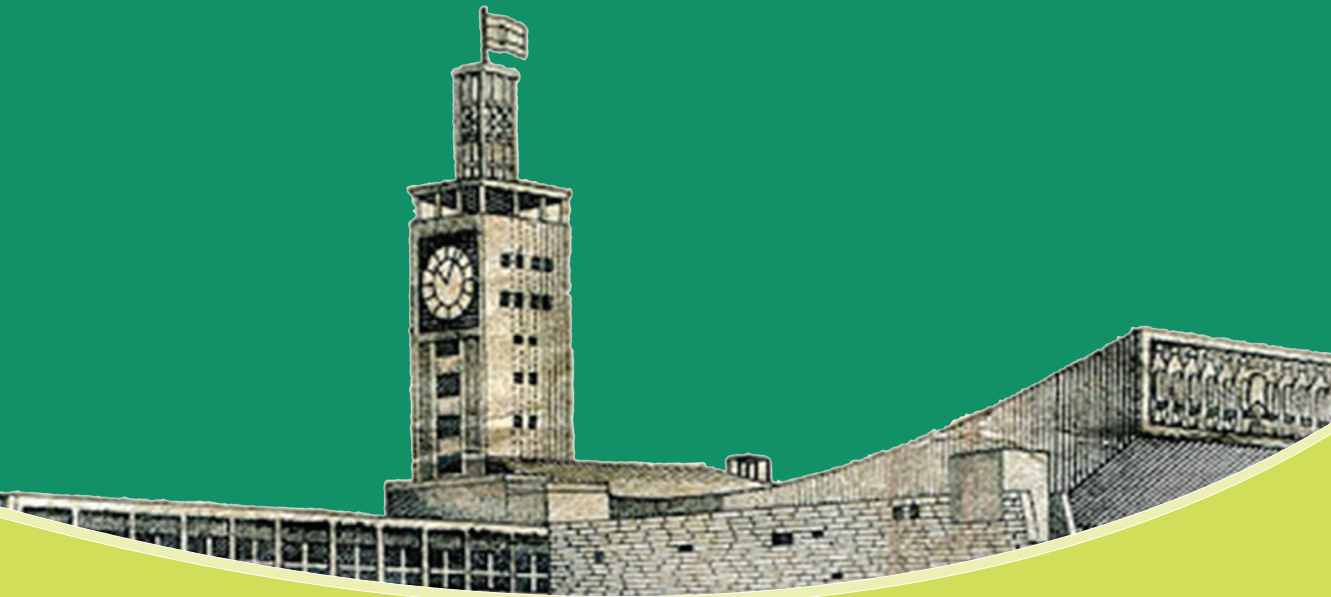




Parliament of Kenya

The National Assembly

Statutory Instruments



Fact Sheet
No. 21

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FactSheet 21: Statutory Instruments

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This Factsheet on **Statutory Instruments** is part of the Kenya National Assembly Factsheets Series that are supposed to enhance public understanding, awareness and knowledge of the work of the Assembly and its operations. It is intended to serve as easy guide for ready reference by Members of Parliament, staff and the general public. The information contained here is not exhaustive and readers are advised to refer to the original sources for further information.

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Statutory Instruments

1. Introduction

Article 94 (5) of the Constitution precludes all other persons or bodies, other than Parliament, from making provisions having the force of law in Kenya except under authority conferred by the Constitution or delegated by the Legislature through a Statute.

The National Assembly may, therefore, delegate to any person or body the power to make subsidiary legislation, which require approval of the House before having the force of law. Subsidiary legislation made by persons or bodies other than Parliament are commonly known as *Statutory Instruments*.

The manner, procedure and criteria for considering statutory instruments is detailed in the Statutory Instruments Act, 2013 and the Standing Orders.

2. What is a statutory instrument?

Section 2 of the Statutory Instruments Act, 2013 and the Standing Orders of the respective Houses of Parliament define a statutory instrument as—

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

3. Prerequisites for Preparation of statutory instruments

Statutory instruments are prepared by a Cabinet Secretary or a body with power to make them, e.g. a commission, authority or a board. Statutory Instruments

must conform to—

3.1 The Constitution:

Regulation making authorities must ensure that the provision in the Statutory Instrument are in tandem with the principles, values and general spirit of the Constitution. In particular, Statutory Instruments should not in any way reduce the rights of and individual or those who will be affected by them.

