

REPORT OF THE COMMITTEE ON DELEGATED LEGISLATION ON THE ELECTORAL COMMISSION OF ZAMBIA BILL, N.A.B NO. 20 OF 2016, FOR THE FIFTH SESSION OF THE ELEVENTH NATIONAL ASSEMBLY APPOINTED ON 23RD SEPTEMBER, 2015

Consisting of:

Mr J J Mwiimbu, MP (Chairperson); Mr I K Banda, MP; Ms M Lubezhi, MP; Mr A Sichula, MP; Mr K Konga, MP; Mr A D Mbewe, MP; Mr M Mutelo, MP; and Mr M J Z Katambo, MP.

The Honourable Mr Speaker
National Assembly
Parliament Buildings
P O Box 31299
LUSAKA

Sir,

Your Committee has the honour to present its Report on the Electoral Commission of Zambia Bill, N.A.B No. 20 of 2016, referred to it by the House on Tuesday, 26th April, 2016.

2.0 Functions of the Committee

In addition to any other duties assigned by the Honourable Mr Speaker, or any other Order of the House, your Committee is mandated to consider any Bill that may be referred to it by the House.

3.0 Meetings of the Committee

Your Committee held seven meetings to consider the Bill.

4.0 Procedure adopted by the Committee

In order to appreciate the ramifications of the Bill, your Committee sought both written and oral submissions from various stakeholders who are listed at Appendix II of the Report.

5.0 Objects of the Electoral Commission of Zambia Bill, N.A.B No. 20 of 2016

The objects of the Bill are to:

- (a) provide for the membership, functions, operations and financial management of the Electoral Commission of Zambia;
- (b) repeal and replace the *Electoral Commission Act, 1996*; and
- (c) provide for matters connected with, or incidental to, the foregoing.

6.0 Background

Article 229 of the *Constitution of Zambia Act, No. 2 of 2016*, establishes the Electoral Commission of Zambia as the body responsible for, among other functions, implementing the electoral process, conducting elections and referenda, registration of voters, and settling minor electoral disputes, as prescribed.

The proposed law, therefore, brings into operation the Electoral Commission of Zambia established under Article 229 of the Constitution of Zambia. In addition, the Bill repeals and replaces the *Electoral Commission Act*, No. 24 of 1996.

7.0 Salient Provisions of the Electoral Commission of Zambia Bill, N.A.B No. 20 of 2016

The salient provisions of the Electoral Commission of Zambia Bill, N.A.B No. 20 of 2016, are as set out below.

Clause 2 – Interpretation

This clause provides for the definitions of key words used in the Bill to make citizens and persons tasked to implement the law understand and interpret the law accordingly.

Clause 3 - Seal of Commission

This clause seeks to provide for a seal of the Commission, the way the seal should be used, and persons allowed to authenticate the seal on behalf of the commission. Further, the clause allows a document purporting to have the seal of the Commission or issued on its behalf to be received in evidence and it is deemed executed or issued by the Commission unless the contrary is proved.

Clause 4 - Functions of Commission

This clause provides for the functions of the Commission. These include promoting conditions conducive to free and fair elections, democratic electoral processes, supervising and controlling the registration of voters for the purposes of an election and conducting education and information programmes to promote public awareness of electoral and parliamentary issues. Furthermore, the clause allows the Commission to collect any information that it considers necessary for its functions and also empowers the Commission to undertake consultations, public hearings and inquiries for purposes of carrying out its functions under the Constitution and the Act.

Clause 5 - Composition of Commission

This clause provides for the composition of the Electoral Commission of Zambia, whose members are to be appointed by the President subject to ratification by the National Assembly. The Commission is composed of seven full time members.

The clause specifies that the person appointed as chairperson should be a person qualified to hold the office of judge and provides for the tenure of office of a member as seven years. It further provides that a member can resign upon giving a one month notice to the President. Furthermore, the clause sets out the circumstances under which the office of a member may become vacant and how the vacancy may be filled.

