



**NATIONAL COALITION
ON FREEDOM OF EXPRESSION &
CONTENT MODERATION IN KENYA**



MEMORANDA ON THE NATIONAL COHESION AND INTEGRATION BILL 2023

Submitted to the
**COMMITTEE ON NATIONAL
COHESION AND EQUAL OPPORTUNITY**

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INTRODUCTION

FECoMo's Response to the National Cohesion and Integration Bill 2023

On **21st March 2024** and in compliance with **Article 118(1) (b) of the Constitution and the Standing Orders of the National Assembly**, the Clerk of the National Assembly invited the public and stakeholders to submit memoranda on the National Cohesion and Integration Bill, 2023 (National Assembly Bill No. 74) to the Committee on National Cohesion and Equal Opportunity. The memoranda was to be submitted to Parliament by or before Friday, 5th April 2024.



The National Coalition on Freedom of Expression and Content Moderation

(hereinafter “FeCoMo”) is an initiative by organizations drawn from academia, civil society, think tanks and national agencies working on freedom of expression and content moderation. The Coalition was established in 2023 under the EU-funded UNESCO Social Media 4 Peace Project in Kenya.

FECoMo welcomes this opportunity to align the National Cohesion and Integration Act, 2008 (hereinafter NCIC Act) with the Constitution of Kenya, 2010. While we advocate for freedom of expression guaranteed under Article 33 of the Constitution of Kenya 2010, we acknowledge that it is not an absolute right and it can be limited for instance where speech advocates for hatred against a protected group under Article 27 (4) of the Constitution.

However, the limitation must be for a legitimate aim in a democratic society, prescribed by law and proportionate to the objective.

The NCIC Act, 2008 was enacted as part of the recommendation of the National Accord and Reconciliation Act, 2008 [1] in the aftermath of the 2007 post-election violence.

[1] National Accord and Reconciliation Act, 2008. [Link](#).

The Act provides for offences similar to those in the current bill to curb discrimination and hate related crimes. **Yet, close to fifteen years later, Kenya is still experiencing polarisation especially heightened during election periods** [2]. Moreover, with the rise of digital communication technologies, manifestations of hate and conflict have moved onto digital platforms. The Bill must be updated to address these current digital realities.

Therefore, criminalization of discriminatory conduct must be accompanied by voluntary initiatives that get to the root of deep-seated historical injustices, [3] including a wide range of positive policy measures that create an enabling environment for freedom of expression and equality.

[1] Article 19, “Content Moderation and Local Stakeholders in Kenya”. [Link](#).

[2] Alt. Advisory and Allard K Loweinstein International Human Rights Law Clinic. “A Human Rights Response to Online Ethnic Hate Speech in Kenya”. [Link](#).

SUMMARY AND RECOMMENDATIONS

Following a detailed analysis of the draft bills, FECoMo submits a summary of recommendations based on its expertise on matters of freedom of expression, content moderation and peace building.

Key recommendations are:

1 CLARIFY KEY TERMS

Define key terms such as ‘negative ethnicity’, ‘discrimination’, ‘victimization’ and others. Existing definitions for terms such as ‘ethnic group’, ‘ethnic grounds’ and ‘ethnic relations’ are contradictory and need streamlining.

2 DEFINE ‘HATE SPEECH’

The Bill lacks a definition for hate speech. The 2008 Act’s previous hate speech provision is now defined as ‘ethnic or racial contempt’ under Clause 47. This further muddles the definition of the offence, which lacks legal certainty.

3 STREAMLINE CLAUSES

Remove Clause 39 on ethnic victimisation — which is ambiguous and duplicative. Instead, merge these concerns with Clause 72(a), which deals with the same issue.

4 MAINSTREAM INCLUSIVITY

Account for and provide inclusive formats/ modes of communication for persons with disabilities during the complaints handling process.

GENERAL COMMENTS

FeCoMo offers the following general comments on the draft bill:



1. CONTENT MODERATION POLICIES

Big-tech/ social media companies have their own content moderation policies on potentially harmful content. At present, the Bill is not sufficiently sensitive to the dynamics of this fragmented policy landscape. **It should consider the implications of this existing set of parallel policies in the private sector to ensure coherence.**

2. MANDATE OF THE NCIC

Section 59 (1) of the Constitution of Kenya designates a Kenya National Human Rights and Equality Commission with a similar mandate to the NCIC, regarding the handling of complaints, non-discrimination and the promotion of equality. **There is a need to review NCIC's mandate or streamline these national structures to avoid duplication.**

3. FORMS OF DISCRIMINATION

Other types of discrimination such as gender, disability, socio-economic status and marital status are not accounted for in the Bill. **All protected groups under Article 27 (4) of the Constitution of Kenya 2010 should be included.**

4. CONSTITUTIONAL ALIGNMENT

The NCIC Act 2008 was enacted during a period of political crisis and before the promulgation of the new constitution. Therefore, **the new Bill must be critically assessed to align with the values and principles of the current constitutional dispensation.**