3.2 The Interpretation and General Provisions Act (Cap 2):

Statutory instruments must conform to the provisions of the Interpretation and General Provisions Act in regard to construction, application and interpretation. This is the Act which provides for limits within which Statutory Instruments operate for instance, the penalties that may be imposed under a Statutory Instrument.

3.3 The Parent Act

In making Statutory Instrument, the regulation-making bodies must do so in conformity with the parent Act delegating that authority. Particular attention must be paid to the provision delegating legislative powers, including adherence to the stipulated timelines so as to ensure that a statutory instrument is made without unreasonable delay.

Where a statutory instrument requires pre-publication scrutiny by the National Assembly, the regulation-making body must cause the instrument to be tabled in the House before publication. For instance, section 17 of the Election Laws (Amendment) Act, 2016 required the Independent Elections and Boundaries Commission to table drafts of all election-related Regulations to the National Assembly for approval before publication.

3.4 Conformity with the Statutory Instruments Act, 2013:

The key requirements of this Act are:

3.4.1 Consultations with stakeholders

Section 5 requires a regulatory making body to carry out consultations with persons who are likely to be affected by a proposed instrument and indicate, in detail in the Explanatory Memorandum attached to the statutory instrument, that consultations were carried out, including the outcome of such consultations.

3.4.2 Preparation of a Regulatory Impact Statement

Sections 6, 7 and 8 of the Act provides for the need to carry out impact statement if a proposed statutory instrument is likely to impose significant costs on the community or a part of the community. The regulatory making authority must give a certificate in writing specifying that—

- a) the requirements relating to regulatory impact statements in the Statutory Instruments Act and the guidelines have been complied with; and
- b) in the Cabinet Secretary's opinion, the regulatory impact statement adequately assesses the likely impact of the proposed statutory rule.

A copy of the regulatory impact statement and the compliance certificate must be tabled in Parliament together with the statutory instrument.

The Act exempts submission of a regulatory impact statement where an instrument—

- a) deals with a matter that is not of a legislative character, including, for example, a matter of a machinery, administrative, drafting or formal nature;
- b) deals with a matter that does not operate to the disadvantage of any person (other than a government entity) by—
 - decreasing the person's rights; or
 - imposing liabilities on the person;
- a) deals with an amendment of statutory instrument to take account of the prevailing Kenyan legislative drafting practice;
- b) deals with the commencement of an Act or subordinate legislation or a provision of an Act or statutory instrument;
- c) deals with an amendment of statutory instrument that does not fundamentally affect the legislation's application or operation;
- d) deals with a matter of a savings or transitional character;
- e) deals with a matter arising under legislation that is substantially uniform or
- f) is complementary with legislation of the National Government or any County;
- g) deals with a matter advance notice of which would enable someone to gain unfair advantage;
- h) deals with an amendment of a fee, charge or tax consistent with announced government policy.

3.4.3 Preparation of explanatory memorandum

Section 11 of the Act obligates the regulation making authority to transmit a copy of the statutory instrument together with the explanatory memorandum to the Clerk for tabling in the House.

3.4.4 Tabling of Statutory Instrument in the House

Section 11 further requires regulation-making authority to transmit a statutory instrument for tabling to the Clerk within seven sitting days from the date of publication; this is a requirement that must be complied with.

4. Consideration of Statutory Instruments by the National Assembly

The manner for considering Statutory Instruments is provided for under the Statutory Instruments Act. Essentially, Statutory Instruments once tabled in the House are referred to the Committee on Delegated Legislation, established under Standing Order 210 and described under Section 2 of the Act, for consideration.

4.1 Committee on Delegated Legislation

The Committee on Delegated Legislation scrutinizes statutory instruments referred to it and may, upon undertaking that scrutiny, resolve that the

statutory instrument be acceded or not acceded to. Where the Committee accedes to a Statutory Instrument, the Clerk notifies the authority from which it originated, without such a resolution having to pass through the House.

If the Committee resolves to annul part or the whole statutory instrument, a Report recommendation as such is tabled in the House for consideration.

4.2 Exemption of certain statutory instruments from scrutiny by the Committee (s.14).

Section 14 of the Act permits the committee to exempt certain classes of statutory instruments from scrutiny, if satisfied that it is not reasonably practical to undertake scrutiny due to the number of regulations in that class e.g. rules on court procedure.