Clause 6 - Proceedings of Commission

This clause seeks to empower the Commission to regulate its own procedure and to meet every three months to carry out its business. The clause prescribes procedure to be followed before an ordinary or special meeting is held and during the meeting and how a decision may be arrived at by the members. The clause further empowers the Commission to invite a person to attend and

participate in the deliberations of the meeting of the Commission. However, the invited person has no right to vote.

Clause 7 - Committees

This clause empowers the Commission to establish committees whenever it considers necessary and to delegate its functions to such committees. Further, the clause empowers the Commission to appoint members of committees for a period determined by the Commission and to regulate its own procedure.

Clause 8 - Emoluments

This clause seeks to provide for payment of emoluments to members of the Commission or any committee.

Clause 9 – Chief Electoral Officer and Other Staff

This clause seeks to provide for the appointment of a Chief Electoral Officer appointed by the Commission to be the Chief Executive Officer of the Commission to carry out the day-to-day administration and management of the Commission, and an ex-official member of the Commission. The clause further empowers the Commission to appoint other staff and officers of the Commission on terms and conditions as it may determine.

Clause 10 – Disclosure of Interest

This clause provides for disclosing of an interest by a person present at a meeting of the Commission or a committee of the Commission in matters relating to that person's relative or associate directly or indirectly. The disclosure of interest should be recorded during the meeting. The clause further provides for a penalty for failure of disclosure of the interest.

Clause 11 - Prohibition of Publication or Disclosure of Information to Unauthorised Persons

This clause prohibits a person from publishing or disclosing the contents of a document, communication or information which has come to that person's knowledge in the course of that person's duties to unauthorised person. Further, the clause provides penalties for contravening the clause.

Clause 13 – Immunity

This clause grants immunity to members and staff of the Commission or the committee for acts done or omitted to be done in good faith in the course of their functions.

Clause 14 – Funds of Commission

This clause provides for funds of the Commission, which shall consist of monies which may be appropriated by Parliament or paid to the Commission by way of grants, donations or otherwise vest in or accrue to the Commission.

Clause 15 – Financial Year

This clause sets out the financial year of the Commission, which shall be the period of twelve months ending on 31st December of each year.

Clause 16 – Accounts and Audit

This clause places an obligation on the Commission to keep proper books of account and other records relating to its accounts. The clause further provides for accounts of the Commission to be audited annually by the Auditor General or an auditor appointed by the Auditor General and that the Auditor General's fees should be paid by the Commission.

Clause 17 – Annual Report

This clause compels the Commission to submit an annual report of the Commission's activities to the President as soon as practicable, but not later than ninety days after the expiry of the financial year. The clause further requires that the annual report includes information on the financial affairs of the Commission and that the report be accompanied by an audited statement of the financial position, income and any other information as the President may require.

Further, the clause provides that the Minister responsible for finance is the one to cause the preparation of the annual statement of income and expenditure of the Commission to be laid before the National assembly.

Clause 18 – Privileged Reports

The clause provides that a report, statement, communication or record of a meeting, hearing, inquiry or proceeding of the commission in the performance of the functions of the Commission is privileged and shall not be produced or compelled to be produced in any legal proceeding unless the chairperson has directed in writing or the court has ordered their production.

Clause 19 – General Offences

The clause provides for general offences and penalties for contravening the Act.

Clause 20 – Regulations

This clause empowers the Electoral Commission to make regulations for the better carrying out of the provisions of the Act.

Clause 21 – Repeal of the *Electoral Commission Act, No. 24 of 1996*

The clause provides for the repeal of the *Electoral Commission Act, No. 24 of 1996*.

Clause 22 – Transitional Provisions

The clause provides transitional provisions pertaining to, among other things, assets, rights, liabilities and obligations of the Electoral Commission; and every deed, bond, and agreement to which the Commission was a party.

Clause 23 – Legal Proceedings

The clause seeks to provide for the continuation of legal proceedings or applications of the Electoral Commission pending before any court. Further, the clause provides for the institution of legal proceedings by or against the Commission.

