified person.

(3) Where any reduction, waiver or refund, in whole or in part, of any fee or charge is provided for, such reduction, waiver or refund may be expressed to apply or to be applicable either generally or specifically—

- (a) in respect of certain matters or transactions or classes of matters or transactions;
- (b) in respect of certain documents or classes of documents;
- (c) when any event happens or ceases to happen;
- (d) in respect of certain persons or classes of persons; or
- (e) in respect of any combination of such matters, transactions, documents, events or persons, and may be expressed to apply or to be applicable subject to such conditions as may be specified in the statutory instrument or in the discretion of any person specified therein.

23.(1) Where an enabling legislation confers power on a regulation-making authority to prescribe any form, then unless that authority prescribes the form, any form approved for the purpose by that authority may be used.

Forms

(2) Where any form has been prescribed under any legislation, a document or statutory instrument which purports to be in such form is not void by reason of any deviation there from which does not affect the substance of the form or which is not misleading.

PART VI—TRANSITION AND SAVING

24. Any regulations, order or notice issued immediately before the commencement of this Act shall continue to be in force as if it were made under this Act unless it is expressly revoked by an Act of a county assembly under which it is made.

Transition

SCHEDULE

THE [Title of Statutory Instrument]

[Year] No. [xxxx]

PART I

Name of the Statutory Instrument:

Name of the Parent Act:

Enacted Pursuant to:

Name of the Department:

PART II

1. Purpose of the Statutory Instrument
2. Legislative Context
3. Policy Background
 - What is being done and why
4. Consultation Outcome
5. Guidance
6. Impact
 - 6.1 The impact on fundamental rights and freedoms
 - 6.2 The impact on the private sector
 - 6.3 The impact on the public sector
 - 6.4 An impact assessment is attached to this memorandum or an impact assessment has not been prepared for this statutory instrument
7. Monitoring and review
8. Contact
 - Name of contact, Telephone Number and Email address

NOTES ON PREPARING EXPLANATORY

MEMORANDA TO STATUTORY INSTRUMENTS

The purpose of the Explanatory Memorandum (EM) is to provide to the lay reader plain English, self contained, explanation of the effect of the legislation and why it is necessary.

In preparing the EM departments should ensure that they do not repeat the content of the Explanatory Note. The EM is not aimed at lawyers, but to help people who know nothing about the law or the subject quickly to gain an understanding of the statutory instrument's intent and purpose.

It can be helpful to produce a single EM for a group of linked statutory instruments (SIs). This prevents unnecessary duplication of common background and makes sure that the reader is aware of the

linkage. It may be helpful to explain (usually in the policy section) the special features of each SI and how it contributes to the overall policy objective. A copy of the group EM should be attached to each of the individual SIs to which it relates. Where possible all the statutory instruments should be laid on the same day and numbered sequentially.

The numbering of the individual section headings is fixed, so the paragraphs that follow should be numbered as subparagraphs. Your explanation should be concise but comprehensive – the EM should not generally exceed 4 pages.

1. Purpose of the statutory instrument

In no more than 3 sentences please describe in **Plain English** what the statutory instrument does and why. Assume that the reader knows nothing about the subject and explain, or better avoid, acronyms and terms of art.

The legal powers under which the statutory instrument is made are generally irrelevant here, and in any case are set out in the statutory instrument itself.

2. Legislative Context

The power under which the statutory instrument is made will be clear from the statutory instrument itself and reference need not be made to the power unless there is a specific reason to do so, for example, if this is the first use of a power under an Act or the power is being used in a novel way. In these paragraphs you should explain why the statutory instrument is being made: for example, to implement a new Act.

Relevant background information should be given to set the statutory instrument in context. Mention in particular—

- if in the course of debate or Committee appearance any specific undertakings were given to the County Assembly that relate to this instrument (including Hansard report where relevant);
- if this instrument relates to any other statutory instruments (i.e. it is one of a group), please cross reference;
- if this statutory instrument paves the way for future statutory instruments it is helpful to indicate what they will do and when they are likely to appear.

3. Policy Background

Paragraph(s) 3.1 onwards will be free text.

