

ADVISORY OPINION ON PROPOSED AMENDMENTS TO THE INDEPENDENT POLICING OVERSIGHT AUTHORITY ACT

We make reference to the Statute Law (Miscellaneous Amendments) Bill, 2015 published in the Kenya Gazette Supplement No. 164 (National Assembly Bills No. 57) of 18th September 2015. We note that the National Assembly has sought public participation in the enactment of the above captioned Bill in line with Article 118(1) of the Constitution. We have carefully examined the Bill, in particular the proposal for the amendment to the Independent Policing Oversight Authority Act, No 35 of 2011 and noted that it seeks to amend section 14 of the Act to empower the President to remove the Chairperson or a Member of the Independent Policing Authority (IPOA) if he deems necessary, without the procedure of receiving a recommendation from a tribunal established for that purpose. We have further noted that there is no justification for the proposed amendment which raises fundamental issues that relate to the Constitution and independence of IPOA. In particular, we note the following:

- a) There is no justification for the Proposed Amendment in the Bill or the mischief that it intends to cure. This goes against one of the cardinal principles in law making which requires legislation to address a mischief or seal the existing gaps in the law. It has not been shown how the current framework that is sought to be amended impedes policing or the work of IPOA. None of these has been identified by the Bill which leads to the conclusion that the Proposed Amendment lacks the necessary threshold and may not serve a positive purpose.

- b) The mandate of IPOA is important and forms part of the police reforms geared towards attaining the objects of Article 144 of the Constitution. Historically, there have been a number of reports of Task Forces established by the Government that called for the establishment of an **INDEPENDENT** policing oversight body in Kenya to ensure accountability and respect for human rights by the police. For instance, the Post-Election Violence, commonly known as the Waki Commission, recommended the establishment of an independent police oversight body with the mandate to investigate police conduct and provide co-ordination oversight over the operations of the police. Similarly, the National Task Force on Police Reforms (Ransley Task Force) also recommended the establishment of an independent police oversight mechanism. This was eventually realised when IPOA was established in 2011 as an independent civilian oversight body over the police.

Given the mandate of IPOA, it was necessary to make it truly independent by not only giving it operational and financial independence, but also securing the tenure of the Chairperson and its Members. Accordingly, the Act as presently designed provides an elaborate provision on security of tenure, including stringent procedure for removal of the Chairperson and Members of IPOA under Section 14 to insulate them from arbitrary removal from office.

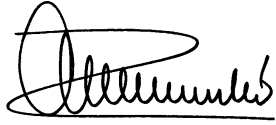
- c) The Proposed Amendment will erode the independence of IPOA with serious negative consequences on its effectiveness. Indeed, it will not only contravene the Constitution, but also violate Section 4 of the Act which states that IPOA is not subject to any person, office or authority in the performance of its functions. It is noteworthy that independence is at the heart of effectiveness of any oversight body such as IPOA; it cannot be expected to deliver on its mandate where its independence is compromised. One of the pillars of independence is the security of tenure of members of an oversight body. Specifically, the appointment, terms and conditions of service and removal of such members should be secured to ensure that they do not serve at the pleasure of any person or authority, including the President. They can only be removed based on objective grounds as set out in the Constitution and/or the law by an independent and credible institution.

The Commission notes that the Proposed Amendment will take away the security of tenure of the Chairperson and Members of IPOA which will affect its overall independence and effectiveness. In other words, they will no longer enjoy the security of tenure thereby negating the principles and values of the Constitution and expectations of Kenyans.

- d) The Proposed Amendment negates the values and principles of the Constitution insofar as it seeks to concentrate state power in the Office of the President. It is worth noting that the design of the Constitution was to address the over-concentration in the core Executive which had created an imperial presidency in the old constitutional dispensation. It, therefore, decongested power from the core Executive to other State Organs. By seeking to concentrate power in the hands of the President, the proposed amendment violates the Constitution.

In light of the above, the Commission is of the considered view that the Proposed Amendment does not promote constitutionalism and the rule of law,

and therefore lacks merit in regard to constitutionalism. Accordingly, we advise the National Assembly to reject the Proposed Amendment in totality.

A handwritten signature in black ink, appearing to read 'Otieno Amollo', written over a horizontal line.

DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION