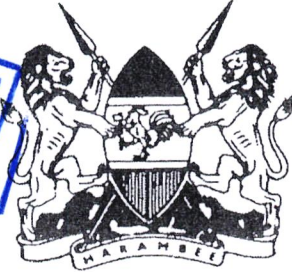


*Paper laid
By the Hon W. Cheptum -
Chair on Thurs 24/7/14
[Signature]*

24 JUL 2014

PARLIAMENT OF KENYA
LIBRARY



PARLIAMENT OF KENYA

THE NATIONAL ASSEMBLY

ELEVENTH PARLIAMENT - SECOND SESSION (2014)

THE SELECT COMMITTEE ON DELEGATED LEGISLATION

REPORT

ON THE CHILD WELFARE SOCIETY OF KENYA ORDER, 2014

**Clerk's Chambers,
Parliament Buildings,
NAIROBI**

JULY, 2014

0 PREFACE

Mr. Speaker Sir,

On behalf of the Members of the Select Committee on Delegated Legislation, and pursuant to Standing Order No.199, it is my pleasure and duty to present to the House the Committee's Report on the Child Welfare Society of Kenya Order, 2014.

1 Committee Membership

The Committee on Delegated Legislation was constituted by the House on 21st May, 2013 and is comprised of the following Members;

- Mr. William Cheptumo, MP – **Co-Chairperson**
- Mr. Joseph Gitari, MP – **Vice Chairperson**
- Mr. Mohamed Haji, MP
- Mr. Peter Kaluma, MP
- Mr. Alfred Keter, MP
- Mr. Hassan Aden Osman, MP
- Mr. Timothy W. Wetangula, MP
- Mr. George Theuri, MP
- Mr. Elisha K. Busienei, MP
- Mr. Eng. Shadrack Manga, MP
- Mr. Yusuf Hassan Abdi, MP
- Mr. Michael Kisoi, MP
- Mr. Mohamed Adan Huka, MP
- Mr. John M. Waiganjo, MP
- Mr. Paul K. Bii, MP
- Mr. Charles Gimose, MP
- Mr. T. J. Kajwang, MP
- Mr. Simba Arati, MP
- Mr. Rachael A. Amolo, MP
- Mr. Vincent Musau, MP
- Mr. William Kisang, MP
- Mr. Neto Agostinho, MP
- Mr. Abdikadir Ore, MP
- Mr. Paul Koinange, MP
- Mr. Ibrahim Abdi Saney, MP
- Mr. Eusilah Ngeny, MP
- Mr. Zainabu K. Chidzuga, MP
- Mr. Nicholas Ngi'kor Nixon, MP

on. Benard Shinali, MP

on. Kabando wa Kabando, MP

ie Hon. Marcus Mutua Muluvi, MP

2 Mandate of the Committee

The Committee on Delegated Legislation is a Select Committee established pursuant to provisions of the Standing Order No. 210 whose mandate is to consider in respect of any statutory instrument whether

- a. Is in accordance with the provision of the Constitution, the Act pursuant to which it is made or other relevant written laws;
- b. Infringes on fundamental rights and freedoms of the public;
- c. Contains a matter which in the option of the Committee should more properly be dealt with in an Act of the Parliament;
- d. Contains imposition of Taxation;
- e. Directly or indirectly bars the jurisdiction of the court;
- f. Gives retrospective effect to any of the provision in respect to which the Constitution 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 form or part of the statutory instrument calls for any elucidation;
- i. Appears to make some unusual or unexpected use of the power 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-renewable 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.

Standing Order No. 210(4) provides that if the Committee-

- a. Resolves that the statutory instrument, be acceded to, the Clerk shall convey that resolution to the relevant state department or the authority that published the statutory instrument.
- b. Does not accede to the statutory instrument, the Committee may recommend to the House that the Assembly resolves that all or part of the statutory instrument be annulled.
- c. The Clerk shall submit the resolution under paragraph 4(b) above to the relevant state department or the authority that published the statutory instrument.