Clause 24 – Staff of Electoral Commission

The clause provides for the transfer of employees of the Electoral Commission to, and the continuation of service with the Commission. The clause further, provides for the enjoyment of rights and liabilities before the commencement of the Act.

8.0 Concerns Raised by Stakeholders

Your Committee interacted with various stakeholders whose concerns are outlined below.

- a) The stakeholders observed and expressed concern that there was no specific provision in the Constitution of Zambia as amended by the *Constitution of Zambia Act*, No.2 of 2016 and the Bill itself, which pointed to the independence and autonomy of the Electoral Commission of Zambia. They stated that this was against international best practice for Electoral Management Bodies (EMBs) and proposed that a provision be included in the Bill to emphasise these key tenets of an electoral body.
- b) Some stakeholders expressed great concern that the Bill, in its current form does not provide for the powers of the Commission. They contended that the Commission's powers should be defined as it had complained in the past that it had no powers to ensure that it executed its mandate effectively.
- c) **Clause 2 - Interpretation**
The stakeholders noted that the words fair, impartial, organisations and associate were used throughout the Bill, but they were not defined. The stakeholders, therefore, recommended that the words be defined in the Bill.
- d) **Clause 3 - Seal of Commission**
The stakeholders observed that although clause 3 provides for the seal of the Commission, it does not clearly state whether the Commission is established as a body corporate capable of suing and being sued in its own name. The stakeholders recommended that the Commission should be explicitly created as a body corporate.
- e) **Clause 4 – Functions of Commission**
The stakeholders further noted that one of the functions of the Commission was to adjudicate disputes that may arise from the organisation, administration or conduct of elections which were of an administrative nature. However, the Bill does not provide for the process of dispute resolution and the meaning of “administrative nature” was also not clear. The stakeholders felt that a mechanism of settlement of administrative disputes must be clearly set out such as an adhoc tribunal to hear and determine these disputes or through regulations and subsidiary legislation. The stakeholders further suggested that a provision should be inserted to define what constitutes a dispute of “administrative nature”.

Another concern highlighted by the stakeholders related to a function of the Commission in clause 4 (2) (j), which provides for the Commission to establish and maintain liaison and cooperation with political parties. The stakeholders were concerned that other

electoral stakeholders such as the media, civil society and the security forces had been omitted and therefore, recommended that they be included in addition to political parties.

f) **Clause 5 - Composition of Commission**

The stakeholders expressed concern that clause 5 (1) provides for the appointment of full time Commissioners by the President, subject to ratification by the National Assembly. They contended that the President was an interested party in the outcome of elections directed, supervised and controlled by the Commission, and, therefore, should not be involved in the appointment of Commissioners. The stakeholders proposed that Commissioners should be selected by a panel of judges set up by the Chief Justice in consultation with key stakeholders, on the basis of the individual's calibre, stature, public respect, competence, impartiality and their knowledge of elections and political development processes. The selected Commissioners should then be subjected to ratification by the National Assembly.

The stakeholders further observed that clause 5(2) provides for the qualifications for appointment as Chairperson of the Electoral Commission of Zambia. They were concerned that the Bill was silent on the qualifications of the other members. The stakeholders proposed that the qualifications of the other members should be set out in the Bill.

The stakeholders noted further that the Bill under clause 5(4) provides for a term of office for Commissioners of seven years subject to reappointment for a further term of seven years. They were concerned that the clause does not indicate whether Commissioners re-appointed for a further term of seven years or appointment of a member to replace one who had ceased to be a member, for the unexpired term would require to be ratified by the National Assembly. The stakeholders recommended that the re-appointment of a Commissioner for a further term or the appointment of a member to replace one who had ceased to be a member for the unexpired term must also be subjected to ratification by the National Assembly. Some stakeholders were also of the view that the term of office should be reduced to five years.