5. FREEDOM OF EXPRESSION

The Bill makes no mention of "Freedom of Expression". This omission raises concerns about whether it will strike a balance between rights-holders and public interest, and if its application will advance or harm the right to freedom of expression. To prevent abuse of such tools meant to protect democracy and human rights, **the Bill should explicitly mention and enshrine the right to freedom of expression in its formulation.**

RECOMMENDATIONS BY PARTS

The National Cohesion and Integration Bill 2023 contains 8 main body parts. The following pages present recommendations organised by parts:

1 PRELIMINARY

- **Clearly define ‘hate speech’, ‘propaganda’, ‘ethnic discrimination’, ‘ethnic conflicts’, ‘cohesion’, ‘integration’** and other key terms in the definitions section.
- **Define ‘Media’**, given that hate speech and harassment are increasingly prevalent on digital media platforms.
- **Review the name and mandate of the National Commission on Integration and Cohesion’s (NCIC)**, since the Commission was established to handle the post-election violence of 2007/2008 and has since outlived its mandate. “Commission” also connotes a temporary quality.
- **Address the forms and consequences of discrimination in the political domain more thoroughly.** The Bill’s reference to ‘development issues’ highlights concerns within the political sphere but does not elaborate.

2 ESTABLISHMENT OF THE NCIC

- **Integrate the NCIC’s Advisory Role in policy-making processes.** Currently, there is no clear mechanism to incorporate the NCIC’s advisory role to government for policy-making on national unity and non-discrimination.
- **Apply clear criteria and indicators in assessing the state of ‘equality’ and ‘non-discrimination’** to avoid subjective interpretation and inconsistent application, as well as ensure consistency and objectivity in NCIC’s assessments and interventions.
- **Include mechanisms for holding the Commission accountable for abuse of power or neglect of duty.** Avenues for public oversight and accountability should be created to facilitate monitoring and evaluation of the NCIC’s performance.
- **Enhance transparency of the appointment process for Commissioners**, such as establishing an independent selection committee for vetting candidates, with oversight from CSO. Procedures for the removal of Commissioners are cumbersome and risk political manipulation.

RECOMMENDATIONS BY PARTS

- **Consider reviewing the NCIC’s mandate or downsizing the Commission to avoid duplication** with the Kenya National Human Rights and Equality Commission (KNHCR) and the National Steering Committee on Peacebuilding and Conflict Management (NSC/PBCM). **There is a need to streamline these national structures.**

- The KNHCR is established under Section 59 (1) of the Constitution of Kenya and shares a similar mandate to the NCIC on the handling of complaints, non-discrimination and the promotion of equality.
- NSC/PBCM is an interagency committee established in 2001 to coordinate and consolidate efforts geared towards peace building and conflict management in Kenya. It currently also performs similar functions as the Commission under Clause 5 (g) and 5 (i) (early-warning and early-response).

3 FINANCIAL PROVISIONS

- **Properly resource the Commission to fulfil its mandate, if it will remain in its current structure.** Although the provisions guarantee funding from Parliament and thus provide the NCIC with a level of independence, fundraising remains a perennial challenge and impedes the effectiveness of the Commission.

4 DISCRIMINATION, HATE SPEECH & NEGATIVE ETHNICITY

- **Strengthen the definitions and explanation (e.g. cases, monitoring guidelines) of what constitutes the three target elements—in particular hate speech—to guide effective implementation and enforcement.**
- **Provide clear criteria for determining when speech or conduct crosses the line into the hate,** so as to strike a balance between freedom of expression and the need to prevent violence, ethnic hatred and discrimination. International human rights instruments provide a framework for addressing hate speech and should inform drafting of the Bill.
- **Include provisions that address and establish enforcement mechanisms to handle coordinated harassment and hate on digital platforms.** This is crucial given advancements in digital communications technology, which is moving manifestations of discrimination, hate speech and negative ethnicity online.
- **Review the severity of consequences for offences related to discriminatory media (per Clause 47(2)).** Given the significant impact of digital, oral, or written media in perpetuating discrimination, a stronger punishment should be seriously considered given the substantial role of the media in igniting past ethnic conflicts.

RECOMMENDATIONS BY PARTS

- **Expand the scope of the Bill to include discrimination on other grounds**— including gender, age, ability, political affiliation and others. While the Bill currently focuses on ethnic discrimination, there are myriad issues which affect fundamental humans rights in the contemporary context which warrant equal attention.
- **Enhance the complaints management system** to enhance efficiency, access, process and data management. Creation of a digital platform/ portal, email or online forms should also made available as an avenue for lodging complaints.

5 COMPLAINTS, INVESTIGATIONS AND ENFORCEMENT

- **Include provisions to ensure timely resolution of complaints, adequate protection for complainants** against retaliation or victimization, and **appropriate compensation for complainants.**
- **Ensure that complaints and reporting mechanisms accommodate the needs of persons with disabilities.** The three means of communication (oral, written and alternative format) should be used to design complaints handling and reporting processes for inclusion.
- **Strengthen the Commission’s enforcement mechanisms to prosecute and follow due process without concern of political intervention.** Relevant clauses for review under Clause 58, 59 and 60, which limit the Commission’s ability to act independently and should be strengthened to deter effectively.
- **Clarify definition and degree of offences that warrant investigation.** In particular, Clause 49(a) states that a matter shall be investigated if it is of a ‘serious’ nature. This is ambiguous and needs to be defined.