4.3 Guidelines for scrutiny of Statutory Instruments

Section 13 of the Act provides guidelines that the Committee on Delegated Legislation while scrutinizing a Statutory Instrument. These guidelines focus on the principles of good governance, the rule of law and the Committee considers whether the statutory instrument-

- (a) is in accordance 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 Parliament;
- (d) contains imposition of taxation;
- (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 any 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 any 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 Parliament;
- (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 parliamentary scrutiny; and
- (q) accords to any other reason that the Committee considers fit to examine.

The criteria set out in section 13 of the Act is replicated in Standing Order 210(3) on the procedure for considering Statutory Instruments.

Paragraph 4 of Standing Order 210 provides that where the Committee on Delegated Legislation resolves that a statutory instrument be acceded to, the Clerk shall convey this resolution to the relevant state authority or department that published the statutory instrument.

Where the Committee resolves that all or any part of the statutory instrument be annulled and the instrument is not made under any legislation concerning counties and a resolution is passed by the Assembly within twenty one days on which it next sits after the instrument was laid before it, the instrument or part of it shall stand annulled.

Where the legislation concerns counties, then the Clerk of the National Assembly shall within seven days of the resolution transmit a message to the Senate.

4.4 Tabling of a Committee Report on scrutiny of Statutory Instrument

Section 15(2) of the Act provides that the Committee on Delegated Legislation must table its report within 28 days following the date of referral of the Statutory Instrument to the Committee.

If the Committee fails to Report to the House within twenty-eight days after the date of referral the Statutory Instrument shall be deemed to have fully met the relevant considerations and shall be deemed to have been approved.

4.5 Notification of a regulation making authority before tabling of a Report

Section 16 of the Act requires the committee to confer with the regulation-making authority before tabling a report to Parliament for their information and modification if necessary. These consultations are necessary to facilitate understanding of the regulations by the Committee and an opportunity for the regulation making authority to rectify errors in the statutory instruments.

4.6 Revocation of Statutory Instruments

A Statutory Instrument may be revoked –

- i. through a resolution of the House under Section 19 of the Act, which provides that if Parliament adopts a report or resolution of the Committee on Delegated Legislation that a statutory instrument be revoked, the instrument shall stand revoked and the regulation making authority shall publish the revocation within fourteen days; or
- ii. automatically under Section 21 of the Act, which provides that Statutory Instruments stands automatically revoked ten years after their making, unless a sooner expiry date is provided or if such regulation is made exempting it from expiry.

5. Can the House amend a statutory instrument?

The manner of considering Statutory Instruments under Part IV of the Statutory Instruments Act and Standing Order 210 does not envisage the House taking back the legislative authority delegated to regulation-making bodies by opening up and amending Statutory Instruments. This implies that where the House is of the view that the regulation-making bodies have overstepped the boundaries of the delegated authority to make Statutory Instrument or the Statutory Instrument does not meet the criteria set out in the Act, the House has the option of annulling

the said Statutory Instruments.

This was affirmed on 26th March 2014 by the Speaker of the National Assembly (Eleventh Parliament) in his ruling on '*the Procedure for Consideration of Delegated Legislation.*' The Speaker ruled that -

"It is apparent that Part IV of the Statutory Instruments Act does not contemplate the full involvement of the House in the regulation making process. As such, the House is not required to approve or make any amendments to the statutory instrument. Rather, the House is only required to annul the whole or any part of the statutory instrument that the House is not happy with. In making the annulment of the whole or any part of the regulation, the House is required to give it reasons which will guide the regulation making authority in formulating new provisions to replace the ones annulled by the House."

However, there are exceptions where the Parent Act requires approval of a Statutory Instrument made pursuant to it by the House. Such Statutory Instrument are considered in the Committee of the Whole House, where they may be amended.

For instance, section 17 of the Election Laws (Amendment) Act, 2016 required provided that all election-related Regulations made by the Independent Elections and Boundaries Commission be approved by the National Assembly before taking effect.