The stakeholders also observed that clause 5 (6) (f) empowers the Republican President to remove any member of the Commission without stating the reasons for removal. They recommended that the reasons for, or circumstances under which the President could remove a member and the procedure should be set out in the Bill.

g) **Clause 6 - Proceedings of Commission**

The stakeholders raised concern over the frequency of meetings of the Commission provided in clause 6(2) of the Bill. Considering that clause 6 (1) empowers the Commission to regulate its own business and that the members of the Commission serve on full time basis, the stakeholders recommended that the clause be deleted as the Commission would regulate the frequency of its meetings. In the same vein, the stakeholders recommended that clause 6 (3) should be deleted entirely. Another concern raised by the stakeholders related to clause 6 (7), which permits a member of the

Commission who is unable to attend a meeting of the Commission to nominate another person from the organisation the member represents to attend such a meeting. The stakeholders stated that proxies should not be allowed at the meetings of the Commission as appointments to institutions such as the Electoral Commission of Zambia were scrutinised thoroughly by the appointing authority and included security checks or vetting to ensure that persons entrusted with the business of such sensitive institutions were of good standing. The stakeholders also proposed that the membership of the Commission and the quorum at its meeting be reduced to five and three, respectively.

h) **Clause 11 - Prohibition of Publication or Disclosure of Information to Unauthorised Persons**

Some stakeholders noted that clause 11 prohibits a person from publishing or disclosing the contents of a document, communication or information which has come to that person's knowledge in the course of that person's duties to unauthorised person. While they were not against the clause, the stakeholders felt that it was equally important for the Commission to provide relevant information to stakeholders in a timely manner. They recommended that the Bill should have a provision under clause 11 that would compel the Commission to release information to stakeholders timely.

i) **Clause 13 - Immunity**

Concern was raised about clause 13 which provides immunity to members and officers against proceedings for actions done or omitted to be done in good faith in the performance of duty. The stakeholders recommended that the clause be deleted from the Bill as it was prone to abuse.

j) **Clause 14 – Funds of Commission**

Clause 14(2) empowers the Commission to accept monies by way of grants or donations from any source within or outside Zambia and to contract loans for the discharge of its functions. The stakeholders proposed that the Commission should not be allowed to receive money and contract loans directly as that was a function of the Ministry responsible for finance. They recommended that the Commission must be fully funded by the Government.

The stakeholders further observed that clause 14(4) provides that the Commission may, with the approval of the President, invest in such manner as it considers appropriate such funds of the Commission that it does not immediately require for the discharge of its functions. The stakeholders were of the view that the President should not be involved in deciding how the funds should be invested in order to safeguard the independence of the Commission. They recommended that the National Assembly was better placed to decide on how such funds must be invested in order to enhance transparency and accountability in the manner the funds would be invested.

j) **Clause 17 – Annual Report**

The stakeholders raised concern over the requirement for the Commission to submit an annual report of its activities to the President. The stakeholders were of the view that the annual report should be submitted to the National Assembly and not to the President in order to enhance the independence, autonomy and transparency of the Commission.

k) **Clause 19 - General Offences**

Clause 19 (1)(c) provides that a person shall not obstruct, assault, insult, hinder, delay or impersonate an officer or staff of the Commission in the lawful exercise of the powers conferred on the officer or staff of the commission under this Act. The stakeholders were concerned that the word “insult” was subject to different interpretations and suggested that it be deleted.

l) **Clause 23 – Legal Proceedings**

Some stakeholders noted that clause 23 provides that legal proceedings can be instituted against the Commission and that there is no other provision in the Bill on whether execution can be levied against the assets of the Commission. The stakeholders suggested that there should be a restriction as regards execution against the assets of the Commission. They suggested further that a grace period of one year after a judgement was rendered could be introduced before execution could be levied.

Committee’s Observations and Recommendations

9.0 Your Committee notes that despite the Bill introducing some new provisions such as clause 13 on the immunity on Commissioners and staff and clause 18 on privileged reports, it has retained a number of provisions contained in the *Electoral Commission Act*, No. 24 of 1996. Your Committee observes further that despite the stakeholders generally supporting the Bill, some of the changes being proposed in the Bill are a source of concern to them. Your Committee is also concerned about some of these provisions.