3 The Child Welfare Society of Kenya Order, 2014

Pursuant to the State Corporations Act, the Cabinet Secretary for Labour, Social Security and Services on 18th June, 2014, submitted to the Clerk of the National Assembly, the Child Welfare Society of Kenya Order, 2014 for scrutiny.

The Order was referred to the Select Committee on Delegated Legislation, by the Hon. Speaker for review and scrutiny pursuant to section 12(1) of the Statutory Instruments Act (Act No. 23 of 2012) and Standing Order 210 of the National Assembly.

Committee Meetings

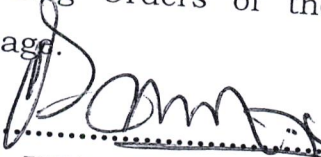
The Committee held a number of sittings and scrutinized the Order pursuant to the Provisions of Section 13 of the Statutory Instruments Act and Standing Order No. 210.

The Committee observed that the Child Welfare Society Order 2014 is not in accord with the Constitution, provisions of the Statutory Instruments Act, Standing Order No.210 and other relevant legislations and Pursuant to Standing Order 210(4) (b) and section 13 and other relevant provisions of the Statutory Instruments Act, 2013, the Committee recommends to the House that the Child Welfare Society of Kenya Order 2014 be annulled entirely

5 Acknowledgement

- a. The Committee wishes to sincerely thank the Offices of the Speaker and the Clerk of the National Assembly for the necessary support extended to it in the execution of its mandate;
- b. The Chairperson of the Committee takes this opportunity to thank all the Members of the Committee for their useful and immense contribution in scrutinizing the Child Welfare Society of Kenya Order, 2014.
- c. The Committee further wishes to record its appreciation for the services rendered by the staff of the National Assembly that enabled the production of this Report.
- d. Finally, it is now my pleasant duty, on behalf of the Committee, to recommend this Report to the House pursuant the provisions of Standing Orders of the National Assembly for adoption and passage.

SIGNED.....



DATE.....

23/07/2014

HON. WILLIAM CHEPTUMO, MP

(CHAIRPERSON)

SELECT COMMITTEE ON DELEGATED LEGISLATION

JOINT COMMITTEE'S CONSIDERATION AND OBSERVATIONS ON THE CHILD WELFARE SOCIETY OF KENYA ORDER, 2014

The Committee on Delegated Legislation reviewed and scrutinized the Child Welfare Society of Kenya Order, 2014 and observed that the order does not conform to the provisions of the Statutory Instruments Act, 2013, the Childrens Act and the Public Finance Management Act, 2012 and other relevant written laws as follows;

The Child Welfare Society of Kenya Order, 2014 was gazetted on the 23rd May 2014, the same were forwarded to the Clerk National Assembly on the 12th June 2014 by the Cabinet Secretary Ministry of Labour Social Security and Services. The statutory instrument herein 'the order' is hereby scrutinized in order to check conformity with the Constitution, the Statutory Instruments Act 2013, the Interpretation and General Provisions Act Cap 2, the Standing Orders, the Parent statute making regulations and other legislations.

a. Conformity with the Constitution:

Article 28 of the Constitution provides for right to human dignity to every person, Article 43(3) requires the state to provide appropriate social security to persons who are unable to support themselves and their dependants and Article 53 on the rights of children; the Order seeks to establish a framework in which the rights of children who lack appropriate care can be achieved.

b. The Statutory Instruments Act, 2013

The draft regulations should conform to the provisions of the Statutory Instruments Act, 2013 on the following issues:-

i. Whether consultations were carried out (section 5).