- ***What is being done and why***

Departments should state in particular—

- the policy objectives of the parent Act/Directive and how this statutory instrument fulfils them
- the size and nature of the problem it is addressing
- the level of public interest in the policy (for example from the response to consultation if undertaken or from media attention)
- whether the change is politically or legally important .

Departments should ensure that, although brief, explanation should start from the basic. The EM is aimed at the lay reader: not just at the committee on delegated legislation but also Members of the County Assembly. Don't say "this amends the XYZ scheme to open it to the under 18s" without providing a sentence about what the XYZ scheme does. Please explain any acronyms or technical terms.

The EM should also make clear why the County Government needs to legislate and what other avenues of attaining the desired objective (e.g. self-regulation through a voluntary code of practice) were explored and why they were rejected.

For "Miscellaneous Amendments" the EM should briefly address each of the broad areas covered. If there is no obvious structure offered by the format of the statutory instrument itself, one way of doing this is to break the Regulations down into associated groups.

- **Consolidation**

Where a statutory instrument amends another statutory instrument, particularly if not for the first time, the memorandum should indicate whether the department intends to consolidate the relevant legislation and if so, what the projected timescale for consolidation may be. If an informal consolidated text is available to the public for free then provide details of the website or other reference from where this can be obtained.

4. Consultation outcome

Paragraph(s) 4.1 onwards will be free text

The EM should contain a brief explanation of who was consulted, over what period and with what responses. There should be some analysis of the outcome and the Department's policy response to the opinions expressed (e.g. "60% supported the proposal, of the rest, the main objections were on the proposed fee structure and the Department has responded to this by agreeing to phase in the increase over 3 years").

5. Guidance

Paragraph(s) 5.1 onwards will be free text.

The memorandum should set out what guidance or other form of publicity, if any, the department is providing to users and stakeholders and enforcement agencies to explain the new obligation and to ensure that it is

fulfilled. This is particularly important where a regulation is legally complex.

6. Impact

Where an Impact Assessment (IA) has been prepared then this should be attached as an Annex. There is no need to duplicate the information. If you are recycling the IA prepared for an Act which the statutory instrument helps implement, please only include the relevant extracts and confirm in the EM that the figures are still up to date. If no IA has been prepared please confirm that this is because no impact on the private or voluntary sector is foreseen and simply mention any public sector impacts.

7. Monitoring and review

Paragraph(s) 7.1 onwards are free text.

What are the success criteria for this statutory instrument? Where possible please define the intended outcome in measurable terms e.g. the changes in the fee structure aim to achieve full cost recovery of the process of issuing and administering this licence by April 2014, or the changes set out in this statutory instrument aim to reduce identity theft by 10% over the next 3 years.

When and how will they be reviewed? State who will review the outcome, when and how the results will be published. e.g the outcome will be subject to internal review after 12 months and the legislation may be amended accordingly

Where this material has already been included in the IA, please include the headline answers in the EM and cross refer to further detail in the IA (specifying the relevant paragraph or page).

8. Contact

All details shall be completed on the copies provided to the County Assembly. The contact phone number given should be covered by someone who is able to answer questions on the statutory instrument for at least 3 weeks after the statutory instrument has been laid.

Disclaimer:

This notes act only as a guideline and as such they are not exhaustive and for clarity, proper reference should be made to the main body of the Act.

MEMORANDUM OF OBJECTS AND REASONS

Statement of the Objects and Reasons for the Bill

The principal object of this Bill is to make provision for the procedure of consideration of Statutory Instruments by County Assemblies. Subsidiary legislation is key in the running of County Governments. The Bill seeks to provide a legal mechanism by which County Assemblies will scrutinize statutory instruments.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill does not delegate legislative powers nor does it limit fundamental rights and freedoms.

Statement of how the Bill concerns County Governments

The Bill concerns county governments in terms of Article 110(1)(a) of the Constitution as it contains provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule to the Constitution by making it mandatory for the County Executive to table all its statutory instruments before the County Assemblies.

Statement that the Bill is not a money Bill within the meaning of Article 114 of the Constitution

The Bill is not a money Bill within the meaning of Article 114 of the Constitution.

Dated the 17th March, 2015.

STEPHEN SANG',
Chairman,
Sessional Committee on Delegated Legislation.