6 MISCELLANEOUS PROVISIONS

- **Remove Clause 62(2) on the media to avoid duplication of work** with the Media Council of Kenya under the Media Council Act 2013. The Computer Misuse and Cyber Crimes Act also deals with related issues.

7 PROVISIONS ON DELEGATED POWERS

- **Establish safeguards** to ensure that conciliation does not compromise justice or allow perpetrators to evade accountability.
- **Include guidelines on Clause 84,** which permits the Cabinet Secretary to refer matters to the Commission to prevent misuse of power.

8 TRANSITIONAL PROVISIONS

There are no significant comments on this section.

SUGGESTED DETAILED MODIFICATIONS

Line edit suggestions are summarised in the table below.

Clause	Provision	Proposal	Justification
2	Definitions of ethnic group, ethnic grounds and ethnic relations are unclear.	Definitions of ethnic group, ethnic grounds and ethnic relations should be streamlined.	Clause 2 gives varied definitions for ethnic group, ethnic relations and ethnic group.
2	Key terms lack definition.	Include definitions for terms such as hate speech, discrimination, incitement, victimisation, cohesion, negative ethnicity among others.	Lack of definitions for key terms renders the legal provisions imprecise. International human rights standards require that laws which place limits on fundamental rights and freedoms be clear enough to prompt individuals to self-regulate their conduct.
5	Functions of the Commission	Integrate the NCIC's advisory role into government policies and decision-making processes.	Though necessary, there is no clear mechanism to incorporate the NCIC's advisory role to government for policy-making on national unity and non-discrimination.
6 and 7	Powers of the Commission	Establish an oversight body to prevent abuse of power by the Commission.	The draft bill lacks a mechanism for holding the Commission accountable for abuse of power or neglect of duty.
32(2)(a)	Annual Estimates	Add the word 'Allowances' between 'remuneration' and 'in'.	To enhance the clarity of the clause.
32(2)(d)	Annual Estimates	Add the words 'Professional prescription' after 'commission'.	The clause lacks clarity as the current statement is incomplete.
38	Ethnic Discrimination	Provide a clearer definition of what constitutes ethnic discrimination and consider expanding protection from discrimination to other groups under Article 27(4) of the Constitution of Kenya 2010 (i.e. women, persons with disabilities)	The clause lacks legal certainty and excludes other protected groups under Article 27(4) of the Constitution.
39	Discrimination through victimisation	Remove clause 39 in its entirety for vagueness. Concerns on discrimination through victimization are already captured under Clause 72 (a) of the Bill.	The current definition—"an act that is injurious to the well-being and esteem of a person"—is too broad and is subject to multiple interpretations.
45(2)	Discrimination in access to and distribution of public resources	Add the words 'and accessible format' after the word 'manner'	The clause necessitates emphasis.

SUGGESTED DETAILED MODIFICATIONS

Line edit suggestions are summarised in the table below.

Clause	Provision	Proposal	Justification
47	Ethnic and racial contempt	<p>Adopt a definition of this offence which offers protection against discrimination for all groups listed under Article 27 (4) of the Constitution of Kenya.</p> <p>Limit the offence only to acts that advocate for discrimination, hatred or violence against protected groups under Article 27 (4) of the Constitution. Therefore, whether the statement is abusive, threatening or insulting is irrelevant in the elements of the offence.</p> <p>We propose that the clause be redrafted as follows:</p> <p>“A person who intentionally makes a statement which advocates for hatred, violence or hostility against a person or a group on grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth”.</p> <p>Add the following provisions</p> <p>“when assessing whether this section has been contravened the Commission will consider the following factors:</p> <ol style="list-style-type: none"> Context of the expression; Speaker/proponent of the expression; Intent of the speaker/proponent of the expression to incite discrimination, hostility or violence; Content of the expression; Extent and Magnitude of the expression (including its public nature, its audience and means of dissemination); Likelihood of the advocated action occurring, including its imminence.” <p>Remove Clause 47 (2) on the penalty of one million and maximum imprisonment of 3 years.</p>	<p>Clause 47 offers the same definition of hate speech under Section 13 of the NCIC Act, 2008.</p> <p>This should be amended since it envisages a broad range of speech, including that which may be offensive but does not warrant a criminal sanction. Abusive, threatening or insulting statements are protected speech under international human rights law, and are necessary for free and open debate.</p> <p>Finally, the prescribed penalty is a disproportionate limitation on legitimate free speech and should be removed.</p>
66	Notice if investigation on complaint is discontinued	<p>Include a sub-clause that the complaint will be communicated in oral, written or other alternative formats accessible to persons with disabilities.</p>	<p>The provision currently does not account for persons with disabilities, as it does not accommodate their different communication needs.</p>



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