Section 5 of the Statutory Instruments Act, 2013 provides as a requirement that a regulatory making body shall carry out consultation with persons who are likely to be affected by a proposed instrument. The Ministry has elaborated in the Explanatory Memorandum that consultations were carried out in various districts in the country, this therefore implies that this section has been complied with.

ii. Preparation of regulatory impact statements (section 6, 7 and 8)

Section 6 of the Statutory Instruments 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 responsible Cabinet Secretary 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.

copy of the regulatory impact statement and the compliance certificate must be tabled in Parliament together with the statutory instrument. This has not been fully complied with, the Order proposes creation of a Board and a fund, the impact assessment should include costs for setting up these institutions.

iii. **Explanatory memorandum (section 11).**

The Cabinet Secretary responsible for a regulation-making authority is required to transmit a copy of the statutory instrument together with the explanatory memorandum to the responsible Clerk for tabling before Parliament. The Ministry has submitted an Explanatory Memorandum; however, it does not conform to the provisions of section 2 and 11 of the Act. There is a guiding schedule in the Act which the Ministry can use to prepare this document.

iv. **Date of publication viz-a-viz the date of tabling (section 11)**

The Statutory Instruments Act is required to be transmitted to the clerk within seven days of publication, the order was gazette on the 23rd May 2014, and transmitted on 12th June 2014 (as per the date of signature), which is more than seven days as required by the law.

Compliance with the Interpretation and General Provisions Act
Statutory instruments must conform to the provisions of the Interpretation and General Provisions Act in regard to construction, application and interpretation, the statutory instrument has laid down in accordance with the provisions of this Act.

Compliance with the parent statute

Section 3 of the State Corporations Act gives the power to establish state corporations to the president, it provides that, **The President may, by order, establish a state corporation as a body corporate to perform the functions specified in that order.** The Act provides for purposes of this regulations shall be the State Corporations Act 446. The following have not been complied with:-

- a) Since the Statutory Instrument is created under the State Corporations Act the Composition of the Board should conform to section 6 of the State Corporations Act.
- b) Term of office of the Board should be five years in order to comply with the State Corporations Act

- c) Regulation 12 conflicts with section 10 of the State Corporations Act, remuneration of the Board should be determined by the State Corporations Advisory Committee not the Cabinet Secretary.
- d) Regulation 20(4) and 22(2) on balances of funds at the end of the financial year: authority must be sought from treasury as per the provisions of the PFM Act 2012

e. Conformity with other legislations:

i. The Children's Act

- a) Regulation 6 (c) and (d) (vi) contradicts with the provisions of the Children's Act section 155 which provides for the establishment of the Adoption Committee. It provides as follows:-

(1) The Minister shall establish a committee to be known as the Adoption Committee which shall comprise the members set out in the Ninth Schedule.

(2) The functions of the Committee shall be—

- (a) Formulating the governing policy in matters of adoption;
- (b) Effecting liaison between adoption societies, the Government and Non-Governmental Organisations;
- (c) considering and proposing names of officers who may serve as guardians ad litem;
- (d) Monitoring adoption activities in the country; and
- (e) Such other functions as are conferred on the Committee by this Act.

(3) The conduct and regulation of the affairs of the Committee shall be as prescribed by the Minister, but subject thereto, the Committee shall regulate its own proceedings.

- b) Regulation 6(d) (iv) on foster care is already provided for under the Children's Act under Section 147

subsidary legislation cannot legislate a matter which is already provided for by an Act of Parliament.

ii. Conformity with the Public Finance Management Act 2012.

- Regulation 4(2) (c) and 22(2) on borrowing and lending of money does not conform with the PFMA Act, any borrowing or investment of public funds, authority of the National Treasury must be sought.

1 Committee Findings

1. The Child Society of Kenya Order, 2014 as presented do not conform to the provisions of the Statutory Instruments Act, the Children's Act and the Public Finance Management Act, 2012, the same needs to be annulled entirely.
2. The Child Welfare Society is saved by the transition clause in the Children's Act 2001 Schedule 7 clause 8(1).
3. The gaps which the order seeks to fill are not explained.

2 Committee Recommendation

In view of the Committee's observations and findings under 2.0 and 2.1 above and pursuant to the provisions of section 13 and other relevant provisions of the Statutory Instruments Act (No.23 of 2013) and Cancellation Order No.210 and other relevant legislations, the Committee hereby recommends to the House that The Child Welfare Society of Kenya Order,2014 be annulled.

.....**END**.....