The above notwithstanding, your Committee supports the Bill. In supporting the Bill, your Committee makes the observations and recommendations set out below.

a) **Clause 4 - Functions of Commission**

Your Committee notes with great concern that neither the Constitution of Zambia as amended by the *Constitution of Zambia Act*, No.2 of 2016, nor the Bill has specifically provided for the autonomy and independence of the Electoral Commission of Zambia in carrying out its functions. While Article 76(1) of the Constitution of Zambia Chapter 1 of the Laws of Zambia explicitly established an autonomous Electoral Commission, Article 229 of the *Constitution of Zambia Act*, as amended by the *Constitution of Zambia Act*, No.2 of 2016 is silent on the matter. Your Committee is aware that establishing an electoral management body without autonomy is against regional and international best practice. Therefore, in order to cure this mischief and ensure that the Commission has autonomy in carrying out its functions, your Committee recommends that clause 4 should be amended as follows:

(i) the marginal note to clause 4 should read as “Independence and functions of Commission;

(ii) insertion of the following new sub-clause (1):

“(1) The Commission shall be autonomous and shall not in the performance of its functions, be subject to the direction or control of any person or authority.”; and

(iii) re-numbering of sub-clauses (1), (2) and (3) as (2), (3) and (4).

b) Clause 5 - Composition of Commission

Your Committee observes that clause 5(2) provides for the qualifications for appointment as Chairperson of the Electoral Commission of Zambia and that the Bill is silent on the qualifications of the other members of the Commission. It is your Committee’s considered view that the members should be those that inspire public confidence and are capable of managing the electoral process, thereby enhancing and protecting the integrity of the Commission and contributing to entrenching democracy. In this regard, those appointed to serve as members must meet a certain standard in terms of their education and standing in society. Your Committee recommends that the qualifications of the other members should be set out in the Bill. Further, in order to give lee way to the appointing authority to cast the net wider when searching for a suitable candidate, clause 5(2) should be replaced with section 4(4) of the *Electoral Commission Act*, No. 24 of 1996, which states:

“The Chairperson shall be a person who has held, or is qualified to hold high judicial office, or any other suitably qualified person.”

c) Clause 5 (4) provides that a member of the Commission shall hold office for a term of seven years and may be re-appointed for the same term. Your Committee is concerned over this provision, especially that the mischief it is trying to cure is not known. In this regard, it is recommended that clause 5 (4) be deleted and replaced with the wording of section 5 (1) of the *Electoral Commission Act*, No. 24 of 1996, as follows:

“5 (4) A member of the Commission shall be appointed for a term not exceeding seven years, subject to renewal and ratification by the National Assembly:

Provided that the first members shall be appointed for periods ranging from two to five years in order to facilitate retirement by rotation.”

d) Your Committee further observes that members of the Commission would serve at the pleasure of the President as clause 5 (6)(f) empowers him to remove any member without giving reasons. This threatens the security of tenure of office of the members. Your Committee, therefore, recommends that the circumstances under which the President could remove a Commissioner and the procedure for removing a member from office,

which is similar to that applicable for removing a Judge, should be set out in the Bill to avoid arbitrary removals.

- e) Clause 6 (7) which permits a member of the Commission who is unable to attend a meeting of the Commission to nominate another person from the organisation that such a member represents to attend such a meeting. Your Committee concurs with the stakeholders that proxies should not be allowed at the meetings of the Commission due to the sensitive nature of its business. Your Committee recommends that the clause should be deleted.
- f) **Clause 13 - Immunity**
Clause 13 provides immunity to members and officers against proceedings for actions done or omitted to be done in good faith in the performance of duty. Your Committee is concerned that this clause is susceptible to abuse and, therefore recommends that the clause be deleted from the Bill.
- g) **Clause 14 – Funds of Commission**
Your Committee notes that clause 14(2) empowers the Commission to accept monies by way of grants or donations from any source within or outside Zambia and to contract loans for the discharge of its functions. Your Committee is of the view that the Commission should not be allowed to receive money and contract loans directly as this should be handled by the Ministry responsible for finance. Your Committee recommends that the Government should fund the Commission adequately to eliminate any need to contract loans.
- h) **Clause 18 - Privileged Reports**
This clause provides for the protection of privileged reports which should not be produced in any legal proceedings unless the Chairperson so directs or a court so orders. Your Committee is of the view that this clause is prone to abuse and against the principle of transparency. It recommends that the clause be deleted from the Bill.