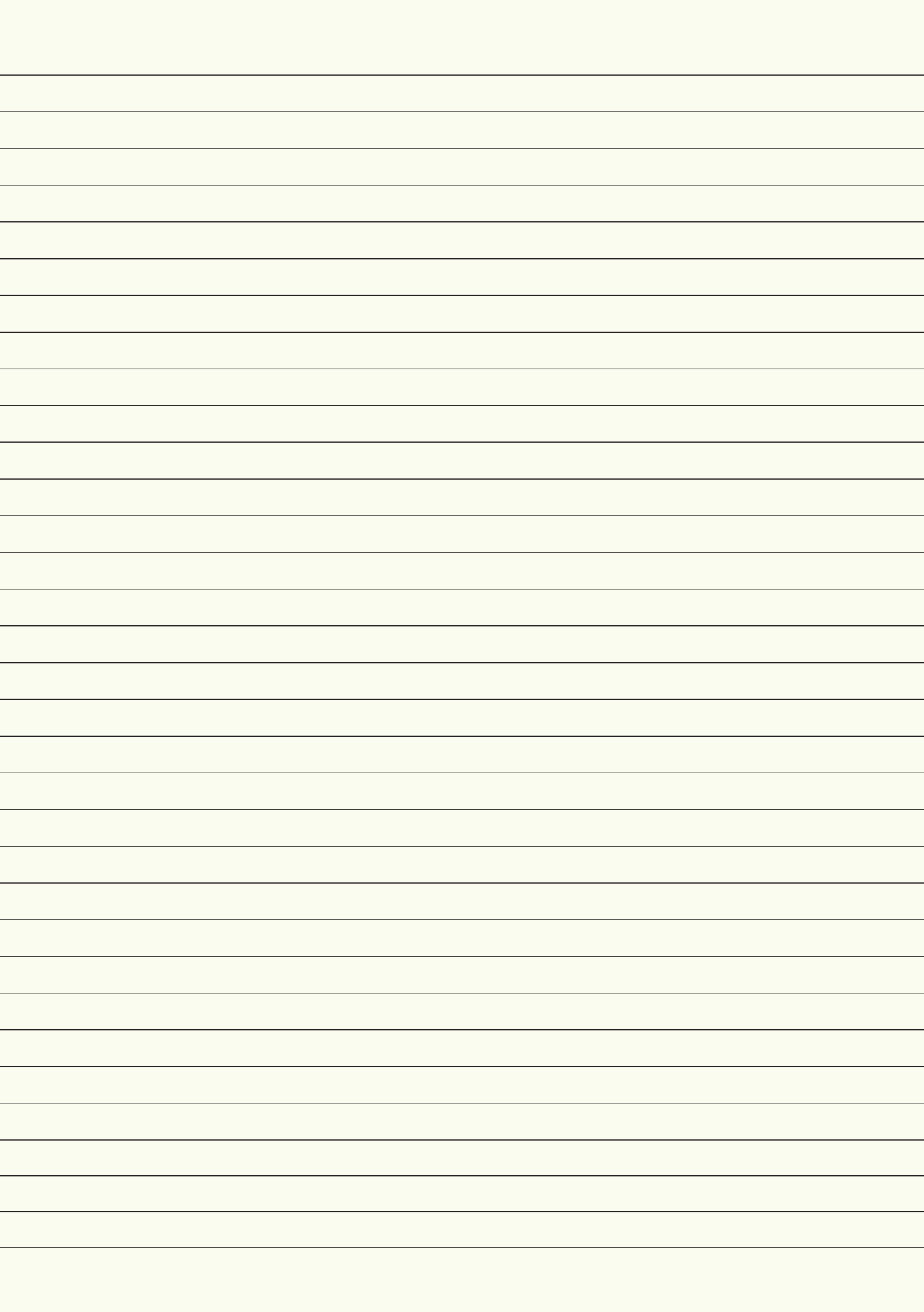
An example of the Statutory Instrument that was amended by the House is the Draft Elections (Registration of Voters) (Amendment) Regulations, 2017 by a resolution passed on Thursday, April 6, 2017.

6. Bicameral consideration of Statutory Instruments

Where a Statutory Instrument concerns counties or affects both Houses of Parliament, it is considered by both Houses. If the Statutory Instrument tabled in the National Assembly has been acceded to or annulled by the National Assembly, the Clerk of the National Assembly shall, within seven days of the resolution transmit a message to the Senate for consideration.

Standing Order 211 provides that whenever the National Assembly receives a Message from the Senate seeking concurrence on a Statutory Instrument tabled in the Senate, the Committee on Delegated Legislation is required to consider and report within twenty one (21) days of referral.

If the National Assembly fails to agree with the Senate resolution, the resolution shall be referred to a Joint Committee for concurrence.





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