10.0 Conclusion

Your Committee wishes to pay tribute to all the stakeholders who appeared before it and made both oral and written submissions. Your Committee also wishes to thank you, Mr Speaker, for the opportunity to study the Bill. Gratitude also goes to the office of the Clerk of the National Assembly for the services provided.

We have the honour to be, Sir, your Committee on Delegated Legislation mandated to consider the Electoral Commission of Zambia Bill, N.A.B No. 20 of 2016.

Mr J J Mwiimbu, MP
(Chairperson)

Mr A Sichula, MP
Member

Mr K Konga, MP
Member

Mr A D Mbewe, MP
Member

Mr M Mutelo, MP
Member

Mr M J Z Katambo, MP
Member

Mr I K Banda, MP
Member

Ms M Lubezhi, MP
Member

May, 2016
LUSAKA

APPENDIX I
List of Officials
National Assembly

Ms M K Sampa, Deputy Principal Clerk of Committees

Mr F Nabulyato, Committee Clerk (SC)

Ms C Musonda, Committee Clerk (FC)

Mrs A M Banda, Assistant Committee Clerk

Ms C Mtonga, Stenographer

Mr M Chikome, Messenger

APPENDIX II WITNESSES

MINISTRY OF JUSTICE

Mrs D Kafunya, Senior Parliamentary Counsel
Mr F Chilunga, Parliamentary Counsel

FOUNDATION FOR DEMOCRATIC PROCESS (FODEP)

Mr M K Chimfwebe, Acting Executive Director
Mr C Zulu, Chairperson – Civic Education
Mr S Makanse, M and E Officer

LAW ASSOCIATION OF ZAMBIA (LAZ)

Ms L Kasonde, President
Mr M A Musukwa, Honorary Treasurer

ZAMBIA CENTRE FOR INTER-PARTY DIALOGUE

Mr H Chilando, Director
Ms N Kanjimana, Project officer - Political Party Strengthening

Ms E Nawakwi, President - Forum for Democracy and Development (FDD)
Mr E Munaile, Chairperson – International Relations (Forum for Democracy and Development)
Ms C Kabongomana, Facilitator - Forum for Democracy and Development (FDD)
Mr A Mwanza, Spokesperson

Ms D M Mbangweta, Secretary General – ADD
Ms W M Zaloumis, National Secretary – Movement for Multi Party Democracy (MMD)
Mr J Sichivula, Director – ZADECO
Mr C Kafumbo, Vice President – ZDDM/PUDD
Mr J Chizu, Acting General Secretary – New Generation Party (NGP)
Mr E Sakala, National Coordinator – ZDDM
Mr P Daka, Chairman (Elections) – APC
Mr L C Bwale, General Secretary – People’s Party
Mr E Zulu, Secretary General – ND
Mr P Chanda, President - New Congress Party (NCP)
Mr J Sambambi, Secretary General – New Congress Party (NCP)

ANTI-VOTER APATHY (AVAP)

Mr R Mulwili, Executive Director
Ms D Njovu, Programme Officer

TRANSPARENCY INTERNATIONAL ZAMBIA (TIZ)

Mr W Chibamba, Director - Programmes
Mr P Bwalya, Advocacy Officer

ELECTORAL COMMISSION OF ZAMBIA (ECZ)

Hon Justice E E Chulu, Chairperson

Hon Justice C S Mushabati, Member

Dr F M Ng'andu, Member

Dr E K Sikazwe, Member

Mr D Matongo, Member

Ms P M Isaac, Director

Mr E M Kamwi, Commission Secretary

CHRISTIAN CHURCHES MONITORING GROUP (CCMG)

Ms I H Mulenga, Project Manager

Mr R Shabwanga, Provincial Coordinator

Ms C N Ngwira, Communications Officer